No. 3-17-00733-CV

Trial Court Cause Number: 15-0819-C277

KEVIN BIERWIRTH

Appellant,

v.

RIO RANCHO PROPERTIES, LLC

Appellee,

APPELLANT'S BRIEF

Appellant, Kevin Bierwirth, files his brief. Appellant will be referred to as Appellant, Bierwirth or Kevin Bierwirth, RIO RANCHO will be referred to as Appellee, Rio Rancho or Craig Otto.

Kevin Bierwirth
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Austin, Texas 78750
(512) 825-0331

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KEVIN BIERWIRTH

Appellant,

v.

RIO RANCHO PROPERTIES, LLC

Appellee,

IDENTITY OF PARTIES & COUNSEL

Appellant certifies that the following is a complete list of the parties, attorney and any other person who has any interest in the outcome of this lawsuit.

APPELLANT

Kevin Bierwirth
13276 Research Blvd., Ste. 204
Austin, Texas 78750

APPELLEE

RIO RANCHO PROPERTIES, LLC

Attorney for Appellee:

Jason E. Billick
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Austin, Texas 78746

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The case before this Court should not have come to this point, however, here it is.

This case unfolds in 3 parts and those parts consist of 3 elements: Plaintiff's Petition for Declaratory Judgment and Real Estate Fraud; Vexatious litigant; and Counter claim by Rio Rancho.

1. THE FIRST ELEMENT: PLAINTIFF'S PETITION FOR MONETARY JUDGEMENT

ISSUES PRESENTED FOR REVIEW

ISSUE 1: Is a purchaser at an HOA foreclosure bound by law to redeem the property if paid the redemption quote during the 180 day redemption period?

ISSUE 2: Can a purchaser at an HOA foreclosure sale accept delivery of the redemption amount and legally refuse to issue a redemption deed?

ISSUE 3: Can a purchaser at an HOA foreclosure sale accept delivery of the redemption amount, refuse to issue a redemption deed, refuse to surrender the property and keep the redemption money?

STATEMENT OF THE CASE

1. Juan Martinez, a man who had been evicted from his property after a foreclosure action by an HOA approached Kevin Bierwirth for help.

2. After ascertaining the facts of the matter, Bierwirth saw that Martinez was still within the HOA redemption period.

3. Martinez did not have the money for the redemption of $5,945.69, so Bierwirth loaned him the money to redeem his property.

4. After redeeming the property, Martinez assigned his interest in the property to Bierwirth. **CR 330.**

5. The plan was to redeem Martinez's property, list the property for sale, pay off the mortgage and give Martinez money for a new start.

6. In exchange for this, Bierwirth would recoup his initial investment and be paid realtor's fees when the house sold.

7. Martinez would not have a foreclosure on his record, and the mortgage company wouldn't have to go through the foreclosure process.

8. The plan was perfectly sound and perfectly legal.

9. Neither Bierwirth nor Martinez counted on the larcenous character of Craig Otto, the principal for Rio Rancho Properties, LLC..

10. Rio Rancho purchased the property at a foreclosure sale on December 2, 2014 for $3,501.00.

11. Rio Rancho evicted Martinez from his property as is allowed by Tex.Prop.Code §209.011(a).

12. By law, Martinez had until June 29, 2015 to redeem his property.

13. On May 20, 2015, in response to Martinez's request for redemption payoff amount, Craig Otto gave a payoff statement for $5,945.69. **CR 411.**

14. The payoff amount was good through May 31, 2015.

15. An amount of $5,945.69 was deposited in Rio Rancho's account on May 28, 2015. **CR 30, 564**

16. A letter was sent to Rio Rancho on May 28, 2015, noticing Otto of the deposit. **CR 29.**

17. Rio Rancho, was bound by Texas Property Code Chapter 209.

18. Martinez had obtained a copy of the HOA's account and it showed a $0 balance due as of December 2, 2014 with the notation of a tax write off. **CR 566-568**

19. As a result, Martinez believed the amount due and owing the HOA was $0.

20. Tex.Prop.Code §209.011(f) If a lot owner or lienholder redeems the property under this section, the purchaser of the property at foreclosure shall immediately execute and deliver to the redeeming party a deed transferring the property to the

lot owner. If a purchaser fails to comply with this section, the lot owner or lienholder may file an action against the purchaser and may recover reasonable attorney's fees from the purchaser if the lot owner or the lienholder is the prevailing party in the action.

21. Martinez and Bierwirth made demands for Otto to issue the transfer deed.

22. Otto/Rio Rancho made no effort to respond to the demands for the deed, nor did Rio Rancho relinquish the property back to Martinez.

23. Rio Rancho made no response whatsoever until after July 2, 2015, the end of the redemption period.

24. Rio Rancho justified its action on the ambiguity of Tex.Prop.Code §209.011(j).

25. Rio Rancho claimed that Martinez did not redeem from the HOA, therefore it was not subject to the conditions of §209.011(f).

26. Bierwirth claims that the statute, §209.011(j), is convoluted, ambiguous and void for vagueness, therefore a nullity as relating to the HOA and the purchaser at the foreclosure sale.

27. Bierwirth claims that the purchaser at the foreclosure sale, without giving evidence of the affidavit from the HOA is bound by §209.011(f).

28. Tex.Prop.Code §209.011(j) is incongruous in that it states: the purchaser at the foreclosure sale, before executing a deed transferring the property to a lot owner, **shall** obtain an affidavit from the association stating that all amounts owed the association have been paid. The association **shall** provide the purchaser with the affidavit not later than the 10th day after the date the association receives all amounts owed to the association under Subsection (e). Failure of a purchaser to comply with this subsection does not affect the validity of a redemption.

29. What exactly does that mean?

30. Does it mean that the purchaser has to get an affidavit before he can issue a redemption deed even after he has been paid the redemption fee?

31. Does it mean that the purchaser has to get an affidavit, but failure to do so doesn't affect the validity of a redemption?

32. Does it mean that the purchaser gets the redemption money but doesn't have to comply with the provisions of 209.011(f)?

33. Since the statute is so nonsensical, Bierwirth cannot be bound by it and Rio Rancho cannot depend on it for support of his failure to issue the redemption deed.

34. In any case, Bierwirth completely complied with the law.

35. Martinez timely paid to Rio Rancho the redemption amount asked for.

36 Since the statute states that the redemption deed must issue immediately after payment, both Martinez and Bierwirth counted on the law.

38. Rio Rancho/Otto did not issue the deed, did not vacate the property Martinez had just paid for, and **KEPT THE MONEY!**.

39. Bierwirth had no choice other than to file suit, just as §209.011(f) instructs him to.

40. However, all Bierwirth could sue for at the time of suit was the return of his money, the property was lost at that point.

41. When he sued to recoup his redemption money, $5,945.69, Bierwirth no longer had the option of forcing Rio Rancho to issue the redemption deed.

42. When Rio Rancho obtained the property at the HOA foreclosure sale, it allowed the mortgage to go unpaid.

43. Even though Rio Rancho was leasing the property and keeping the rent, no attempt was made to bring the mortgage current.

44. The mortgage company, unaware of the occupant of the property, moved forward with foreclosure for lack of payment.

45. Before Bierwirth could sue for the redemption deed, Rio Rancho/Otto had allowed the property to go to foreclosure and it was forever lost to Martinez.

46. At that juncture, Bierwirth could not sue to force Rio Rancho to issue and deliver a redemption deed, all Bierwirth could do was sue for recovery of his money.

47. Rio Rancho failed to obey the law, breached the terms of the contractual agreement it agreed to when it bought the HOA foreclosure at auction, refused to issue and deliver a redemption deed and kept Martinez/Bierwirth's money.

48. For this act of following the law, Bierwirth has been permanently injured and the damage inflicted upon him is too great to quantify.

49. RIO RANCHO/OTTO stole his money, claimed he was a vexatious litigant, with which Judge Lambeth agreed, and ended up with a judgment against him for $64,361.26.

50. All because he attempted to recoup his $5,945.69.

51. Defendant Rio Rancho, in response to Bierwirth's suit, filed a Motion to declare Bierwirth a Vexatious Litigant.

52. Defendant Rio Rancho had no defense to the suit for payment, so resorted to deflection and deceptive practices.

53. Judge Lambeth granted the motion and did not even address Bierwirth's response to the motion, an anti-slapp charge.

54. A vexatious litigant label immediately requires a bond to continue the case.

55. Bierwirth filed a surety bond into the case in the amount of $7500 as determined by the Court in order to continue his case. **CR 366-368**

56. Rather than answer Bierwirth's suit, Rio Rancho filed a counterclaim.**CR 341-353**

57. Rio Rancho then filed a motion demanding Bierwirth post a cash bond rather than a surety bond.

58. Rio Rancho knew that Bierwirth did not have $7,5000, he could not and did not post it and Judge Lambeth dismissed his claims for want of payment.

59. Judge Lambeth signed an Order on September 29, 2016 ordering Bierwirth to post a cash bond of $7,500.00. **CR 425**.

60. When the bond was not posted, Bierwirth's case was dismissed.

ARGUMENTS AND AUTHORITIES

61. When an investor buys a property at an HOA foreclosure, he knows he is bound by Texas law to redeem the property during the first 180 days if redemption is requested.

62. Craig Otto/Rio Rancho, after he was paid, not only violated the law, he kept the redemption money.

63. His actions constitute fraud or theft or both.

64. Rio Rancho rested its action on the ambiguity of Tex.Prop.Code §209.011(j).

65. Rio Rancho claimed that Martinez did not redeem from the HOA, therefore it was not subject to the conditions of §209.011(f).

66. Bierwirth claims that the statute, §209.011(j), is convoluted, ambiguous and void for vagueness, therefore a nullity as relating to the HOA and the purchaser at the foreclosure sale.

67. Bierwirth claims that the purchaser at the foreclosure sale, without giving evidence of the affidavit from the HOA is bound by §209.011(f).

68. Tex.Prop.Code §209.011(j) is incongruous in that it states: the purchaser at the foreclosure sale, before executing a deed transferring the property to a lot owner, **shall** obtain an affidavit from the association stating that all amounts owed the association have been paid. The association **shall** provide the purchaser with the affidavit not later than the 10th day after the date the association receives all

amounts owed to the association under Subsection (e). Failure of a purchaser to comply with this subsection does not affect the validity of a redemption.

69. What exactly does that mean?

70. Does it mean that the purchaser has to get an affidavit before he can redeem even if he has been paid?

71. Does it mean that the purchaser has to get an affidavit, but failure to do so doesn't affect the validity of a redemption?

72. Does it mean that the purchaser gets the redemption money but doesn't have to comply with the provisions of 209.011(f)?

73. Since the statute is so nonsensical, Bierwirth cannot be bound by it and Rio Rancho cannot depend on it for support of its failure to issue and deliver the redemption deed.

74. In any case, Martinez and Bierwirth completely complied with the law.

75. Martinez paid the redemption amount asked for to Rio Rancho.

76. Since the statute states that the redemption deed must issue immediately, Bierwirth counted on the law.

77. Martinez, after payment, quickly listed the property for sale in order to avoid a foreclosure.

78. Rio Rancho/Otto did not issue the deed, did not vacate the property Martinez had just paid for, and **KEPT THE MONEY**!

79. Bierwirth had no choice other than to file suit, just as §209.011(f) instructs him to do.

80. Bierwirth can offer no case cites or opinions concerning this situation, because he could not find any case in Texas jurisprudence where a redemption amount was timely paid, the redemption deed was not issued, and the purchaser at the foreclosure was allowed to keep the money.

2. THE SECOND ELEMENT: VEXATIOUS LITIGANT

ISSUES PRESENTED FOR REVIEW

ISSUE 1: Can a Defendant who has never answered the original petition deflect the court by filing a motion to deem Bierwirth a vexatious litigant?

ISSUE 2: Can Kevin Bierwirth be deemed a vexatious litigant when there was a reasonable probability that he would prevail in the litigation against the defendant?

ISSUE 3: Is the vexatious litigant statute in harmony with the 4 organic laws of the United States of America; namely, the Declaration of Independence, Articles of Confederation, Northwest Ordinance, and the Constitution of the United States of America?

ISSUE 4: Is the vexatious litigant statute in harmony with the Texas Bill of Rights?

STATEMENT OF THE CASE

81. Defendant Rio Rancho, in response to Bierwirth's suit, filed a Motion to declare Bierwirth a Vexatious Litigant. **CR 39-295**

82. Defendant Rio Rancho had no defense to the suit for payment, so resorted to deflection and deceptive practices.

83. The Texas Vexatious litigant statute is so illegal on so many levels, that it is difficult to see how anyone could believe it is in the Texas Codes.

84. First, the Texas Constitution Art. 1, Sec. 3 promises that we all have equal rights.

85. This is frankly, not true in Texas.

86. A man or woman with a bar card may file as many lawsuits as they want.

87. A man without a bar card may not file more than 4 cases in any 7 year period, or he runs the risk of being forever banned from the use of Texas courts.

88. In Kevin Bierwirth's case, this is troubling, as before the bust of 2008, he owned a number of properties which all became at risk when the market crashed.

89. Bierwirth believed, and still believes he had very good defense against foreclosure of his properties, and he litigated on each property utilizing all legal processes for his use in pursuing the due course of law.

90. Art. 1, Sec. 13 promises that all courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

91. That is simply not true in Texas.

92. Any bar card attorney, at any time, can put in a motion to have a man or woman without a bar card be deemed a vexatious litigant and that man or woman is FOREVER barred from filing for an injury done to him or her.

93. This constitutes a life sentence.

94. Art. 1, Sec. 19. The Constitution promises us that we shall not be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by due course of the law of the land.

95. This is a lie, Texas courts are happy to disfranchise a person who is acting *propria persona.*

96. To deem a man or woman without a bar card to be a vexatious litigant is to put that man or woman permanently in the public stocks.

97. Anyone can come by and throw rocks at them, and there is nothing that yoked man or woman can do.

98. He or she is rendered helpless because he or she has been disfranchised.

99. Disfranchise: To deprive of the rights and privileges of a free citizen; to deprive of chartered rights and immunities; to deprive of any franchise, as of the right of vote in elections. etc.. Black's Law Dictionary Sixth Edition.

100. Or to deprive a free citizen from ever using the courts to resolve an injury or redress of grievance.

101. Art. 1, Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

102. What could be more punitive than disfranchisement from court processes?

103. To deem a pro se litigant a vexatious litigant is outlawry.

104. No citizen shall be outlawed.

105. This too, is a right promised by the Texas Constitution at Art. 1, Sec. 20.

106. However, in reality, that is exactly what happens when one is declared a vexatious litigant.

107. Rio Rancho's petition to deem Bierwirth a vexatious litigant fails on its first plank: A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant.

108. There is no way that Kevin Bierwirth was not entitled to the return of the money he put up to redeem a property when no redemption deed was issued.

109. Once Judge Lambeth determined Bierwirth to be a vexatious litigant, there was no way she was ever going to rule in his favor on his petition.

110. It was not in her best interest.

111. In fact, when he did not receive the redemption deed, the property statutes not only gave him permission to file, he was encouraged to file.

112. When this Court reverses Judge Lambeth's dismissal of his claim for payment, the vexatious litigant label must be removed, as the first prong of the criteria will not be met.

113. The vexatious litigant label, when ordered by a district court, becomes immediately effective as it is instantly entered on the Texas Attorney General's vexatious litigant list.

114. This is before an appeal and treated like a final judgment.

115. This is a denial of due process and a violation of the due course of the law.

116. In addition to being in violation of all the inviolate Rights enumerated by the Texas Constitution, the label is in violation of the Declaration of Independence and the Eighth Amendment of the Bill of Rights.

117. Bear in mind that the vexatious litigant forfeits Bierwirth's Right to bring an action for injuries, Right to file suit for redress of grievances, Right to access to the Courts, and is in violation of the Declaration of Independence's unalienable Right to Life, Liberty and the Pursuit of Happiness.

118. Also, the label disfranchises Bierwirth.

119. These are heavy and onerous weights on Bierwirth's unalienable Rights.

120. In point of fact, Judge Betsy Lambeth has violated the 1st Organic Law of the United States of America, she has aliened Bierwirth's Rights.

121. This is unacceptable.

122. Not only has Judge Lambeth ordered that Bierwirth not be recompensed for money paid which should have resulted in the issuance of a redemption deed or the refund of his money, she has penalized him with disfranchisement, and added to the injury by awarding almost $65,000 to the man who broke the law.

123. This is more than excessive punishment.

124. One could call it insanity.

ARGUMENTS AND AUTHORITIES

125. To prevent this Court from determining that the 8th Amendment only applies to criminal cases, Bierwirth quotes from the U. S. Supreme Court case of *Austin v. United States,* 509 U.S. 602 (1993).

126. "In this case, we are asked to decide whether the Excessive Fines Clause of the Eight Amendment applies to forfeitures of property under 21 U.S.C. §§881(a)(4) and (a)(7). We hold that it does and therefore remand the case for consideration of the question whether the forfeiture at issue here was excessive."

127. The *Austin* Court goes on to say:

> "The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. See *Browning-Ferris,* 492 U. S., at 266-267, 275. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, "as *punishment* for some offense." *Id.,* at 265 (emphasis added). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *United States* v. *Halper,* 490 U. S. 435, 447-448 (1989). "It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." *Id.,* at 447. See also *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 554 (1943) (Frankfurter, J., concurring). Thus, the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment."

128. The Court reasoned that the question of whether the Eighth Amendment applied to a forfeiture did not hinge on whether it was civil or criminal, but rather whether it was "punishment". *Young v. State*, 806 A.2d 233, (Ct.App.—Maryland, 2002) and 69 similar citations.

129. "A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *State v. Leyva*, 985 P. 2d 498, (Ct.App.—Arizona, 1st Div. 1998) and 135 similar citations.

130. For what is Bierwirth being punished?

131. Is it because he didn't hire an attorney?

132. What happens to him if he can't afford to hire an attorney, as in this case?

133. Is he being punished for being poor?

134. And more important than any other question, does Texas have the right to punish her citizens by disfranchising them and outlawing them?

135. The answer is no.

136. The Vexatious Litigant statute is in abject violation, in direct antithesis of the four Organic Laws of the United States of America and of the Texas Bill of Rights.

137. When this Court rules that Kevin Bierwirth was entitled to get back the money paid for redemption, his vexatious litigant label must go away.

138. But the fact of the matter is, the vexatious litigant statute is an abomination to the four Organic Laws of the United States of American and cannot stand in any of her several States.

139. The vexatious litigant punishment statute is forfeiture of unalienable Rights and no State has the power or authority to impose such a punishment.

140. In point of fact, no State has any reason to impose such punishment.

3. THE THIRD ELEMENT: DEFENDANT'S COUNTERCLAIM

ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did Rio Rancho, after receiving $5,749.69 for a redemption on May 28, 2015 have any interest in the property after that date?

ISSUE 2: Can Rio Rancho claim injury for a property in which it held no interest?

STATEMENT OF THE CASE

141. Rio Rancho, on May 28, 2015 took Martinez's money, didn't issue the mandatory redemption deed and did not vacate the premises, had no defense to its actions.

142. However, it had the wily Dr. J. Hyde as its defense attorney.

143. Hyde got Judge Betsy Lambeth to declare that Bierwirth was a vexatious litigant so he wouldn't have to answer for his client.

144. Then, Hyde got Judge Betsy Lambeth, without a hearing to determine the worth of the Sureties, to revoke the Surety Bond and demand cash bond in order to continue to litigate his case.

145. Then, Hyde enticed Judge Betsy Lambeth to dismiss Bierwirth's claims for lack of surety.

146. Then, Hyde filed a Counterclaim for Rio Rancho claiming all kinds of injuries.

147. All of the injuries complained of occurred **AFTER** May 28, 2015.

148. Remember, Rio Rancho accepted the payment for redemption on May 28, 2015.

149. By law, from that point on the property is deeded back to the homeowner who has the right of immediate possession of the property.

150. By law, the former homeowner attains all the rights and interests in his property from the purchaser and is once more reinstated in his property.

151. In its Counter claim, Rio Rancho admits it received a letter confirming payment of the redemption money, and adds: "The letter said nothing about whether WHOA had been paid all amounts necessary for Mr. Martinez to redeem the Property. **CR. 344**

152. It goes on at #19. "Rio Rancho contacted WHOA and was informed that, independent of the amount paid to Rio Rancho, Mr. Martinez owed WHOA over $5,000 to redeem the property." **CR 344**

153. Martinez redeemed the property with more than one month left on the redemption expiration.

154. If Rio Rancho knew, when it received the money, that the HOA had not been paid, was it not his obligation to communicate that fact to Martinez?

155. If Rio Rancho was acting in good faith, honoring the agreement with the statutes for redemption, would Otto not have told Martinez or sent the money back with the reason why he felt he couldn't redeem?

156. Does very action not show the Court the bad faith Rio Rancho/Otto was operating under?

157. At **#23, CR 344**, "On or about 8 June 2015, Bierwirth listed the Property for sale with Homescapes Realty at a price of one hundred ninety-three dollars ($193,000.00) under MLS number 1535318, even though neither Bierwirth nor Martinez held title to the Property."

158. But, Martinez did hold title to his property on that date, he just had not been issued the redemption deed and taken delivery.

159. Tex.Prop.Code §209.011(f) mandates that the purchaser shall immediately execute and deliver to the redeeming party a deed transferring the property to the lot owner upon receiving payment for redemption.

160. In its counterclaim, Rio Rancho says it filed suit on May 28, 2015, in Justice Court, Precinct Two, Williamson County, seeking to prevent SPS from selling the Property at a foreclosure sale. **#17. C R 343**

161. This is the same day Rio Rancho was paid and accepted the $5,945.69.

162. Later, at **CR 344 #20**, Rio Rancho calls this action a Title Suit.

163. Any first year law student knows you can't file a Title Suit in a Justice Court.

164. That is a District Court action.

165. Bierwirth asserts this JP action was merely a diversionary tactic on Rio Rancho's part and had no legal validity.

166. Rio Rancho could not sue the mortgage holder as it had no standing to do so.

167. J. Hyde claimed that Martinez requested a redemption amount, **CR 343**, and refers to it as "the total amount Mr. Martinez would need to pay Rio Rancho as part of the redemption process."

168. As far as Rio Rancho was concerned, that is the complete redemption process.

169. Rio Rancho had no authority to act for the HOA, and had Rio Rancho issued the redemption deed, Martinez could have sold the property, not had a foreclosure on his record, and the proceeds from the sale would have paid the HOA if there was anything actually owing.

170. It matters not what Rio Rancho claims after May 28, 2015.

171. The record is clear, Juan Martinez had the right of redemption.

172. Juan Martinez exercised the right of redemption.

173. Once the cash was deposited in Rio Rancho's bank account, Rio Rancho lost all right, interest or claim to the property.

174. All of Rio Rancho's counterclaim alleges injuries after May 28, 2015.

175. Neither Martinez nor Bierwirth could have caused Rio Rancho harm, as Rio Rancho, by operation of law, held no interest in the property.

176. It could not occupy the property, it could not sell the property, the only thing it could do but did not, was immediately issue and deliver a redemption deed.

177. This it failed to do.

178. Perhaps if Rio Rancho had returned the money, it could have pleaded a claim.

179. However, Rio Rancho had no claim because according to the terms of the Texas Property Code, and the contract which it entered into by buying the property at the HOA foreclosure, it was bound by law to accept a redemption if offered within 180 days and deliver a deed and the property to Juan Martinez.

180. Rio Rancho, nowhere in the 1047 pages of the clerk's record, nowhere in the 12 Volumes of reporter's records, nowhere does it claim that it issued and delivered a redemption deed, but more importantly, nowhere does it claim it did anything but keep the money.

181. Wily Dr. Hyde made certain to distract the court from the crux of the suit.

182. The judge erred when she signed the vexatious litigant order.

183. The judge abused her discretion when she did not accept the surety bond Bierwirth filed so he could continue his case until he could appeal it.

184. The judge abused her discretion when she forced Bierwirth to post a cash bond instead of the surety bond.

185. The judge abused her discretion when she dismissed Bierwirth's case for failure to post the cash bond.

186. The judge abused her discretion when she heard the counter claim of Rio Rancho, which complained of events after May 28, 2015 although she had evidence that all interest it had in Martinez's property was nonexistent on May 29, 2015.

187. All of Rio Rancho's interest in the property was estopped, barred, paid for and sold by operation of law on May 28, 2015, yet, the judge allowed Rio Rancho to control the court and terrorize Kevin Bierwirth.

188. The judge abused her discretion in granting judgment to Rio Rancho.

189. The judge erred, because the only jurisdiction she was granted was Texas Property Code as it pertained to HOA redemption.

190. Judge Betsy Lambeth lacked subject matter jurisdiction to issue the orders she did.

ARGUMENTS AND AUTHORITIES

191. Bierwirth does not attach any case opinion on this issue because there isn't any, and the facts should be evaluated with common sense not case opinion.

192. Rio Rancho/Otto could not have had favorable treatment in any fair, unbiased court in Texas on this issue.

193. This is akin to horse theft in Texas, except the robbers only stole horses, they weren't paid for them and then stole them back.

194. Rio Rancho did the unthinkable.

195. Rio Rancho broke its contract with the state when it didn't uphold the contract of HOA redemption.

196. Rio Rancho took the money, did not deliver the goods, and got away with it AND was rewarded in Judge Betsy Lambeth's court.

197. If the appeals court upholds Lambeth's decisions, it will be a boon for all thieves in Texas. They will be able to show this case as the model for legal snatch and grab.

REQUEST FOR RELIEF

Appellant requests this Court to reverse every one of Judge Betsy Lambeth's orders in this case.

Appellant asks that this court order the vexatious litigant label stricken as to Kevin Bierwirth.

Appellant asks that this Court remand this case back to Williamson County with orders to allow Appellant to file an Amended Petition that reflects the new set of injuries inflicted on Appellant by Rio Rancho.

Appellant requests this Court to rule that the vexatious litigant statute is in absolute opposition to the 4 Organic Laws of the United States of America and the Texas Bill of Rights and notice the Texas Legislature of its findings.

Appellant requests that when his case is remanded to Williamson County that is removed from the court of Betsy Lambeth.

Respectfully,

Kevin Bierwirth
13276 Research Blvd. Ste. 204
Austin, Texas 78750
(512) 825-0331

CERTIFICATE OF SERVICE

I hereby certify by my signature above that I have served a true and correct copy of the above and foregoing document on all counsel of record via electronic mail in accordance with the requirements of the Texas Rules of Civil Procedure, rule 21a on this the 25th day of July, 2018.

CERTIFICATE OF COMPLIANCE

I, Kevin Bierwirth certify that Appellant's Brief is in Times New Roman typeface, 14 point font, and contains 5,219 words.

APPENDIX

TAB 1

Order Granting Defendant's Motion to Declare Kevin Bierwirth a Vexatious Litigant and Order for Plaintiff To Furnish Security
January 22, 2016

FILED at 9:40 o'clock A M
JAN 22 2016
Lisa David
District Clerk, Williamson Co., TX.

CAUSE NO. 15-0819-C277

KEVIN BIERWIRTH,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	WILLIAMSON COUNTY, TEXAS
	§	
RIO RANCHO PROPERTIES, LLC,	§	
	§	
Defendant.	§	277th JUDICIAL DISTRICT

ORDER GRANTING DEFENDANT'S MOTION TO DECLARE KEVIN BIERWIRTH A VEXATIOUS LITIGANT AND ORDER FOR PLAINTIFF TO FURNISH SECURITY

On the 20 of January, 2016, came on to be heard Defendant's Motion to Declare Kevin Bierwirth a Vexatious Litigant and Order for Plaintiff to Furnish Security in the above styled and numbered cause. Having heard and considered the Motion and the parties' briefing and arguments, the Court finds that the Motion should be and is GRANTED.

The Court finds that there is not a reasonable probability that Plaintiff will prevail in this litigation. The Court further finds, pursuant to Section 11.054 of the Texas Civil Practices and Remedies Code, that Kevin Bierwirth, in the seven-years period immediately preceding the date of Defendant's Motion, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in a small claims court that have been finally determined adversely to the plaintiff or permitted to remain pending at least two years without having been brought to trial or hearing.

IT IS THEREFORE ORDERED that Kevin Bierwirth is hereby declared a vexatious litigant in the State of Texas, pursuant to Section 11.054 of the Texas Civil Practices & Remedies Code.

IT IS FURTHER ORDERED that Plaintiff furnish security, for the benefit of the moving Defendant, in the amount of $7,500.00 by MARCH 20, 2016 to proceed in this case. The Court finds that the security is an undertaking by the Plaintiff to assure payment to the moving Defendant of the moving Defendant's reasonable expenses incurred in or in connection with a litigation commenced, caused to be commenced, maintained, or caused to be maintained by Plaintiff, including costs and attorney's fees. Failure to timely furnish security will result in dismissal of this suit.

IT IS FURTHER ORDERED, pursuant to Section 11.101 of the Civil Practices and Remedies Code, that Plaintiff be prohibited from filing new litigation in any court in this State without permission from a local administrative judge. The Clerk of the Court shall forward a copy of this order to the Office of Court Administration pursuant to Section 11.104 of the Texas Civil Practices and Remedies Code.

Signed this 20 day of Jan., 2016

Presiding District Judge
Williamson County, Texas

TAB 2

Order Clarifying Requirement for Plaintiff to Furnish Security
September 29, 2016

FILED
at 352 o'clock P M
SEP 29 2016
Lisa David
District Clerk, Williamson Co., TX.

CAUSE NO. 15-0819-C277

KEVIN BIERWIRTH,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	WILLIAMSON COUNTY, TEXAS
	§	
RIO RANCHO PROPERTIES, LLC,	§	
	§	
Defendant.	§	277th JUDICIAL DISTRICT

ORDER CLARIFYING REQUIREMENT FOR PLAINTIFF TO FURNISH SECURITY

On January 20, 2016, the Court entered an Order declaring Plaintiff Kevin Bierwirth to be a vexatious litigant pursuant to Texas Civil Practice and Remedies Code section 11.054. The Court further ordered Plaintiff to furnish security, for the benefit of the moving Defendant, in the amount of $7,500.00 by March 20, 2016 to proceed in this case. The Order noted that failure to furnish such security would result in dismissal of Plaintiff's suit.

On September 28, 2016, the Court heard argument on Defendant's motion to dismiss Plaintiff's claims for failure to furnish security as required by the above-referenced Order. The Court has determined that this Order requires clarification in that the Order did not specify the type of security Plaintiff was required to furnish to avoid dismissal. The Court finds that a cash deposit is the type of security necessary to adequately assure payment to the Defendant of its reasonable expenses incurred in or in connection with a litigation commenced, caused to be commenced, maintained, or caused to be maintained by Plaintiff.

IT IS THEREFORE ORDERED, pursuant to Texas Civil Practice and Remedies Code section 11.055, that Plaintiff shall furnish the required security by depositing $7,500.00 in cash into the Court's registry no later than October 28, 2016. Failure to do so will result in immediate dismissal of Plaintiff's claims with prejudice.

Signed this 29 day of Sept., 2016

B Sannett
Presiding District Judge
Williamson County, Texas

TAB 3

Order Denying Plaintiff's Challenge
To the Jurisdiction
September 25, 2017

FILED
at 3:37 o'clock P M
SEP 25 2017
Lisa David
District Clerk, Williamson Co., TX.

CAUSE NO. 15-0819-C277

KEVIN BIERWIRTH, *Plaintiff/Counter Defendant,*	§	IN THE DISTRICT COURT OF
v.	§	WILLIAMSON COUNTY, TEXAS
RIO RANCHO PROPERTIES, LLC, *Defendant/Counter Plaintiff,*	§	
v.	§	
BOB DEAN SCHREIBER d/b/a AUSTIN HOMESCAPES REALTY Cross-Defendant	§	277TH JUDICIAL DISTRICT

ORDER DENYING PLAINTIFF'S CHALLENGE TO THE JURISDICTION

On this day, came on to be considered, Plaintiff's Challenge to the Jurisdiction. The Court, after considering said Motion, Defendant's response thereto and the arguments of counsel, finds that said Motion should be denied.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that Plaintiff's Challenge to the Jurisdiction is hereby DENIED.

SIGNED this 25 day of Sept, 2017.

JUDGE PRESIDING

TAB 5

Order Granting Defendant/Counter Plaintiff Rio Rancho Properties, LLC Traditional and No-Evidence Motion for Summary Judgment

October 25, 2017

CAUSE NO. 15-0819-C277

KEVIN BIERWIRTH, *Plaintiff/Counter Defendant,*	§	IN THE DISTRICT COURT OF
v.	§	WILLIAMSON COUNTY, TEXAS
RIO RANCHO PROPERTIES, LLC, *Defendant/Counter Plaintiff,*	§	
v.	§	
BOB DEAN SCHREIBER d/b/a AUSTIN HOMESCAPES REALTY Cross-Defendant	§	277TH JUDICIAL DISTRICT

ORDER GRANTING DEFENDANT/COUNTER PLAINTIFF RIO RANCHO PROPERTIES, LLC TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

On this date, the Court considered Defendant/Counter Plaintiff Rio Rancho Properties, LLC's ("Rio") Traditional and No-Evidence Motion for Summary Judgment (the "Motion"). After considering the Motion, any response, and any pleadings on file with this Court, the Court finds that the Motion is meritorious and is hereby GRANTED on all of Rio's affirmative claims.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that the Affidavit of Redemption ('Affidavit") recorded with the Williamson County Clerk on July 8, 2015, with the electronic document number 2015058040 is invalid and void and hereby REMOVED. The clerk is ordered to take such further steps as necessary to remove said lien and/or claim.

IT IS FURTHER ORDERED that the Affidavit was fraudulent pursuant to Civil Practice and Remedies Code, Chapter 12, and Plaintiff Kevin Bierwirth is hereby ORDERED to pay Rio $10,000.00 for such violation against it.

IT IS FURTHER ORDERED that Plaintiff Kevin Bierwirth pay Rio $37,556.26 in actual damages.

The Court further finds that Plaintiff/Counter Defendant was a license holder as defined by § 1101.601 of the Occupation Code as found by the Texas Real Estate Commission (a/k/a the Real Estate Licensing Act) during the events made the basis of this lawsuit. The Court further finds that Plaintiff/Counter Defendant Kevin Bierwirth engaged in conduct prohibited by § 1101.652 (a-1), (b), 1101.653(1), (2), (3), or (4). Specifically, Plaintiff/Counter Defendant Kevin Bierwirth's conduct described herein constitutes misrepresentations, dishonesty, or fraud by interfering with the subject Property and attempting to sell the Property when he had no authority to do so. Therefore, IT IS FURTHER ORDERED that Defendant/Counter Plaintiff Rio may enforce this judgment pursuant to Texas Occupation Code. § 1101.606(a) to recover this judgment under the Texas Real Estate License Act trust account.

The Court further SUSTAINS Plaintiff/Counter Defendant's objections to Plaintiff/Counter Defendant Kevin Bierwirth summary judgment evidence.

IT IS FURTHER ORDERED that Plaintiff Kevin Bierwirth pay Rio $9,275.00 in attorney's fees and an additional $3,000.00 for enforcement of the Court's judgment. In addition, Plaintiff Kevin Bierwirth is ordered to pay Rio $4,500 for resisting appeal of this judgment at the Court of Appeals, if Defendant/Counter Plaintiff Rio is successful; an additional $4,500.00 for resisting a rehearing at the Court of Appeals, if Defendant/Counter Plaintiff Rio is successful; and an additional $6,500.00 for resisting appeal to the Texas Supreme Court, if Defendant/Counter Plaintiff Rio is successful.

SIGNED THIS THE 24 DAY OF Oct., 2017

JUDGE PRESIDING

TAB 4

Order Denying Plaintiff's Motion for Summary Judgment

August 21, 2017

FILED
at 309 o'clock P M
AUG 21 2017
Lisa David
District Clerk, Williamson Co., TX.

CAUSE NO. 15-0819-C277

KEVIN BIERWIRTH, *Plaintiff/Counter Defendant,*	§	IN THE DISTRICT COURT OF
v.	§	WILLIAMSON COUNTY, TEXAS
RIO RANCHO PROPERTIES, LLC, *Defendant/Counter Plaintiff,*	§	
v.	§	
BOB DEAN SCHREIBER d/b/a AUSTIN HOMESCAPES REALTY Cross-Defendant	§	277TH JUDICIAL DISTRICT

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On this day, came on to be heard Plaintiff's Motion for Summary Judgment, and the Court, after considering the motion and the arguments, is of the opinion that said motion should be **DENIED**.

The Court further finds Defendant's First Amended Counterclaims and Cross Claims, and Defendant's Response and Special Exceptions to Plaintiff's Motion for Summary Judgment are both timely.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment is in all things **DENIED**.

SIGNED this 21st day of August, 2017.

Judge Presiding

TAB 5

Final Judgment
November 17, 2017

CAUSE NO. 15-0819-C277

KEVIN BIERWIRTH, *Plaintiff/Counter Defendant,*	§	IN THE DISTRICT COURT OF
v.	§	WILLIAMSON COUNTY, TEXAS
RIO RANCHO PROPERTIES, LLC, *Defendant/Counter Plaintiff,*	§	FILED at 910 o'clock a M NOV 17 2017 Lisa David District Clerk, Williamson Co., TX.
v.	§	
BOB DEAN SCHREIBER d/b/a AUSTIN HOMESCAPES REALTY Cross-Defendant	§	277TH JUDICIAL DISTRICT

FINAL JUDGMENT

On this date, the Court considered and determined the rights of all parties and disposed of all issues before it, and issues final judgment for Defendant/Counter Plaintiff Rio Rancho Properties, LLC ("Rio") on all of its claims against Plaintiff/Counter Defendant Kevin Bierwirth ("Bierwirth"), and issues final judgment that Bierwirth take nothing on his claims against Rio, as follows:

On November 4, 2016, this Court signed an Order Dismissing Plaintiff's Claims. Such order is incorporated and merged into this Final Judgment for all purposes.

On October 24, 2017, this Court signed an order granting summary judgment to Rio on all of its affirmative claims against Bierwirth. Such order is incorporated and merged into this Final Judgment for all purposes. In connection with the above ruling the Court finds as follows: That the Affidavit of Redemption ("Affidavit") recorded with the Williamson County Clerk on July 8, 2015, with the electronic document number 2015058040 is invalid and void. The Court further finds that the Affidavit is fraudulent pursuant to Civil Practice and Remedies Code ("CPRC"), Chapter 12. The Court further finds that Plaintiff/Counter Defendant was a license

holder as defined by § 1101.601 of the Occupation Code as found by the Texas Real Estate Commission (a/k/a the Real Estate Licensing Act) during the events made the basis of this lawsuit. The Court further finds that Plaintiff/Counter Defendant Kevin Bierwirth engaged in conduct prohibited by § 1101.652 (a-1), (b), 1101.653(1), (2), (3), or (4). Specifically, Plaintiff/Counter Defendant Kevin Bierwirth's conduct described herein constitutes misrepresentations, dishonesty, or fraud by interfering with the subject Property and attempting to sell the Property when he had no authority to do so. Finally, the Court finds that Rio has agreed to nonsuit its claims against Cross-Defendant Bob Dean Schreiber d/b/a Austin Homescapes Realty without prejudice.

IT IS THEREFORE ORDERED that Plaintiff Kevin Bierwirth pay Rio $37,556.26 in actual damages.

IT IS FURTHER ORDERED that Bierwirth pay Rio an additional $10,000.00 in damages in light of the Court's finding that Bierwirth has violated CPRC Chapter 12 by filing a fraudulent claim. IT IS FURTHER ORDERED that the clerk is ordered to take such further steps as necessary to remove the Affidavit, if it has not already been removed.

IT IS FURTHER ORDERED that Rio may enforce this judgment pursuant to Texas Occupation Code. § 1101.606(a) to recover this judgment under the Texas Real Estate License Act trust account.

IT IS FURTHER ORDERED that Bierwirth pay Rio $9,275.00 in attorney's fees and an additional $3,000.00 for enforcement of the Court's judgment. In addition, Bierwirth is ordered to pay Rio $4,500 for resisting appeal of this judgment at the Court of Appeals, if Rio is successful; an additional $4,500.00 for resisting a rehearing at the Court of Appeals, if Rio is

successful; and an additional $6,500.00 for resisting appeal to the Texas Supreme Court, if Rio is successful.

IT IS FURTHER ORDERED that Cross-Defendant Bob Dean Schreiber d/b/a Austin Homescapes Realty is dismissed from this lawsuit without prejudice.

IT IS FURTHER ORDERED that all the above-listed amounts shall bear post-judgment interest at the rate of 5% per annum, beginning on the day after this Judgment is signed.

Finally, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all remaining claims and counterclaims are dismissed with prejudice and all other relief of any type or kind plead or which could have been plead in this suit by or against any party, which relief is not expressly granted herein is denied. This judgment finally disposes of all parties and all claims.

SIGNED THIS THE 17 DAY OF Nov., 2017

JUDGE PRESIDING

AGREED TO FORM:

E. Jason Billick
ALMANZA, BLACKBURN, DICKIE & MITCHELL, L.L.P.
2301 S. Capital of Texas Hwy., Bldg. H
Austin, Texas 78746
Plaintiff/Counter Defendant

Kevin Bierwirth
Plaintiff/Counter Defendant

TAB 6

Austin v. United States
509 U.S. 602 (1993)

Austin v. United States, 509 US 602 - Supreme Court 1993

509 U.S. 602 (1993)

AUSTIN
v.
UNITED STATES

No. 92-6073.

United States Supreme Court.

Argued April 20, 1993.
Decided June 28, 1993.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

603*603 Blackmun, J., delivered the opinion of the Court, in which White, Stevens, O'Connor, and Souter, JJ., joined. Scalia, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 623. Kennedy, J., filed an opinion concurring in part and concurring in the judgment, in which Rehnquist, C. J., and Thomas, J., joined, *post,* p. 628.

Richard L. Johnson argued the cause for petitioner. With him on the briefs was *Scott N. Peters.*

Miguel A. Estrada argued the cause for the United States. With him on the brief were *Acting Solicitor General Bryson, Acting Assistant Attorney General Keeney,* and *Thomas E. Booth.*[*]

604*604 Justice Blackmun, delivered the opinion of the Court.

In this case, we are asked to decide whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U. S. C. §§ 881(a)(4) and (a)(7). We hold that it does and therefore remand the case for consideration of the question whether the forfeiture at issue here was excessive.

I

On August 2, 1990, petitioner Richard Lyle Austin was indicted on four counts of violating South Dakota's drug laws. Austin ultimately pleaded guilty to one count of possessing cocaine with intent to distribute and was sentenced by the state court to seven years' imprisonment. On September 7, the United States filed an *in rem* action in the United States District Court for the District of South Dakota seeking forfeiture of Austin's mobile home and auto body shop under

21 605*605 U. S. C. §§ 881(a)(4) and (a)(7).[1] Austin filed a claim and an answer to the complaint.

On February 4, 1991, the United States made a motion, supported by an affidavit from Sioux Falls Police Officer Donald Satterlee, for summary judgment. According to Satterlee's affidavit, Austin met Keith Engebretson at Austin's body shop on June 13, 1990, and agreed to sell cocaine to Engebretson. Austin left the shop, went to his mobile home, and returned to the shop with two grams of cocaine which he sold to Engebretson. State authorities executed a search warrant on the body shop and mobile home the following day. They discovered small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and approximately $4,700 in cash. App. 13. In opposing summary judgment, Austin argued that forfeiture of the properties would violate the Eighth Amendment.[2] The District Court rejected this argument and entered summary judgment for the United States. *Id.*, at 19.

The United States Court of Appeals for the Eighth Circuit "reluctantly agree[d] with the government" and affirmed. 606*606 *United States* v. *One Parcel of Property*, 964 F. 2d 814, 817 (1992). Although it thought that "the principle of proportionality should be applied in civil actions that result in harsh penalties," *ibid.*, and that the Government was "exacting too high a penalty in relation to the offense committed," *id.*, at 818, the court felt constrained from holding the forfeiture unconstitutional. It cited this Court's decision in *CaleroToledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663 (1974), for the proposition that, when the Government is proceeding against property *in rem*, the guilt or innocence of the property's owner "is constitutionally irrelevant." 964 F. 2d, at 817. It then reasoned: "We are constrained to agree with the Ninth Circuit that `[i]f the constitution allows *in rem* forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures.' " *Ibid.*, quoting *United States* v. *Tax Lot 1500*, 861 F. 2d 232, 234 (CA9 1988), cert. denied *sub nom. Jaffee* v. *United States*, 493 U. S. 954 (1989).

We granted certiorari, 506 U. S. 1074 (1993), to resolve an apparent conflict with the Court of Appeals for the Second Circuit over the applicability of the Eighth Amendment to *in rem* civil forfeitures. See *United States* v. *Certain Real Property*, 954 F. 2d 29, 35, 38-39, cert. denied *sub nom. Levin* v. *United States*, 506 U. S. 815 (1992).

II

Austin contends that the Eighth Amendment's Excessive Fines Clause applies to *in rem* civil forfeiture proceedings. See Brief for Petitioner 10, 19, 23. We have had occasion to consider this Clause only once before. In *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989), we held that the Excessive Fines Clause does not limit the award of punitive damages to a private party in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages. *Id.*, at 264. The Court's opinion and Justice O'Connor's 607*607 opinion, concurring in part and dissenting in part, reviewed in some detail the history of the Excessive Fines Clause. See *id.*, at 264-268, 286-297. The Court concluded that both the Eighth Amendment and § 10 of the English Bill of Rights of 1689, from which it derives, were intended to prevent *the government* from abusing its power to punish, see *id.*, at

266-267, and therefore that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government," *id.*, at 268.[3]

We found it unnecessary to decide in *Browning-Ferris* whether the Excessive Fines Clause applies only to criminal cases. *Id.*, at 263. The United States now argues that

"any claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a *criminal* punishment at the time the Eighth Amendment was adopted." Brief for United States 16 (emphasis added).

It further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal under *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), and *United States* v. *Ward*, 448 U. S. 242 (1980). Brief for United States 26-27. We disagree.

Some provisions of the Bill of Rights are expressly limited to criminal cases. The Fifth Amendment's SelfIncrimination Clause, for example, provides: "No person . . . shall be compelled in any criminal case to be a witness 608*608 against himself." The protections provided by the Sixth Amendment are explicitly confined to "criminal prosecutions." See generally *Ward*, 448 U. S., at 248.[4] The text of the Eighth Amendment includes no similar limitation. See n. 2, *supra.*

Nor does the history of the Eighth Amendment require such a limitation. Justice O'Connor noted in *BrowningFerris:* "Consideration of the Eighth Amendment immediately followed consideration of the Fifth Amendment. 609*609 After deciding to confine the benefits of the SelfIncrimination Clause of the Fifth Amendment to criminal proceedings, the Framers turned their attention to the Eighth Amendment. There were no proposals to limit that Amendment to criminal proceedings . . . ." 492 U. S., at 294. Section 10 of the English Bill of Rights of 1689 is not expressly limited to criminal cases either. The original draft of § 10 as introduced in the House of Commons did contain such a restriction, but only with respect to the bail clause: "The requiring excessive Bail of Persons committed in criminal Cases, and imposing excessive Fines, and illegal Punishments, to be prevented." 10 H. C. Jour. 17 (1688). The absence of any similar restriction in the other two clauses suggests that they were not limited to criminal cases. In the final version, even the reference to criminal cases in the bail clause was omitted. See 1 W. & M., 2d Sess., ch. 2, 3 Stat. at Large 441 (1689) ("That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted"); see also L. Schwoerer, The Declaration of Rights, 1689, p. 88 (1981) ("But article 10 contains no reference to `criminal cases' and, thus, would seem to apply . . . to all cases").[5]

The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. See *Browning-Ferris*, 492 U. S., at 266-267, 275. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government's power to extract payments, whether 610*610 in cash or in kind, "as *punishment* for some offense." *Id.*, at 265 (emphasis added). "The notion of punishment, as

we commonly understand it, cuts across the division between the civil and the criminal law." *United States* v. *Halper,* 490 U. S. 435, 447-448 (1989). "It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." *Id.,* at 447. See also *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 554 (1943) (Frankfurter, J., concurring). Thus, the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.[6]

In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 490 U. S., at 448. We turn, then, to consider whether, at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment 611*611 and whether forfeiture under §§ 881(a)(4) and (a)(7) should be so understood today.

III

A

Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture. See *Calero-Toledo,* 416 U. S., at 680-683. Each was understood, at least in part, as imposing punishment.

"At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand. The origins of the deodand are traceable to Biblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required. See O. Holmes, The Common Law, c. 1 (1881). The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses. 1 W. Blackstone, Commentaries *300. When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness." *Id.,* at 680-681 (footnotes omitted).

As Blackstone put it, "such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture." 1 W. Blackstone, Commentaries *301.

The second kind of common-law forfeiture fell only upon those convicted of a felony or of treason. "The convicted felon forfeited his chattels to the Crown and his lands escheated 612*612 to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." *Calero-Toledo,* 416 U. S., at 682. Such forfeitures were known as forfeitures of estate.

See 4 W. Blackstone, at *381. These forfeitures obviously served to punish felons and traitors, see *The Palmyra,* 12 Wheat. 1, 14 (1827), and were justified on the ground that property was a right derived from society which one lost by violating society's laws, see 1 W. Blackstone, at *299; 4 *id.,* at *382.

Third, "English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." *Calero-Toledo,* 416 U. S., at 682. The most notable of these were the Navigation Acts of 1660 that required the shipping of most commodities in English vessels. Violations of the Acts resulted in the forfeiture of the illegally carried goods as well as the ship that transported them. See generally L. Harper, English Navigation Laws (1939). The statute was construed so that the act of an individual seaman, undertaken without the knowledge of the master or owner, could result in forfeiture of the entire ship. See *Mitchell* v. *Torup,* Park. 227, 145 Eng. Rep. 764 (Ex. 1766). Yet Blackstone considered such forfeiture statutes "penal." 3 W. Blackstone, at *261.

In *Calero-Toledo,* we observed that statutory forfeitures were "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." 416 U. S., at 682. Since each of these traditions had a punitive aspect, it is not surprising that forfeiture under the Navigation Acts was justified as a penalty for negligence: "But the Owners of Ships are to take Care what Master they employ, and the Master what Mariners; and here Negligence is plainly imputable to the Master; for he is to report the Cargo of the Ship, and if he had searched and examined the Ship with proper care, according to his Duty, he would have found the Tea . . . and 613*613 so might have prevented the Forfeiture." *Mitchell,* Park., at 238, 145 Eng. Rep., at 768.

B

Of England's three kinds of forfeiture, only the third took hold in the United States. "Deodands did not become part of the common-law tradition of this country." *CaleroToledo,* 416 U. S., at 682. The Constitution forbids forfeiture of estate as a punishment for treason "except during the Life of the Person attainted," U. S. Const., Art. III, § 3, cl. 2, and the First Congress also abolished forfeiture of estate as a punishment for felons. Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117. "But `[l]ong before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes.' " *Calero-Toledo,* 416 U. S., at 683, quoting *C. J. Hendry Co.* v. *Moore,* 318 U. S. 133, 139 (1943).

The First Congress passed laws subjecting ships and cargos involved in customs offenses to forfeiture. It does not follow from that fact, however, that the First Congress thought such forfeitures to be beyond the purview of the Eighth Amendment. Indeed, examination of those laws suggests that the First Congress viewed forfeiture as punishment. For example, by the Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39, Congress provided that goods could not be unloaded except during the day and with a permit.

"[A]nd if the master or commander of any ship or vessel shall suffer or permit the same, such master and commander, and every other person who shall be aiding or assisting in landing,

removing, housing, or otherwise securing the same, shall forfeit and pay the sum of four hundred dollars for every offence; shall moreover be disabled from holding any office of trust or profit under the United States, for a term not exceeding seven years; and it shall be the duty of the collector of the district, to 614*614 advertise the names of all such persons in the public gazette of the State in which he resides, within twenty days after each respective conviction. And all goods, wares and merchandise, so landed or discharged, shall become forfeited, and may be seized by any officer of the customs; and where the value thereof shall amount to four hundred dollars, the vessel, tackle, apparel and furniture, shall be subject to like forfeiture and seizure."

Forfeiture of the goods and vessel is listed alongside the other provisions for punishment. It is also of some interest that "forfeit" is the word Congress used for fine. See *ibid.* ("shall forfeit and pay the sum of four hundred dollars for every offence").[7] Other early forfeiture statutes follow the same pattern. See, *e. g.,* Act of Aug. 4, 1790, ch. 34, §§ 13, 22, 27, 28, 1 Stat. 157, 161, 163.

C

Our cases also have recognized that statutory *in rem* forfeiture imposes punishment. In *Peisch* v. *Ware,* 4 Cranch 347 (1808), for example, the Court held that goods removed from the custody of a revenue officer without the payment of duties should not be forfeitable for that reason unless they were removed with the consent of the owner or his agent. Chief Justice Marshall delivered the opinion for a unanimous Court:

"The court is also of opinion that the removal for which the act punishes the owner with a forfeiture of 615*615 the goods must be made with his consent or connivance, or with that of some person employed or trusted by him. If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property." *Id.,* at 364.[8]

The same understanding of forfeiture as punishment runs through our cases rejecting the "innocence" of the owner as a common-law defense to forfeiture. See, *e. g., Calero-Toledo,* 416 U. S., at 683; *J. W. Goldsmith, Jr.-Grant Co.* v. *United States,* 254 U. S. 505 (1921); *Dobbins's Distillery* v. *United States,* 96 U. S. 395 (1878); *Harmony* v. *United States,* 2 How. 210 (1844); *The Palmyra,* 12 Wheat. 1 (1827). In these cases, forfeiture has been justified on two theories—that the property itself is "guilty" of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence.

The fiction that "the thing is primarily considered the offender," *Goldsmith-Grant Co.,* 254 U. S., at 511, has a venerable history in our case law.[9] See *The Palmyra,* 12 Wheat., 616*616 at 14 ("The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing"); *Harmony,* 2 How., at 233 ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner"); *Dobbins's Distillery,* 96 U. S., at 401 ("[T]he offence. . . is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal

misconduct or responsibility of the owner"). Yet the Court has understood this fiction to rest on the notion that the owner who allows his property to become involved in an offense has been negligent. Thus, in *Goldsmith-Grant Co.,* the Court said that "ascribing to the property a certain personality, a power of complicity and guilt in the wrong," had "some analogy to the law of *deodand.* " 254 U. S., at 510. It then quoted Blackstone's explanation of the reason for deodand: that "`such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture.' " *Id.,* at 510-511, quoting 1 W. Blackstone, at *301.

In none of these cases did the Court apply the guilty property fiction to justify forfeiture when the owner had done all that reasonably could be expected to prevent the unlawful use of his property. In *The Palmyra,* it did no more than reject the argument that the criminal conviction of the owner was a prerequisite to the forfeiture of his property. See 12 Wheat., at 15 ("[N]o personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature"). In *Harmony,* the owners' claim of "innocence" was limited to the fact that they "never contemplated 617*617 or authorized the acts complained of." 2 How., at 230. And in *Dobbins's Distillery,* the Court noted that some responsibility on the part of the owner arose "from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery." 96 U. S., at 401. The more recent cases have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner. See, *e. g., Goldsmith-Grant Co.,* 254 U. S., at 512; *Calero-Toledo,* 416 U. S., at 689-690 (noting that forfeiture of a truly innocent owner's property would raise "serious constitutional questions").[10] If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense.

The second theory on which the Court has justified the forfeiture of an "innocent" owner's property is that the owner may be held accountable for the wrongs of others to whom he entrusts his property. In *Harmony,* it reasoned that "the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs." 2 How., at 234. It repeated this reasoning in *Dobbins's Distillery:*

"[T]he unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself. Power to that effect the law vests in him by virtue of his lease; and, if he abuses his trust, it is a matter to be settled between him and his lessor; but the acts of violation 618*618 as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner." 96 U. S., at 404.

Like the guilty-property fiction, this theory of vicarious liability is premised on the idea that the owner has been negligent. Thus, in *Calero-Toledo,* we noted that application of forfeiture provisions "to lessors, bailors, or secured creditors who are innocent of any wrongdoing . . . may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." 416 U. S., at 688.[11]

In sum, even though this Court has rejected the "innocence" of the owner as a common-law defense to forfeiture, it consistently has recognized that forfeiture serves, at least in part, to punish the owner. See *Peisch* v. *Ware*, 4 Cranch, at 364 ("[T]he act punishes the owner with a forfeiture of the goods"); *Dobbins's Distillery*, 96 U. S., at 404 ("[T]he acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner"); *Goldsmith-Grant Co.*, 254 U. S., at 511 ("`[S]uch misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture' "). More recently, we have noted that forfeiture serves "punitive and deterrent purposes," *Calero-Toledo*, 416 U. S., at 686, and "impos[es] an economic penalty," *id.*, at 687. We conclude, therefore, that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment.[12]

619*619 IV

We turn next to consider whether forfeitures under 21 U. S. C. §§ 881(a)(4) and (a)(7) are properly considered punishment today. We find nothing in these provisions or their legislative history to contradict the historical understanding of forfeiture as punishment. Unlike traditional forfeiture statutes, §§ 881(a)(4) and (a)(7) expressly provide an "innocent owner" defense. See § 881(a)(4)(C) ("[N]o conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner"); § 881(a)(7) ("[N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner"); see also *United States* v. *Parcel of Rumson, N. J., Land*, 507 U. S. 111, 122-123 (1993) (plurality opinion) (noting difference from traditional forfeiture statutes). These exemptions serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less. In *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971), we reasoned that 19 U. S. C. § 1618, which provides that the Secretary of the Treasury is to return the property of those who do not intend to violate the law, demonstrated Congress' intent "to impose a penalty only upon those who are significantly involved in a criminal enterprise." 401 U. S., at 721-722. The inclusion of innocent-owner defenses in §§ 881(a)(4) and (a)(7) reveals a similar congressional intent to punish only those involved in drug trafficking.

620*620 Furthermore, Congress has chosen to tie forfeiture directly to the commission of drug offenses. Thus, under § 881(a)(4), a conveyance is forfeitable if it is used or intended for use to facilitate the transportation of controlled substances, their raw materials, or the equipment used to manufacture or distribute them. Under § 881(a)(7), real property is forfeitable if it is used or intended for use to facilitate the commission of a drug-related crime punishable by more than one year's imprisonment. See n. 1, *supra*.

The legislative history of § 881 confirms the punitive nature of these provisions. When it added subsection (a)(7) to § 881 in 1984, Congress recognized "that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." S. Rep. No. 98-225, p. 191 (1983).[13] It characterized the forfeiture of real property as "a powerful deterrent." *Id.*, at 195. See also Joint House-Senate Explanation of

Senate Amendment to Titles II and III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34671 (1978) (noting "the penal nature of forfeiture statutes").

The Government argues that §§ 881(a)(4) and (a)(7) are not punitive but, rather, should be considered remedial in two respects. First, they remove the "instruments" of the drug trade "thereby protecting the community from the threat of continued drug dealing." Brief for United States 32. Second, the forfeited assets serve to compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade. *Id.,* at 25, 32.

621*621 In our view, neither argument withstands scrutiny. Concededly, we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. See *United States* v. *One Assortment of 89 Firearms,* 465 U. S. 354, 364 (1984). The Court, however, previously has rejected government's attempt to extend that reasoning to conveyances used to transport illegal liquor. See *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693, 699 (1965). In that case it noted: "There is nothing even remotely criminal in possessing an automobile." *Ibid.* The same, without question, is true of the properties involved here, and the Government's attempt to characterize these properties as "instruments" of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth sedan as "contraband."

The Government's second argument about the remedial nature of this forfeiture is no more persuasive. We previously have upheld the forfeiture of goods involved in customs violations as "a reasonable form of liquidated damages." *One Lot Emerald Cut Stones* v. *United States,* 409 U. S. 232, 237 (1972). But the dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) undercut any similar argument with respect to those provisions. The Court made this very point in *Ward:* The "forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." 448 U. S., at 254.

Fundamentally, even assuming that §§ 881(a)(4) and (a)(7) serve some remedial purpose, the Government's argument must fail. "[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Halper,* 490 U. S., at 448 (emphasis added). In light of the historical understanding of forfeiture as punishment, the 622*622 clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose.[14] We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense," *Browning-Ferris,* 492 U. S., at 265, and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

V

Austin asks that we establish a multifactor test for determining whether a forfeiture is constitutionally "excessive." See Brief for Petitioner 46-48. We decline that invitation. Although

the Court of Appeals opined that "the government is exacting too high a penalty in relation to the offense committed," 964 F. 2d, at 818, it had no occasion to consider what factors should inform such a decision because it thought it was foreclosed from engaging in the inquiry. Prudence dictates that we allow the lower courts to consider that question 623*623 in the first instance. See *Yee* v. *Escondido*, 503 U. S. 519, 538 (1992).[15]

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Justice Scalia, concurring in part and concurring in the judgment.

We recently stated that, at the time the Eighth Amendment was drafted, the term "fine" was "understood to mean a payment to a sovereign as punishment for some offense." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 265 (1989). It seems to me that the Court's opinion obscures this clear statement, and needlessly attempts to derive from our sparse case law on the subject of *in rem* forfeiture the questionable proposition that the owner of property taken pursuant to such forfeiture is always blameworthy. I write separately to explain why I consider this forfeiture a fine, and to point out that the excessiveness inquiry for statutory *in rem* forfeitures is different from the usual excessiveness inquiry.

I

Whether any sort of forfeiture of property may be covered by the Eighth Amendment is not a difficult question. "Forfeiture" and "fine" each appeared as one of many definitions of the other in various 18th-century dictionaries. See *ante,* at 614, n. 7. "Payment," the word we used in *Browning-* 624*624 *Ferris* as a synonym for fine, certainly includes in-kind assessments. Webster's New International Dictionary 1797 (2d ed. 1950) (defining "payment" as "[t]hat which is paid; the thing given to discharge a debt or an obligation"). Moreover, for the Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense, altering only the form of the Star Chamber abuses that led to the provision of the English Bill of Rights, from which our Excessive Fines Clause directly derives, see *Browning-Ferris, supra,* at 266-267. Cf. *Harmelin* v. *Michigan*, 501 U. S. 957, 978-979, n. 9 (1991) (opinion of Scalia, J.). In *Alexander* v. *United States, ante,* at 558, we have today held that an *in personam* criminal forfeiture is an Eighth Amendment "fine."

In order to constitute a fine under the Eighth Amendment, however, the forfeiture must constitute "punishment," and it is a much closer question whether statutory *in rem* forfeitures, as opposed to *in personam* forfeitures, meet this requirement. The latter are assessments, whether monetary or in kind, to punish the property owner's criminal conduct, while the former are confiscations of property rights based on improper use of the property, regardless of whether the owner has violated the law. Statutory *in rem* forfeitures have a long history. See generally *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 680-686 (1974). The property to which they apply is not contraband, see the forfeiture Act passed by the First Congress, *ante,* at 613-614, nor is it necessarily property that can only be used for illegal purposes. The theory of *in rem* forfeiture is

said to be that the lawful property has committed an offense. See, *e. g.*, *The Palmyra*, 12 Wheat. 1, 14-15 (1827) (forfeiture of vessel for piracy); *Harmony* v. *United States*, 2 How. 210, 233-234 (1844) (forfeiture of vessel, but not cargo, for piracy); *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 400-403 (1878) (forfeiture of distillery and real property for evasion of revenue laws); *J. W. Goldsmith, Jr.-Grant Co.* v. *United* 625*625 *States*, 254 U. S. 505, 510-511 (1921) (forfeiture of goods concealed to avoid taxes).

However the theory may be expressed, it seems to me that this taking of lawful property must be considered, in whole or in part, see *United States* v. *Halper*, 490 U. S. 435, 448 (1989), punitive.[*] Its purpose is not compensatory, to make someone whole for injury caused by unlawful use of the property. See *ibid.* Punishment is being imposed, whether one quaintly considers its object to be the property itself, or more realistically regards its object to be the property's owner. This conclusion is supported by Blackstone's observation that even confiscation of a deodand, whose religious origins supposedly did not reflect any punitive motive but only expiation, see Law of Deodands, 34 Law Mag. 188, 189 (1845), came to be explained in part by reference to the owner as well as to the offending property. 1 W. Blackstone, Commentaries *301; accord, Law of Deodands, *supra,* at 190. Our cases have described statutory *in rem* forfeiture as "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." *Calero-Toledo, supra,* at 682.

The Court apparently believes, however, that only actual culpability of the affected property owner can establish that a forfeiture provision is punitive, and sets out to establish (in Part III) that such culpability exists in the case of *in rem* forfeitures. In my view, however, the case law is far more ambiguous than the Court acknowledges. We have never held that the Constitution requires negligence, or any other degree of culpability, to support such forfeitures. See *ante,* 626*626 at 616-617, and n. 10; *Goldsmith-Grant, supra,* at 512 (reserving question); *Calero-Toledo, supra,* at 689-690 (same). A prominent 19th-century treatise explains statutory *in rem* forfeitures solely by reference to the fiction that the property is guilty, strictly separating them from forfeitures that require a personal offense of the owner. See 1 J. Bishop, Commentaries on Criminal Law §§ 816, 824, 825, 833 (7th ed. 1882). If the Court is correct that culpability of the owner is essential, then there is no difference (except perhaps the burden of proof) between the traditional *in rem* forfeiture and the traditional *in personam* forfeiture. Wellestablished common-law distinctions should not be swept away by reliance on bits of dicta. Moreover, if some degree of personal culpability on the part of the property owner always exists for *in rem* forfeitures, see *ante,* at 614-618, then it is hard to understand why this Court has kept reserving the (therefore academic) question whether personal culpability is constitutionally required, see *ante,* at 617, as the Court does again today, see *ante,* at 617, n. 10.

I would have reserved the question without engaging in the misleading discussion of culpability. *Even if* punishment of personal culpability is necessary for a forfeiture to be a fine; and *even if in rem* forfeitures in general do not punish personal culpability; the *in rem* forfeiture in *this* case is a fine. As the Court discusses in Part IV, this statute, in contrast to the traditional *in rem* forfeiture, *requires* that the owner not be innocent—that he have some degree of culpability for the "guilty" property. See also *United States* v. *Parcel of Rumson, N. J., Land*, 507 U. S. 111, 121-123 (1993) (plurality opinion) (contrasting drug forfeiture statute with traditional statutory *in rem*

forfeitures). Here, the property must "offend" *and* the owner must not be completely without fault. Nor is there any consideration of compensating for loss, since the value of the property is irrelevant to whether it is forfeited. That is enough to satisfy the *Browning-Ferris* standard, and to make the entire discussion 627*627 in Part III dictum. Statutory forfeitures under § 881(a) are certainly *payment* (in kind) *to a sovereign* as *punishment* for an *offense.*

II

That this forfeiture works as a fine raises the excessiveness issue, on which the Court remands. I agree that a remand is in order, but think it worth pointing out that on remand the excessiveness analysis must be different from that applicable to monetary fines and, perhaps, to *in personam* forfeitures. In the case of a monetary fine, the Eighth Amendment's origins in the English Bill of Rights, intended to limit the abusive penalties assessed against the King's opponents, see *Browning-Ferris,* 492 U. S., at 266-267, demonstrate that the touchstone is value of the fine in relation to the offense. And in *Alexander* v. *United States,* we indicated that the same is true for *in personam* forfeiture. *Ante,* at 558.

Here, however, the offense of which petitioner has been convicted is not relevant to the forfeiture. Section § 881 requires only that the Government show probable cause that the subject property was used for the prohibited purpose. The burden then shifts to the property owner to show, by a preponderance of the evidence, that the use was made without his "knowledge, consent, or willful blindness," 21 U. S. C. § 881(a)(4)(C), see also § 881(a)(7), or that the property was not so used, see § 881(d) (incorporating 19 U. S. C. § 1615). Unlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been "tainted" by unlawful use, to which issue the value of the property is irrelevant. Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal. But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality 628*628 of the offense—the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine. The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.

This inquiry for statutory forfeitures has common-law parallels. Even in the case of deodands, juries were careful to confiscate only the instrument of death and not more. Thus, if a man was killed by a moving cart, the cart and its horses were deodands, but if the man died when he fell from a wheel of an immobile cart, only the wheel was treated as a deodand, since only the wheel could be regarded as the cause of death. 1 M. Hale, Pleas of the Crown *419—*422; 1 W. Blackstone, Commentaries *301—*302; Law of Deodands, 34 Law Mag., at 190. Our cases suggest a similar instrumentality inquiry when considering the permissible scope of a statutory forfeiture. Cf. *Goldsmith-Grant,* 254 U. S., at 510, 513; *Harmony,* 2 How., at 235 (ship used for piracy is forfeited, but cargo is not). The relevant inquiry for an excessive forfeiture under § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, "guilty" and hence forfeitable?

I join the Court's opinion in part, and concur in the judgment.

Justice Kennedy, with whom The Chief Justice and Justice Thomas join, concurring in part and concurring in the judgment.

I am in substantial agreement with Part I of Justice Scalia's opinion concurring in part and concurring in the judgment. I share Justice Scalia's belief that Part III of the Court's opinion is quite unnecessary for the decision of the case, fails to support the Court's argument, and seems rather doubtful as well.

In recounting the law's history, we risk anachronism if we attribute to an earlier time an intent to employ legal concepts 629*629 that had not yet evolved. I see something of that in the Court's opinion here, for in its eagerness to discover a unified theory of forfeitures, it recites a consistent rationale of personal punishment that neither the cases nor other narratives of the common law suggest. For many of the reasons explained by Justice Scalia, I am not convinced that all *in rem* forfeitures were on account of the owner's blameworthy conduct. Some impositions of *in rem* forfeiture may have been designed either to remove property that was itself causing injury, see, *e. g.*, *Harmony* v. *United States,* 2 How. 210, 233 (1844), or to give the court jurisdiction over an asset that it could control in order to make injured parties whole, see *Republic Nat. Bank of Miami* v. *United States,* 506 U. S. 80, 87 (1992).

At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question. Though the history of forfeiture laws might not be determinative of that issue, it would have an important bearing on the outcome. I would reserve for that or some other necessary occasion the inquiry the Court undertakes here. Unlike Justice Scalia, see *ante,* at 625, I would also reserve the question whether *in rem* forfeitures always amount to an intended punishment of the owner of forfeited property.

With these observations, I concur in part and concur in the judgment.

[*] Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Gerard E. Lynch, Steven R. Shapiro,* and *John A. Powell;* and for the National Association of Criminal Defense Lawyers by *David B. Smith* and *Justin M. Miller.*

Roger L. Conner, Robert Teir, Edward S. G. Dennis, Jr., and *Peter Buscemi* filed a brief for the American Alliance for Rights and Responsibilities et al. urging affirmance.

A brief of *amici curiae* was filed for the State of Arizona et al. by *Grant Woods,* Attorney General of Arizona, and *Cameron H. Holmes* and *Sandra L. Janzen,* Assistant Attorneys General, *Daniel E. Lungren,* Attorney General of California, *George Williamson,* Chief Assistant Attorney General, and *Gary W. Schons, Domenick Galluzzo,* Acting Chief State's Attorney of Connecticut, and by the Attorneys General for the irrespective jurisdictions as follows: *Winston Bryant* of Arkansas, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Robert A. Marks* of Hawaii, *Larry EchoHawk* of Idaho, *Robert T. Stephan* of Kansas, *Chris Gorman* of Kentucky, *Richard P. Ieyoub* of Louisiana, *Michael Carpenter* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Michael Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Tom Udall* of New Mexico, *Michael F. Easley* of North Carolina, *Susan B. Loving* of Oklahoma, *Ernest D. Preate, Jr.,* of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *T. Travis Medlock* of South Carolina, *Dan Morales*

of Texas, *Jan Graham* of Utah, *Stephen D. Rosenthal* of Virginia,*Christine O. Gregoire* of Washington, *Joseph B. Meyer* of Wyoming, and *Rosalie Simmonds Ballentine* of the Virgin Islands.

[1] These statutes provide for the forfeiture of:

"(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, their raw materials, and equipment used in their manufacture and distribution]

. . . . .

"(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . ."

Each provision has an "innocent owner" exception. See §§ 881(a)(4)(C) and (a)(7).

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. Const., Amdt. 8.

[3] In *Browning-Ferris,* we left open the question whether the Excessive Fines Clause applies to *qui tam* actions in which a private party brings suit in the name of the United States and shares in the proceeds. See 492 U. S., at 276, n. 21. Because the instant suit was prosecuted by the United States and because Austin's property was forfeited to the United States, we have no occasion to address that question here.

[4] As a general matter, this Court's decisions applying constitutional protections to civil forfeiture proceedings have adhered to this distinction between provisions that are limited to criminal proceedings and provisions that are not. Thus, the Court has held that the Fourth Amendment's protection against unreasonable searches and seizures applies in forfeiture proceedings, see *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 3, 696 (1965); *Boyd* v. *United States,* 116 U. S. 616, 634 (1886), but that the Sixth Amendment's Confrontation Clause does not, see *United States* v. *Zucker,* 161 U. S. 475, 480-482 (1896). It has also held that the due process requirement that guilt in a criminal proceeding be proved beyond a reasonable doubt, see *In re Winship,* 397 U. S. 358 (1970), does not apply to civil forfeiture proceedings. See *Lilienthal's Tobacco* v. *United States,* 97 U. S. 237, 271-272 (1878).

The Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial. See *United States* v. *One Assortment of 89 Firearms,* 465 U. S. 354, 364 (1984); *One Lot Emerald Cut Stones* v. *United States,* 409 U. S. 232, 237 (1972); see generally *United States* v. *Halper,* 490 U. S. 435, 446-449 (1989) (Double Jeopardy Clause prohibits second sanction that may not fairly be characterized as remedial). Conversely, the Fifth Amendment's Self-Incrimination Clause, which is textually limited to "criminal case[s]," has been applied in civil forfeiture proceedings, but only where the forfeiture statute had made the culpability of the owner relevant, see *United States* v. *United States Coin & Currency,* 401 U. S. 715, 721-722 (1971), or where the owner faced the possibility of subsequent criminal proceedings, see *Boyd,* 116 U. S., at 634; see also *United States* v. *Ward,* 448 U. S. 242, 253-254 (1980) (discussing *Boyd*).

And, of course, even those protections associated with criminal cases may apply to a civil forfeiture proceeding if it is so punitive that the proceeding must reasonably be considered criminal. See *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963); *Ward, supra.*

[5] In *Ingraham* v. *Wright,* 430 U. S. 651 (1977), we concluded that the omission of any reference to criminal cases in § 10 was without substantive significance in light of the preservation of a similar reference to criminal cases in the preamble to the English Bill of Rights. *Id.,* at 665. This reference in the preamble, however, related only to excessive bail. See 1 W. & M., 2d Sess., ch. 2, 3 Stat. at Large 440 (1689). Moreover, the preamble appears

designed to catalog the misdeeds of James II, see *ibid.*, rather than to define the scope of the substantive rights set out in subsequent sections.

[6] For this reason, the United States' reliance on *Kennedy* v. *MendozaMartinez* and *United States* v. *Ward* is misplaced. The question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required. See *Mendoza-Martinez,* 372 U. S., at 167, 184; *Ward,* 448 U. S., at 248. In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in *MendozaMartinez* and *Ward.* See, *e. g., United States* v. *Halper,* 490 U. S., at 447. Since in this case we deal only with the question whether the Eighth Amendment's Excessive Fines Clause applies, we need not address the application of those tests.

[7] Dictionaries of the time confirm that "fine" was understood to include "forfeiture" and vice versa. See 1 T. Sheridan, A General Dictionary of the English Language (1780) (unpaginated) (defining "fine" as: "A mulct, a pecuniary punishment; penalty; forfeit, money paid for any exemption or liberty"); J. Walker, A Critical Pronouncing Dictionary (1791) (unpaginated) (same); 1 Sheridan, *supra* (defining "forfeiture" as: "The act of forfeiting; the thing forfeited, a mulct, a fine"); Walker, *supra* (same); J. Kersey, A New English Dictionary (1702) (unpaginated) (defining "forfeit" as: "default, fine, or penalty").

[8] In *Peisch,* the removal of the goods from the custody of the revenue officer occurred not by theft or robbery, but pursuant to a writ of replevin issued by a state court. See 4 Cranch, at 360. Thus, *Peisch* stands for the general principle that "the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control." *Id.,* at 365.

[9] The Government relies heavily on this fiction. See Brief for United States 18. We do not understand the Government to rely separately on the technical distinction between proceedings *in rem* and proceedings *in personam,* but we note that any such reliance would be misplaced. "The fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts," *Republic Nat. Bank of Miami* v. *United States,* 506 U. S. 80, 87 (1992), which, particularly in admiralty proceedings, might have lacked *in personam* jurisdiction over the owner of the property. See also *Harmony* v. *United States,* 2 How. 210, 233 (1844). As is discussed in the text, forfeiture proceedings historically have been understood as imposing punishment despite their *in rem* nature.

[10] Because the forfeiture provisions at issue here exempt "innocent owners," we again have no occasion to decide in this case whether it would comport with due process to forfeit the property of a truly innocent owner.

[11] In the criminal context, we have permitted punishment in the absence of conscious wrongdoing, so long as the defendant was not "'powerless' to prevent or correct the violation." *United States* v. *Park,* 421 U. S. 658, 673 (1975) (corporate officer strictly liable under the Food, Drug, and Cosmetic Act). There is nothing inconsistent, therefore, in viewing forfeiture as punishment even though the forfeiture is occasioned by the acts of a person other than the owner.

[12] The doubts that Justice Scalia, see *post,* at 625-627, and Justice Kennedy, see *post,* at 629, express with regard to the historical understanding of forfeiture as punishment appear to stem from a misunderstanding of the relevant question. Under *United States* v. *Halper,* 490 U. S. 435, 448 (1989), the question is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion.

[13] Although the United States omits any reference to this legislative history in its brief in the present case, it quoted the same passage with approval in its brief in *United States* v. *Parcel of Rumson, N. J., Land,* 507 U. S. 111 (1993). See Brief for United States, O. T. 1992, No. 91-781, pp. 41-42.

[14] In *Halper,* we focused on whether "the sanction as applied in the individual case serves the goals of punishment." 490 U. S., at 448. In this case, however, it makes sense to focus on §§ 881(a)(4) and (a)(7) as a whole. *Halper* involved a small, fixed-penalty provision, which "in the ordinary case . . . can be said to do no more than make the Government whole." *Id.,* at 449. The value of the conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7), on the other hand, can vary so dramatically that any relationship between the Government's

actual costs and the amount of the sanction is merely coincidental. See *Ward*, 448 U. S., at 254. Furthermore, as we have seen, forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence. Finally, it appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures under §§ 881(a)(4) and (a)(7) or only to those that cannot be characterized as purely remedial. The Clause prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

[15] Justice Scalia suggests that the sole measure of an *in rem* forfeiture's excessiveness is the relationship between the forfeited property and the offense. See *post,* at 627-628. We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive.

[*] Thus, contrary to the Court's contention, *ante,* at 618-619, n.12, I agree with it on this point. I do not agree, however, that culpability of the property owner is necessary to establish punitiveness, or that punitiveness "in part" is established by showing that at least in *some* cases the affected property owners are culpable. That is to say, the statutory forfeiture must *always* be at least "partly punitive," or else it is not a fine. See *ante,* at 622, n. 14.