In the

Supreme Court of the United States

MARGARITA FUENTES, et al.,

Appellants,

v. No. 70-5039

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY,

Appellees

Washington, D. C.
November 9, 1971

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Washington, D. C.,

Tuesday, November 9, 1971.

The above-entitled matter came on for argument at 1:10 o'clock, p.m.

BEFORE:

WARREN E.BURGER, Chief Justice of the United STates
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

C. MICHAEL ABBOTT, ESQ., 2837 Pittsfield Boulevard, Ann Arbor, Michigan, for the Appellant.

HERBERT T. SCHWARTZ, ESQ., Deputy Attorney General of Florida, Tallahassee, Florida, for Appellee Shevin.

GEORGE W. WRIGHT, JR., ESQ., 1600 First National Bank Building, Miami, Florida, for Appellee Firestone.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 5039, Fuentes against Shevin and others.

Mr. Abbott, you may proceed whenever you're ready.

ORAL ARGUMENT OF C. MICHAEL ABBOTT, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. ABBOTT: Mr. Chief Justice, and may it please the Court:

If I may, Your Honor, I would like to reserve five minutes of my time for rebuttal.

The nature of the case before the Court now is a challenge to the Florida prejudgment replevin statute on procedural due process and Fourth Amendment search and seizure grounds.

The issues are twofold. Simply stated: whether the Florida prejudgment replevin procedure, in which a writ is issued without notice and prior hearing, violates the procedural due process under the Fourteenth Amendment; and, secondly, whether the same procedure, insofar as it commands a State officer to enter a private dwelling by force if necessary, violates search and seizure provisions of the Fourth Amendment as applied to the States through the Fourteenth.

The lower court held, with one judge dissenting, that the Florida prejudgment replevin statutes were constitutional.

The facts of the case can be briefly stated:

The appellant, Margarita Fuentes, separately purchased a stove and a stereo from the appellee, Firestone Tire and Rubber Company, in 1967 under retaining title contracts. These contracts were then consolidated into one agreement.

Margarita Fuentes has complained to Firestone on a number of occasions about mechanical difficulties with her stove; appellee Firestone indicates that those difficulties had been repaired. Margarita Fuentes alleges that they have not.

For that reason she began withholding payments on her contract in April of 1969. In May of that year Firestone sent her a telegram threatening imminent repossession. Four and a half months later, on September 15th, they filed an affidavit and a bond pursuant to the Florida statute and replevied her property.

The execution writ was executed on the same day, September 15th, by a deputy sheriff of Dade County, over her protest and the protests of her relatives.

The appellant then filed the instant action in the court below in November of 1969.. The Dade County Small Claims Court, on our motion, agreed to stay that action pursuant to the conclusion of this action; and on August 24th, the three-judge court below held that neither of these -- that this statutory procedure did not violate either the Fourth or the Fourteenth Amendments.

Now, with regard to the issue of procedural due process, our position can be stated very simply. If you look over the breadth of the due process cases that have come before this Court, conceiving that it is a flexible concept, nevertheless, one rule has emerged, and that is that: absent special circumstances involving a compelling governmental interest, that no one may be deprived of a significant property interest prior to having a chance to protest the taking.

That's what this Court said in Sniadach and reaffirmed it in Boddie vs. Connecticut. Mr. Justice Brennan said it again in Bell vs. Burson.

Now, if you look at the Florida procedure, usually an affidavit is filed, although it is not now required under the Florida statute, but it was filed in this case. It is the usual procedure to file an affidavit that indicates the claimant is lawfully entitled to the property. That is the only allegation he must make.

He files a complaint, a bond in double the value of the property, and the clerk issues a writ without any judicial inquisition; simply a ministerial act, he issues the writ without notice and a hearing, gives it to the sheriff, the sheriff takes it to the home and executes it on the property.

Q He files a bond in double the amount of the value of the property?

MR. ABBOTT: That is correct, Your Honor.

Q And he's the one who asserts the value of the property?

MR. ABBOTT: That is correct.

And there is no examination of whether this is true or not.

Now, we submit that the Florida procedure displays the same types of constitutional deficiencies that this Court found lacking in Sniadach vs. Family Finance Corporation. There is no evidence indicating the validity or the probable validity of the claim prior to the taking. The statute is not nearly drawn to certain circumstances that may be of extreme interest to the creditor. There is no need for the creditor to allege a particular stated interest that is of concern to him.

And it is the use of the property here as well as in Sniadach that is of concern. It is the use of the property itself as the property under the Fourteenth Amendment we're talking about.

As a matter of fact, the contract between Margarita Fuentes and Firestone Stores is simply this: that she says, "I will pay you more money than the cash price of these goods over a period of time in order that I might have the goods immediately. That's exactly what I'm paying for: I'm paying for the use of those goods. I agree to pay you finance charges so that I might have them now." And it is the use of

the goods that she is entitled to until she defaults.

But here under this procedure there is no need for Firestone to prove that she has in fact defaulted on this procedure. They can come and get it any time they think they want it back, for whatever reason.

Q What is the bond for?

And under what circumstances can the purchaser use it?

MR. ABBOTT: The bond is under the condition that if Firestone should be proven wrong, she can thereafter reach that bond and collect on it. Of course, the bond does nothing to establish the validity of the claim. The bond does nothing to mitigate deprivation between the taking and the trial.

Q But does it indicate at all that what Firestone's claim is, that there is a default?

MR. ABBOTT: No, I don't think so. I mean, there's no indication in the claim itself, no one makes an examination of whether there is or is not a default.

One can argue that by filing a bond you're going to deter a frivolous claim; that if one has to file a bond you'll deter those people who don't have a proper claim.

Q Did Firestone have to file anything in court prior to taking the goods that in any way indicated there was a default?

MR. ABBOTT: No. All they have to file is something to indicate they are lawfully entitled to it. Now, to the

extent one reads that as anything in default, I suppose yes. But there's no examination.

Q What's the condition of the bond, though, that if Firestone doesn't prove what?

MR. ABBOTT: If Firestone then doesn't prove at the time this comes to trial that they are lawfully entitled to it, Mrs. Fuentes raises defenses that show that Firestone is not, then if she can show damages she can reach the bond. But, in the first instance, they have to show nothing; all they have to do is file an affidavit that is already pre-written, that says "I am lawfully entitled to the property".

It seems to me that what we have to focus on in this case are: What are the State interests here that are compelling, that require Firestone to need this kind of summary procedure?

Q Well, is it possible that the perishable nature of the merchandise, the fact that it's rather a rapidly wasting asset have something to do with that?

MR. ABBOTT: If they could show that, I think that might be significant, Your Honor. In fact, it's interesting to note here that in April when she withheld her first payment they sent her a notice; in May they sent her a telegram saying "We're going to repossess within 24 hours if you don't start paying."

Then they waited four and a half months before they actually issued the writ.

Q You aren't complaining about that, are you?

MR. ABBOTT: No. The only point I'm trying to make is that if they're actually interested in getting the property, because of the deteriorating value, why did they wait this length of time before going after it?

I think what they really wanted here, they wanted the money. By taking the property first, they gain an additional bit of leverage over that period of time to try to coerce her into paying, whether she may have valid defenses or not. I think that's the point to be made.

It seems to me, though, if one looks at the interest that the appellees put forward as compelling this procedure, there is simply no indication that it is necessary for them to do this. The State of Florida says that it's the protection of property for the citizens that is of compelling interest here; but, of course, our position would be they're emphasizing the rights of one class of citizens, that is to say creditors, over another class of citizens, such as debtors.

They also say, well, it's the economic life of the community that's at stake here. As a matter of fact, however, there is no evidence at all indicating there is any relationship between attachment type remedies and the availability of credit.

The California Supreme Court was recently faced with this same issue just last month, in Randoni vs. Appellate Department, and they rejected it. And they said: there is no

evidence here that there is any relationship between the attachment of property like this and the availability of credit. Further, we note that there are some critical studies that indicate that there are -- there is no relationship between these two factors.

So if, in fact, Firestone is restricted, what's going to happen?

Well, the only evidence before this Court, indicating that there's going to be any damage to Firestone at all, is an affidavit by Firestone's own National Manager of Retail Credit in Akron, Ohio. And the lower court reindicated a counter-affidavit by Professor William F. Willyer of the National Consumer Loss Center in Boston. We didn't even submit that for the record in this Court, because we don't feel that either of these affidavits give the Court the kind of hard data on which you could comfortably rely and say, Yes, in fact there is going to be an economic deprivation to the life of the community.

But let's go one step further, let's assume that replevin is essential to consumer credit. It seems to me that one can make the argument that, to the extent you give debtors or creditors a relatively inexpensive and expeditious remedy, such as we have here, to that extent it just encourages them to overextend. I mean, maybe they're giving credit to people that shouldn't have credit.

Now, is that in the interest of the citizens of Florida? I don't think so.

Our research showed that one out of five people simply default on these things. They just never show up, once their property is taken they think it's gone. I think that's significant. One out of every five people.

I suspect that's low for the national average; I suspect it's much higher than that. I think if you look at the studies of Dr. Caplovitz that was mentioned this morning in the Swarb case, you will find that nationally the default rate is much higher. But in Florida it happens to be one out of five.

So I don't think they can show that even if we assume that they're going to be hurt, I don't think they can show that consumer credit itself is related to the public interest.

The Anakinds? case say that in addition to this there is a public interest in the conservation of state resources. Well, that may be true. They're assuming that a prehearing procedure is going to take more resources than there is now. I mean, there's going to be a trial in this case. There's supposed to be a trial. But simply by having the hearing first, does not necessarily indicate that you're going to have to spend more State money.

I think only in the few cases where you have a really compelling interest, where you can show, for example,

that the debtor is about to take the property out of the jurisdiction, or he is going to probably fraudulently convey it to a third person, or that it's rapidly deteriorating in value. those are the type of cases where you might want to have some kind of a summary procedure.

But even then you can still do it on probable validity, you don't have to just give it to them and say we believe you. You can say, you know, what is the evidence that you have a right to this property? What is the current situation that you need it now? Then, okay, we'll let you take it.

Q Is it a criminal offense to move this type of property without notice to the legal owner?

MR. ABBOTT: I suspect it probably is, Your Honor, although that relates somewhat to the concealment of property under lien statute in Florida, which, as Firestone has pointed out, in the opinion of the Attorney General, that state is no longer valid.

Aside from that particular statute, I am just not sure if there are other statutes indicating it is a misdemeanor to move the property. I just don't know.

Q Well, the movability of this property, the portability, perhaps I should say, does that have some relationship to the right of summary remedy? Does that enlarge the need for summary proceedings?

MR. ABBOTT: It seems to me it might, if you could show that in fact you had that fear, that in fact they thought Margarita Fuentes was going to move the property.

Q Well, you don't -- do you make that kind of a decision on an ad hoc basis, or do you make that on the basis of the generality?

MR. ABBOTT: If you had evidence to show that there was some reason to make that evident, that evidence, you know, on the broad basis, I think, you know, there would be a point there.

The whole point that we make is that there is no evidence indicating that the large number of debtors -- in fact, what Firestone says in their own brief, at page 18, they say "in the vast majority of these cases" -- and that's their language, not mine -- "in the vast majority of these cases" the debtors will voluntarily relinquish the property. They give it up freely.

They also point out that the default rate in all consumer installment contracts of this kind is 1.76 percent. Way below the types of defaults that consumers are having, when they just don't show up. I mean, we're talking about a very narrow portion of the total consumer contracts. There is no evidence even indicating that that small portion, there's going to be a large number who are going to abscond with the property.

In fact, if anyone wants to abscond, it seems to me he has a lot of opportunity to do so, prior to the time of the hearing. I mean, Firestone, just like any other creditor, begins to go through this debt collection process once they think there is a default. You know, they sent Margarita Fuentes a letter; they sent her a telegram. And if she really wants to get away with the property, it seems to me she's going to do it then. And she knows, eventually, they may come to get it, it seems to me.

But if she has a default, she's simply not -- if she thinks she has not defaulted, she's simply not willing to give it up. I mean, it's her property, why should she?

But there's just no evidence over the broad basis of -- to indicate that Firestone needs this kind of protection. That they just can't provide it there, and they haven't provided it.

Q So you would not be satisfied if Firestone, before repossession, was required to go before a judicial officer and establish what we might, for want of better language, call probable cause, or reasonable grounds to believe that there has been a default; exhibit the contract or the note or whatever it is; and an affidavit that there has been a default. And you wouldn't be satisfied if a judicial officer were required to sign the writ of replevin?

MR. ABBOTT: I would not, Your Honor, because I

think what would happen, it would quickly become a rubber-stamp procedure.

Q Yes. So you say that there must -- it cannot be done ex parte in any way, no matter what --

MR. ABBOTT: Only in the narrow circumstances where --

Q Yes.

MR. ABBOTT: -- they can show probability and a compelling reason. But these are sometimes very complex issues. Now, if you take a look at the brief of the National Consumer Law Center, one of the things that's interesting in this case is that it fears that the security interest that Firestone had in the stove had expired at the time they got it. That is to say that any rational allocation of payment between the stereo and the stove, Mrs. Fuentes had paid off that stove when they came and took it.

And that is not a type of defense that a judge would simply look in the contract and see. She's got to have a chance to come in and say, you know, I've paid for that stove already; Firestone has breached their warranty of repair. A judge, just by himself, would not make that kind of a determination.

Finally, it seems to me -- I'd like to look briefly at the Fourth Amendment issue. Under the Florida procedure, the writ commands the officer, State officer, or deputy sheriff in our case, to enter by force if necessary and to make a

reasonable exploration of the dwelling in order to find the property.

Now, the problem we have with that is again: what is the compelling State interest that Firestone has in allowing a deputy sheriff not only to enter but to enter by force if necessary?

Now, if you look a balancing test, which this Court has done in the past, it seems to me you have to weigh the interest of Firestone against the invasion which that search entails. If we agree, as Mr. Justice White said in Camara, that you're going to have as much of a disturbance in a civil seizure as you are in a criminal seizure, it seems to me that you have to allege a very substantial State interest before you can go into that home.

Again, the statute is that narrowly drawn, there is no advance notice that they're coming here, in comparison with Wyman vs. James, resistance is a misdemeanor in comparison with Wyman, where if the welfare recipient wanted to refuse, she could. There's no way to refuse here, the sheriff is going to go in whether you refuse or not.

If you look at the facts in this case, Margarita Fuentes did everything one could expect a private citizen to do, short of actually physically obstructing the sheriff. She told him, she stopped him at the door, she called her son-in-law, the son-in-law who speaks English, which she does not, explains

to the sheriff that he could not take the property; and the sheriff comes back and says, "I've got to take the property; that's my obligation". Only at that point did she let him into the house.

Q Would your case be any different if the stereo were not kept at her home but in a little grocery store that she ran?

MR. ABBOTT: I don't think so, Your Honor, unless there was some evidence to indicate that she was attempting to conceal it. If Firestone indicated, you know, "we don't know where it is, we can't find it; she refuses to indicate that she still has it, in order to make us feel secure", then they may have an interest. But that's of course not this case.

Q Well, you're giving so much emphasis to the home, as such, and I wondered if that factor is influential in your case.

MR. ABBOTT: Simply the fact that it's in the home.

Q Yes.

MR. ABBOTT: But to the extent that the property is located in a public dwelling, where they may have a chance to enter anyway, it seems to me that one could make a less compelling claim.

Of course that's not the statute, and the statute doesn't cover special situations like that.

Q Now, you're assuming that the standard that is

applicable here is that of compelling State interest. Is this established?

MR. ABBOTT: It seems to me, under the due process cases of this Court, it is established.

Switching back to the procedural due process issue, for example, if you look at the cases that were cited in Sniadach, all of those cases dealt with the compelling State interest, you know, Fahey vs. Mallonee --

Q Yes, indeed, they did, but the facts were different. And I'm asking whether this one comes within the factual range of those cases? They must, in your view, I take it?

MR. ABBOTT: It seems to me it comes within the general principles, yes. I mean, it seems to me Firestone has to show some reason why they need this procedure.

Q Maybe your opposition won't agree to that?

MR. ABBOTT: I suspect they will not, Your Honor.

Q If the statute permitted the counter-bond that is present in one of the other cases we're hearing, would you say that --

MR. ABBOTT: This statute does have a counter-bond, Your Honor.

Q It does?

MR. ABBOTT: Yes, it does.

Q Then the process can be stopped, can't it, by

complete protection --

MR. ABBOTT: Well, as a matter of fact, I think one of the things that is also interesting, if you look at the record here, it appears that in fact what the sheriff is supposed to do, he's supposed to take this property and hold it for three days, and give Mrs. Fuentes a chance to post a counter-bond.

Well, in the first place, there is no notice to her that she has that opportunity. I mean, only if she has a lawyer who can tell her within the 72 hours that exists will she ever be likely to do it.

We examined 442 cases, in fact, in the Dade County Small Claims Court, and we found that nobody ever, in that entire year, ever posted a counter-bond.

Q I didn't -- I heard what you just said now, that you examined well over 400 cases and found nobody did it. I didn't hear what you said a little earlier. Was there any notice to the debtor, to the vendor that he has this opportunity of filing a bond?

MR. ABBOTT: To the debtor, there's no notice --

Q To Mrs. Fuentes in this case.

MR. ABBOTT: No, there's no notice to Mrs. Fuentes that she has that opportunity.

One of the other interesting things is that even though the sheriff is supposed to hold this property for three

days, it appears from the record below that actually the property went directly to Firestone, that Firestone accompanied the sheriff in their truck; Firestone took the property, not the sheriff. They took it immediately, they didn't wait three days.

Q Well, what other -- what were the remedies of Mrs. Fuentes? One was to file a bond in the same amount as had been filed by Firestone?

MR. ABBOTT: That's correct. That's correct.

Q And then what would have happened?

MR. ABBOTT: If she had filed the bond, and if the sheriff was still holding the property, then she had a chance to get it back until the trial.

Of course, one of the other things we found is that --

Q Until the trial on what? So far there's no complaint been filed.

MR. ABBOTT: Yes, there is a complaint in the Florida procedure, there's not in the Pennsylvania procedure.

Q There's a complaint on what?

MR. ABBOTT: There is a complaint under the Florida procedure.

Q Yes.

MR. ABBOTT: They do file a complaint at the time of taking.

Q I see.

MR. ABBOTT: They do not in Pennsylvania.

Q Right. So the complaint has been filed?

MR. ABBOTT: That's correct.

Q And it's a complaint -- what -- in assumpsit, as one would say?

MR. ABBOTT: That's right. That's right.

Q And that's a condition precedent to the --

MR. ABBOTT: It is, it is.

Q -- whole procedure?

MR. ABBOTT: The affidavit, they're entitled to it but nobody ever looks to see what the complaint says. But they do have to file one.

Q And then, is a copy of the complaint served on Mrs. Fuentes?

MR. ABBOTT: It is at the time the property is taken; there's no previous notice. At the same time the sheriff takes the property, he says, "Here's the affidavit, here's the complaint."

Q And then if she files a bond in an amount equal to that filed by Firestone, in this case, by the plaintiff, then the sheriff continues to hold the property, does he?

MR. ABBOTT: Well, he's supposed to. I don't think he did in this case.

Q Well, what does the law provide?

MR. ABBOTT: He's supposed to hold the property for

three days, and give her the chance to file her bond.

Of course, what we have found is that --

Q Yes, file her bond, and then how long does she have to make an answer to the complaint?

MR. ABBOTT: Then she has the normal time to make an answer.

Q But if she files the bond, she gets the property back?

MR. ABBOTT: Assuming the sheriff has it, that's correct.

Q She gets it back?

Q Yes.

MR. ABBOTT: She gets the property back until trial--

Q You told me it remained in the custody of the sheriff.

MR. ABBOTT: No, no, no. I'm sorry, Your Honor. The sheriff is supposed to hold it for three days before he gives it to Firestone. Now, if she doesn't file a bond, he then gives it to Firestone.

Q But if she does?

MR. ABBOTT: If she does file a bond, he then gives it back to Margarita Fuentes. Of course, our research shows that nobody ever files a bond --

Q Well, we're talking about the law of Florida.

MR. ABBOTT: That's right. That there is that provision

there.

It's also interesting to note, I think, though, that in order to file this type of a bond you've got to put forth the full amount, full cash value of the property. Firestone can file their bond with about one percent of the total that they're charging, say, $200 here. Mrs. Fuentes, on a forthcoming bond, is going to have to file the full cash value, $200, plus a premium.

If Mrs. Fuentes were a plaintiff, they wouldn't make no distinction, she could then file a one percent bond. I mean it's not a question of, we know, we think Firestone is more reputable than Mrs. Fuentes. It's just simply a question of are you a plaintiff or are you a defendant.

If you're a defendant you file the full bond; if you're a plaintiff, the bonding companies are willing to --

Q But if she doesn't file the bond, she's still -- it's perfectly -- and the property delivered to Firestone, in that event she's still perfectly free to file an answer to the complaint?

MR. ABBOTT: She is, Your Honor. She is.

Q And if she can get judgment, she gets judgment?

MR. ABBOTT: That's correct.

Q Yes.

MR. ABBOTT: Of course, in the meantime she's without that property.

Q And then if she gets judgment, does she -- she gets the property back, I guess, and what happens? What else does she get?

MR. ABBOTT: If she can show damages, she then gets damages. I think it would be very difficult to show --

Q Out of the bond filed by Firestone?

MR. ABBOTT: That's correct.

Q That's the purpose of its filing, right?

MR. ABBOTT: Right. But, assume, for example -- it's not this case -- but assume she was without a stove, that she was using, for six weeks prior to trial. I mean, how do you show those types of damages?

The types of damages one is liable to be -- one is liable to suffer is not the type that you can show in terms of money. And that's our point. It's the taking of the property that is the deprivation itself.

It's the significant interest. And we're talking about property worth about $600. She's got a right to hold onto that until they show she defaults. That's the contract.

Q You say she may file a bond, but she must file it within three days? Is that the procedure?

MR. ABBOTT: She must file within three days.

Q Must file it within three days.

Q In order to get the property back?

MR. ABBOTT: Prior to trial.

Q At the hearing can she plead breach of warranty?

MR. ABBOTT: The Florida law is a little bit uncertain. We believe she can. There are cases which indicate --

Q Well, let's put it this way: she can put the same defenses as if Firestone had originally sued her?

MR. ABBOTT: That's right. That's our position, yes.

Q She can. She's not denied any of the defenses, right?

MR. ABBOTT: No.

Q And in Florida, must Firestone proceed to bring that action instituted by the complaint to a conclusion? Is it required to do so?

MR. ABBOTT: I think it's unlike the Pennsylvania procedure, where there's no requirement that you file a complaint at all.

Q So that in Florida they are compelled to bring it to a conclusion?

MR. ABBOTT: Well, if they didn't, I suppose that -- if they didn't show up for the hearing, it would just be a moot -- ordinarily, yes. In the normal course of events, one would normally go through with the complaint.

Q Not if there's an answer filed?

MR. ABBOTT: Yes, if there's an answer filed, then you're going to have your trial.

Q If there isn't one, there's a default.

MR. ABBOTT: On the part of the debtor, correct.

Q Incidentally, I think -- did you say that the debtor is not informed by Firestone, at least, or by the sheriff's office that she may get the property back by posting a bond within three days?

MR. ABBOTT: No, she's not informed.

Q I mean she -- so she's to know that, she either knows it from some source or because a lawyer so advises her; is that it?

MR. ABBOTT: That's correct. That's correct, Your Honor.

Finally, I'd briefly just like to run over what the lower court held.

One of the things they said is that it seems to them that Firestone -- that Mrs. Fuentes may have waived her rights. It's a little unclear from the opinion. But it appears that they're saying that since the contract reads that in the event of default of any payments, since Mrs. Fuentes has admitted that she withheld payments, therefore, that gives Firestone the right to the property. I think that is an incorrect assertion of Florida law.

Our whole position during the whole litigation has been that default is a technical word. Default indicates breach of legal obligation. Now, if Firestone has breached their warranty as she says they have, under the Uniform

Commercial Code in Florida, she has a right to suspend her payments. That is her right.

Therefore, if she has a right to suspend payment, she cannot be in default.

If the contract said, in the event of an omission of payment, Firestone is entitled to repossession; then they'd have a stronger case. It doesn't say that; it says, in the event of default in payment.

There can be no default unless one proves that there is technical default. And that has not been proved here.

Likewise the court below says that we're here dealing with a peaceable entry into her home. It seems to me that, with due deference to the lower court, that is misleading. I think the question has to be asked: Are we dealing with an entry that is coerced? And did Mrs. Fuentes says, "Sheriff, come on in, take my property; it's all right", or did she stop him at the door and say "No, you can't have it."

What happened --

Q What about prior consent to retain?

MR. ABBOTT: I think there was no prior consent to retain --

Q What does the contract say?

MR. ABBOTT: The contract says, in the event of default of any payment or payments.

Q The property may be repossessed?

MR. ABBOTT: That's correct.

Q And you say that doesn't mean they may repossess it from her home, although that's where this kind of property always is?

MR. ABBOTT: Not unless they can show some compelling reason that they need to break the sanctity of the home.

Q I know, but -- well, I suppose she can -- you say she cannot consent in advance to repossess it from her home?

MR. ABBOTT: I think maybe she could; I don't think she did. I don't think --

Q Well, you said she did say, "You may repossess it".

MR. ABBOTT: In the event of default.

Q Yes.

MR. ABBOTT: Of course, there's been no default, in our --

Q Yes.

MR. ABBOTT: -- in our opinion.

Q Well, that's a different point.

You say that even if there had been a default, there is no grounds for entry of the home.

MR. ABBOTT: No. Assuming that --

Q Isn't that your position?

MR. ABBOTT: No. Assuming there had been a default,

it still seems to me that she ought to have a chance to comply first. I mean, they give her no notice that they're coming. If they --

Q Well, I'm just wondering -- let's assume a default was,what she said in the contract, sufficient to give consent to enter into the home.

MR. ABBOTT: No, I don't believe it is. It seems to me that --

Q It violates the Fourth Amendment.

MR. ABBOTT: It seems to me there has got to be a knowing waiver. It seems to me it's their burden to show that she knowingly waived it.

I think she could knowingly waive it perhaps under the proper circumstances. I don't think that the contract here indicates that she did or even had the kind of language indicating that "we have a right to enter your home".

Q You don't think that a written waiver is prima facie evidence of a waiver?

MR. ABBOTT: If the written waiver indicated what Firestone contends it indicates; I don't think it does, I don't think, if you read the contract, you believe from it an indication or an inference that Firestone has the right to enter the home. That's not in there. If it were, then this would be a more difficult case.

I'd like to reserve the rest of my time for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Schwartz.

ORAL ARGUMENT OF HERBERT T. SCHWARTZ, ESQ.,

ON BEHALF OF APPELLEE SHEVIN

MR. SCHWARTZ: Mr. Chief Justice, and may it please the Court:

I am Herbert Schwartz, Deputy Attorney General of the State of Florida. I represent the appellee, Robert L. Shevin, the Attorney General of Florida; and Mr. George Wright, co-counsel, will be representing appellee Firestone, and he and I will equally divide the argument.

I should first like to address some remarks to the comments of the appellant as to the facts. There is a stipulated set of facts in the Appendix, which indicate that the deputy sheriff may or may not have been refused entry.

The appellees, and the testimony that was taken at the hearing before the three-judge court, indicated that the deputy sheriff was admitted to the home peaceably, and he didn't force his way in at all.

Nor was this a type of entry that comes under the sheriff appearing in the doorway and the force of law behind him idea, as in previous cases before this Court. Indeed, the deputy sheriff was in civilian clothes.

Apart from that, the facts --

Q Was the deputy sheriff armed?

MR. SCHWARTZ: There were no arms on the deputy sheriff that were showing. I don't know whether he had a concealed weapon.

Q Does the record show that?

MR. SCHWARTZ: I'm not sure, Your Honor. I really don't --

Q Well, there's no question he said he was the deputy sheriff?

MR. SCHWARTZ: That's correct, Your Honor; he did.

Q And that meant to anybody with any reasonable sense that he had the whole power of the State of Florida behind him?

MR. SCHWARTZ: I would say yes, Your Honor, that's a reasonable assumption, yes.

Q Thank you.

MR. SCHWARTZ: The State of Florida is a real party of interest in this case, and the State does assert a real value to this statute. It is more -- it is more than the State of Florida merely siding with a creditor, because in the proper circumstances we would take whichever side were just and equitable in defending our statute.

But we do have a valuable interest in keeping creditor and debtor peace between the two. It is to the interest of the State of Florida that we prevent and provide ways to keep

people from resorting to self-help, such as breaking in and seizing the property and perhaps altercations over it.

So the reason for the replevin statute in the State of Florida is simply stated in our brief, to take the property and to custodially descend, to let the two, the creditor and the debtor, to have it out in court. Because, I hope the Court got the distinct impression, because it would be a true impression, that everything that is done in Florida in the replevin statute must be done by a court. There is no prothonotary doing anything.

There is only officers of the circuit court, or the the court that has jurisdiction. During the issuing of papers and the hearing, only a judge --

Q Well, who issues the writ of replevin?

MR. SCHWARTZ: An officer of the court, a clerk does all --

Q Yes, but a judge never signs it.

MR. SCHWARTZ: No, not sign it, but before a default can be entered or a judgment entered on the default --

Q Well, I understand that, but the writ of replevin is not issued by a judge, and the judge never sees any of the basis for the issuance of the writ.

MR. SCHWARTZ: No, Your Honor. But ultimately the matter is disposed of by a court, before anybody gets the property. And indeed, the clerk must be satisfied, and in our

State clerks are officers of the court, I'm not sure how they are in other States. But he must be satisfied that the bond is in proper form, and that the complaint is in proper form, and that the papers are in quite correct order, and that's the last thing the ministerial officer of the court has to do with it. From then on it's before the court. And no disposition of the case can be had without the court doing something.

I think there's a very interest in the conservation of judicial time and energy to be had in the method that the statute envisions, and that it will take a great deal of judicial time and energy for a party to come before the court of competent jurisdiction, to get the writ of replevy. Especially, as Mr. Abbott says, in an adversary hearing.

Certainly that would consume even more than the ex parte type of hearings suggested by the Court in questioning.

And I think the State of Florida does have a very appropriate interest in preserving the economic viability of the installment credit system.

So there really is, as the State of Florida sees it, two major concepts involved here.

One is the very basic underlying question that the State poses, and that is, our right to legislate in this statutory scheme of replevin, a writ that is over 700 years old, and somehow the appellants would have you believe that the viability and vitality of the writ of replevin somehow

anded when the deputy sheriff stepped on the front porch of Mrs. Fuentes' house.

Q Mr. Schwartz, back in common law it was ex parte, wasn't it, with replevin?

MR. SCHWARTZ: Yes, Your Honor, it was.

Q It was strictly ex parte, and then you had, what is it, a writ of abendo returno or something, that you filed upon, if you wanted it back.

MR. SCHWARTZ: It evolved --

Q That was ex parte, wasn't it?

MR. SCHWARTZ: It evolved to that, Your Honor; yes, sir. Yes, Your Honor, that's correct.

The common law history of the writ is well known to this Court, and it is detailed in our brief that this is a viable common law institution that has been engrafted on our constitutional scheme of law, and one that has withstood the test of time. It is not to be abandoned, the State of Florida feels, simply because it's old. Certainly the older the law the more firmly rooted it is in our jurisprudence.

Q Could, under Florida law, Firestone have repossessed without getting a writ of replevin at all? Just use self-help, if it could have done it peacefully?

MR. SCHWARTZ: That would not be satisfactory to the State, Your Honor.

Q Well, not to the State, but how about under the

Florida statute?

MR. SCHWARTZ: No, Your Honor, that would not satisfy the statute.

Q A secured creditor cannot -- there cannot be wholly private repossessions by a secured creditor in Florida?

MR. SCHWARTZ: Not under the statute, Your Honor, there cannot be.

I am sure, sure as I'm standing here, that automobile lending institutions do it, when they find the car on the street, will take it. I'm not saying that we sanction that, but I'm sure that goes on. We're not involved in any type of case like that, nor would we be. This is purely and simply our statutory replevin action that we're seeking to defend.

I think there's another paramount and overriding issue that is before the Court, and that is, just how far-reaching is the doctrine of Sniadach or Goldberg? I think the appellant in this case tries to view and characterize this case in a vacuum, separately and apart from its operative facts. The facts are that Firestone, under our replevin statute and under its contract, had an absolute right to possess the exact same specific property that they went and got. It is not so ethereal or abstract right of judgment that they're seeking to execute on, and therefore garnish Mrs. Sniadach's wages or stop Mr. Kelly's welfare payments; those things that are a peculiar type of property, those things that

are needed for the lifeblood of a family.

But the appellant speaks here in conclusionary terms, without any real facts to support those conclusions. He is speaking -- this case is one of abstraction, really, in regard to Mrs. Fuentes, because the factual basis is one that wholly supports the reasonableness and the rationality of the Florida statute, that it was a peaceful repossession. She has all the defenses available to her at the time and place when they reasonably can be presented, and the appellant here would have this Court engraft on our law exactly what this Court has said it won't do many times, and that is, make due process of law some fixed, mechanistic principle, without regard to the facts under which it is operating in a given case.

And I believe the attack on the Florida statute is a very broad-brush treatment of storm and fury that really, in a real sense, attacks the very system of which Mrs. Fuentes is a beneficiary.

Because the system is orderly, it has a great deal of rationality to it. She, Mrs. Fuentes, upon repossession could have a quick hearing on the merits; she could post a bond; and also, if this statute were abused at the hearing, and she laid the predicate to establish the abuse of the procedure, she has her civil recourses to misuse of process, the civil actions for harassing creditor techniques and tactics. She could take Firestone into court and get damages from them for this

harassment, and for misuse of process, if she could establish that this was indeed the case.

So, the fact that the statute has not been abused speaks of its rationality. And I think also the fact that people know when they buy something on an installment basis that they're obliged to pay for it, and they know that if they don't pay for it, it's going to get taken back by the seller.

So, Mrs. Fuentes is in not a precarious position. Indeed, the record shows that she had been a credit and installment purchaser of this very same Firestone store several times before over a period of years. She had established a credit rating with them, and that if she really had some defense to raise as to breach of warranty, the place to do it was before the court in a proper manner, in a proper case, and the forum was there for her to use.

Certainly Mrs. Sniadach's wages cannot be made analogous to Mrs. Fuentes' stereo set. Mrs. Sniadach's wages were the lifeblood of her family, they were that, to quote this Court, "specialized type of property presenting distinct problems in our society". Without Mrs. Sniadach's wages, her family could not exist. Without Mr. Kelly's welfare payments, being cut off, his family could not have existed.

Money represents those things that is a specialized type of property. Certainly one cannot say that a stereo set and an unused electric range, sitting out on the back porch of

a home, are those specialized type of property.

Q Well, I presume the -- I gathered from reading the stipulation, that the reason it was unused and sitting on the back porch was that Firestone -- that it was defective.

MR. SCHWARTZ: This is a controverted --

Q Firestone had breached its warranty, as I understood.

MR. SCHWARTZ: This is --

Q There had been controversy between Firestone and Mrs. Fuentes about the stove and, as I gather, Firestone had supplied new burners and whatnot for the stove, but it wouldn't work; is that right?

MR. SCHWARTZ: That's correct, Your Honor. There had been some dispute about the -- Firestone said it was fixed, Mrs. Fuentes said it wasn't. Nevertheless, the operative facts are that this was a stove sitting out on the back porch, she had another one, and a stereo set that hardly can be called the lifeblood of a family.

As the lower federal court said in Pennsylvania, this is really the garden variety of personal property, in a footnote to the Epps case.

Q Mr. Schwartz, I suppose it's hard to conceive of it, but suppose this installment purchase instead of being for a stereo and a range had been for peaches or foodstuffs or something, then would we be closer to Sniadach and Kelly?

MR. SCHWARTZ: This is precisely the point, Your Honor. You would become very close to those specialized types of property that were the subject matter of Sniadach and Kelly. In those cases, I would certainly say they might very well be the lifeblood of a family.

Q And you would have us draw the line ad hoc, then, between these types of cases?

MR. SCHWARTZ: Your Honor, the State of Florida says that if you don't, if you don't, what this Court will be doing will be decidding replevin cases ad infinitum as to precise property, which property does come under Sniadach and Kelly and which property does not, on a case-to-case basis.

The operative facts, I think -- in summary, the operative facts show the State's interest is to get between the debtor and the creditor and that this process, which is set up by the Florida statutes, does meet those rudimentary standards of fairness and due process that have been so often enunciated by this Court. And that to change the Florida statutes, in effect would be to throw a monkey wrench into the works of an orderly State process and an economic process in which both parties are eminently aware of their rights and duties.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Schwartz.

Mr. Wright.

ORAL ARGUMENT OF GEORGE W. WRIGHT, JR., ESQ.,

ON BEHALF OF APPELLEE FIRESTONE

MR. WRIGHT: Mr. Chief Justice, and may it please the Court:

Before proceeding to discuss the appellants' due process complaints as they relate to this case, I would like to clarify one or two matters that have been heretofore discussed by counsel for appellants.

He has asserted in argument before the Court that there were complaints about the performance of the stove in question, and has asserted here in oral argument that that was the reason for Mrs. Fuentes withholding payment on the installment contract.

When we were requested by the three-judge federal court below to confer for the purpose of stipulating to as many facts as we could to ease the burden of that court in resolving this case, Mr. Abbott, counsel for the plaintiff, asserted, and it's reflected in the stipulation, that he made a contention that there was some difficulty with the stove and that his client was not satisfied with the repairs that were made by Firestone.

Because of the fact that such assertion was made by counsel in that stipulation, the three-judge federal court below set down an evidentiary hearing for the purpose of allowing either or both parties to this cause to adduce before

that court evidence on any matters on which they may not be able to be stipulated. At that evidentiary hearing, despite inquiry by that court of Mr. Abbott, he declined to adduce any evidence to support his unsupported contentions that the stove was in fact defective or had not been properly repaired.

There is nothing in this record to reflect in one iota that the reason for Mrs. Fuentes withholding payment for the stove or for the merchandise purchased was because of a defect or a failure to properly repair.

The next point I would like to mention in respect to a factual statement, and that is as to the Fourth Amendment contention. Counsel for appellant implies and has throughout his brief implied that there may have been some forcible entry in the service of the particular replevin writ here involved. That is a far cry from the undisputed facts here.

Not only was there a peaceable repossession, the deputy himself was invited in to the Fuentes' home. There is only a dispute as to the time of the invitation of the deputy into the home, but there is no dispute, and it is conceded that prior to the actual service of the writ, the deputy was invited in to the Fuentes' home.

There was no objection by Mrs. Fuentes herself, there was a question raised by her daughter-in-law, who happened to be in the home with her, about the right of the sheriff to repossess the merchandise. The sheriff awaited the

daughter-in-law's call to Mrs. Fuentes' son-in-law, who then sought the advice of counsel. And the sheriff stood there during this period of time, which must have been some 30 minutes or so when all this was going on, and the son-in-law came to the home and advised the sheriff that he had talked with his counsel and that his counsel said he could not take back the merchandise unless there was an actual court proceeding pending.

At which point, of course, the deputy explained that there was a court proceeding pending, at which point all parties involved retracted and failed to raise any objection to the repossession of the merchandise.

One matter I would also like to clarify --

Q Well, was the complaint in replevin --

MR. WRIGHT: There was a complaint in --

Q -- given to her then?

MR. WRIGHT: Yes, sir.

And the complaint in replevin, Mr. Justice White, stated the basis of the claim, that is, that she had defaulted on the installment contract for the purchase of the stove, and it was asserted what her default was and the balance owed upon that obligation, as reflected by the contract. So she --

Q She had to have it. Was that complaint filed in connection with getting the bond, the replevin bond?

MR. WRIGHT: Yes, sir. The complaint had to be filed under our statute in order for the clerk to issue a writ

of replevin.

Q Together with an affidavit?

MR. WRIGHT: Together -- our statute no longer, as Mr. Abbott pointed out, requires an affidavit, but in fact one was filed with this complaint. But our statute does require the filing of a complaint, that is, the actual institution of a lawsuit, before the clerk is empowered to issue a writ of replevin; and of course the replevying party must file with the clerk a bond in twice the value of the property sought to be repossessed.

One question --

Q What did Mr. Abbott mean by a one or two percent bond? Under your practice.

MR. WRIGHT: I think he has reference to the fact he filed an affidavit in the court below to the effect that, I think most of the practice -- or the practice of most bonding companies in Florida require the defendants who post forthcoming bonds to actually collateralise the bond by putting up the value of the bond itself as security, where they apparently do not require full collateralization of the replevin bond itself. That is a matter of practice --

Q But the face amount of the bond is the same in both cases?

MR. WRIGHT: The face -- yes, sir. The face amount of the bond is exactly the same. If there are abuses in the

bonding company's procedures or charges, we of course would submit that that would be a matter for legislative correction and not for a constitutional strikedown of this statute on the basis of Fourth Amendment violation.

I would like to mention the fact that in our brief before this Court, we have dealt somewhat with the economic aspects of the secured sales transaction. Our purpose in doing so is not because I purport to be an expert in the field of economics, which is somewhat of a complicated field, but to point out, I think significantly, that the property interest in the collateral sale, the collateral which forms the subject matter of the installment sale, is vitally different from those involved in wage garnishments, which were involved in Sniadach, and welfare termination payments which were involved in the Goldberg v. Kelly case.

And secondly because the impact of altering or, in fact, eliminating summary repossession remedies is conceivably so great that it should not be done by a constitutional, sweeping constitutional attack upon a long acquiesced-in and honored remedy, such as replevin, certainly in absence of compelling judicial precedent.

We submit that there is no compelling judicial precedent of this court that would require a constitutional strikedown of this statute on the basis of due process contentions.

The times when this Court has had before it the question and the validity of the remedies of prejudgment attachments generally, such as in McKay vs. McInnes. This Court has approved them, and only in Sniadach has the Court disapproved any prejudgment attachment remedy or general attachment remedy, and that of course dealt with the question of garnishment.

The basis there being, of course, as Mr. Schwartz has emphasized, that that involved, as the court stated, a specialized type of property, wages, which the Court has described there and in Goldberg, as the very means by which to live.

Both the economic and legal aspects of the secured sales transaction, we submit their consideration in considering the due process contentions asserted here by the appellant.

The respective property rights, of course, of the secured seller and purchaser are vitally different from those involved in a prejudgment garnishment.

For example, Family Finance has no contractual interest or legal interest in the wages of Mrs. Sniadach. It has none, certainly, until after judgment is entered upon the debt, if there be a judgment ever entered upon the debt.

Of course there is no contractual relationship involved in the Goldberg situation.

But in the secured sales transaction, there is a

contractual relationship involved which gives the creditor, we submit, certainly an equal if not greater property right in the collateral as the debtor. And it is for the protection of the creditor and the debtor that replevin remedies have been approved, have been enacted, and have been followed, and have been acquiesced in for centuries of time.

Q This remedy would be equally available, I suppose, if, let's assume that the personal property cost a thousand dollars, and after $999 had been paid and then there was default on the last dollar, the remedy would be equally available to them, is that correct?

MR. WRIGHT: The remedy, Mr. Justice Stewart, would be legally available under the Florida statute, yes, sir.

Q So you can't say that in every case there is more property right in the plaintiff than in the defendant?

MR. WRIGHT: No, sir. You cannot say that in every conceivable factual situation that that be the case. We have adduced in our brief and appendix to our brief statistics reflecting, in so many instances, that for -- particularly in automobiles, for example; that for the greater portion of the ordinary automobile -- the term of the automobile loan, that the value of the collateral itself is, or the resale value of the collateral itself is much less than the balance owed on the debt.

For example, if I can recall correctly, and it's

reflected in our brief, that on a 36-month automobile loan, that for the first 22 months the wholesale or resale value of the automobile is less than the balance due on the 36-month loan debt.

Q Well, there are two reasons for that: one is the fast depreciation of an automobile in the first few months of its life; and the other is that for the first few months the buyer is paying mostly interest and almost no principal. Isn't that correct?

MR. WRIGHT: That's correct, I would assume, if the contract provides, of course, that interest is being applied --

Q For the length of the payments.

MR. WRIGHT: Payments are being applied first to interest and then to principal, which I trust is probably the case in most such transactions.

We submit further that the Sniadach situation, or Sniadach ruling should not be extended to all types of tangible personal property, and to the replevying of them, as counsel for appellant would here assert. Indeed, I think that this Court expressly recognized in Sniadach that it was not intended to extend its doctrine to all of prejudgment attachments in general.

The Court stated there that a procedural rule that may suit due process, or satisfy due process for attachments in general, citing its prior decision in McKay vs. McInnes, which

upheld on due process claims the constitutionality of pre-judgment attachment statutes of Maine, does not necessarily satisfy procedural due process in every case. And every case in Sniadach involved, of course, the specialized type of property that the Court recognized warranted the specific conclusion reached in that decision.

The same holds true in essence, we submit, for the Court's holding in the Goldberg decision. The new property concept there recognized as embracing those dependent upon the sovereign for their very existence, that is the persons being on welfare, and when they are deprived of their welfare payments they are denied of their very means by which to live, we submit, is peculiar to that situation and should not be extended to cover the situation of replevy of all types of tangible personal property.

I think, perhaps counsel --

Q What about Bell v. Burson?

MR. WRIGHT: Excuse me?

Q What about Bell v. Burson?

MR. WRIGHT: Bell v. Burson, if my memory serves me correctly, Mr. Justice Brennan, involves of course the situation of the driver's license of the Georgia minister. My understanding, or reading of the Bell v. Burson decision, was essentially based on the entitlement concept that this Court recognized in Goldberg, that once the government undertakes to

give you something, even though they are not obliged to give you something, then that person has acquired such a property right in that entitlement that he should have an opportunity to be heard. Of course in Bell v. Burson there was a provision for a hearing, but not on the question of liability or fault.

But I think that Bell v. Burson more closely fits the specialized situation in Goldberg, because the Court did observe in Bell v. Burson, if my memory serves me correctly, that the driver's license itself might well constitute the very means by which to live, virtually speaking, as are analogous to the Goldberg v. Kelly situation.

Certainly we submit that cannot be applied categorically to all types of tangible personalty, and it should not be implied to a tangible personalty at all.

I think there is one interesting statistic that we have cited in our brief from a publication often cited by the appellants themselves in their brief, entitled "The Poor Pay More". And it is -- it demonstrates that people, while they may not be able to do without wages, can do without things. The statistics show that insofar as consumer durable goods, including such things as washing machines, furniture, carpeting, sewing machines, that in families earning an annual income of less than $3,000, almost 30 percent -- anywhere from 30 to 40 percent of those families, and this of course is a sampling, it's about a 300-family sampling; but it reflects that of the

families sampled, the 300 families sampled, earning $3,000 annually or less, who had these particular items, the washing machine, the TVs, the sewing machines and so forth, that they had paid cash for them. They had waited until they could save enough cash to pay cash for these articles.

And I think it demonstrates that whether we're talking about rich or poor, that people can do without things, where they cannot do without wages or welfare benefits.

I think it is important to mention, also that there is a vast distinction and a consideration to be given to the contractual property right that is involved in this particular decision, or in this particular case, which is not existent in the decisions of this Court that counsel for appellant relied upon.

I did want to mention, to clarify, in response to a question asked Mr. Schwartz by Mr. Justice White, that Florida does have the Uniform Commercial Code, and under the provisions of Section 679.9-503, Florida Statutes, it has the self-help repossession feature --

Q Well, could Firestone have repossessed this without going -- getting a replevin bond?

MR. WRIGHT: It could have repossessed this peaceably --

Q Under the Florida statute and under the Uniform Commercial Code?

MR. WRIGHT: Yes, sir; it could have, so long as it did not invoke a breach of the peace.

But we submit certainly if that is reasonable and valid, and we submit, of course, that it is, that it should not be justification for striking down the replevin statute which does provide for, of course, the intervention of the State to assure a no-breach of the peace.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you.

You have two minutes left to you, Mr. Abbott.

REBUTTAL ARGUMENT OF C. MICHAEL ABBOTT, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. ABBOTT: Mr. Chief Justice, and may it please the Court:

Briefly, with regard to the facts, the only point I want to make is that to the extent that the appellee Firestone continues to say that the sheriff was invited into the home, I think is essentially misleading. I would also like to note, one --

Q Is that stipulated or isn't it?

MR. ABBOTT: No, it's not stipulated, Your Honor.

Q It's not covered by the stipulation?

MR. ABBOTT: What happened was that Mrs. Fuentes allowed the sheriff to enter after he had made clear his position, that he had an obligation to execute the writ. I mean,

she didn't say, you know, "Come on into my home."

To say that he was actually invited, I think what happened was that Mrs. Fuentes acquiesced. In fact Mr. Leon acquiesced, in speaking for Mrs. Fuentes who did not speak English.

But one thing I did want to note is that both the lower court and our own brief made an error in indicating that Mrs. Delgado called the son-in-law to come to the house. Firestone continues to contend that Mrs. Fuentes herself made no protest.

I think that's not true. But, in fact --

Q Well, do these factual matters really make any difference here on the constitutional issue?

MR. ABBOTT: I don't think they do. Firestone contends that Mrs. Fuentes didn't make any objection. The only point I want to make is that the record, at page 28, will show that actually it was Mrs. Fuentes who called Mr. Leon and not her daughter-in-law, and that the lower court and our own brief in quoting the lower court were in error on that point.

The only point I want to emphasize is to say that, as Mr. Wright did, they have more property rights than Mrs. Fuentes has, or she has more property rights than Firestone has; I think is to miss the point.

My whole point has been that what Mrs. Fuentes was

paying for is the use of these goods. And that is why she paid the higher price than the cash sale price.

In fact, we can show in this case, I think, that they didn't have any security interest in the stove at all, when they took it. I don't think that's particularly important. I think the situation would be exactly the same if she had made only one payment at the time they came to take it, that they have security interest in both items. The point to be made is that she is paying more for these so that she can have their use immediately.

Q Well, if she continues to pay more for them, then she has their use, doesn't she?

MR. ABBOTT: That is correct, Your Honor. But --

Q This only arises when she stops paying.

MR. ABBOTT: That's right. But of course the Uniform Commercial Code in Florida says there are situations in which she has a right to suspend payment. That is the crux of our thrust, and it seems to me that Firestone ought to establish that she has violated or is somewhat in default. I mean, if Florida gives her the right to suspend payments, is it then fair to give Firestone a right to take her property before they prove that they're entitled to it? That's our thrust.

It seems to me, to the extent that the appellees rest on the specialized property, that they are ignoring either the past history of the due process cases in this Court -- this

Court doesn't always look first to the State interest involved, and then, if there is a compelling State interest, they look to see whether the property is significant.

Here you hear very little talk coming from the appellees on significance of the interest, and why they need this procedure, why is it compelling that they have it? What interest do they show that they need it or that it is required or that they are going to suffer without it? They just haven't shown that.

And that is the thrust of the past cases in this Court. You look first to the State interest.

Q Well, do you think this would be true every time that somebody wants to attack the case law or the statutory law of contracts of a particular State, saying that it's unconstitutional, that all of a sudden the burden passes to the State to show a compelling State interest?

MR. ABBOTT: It seems to me --

Q For this particular rule of contract law?

MR. ABBOTT: It seems to me if they're violating the fundamental rule of --

Q But that's the question before us, isn't it? On that basis?

MR. ABBOTT: That's right. That's right. But if you look at the cases --

Q Whether it's unconstitutional.

MR. ABBOTT: Mr. Justice Stewart, if you look at the cases that are cited in Sniadach, all of those cases have a compelling State interest except for two, Ownbey vs. Morgan and McInnes vs. McKay, about which Mr. Wright speaks.

Now, those two cases, at least Ownbey clearly involves a nonresident defendant, so that they needed that kind of prejudgment attachment in order to bring him into court. McInnes vs. McKay, which was a per curiam decision, appears to indicate that also there was a nonresident defendant there, too, to the extent the Court speaks of the defendant making a special appearance.

Those are the only two cases cited by the Court in Sniadach in which there is not a compelling State interest in, terms of the statute at hand, in which a private creditor initiated the procedure. Those are the only two cases. And both of those cases are distinguishable in that you needed that statute in order to bring that defendant into court. All the rest of those cases involved compelling State interest.

MR. CHIEF JUSTICE BURGER: Your time is up now.

MR. ABBOTT: I thank Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:13 p.m., the case was submitted.]