In the

Supreme Court of the United States

PAUL PARHAM, et al.,

Appellants,

v. No. 70-5138

AMERICO V. CORTESE, et al.,

Appellees.

Washington, D. C.
November 9, 1971

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Tuesday, November 9, 1971.

The above-entitled matter came on for argument at 2:14 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:

DAVID A. SCHOLL, ESQ., Community Legal Services, Inc., 313 South Juniper Street, Philadelphia, Penna.19107, for the Appellants.

ROBERT F. MAXWELL, ESQ., 4640 Roosevelt Boulevard, Philadelphia, Penna. 19132, for Appellee Sears, Roebuck.

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 in 5138, Parham against Cortese.

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

ORAL ARGUMENT OF DAVID A. SCHOLL, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. SCHOLL: Mr. Chief Justice, --

MR. CHIEF JUSTICE BURGER: We'll try to complete tonight, if it's at all possible.

MR. SCHOLL: Okay. Thank you.

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

In this case, this is another action which is a class action, brought by a group of consumers. This is similar, in effect, to the Swarb action, which was also a class action, instituted in behalf of all of the residents of a State, which had been subjected to a certain procedure.

For that reason I'd like to refer to the plaintiffs appellants as the consumers, although I think that's partially a misnomer in this case.

The appellees I will refer to as the creditors again, although, again,, it's partially a misnomer.

While what is in question in this case is the Pennsylvania procedure of replevin-with-bond; now the Pennsylvania procedure of replevin-with-bond is similar in many ways to the Florida procedure, which was considered in

the Fuentes case. However, there are very important distinctions in Pennsylvania.

As was pointed out in the arguments in the Fuentes case, the replevin seizure in Florida is part of a proceeding which has already been commenced, which will ultimately determine the rights of the parties to the particular goods which are seized.

That is not the case in the Pennsylvania replevin-with-bond procedure. All that a creditor may file in Pennsylvania to commence a replevin-with-bond procedure are four things: one of these things is an entry of appearance; the other is an affidavit to what the value of the goods are that he's going to go out and have seized; the third thing is a bond, the bond must be in double the value of the goods that are being seized; and the fourth thing is merely a praecipe which is directed to the prothonotary asking or ordering the prothonotary to issue a writ of replevin-with-bond.

Now, what need be included in such a praecipe? Well, really, nothing, except it's just a direction. The form just is a direction to the prothonotary to issue the writ of replevin. The prothonotary, as I mentioned in the Swarb case this morning, is merely a court clerk. All that the court clerk does is examine to see whether in fact the four pieces of paper that have to be filed have been filed. And if they have, he then ministerially issues the writ of replevin-with-bond to

the sheriff, and the sheriff is required to go out and forcibly seize the property from the consumer.

Now, this is distinct in -- a distinction in the Pennsylvania procedure, not only from the Florida procedure, which was considered in Fuentes, but also even the procedures in New York, which was the subject of the Laprease vs. Raymours Furniture case, and in California, which was the subject of the Blair vs. Pitchess case. Both of these cases held that the procedures involved there were unconstitutional.

Another important feature of the Pennsylvania procedure, which is probably distinct from Florida, because it's not actually the beginning of an ongoing process which is going to determine the party's rights to the goods, is that for all practical purposes, when the seizure is made by the sheriff, that's the end of the proceeding.

Usually nothing further is filed. Now, there are three possible ways in which the consumer can possibly get that property back, and these three only.

The first is: he can file the counter-bond, within 72 hours of the seizure of the property.

Q When is he advised of that?

MR. SCHOLL: Well, he's never advised of it. In fact, in the Pennsylvania Rules of Civil Procedure there's a form set out, it's Rule 1354, and it is included in the Appendix -- I believe it's included in our Appendix, Appendix A to our

brief. And the form has nothing in it which states that the consumer can file a counter-bond to recover the property.

Q So that this part of the Pennsylvania procedure appears to be identical with that in Florida?

MR. SCHOLL: Yes. I think that --

Q In 72 hours, double the amount --

MR. SCHOLL: Seventy-two hours --

Q -- and bond in double the amount of the property, and no notice?

MR. SCHOLL: That's right.

Q Is that it?

MR. SCHOLL: That's right.

There are two other ways that the consumer could possibly get the property back eventually. The one is that he could file a precipe with the court, which would require the creditor to commence an action to finally determine the rights to the goods. Of course, in the intervening time, until that complaint is filed, and until it comes to a hearing, the consumer is going to be deprived of the goods.

The only other possible way that the consumer could get the goods back would be to commence an action of replevin-with-bond himself, and get the goods back from the creditor. Of course this is also going to require him to put up the bond.

Q You said that the proth -- prothonotary -- how to you pronounce that?

MR. SCHOLL: It's prothonotary.

Q Prothonotary.

MR. SCHOLL: You can refer to him as the clerk.

Q Right.

[Laughter.]

-- is nothing more nor less than a clerk of the court.

MR. SCHOLL: Exactly.

Q Well, does that imply that this is filed in a court?

MR. SCHOLL: It is filed with the prothonotary, who is the court clerk; and to that extent it is filed in a court.

Q In a court, just as anything filed in this Court is filed with our Clerk. Is that it?

MR. SCHOLL: That's right.

Q We don't call him by that title, it's probably because we can't pronounce it.

[Laughter.]

MR. SCHOLL: Of course it never goes before a judge, at any point, in the replevin-with-bond procedure. Until -- well, it may never go to a judge. In fact, it probably never will. But certainly not before the seizure.

Q How can it? How can it get there?

MR. SCHOLL: Well, the only way it possibly could is if the consumer does something, files a precipe and makes the

creditor file a complaint, then that complaint will eventually get before --

Q Well, what happens if the consumer files this double bond?

MR. SCHOLL: Well, if he --

Q And gets the property back, then what happens?

MR. SCHOLL: Well, then the creditor -- it's the creditor's move, so to speak. The creditor is going to have to do something to get --

Q And what is "something"?

MR. SCHOLL: Well, he probably would file -- would follow it up by filing an action; file a complaint at that point, because then he would have to get the rights to the goods determined before he would be able to get the property.

Q And that thing would get you before a judge?

MR. SCHOLL: Yes. That would get you before a judge. So if the consumer can come up with the counter-bond, the creditor is going to have to go before the judge to get that property.

But I think the problem is, with the counter-bond proceeding, especially when one considers the appellants in this record. We have two welfare recipients, we have the Parhams and the Washingtons, Mrs. Washington, both of whom are welfare recipients. They are required to come up with a counter-bond within 72 hours or they're not going to get the property

back.

Q Now, you say -- they have three alternatives, as I understood it. One was to come up with a counter-bond within 72 hours, --

MR. SCHOLL: That's right.

Q -- and that gives them back the property.

MR. SCHOLL: Then they'll get the property back.

Q Then the litigation in controversy. And the other was to file a precipe.

MR. SCHOLL: Yes, but the trouble with a precipe proceeding is that they won't get the property back when they file the precipe. The precipe --

Q The precipe compels the plaintiff to file a complaint, is that it?

MR. SCHOLL: Right. If you file a precipe, then you're back to where Fuentes is, you're back to where the Florida proceeding is, then --

Q Where the Florida proceeding begins.

MR. SCHOLL: Right. Exactly.

Q And you can always do that, as of right, by filing a precipe?

MR. SCHOLL: That's right.

Q Without filing any bond?

MR. SCHOLL: Yes, but you have -- no, you're not really -- not at any time. You do have to file the precipe,

I believe it's within 30 days.

Q Yes, within a period of time. And then the third alternative is to yourself, is to the defendant himself, to file a counter replevin.

MR. SCHOLL: Right.

Q Take the offense.

MR. SCHOLL: That is always permissible.

Q Yes.

MR. SCHOLL: I think it would be in any jurisdiction.

Q Replevin is sort of for personal property what habeas corpus is for human beings, isn't it?

MR. SCHOLL; Well, I never thought of that analogy.

Q In a manner of speaking.

MR. SCHOLL: Perhaps it is.

Now, I think -- we've already had some discussion on due process, and I think the due process claim here is relatively clear. We sat during the Sniadach case and also here in the Fuentes case. It is that there is a seizure of the property of the consumer without his having had any notice or opportunity to be heard prior to the time at which he's deprived of that property.

Essentially that is the due process claim.

Q That's so much that he gets no notice, that within 72 hours he can file a counter-bond?

MR. SCHOLL: Well, he doesn't get -- he doesn't get

notice of that.

Q No, no, no. I'm just trying to get clear on it. You said that your due process claim deals primarily with the failure to give any notice or opportunity to be heard before the property is seized.

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

Q And not with the fact that he does not get a notice that he has 72 hours within which to file a counter-bound?

MR. SCHOLL: That is correct, Your Honor. Although I think the fact that he doesn't get notice of the counter-bond accentuates the fact that the seizure is unlikely to be a temporary seizure.

Q What would happen if Mr. Cortese had --

MR. SCHOLL: Well, he's the prothonotary.

Q I'm sorry. Mr. Parham had -- have I got the right name?

MR. SCHOLL: Yes, I think so. [Laughing.]

Q If the conditional vendee had filed this counter replevin, how long could that process go on? He files a bond in double the amount of the value of the property, and so then the sheriff seizes the property back, and the original claimant has 72 hours to get the ball back in the other court. How long does that go on?

MR. SCHOLL: Well, it could go on, I guess, for any

length of time.

Q I would suggest --

Q With the merits of the case never determined?

MR. SCHOLL: That's right. I think it's unlikely that it would go on past the first seizure, because Mr. Parham being a welfare recipient is not going to be able to come up with the bond.

Q Well, let's assume he has a rich friend.

MR. SCHOLL: But, presuming that --

Q Who says, "Let's play this game and see what happens." Then what would happen?

MR. SCHOLL: It would just keep going indefinitely.

Q With never any resolution of the merits of the controversy, is that it?

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

Q I submit --

Q Have you ever known this to --

Q I submit that's not true, that what happens then is that the creditor files a legal action and it's tried out in court.

MR. SCHOLL: I think Your Honor is right in that --

Q I'm sure.

MR. SCHOLL: -- that is exactly what would happen. But I was answering Justice Stewart's question as to what could possibly happen, and it would be possible; if the creditor

decided to be stubborn about it, try to outlast the consumer, --

Q Well, have you ever known of an instance --

Q Never heard of such.

Q -- that has happened?

MR. SCHOLL: I have never heard of that happening, no.

Q I've never heard of such as that.

Q He could file a lawsuit, couldn't he?

Q Sure.

MR. SCHOLL: Now, the court below recognized that the case of Sniadach vs. Family Finance Corporation, which of course concerned a prejudgment wage garnishment seizure, in Wisconsin, which this Court held was violative of due process because it deprived the consumer in that case of wages prior to a determination of the creditor's rights to it, was closely analogous to this case. And I think that principally the best way of presenting this case on appeal is to discuss what the court below said and try to establish how what the court said did not have support in either.

Now, the court relies heavily on the fact that what was concerned with in Sniadach, what this Court was concerned with in Sniadach was wages. The court in fact ruled that because Sniadach concerned wages, therefore Sniadach can't possibly have any direct relevance on this case where there's a seizure of personal property.

I would submit that there are two rationales by which

the reasoning that the court below suggested can be rebutted. I think the first arises when one considers what what is challenged here is a procedure by which certain property is taken. The taking of the property, of course, is an instance of the procedure, but it's the taking of the property before there's any determination that the party getting it has any right to it, that is really in question. And should it make any difference at all, whether it's wages or whether it's personal property or whatever it is, that's being seized, prior to there being any notice and opportunity to be heard.

I think that this Court's decision in Kelly vs. Goldberg, which, of course, concerned welfare benefits, and the Bell vs. Burson case, which has already been discussed, suggests that this Court did not intend the language in Sniadach to be delimited, or did not intend to delimit its ruling in the Sniadach case solely to wages.

However, I think there's an alternative ground on which the court's reasoning can be rebutted. And that is that the property seized here, which is the personal property of poor persons, is equally as specialized as the wages that were concerned -- that the Court was concerned with in Sniadach.

What we have here, in fact in the case of the Parhams, we have a bed, a table and stools, which were simply seized. Now, these are things which the Parhams, as welfare recipients, simply cannot go out and replace. It would take many months

of saving and even then they perhaps wouldn't be able to save enough to replace the goods that are seized.

In the case of Mrs. Washington, it's the clothes cabinets that her daughter's and her son's clothes had been kept in that were seized. She was forced to simply put the clothes on the floor, and just not put them in a cabinet.

Q Now, that's the case, the Washington case doesn't involve a conditional sale at all, does it? That's an argument between a man and his wife over the custody of one of their children. Is that right?

MR. SCHOLL: Well, that is right, Your Honor. And I think this points out another flaw in the court's reasoning; the court below, in its discussion of the seizure, constantly points to the fact that there's an extraordinary creditor interest here, because the creditor has title and security interest in the property which is seized.

In the case of the Washingtons, we don't even have a debtor-creditor situation.

Q That's what I thought.

MR. SCHOLL: So how can the fact that title or security interest in the goods have any real relevance to how replevin in Pennsylvania works?

And the answer is that it doesn't. The Pennsylvania replevin procedure actually permits any person to seize anything from anybody, as long as they can come up with the bond.

For instance, I could probably replevy this chair here, if I had a mind to do it -- I might be liable in some other court for abuse of process eventually; but certainly the replevin statutes would permit me to take it.

Q But there are a lot of statutes which, if abused, can produce these anomalous results that aren't used that way. That speculation doesn't get us very far, does it?

MR. SCHOLL: Well, I would submit that the Washington case does submit an instance of abuse. We have, in that case, and that is the case before this Court --

Q You're talking about replevin of a piece of merchandise now.

MR. SCHOLL: Well, the point that I was making, of course, is that replevin is not limited to the case of a seizure of merchandise, that it can be used to seize anything; and in fact one of the parties before the Court was involved in a case that was not a consumer transaction. It was a case where a father, who had just been divorced from his wife, took the child, one of the children, and then attempted to get all the goods that the child was using in his wife's house.

Interestingly enough, he was a deputy sheriff and knew about replevin, and that's how he effectuated it.

I think, though, that even if we can assume that -- well, in -- I think if we even focus on some of the other named plaintiffs in this case, even if we focus upon the case

of Mitchell Epps. Now, he is not an appellant in this case, but of course his case is part of the record below. We can see how, in other instances, we're presented with the fact that the replevin procedure in Pennsylvania is not narrowly drawn in such a way to merely protect creditor interests.

For instance, we might have a different case if we were --

Q Well, are all but one of these parties debtors, of the named plaintiffs?

MR. SCHOLL: Well, there are originally three named plaintiffs; two of them were debtors and the other one was Mrs. Washington, who's not a debtor.

Q And the two debtors agreed that they were in default?

MR. SCHOLL: No. There's no --

Q They agreed they weren't -- behind in their payments?

MR. SCHOLL: Well, there was no agreement as to Mitchell Epps regarding his default. Perhaps I ought to explain what happened in the Epps case, because I think it shows another instance of how replevin procedure can be abused, even in the debtor-creditor context.

Mitchell Epps had two separate accounts. He had a revolving account, on which he bought clothes and various other things, and then he had some time payment accounts. Now, what

happened is that he fell behind on the revolving account. He was paid up to date with his time payment account.

So Government Employees Exchange, which was the creditor concerned in his particular case, filed a writ of replevin and came out and seized all the things that he had bought on the time payment account.

Now, there is some question as to whether they even had a security interest in those goods. Even assuming that somewhere they could produce a contract which showed that there was a security interest in goods purchased in the time payment account, for violations in the revolving account, such a security interest would probably be invalid, because we have a case right on point, decided in the District of Columbia Circuit, which indicates that such a security interest is unconscionable. That's the case of Williams vs. Walker-Thomas Furniture Company.

So I think that this shows another of the possible abuses to which the Pennsylvania replevin procedure, because it is not narrowly drawn, is subject. That is, that the creditor can define what the security interest is, and what he thinks the security interest extends to, before he goes out and replevies the goods.

Q Well, apparently in Pennsylvania, one of the incidents of personal property is that it can be seized by anybody else if he puts up twice the amount of the value of

the property?

MR. SCHOLL: Yes, I would say it is.

Q And you say that's unconstitutional for Pennsylvania to treat personalty that way?

MR. SCHOLL: I think that it is. I think that it represents a violation of due process of the citizens of Pennsylvania, particularly those citizens who've been subject to the seizure of the property without any notice or opportunity to be heard.

Now, what the court below constantly speaks of is only the Parham fact situation, and the court talks about how default is not denied here. Well, there's no question that the Parhams were behind in the payments on their contract. But, they were making some payments. In fact, they had made a $25 payment in August of 1970; they made a $20 payment in the beginning of September 1970; and then a week later Sears, Roebuck, who had accepted the $20 payment, came out and replevied the goods.

By this time they had paid off, I believe, approximately $200 of the $384 debt that they originally had. Now, I think that the Parhams, had they had an opportunity to get into court and raise any defenses that they might have had, might have been able to establish that in fact Sears, Roebuck had agreed to accept the $20 payment a month as a payout schedule, because the only reason that Mr. Parham wasn't able

to keep up his original schedule was because he lost his job.

So this is the kind of thing, also, that the replevin procedure is subject to. Mr. Parham never having an opportunity to go to court.

Q Do I understand you, that where there's a note, without all these provisions in it, that it's a good defense to say you can't afford to pay?

MR. SCHOLL: No, what I'm suggesting --

Q Because you are unemployed? Is that a good defense?

MR. SCHOLL: That is not what I meant to suggest, Mr. Justice Marshall, and perhaps I ought to explain that.

Q Well, you said he paid, and the fact that they accepted less than the payment did something to Sears, Roebuck. What did that do to Sears, Roebuck?

MR. SCHOLL: I'm saying that it may have.

Q Estopped them or something?

MR. SCHOLL: It may have represented that they accepted a lesser payment schedule from the Parhams, in light of the fact that they were not working --

Q Can you give me anything in any lawbook that comes close to that?

MR. SCHOLL: Well, I can't cite a particular case --

Q That if you agreed to pay $25 a month and you pay 20, that you're excuse from the five, because the man

accepted the 20?

MR. SCHOLL: Well, I think if the man accepts the 20 and doesn't say anything about it, there's at least an argument that can be made.

Q Yes, that he doesn't owe the five?

MR. SCHOLL: Not that he doesn't owe the five, but that, in fact, the creditor should desist from taking the property, as long as the consumer is willing to work out --

Q No; no, I assume you mean that he doesn't owe the five.

MR. SCHOLL: I don't think it could possibly be asserted that they didn't owe the balance. And I didn't mean to assert that.

Now, in addition to the claim that the due process rights of the consumers were violated, there is also a claim made by the consumers in this Court, and it was also made below, that the Fourth Amendment rights of the consumers were also violated. Because what in effect is permitted here is an entry into the home of the consumers, and the taking of their goods without their being any assertion on the part of the creditor that he has probable cause to enter the home and to seize the particular goods.

Now, the court below gets out of any discussion of the Fourth Amendment in a very easy manner, they simply say that the Fourth Amendment doesn't apply to civil cases, and

this is a civil case; therefore no Fourth Amendment.

Well, I don't think that that follows the teachings of this Court as to what the nature of the Fourth Amendment is. The nature of the Fourth Amendment is to protect person's rights of privacy to their home. It's to prevent seizure or searches of the home and entry into the home by State officials in any instance, whether the official is executing criminal process, or whether he is, as in this case, executing on civil process.

Now, I think that there are several cases that point to this result. First of all, the Camara case, the See case, even this Court's decision in Wyman vs. James, although in that case it was found that there was no search and no seizure, that case reiterated the holding of the Camara and the See cases that in fact the Fourth Amendment is not limited to cases in which there is a criminal matter that's before the court.

And I think other cases that support this notion is the Griswold case, which the Fourth Amendment was one of the grounds given for that decision, and also the Bivens case, in which it was permitted, the plaintiff was permitted to bring an action, civil action, based on the Fourth Amendment.

Now, positing that the Fourth Amendment does apply to civil cases, I think it is fairly easy to see that in this case there is no showing of probable cause before a magistrate or any person before the seizure of property is effected.

In fact, in Pennsylvania there is no procedure that ever goes before any neutral arbitrator.

Q But haven't the parties undertaken to substitute agreement in advance for these processes?

MR. SCHOLL: Well, I don't -- neither of the contracts concerned in this case really say anything about replevin. The only thing that the contracts -- you see, this is putting aside the Washington case, which of course is not a consumer case, and shows how the Fourth Amendment -- the Fourth Amendment invasion on Mrs. Washington, I don't think that's at all relevant to it.

But even assuming that Mrs. Washington is out of the case for a minute, and we have just the consumers, we have an agreement that says that the creditor shall retain title to the instruments, and the one contract says they may repossess goods, the other says they may retake goods.

Well, Title in itself, as the Uniform Commercial Code points out, merely means that the creditor has a security interest in the goods. So to say they have a security interest and title is probably redundant.

Now, in the --

Q But it says you may retake the merchandise, sell the same, and hold me for any deficiency.

MR. SCHOLL: Right. That does. The quote is from the contract that I was referring to.

Q Right.

MR. SCHOLL: They may retake the merchandise.

Q Yes.

MR. SCHOLL: It doesn't say, however, that they may -- that's the Epps contract, if I'm not mistaken.

Q It is.

MR. SCHOLL: That indicates -- that does not say that they may replay the contract, and perhaps -- or the property, and perhaps the reasonable interpretation of the Epps contract is to be interpreted the same way as the Sears, Roebuck contract, which merely permits repossession.

Q By the creditor.

MR. SCHOLL: And repossession is not replevin.

Q Well, you mean that they -- you could think that they were coming there just by self-help and take it?

MR. SCHOLL: Well, they could attempt to come there by self-help, because there's a distinction between repossession and replevin; is that if Mrs. Washington or Mrs. Parham said to Sears, Roebuck, or to Mr. Washington, "You cannot enter my house; I'm not going to let you come in to repossess the goods." The repossession would have to stop at that point. And I think that's the important distinction.

Q You think that's a fair interpretation of that language?

MR. SCHOLL: I think that it is. I think that's

indigenous to retake.

Q It's there interpretation that Mr. Epps could stop them from repossessing it?

MR. SCHOLL: I think a fair interpretation is that all retaking is repossession.

Q Even though he agrees that they could repossess. He agreed that they could repossess it, but you say he could interpret that agreement that they could repossess it as giving him the right to stop them from repossessing it?

MR. SCHOLL: Well, that's the definition of repossession. Repossession has to be a peaceable taking. So the minute that Mr. Epps or Mrs. Parham would attempt to stop Sears from retaking the goods, they would have to stop it. All repossessions, ofcourse, are not nonconsential. A repossession can be consential. The Parhams may have decided in fact they couldn't keep up the payments and they would just as soon have Sears take it back.

Q Well, I'd assume that's what they meant by sining that contract. That any time the man wanted to repossess it, he was free to take it.

I would think that's what the language says.

MR. SCHOLL: I would not --

Q Without replevin.

MR. SCHOLL: I would not interpret that contract as permitting forcible seizure, merely because the meaning of

repossession --

Q Well, I didn't say forcible. I said I would interpret that contract to say that if at any time the creditor wants to repossess it, he has the right to repossess it.

MR. SCHOLL: Well, I would agree with Your Honor. But --

Q Well, how does he have a right if you can stop it?

MR. SCHOLL: Well, by definition --

Q That's a right without a remedy, I guess. Yes, I guess that's what it is.

MR. SCHOLL: Well, it --

Q He has an abstract right, I see.

MR. SCHOLL: Yes, I don't think that Mr. Parham can be held to any interpretation of repossession other than what it means in the law ordinarily, which is a peaceable taking. And I don't see how Mr. Parham, especially -- Mr. Parham of course is not the person that drafted the contract -- could possibly be held to such an interpretation that it would permit replevin.

Also with respect to the Fourth Amendment, of course, the agreement is merely between Sears, Roebuck and Mrs. Parham; it doesn't permit the sheriff to come in and take the goods, and that's the person that takes the goods in this case.

MR. CHIEF JUSTICE BURGER: No, no, Mr. Scholl. Your time is up.

MR. SCHOLL: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Maxwell.

ORAL ARGUMENT OF ROBERT F. MAXWELL, ESQ.,

ON BEHALF OF THE APPELLEES

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

I represent solely Sears, Roebuck in this matter as an appellee, and -- but I do think I should mention one or two things where I feel there has been some misunderstanding. Much is made of the Washington case, and the impropriety of the repossession there, that there was no right to immediate possession or title.

There was a hearing held in this case by the lower court, where Mr. Washington himself was summoned, and so was the plaintiff, Mrs. Washington. Mrs. Washington did not appear, nor did her attorneys, and the court, after hearing testimony of Mr. Washington, vacated the injunction it had previously issued, and the order to return the goods, saying on page 29 of the record: "It now appears to the court that the representations upon which the temporary restraining order of September 8th issue were incorrect, both as to allegations contained in the complaint and representations made by counsel.

"Accordingly we will both vacate the order of September 8 -- 18th".

Thus there is a finding in the lower court on the

merits of this controversy, which has never been controverted.

Secondly, I would like to call to the Court's attention that while no complaint is filed in Pennsylvania replevin procedure, the bond itself, signed by the person making the replevin, and signed by a surety which must be an approved surety by the court, which is decided by the judges themselves not the prothonotary, there must be a corporate surety in twice the amount of the goods, but this bond says specifically that it -- that the plaintiff claims the right to immediate possession of the goods, and that if he does not sustain this, in an action -- in the action, then he is liable to the defendant, the value of the property, all legal costs, fees, and damages sustained by reason of the issuance of the said writ.

Now, I would further call to Your Honors' attention that this procedure is before -- that at the first instance, before a prothonotary of the court, and his deputy clerks of the Common Pleas Court. The fact that a complaint is not filed at the beginning is taken care of, in my opinion, by this bond where the man binds himself the replevining party and his surety, and says he has a right to immediate possession. But, more than that, the rules are replete, as is the original Act of 1705 in Pennsylvania, with immediate action that the defendant can take to turn away the writ, the effect of the writ.

True, he can file a counter-bond within 72 hours. If he does so, then he immediately gets the property back, but, as Justice Marshall has indicated, this does not result in a back-and-forth bond, it requires, as the rule says, that all actions of this nature shall follow the rules of assumpsit in Pennsylvania.

There must be a filing of a complaint immediately at this time by the plaintiff, there is a right to answer, and then it comes before the court either on a jury trial or by mutual waiver of jury trial.

Now, second, there is also an immediate right under the rules to move to adjust the bond, to cancel the bond, to take over the prothonotary -- to say that they can move the court immediately, go immediately into a judge to move that the prothonotary's action in issuing this bond is improper, and to limit the bond, to discharge the bond, et cetera.

So there is really an actual -- let's see, this is one of the rules here, which are attached, and says specifically that the bond can be adjusted, and that there can be -- it can be thrown out, in fact, by the court.

Now, --

Q But this, I gather, is after the possession of the goods has been taken by the sheriff?

MR. MAXWELL: That's right; yes, sir.

In other words --

Q And if the result is to discharge the bond, then what happens?

MR. MAXWELL: Then, if the bond were discharged, the goods would immediately revert to the defendant, and the court would either enter a final order at that point, or would settle -- set it down for a future trial.

Q And adjusting the bond means adjusting the amount that --

MR. MAXWELL: It would be adjusting, or they could cancel the bond, say the bond has been improvidently issued, the rule says.

Now, in addition to this situation, a replevin action in Pennsylvania is never dead until a complaint has been filed, served upon the defendant, and judgment entered either by default after 20 days, or after hearing before the court. And there are provisions in the rule stating that the court has the right to give damages on either side, substantial damages. It can hear the entire case, either before a judge or before a jury.

Now, I submit that under these facts, that there has been compliance with constitutional rulings of this Court throughout its previous history. I think it has been indicated in this Court that a party, first taking advantage of a statute, cannot be sought to -- seen to come in and to attack the constitutionality of the statute. And this was in

the very case of Fahey, which Mr. Justice Douglas referred to as an exception in the Sniadach case.

And the Court specifically said, and I think that opinion also was -- no, that was by Mr. Justice Jackson, said that if you take advantage of a statute, you cannot attack its constitutionality.

Now, these people, in gaining these goods, the possession and title of this goods depends on the commercial code, and the Goods and Sales Act of Pennsylvania.

These forms, the way the form reads, the amount of the -- the height of the type, everything is provided by these laws. They got possession of this goods by means of compliance with this Act, but they say that the punitive effect of this Act, the collecting of money for it, or replevying the goods, that should be stricken down because it is unconstitutional.

In this action replevin is merely a procedural remedy to enforce the rights of the creditor given by the Commercial Code, the right to self-help, plus the right to replevy by court action if this is so desired.

And this is how the plaintiff's rights in this case arose in this property, by this very Commercial Code, and certainly you cannot today just strike down the replevin action, it would seem to me you would have to strike down the security provisions of the Uniform Commercial Code, which is effective

in 49 States, the very language precisely here saying that you can proceed with self-help or the alternative, by an action of replevin. And the action of replevin has been proceeded with in this case.

Now, I think the only other thing that this Court has said over its past history, again in certain exceptions to the Sniadach doctrine, that is language that was used in the Sniadach doctrine, has indicated that in personal property, if there is sufficient availability of immediate or subsequent remedies, sufficiently protecting the party against whom a replevin or action is had, where the property is taken from him, that this satisfies due process.

Now, in the specific cases before us, speaking of the Fourth Amendment, there is certainly -- I can see no violation of the Fourth Amendment here. There was a peaceable taking certainly in our case, and in all other cases. And I do not see -- again it was by agreement, the right in the property of these plaintiffs passed to them by virtue of the Uniform Commercial Code, by provisions of the Uniform Commercial Code, which is, as I say, in effect in 49 States, and then it is said that because it passed this way, the other part of the Uniform Commercial Code, which not only gives rights to these plaintiffs but gives defects, that this part of the Code should be stricken down.

And I think --

Q What's that holdout State on the Code?

MR.MAXWELL: Pardon?

Q What is the holdout State, you said only 49 --

MR. MAXWELL: I believe, sir, as I understand it, it is Louisiana, because of the French law. I believe that is it.

So I think that is really -- really I have just in this case, really, solely moved for a dismissal on the ground of the specific case. In our specific case we gave prior notice, four or five prior notices, which are a part of the record, that we were going to repossess, that there was default, and after that we finally did repossess.

And, as I say, this replevin action, as any other replevin action, is still open. The State courts are open to these people. In every one of these cases they could have gone to the State court, and a Common Pleas judge sitting in City Hall in Philadelphia would have given an immediate order, if they had rights on which they can depend, or which they can -- which exist.

I thank you.

Q Mr. Maxwell, in this case as in an earlier case today we have the Attorney General of the State of the Commonwealth of Pennsylvania, instead of seeking to uphold the constitutionality of the legislation passed in his Commonwealth, respectfully praying that the judgment of the

court below be reversed, and that this Court enter a judgment declaring the Pennsylvania statute unconstitutional on their face.

What's the history of that? Is that --

MR. MAXWELL: We're so --

Q What's the history here? At least, I am used, in federal cases, to the tradition that it's the duty of an Attorney General of the State to defend the validity of his State laws.

MR. MAXWELL: Your Honor, you probably state the law. In my position I have enough problems as it is, as attorney for Sears, Roebuck, and general counsel for them, I would prefer to --

Q Well, what's the reason?

MR. MAXWELL: I do not know, sir.

Q Was the State involved in the --

MR.MAXWELL: They did not appear in the lower court, Your Honor. They -- of course there has been a change, I think it was mentioned by Mr. Scholl, there was a change in administration. The previous Attorney General was Mr. Speaker, and it is now Mr. Shane Creamer.

Q But this law has been --

MR. MAXWELL: I don't think it would be right for me to comment on that.

Q Well, this law has been on the books, at least

the core of it, since what? 1705?

MR. MAXWELL: It has been in effect since 1705, Your Honor, and, of course, before that I guess it was common law; but it was a law of the colony when the Constitution was enacted in Independence Hall in Philadelphia.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Maxwell.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:00 p.m., the case was submitted.]