

In the

Supreme Court of the United States

FLAGG BROTHERS, INC., ETC., ET AL.,) No. 77-25

PETITIONERS,)

V.)

LOUIS J. LEFKOWITZ, ATTORNEY GENERAL) No. 77-37
OF NEW YORK,) c.1

PETITIONER,)

AND)

AMERICAN WAREHOUSEMEN'S ASSOCIATION) No. 77-42
AND THE INTERNATIONAL ASSOCIATION OF)
REFRIGERATED WAREHOUSES, INC.,)

PETITIONERS,)

V.)

SHIRLEY HERRIOTT BROOKS, ET AL.,)

RESPONDENT.)

Washington, D. C.
January 18, 1978

Pages 1 thru 57

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IN THE SUPREME COURT OF THE UNITED STATES

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: FLAGG BROTHERS, INC., etc., et al., :
: Petitioners, :
: v. : No. 77-25
: SHIRLEY HERRIOTT BROOKS, et al., :
: Respondents. :
----- :
: LOUIS J. LEFKOWITZ, ATTORNEY GENERAL :
: OF NEW YORK, :
: Petitioner, :
: v. : No. 77-37
: SHIRLEY HERRIOTT BROOKS, et al., :
: Respondents. :
----- :
: -- and -- :
: AMERICAN WAREHOUSEMEN'S ASSOCIATION :
: AND THE INTERNATIONAL ASSOCIATION OF :
: REFRIGERATED WAREHOUSES, INC., :
: Petitioners, :
: v. : No. 77-42
: SHIRLEY HERRIOTT BROOKS, et al., :
: Respondent. :
----- :

Washington, D. C.,

Wednesday, January 18, 1978.

The above-entitled matters came on for consolidated

argument at 11:17 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice
 HARRY A. BLACKMUN, Associate Justice
 LEWIS F. POWELL, JR., Associate Justice
 WILLIAM H. REHNQUIST, Associate Justice
 JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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 10019; on behalf of Petitioners Flagg Brothers,
 Inc., etc., et al.

A. SETH GREENWALD, ESQ., Assistant Attorney General
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 New York 10047; on behalf of Petitioner Lefkowitz.

MARTIN A. SCHWARTZ, ESQ., Westchester Legal
 Services, Inc., 171 East Post Road, White Plains,
 New York 10601; on behalf of the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Flagg Brothers against Brooks, and the related and consolidated cases.

Mr. Altman, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF ALVIN ALTMAN, ESQ.,

ON BEHALF OF PETITIONERS FLAGG BROTHERS

INC., ETC., ET AL.

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

The issue before the Court is the presence or absence of State action in the sale by a warehouseman of household goods, a sale of the household goods deposited by a warehouse depositor who has defaulted in payment of the storage charges, the sale being made pursuant to New York Uniform Commercial Code, Section 7-210.

The petitioner is the warehouseman; respondents are two depositors of warehouse goods, household goods. While the facts in each case are not identical, they are substantially similar.

Both respondents, tenants in an apartment dwelling in Mount Vernon, New York, were evicted from their respective apartments by court order.

On the day of the eviction, the petitioner warehouse-

man, acting on behalf of the landlord, the evicting landlord, to effectuate the removal of the household goods from the apartment to the sidewalk, appeared at the apartment and entered into discussions with the respondents.

I may point out to the Court that these two occasions did not occur on the same day, they were separate occasions on different days.

As a result of the discussion in the Brooks case, respondent Brooks requested that her household effects be removed from the apartment to petitioner's warehouse rather than leaving the goods on the sidewalk.

In the Jones case, the respondent Jones was present with the warehouseman in the apartment at the time of discussion, made a call to the Department of Social Services for the purpose of obtaining approval for getting funds to pay the transportation charges and to pay storage charges. This was confirmed by letter of the Department of Social Warehouses -- Social Services.

The Department of Social Services approved one month's storage.

After a period of time elapsed, both accounts became in arrears, and the warehouseman threatened to sell in conformity with Section 7-210.

Respondents sought an injunction -- injunction relief and a declaration from the United States District Court that

Section 7-210 was unconstitutional, being in violation of the Fourteenth Amendment due process.

The district court, on motion of the warehouseman, dismissed the case on the ground that State action was not present.

The Second Circuit Court of Appeals reversed.

Since the bedrock principle of the Fourteenth Amendment is a prohibition against State action and not individual action, no matter how harmful or hurtful, the question is: whether the State of New York was so involved in the sale that the action of the warehouseman may be fairly treated as the action of the State of New York?

QUESTION: Mr. Altman, in that connection, just as a matter of curiosity, if you prevail here, what remedies do the respondents have under the New York system for any alleged wrongs?

MR. ALTMAN: If we prevail here, Your Honor, the remedies of the respondents are, of course, to go into court, to enjoin any action in which they feel the warehouseman has not complied with the rigorous safeguards of the statute.

QUESTION: For damages, if they have?

MR. ALTMAN: They have an action for damages, Mr. Chief Justice, for any infraction of the statute, no matter how minute; and they have an action for conversion in the event that the infraction is a wilful one.

QUESTION: Well, really, all the respondents are complaining about is that the UCC gives your client an additional defense to a claim for conversion in the State courts of New York, isn't it?

MR. ALTMAN: Well, that is so, Mr. Justice Rehnquist; but, of course, in addition, they have taken the position that the conferral of the right of sale upon the warehouseman is an action associated with sovereignty -- is a right associated with sovereignty, which you deny --

QUESTION: But if the UCC weren't even in existence --

MR. ALTMAN: Yes, sir.

QUESTION: -- and there was nothing on the books at all with respect to what a warehouseman could do, common law or statutory law, presumably if the warehouseman, without any contractual right to do so, took a bailor's goods out and sold them, the bailor could sue for conversion.

MR. ALTMAN: Yes, sir.

QUESTION: And the UCC simply says that you follow these, what you describe as rigorous procedures -- and I presume your opponent characterizes them otherwise -- you will have a defense to that State court action for conversion.

MR. ALTMAN: Yes, sir.

QUESTION: There's no attack here on the -- even assuming a State action, there's no attack on the lien itself, is there?

MR. ALTMAN: No, Your Honor.

The only attack is on the control of the right of sale.

QUESTION: The control of the right to sell, and the ---

MR. ALTMAN: Yes, sir.

QUESTION: --- in fact, in these cases there was no sale with respect to either one of the named parties now before us ---

MR. ALTMAN: That is correct, Your Honor.

QUESTION: Is that correct?

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

QUESTION: Yes.

QUESTION: Was there a contract between the warehouseman and the party whose goods were stored?

MR. ALTMAN: In the one case, Mr. Justice Powell, there was a storage receipt, a warehouse receipt, which we claim has all of the elements of a contract in it.

QUESTION: Is the warehouse receipt in the record here?

MR. ALTMAN: There is --- the warehouse receipt of the particular petitioner warehouseman, and there is also a warehouse receipt which is used more commonly throughout the industry; so the Court has before it the receipt issued in this particular case, plus the receipt which is in common

usage.

QUESTION: Does that receipt, the one issued in this case, refer to Section 7-210?

MR. ALTMAN: Not in those words, Your Honor.

QUESTION: What does it say that's relevant to this case, if anything?

MR. ALTMAN: There is a provision in that warehouse receipt which confers the right of sale by the warehouseman in the event of a default in payment.

However, there is no specific pointing out of Section 7-210.

QUESTION: Could you rely on that contract, rather than the New York statute?

You can in a deed of trust in my State.

MR. ALTMAN: We believe that you can rely on that contract. Of course, in this case, if I may point out, Your Honor, we have a special situation in that it was an emergency situation. There was not the normal time to prepare the storage contract, the warehouse receipt in the ordinary case where there is a removal to storage. This was an emergency, whereby the goods were being removed to the sidewalk; and, in order to prevent that, the warehouseman took the goods into storage.

QUESTION: Did the bailor sign the warehouse receipt?

MR. ALTMAN: No, Your Honor.

QUESTION: So how could it be a contract then?

MR. ALTMAN: We submit that there is an implied contract based on all of the facts in this instance.

QUESTION: But not a writing signed by the party to be charged or anything?

MR. ALTMAN: That is correct, Your Honor.

QUESTION: Well, it's like if you want to store your goods, you store them on these terms or we won't store them; and so they stored the goods. That's what it amounts to, I suppose.

MR. ALTMAN: Not quite, Your Honor, if I may disagree. There was --

QUESTION: Well, what more is there? In this case at least.

MR. ALTMAN: There was the right --

QUESTION: In terms of a contract.

MR. ALTMAN: Well -- right. There was the right of the bailor to obtain a different warehouseman if she did not agree to the terms as specified by this particular warehouseman.

QUESTION: Yes, but she --

QUESTION: You mean she had the choice not to give it to him?

QUESTION: Well, you couldn't suggest that she

knew anything, had any notion of what the terms were when you took the goods away.

It was an emergency, as you said.

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

QUESTION: The choice was to either give it to him or to leave it out in the street.

MR. ALTMAN: Or try to obtain the services of another warehouseman; that's true, Mr. Justice Marshall.

QUESTION: But your implied contract must imply a power of sale, which is in the written contract, isn't it?

MR. ALTMAN: Yes, Mr. Chief Justice.

QUESTION: How do you imply a power of sale in just a storage contract?

MR. ALTMAN: Well, Your Honor, we imply it, first, because the statute itself should be considered, and the statute itself should be considered in the terms of a contract. That is one way.

And then we say, Your Honor, that this is a --

QUESTION: There are statutes of limitation on the power of the parties to contract, is there not?

MR. ALTMAN: Yes, Mr. Chief Justice. Yes, it is definitely a limitation.

QUESTION: Why shouldn't the warehouseman frame a contract that would solve this problem?

That is consistent with the terms of the statute.

MR. ALTMAN: That could very well be done, and that is the case, Mr. Justice Powell, in the vast majority of warehouse deposits, the contracts are specific on this point. The documentation, the warehouse receipt of the storage contract. It so happens in this particular case that was not done for the reasons that I've mentioned.

QUESTION: This case came to the Court of Appeals after the district court dismissed the complaint?

MR. ALTMAN: Yes, Your Honor.

QUESTION: And the posture of the case, therefore, is that we assume that the allegations of the complaint are all true; and, taking those allegations, there's no contract in this case.

The question, as you quite accurately said at the outset of your argument, and the only question before us, is whether the action of your client was State action.

MR. ALTMAN: That's correct, sir.

QUESTION: Isn't that right?

MR. ALTMAN: That's correct, sir.

We respectfully submit that State involvement in a disputed private act must be significant, affirmative, all but ordering the challenged activity, and that the delegation of sovereign power in an economic due process setting is insufficient to cross the State action threshold. We would

point out that the New York Commercial Code is a permissive statute. There is no direction in the statute to sell. The decision to sell is the decision of the warehouseman, it's a private decision arrived at by a private party in a private transaction, with no State official being present, no State encouragement whatsoever.

QUESTION: On that point, Mr. Altman, without a contract and without a statute, do you think your client would have gone ahead and sold?

MR. ALTMAN: Without a contract and without the statute --

QUESTION: You say that --

MR. ALTMAN: -- I would --

QUESTION: Isn't the statute a fairly important part of the whole picture?

MR. ALTMAN: Yes. Yes, it is.

QUESTION: Otherwise, you'd have to go to court to foreclose your lien.

MR. ALTMAN: That is correct.

QUESTION: Yes.

MR. ALTMAN: That is correct.

QUESTION: And the question, I guess, is whether it's under color of State law, in the sense that it's something that would not have been done without the statute.

MR. ALTMAN: That's right, sir.

And on that issue, may I say that the conferral of this right of sale is not the delegation of a power associated with sovereignty. Far from being a power associated with sovereignty, this statute is the codification of a power to dispose of property which any private party had at common law. The power of sale was an attribute of ownership, and at common law, position was deemed to be, was presumed to be ownership.

QUESTION: That doesn't -- now, you state that under the law of bailor or bailee at common law, the bailee could sell the property without taking it to court?

MR. ALTMAN: The bailee could sell the property under common law if possession had been voluntarily delivered to him, yes, Mr. Justice --

QUESTION: And without going to court at all?

MR. ALTMAN: Yes, sir.

QUESTION: Let me ask you one more question, if I may, Mr. Altman: Supposing that, contrary to your answer to Mr. Justice White, at common law the bailee had absolutely no power to sell without going to court, but the New York Court of Appeals, without any statute at all, had said, "We're not going to follow that branch of the common law, we're going to enunciate a new principle that the bailee does have the power to sell"; so that without statute, but as a result of decisional law of the New York Court of Appeals your client would have the same right as now conferred on it

by statute. Do you think the case would be any different here?

QUESTION: No, you don't.

MR. ALTMAN: In so far as a seizure is not concerned in this case, in so far as possession was delivered voluntarily, I don't think there would be any difference.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Greenwald.

ORAL ARGUMENT OF A. SETH GREENWALD, ESQ.,

ON BEHALF OF PETITIONER LEFKOWITZ

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

My co-counsel has stated the relevant facts of this case. The Attorney General of the State of New York has intervened, and intervened at the district court level, by the way, to defend the constitutionality of the State law; and at this time there is only one provision involved, Uniform Commercial Code, Section 7-210.

And, of course, the New York State Legislature, several years ago, passed that statute; but it is my contention that that is not enough to make this a matter of State action. I think there's really no dispute about that.

And that --

QUESTION: That is, the simple enactment of the law.

MR. GREENWALD: Precisely.

QUESTION: That anybody who thereafter acts under its provisions, just by reason of the existence of the law, that that private person is not acting like, as a State; that's your point.

MR. GREENWALD: That is precisely it.

QUESTION: A simple enactment of the law doesn't make the action of Mr. Flagg, Flagg Brothers, State action.

MR. GREENWALD: Yes.

QUESTION: The question isn't whether it's State action; isn't the question whether it's action under color of State law?

MR. GREENWALD: I think those two terms are basically interchangeable. They have, I think, in the past, been used alternatively --

QUESTION: Sometimes they are.

MR. GREENWALD: -- and perhaps confusingly. I think that this is not the case to make any distinction whether it's under --

QUESTION: I read an opinion once saying there's quite a difference between the two. I guess nobody's got it, though.

MR. GREENWALD: Well, you know, if I was -- you know, if this was before a fireplace, that might be the time and the place; but I think, in the context of this case, it is

basically under color of State law and State action, and basically interchangeable with ---

QUESTION: Well, really, what we have here is whether we're relying on the language of 1983, or whether we're relying on the language of the due process clause of the Fourteenth Amendment, and that could be a difference. But perhaps that is ---

MR. GREENWALD: No. Well, I ---

QUESTION: --- a fireside discussion.

MR. GREENWALD: Yes. I think that we basically have to go back to Section 1983 is derived from and based on the Fourteenth Amendment, and I think this Court has so held.

QUESTION: Well, don't you have to have both here as a matter of fact? You have to have under color of State law, a deprivation of a constitutional right; and the constitutional right is that you not be deprived of due process by the State.

MR. GREENWALD: Yes, that is --- that is a fair statement. The fact of the matter is there has to be some --- once again getting back to the magic words --- there must be some State action that has deprived you of your constitutional rights, because ---

QUESTION: Well, there is no constitutional right, unless there is a deprivation by the State, that's the point.

MR. GREENWALD: Yes. Basically, of course.

QUESTION: Deprivation by a private individual is not a violation of a person's --

MR. GREENWALD: Yes, it has to --

QUESTION: -- constitutional right, no matter how gross the deprivation might be.

MR. GREENWALD: Yes. And I think that was determined back in the civil rights cases, I think over a century ago.

QUESTION: There's been a lot of water over the dam since then!

MR. GREENWALD: Well, I don't think that much, I think the law still is -- has been reaffirmed only a few years ago by this Court in Jackson v. Metropolitan Edison.

But I think it's worthwhile to emphasize to this Court that not only has New York passed the Uniform Commercial Code, 48 other State Legislatures plus the District of Columbia have passed this section that's under challenge here. So, of course, it's rather obvious we have a statute with nationwide impact.

And this statute simply regulates and authorizes the exercise of power of non-judicial sale by the warehouseman, where his customer may have disappeared, done any sort of thing, and not paid his bill.

Now, there may be a dispute about the bill, but that's something else. That's not a constitutional dispute. And, as I say, in speaking about the UCC, this statute, though,

dates much further back than UCC, which is a product of a distinguished group of legal authorities of the late 50's and early 1960's. It dates back in New York, back to 1879. And it is based on -- and I'd emphasize this, it's part of a uniform statutory scheme of warehousemen having a specific possessory lien over stored goods in his possession, and the statute, by regulating sale by the warehouseman, is basically a wholesome statute. And --

QUESTION: Well, what difference does it make when New York first enacted the statute? Supposing that there was no statute on the books and no decisional law in New York, had just become a member of the union, and the Court of Appeals was first established and had no cases at all on this subject, and this precise case came before it. The Court of Appeals would have had to decide one way or another, whether the bailor, bailee -- whether the bailee had a right to sell without going to court, wouldn't it?

MR. GREENWALD: Well, I put it this way: age is not a determinative factor, and of course -- but when we speak of, and this Court has spoken of, the traditional function of the State, it becomes of interest. And I simply say "of interest", how old is the statute; because when the court below, the Court of Appeals decision, said that we had transferred by the UCC provision a traditional function of the State, and I can cite -- and they even themselves cite the fact that it dates

back to 1879, and perhaps even longer in other States, it hardly becomes a traditional State function for a warehouseman to exercise the power of non-judicial sale when his lien, which is not under question here, is still outstanding.

QUESTION: Are you going to touch at any time on the question of possible mootness?

MR. GREENWALD: Well, I have in my brief, of course, pointed out that --

QUESTION: If you want to rely on the brief, you may do so.

MR. GREENWALD: Yes, I would prefer to rely on my brief. As I say, I have many things to say here, and I think they would go to the merits.

As I say, and I mentioned Jackson v. Metropolitan Edison case, which had to do with utility cutoffs, this Court enumerated, went to the extent of enumerating what are traditional functions of the State. And, quite interestingly, not one of them even closely approached non-judicial sale by a warehouseman or anyone else.

It's really a total stretch of the imagination to call a non-judicial sale, which was only threatened in the instant case and never carried out, or it cannot be now, to call that a traditional function of a sheriff. Because a sheriff has a significant power of sovereignty that the warehouseman does not have. Basically stated, a sheriff

seizes property, and this is something that a warehouseman cannot do, did not do in this case, and never will do. Because his lien is based on voluntary consensual possession.

And there's another aspect when you're speaking about State action. It has been generally recognized that this Court and any court is much quicker to find a delegation of a State function, State -- a traditional State function in a case that involves racial discrimination. Because that racial discrimination is at the heart of the purpose of the Fourteenth Amendment when it was passed, and what we all know is that debtor-creditor relations really had nothing to do with the passage of the Fourteenth Amendment, it was not involved one iota.

And I think it's rather obvious that in New York a sale by a warehouseman, like they are challenging here and claiming the State action the respondents are claiming, is not a traditional State function.

Now, there is some authority in the New York Court of Appeals which the respondents cite that says it is a traditional State function. That is the Blye case.

But I emphasize -- and I was involved in the Blye case, I argued that to the Attorney General up in Albany. That case involved a lien sale, it did not involve a lien -- no, it involved, excuse me, liens, simply liens, not a lien sale; involved an innkeeper's lien which is a basically differ-

ent type of lien than a warehouseman's lien.

And finally, and most importantly, the decision of the New York Court of Appeals simply doesn't control this Court, even the cases that respondents cite show that you make an independent determination in a case where there's a federal constitutional issue.

And, once again, I would emphasize that the question of State action is one of great importance because, at the present time, we have a conflict in the Circuits: the Ninth Circuit in California has clearly stated --

QUESTION: Mr. Greenwald, you're down to five minutes, --

MR. GREENWALD: Yes, I'm going to --

QUESTION: -- are you going to get to the Chief Justice's question of mootness?

As I understand it, that Miss Jones paid the money and that the other one, by agreement they removed her.

MR. GREENWALD: Well, as I said, I said -- and the Chief Justice accepted my statement, that I would rely on the brief.

QUESTION: Well, I didn't.

MR. GREENWALD: But you haven't. Okay, then I will address my answer -- yes, the point is that Mrs. Jones, the late Mrs. Jones, at the termination of the district court case, by her own action, paid her bill and got her goods back. It

wasn't a case of Mr. Altman trying to moot this case out, this was a matter of the plaintiff taking action, in effect, to resolve the question. Of course, she now states that she didn't get all her goods back, and some were in damaged condition; but that is a State law question, it's certainly not a constitutional issue.

And I might point out also, of course, that my co-counsel has differing views as to the mootness of this case, and he has a client who would fight, is very anxious to get this matter resolved, because it has been around for an awful long time.

But I have pointed out to Your Honors that, having an actual case of controversy is a necessary ingredient to the case, and I felt the obligation to inform Your Honors.

At this point I would like to reserve my remaining time for rebuttal.

QUESTION: Just before you sit down, Mr. Greenwald, we have an amicus brief here from the New York State Consumer Protection Board, taking a position opposed to yours.

MR. GREENWALD: Yes.

QUESTION: Now, you represent the State of New York, and this is a State agency, how is that --

MR. GREENWALD: Well, once again, --

QUESTION: -- perhaps it's none of our business.

MR. GREENWALD: Yes. That -- this is the second

time, at least in my own personal experience, that you have an amicus brief opposing the Attorney General from the Consumer Protection group.

QUESTION: From a State agency.

MR. GREENWALD: Yes. But --

QUESTION: And you represent the State.

MR. GREENWALD: -- they are not -- they perform some State function.

QUESTION: Yes.

MR. GREENWALD: As we say, it's questionable who they represent. It's also questionable -- and is not questionable, there's no doubt, under New York State law they have no right to come into court cases, even when this law gives them a right to appear at a legislative -- not a legislative, at an administrative, regulatory agency hearing of the Public Service Commission, even though they can appear at that hearing, they can't then go in to challenge the matter.

So I emphasize that the views of the State of New York are presented by the Attorney General.

QUESTION: Right.

MR. GREENWALD: Not the Consumer Protection Board.
Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Schwartz.

ORAL ARGUMENT OF MARTIN A. SCHWARTZ, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Before I commence my argument, I would like to address the question of mootness.

Mrs. Jones claims that the \$1600 payment she made during the course of the litigation was not made voluntarily, but at least in part because of the threat of sale. She would have a claim for damages, at least for part of that \$1600 payment.

In addition, I closely point out to the Court that the defendants charged Mrs. Jones an auctioneer's fee, presumably for a scheduled sale, and under the Code, in order for a person whose goods are stored to exercise a right of redemption, part of the cost which must be paid are the fees involved in the carrying out of the contemplated or actual sale. I think this claim for damages is sufficient to keep the case alive.

I would also point out that in all of these consumer due process cases which have been brought the last few years, there is virtually an inherent problem in mootness. We pointed this out to the circuit court. We prepared an Appendix in the circuit court which listed the various cases, and the status of the goods during the litigation. And it is inevitable

that a threat of sale will not continue during an entire lengthy litigation period. We brought this case at the time the threat of sale existed. We submit that was the proper time to bring the case, to try to stop the sale. The laws serve that purpose.

But it's not reasonable to suppose that that will continue during the course of a three or four-year litigation period. I would say that the "capable of repetition yet evading review" doctrine would also apply to this type of situation.

And I would also point out --

QUESTION: Well, it seems to me that a woman, I think it was, who can pay \$1600 is not automatically in danger of not being able to pay storage in the future.

MR. SCHWARTZ: She --

QUESTION: She paid \$1600.

MR. SCHWARTZ: But she claims that one reason for that \$1600 payment --

QUESTION: Yes, I know, but she did manage to get together 1600.

MR. SCHWARTZ: But she claims it was not a voluntary payment. This woman was left without all her possessions, --

QUESTION: For how long?

MR. SCHWARTZ: -- for virtually a two-year period, Your Honor. And of course the payment of the auctioneer's

fee would only have to be made because the statute was invoked against her.

I also would like to point out that we have filed an action on behalf of a client whose goods have been sold already in the Southern District, and it has been assigned to the same judge before whom the Brooks case was assigned. And the only reason that we could not move to intervene that client into the Brooks action is because the circuit court stayed its own mandate remanding the action to the district court pending proceedings in this Court. So there is another case which has been filed; as I say, it was just a mere formality.

I would also point out that the parties did stipulate to the propriety of the class here. There was no certification, the district court there so ordered the stipulation, but we --

QUESTION: Well, some of the parties stipulated, not all of them --

MR. SCHWARTZ: Well, at the time stipulation was entered into, Your Honor, the Attorney General and the Associations were not parties to the lawsuit.

QUESTION: But now they are.

MR. SCHWARTZ: Now they are, but --

QUESTION: And they have it stipulated.

MR. SCHWARTZ: Well, I would also point out that

the action clearly meets all the requirements of Rule 23(a) and (b)(2). It's clearly the type of action that subdivision (b)(2) was intended to apply to.

QUESTION: Well, we can't consider it unless it's certified.

MR. SCHWARTZ: I understand that, Your Honor. I'm just saying that it's another factor to consider if the case was remanded back to the district court as the circuit court contemplated. The circuit court opinion, I believe, contemplates that the action is a proper class action, but that the only question is the propriety of the scope. We did everything possible to get this class certified.

We entered into a stipulation, went to oversight or whatever, the stipulation wasn't approved, we moved for class certification, the district judge didn't pass on the certification.

QUESTION: And then you --

MR. SCHWARTZ: We appealed --

QUESTION: And then you asked for summary judgment.

MR. SCHWARTZ: I mean, we moved for a class certification and summary judgment at the same time, Your Honor. We then appealed from the denial of the class certification as well. As I say, the only reason there's any mootness problem here at all is because the circuit court stayed its own mandate. Otherwise, this new client,

Mrs. Svendsen, would have intervened into the Brooks action. But we do have an action filed on behalf of somebody whose goods were sold.

Your Honors, the plaintiffs' intantion is that State action is present in this case, because we have a direct, precise and significant nexus between the State and the contested activity.

The State has delegated two warehouses the extraordinary power to summarily sell a bailor's goods. And in doing so, we contend that New York has delegated to warshousemen the public functions of lien enforcement and non-consensual dispute resolution.

QUESTION: Without that delegation, where would the power of sale be?

MR. SCHWARTZ: There would be no power of sale, Your Honor, and despite what my adversary said, the authorities are in consistant agreement, and we've cited them in the brief, there was no power of sale at common law. It is clear, I don't know how my adversary can make the statement to the contrary; but the bailee's right at common law was merely the right to retain possession of the goods.

QUESTION: What about --

QUESTION: And go to court, he could go to court.

MR. SCHWARTZ: He could --

QUESTION: And foreclose his lien.

MR. SCHWARTZ: The norm at common law, if the bailee sought to enforce his lien, his remedy was to bring an action to court, and if he proved his claim and defeated defenses and obtained a judgment, the sheriff would then levy execution on the very goods that were sold.

QUESTION: Well, in some respects that involves almost more State action than this, doesn't it?

MR. SCHWARTZ: I would say that this is a direct substitute for that process. That is a judicial process, judicial determination, and judicial enforcement.

And our position is that a person whose goods are sold under this statute, under Section 7-210, stands in the precise posture of a defendant in a judicial action, against whom a judgment has been gotten and enforced with one exception, and that exception is that the person whose goods are sold under Section 7-210 does not get an opportunity to be heard prior to sale. Whereas, the person whose goods are sold after a judicial proceeding presumably does.

QUESTION: Well, is your claim of State action based on the Legislature's enactment of the statute?

MR. SCHWARTZ: Our primary claim, Your Honor, is that the enactment of the statute constitutes the delegation of power which is normally associated with sovereignty.

QUESTION: Okay. Supposing that without any such statute the New York Court of Appeals, as a matter of common

law, had reached precisely the same result?

MR. SCHWARTZ: My position would have to be the same. If the New York courts, if the New York Court of Appeals had recognized that the ostensibly private sector had the power to exercise functions which are governmental in nature, we would nevertheless have a delegation from the public sector to the private sector of governmental power.

QUESTION: So it's not the enactment of the statute, it's the -- any recognition by a body in New York that is capable of laying down law, that a warehouseman has a defense to a conversion action in this situation?

MR. SCHWARTZ: It's the delegation of sovereign power by any branch of the government; that's right, Your Honor.

QUESTION: Well, when you say delegation of sovereign power, but all it really is is a defense to a conversion action.

MR. SCHWARTZ: It's more than a defense, Your Honor, because these goods are sold without a hearing.

QUESTION: But in a conversion action the goods would have been taken without a hearing.

MR. SCHWARTZ: That's -- a conversion action would come about because of an unlawful sale.

QUESTION: And here --

MR. SCHWARTZ: What this statute does is make this

sale lawful. It makes what would have been an unlawful act a lawful act.

QUESTION: So it gives them a defense to an otherwise unlawful act by way of conversion --

MR. SCHWARTZ: It gives them more than a defense. It gives them much more than a defense. It gives them a defense if an action in conversion is brought, but if an action in conversion is not brought, it gives them the power to resolve this dispute by selling a person's goods summarily.

QUESTION: Well, just as if a converter takes your goods and does away with them and you never sue him, he gets away scot-free.

MR. SCHWARTZ: Well, that's true, but if a case was brought, it would be an unlawful act. The State here is making lawful what would otherwise would be clearly unlawful at common law. There's no question about that.

QUESTION: Well, you don't just mean --

QUESTION: Not that alone, certainly, you've got to go further than that.

MR. SCHWARTZ: We don't rely on that at all. We -- the heart of our claim is this, that this person whose goods are sold stands in the same position as a defendant in a judicial proceeding, against whom a judgment was taken and against whom that judgment was enforced by the power of sale of his goods. And we would say that what is involved here

are the combination functions of non-consensual dispute resolution, which is normally, historically and judicially carried out by the courts, together with lien enforcement, which is an enforcing mechanism which is normally carried out by sheriffs and constables.

QUESTION: If it were clear at common law that this power of sale existed, would you be making the same argument?

MR. SCHWARTZ: I would have to, consistently, Your Honor, because the common law would then be recognizing that the private sector has what we claim to be a power of the sovereign. I cannot -- I cannot --

QUESTION: So you view their argument as to what the common law was to be immaterial?

MR. SCHWARTZ: No, I don't think it's immaterial. Perhaps the circuit court stated the proposition too broadly, when they spoke about the statutory reversal of the common law in a vacuum. I think the statutory reversal of the common law is relevant in two somewhat limited respects.

First of all, how the function was carried out at common law tends to give us some evidence as to whether that function was in the private and public sector. For example, in this case it's clear that the private sector did not have the power to determine these disputes and to enforce liens. So it's some evidence that the power was not lodged in the

private sector at common law.

And, on the contrary, in response to Mr. Justice White's question, I stated that what happened at common law was that the -- it would in fact be enforced after a judicial proceeding and enforcement by the sheriff. So that at common law this is a function which historically and traditionally was carried out by courts and sheriffs and constables.

In addition, I think the lack of common law authority is significant in that it shows that when the warehouseman does exercise his power, he is acting under and only under this particular statute. He must be acting in reliance upon the statute.

QUESTION: Would you be making the same argument if all the State law said is that in bailor-bailee situations we'll go just by the contract, whatever the parties agree to; if the parties agree to a private sale, that's the end of it.

MR. SCHWARTZ: Your Honor, --

QUESTION: That would be State authorization of a private sale, and that would be enough for you, I take it?

MR. SCHWARTZ: Your question presupposes a valid contract. If --

QUESTION: Well, yes, it does.

MR. SCHWARTZ: All right. If we had a valid contractual power of sale, I would say that this would be a

prime example of a creditor's remedy which came about as a result of a contractual voluntary agreement. That is --

QUESTION: Even though it comes about because of this State law simply authorizes parties to agree on a private sale; would that be State action?

MR. SCHWARTZ: Well, now you're assuming the existence of the statute.

QUESTION: Yes. Yes, I am. I'm just trying to find out what --

MR. SCHWARTZ: Then it would be State action, because the only -- let me make sure I have this question straight. We have the statutory power of sale, and we have an express --

QUESTION: Well, the statute says -- the statute says whatever the parties agree to with respect to a private sale is all right with us. That's what the statute says. And the parties agree to a private sale.

Now, is the State involved in that --

MR. SCHWARTZ: If it's totally contractual, I would say that the State is not involved. But --

QUESTION: Well, the --

QUESTION: But the whole source of enforcement of law for contracts is the State sovereignty, under Austen or anybody else. In many societies a written agreement between two parties is not enforced by the sovereign.

MR. SCHWARTZ: But if we have a valid contract, with a power of sale in that contract, --

QUESTION: Well, valid, you automatically have reference to State law right there.

MR. SCHWARTZ: Well, we may have reference by -- to State law; but the power of sale came about because the parties mutually, consentually agreed that upon default the warehouseman would have the power of sale. That's not what we have in this case.

In this case we have a power of sale which exists only by operation of the statute.

QUESTION: Well, you do agree that there's a lien?

MR. SCHWARTZ: We do not contest --

QUESTION: In common law there was a lien.

MR. SCHWARTZ: We do not contest the lien. The constitutionality of the lien we are not contesting.

QUESTION: Well, what does the lien mean, that you can sell it?

MR. SCHWARTZ: The lien at common law is defined as the right to detain the goods indefinitely, until the bailor makes all the payments which the bailee claims are due and owing.

QUESTION: And?

MR. SCHWARTZ: And that is all.

QUESTION: No. And he can go to court.

MR. SCHWARTZ: He can go to court, but any other creditor can go to court, too.

QUESTION: Right.

MR. SCHWARTZ: The norm is for a creditor, who claims he has an amount due and owing, to bring a judicial proceeding, prove his claim, if he can defeat defenses, obtain a judgment, and seek to enforce that judgment.

This statute, in effect, short-circuits that entire process.

If I could get back to Mr. Justice White's question, the difference between a contractual power of sale and the statutory power of sale is the difference between voluntary dispute resolution, which has historically and traditionally been in the private sector, and involuntary, non-consensual dispute resolution which has historically and traditionally been the function of the courts and sheriffs.

Well, I see that it's twelve o'clock. If I may complete my argument after --

MR. CHIEF JUSTICE BURGER: Well, we'll allow you to start at one o'clock, then.

MR. SCHWARTZ: Thank you.

[Whereupon, at 12:00 noon the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Schwartz.

ORAL ARGUMENT OF MARTIN A. SCHWARTZ, ESQ.,

ON BEHALF OF THE RESPONDENTS -- Resumed

MR. SCHWARTZ: Thank you, Your Honor.

In Jackson vs. Metropolitan Edison Company, this Court stated that the characterization which the State courts give to a function, as to whether that function is public or private in nature, is entitled to weight in making the determination whether the State has delegated a public function to the ostensibly private sector.

The rationale for this, we respectfully submit, is that just as the State courts have the expertise --

QUESTION: Well, now you say a public function. You sort of lost me there. What about -- the State of New York, I assume, grants licenses to -- does it grant licenses to truck lines as well as --

MR. SCHWARTZ: The granting of the license itself, of course, would be a public function; but the activities carried out under that license might be public, might be private, depending upon the nature of the powers that were delegated.

QUESTION: Well, some trucking companies own ware-

houses, and some warehousing companies own lines of trucks, too, don't they?

MR. SCHWARTZ: The general every-day activities of warehouse companies, I would concede, are functions which are private in nature. They are generally contractual relationships, contracts of moving and storage.

The question here is whether the State's delegation of the power of summary sale is of that type of nature, whether it's private in nature or whether this is the type of function which historically and traditionally has been associated with sovereignty, whether it's a public function.

And my point is that the characterization given by a State court as to whether that function is public or private in nature should be given some weight by this Court in making that determination. And the rationale for that is that the State courts, just as they have the expertise on questions of State law, are in a particularly good position, particularly the highest court in the State, to evaluate whether a function is public or private in the particular State.

And in this case, in New York, the New York Court of Appeals, in Blye vs. Globe-Wernicke Company, has concluded that in New York lien enforcement historically and traditionally has been the function of the sheriff.

Now, the Attorney General seeks to distinguish the Blye case as a case involving a seizure of goods under the

innkeeper's lien law. However, the Court of Appeals, in Blye, did not hold that it's the seizure which constitutes a public function, but, rather, held that it's the execution of a lien, regardless of the method of lien enforcement, which in New York has been the function of the sheriff. And in fact cited two types of liens, judgment liens and liens which arise from an action to judicially foreclose a mortgage, which are liens which can be enforced by sale and without seizure.

In addition, the Appellate Division in New York has concluded that lien enforcement, where accomplished by sale and without seizure, is also a function which historically and traditionally has been the function of the sheriff in New York.

QUESTION: But you don't -- you don't contend that the actual sale is an act of the State, do you?

MR. SCHWARTZ: It's not an act by a State official. But we say that the --

QUESTION: Well, is it by the State?

MR. SCHWARTZ: It is an act which is equivalent to the exercise of sovereign power. It is something which we contend historically --

QUESTION: Well, you wouldn't say the State is liable if, for example, the person misuses the power?

MR. SCHWARTZ: We would not say the State is liable, any more so than we would say that the State would be liable in Evans vs. Newton, in the case where the function of running

a park has been delegated. It's public under the State action doctrine, it doesn't mean that the State has liability for the acts of the defendant. That would be true in all the public function cases which this Court has decided.

I would also stress that the decisions --

QUESTION: But your point is that this defendant has liability, as though it were the State.

MR. SCHWARTZ: Our point is that this defendant is bound to comply with the Fourteenth Amendment, as though it were the State.

QUESTION: As though it were a State.

MR. SCHWARTZ: That's right.

QUESTION: And therefore it's liable under 1983.

MR. SCHWARTZ: That's right.

But that does not make the State qua Statewide, which I took to be Mr. Justice White's question.

QUESTION: I think it was.

QUESTION: Can you -- I suppose that if a -- where the foreclosure is done by a sheriff and the sheriff goes out and if he absconds, or if he does something wrong, perhaps you could -- perhaps you could sue him under 1983?

MR. SCHWARTZ: The sheriff would be liable with the one exception, that he would have a good-faith immunity from liability for damages. He is subject to liability in the first instance under Section 1983.

QUESTION: In the warehouseman situation, if the private seller misperforms, can you sue him under 1983?

MR. SCHWARTZ: Well, that raises a question which I --

QUESTION: Well, is it State action or isn't it?

MR. SCHWARTZ: We contend that it is State action. Whether damages would flow from the private party's wrong in this situation, whether this --

QUESTION: But you could get into court on a 1983 case.

MR. SCHWARTZ: We could get into court on a 1983 action.

QUESTION: Claiming that this private seller was exercising State power and therefore should answer for --?

MR. SCHWARTZ: Injunctive relief, declaratory relief, and damages, with the possible exception that whether or not this defendant would have a good-faith immunity is, I believe, a question which this Court has not answered. In other words, whether this type of defendant would have the same immunity as a sheriff or other executive or administrative official. I only qualify it in that respect.

The decisions of the New York courts --

QUESTION: But at least the sheriff, when he's making the sale, is a neutral; but when the sale is made under a power of sale, either express or implied, the selling official

is not a neutral, is he?

MR. SCHWARTZ: Absolutely not, Your Honor. We contend that that makes this statute worse than the statutes which were involved in the Sniadach, Fuentes and Di Chem cases.

QUESTION: Would your theory make all powers of sale under mortgages and trusts of both real and personal property State action?

MR. SCHWARTZ: Absolutely not, Your Honor. Because they come about as a result of a contractual agreement. We sharply distinguish --

QUESTION: But as a substitute for what, I think, you have at least implied, is that traditional common law sovereign act.

MR. SCHWARTZ: It's a substitute, Your Honor, when it's exercised as a result of non-consensual dispute resolution. When it's a substitute for the functions exercised by the courts and sheriffs. It is not a substitute when it comes about as a result of a voluntary mutual agreement between the parties. That, historically and traditionally, has been in the private sector.

QUESTION: Mr. Schwartz, may I ask you a question? If there were compliance -- or non-compliance with a statutory procedure, it says failure to give a notice the statute requires, something like that, would you say that was State action?

QUESTION: Sure.

QUESTION: Could you sue in a federal court on the ground that there was a failure to comply with the State --

MR. SCHWARTZ: The failure to give the notice might constitute not only a State rule law, but if there is State action in this case, as we contend, then it would also constitute a violation of the due process clause. Because our substantive claim is that an owner of the goods should be given adequate notice and some opportunity to be heard prior to the sale.

QUESTION: But if he acts without the statute, without complying with the statute, is he then acting under color of State law?

MR. SCHWARTZ: Your Honor, he might be acting in violation of State law, but in threatening to sell or in engaging in the sale itself, he would necessarily be invoking the power of the statute.

Otherwise he could not sell.

QUESTION: What I'm really asking is, is it your position that the federal court has jurisdiction of every case arising under one of these statutes, or are you only contending that the court has jurisdiction to determine a constitutionality of the basic procedure?

I guess you're arguing the former.

MR. SCHWARTZ: We are only arguing that the court

has the jurisdiction to determine whether there's been a constitutional violation, a violation of due process, which I take it to be the latter.

QUESTION: But there could be a violation of due process resulting from a failure to follow the State procedure?

MR. SCHWARTZ: That's right. Because our basic claim is that due process refers some opportunity to be heard prior to the sale. The statute does not provide for any opportunity to be heard.

QUESTION: You say there's the same kind of State action whether or not the defendant complies with the statutory procedure?

MR. SCHWARTZ: I can't see a distinction, Your Honor, because the --

QUESTION: Well, in one case he's acting under color of the State law, and the other case he's acting contrary to the State law.

MR. SCHWARTZ: But in --

QUESTION: You don't draw a distinction --

MR. SCHWARTZ: In exercising the power of sale, he's invoking the statutory power. He may have engaged in some procedural irregularity along the way, but when he makes that determination to sell, and he in fact sells, he is acting under color of that statute.

QUESTION: But supposing -- suppose it's a fraudulent sale, suppose he sells it at an unconscionably low price to his brother-in-law, he just steals. Now, that's a -- he's exercising the State, State authority you say, and so you could sue him under 1983 and recover damages.

MR. SCHWARTZ: That's right. But not because -- not because it was fraudulent.

QUESTION: No. I understand, because --

MR. SCHWARTZ: Because of his due process violation.

QUESTION: -- because he's exercising, in fact, what the State told him he --

MR. SCHWARTZ: That's right. Now, whether he conducted a fraudulent sale or didn't comply with the procedural requirements, those are all, of course, generally questions of State law.

QUESTION: Well, the State deprived him of his property without due process of law.

MR. SCHWARTZ: That's right.

I might also say that those are normally questions which would be determined at a hearing prior to the sale. Whether the warehouseman has a proper lien, the amount of the charges, the extent of the lien, whether the proper notification provisions were given, and so forth. Those are questions, primarily questions of State law, which would be resolved at a due process hearing prior to the sale. It's the lack of that

mechanism that brings us to this Court.

QUESTION: Mr. Schwartz, what about the provision in the contract that they have this right?

MR. SCHWARTZ: Your Honor, there is no contractual power of sale in this case. In the case of plaintiff Jones, the complaint alleges no contractual authorization for storage and transportation at all. In the case --

QUESTION: What about the other one?

MR. SCHWARTZ: In the case of plaintiff Brooks, the bill of lading which was given to Mrs. Brooks, and I refer you to page 19a of the record, in the most minute print imaginable, it refers to a right of sale if goods are not claimed after shipment upon destination. That refers to a carrier's lien, and the carrier's right to sell if the purchaser does not --

QUESTION: That's not a warehousing lien?

MR. SCHWARTZ: That is not a warehousing lien.

QUESTION: Well, what would a warehousing lien, a good one, do to your argument?

MR. SCHWARTZ: Your Honor, a valid contractual power of sale --

QUESTION: Yes.

MR. SCHWARTZ: -- would result in a lack of State action. But we would point out that in the Fuentes case, this Court indicated that there were several factors that might

lead a court, as a matter of State law, to conclude that this type of contractual power of sale would be an invalid contract of adhesion, the unequal bargaining power, the fact that the term isn't used, bargained for; if it's in a form contract, a fine-print form contract, these would be other factors which might lead the court to conclude that there was no valid contractual power of sale.

We have the same problems in this case.

QUESTION: But your argument leads you, doesn't it, to conclude --

MR. SCHWARTZ: Does what?

QUESTION: Doesn't your argument lead you to the conclusion that you could have a voluntary agreement between the bailor and bailee here, which didn't comply with the Uniform Warehouse -- with the UCC provision, but was perfectly valid under the Fourteenth Amendment, since it was entirely consensual?

MR. SCHWARTZ: If there is a consensual power of sale, and it was valid as a matter of State law, --

QUESTION: Well, supposing it's invalid as a matter of State law?

MR. SCHWARTZ: Well, then we would not have a contractual power of sale. Then, in that case, the power of sale would arise wholly from the statute, and the sale would be an involuntary act.

QUESTION: And valid with me, there was no coercion or anything.

MR. SCHWARTZ: That's right.

QUESTION: But "valid" is the word that decides it. Whether or not it's valid.

MR. SCHWARTZ: I agree, Your Honor.

QUESTION: So it isn't just any consensual agreement that gets you or the State out from under -- the warehouseman out from under the Fourteenth Amendment here?

It has to be not only consensual but it must also comply with the State statute which you say is delegated to the warehouseman, the State's ordinary function.

MR. SCHWARTZ: Absolutely, because that would be a prerequisite for a valid contractual power of sale.

And I say the distinction is critical in this case, the distinction between contractual voluntary powers, which the parties agree to confer upon a creditor, such as the Article 9 secured transactions, on the one hand, which --

QUESTION: But in this case are you contending that your adversary violated the statute in any way?

MR. SCHWARTZ: No, we're not, Your Honor.

QUESTION: So we don't have a problem of whether or not a violation of the statute could be stated.

MR. SCHWARTZ: We don't have that problem; in the case of Jones we don't have a contract at all; in the case of

Brooks, we say that that clause doesn't pertain to a warehouseman's lien; even if it did, it would be invalid as a contract of adhesion. That's what the court below stated.

QUESTION: Do the members of the class that was stipulated, are they all parties who had no contracts?

MR. SCHWARTZ: The class was not limited in that respect, but I would have to concede that the class should be limited in that respect.

Your Honors, in enforcing liens, warehousemen have been engaged in the enforcement of non-consensual, binding, dispute resolution. This has been and always has been, and remains an essential attribute of sovereignty.

According to Locke, one of the great and fundamental basic purposes of government is the protection of property by the establishment of courts to resolve disputes consensually when the parties cannot voluntarily do so. From the early common law, and it remains so today, self-help remedies have always been very strictly limited.

And we submit to this Court that our system of law recognizes that a person who is interested in the dispute, such as a warehouseman, should not have the power -- I see that my time is up.

MR. CHIEF JUSTICE BURGER: Well, you may finish your sentence.

MR. SCHWARTZ: A person who is interested in the

dispute, such as the warehouseman, should not have the power to unilaterally resolve that dispute by the forced sale of another person's property, without giving that other person an opportunity to be heard.

Thank you.

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

Do you have anything further, Mr. Greenwald?

REBUTTAL ARGUMENT OF A. SETH GREENWALD, ESQ.,

ON BEHALF OF THE PETITIONER LEFKOWITZ

MR. GREENWALD: Yes. In response to respondents' argument, early on there was a mention of a -- and it's been mentioned again -- a stipulation about class action. As has been recognized by this Court, the Attorney General didn't sign this, and an awful -- many other parties did not sign this so-called class action stipulation.

So we are parties to this case, so are these other people; so it basically is inoperative.

Furthermore, I think I should emphasize that the respondent seems to be saying that he wants us to bring -- not us, but the warehouseman to bring -- serve a summons and complaint and bring a court action. As has been pointed out, I think in the reply brief of the petitioner Flagg Brothers, that brings into play, when the sheriff goes out to execute the judgment lien, brings into play the question of the household goods exemption provided by the New York State

statute, and makes a world of problems, which I don't have time to go into now.

Now, I think that, once again, there's a claim here that there isn't an opportunity to be heard. Well, the claim, as I now hear it, that there's no opportunity to be heard, he says he has no opportunity to be heard before the sale.

Well, that's questionable. But what I wish to emphasize to Your Honors is that the sale is not such a significant event. The customer can be heard before the sale, if he has a vigorous attorney and that he wants to be heard before the sale, seeking an injunction or the like; or he can be heard, as he very frequently is, after the sale, claiming in an action of conversion that the sale wasn't properly conducted and the like.

This is a complete opportunity to be heard. It can result in the --

QUESTION: Yes, but that's after his property, some of it perhaps personal, irreplaceable personal property, has been sold.

MR. GREENWALD: Well, once again I would point out that we're dealing here with personal property, and you use the term "irreplaceable". I would say the personal property can be replaced by money. Money will replace it.

QUESTION: Well, there may be family portraits and so on that cannot be.

MR. GREENWALD: Well, I -- there's no allegation here that anything --

QUESTION: I know.

MR. GREENWALD: -- were matters of family -- and, by the way, I would also say that this is store goods also. They can go to --

QUESTION: Of course, it's really a question of whether there's a violation of the due process, rather than the State action issue, I guess.

MR. GREENWALD: Right.

QUESTION: May I just ask you one question on the State action issue? Sometimes a hypothetical will illustrate a position.

Supposing New York passed a statute that said: if a man is large enough and strong enough, he can go next door and take his neighbor's chattels, his lawn mower, one thing and another, and then he has the power to sell them to a third party and give good title. And someone does that, pursuant to that statute. Could you get federal jurisdiction to challenge that statute?

MR. GREENWALD: Well, that raises another issue, which is not in this case. That raises the issue of general non-possessory liens, which is a totally different problem from the warehouseman's lien.

QUESTION: Well, under that hypothetical, do you

think the man would be acting under color of State law?

Within the meaning of 1983.

MR. GREENWALD: Well, I don't think that question is before us. But I would say that the State of New York cannot authorize someone to do a wrongful act.

QUESTION: But the question is, how do we decide when State action is involved, --

MR. GREENWALD: Well, --

QUESTION: -- when action is authorized by a statute, but no State official participates? Is it your view that unless a State official participates, there's never a State action?

MR. GREENWALD: Right, I would say that where a State official does not participate, it's much more difficult to find State action. In racial disputes --

QUESTION: But do you ever find it? That's the question.

MR. GREENWALD: Well, basically, you might never find -- unless it's a racial discrimination case, which -- or a classic governmental function, like in --

QUESTION: Well, your answer is that in my case there would be no State action. I think that's your position.

MR. GREENWALD: Yes, but I don't think --

QUESTION: It's perfectly --

MR. GREENWALD: -- I don't think you'd get very far

relying on such a law, and of course such a law has never been passed.

QUESTION: No, but you'd be able to rely on a --- in federal court you could dismiss on the ground that there's no federal jurisdiction.

MR. GREENWALD: Well, --

QUESTION: Isn't that your position here?

MR. GREENWALD: No, that's not my position here, because the type of lien we're --

QUESTION: What has that got to do with whether the private individual is acting on behalf of the State?

MR. GREENWALD: Well, I think it has a lot to do, because you have to focus upon the type of lien that the warehouseman has. He has a lien by the voluntary -- there's a question -- you know, basically by the delivery by the customer of property for moving and storage to the warehouseman. The customer wants to have his goods taken care of. And, not surprisingly, the warehouseman expects to be paid. The law provides a lien for this service.

QUESTION: Because there's greater legal involvement there's less State action? I don't understand.

MR. GREENWALD: Well, I would put it this way --

QUESTION: What is your test of when there's State action in a case like this? That's what I want to find out.

MR. GREENWALD: Well, I would say that you have to have a traditional State function involving a -- the best example is racial discrimination or, say, free speech, a fundamental right, restriction on a fundamental right; and --

QUESTION: Like due process?

MR. GREENWALD: What?

QUESTION: Like -- like due process?

MR. GREENWALD: Not like; no, I'd say not like.

QUESTION: Well, that's what he said. He wants a little due process here.

MR. GREENWALD: Well, I don't think due process would --

QUESTION: He doesn't object -- just one moment. He doesn't object to you giving the warehouseman a lien; he doesn't object to that. He objects to you selling the property.

MR. GREENWALD: Well, I think that --

QUESTION: Not granting the lien.

MR. GREENWALD: Well, I think that giving him due process would be an illusory benefit, because due process, as we all know, has -- and have in this case -- a very substantial cost, and in the end the person who is going to pay this cost is the customer; and we're dealing here allegedly with people who don't have a lot of money.

QUESTION: Well, he's asking to pay for it.

MR. GREENWALD: No, he has never yet -- well, in the end he will pay for it, because the bill that he's going to receive in the first instance is going to --

QUESTION: But just -- that's a -- if a man wants due process, don't tell him that he can't have it because he'll have to pay for it.

MR. GREENWALD: Well, that's a factor this Court has considered in other cases.

QUESTION: Well, do we have to consider it in this case?

MR. GREENWALD: No, because you're on the State action issue, you're not on the due process issue.

QUESTION: Mr. Greenwald, what if the New York Legislature decided that the courts of New York were so congested that they just had to eliminate some kind of claims for relief and they decided to eliminate any civil action for conversion?

MR. GREENWALD: Well, in --

QUESTION: Do you think that would implicate State action, so that someone who had previously had a claim for conversion could go into the district court and say: The State has taken away my claim?

MR. GREENWALD: No, because we actually had that case with our no-fault law, and I think it was appealed up to this Court, where we, under the no-fault insurance provision,

we provided that any dispute about no-fault benefits, auto insurance, is subject to binding arbitration, it basically was taken out of the courts of the State of New York because we do have a lot of congestion in our courts. And I think that is the example that is operative in that situation.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:23 o'clock, p.m., the case in the above-entitled matter was submitted.]

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