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Constitutional Law—State Action—Debtors and Creditors—Sale of Property Pursuant to Statute and State Action for Purposes of the Fourteenth Amendment—Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976); Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975)

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RECENT NINTH CIRCUIT DECISIONS

CONSTITUTIONAL LAW—STATE ACTION—DEBTORS AND CREDITORS—SALE OF PROPERTY PURSUANT TO STATUTE AND STATE ACTION FOR PURPOSES OF THE FOURTEENTH AMENDMENT—*Melara v. Kennedy*, 541 F.2d 802 (9th Cir. 1976); *Culbertson v. Leland*, 528 F.2d 426 (9th Cir. 1975).

On two recent occasions the Ninth Circuit has faced the issue of whether the private actions of creditors exerting self-help remedies constitute state action for purposes of the fourteenth amendment or "color of state law" necessary to state a claim under 42 U.S.C. § 1983.[1] In *Culbertson v. Leland*,[2] a sharply divided court found state action in a landlord's seizure of a tenant's personal property pursuant to an innkeeper's lien law. In *Melara v. Kennedy*,[3] however, a unanimous court held that there was no state action in the extrajudicial sale of property stored pursuant to a warehouseman's lien. This casenote will explore the criteria used by the Ninth Circuit to determine whether creditor remedies provided by a state constitute "significant state involvement,"[4] which is essential to trigger due process guarantees of the fourteenth amendment.

I. THE FACTS OF *Culbertson* AND *Melara*

In *Culbertson*, the plaintiff tenants moved into the defendant's hotel and agreed to pay rent weekly. After several weeks of regular payment, they fell one week behind, were evicted and locked out of their room.[5] The hotel manager, acting under the authority of the Arizona Innkeep-

1. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

In the Civil Rights Cases, 109 U.S. 3 (1883), the Supreme Court established that the fourteenth amendment was limited to protecting persons against deprivations of liberty and property by the states. The state action requirement of the fourteenth amendment and the color of law requirement of section 1983 are often treated as the same thing and will be so treated in this note. *See* United States v. Price, 393 U.S. 787, 794-95 n.7 (1966).

2. 528 F.2d 426 (9th Cir. 1975).

3. 541 F.2d 802 (9th Cir. 1976).

4. Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976), *citing* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

5. 528 F.2d at 429. For one judge's interpretation of the significance of the eviction,

er's Lien Statute,[6] seized the personal possessions[7] of the tenants as security for the unpaid rent. At no time during the course of the landlord's actions were any state officials involved.[8]

In *Melara*, the plaintiff's home was sold by his conservator and his possessions were stored with Kennedy Van and Storage. Melara first became aware of the storage when he received a bill. Refusing to pay in full, he entered into negotiations with the conservator, the agent of the buyer of his home, and the warehouse. No payment was made for four months. In the meantime, Kennedy had sent notice of foreclosure of the lien and the proposed extrajudicial sale, pursuant to California Commercial Code section 7210.[9] Melara filed suit alleging that the proposed sale violated his due process rights under 42 U.S.C. § 1983. Unlike the Culbertsons, he did not challenge the warehouseman's right to hold the goods, only the extrajudicial sale.[10]

II. ANALYSIS OF THE DECISIONS

The analyses used by the Ninth Circuit in what, at first glance, appear to be contradictory decisions is indicative of the court's struggle to adapt the state action concept to the area of private creditor remedies. However, in viewing these cases together, certain key factors have emerged. Though far from providing clarity, they at least provide some guidelines for a case by case determination.

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see text accompanying note 28 *infra*.

6. The Arizona statute is typical of innkeeper lien laws. It gives to inn and apartment house keepers a lien on the baggage and other property of their guests for charges due, with the right to possession of the property until the charges are paid. ARIZ. REV. STAT. ANN. § 33-951 (West 1956). If the property is unclaimed or the charges remain unpaid for four months, the property may be sold at public auction, with the proceeds used to satisfy the unpaid charge and the balance going to the owner of the property. Also contained in the statute are notice provisions. *Id.* § 33-952.

7. According to the complaint, the items seized included special medicines and foods for Mrs. Culbertson, who was nearly blind and diabetic, and Mr. Culbertson's prescription medicines. 528 F.2d at 434 n.3 (Ely, J., concurring).

8. The manager did call the Phoenix Police Department to ascertain her rights and was told the seizure was permissible under state law. 528 F.2d at 427.

9. This section provides for the enforcement of the warehouseman's lien which is acquired by section 7209. Section 7210 states in part:

> (1) a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods.

CAL. COM. CODE ANN. § 7210 (West 1964).

10. 541 F.2d at 803.

A. *Divergent Views in* Culbertson

The wide disparity of opinion in *Culbertson* is reflective of the present uncertainty of the courts in defining state action.[11] In the lead opinion, Judge Weigel analyzed the case under the criteria set forth in the Ninth Circuit's landmark automobile repossession case of *Adams v. Southern California First National Bank*[12] to determine whether there was significant state involvement. The first of the three criteria was the presence or absence of private rights under the common law. In *Adams*, the Ninth Circuit noted that sections 9503 and 9504 of the

11. *See* Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976) (warehouseman's lien —no state action); Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975) (innkeeper's lien—state action); Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976) (innkeeper's lien—no state action); Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975) (innkeeper's lien—no state action); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) (landlord lien—state action); Brooks v. Flagg Bros., 404 F. Supp. 1059 (S.D.N.Y. 1975) (warehouseman's lien—no state action); Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S.D. Fla. 1975) (innkeeper's lien—state action); Ragin v. Schwartz, 393 F. Supp. 152 (W.D. Pa. 1975) (landlord lien—state action); Smith v. Bekins Moving & Storage Co., 384 F. Supp. 1261 (E.D. Pa. 1974) (warehouseman's lien—no state action); Adams v. Joseph F. Sanson Invest. Co., 376 F. Supp. 61 (D. Nev. 1974) (landlord lien—state action); Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972) (landlord lien—state action); Dielen v. Levine, 344 F. Supp. 823 (D. Neb. 1972) (landlord lien—state action); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972) (innkeeper's lien—state action); Magro v. Lentini Bros. Moving & Storage Co., 338 F. Supp. 464 (E.D.N.Y. 1971), *cert. denied*, 406 U.S. 961 (1972) (warehouseman's lien—assuming state action, no due process violation); Kerrigan v. Boucher, 326 F. Supp. 647 (D. Conn. 1971), *aff'd on other grounds*, 450 F.2d 487 (2d Cir. 1971) (innkeeper's lien—no state action); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeeper's lien—state action); Blye v. Globe-Wernicke Realty Co., 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973) (innkeeper's lien—state action); Jones v. Banner Moving & Storage, 358 N.Y.S.2d 885 (Sup. Ct. 1974), *modified and aff'd*, 369 N.Y.S.2d 804 (App. Div. 1975) (warehousehan's lien—appellate court holds constitutional decision was premature as lower court failed to discuss state action requirement).

12. 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). In *Adams*, the Ninth Circuit examined sections 9503 and 9504 of the Uniform Commercial Code as enacted in California, *see* note 13 *infra*, and determined that the actions of creditors in using self-help to repossess automobiles of delinquent debtors did not constitute action under color of state law. 492 F.2d at 431. For further comments on repossession under the U.C.C., *see generally* Burke and Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1 (1973) [hereinafter cited as Burke and Reber]; Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302 (1972); Clark and Landers, *Sniadach, Fuentes, and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973); Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767 (1973); Neth, *Repossession of Consumer Goods: Due Process for the Consumer: What's Due for the Creditor?*, 24 CASE W. RES. L. REV. 7 (1972); Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975).

Uniform Commercial Code as enacted in California[13] were merely codifications of common law rights and therefore, the right of repossession existed independently of the state statute.[14] This was not the situation in *Culbertson.*

Though historically innkeepers had rights under the common law to seize a boarder's possessions as security for unpaid charges,[15] boarding-house keepers did not enjoy similar lien rights.[16] Since Mrs. Leland, the hotel manager, was not an innkeeper under the common law definition,[17] Judge Weigel concluded that the lien exercised in *Culbertson* was purely statutory in nature. Though he warned that this finding was not "dispositive" of the issue, he concluded that "state action [was] more likely found where the common law did not permit the action. . . ."[18]

The second criterion was the relationship of the debt owed to the property seized.[19] In *Adams,* the car seized was the subject to a specific security interest. In *Culbertson,* however, in executing the lien the manager seized collateral having no relation to the debt owed.[20] This broad power of seizure, as distinguished from the narrow power subject to the written terms of an agreement in repossession cases, was considered to be a function of the state and a power over which the state should retain a monopoly.[21]

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13. Section 9503 permits a secured party, upon default by the debtor, to take possession of the collateral. In so doing, judicial process need not be utilized if possession can be had without breach of the peace. CAL. COM. CODE ANN. § 9503 (West 1964). Section 9504 provides that a secured party may sell, lease, or otherwise dispose of the collateral upon default. *Id.* § 9504 (West Supp. 1976).

14. 492 F.2d at 330, 333-34.

15. *See* Hogan, *The Innkeeper's Lien at Common Law,* 8 HASTINGS L. REV. 33 (1956); Comment, *A Proposal for a Constitutional Innkeeper's Lien Statute,* 24 BUFFALO L. REV. 369, 393 (1975).

16. 528 F.2d at 429.

17. *Id.* at 431. In Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510 (Iowa 1928), the court defined an innkeeper as "one who held out his place as one for the entertainment of all respectable transient persons who chose to come to him." *Id.* at 511.

18. 528 F.2d at 431.

19. *Id.*

20. *Id.*

21. *Id.* The adoption of this view is in conformity with the theory of Judge Kaufman in Shirley v. State Nat'l Bank of Conn., 493 F.2d 739, 745-47 (2d Cir.), *cert. denied,* 419 U.S. 1009 (1974) (Kaufman, C.J., dissenting), that the unrestricted non-consensual general seizure of collateral is a power so fraught with danger that the state should retain a monopoly over it. *See also* Hall v. Garson, 430 F.2d 430 (5th Cir. 1970).

The third criterion analyzed was the presence or absence of private contractual remedies. Unlike *Adams*, where a written contract provided a private self-help remedy, in *Culbertson* the sole authority for the seizure was the statutory lien.[22]

Judge Ely concurred in *Culbertson*, but took a more direct route to finding state action. He viewed the Arizona lien law as a clear delegation of a public function to private individuals.[23] He adopted the principle enunciated in the Fifth Circuit landlord lien case, *Hall v. Garson*,[24] that a state must retain a monopoly over the power to seize collateral to satisfy a general debt. The *Hall* opinion had found a clear analogy between the actions of the landlady and the actions of private parties in the all-white primary voting cases.[25] In both situations, the parties were performing a traditional state function delegated by the state. Judge Ely reasoned that since such power was "fraught with dangers," it must be restrained by the constitutional requirements of due process of law.[26]

Judge Choy, in dissent, did not find state action. He summarily rejected Judge Weigel's analysis[27] and distinguished *Hall* on its facts. In *Hall*, the apartment was entered and the television removed prior to any legal termination of the tenancy. In *Culbertson*, the manager evicted the tenants before taking constructive possession of the property. This distinction, he argued, made Mrs. Leland merely the bailee of the Culbertsons' belongings.[28] It did not, however, clothe her with the authority of state law.[29]

Judge Choy interpreted *Adams*, on which Judge Weigel had relied for guidelines, as "holding without qualification that a creditor authorized by state law to seize property of his debtor, where this can be done without a breach of the peace, does not perform a public function

22. 528 F.2d at 432. In Judge Weigel's view, the existence of the statute in *Adams* was almost "superfluous." *Id.*

23. 528 F.2d at 434-35. Judge Ely expressly rejected the distinction between the common law and the statutory nature of the lien. *Id.* at 435 n.5.

24. 430 F.2d 430 (5th Cir. 1970). Judge Ely found ample support for the public function test in Terry v. Adams, 345 U.S. 461 (1953), and Marsh v. Alabama, 326 U.S. 501 (1946). 528 F.2d at 434, *citing* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974).

25. 430 F.2d at 439. *See* Terry v. Adams, 345 U.S. 461 (1953) (exclusion of black voters by all-white voting association); Smith v. Allwright, 321 U.S. 649 (1944) (exclusion of blacks by voter qualifications); Nixon v. Condon, 286 U.S. 73 (1932) (exclusion of black voters from primaries).

26. 528 F.2d at 433.

27. *Id.* at 435.

28. *Id.*

29. *Id.*

so as to constitute state action."[30] His primary concern lay with an individual's expectations of residential privacy.[31]

The diverse approaches in *Culbertson* thus provided little guidance for determining whether state action is present in the area of creditor remedies. Less than a year later the court had the chance to speak again.

B. *Has* Melara *Alleviated the Uncertainty?*

Melara provided Judge Choy with an opportunity to reassess the state action question. The factors posited as state action criteria in *Culbertson* served as guideposts.

1. Common Law/Statutory Law Distinction

Judge Choy attempted to lay to rest the common law/statutory law distinction raised by Judge Weigel in *Culbertson* as a viable factor in determining the presence or absence of state action.[32] The conclusion that this factor was of "dubious worth"[33] was underscored by the further assertion that the statute had been in existence for 120 years and had not been enacted with the intention of providing a way for the state to circumvent the fourteenth amendment.[34]

In *Culbertson*, Judge Weigel had disclaimed full reliance on the fact that the statute gave the hotel manager a right she would not have had at common law.[35] However, it was evident from his thorough and scholarly discussion of the historical basis of landlord liens and his cursory treatment of the other two factors[36] that the distinction carried great weight. This basis for finding state action has been subject to criticism, commentators warning that to "make state action turn upon whether the right being asserted has common law origins [would] lead to anomalous results."[37] Courts, though recognizing the statutory nature

30. *Id.* at 436. The *Melara* court also noted that since the seizure and proposed sale were limited to the goods stored in the warehouse, enforcement would be peaceful. 541 F.2d at 807. It is questionable how breach of the peace could be the dividing line for state action purposes. The idea comes from U.C.C. § 9503. See note 13 *supra.*

31. 528 F.2d at 437.

32. 541 F.2d at 805-06. See text accompanying notes 13-18 *supra.*

33. *Id.* at 805. In *Culbertson*, Judge Ely had noted that this factor would lead to obsolete distinctions. 528 F.2d at 435 n.5. *See* Davis v. Richmond, 512 F.2d 201, 203-04 (1st Cir. 1975).

34. 541 F.2d at 806. See notes 61-70 *infra* and accompanying text.

35. 528 F.2d at 431.

36. *Id.* at 431-32. See text accompanying notes 19-22 *supra.*

37. Burke and Reber, *supra* note 12, at 47. In full the authors say:

of the lien, have felt that this factor should be given little or no weight because it is the state's function to continually redefine property rights and remedies available to creditors.[38]

2. Consideration of State Action Theories

The *Melara* court considered key Supreme Court decisions and modern theories of state action that have developed therefrom. None proved to be applicable. Both the symbiosis or joint venture theory[39] and the entwinement or regulation theory[40] were summarily discarded. The court did not consider an offshoot of the entwinement theory that

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The fact that the law under attack is new and creates, rather than codifies, common law rights should not change the inquiry. The focus for state action purposes should always be on the impact of the law upon the private ordering, not the law's age or historical underpinnings. Unless the law in some fashion significantly interferes with private ordering, the challenged conduct should not be attributed to the state. To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct, pursuant to the identical state statutory or judicial law, would be state action in some states while not in others depending solely upon the fortuitous and unimportant circumstance of the age and history of the law.

Id.

38. *See* Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150, 155-56 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976); Davis v. Richmond, 512 F.2d 201, 202-03 (1st Cir. 1975).

39. The leading case under the symbiosis theory is Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In *Burton*, the Court found the requisite state action in the relationship between the state-owned garage and the racially discriminatory private restaurant, which rented space in the structure. Although the Court warned that it did not have an exact formula to ascertain when state involvement became sufficient to trigger the state action requirement, it held that the state of Maryland had "so far insinuated itself into a position of interdependence with [the restaurant owner] that it must be recognized as a joint participant in the challenged activity. . . ." *Id.* at 725.

In United States v. Price, 383 U.S. 787 (1966), the Court examined the state action question in the context of state officials and private parties cooperating in civil rights violations. The court found action under color of state law in the "joint activity" of the state officials and the private parties. *Id.* at 794-95.

40. 541 F.2d at 806-07. The entwinement theory primarily arises where a state agency has heavily involved itself in activities of a private nature through regulation. In the leading case of Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court found that the state issuance of a liquor license to a private club did not constitute state action and noted that they had "never held . . . that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receive[d] any sort of benefit or service at all from the State; or [was] subject to state regulation in any degree whatever." *Id.* at 173.

Courts have found state action, however, in the public utility field where state agencies regulate extensively. One of the strongest opinions came in Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153 (6th Cir. 1973), wherein the Sixth Circuit found the "operations of the appellant company [were] fully circumscribed by an all encompassing system of state statutes, city ordinances and the supervision of state regulatory authority . . . ." *Id.* at 165.

The holding in *Palmer* was undermined by Jackson v. Metropolitan Edison Co., 419

has often been raised in creditor lien litigation.[41] This latter concept, developed in *Reitman v. Mulkey*,[42] is based on state involvement through the passage of legislation which "encourages" an activity previously forbidden.[43] Presumably, it was not discussed in *Melara* because the court did not consider it a viable theory with respect to private creditor remedies since its genesis and development had taken place in courts facing issues of racial discrimination.[44]

The *Melara* court did consider application of the public function theory, which was applied to creditor remedy cases in the Fifth Circuit.[45] In *Culbertson*, Judge Ely promoted this theory, reasoning that the statute which permitted seizure of collateral as security for a debt was a role historically reserved to the state.[46] In *Melara*, however, the theory was held to be inapplicable on the facts because the property held for sale was the very property that created the debt.[47] Thus, Kennedy

U.S. 345 (1974), which involved a privately-owned utility company licensed by the Pennsylvania Utility Commission. After examining several theories of state action (including the entwinement theory), the Court ruled that the petitioner had failed to show a sufficient connection between the termination of the utility service, without notice or hearing, and any action of the state. Though the respondent utility was heavily regulated, the state involvement was not sufficient to constitute state action. *Id.* at 358-59. *Cf.* Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

41. *See* Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976); Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975); Brooks v. Flagg Bros., 404 F. Supp. 1059 (S.D.N.Y. 1975); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

42. 387 U.S. 369 (1967).

43. In Reitman v. Mulkey, 387 U.S. 369 (1967), the people of California, utilizing the processes of initiative and referendum, had added an amendment to the California Constitution, the effect of which would have been to allow racial discrimination in private housing rental and sale. This action changed prior California law, which had prohibited racial discrimination in housing. The Court found that the state had encouraged the wrongful activity and had significantly involved itself in the racial discrimination. *Id.*

44. *See, e.g.*, Evans v. Abney, 396 U.S. 435 (1970); Reitman v. Mulkey, 387 U.S. 369 (1967); Shelley v. Kraemer, 334 U.S. 1 (1948).

45. *See* Hall v. Garson, 430 F.2d 430 (5th Cir. 1970). The public function test finds state action present in the exercise by a private entity of powers which are the traditional and exclusive reserve of the state. The theory was originally developed to combat racial discrimination in the voting rights area. *See, e.g.*, Evans v. Newton, 382 U.S. 296, 301-02 (1966) (privately-owned municipal park); Terry v. Adams, 345 U.S. 461, 469-70 (1953) (voting rights); Marsh v. Alabama, 326 U.S. 501, 506-09 (1946) (freedom of speech); Smith v. Allwright, 321 U.S. 649, 659-66 (1944) (voting rights). *But see* Evans v. Abney, 396 U.S. 435, 445 (1970), where the Court refused to find state action when the park that was the subject of the suit in Evans v. Newton, 382 U.S. 296 (1966), was returned to the testator's heir by operation of Georgia trust law.

46. 528 F.2d at 433 (Ely, J., concurring).

47. 541 F.2d at 807.

Van and Storage did not function as if it had a "roving commission."[48] Also, Kennedy Van and Storage provided notice to the debtor[49] and, because it already had possession of the property, no seizure was necessary.[50]

Though the *Melara* court did not advocate the application of the public function test,[51] neither did it completely reject the test. The legal merits of the theory were not explored. This was the same position taken by Judge Choy in *Culbertson* when he chose to distinguish *Culbertson* from *Hall v. Garson*[52] and impliedly leave the public function test as a viable theory.[53]

3. Relationship of the Property to the Debt; the Existence of a Contract

The key factors in *Melara* were the existence of a private contractual remedy and the direct relationship between the debt and property. The court recognized the special interest that attaches to "goods that act as . . . collateral."[54] Unlike *Culbertson*, the levy was not a "general and indiscriminate" one.[55] Rather, as in *Adams*, the enforcement of the lien was peaceful and limited to goods stored.[56] Thus, the dangers that accompany a "roving commission" were absent.[57]

Also, in *Melara* the stored property was the basis of the obligation.[58] This was similar to *Adams*, where a security interest was created by contract in the specific automobile sold.[59] In contrast, the property of the tenant in *Culbertson* did not have any direct relationship to the debt owed for rent.[60]

These pivotal factors allowed the court to treat a sheriff performing his public duty differently from a creditor. Stripped down, *Melara* holds that where private parties have entered into a written agreement,

48. *Id.*
49. *Id.*
50. *Id.* at 808.
51. The court noted that the theory had never been accepted in the Ninth Circuit. *Id.* at 807.
52. 430 F.2d 430 (5th Cir. 1970).
53. 528 F.2d at 435, 437.
54. 541 F.2d at 807.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

and the property to be sold without any state involvement actually created the debt, state action will not be found.

III. HISTORICAL PERSPECTIVE

The historical purpose of the fourteenth amendment has been protection against racial discrimination.[61] It was primarily in this area that the Supreme Court expanded the state action concept.[62] Though the Court has not yet provided guidance in the area of creditor remedies,[63] it is unlikely that the Court would apply the broad reach of state action used in discrimination cases.

Commentators have urged that creditor remedy cases be distinguished from racial discrimination cases[64] and have endorsed a balancing approach characteristic of the Burger Court.[65] This approach weighs the extent of governmental participation against the importance of the rights asserted.[66] Application of a "sliding scale" could conceivably result in a finding that the same act constitutes state action in one context, but not in another.

The Ninth Circuit was perhaps the first court to discuss directly the distinction between racial discrimination and creditor remedy cases. In

61. *See* Burke and Reber, *supra* note 12, at 4.

62. *See* cases cited note 45 *supra; see also* Robinson v. Florida, 378 U.S. 153 (1964). The Supreme Court also expanded the state action concept in the area of first amendment freedoms. In Marsh v. Alabama, 326 U.S. 501, 504-09 (1946), and Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315-20 (1968), the Court articulated the theory that in certain instances, private property became the functional equivalent of public property and the actions of private individuals the equivalent of those of the state. The *Logan Valley* decision was distinguished and severely undermined by Lloyd Corp. v. Tanner, 407 U.S. 551, 562-67 (1972). In the recent case of Hudgens v. NLRB, 424 U.S. 507 (1976), the Court made it clear that the functional equivalent test as applied in *Logan Valley* had been overruled by the subsequent decision in *Lloyd Corp.* Thus, only a factual situation similar to *Marsh*, however unlikely, will give rise to the state action concept.

63. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) is an exception. The Court went into an extensive discussion of state action and concluded that none was present. In other landmark creditor remedies cases the question of state action was not discussed because each involved the participation of a state official in the process prior to seizure. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (court clerk); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (judge); Fuentes v. Shevin, 407 U.S. 67 (1972) (court clerk); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (court clerk).

64. *See* Note, *Banker's Lien and Equitable Setoff: Constitutional and Policy Considerations for Protecting Bank Customers*, 27 STAN. L. REV. 1149, 1155-56 (1975).

65. *See* Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974). *But cf.* Comment, *Creditors' Remedies: Does The State Help Those Who Help Themselves?*, 20 VILL. L. REV. 1035, 1037, 1048-56 (1974-75).

66. *See* Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 863 (1974).

Adams v. Southern California First National Bank,[67] the court recognized that state action is a jurisdictional question, not a matter of substantive merit, but it determined that "balancing facts and weighing circumstances [required] consideration of substantive facts."[68] The court emphasized the clear differences between the enforcement of deficiency claims and the enforcement of racial covenants,[69] and it was "not convinced that the resolution of the state action question involving prejudgment self-help repossession of secured property is controlled by a case involving racial discrimination."[70]

The absence of Supreme Court guidance has resulted in a lack of uniformity in the numerous decisions on self-help creditor remedies to date.[71] At first, statutory lien laws were struck down routinely as unconstitutional. For example, the California innkeeper's lien law was invalidated in *Klim v. Jones*,[72] where the district court relied heavily on *Reitman v. Mulkey*.[73] It emphasized that the statute was the only authorization for the seizures and the lien statute encouraged the innkeeper to act.[74] The court read *Reitman* as evidence of an increasingly liberal trend towards finding state action.[75]

Since then the Supreme Court has retreated from such an expansive definition of state action,[76] and the lower courts have begun to reflect the more restrictive reading. In *Davis v. Richmond*,[77] the First Circuit, in construing a state lien statute,[78] found no state action in a boarding-

67. 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

68. *Id.* at 333 n.23.

69. *Id.* at 337.

70. *Id.* at 333. The importance of distinguishing racial discrimination cases from other civil rights action was more forcefully stated by the Ninth Circuit recently:

> [W]hile section 1983 is not limited in application to cases of discrimination by virtue of race or color, a "less onerous" test [for state involvement] has been applied to cases involving those ingredients and a "more rigorous" standard applied for other claims.

Aasum v. Good Samaritan Hosp., 542 F.2d 792, 794 (9th Cir. 1976), *citing* Weise v. Syracuse Univ., 522 F.2d 397, 405 (2d Cir. 1975); Jackson v. Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

71. *See* note 11 *supra*.

72. 315 F. Supp. 109 (N.D. Cal. 1970).

73. 387 U.S. 369 (1967); *see* text accompanying notes 42-44 *supra*.

74. 315 F. Supp. at 114-15.

75. *Id.* The Court concluded that in light of Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), the innkeeper lien statute was unconstitutional insofar as it failed to provide for a hearing prior to imposition of the lien. 315 F. Supp. at 124.

76. *See* notes 62-66 *supra*.

77. 512 F.2d 201 (1st Cir. 1975).

78. MASS. GEN. LAWS ANN. ch. 255, § 23 (West 1959). The identical statute was held unconstitutional in Porter v. Fleischhacker, No. 00538 Eq. (Boston Housing Ct. Jan. 15, 1975).

house keeper's seizure of a tenant's belongings.[79] The plaintiffs asserted both an encouragement and public function theory, but both arguments were rejected. The court found the fact that the boardinghouse keeper did not enjoy the lien at common law to be insignificant,[80] reasoning that it was the function of government to regulate property rights.[81] The court analogized to the self-help remedies of bankers' liens[82] which had not found state action. Although the court agreed that the effect of the seizure of a tenant's belongings was similar to the action of a sheriff, it stated further that to place "reliance on this fact rather than the extent of state involvement would rob the state action requirement of any meaning."[83]

In the same year, the Seventh Circuit in *Anastasia v. Cosmopolitan National Bank*[84] ruled that seizure of property by hotelkeepers for nonpayment of rent did not constitute state action.[85] The court believed that there was an insufficient nexus between the action of the state in enacting the statute and the actions of the hotelkeepers to support an entwinement theory.[86] The court stated its basic disagreement with the public function theory, concluding that the execution of a lien "can hardly be said to be traditionally and exclusively that of the state."[87] At most, it was a power shared by both the state and private persons.[88]

In two district court cases, the challenged sale provisions of warehousemen's liens were held not to constitute state action. One New York case[89] went so far as to say that even if there had been no contract provision for the sale, state action still would not be present.[90] A Pennsylvania case[91] analogized to the Third Circuit's auto repossession case,

79. 512 F.2d at 205.

80. *Id.* at 203.

81. *Id.* at 204.

82. *Id.* at 202, *citing* Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927 (1st Cir. 1974). The California Supreme Court has also failed to find state action in upholding the banker's lien in Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974).

83. 512 F.2d at 205.

84. 527 F.2d 150 (7th Cir. 1975), *cert. denied,* 424 U.S. 928 (1976).

85. *Id.* at 157. In so deciding, the circuit court reached an opposite conclusion to that of an earlier district court dealing with the same Illinois innkeeper lien. *See* Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972).

86. 527 F.2d at 156. The absence or presence of the lien at common law was deemed not to have overriding significance but was "one consideration in the mix." *Id.*

87. *Id.* at 157.

88. *Id.* at 157-58.

89. Brooks v. Flagg Bros., 404 F. Supp. 1059 (S.D.N.Y. 1975).

90. *Id.* at 1066.

91. Smith v. Bekins Moving & Storage Co., 384 F. Supp. 1261 (E.D. Pa. 1974).

Gibbs v. Titelman,[92] and found no state action.

The Ninth Circuit in *Adams* was at the forefront of this new trend and has advanced it in *Melara*. Was *Culbertson* therefore an aberration?

IV. A Prognosis for the Ninth Circuit

In recent years a number of different statutory liens have been tested.[93] Certain key factors have emerged which, if not providing absolute clarity, at least make it easier to predict how the Ninth Circuit will rule on the question of state action in the area of self-help creditor remedies. If the creditor is in possession of the property and there is a security agreement between contracting parties, then the retention of the property and subsequent sale to satisfy delinquent debts will probably be upheld with no state action found. On the other hand, when there is no contract, no relationship between the property seized and the debt owed, and the debtor is in possession of the property, the court is likely to find state action.

In *Culbertson*, Judge Weigel's statutory law/common law distinction weighed heavily in determining state action issues. This factor was rejected by the other two judges, and was completely discarded in *Melara*. Thus, at best, its continued vitality is suspect.

The public function test, though never adopted in the Ninth Circuit,[94] may still have viability. In *Culbertson*, Judge Ely argued that there was "substantial support in Supreme Court precedent for its application. . . ."[95] In *Melara*, the theory was held to be inapplicable

92. 502 F.2d 1107 (3d Cir. 1974). Following the lead of the Ninth Circuit in *Adams*, all of the circuits and most district courts have found no state action in cases of auto repossession. *See* Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Gibbs v. Titelman, 502 F.2d 1107 (3d Cir. 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974); Bowman v. Chrysler Credit Corp., 496 F.2d 1322 (5th Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); *cf.* Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973). *But see* Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974); Boland v. Essex County Bank and Trust Co., 361 F. Supp. 917 (D. Mass. 1973); Straley v. Gassaway Motor Co., 359 F. Supp. 902 (S.D. W. Va. 1973).

93. *See* note 11 *supra*. For recent California cases interpreting statutory liens, see Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974) (garageman's lien); Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (banker's lien).

94. 541 F.2d at 807.

95. 528 F.2d at 434 (Ely, J., concurring). However, only one case is cited, Jackson

on the facts.[96] In a dissent to the denial of a rehearing en banc in *Adams*, Judge Hufstedler argued that the California self-help repossession laws so involved the state as to constitute state action.[97] Although she was focusing on the heavily regulated automobile-secured credit industry, Judge Hufstedler cited *Hall v. Garson*,[98] the Fifth Circuit's landlord lien case, for the proposition that the state cannot avoid the fourteenth amendment by delegating its functions to private creditors.[99] Thus, by not closing the door on the public function test, the Ninth Circuit has left open the option of applying it, at least in cases where there is a broad and general seizure of personal property having no relation to the outstanding debt.

V. CONCLUSION

Though one's sympathies lie with the plight of the Culbertsons and Mr. Melara, courts cannot intervene to protect them from having their property taken without due process of law absent a preliminary finding of state action. Such a finding will not be based solely on the fact that the state by enacting a statute has lent affirmative support to creditors,[100] unless there is a showing that the statute is in direct contravention of a goal of the fourteenth amendment.[101] To hold otherwise would subject nearly all private activity to the application of the fourteenth amendment and leave the requirement of state action meaningless.[102]

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v. Metropolitan Edison Co., 419 U.S. 345 (1974), where the Supreme Court rejected the contention that the action of a public utility in shutting off service was really an action of the state. The wedge left in the door, upon which Judge Ely seized, was language indicating that if the utility were exercising some power traditionally assigned to the state, then that would constitute state action. Because it is grounded in supposition, this argument is shaky standing alone. Even the court in Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), that Judge Ely used as a guidepost in *Culbertson*, backtracked in the second opinion to more of an authorization theory. Hall v. Garson, 468 F.2d 845 (5th Cir. 1972). There the court stated that the statutory lien in issue "clothes the apartment operator with clear statutory authority to enter into another's home and seize property contained therein. This makes his actions those of the State." *Id.* at 848.

96. *See* text accompanying notes 47-50 *supra.*

97. 492 F.2d at 340 (Hufstedler, J., dissenting).

98. 430 F.2d 430 (5th Cir. 1970). See text accompanying notes 24-29, 45-53 *supra.*

99. 492 F.2d at 342.

100. *See* Melara v. Kennedy, 541 F.2d 802, 806 (9th Cir. 1976); Culbertson v. Leland, 528 F.2d 426, 431 (9th Cir. 1975); Adams v. Southern California First Nat'l Bank, 492 F.2d 324, 330 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

101. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967).

102. *See* Burke and Reber, *supra* note 12, at 43.

Absent this showing, the alternatives are numerous. The concept of state action can be applied broadly or narrowly; it can be tested by a single theory or combination of factors which add up to state action. Currently, there is precedent to support every approach, and it is time for the Supreme Court to lend some guidance. It is probable that the Court will find no state action when it examines self-help creditor remedies. Taking a cue from the Court, the lower courts are applying a different standard to non-discrimination cases. If this approach is to continue it must be constitutionally justified. If the Court declines to speak, it will be left to the legislatures to insure that adequate procedures are incorporated into the creditor remedy statutes to protect debtors from deprivation of their property without due process of law.

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