

Florida State University Law Review

Volume 2 | Issue 2

Article 8

Spring 1974

Northside Motors, Inc. v. Brinkley, 282 So. 2d 617 (Fla. 1973)

Florida State University Law Review

Follow this and additional works at: <https://ir.law.fsu.edu/lr>



Part of the Securities Law Commons

Recommended Citation

Florida State University Law Review, *Northside Motors, Inc. v. Brinkley*, 282 So. 2d 617 (Fla. 1973), 2 Fla. St. U. L. Rev. 391 (1974) .

<https://ir.law.fsu.edu/lr/vol2/iss2/8>

This Comment is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

selling situation, however, should have been expressly rejected by the court because, although such application arguably is within the letter of the statute, it is not within the statute's spirit.²⁷

Uniform Commercial Code—SECURED TRANSACTIONS—REPOSSESSION OF COLLATERAL WITHOUT JUDICIAL PROCESS NOT VIOLATIVE OF FOURTEENTH AMENDMENT.—*Northside Motors, Inc. v. Brinkley*, 282 So. 2d 617 (Fla. 1973).

Paul Brinkley financed a 1968 Buick under a sales contract with Northside Motors (Northside). The contract stipulated that title and security remained in the seller until all payments were made in full, and that the seller retained the right to repossess without notice in the event of default. After Brinkley had defaulted on the contract, employees of Northside took possession of the car without his knowledge or consent. Brinkley brought an action for unlawful conversion and damages. The trial court held invalid the provision of the sales contract consenting to repossession without notice¹ and granted Brinkley summary judgment on the issue of liability.² On motion for rehearing, Northside alleged that the court had failed to consider the effect of section 679.503³ of the Florida statutes, which grants

27. See *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 619 (1967); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459-60 (1892). Put another way, the courts ought to look beyond words used in legislation when the supposed meaning leads to absurd or futile results, or to an unreasonable result plainly at variance with the policy of the legislation as a whole. *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966).

1. Paragraph 18 of the contract provided:

In the event of default . . . Seller, without notice, shall have the right to . . .
(c) lawfully enter the premises of any Buyer where the Motor Vehicle may be found without prior notice, demand for performance or legal process and take possession of the Motor Vehicle without being liable in any way to such Buyer on account of entering said premises

Northside Motors, Inc. v. Brinkley, 282 So. 2d 617, 618 (Fla. 1973).

2. See 282 So. 2d at 619.

3. The relevant part of § 679.503 provides:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

FLA. STAT. § 679.503 (1971). This section is a verbatim codification of UNIFORM COMMERCIAL CODE § 9-503.

creditors the right to repossess without judicial process. The trial court found the statute unconstitutional as a violation of the procedural due process guarantee of the fourteenth amendment to the United States Constitution.⁴ On direct appeal, the Florida Supreme Court reversed, upholding the constitutionality of section 679.503.⁵

After the United States Supreme Court in *Sniadach v. Family Finance Corp.*⁶ and *Fuentes v. Shevin*⁷ held two statutory summary creditors' remedies unconstitutional for failure to require notice and some form of hearing prior to dispossession, it might have been expected that similar summary procedures would be challenged. Section 9-503 (self-help repossession) of the Uniform Commercial Code (UCC)⁸ is one such summary creditors' remedy that commentators have suggested might violate the procedural due process requirements set forth in *Sniadach* and *Fuentes*.⁹ However, the Florida Supreme Court in *Northside Motors* refused to extend the rationale of these cases to invalidate section 679.503, Florida's codification of UCC section 9-503, since no "state action" is involved in repossession undertaken pursuant to that section.¹⁰

The fourteenth amendment to the United States Constitution provides that no state shall deprive any person of life, liberty or property, without due process of law.¹¹ This prohibition pertains only to deprivations involving action of the state, "by whatever instruments or in whatever modes that action may be taken."¹² As Justice Bradley ob-

4. See 282 So. 2d at 619.

5. *Id.* at 624. The constitutionality of § 679.503 had previously been upheld in the United States District Court for the Southern District of Florida. See *McCormick v. First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971).

6. 395 U.S. 337 (1969). *Sniadach* struck down Wisconsin's prejudgment garnishment procedure as a taking of property without notice and prior hearing in violation of the "fundamental principles of due process." *Id.* at 342.

7. 407 U.S. 67 (1972). In *Fuentes*, the prejudgment replevin procedures of both Florida and Pennsylvania were held invalid as a violation of due process since no provision was made for an opportunity to be heard prior to dispossession.

8. UNIFORM COMMERCIAL CODE § 9-503. This section, entitled "Secured Party's Right to Take Possession After Default," is codified verbatim in FLA. STAT. § 679.503 (1971). See note 3 *supra*.

9. See Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973); Spak, *The Constitutionality of Repossession by Secured Creditors Under Article 9-503 of the Uniform Commercial Code*, 10 HOUSTON L. REV. 855 (1973). But see Note, *State Action and the Constitutionality of UCC § 9-503*, 30 WASH. & LEE L. REV. 547 (1973); Comment, *Procedural Due Process: For Sale in Texas to the Highest Bidder?*, 10 HOUSTON L. REV. 880 (1973).

10. 282 So. 2d at 624.

11. U.S. CONST. amend. XIV, § 1.

12. *Ex parte Virginia*, 100 U.S. 339, 346-47 (1880). This was one of the early cases that emphasized the "state action" requirement of the fourteenth amendment. In its discussion of state action, the Court further stated that a "State acts by its legislature,

served in *The Civil Rights Cases*:¹³ "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."¹⁴ In *Sniadach* and *Fuentes* the issuance of judicial writs¹⁵ and the acts of sheriffs¹⁶ satisfied the state action requirement. Since the acts of legal officers of the state obviously constituted action by the state, the Supreme Court had no difficulty finding the fourteenth amendment applicable.¹⁷

In determining whether the fourteenth amendment prohibits creditors' repossession under Florida statutes section 679.503, the Florida Supreme Court considered the possible existence of "a sufficient element of state action" evinced by "some form of active assistance or cooperation on the part of the state" in the challenged activity.¹⁸ On the facts of the case, no direct involvement of any officer of the state was apparent; Brinkley did not even allege that the state had acted directly to repossess his car. Thus, the only possible ground for the finding of "a sufficient element of state action" was the enactment of section 679.503.

The court implicitly recognized that indirect, nonobvious state involvement in the activities of private parties might, in some cases, constitute "state action."¹⁹ However, the court apparently would find

its executive, or its judicial authorities." Undoubtedly, the Court referred to what is now termed "direct" state action and did not understand this concept to encompass "nonobvious involvement" of the state.

13. 109 U.S. 3 (1883).

14. *Id.* at 11. The Florida Supreme Court restated this familiar axiom in its opinion. See 282 So. 2d at 620.

15. The Wisconsin garnishment statute provided that the clerk of court issue a summons at the request of the creditor's lawyer. The lawyer then served the garnishee who "froze" one-half the employee-debtor's wages. The statute gave the plaintiff-creditor 10 days after service on the garnishee in which to serve the summons and complaint on the defendant-debtor. The debtor was thus deprived of property without any notice or opportunity to be heard—solely upon the issuance of a summons by the clerk of court, who was clearly an agent of the state. *Cf. Sniadach v. Family Finance Corp.*, 395 U.S. at 338-39.

16. Both the Florida and Pennsylvania statutes involved provided for the issuance of writs ordering state officers (sheriffs) to replevy the goods and chattels in possession of the debtors. All that was required to entitle the creditor to the writ was a complaint alleging that the creditor was lawfully entitled to possession and the posting of a security bond. Therefore, these cases involved both a judicial writ and its execution by an officer of the state. See *Fuentes v. Shevin*, 407 U.S. at 69-78.

17. See *Fuentes v. Shevin*, 407 U.S. at 84-86; *Sniadach v. Family Finance Corp.*, 395 U.S. at 338. In fact, the Court did not expressly address the issue of state action in either case.

18. 282 So. 2d at 620.

19. The court quoted from *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961): "Only by sifting facts and weighing circumstances can the *nonobvious involvement* of the state in private conduct be attributed its true significance." 282 So. 2d at 621 (emphasis added). *Burton* was an equal protection case wherein a restaurant

state action only when the state has become "significantly involved" in the private activities.²⁰ After noting that the United States Supreme Court has found sufficient state action in due process cases only where a state official, agency or branch has taken some direct action,²¹ the

located in a publicly owned and operated parking building refused service to plaintiff solely because he was a Negro. The parking building was financed with public funds and the restaurant was operated as an integral part of the building even though it was leased from the state and operated by a private concern. The Court found that these circumstances constituted "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." 365 U.S. at 724. The Court labeled the state a "joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U.S. at 725. For an analysis of the case, see Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).

20. The court noted that in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the United States Supreme Court refused to find "mere state regulation" sufficient state action to invoke the fourteenth amendment. The court further noted that *Moose Lodge* reaffirmed the premise that where the discrimination in equal protection clause cases occurs through private acts, "the state must significantly involve itself in the activities by the private parties in order for those activities to take on constitutional dimensions . . ." 282 So. 2d at 621. *Moose Lodge* involved a Negro plaintiff who was refused service by a local Moose Lodge. Plaintiff contended that inasmuch as the state of Pennsylvania had issued the lodge a private club license authorizing the sale of alcoholic beverages on its premises, the refusal of service was state action for the purposes of the equal protection clause of the fourteenth amendment. The Supreme Court distinguished *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), stating: "In short, while [the restaurant involved in *Burton*] was a public restaurant in a public building, Moose Lodge is a private social club in a private building." 407 U.S. at 175. As to the contention that the state liquor control board's regulation of private clubs constituted "significant involvement," the Court stated that "[h]owever detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination We therefore hold that, [with a noted exception], the operation of the regulatory scheme enforced by the [liquor control board] does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge so as to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." 407 U.S. at 176-77.

21. 282 So. 2d at 621. The court quoted with approval from the decision of *Greene v. First Nat'l Exch. Bank*, 348 F. Supp. 672 (W.D. Va. 1972), which also involved the constitutionality of UCC § 9-503. See 282 So. 2d at 621. *Greene* held that the fourteenth amendment was not applicable because "the operation of the statute involved does not require the aid, assistance, or interaction of any state agent, body, organization, or function." 348 F. Supp. at 675. The Florida Supreme Court was apparently in full agreement with the statement quoted from *Greene*: "The cases appear clear in this area that under the Fourteenth Amendment due process is denied only when an arm of the state acts directly against an individual's property and deprives him of it without notice or a hearing." 282 So. 2d at 621, quoting from 348 F. Supp. at 674. Following this statement, *Greene* lists several United States Supreme Court decisions finding violations of due process, all of which involved some direct action by the state. This prompted the court to state its opinion that "passive state action such as is present in [this case] is not violative of due process. There must be active and direct state action." 348 F. Supp. at 675.

The Florida Supreme Court's opinion followed closely the reasoning and language

court labelled section 679.503 an "insignificant" factor in determining whether state action inhered in self-help repossession.²² This conclusion was premised on the fact that the right to repossess had existed in Florida in "contract, pre-commercial code law."²³ The court then held that "self-help repossession by a creditor does not constitute state action,"²⁴ adding that section 679.503 does nothing more than codify or restate "a common law right and a contract right," and that it "creates no new rights," but "merely recognizes the parties [*sic*] right to contract in such a manner if they so desire."²⁵

In concluding that the enactment of section 679.503 was too insignificant to constitute state involvement in self-help repossession, the court failed to consider two approaches previously used to find state action in the indirect acts of states. First, the court totally ignored the "state function" concept,²⁶ which the United States Supreme Court has employed to invoke the fourteenth amendment. *Nixon v. Condon*²⁷ illustrates this approach. There, the executive committee of the Texas Democratic Party, empowered by the Texas legislature to regulate primary elections, restricted its membership to whites after a statutory whites-only voting restriction had been declared unconstitutional. The Supreme Court held that the committee members were operating as "delegates of the State"²⁸ and, therefore, committee actions consti-

of *Greene*. Both opinions seem to draw a distinction between due process and equal protection clause cases. *Greene* does this by referring strictly to due process cases, while in *Northside Motors*, the court, through its brief discussion of *Burton* and *Moose Lodge*, merely acknowledges that "nonobvious involvement" has been sufficient state action in *equal protection clause* cases and then turns to *Greene* and its discussion of the *due process clause* cases which involved some direct action by the state. The distinction the court is making is apparent: nonobvious, passive state involvement has not been sufficient to constitute state action in due process clause cases. This may be true of United States Supreme Court decisions. See the collection of cases in *Greene v. First Nat'l Exch. Bank*, 348 F. Supp. 672, 674 (W.D. Va. 1972), reproduced in *Northside Motors, Inc. v. Brinkley*, 282 So. 2d 617, 621 (Fla. 1973). However, the lower federal courts have found sufficient state action in due process clause cases involving nonobvious, indirect state action. See, e.g., *Intercontinental Indus., Inc. v. American Stock Exch.*, 452 F.2d 935, 941 (5th Cir. 1971); *McQueen v. Druker*, 438 F.2d 781, 784-85 (1st Cir. 1971); *Coleman v. Wagner College*, 429 F.2d 1120, 1125 (2d Cir. 1970).

22. 282 So. 2d at 622.

23. *Id.*

24. *Id.*

25. *Id.*

26. The fourteenth amendment has been applied to actions involving private individuals or organizations which are performing what is, or should be considered, a state function. For an excellent analysis of this aspect of the state function doctrine, see Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1050-74 (1973).

27. 286 U.S. 73 (1932).

28. "Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as

tuted state action violative of the fourteenth amendment equal protection clause.²⁹ Recently, the United States Court of Appeals for the Fifth Circuit employed a similar approach in *Hall v. Garson*.³⁰ An agent of a landlord, with neither consent from the tenant nor authorization by any judicial or administrative officer, entered the tenant's apartment and seized a television set as security for overdue rent payments. The Fifth Circuit, relying upon *Fuentes*, held unconstitutional the Texas statute granting the right to enforce a landlord's lien by peremptory seizure and retention of property.³¹ In an earlier appeal of the same case,³² the Fifth Circuit had reasoned:

In this case the alleged wrongful conduct was admittedly perpetrated by a person who was not an officer of the state or an official of any state agency. But the action taken, the entry into another's home and the seizure of another's property, was an act that possesses many, if not all, of the characteristics of an act of the State. The execution of a lien, whether a traditional security interest or a quasi writ of attachment or judgment lien has in Texas traditionally been the function of the Sheriff or constable. Thus [the statute in issue] vests in the landlord and his agents authority that is normally exercised by the state and historically has been a state function.³³

The court must first conclude that a particular function is one that properly belongs to the state before finding state involvement in the actions of private individuals or organizations. This consideration should mitigate any fear of subjecting all contracts—and, ultimately, the entire credit structure—to fourteenth amendment requirements.³⁴

the delegates of the State." *Id.* at 85. Further, "[t]he pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power." *Id.* at 88.

29. *Id.* at 89.

30. 468 F.2d 845 (5th Cir. 1972).

31. *Id.* at 848.

32. *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970). *Fuentes* was decided subsequent to this appeal of *Hall* and prior to the 1972 appeal.

33. 430 F.2d at 439 (footnote omitted). On second appeal, the court stated that the statute in issue "cloth[ed] 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." 468 F.2d at 848.

34. The court in *Northside Motors* quoted from *Plante v. Industrial Nat'l Bank*, 12 UCC REP. SERV. 739 (R.I. Super. Ct. 1973), for the proposition that an extension of *Fuentes* to this situation would have an adverse effect on the entire credit structure of the United States. *Id.* at 741, quoted in 282 So. 2d at 623. Surely the presently existing legal restrictions on self-help repossession restrict its use to such an extent that it can have very little significance for the entire credit structure of the United States. See

The very existence of judicial remedies such as replevin, landlords' liens and ejectment, however, supports the notion that dispossession generally requires state participation and distinguishes acts of dispossession from other purely commercial actions. The Florida Supreme Court might have used the state function principle to conclude that a private individual acting under authority of Florida statutes section 679.503 is, in effect, performing a state function and, therefore, that his actions constitute state action.

The "encouragement" theory is a second approach to the state action issue that the Florida Supreme Court might have considered. The United States Supreme Court has found significant state involvement in private acts when the state has in some manner "encouraged" those acts.³⁵ *Reitman v. Mulkey*,³⁶ cited by the *Northside Motors* dissent,³⁷ suggests this approach. There, the Supreme Court found a newly enacted amendment to the California constitution violative of the fourteenth amendment equal protection clause. The new amendment effectively precluded future fair housing legislation by raising to constitutional status a citizen's right to decline to sell his real property to anyone he might choose.³⁸ The Court noted that the effect of the amendment was to "encourage" discrimination in the private housing market,³⁹ and to frustrate attempts by minority groups to instigate fair housing legislation.⁴⁰

Burke & Reber, *supra* note 26; Krahmer, Slifford & Lasley, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 TEXAS TECH L. REV. 23 (1972); Note, *Automobile Repossession: Law in Flux*, 2 U. SAN FERNANDO VALLEY L. REV. 43 (1972). *But see* Messenger v. Sandy Motors, Inc., 295 A.2d 402 (N.J. Super. Ct. 1972); Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CAL. L. REV. 82 (1973).

35. It has been asserted that the United States Supreme Court has never found state action on the basis of the "authorization" and "encouragement" theory. Burke & Reber, *supra* note 26, at 1098-99. The authors contend that although the Court has spoken of encouragement and authorization in its opinions, the references have not been material because of the presence of other factors and because of the Court's tendency to cumulate these factors in reaching its decision. However, even if this view is adopted, the state function approach presents an additional factor that could have been considered in the principal case.

36. 387 U.S. 369 (1967).

37. 282 So. 2d at 625.

38. CAL. CONST. art. I, § 26 read:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

39. 387 U.S. at 375, 381.

40. Although the Supreme Court did not expressly state this conclusion, it may be fairly implied from the opinion: "The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, *immune*

Justice Ervin's dissent in *Northside Motors* noted with approval the "encouragement" theory suggested by *Reitman*.⁴¹ Ervin stated that "[t]he enactment of [UCC section 9-503] into law means that Florida has chosen to explicitly sanction and support extrajudicial summary repossessions."⁴² In *Adams v. Egley*⁴³ a federal district court found that the enactment of UCC section 9-503 into law constituted "sufficient state action to raise a federal question," relying almost exclusively upon *Reitman*. Although the Ninth Circuit reversed *Adams*,⁴⁴ and while the reasoning of the *Adams* district court has been more widely rejected than accepted,⁴⁵ most courts, in passing on the state action issue, have at least considered the effect of encouragement through state authorization. The majority in *Northside Motors* failed even to address this question.

The Florida Supreme Court also might have found state action in the enactment of section 679.503 because of that legislation's ultimate

from legislative, executive, or judicial regulation at any level of the state government." 387 U.S. at 377 (emphasis added).

It has been suggested that the "encouragement" concept actually had minimal influence in *Reitman*, and that the apparent discriminatory intent of the amendment prompted the Court's decision. See Black, *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 75-82 (1967); Burke & Reber, *supra* note 26, at 1074-82.

41. 282 So. 2d at 625-26.

42. *Id.* at 625. This observation fairly distinguishes the self-help repossession statute from the state liquor license regulation that was found not to implicate the state in the discriminatory practices of the licensee in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). The challenged practice in *Moose Lodge* was merely incidental to the holding of a license and was not dictated by the state liquor control board's regulations. Section 679.503, on the other hand, specifies exactly the procedure challenged. The United States District Court for Vermont noted the significance of a similar distinction in *Michel v. Rex-Noreco, Inc.*, 12 UCC REP. SERV. 543, 548 (D. Vt. 1972):

[W]here the legislature has undertaken to prescribe the method and means for divesting property rights, the courts can direct that the safeguards of due process are met [*sic*], and that the buyer's property will not be summarily forfeited prior to an adequate and effective judicial determination of the rights of the parties.

43. 338 F. Supp. 614 (S.D. Cal. 1972).

44. *Adams v. Southern Cal. First Nat'l Bank*, 42 U.S.L.W. 2230 (9th Cir., Oct. 4, 1973). In its analysis of the state action question the court stated:

The objective finding that the creditors in part acted with knowledge of and pursuant to state law is but one element of the action taken under color of state law requirement; alone it is not sufficient. The test is not state involvement, but rather is significant state involvement. Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept.

Id.

45. For a listing of the cases involving the constitutionality of UNIFORM COMMERCIAL CODE § 9-503, see Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1, 8 n.490 (1973). The authors list 36 cases, 32 of which upheld the section's constitutionality.

impact upon Florida contract law. Contrary to the court's conclusion that section 679.503 merely codified a pre-existing common law right,⁴⁶ the adoption of that provision has significantly altered prior law. The court apparently assumed that, before the enactment of section 679.503, a seller in Florida was presumed to enjoy the right to repossess regardless of whether summary procedure was authorized by the contract.⁴⁷ However, Florida law had presumed exactly the opposite—that a seller did not have the right to self-help repossession unless specifically provided for in the contract.⁴⁸ Since the enactment of section 679.503 extends to the seller the right to self-help repossession “unless otherwise agreed”⁴⁹ the statute has reversed the prior pre-

46. 282 So. 2d at 622.

47. The court relied in part upon *Messenger v. Sandy Motors, Inc.*, 295 A.2d 402 (N.J. Super. Ct. 1972), a decision upholding New Jersey's adopted version of UNIFORM COMMERCIAL CODE § 9-503. There the court, with citations to the same treatises referred to in *Northside Motors*, concluded that since “self-help has been known to the common law for centuries,” codification of this practice cannot give it the color of state law so as to “take it out of the private area and make it subject to the Fourteenth Amendment.” 295 A.2d at 405-06. The court then quoted from the amicus curiae brief filed in the appeal of *Adams* to the Ninth Circuit by Professor Mentschikoff on behalf of the permanent editorial board for the UCC:

“Section 9-503 simply recognizes this common knowledge of buyers on time that repossession follows default and makes unnecessary its statement in the contract. It cannot be that codifying a generally understood practice of ancient and honorable lineage and surrounding it with safeguards renders the practice unconstitutional.” 295 A.2d at 406, *quoted in Northside Motors, Inc. v. Brinkley*, 282 So. 2d 617, 623 (Fla. 1973).

48. In fact, this opposite presumption was at one time recognized by statute in Florida:

When the buyer is in default in the payment of any sum due under the contract or in the performance of any other condition or promise, the breach of which is by the contract expressly made a ground for the retaking of the motor vehicle, the holder may retake possession thereof either peaceably or by legal process.

Fla. Laws 1961, ch. 61-117, § 2 (repealed 1965). See *C.I.T. Corp. v. Brewer*, 200 So. 910 (Fla. 1941); *C.I.T. Corp. v. Reeves*, 150 So. 638 (Fla. 1933); *Percifield v. State*, 111 So. 519 (Fla. 1927). The Florida Supreme Court quoted from *Percifield* to illustrate that “contract, pre-commercial code law clearly gave the seller the right to repossess upon default of the buyer.” 282 So. 2d at 622. However, the language quoted by the court serves to illustrate the opposite conclusion:

“[W]hen default has occurred . . . the vendor has the legal right to take possession of the property, sell the same and apply the proceeds to the payment of the obligation, and, if the note or contract contains the provision that the vendor under such conditions may repossess the property without process of law, then the vendor may repossess such property without resorting to legal process, if he can do so without committing a breach of the peace or committing an unlawful trespass.”

Id., quoting from 111 So. at 520 (emphasis added). *Percifield* has been cited for the proposition that “[u]nder an express provision of the contract” the creditor has the right to repossess peacefully. Annot., 55 A.L.R. 180, 184 (1928).

49. See note 3 *supra*.

sumption. Thus, the state has acted affirmatively to strengthen the bargaining position of the seller.

In reaching its conclusion, the court stressed that self-help repossession under section 679.503 can only be carried out "peacefully without a breach of the peace and thus an aggrieved debtor has access to the courts if self-help is used improperly."⁵¹ Use of self-help techniques that would result in a breach of the peace "would expose the creditor to tort liability and would also expose him to liability under Florida Statute 679.507 . . ."⁵² Apart from the statutory liability, the court apparently was referring merely to those acts of repossessors for which damages traditionally have been recoverable in tort:⁵³ trespass;⁵⁴ assault;⁵⁵ conversion;⁵⁶ and negligence.⁵⁷ However, the court did suggest that a tort action also might lie for repossession over a debtor's physical objection when a chattel is located on a public street.⁵⁸ Since the reposessor cannot remove a chattel from inside a

50. If the supreme court had found state action in the legislature's codification of self-help repossession, Northside could have argued that, since it had repossessed Brinkley's automobile pursuant to a private agreement, its actions should remain free from the strictures of fourteenth amendment due process. Indeed, several courts have suggested that if parties provide for a certain practice in a private contract, their acts pursuant to that contract remain private regardless of its conformity with statutory requirements or codification of the practice. *See, e.g.*, *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972); *McCormick v. First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971); *Messenger v. Sandy Motors, Inc.*, 295 A.2d 402 (N.J. Super. Ct. 1972).

51. 282 So. 2d at 624.

52. *Id.*

53. The court's loose phraseology might suggest that it intended to create a new "breach of the peace" tort action. But breach of the peace traditionally has been viewed as a crime against society to be suppressed by criminal sanctions—not as an interpersonal offense to be remedied by a private, civil action. Thus, the phrase "if this can be done without breach of the peace," FLA. STAT. § 679.503 (1971), seems intended merely to emphasize that the reposessor may not violate any criminal laws in his attempt to repossess.

54. *See, e.g.*, *C.I.T. Corp. v. Brewer*, 200 So. 910 (Fla. 1941). There the automobile had been repaired by plaintiff's garage, but the owner failed to pay for the repairs. Consequently, the plaintiff refused to allow the owner to take possession. The bank that had financed the automobile assigned the conditional sales contract to the defendant. When defendant's agent attempted to repossess the vehicle after plaintiff refused to give up possession, a fight ensued and plaintiff received a "serious hernia resulting in great pain and suffering and in permanent injury." *Id.* at 911. Plaintiff was allowed to recover on both trespass and assault theories.

55. *Id.*

56. *See, e.g.*, *Southern Indus. Sav. Bank v. Greene*, 224 So. 2d 416 (Fla. 3d Dist. Ct. App. 1969), *cert. denied*, 232 So. 2d 181 (Fla. 1969) (action for conversion of personal articles in car trunk at time of repossession).

57. *Id.* The court classified the reposessor as a constructive bailee of the personal property left in the trunk of the car and found a breach of the bailee's duty of care.

58. 282 So. 2d at 624-25. In some, if not all, such situations it would seem that an action for assault would lie.

house or garage without permission from the debtor, it appears that only those repossessions that occur on the street or in the debtor's driveway, and that avoid any confrontation with the debtor, are relatively safe from legal sanctions.⁵⁹

Additionally, a finding that a breach of the peace has occurred will expose the creditor-repossessor to liability under section 679.507 of the Florida statutes.⁶⁰ This section provides two possible remedies for the debtor. First, if the creditor has not disposed of the collateral, the debtor may petition the court to restrain disposition on appropriate terms.⁶¹ Second, where disposition has occurred, the debtor has the right to recover from the creditor any loss caused by the creditor's acts, with a minimum recovery set by the statute.⁶² The recovery under the statute for "any loss" caused by the creditor may, in some cases, overlap the debtor's common law tort remedy. If so, it is doubtful that the courts would allow double recovery and therefore the debtor would have to elect his remedy.⁶³

Regardless of the remedies available for breach of the peace, the very existence of section 679.503 will inevitably lead to confrontations that might degenerate into physical altercations. Obviously, an in-

59. Repossession from the debtor's driveway, where he has not given consent in the security agreement, probably would be a technical common law trespass, entitling the debtor to at least nominal damages. See *Leonard v. Nat Harrison Associates, Inc.*, 122 So. 2d 432 (Fla. 2d Dist. Ct. App. 1960). However, the court acknowledged that the reposessor probably would not incur any significant liability in this situation. 282 So. 2d at 624-25.

60. FLA. STAT. § 679.507, entitled "Secured party's liability for failure to comply with this part," provides in part:

If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor . . . has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.

FLA. STAT. § 679.507(1) (1971).

61. FLA. STAT. § 679.507 (1971). Since § 679.503 stipulates that the creditor cannot repossess without judicial process unless this can be done without breach of the peace, a creditor who does breach the peace has not proceeded in accordance "with the provisions of this part." The "part" referred to is part V of ch. 679, entitled "Default," and consists of §§ 679.501-.507.

62. See note 60 *supra*. Since an automobile is likely to be considered a "consumer good," the debtor could qualify for the minimum damages. See FLA. STAT. § 679.109 (1971).

63. Suppose, for example, that the creditor repossesses without cause and disposes of the vehicle. The debtor could bring an action for conversion or proceed under the statute. Assuming that the debt outstanding was approximately equal to the fair market value of the car, the debtor would be best advised to proceed under the statute and take the minimum recovery.

dividual might react violently to the sight of an ununiformed stranger entering his automobile or attempting to drive it away. The court's approval of summary repossession, even if only applicable to automobiles, will undoubtedly lead to regrettable consequences.⁶⁴ The fact that punitive⁶⁵ as well as actual damages are recoverable from repossessors is an unpersuasive defense of this procedure.

While the result reached in *Northside Motors* comports with the view of most courts that have heard challenges to the constitutionality of UCC section 9-503,⁶⁶ both the judiciary and the legislature should review more carefully the wisdom of contractual and statutory self-help repossession. Even though analysis may find insufficient state action to invoke the fourteenth amendment, fair and orderly procedure would seem to be a desirable policy to apply to private takings of property, as well as to those in which the state is involved. Regardless of whether one adopts the view that the fourteenth amendment applies to private repossession, something analogous to procedural due process should apply. This is not to suggest that a full, pre-repossession hearing in an adversary setting should be required. Rather, the task remains that set forth in *Fuentes*—"to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing"⁶⁷ Although this may be a proper task for the legislature, the judiciary should not hesitate to explore the alternatives⁶⁸ to self-help repossession and to delineate the legal requirements that must be satisfied before the courts will sanction the taking of property without a judicial determination of the right to possession.

64. See note 54 *supra*.

65. See *Ford Motor Credit Co. v. Waters*, 273 So. 2d 96 (Fla. 3d Dist. Ct. App. 1973); *Buie v. Barnett First Nat'l Bank*, 266 So. 2d 657 (Fla. 1972).

66. See note 45 *supra*.

67. 407 U.S. at 97 n.33.

68. For suggested alternatives to self-help repossession, see Note, *Automobile Repossession: Law in Flux*, 2 U. SAN FERNANDO VALLEY L. REV. 43 (1973). See generally Dauer & Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply*, 47 S. CAL. L. REV. 116 (1973).