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State Action--Landlord Lien Enforcement Does Not Constitute State Action Violative of Due Process

Nancy Vyhnal

STATE ACTION—LANDLORD LIEN ENFORCEMENT DOES NOT CONSTITUTE STATE ACTION VIOLATIVE OF DUE PROCESS. *Hitchcock v. Allison*, 572 P.2d 982 (Okla. 1977).

I. INTRODUCTION

The Oklahoma Supreme Court was recently required to determine whether the acts of a private party, done pursuant to a state statute authorizing the conduct, constituted state action subject to fourteenth amendment due process requirements as applied through 42 U.S.C. § 1983.[1] In the case of *Hitchcock v. Allison*,[2] tenants brought a replevin action against their landlord for household goods and other personal property which he had seized and stored without notice or a prior hearing. The landlord claimed a lien on the items pursuant to an Oklahoma statute[3] and to satisfy amounts claimed due as unpaid rental and damages. His actions were not covered by any provision of the oral rental agreement and were taken without any aid from state officials. The trial court denied the tenants' writ of replevin and rendered a money judgment in favor of the landlord, establishing a lien on the tenants' personal property then in the possession of the landlord. The tenants brought an appeal challenging the constitutionality of the landlord lien statute,[4] and the lower court's decision upholding the statute was affirmed by the Oklahoma Supreme Court. The statute, as approved by that court, allows a landlord to seize a tenant's personal possessions found in the rental unit upon the landlord's unilateral

1. 42 U.S.C. § 1983 (1976) provides in part:

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 . . . 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 proceedings for redress.

2. 572 P.2d 982 (Okla. 1977).

3. OKLA. STAT. tit. 41, § 42 (Supp. 1977) provides:

An operator shall have a lien upon that part of the property belonging to the tenant which has a value not to exceed the amount of proper charges owed by the tenant, which may be in a rental unit used by him at the time notice is given, for the proper charges owed by the tenant, and for the cost of enforcing the lien, with the right to possession of the property until the debt obligation is paid to the operator. Provided, however, that such lien shall be secondary to the claim of any prior bona fide holder of a chattel mortgage or to the rights of a conditional seller of such property, other than the tenant.

4. *Id.*

determination of overdue rent. Because the statute does not provide for regulation of this activity by state officials in any way,[5] the potential for abuse by the landlord and disproportionate hardship on the tenant is apparent.

An investigation of the constitutionality of Oklahoma's landlord lien law must necessarily begin with an initial decision as to whether a private person acting under the authority of the statute does so under color of state law.[6] The criteria courts have applied to determine the presence or absence of state action are elusive, ambiguous, and subject to result-oriented interpretations which often produce conflicting decisions in identical fact situations.[7] The disorderly case-by-case analysis of state action decisions concerning the constitutionality of landlord lien statutes was noted by the Oklahoma court in its decision when it was presented with conflicting decisions on the question from various federal circuit courts. This note will analyze the evolution and modern judicial treatment of landlord lien laws, and will evaluate their function, effectiveness and desirability vis-a-vis the state action-private action dichotomy.

II. EVOLUTION AND CURRENT STATE OF THE LAW

Landlord lien statutes originated as a result of the traveling conditions in medieval England.[8] Because road travel was dangerous, especially at night, the law imposed an absolute duty upon innkeepers to receive any traveler and to keep his goods safe. To compensate the innkeeper for the imposition of absolute duty and liability to all guests, the law allowed him the extraordinary self-help measure of distraint of the traveler's personal baggage until the cost of the lodging was paid.

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5. There is no court determination in an adversary context that the rent is indeed overdue and that the value of the property sought to be seized does not exceed the amount of rent claimed. *Id.*

6. Purely private action is not subject to the fourteenth amendment due process requirements of prior notice and hearing; action taken under color of state law must conform to these requirements. *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883). *See also* Shelley v. Kraemer, 334 U.S. 1, 13 (1948), in which the Supreme Court stated:

> Since the decision of this court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

7. *See* Black, *The Supreme Court 1966 Term, Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967) [hereinafter cited as Black]; Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221 [hereinafter cited as Glennon & Nowak].

8. Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970). *See generally*, Hogan, *The Innkeeper's Lien at Common Law*, 8 HASTINGS L. J. 33 (1956).

Such a remedy did not extend at common law to landlords or boardinghouse keepers, however the concept evolved into a modern counterpart, codified in many state laws, which provides innkeepers, as well as boardinghouse keepers *and* landlords, a statutory lien on tenants' personal property to satisfy unpaid rent charges.[9] These statutes typically do not require the tenant to be given any notice or hearing prior to seizure of his possessions by the landlord and do not involve any activity on the part of state officials.[10] Tenants have challenged the constitutionality of such statutes, alleging that the landlord's activity is a violation of due process occurring under color of state law.[11] The resulting federal court decisions have produced two directly conflicting lines of opinion.

The Ninth and Fifth Circuits have found the landlord's conduct under such statutory authority to be under color of state law and therefore subject to the due process requirements of the fourteenth amendment.[12] In *Hall v. Garson*,[13] the fifth circuit based its finding of state action upon a "public function" theory.[14] The execution of a lien in Texas is ordinarily performed by a sheriff or constable. Therefore, the court reasoned, when a private party undertakes such an activity, he is necessarily subject to the same constitutional standards that are imposed upon the conduct of state officials.[15] The Ninth Circuit, in *Culbertson v. Leland*,[16] adopted and further refined the public function theory set forth in *Hall v. Garson*. Pointing out that at common law

9. *See, e.g.*, Arizona Innkeeper's Lien Statute, ARIZ. REV. STAT. § 33-951 (1974); Massachusetts Boardinghouse Lien Statute, MASS. GEN. LAWS ANN. ch. 255, § 23 (West 1959); TEX. REV. CIV. STAT. ANN. art. 5236d (Vernon 1978).

10. *See* note 3 *supra*.

11. *See* notes 12-19 *infra*.

12. Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970).

13. 430 F.2d 430 (5th Cir. 1970).

14. The "public function" rationale used to support a finding of state action is based in large part on Justice Black's majority opinion in Marsh v. Alabama, 326 U.S. 501, 506 (1946), in which he stated, "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . . Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation." This analysis was emphasized by Justice Douglas in writing the majority opinion in Evans v. Newton, 382 U.S. 296 (1966), where he pointed out that when state courts aid private parties to conduct an activity ordinarily only performed by the state, such conduct is subject to the fourteenth amendment.

The "public function" theory appears to have survived the Supreme Court's decision in Jackson v. Metropolitan Edison Co. 419 U.S. 345, 352 (1974), as witnessed by the statement in the opinion of the Court that "[w]e have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State."

15. 430 F.2d at 439.

16. 528 F.2d 426 (9th Cir. 1975).

extraordinary self-help was provided to innkeepers only, the court emphasized that the lien created in favor of landlords and boardinghouse keepers by the Arizona statute in question had no common law basis, but had its origin in the State legislature. The Arizona statute then was not merely codifying a pre-existing common law right, but was extending this right to parties to whom it had never been available at common law. The court found the statutory creation of new rights favoring landlords to be a significant indication of state action.[17] Several federal district courts have reached the same result[18] and found statutes which authorize summary landlord seizure of tenant property without notice or hearing constitutionally impermissible violations of the due process clause.[19]

Taking the opposite position, the First Circuit has determined that the seizure of a tenant's personal effects under statutory authority does not constitute state action. In *Davis v. Richmond*,[20] the court was presented with a constitutional challenge to a Massachusetts landlord lien law.[21] In a fact situation virtually identical to those considered by the Fifth and Ninth Circuits, the First Circuit found the actions of the

17. "In the present case, the statute was appellee Leland's sole authority for the seizure, which would not otherwise have been even colorably legal. And since the statute was the *sine qua non* for the activity in question, the state's involvement through the statute is not insignificant." *Id.* at 432 (footnote omitted).

The court also distinguished the instant situation from the seizure by a conditional seller, pursuant to a sales contract, of property serving as security for the loan of its purchase price. "Special interests of the conditional seller attach to the specific goods which serve as his collateral, interests which are not present in the case of a general debt and indiscriminate seizure of property as collateral." *Id.* at 431 (citations omitted). The court went on to emphasize the narrow limits within which the conditional seller might act, and contrasted his activity with the broad and relatively undefined activity of the landlord, observing that "[t]he latter, because its . . . impact is potentially much more severe, is the type of activity which is a function of the state and over which, ordinarily, the state has a monopoly." *Id.* (citations omitted). The Fifth Circuit, in James v. Pinnix, 495 F.2d 206 (5th Cir. 1974), also distinguished repossession under Uniform Commercial Code provisions from landlord seizures, emphasizing that the latter closely resemble seizure in satisfaction of a judgment, a traditional state function.

The Ninth Circuit, in *Culbertson*, based its distinction between seizure by a conditional seller and seizure by a landlord on the fact that the former remedy existed at common law and predated any statutory codification. The court observed that the challenged Arizona statute created a right in a private party to perform a function traditionally undertaken by the state, a right without a background in common law and without contract authorization. The result was state action in the opinion of the court and the court held the statute unconstitutionally deficient in due process.

18. *See, e.g.*, Johnson v. Riverside Hotel, Inc. 399 F. Supp. 1138 (S.D. Fla. 1975); Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

19. Shaffer v. Holbrook, 346 F. Supp. 762 (S.D.W. Va. 1972), traces West Virginia's summary distress procedure back to the landlord's right to distraint at common law. In this case, the court found state action resulting from the requirement of a warrant issued by a state official. Following the rationale in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), the court held that the state procedure denied due process.

20. 512 F.2d 201 (1st Cir. 1975).

21. MASS. GEN. LAWS ANN. ch. 255, § 23 (West 1959).

landlord pursuant to the statute to be purely private conduct. The court considered two of the factors which other federal courts had felt to be indicative of state action,[22] but found them unpersuasive. In rejecting the argument that statutory authorization of previously illegal acts gives rise to conduct under color of state law, the court stated, "Merely because a state "legalizes" something does not necessarily signal that the state itself has become a participant."[23] Stressing instead that the statute was performing the neutral function of clarifying competing rights, the court refused to find state action in private conduct pursuant to the statute.[24] The court also rejected the public function theory as a foundation for state action, because it could find no expressed state support, symbiotic relationship, joint activity, or delegation of powers.[25]

III. THE OKLAHOMA DECISION

The rationales which support the conflicting results reached by the various federal courts were analyzed by the Oklahoma Supreme Court as a basis for its decision concerning the presence of state action. The court, adopting the approach used by the First Circuit in *Davis v. Richmond*,[26] disregarded the significance of the statutory creation of new rights and instead reiterated "that merely because a State legalizes certain action does not necessarily signal that the State itself has become a participant."[27] The court held that the statutory enactment of a right to act within narrowly defined limits did not result in state action, and pointed out that this decision was in line with the its earlier holding in *Helfinstine v. Martin*.[28] That case concerned repossession by a creditor under a provision of the Oklahoma version of the Uniform

22. *See* notes 12 and 18 *supra* and accompanying text.

23. Davis v. Richmond, 512 F.2d 201, 204 (1st Cir. 1975).

24. "Such self-help is inherently private, and we can find no significant state involvement in the legislature's choice of a point at which to draw the line between permissible individual conduct and the necessity for state intervention." *Id.* at 205.

25. The Seventh Circuit adopted the reasoning of Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975), in upholding an Illinois hotelkeeper's lien statute against a constitutional challenge. *See* Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976). The court refused to find state and private conduct to be so entwined as to amount to state action by the mere passage of legislation, and simply disagreed with the public function rationale supporting the decision in Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), without a real attempt to distinguish the case.

26. 512 F.2d 201 (1st Cir. 1975).

27. Hitchcock v. Allison, 572 P.2d 982, 986 (Okla. 1977) (quoting Davis v. Richmond, 512 F.2d 201, 204 (1st Cir. 1975).

28. 561 P.2d 951 (Okla. 1977).

Commercial Code.[29] While recognizing that the decision in *Helfinstine* was based in part on the fact that the Oklahoma U.C.C. provision did not create new rights, but only codified a pre-existing common law remedy, the court felt the lack of involvement of any state official was equally determinative of the result there and significant when applied to the present situation.[30]

An evaluation of the Oklahoma court's state action analysis must begin with a recognition of the dual nature of the functions performed by the fourteenth amendment.[31] Purely individual activity is shielded from what would otherwise be the intolerable interference of government regulation, while the states are required to perform their activities under constitutional restrictions which protect civil liberties.[32] The impact of the fourteenth amendment thus affects both public and private action. However, conduct which is totally public or private is rarely litigated in a context which requires application of the state action doctrine. Indeed, it has been suggested that as a result of the modern complex interrelation of state regulation and private conduct, state action is always present to some degree in any individual activity.[33] It is in this vast gray area, where state action is arguably present, that both parties claim the protection of the fourteenth amendment; one party asserting that his autonomous decision-making should be protected from governmental interference, the other claiming that the state is involved to a sufficient degree to require the conduct to be subject to constitutional safeguards so as to protect civil liberties.[34] The issue which the state action doctrine is then called upon to resolve is where the challenged activity falls on the continuum of state-private activity. Scrutiny of the challenged activity under the Oklahoma statute therefore involves the balancing of two factors: the nature and extent of the state involvement is balanced against an examination of the allegedly private conduct giving rise to the litigation.[35]

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29. OKLA. STAT. tit. 12A, § 9-503 (1971).

30. "We think when these same criteria are applied to the case at bar, the same finding—no State action—results." 572 P.2d at 986.

31. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1149-50 (1978) [hereinafter cited as TRIBE]; Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 841 (1974).

32. *See* Black, *supra* note 7 at 100-01; Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 665 (1974) [hereinafter cited as *State Action*].

33. Black, *supra* note 7 at 70; Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 370 (1963) [hereinafter cited as Williams].

34. *See* TRIBE, *supra* note 31 at 1184; Glennon & Nowak, *supra* note 7 at 226-27; Williams, *supra* note 33, at 370.

35. *See* Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, 597 (S.D.N.Y. 1970) where the court concluded:

The Oklahoma court characterized the effect of the statute in question as "merely providing rules by which the parties can peacefully settle their dispute rather than acting as a moving party."[36] However, it is difficult to accept the court's characterization of the statute as neutral rule-making when it provides one party with legal authority for previously illegal conduct without affording the other party any means of protection against the arbitrary and abusive use of such power.[37] Such statutory promotion of the interests of one party at the expense of another goes beyond disinterested regulation and indicates a legislative preference for a particular course of action, a course of action which is only legally permissible as a result of statutory enactment.[38] These considerations argue persuasively that such conduct is pursued under color of state law and should be subject to due process limitations.[39]

The second part of the state action inquiry requires an examination of the allegedly private conduct giving rise to the litigation. Such examination allows a determination of the extent to which these actions should be considered purely private so as to be free from constitutional restrictions. In part this requires ascertaining whether the landlord's conduct is the type of activity which has traditionally been the result of private decision-making and, thus, the type of individual autonomous conduct which the fourteenth amendment is designed to protect from governmental interference. The public function analysis used by several federal courts[40] is relevant on this issue. These courts point out

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> In determining whether state involvement has risen to the level of "significance" for state action purposes, therefore, inquiry should focus upon the alleged sphere of privacy and autonomy in need of protection from federal intervention, as well as upon the customary search for some causal relation, however tenuous, between state activity and the discrimination alleged.

See also Comment, *State Action: A Pathology and a Proposed Cure*, 64 CAL. L. REV. 146 (1976) [hereinafter cited as *State Action*].

36. 572 P.2d at 986.

37. *See State Action, supra* note 32 at 665, in which the writer contends that when the government increases power or status in an individual beyond that which existed at common law it has granted power, the use of which is subject to fourteenth amendment restraints.

38. *See* Adickes v. Kress, 398 U.S. 144, 203, 212 (1969) (Brennan, J., concurring in part and dissenting in part); Klim v. Jones, 315 F. Supp. 109, 114 (N.D. Cal. 1970).

39. One scholar, in discussing repossession under state-enacted U.C.C. provision 9-503 has stated that:

> [T]he question whether procedural due process is accorded by the system of rules through which a state allocates powers and duties in disputes between creditors and peaceful (if allegedly wrongful) possessors focuses attention at once on an aspect of state law: that aspect either is or is not constitutional; that it is "state action" could hardly be clearer.

Tribe, *supra* note 31 at 1171.

40. *See* James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S.D. Fla. 1975); Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972).

that the landlord is performing a function ordinarily reserved to the state. Therefore imposing constitutional due process duties does not invade an area historically preserved to individual activity, because such activity has not traditionally been undertaken privately.

Deprivation of property to satisfy a general debt has always been a governmental function and subject to due process requirements of prior notice and hearing except under extraordinary circumstances.[41] The Oklahoma court believed that the situations in which landlord lien laws are invoked made it necessary to dispense with these requirements, and referred to the *Davis* case, which allowed the possessory advantage to go to the landlord so as to prevent the tenant from absconding with his property and leaving the rent unpaid.[42] The most compelling practical argument in favor of the landlord is that giving the tenant prior notice would allow him an opportunity to leave *with* his possessions before the landlord could collect the rent.[43] The private interest which the landlord promotes by using the statute is to insure that the rent allegedly owing is paid. However, the Forcible Entry and Detainer (F.E.D.) statutes[44] already furnish a summary process to the landlord which allows him to bring the tenant into court without delay and obtain a writ of execution on the tenant's goods for rental owed.[45] These statutes provide the immediate relief sought by the landlord and at the same time offer the tenant judicial resolution of the rent dispute.

With this quick judicial determination available, the legislative decision to provide the landlord with an additional self-help provision in the form of a landlord lien statute may be explained by the amount of rental often involved in the situations where landlord lien statutes are invoked.[46] Many times the charges sought are too small to make resort

41. *See State Action, supra* note 35, at 170-78.

42. *But see* Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972), in which the court denied this extraordinary self-help measure on constitutional grounds because the statute under attack did not require a showing that summary seizure was needed under the facts in the case.

43. *But see* Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973), which argues that landlord lien statutes are ineffective to prevent such conduct by a determined tenant.

44. OKLA. STAT. tit. 12, §§ 1148.1—.16 (1971 and Supp. 1977).

45. *See, e.g.*, Oklahoma Forcible Entry and Detainer Statutes: OKLA. STAT. tit. 12, § 1148.4 (1971) (requiring the tenant to appear in court 5 to 10 days after receiving summons); OKLA. STAT. tit. 12, § 1185.10 (1971) (providing for levy of a writ of execution on the tenant's goods if judgment is in favor of the landlord); and OKLA. STAT. tit. 12, § 1148.14 (1971) (allowing actions for amounts under $400 to be brought in small claims court).

46. While it is true that in *Hitchcock* the landlord was claiming an amount of $453.54, the court referred to another case, Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975), which involved $20. A survey of the facts in cases involving litigation of landlord lien statutes shows that the amount in controversy is often less than $100. *See* Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S. D. Fla. 1975) ($12.38); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972)

to judicial action under the F.E.D. statutes practical. Landlord lien statutes provide the landlord with a convenient and cost-free means of coercing payment of an amount allegedly due, allowing him to bypass the safeguards built into the F.E.D. statutes and to invade the civil liberties of the tenant. The landlord may use the statute without showing such self-help is necessary for his protection under the circumstances of the specific case, and without supervision to insure the value of property seized does not exceed the debt claimed. The private interest which the statute protects is not necessity, but convenience.

The Oklahoma legislature recently had the opportunity to reconsider the propriety of the landlord lien statute when it undertook an extensive recodification of residential landlord-tenant law. The new act[47] retains the wording of the law under which *Hitchcock v. Allison* was decided,[48] but in addition provides that the lien given to the landlord by the statute may be enforced in the same manner as any other general lien in Oklahoma.[49] The foreclosure procedure provides that notice must be given to the tenant ten days before the sale of his property by the landlord. The foreclosure sale cannot occur until thirty days after the lien has accrued. These new notice requirements provide the tenant with more protection than was available under the old statute. However, the actual benefit is minimal. The right to possession is still with the landlord, and no provision is made for a hearing on the issue before an impartial tribunal.

Because the landlord lien statute goes beyond the neutral process set out in the F.E.D. statutes and promotes the interest of the creditor by permitting his encroachment upon the civil liberties of the debtor, a significant degree of state involvement can be argued. Balanced against this state involvement is the activity of the landlord, who claims freedom from constitutional obligations for conduct which is not ordinarily found in the purely private sphere, and which is desirable not because such activity is necessary but because it is convenient and inexpensive. It is difficult to support the Oklahoma Supreme Court's decision to uphold the constitutionality of the landlord lien law when it

($28.28); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) ($5.00); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) ($60.00); Blye v. Globe-Wernicke Reality Co., 33 N.Y. 15, 300 N.E. 2d 710, 347 N.Y.S. 2d 170 (1973) ($60.60).

47. Residential Landlord And Tenant Act, ch. 257, §§ 1-40, 1978 Okla. Sess. Laws 675 (effective October 1, 1978) (repealing OKLA. STAT. tit. 41, §§ 31, 32, 34, 39 (1971) and OKLA. STAT. tit. 41, §§ 41, 42, 43 (Supp. 1971) (to be codified as OKLA. STAT. tit. 41, §§ 101-135)).

48. OKLA. STAT. tit. 41, § 42 (Supp. 1977).

49. *See* OKLA. STAT. tit. 42, § 91 (Supp. 1977) for the procedure to be followed when foreclosing a general lien.

empowers the private performance of a traditionally public function, and dispenses with due process guarantees for the convenience of a favored party.

The Oklahoma court has disregarded what other courts have found to be a significant degree of state involvement, the statutory authorization of a course of conduct. It has chosen instead to emphasize the absence of activity by any state official and to weigh heavily the private aspects of the activity challenged, despite the public nature of the function performed and the lack of any compelling necessity for such activity to occur without due process guarantees. The holding is unfortunate because it disregards the fact that private interest lessens as the private actor moves into a relationship with the public generally,[50] and that "how private power is used in our society, insofar as it affects the rights of citizens, [has] finally been recognized as amenable to constitutional and judicial remedy."[51] The state action concept is a tool for separating out those non-governmental activities whose existence so impairs certain fundamental values that they are proscribed by the Constitution.[52] In a conflict between competing individual rights, the courts must determine whether the fourteenth amendment dictates a preference for one over the other. The Oklahoma court has chosen to uphold a statute which legitimizes a practice repugnant to constitutional guarantees and which operates to deprive a segment of the public of its civil liberties. The fourteenth amendment and the Civil Rights Act require that private power sanctioned by statute should operate under constitutional limitations and it is the duty of the courts to enforce these limitations.

IV. CONCLUSION

The landlord lien law does not directly authorize a state official to seize property of a tenant to satisfy rent charges. Instead it permits the landlord to do so when he decides charges are owing. The law provides no means by which the tenant can protect himself from a landlord who is mistaken as to the rental charges or who seizes property in excess of the amount allegedly due. The potential for abuse in giving

50. Williams, *supra* note 33 at 370.

51. Nerkin, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.L. L. REV. 297, 362 (1977) (footnote omitted).

52. "The Amendment does not require the judiciary to determine whether a state has "acted," but whether a state has "deprived" someone of a guaranteed right." Glennon & Nowak, *supra* note 7, at 229.

such unsupervised authority to a party who is interested in the conflict cannot be justified by the interest which the statute ostensibly promotes. The landlord's right to receive rent due is adequately protected by the F.E.D. statutes, which also afford the tenant due process. The wisdom of the legislature in placing such discretionary power in the hands of the landlord is questionable since the peaceful settlement of disputes which it intends to promote occurs only with great hardship to the tenant.

The holding of the Oklahoma Supreme Court that conduct pursuant to such a statute is not under color of state law is equally difficult to justify. The statute cannot be characterized as neutral when it plainly and unnecessarily advances the interest of one party to the detriment of the other. Such activity would undeniably be unconstitutional if undertaken by a state official, and would undeniably be illegal unless authorized by statute. The Civil Rights Act of 1871 was enacted to prevent the states from by-passing constitutional guarantees by delegating their public functions to private individuals. This, however, is exactly the result which the Oklahoma legislature has produced and which the Oklahoma Supreme Court has upheld.

Nancy Vyhnal