UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-375

F.H.C. COMPANY, INCORPORATED PLAINTIFF,

VS: JUDGMENT ON DIRECTED VERDICT FOR DEFENDANT

BEN TAYLOR, Sheriff
of Letcher County DEFENDANT.

* * * * * * * * *

Pursuant to a Memorandum Opinion and Order entered in this action on the 23rd day of August, 1983,

IT IS ORDERED AND ADJUDGED:

That the plaintiff, F. H. C. Company, Incorporated, take nothing herein and that the defendant, Ben Taylor, Sheriff of Letcher County, have and receive of the plaintiff all costs herein expended.

This is a **FINAL JUDGMENT** upon all the issues between all the parties herein.

This case is **STRICKEN** from the Court's active docket.

This 23rd day of August, 1983.

G. Wix Unthank

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-375

F.H.C. COMPANY, INCORPORATED PLAINTIFF,

VS: MEMORANDUM OPINION AND ORDER

BEN TAYLOR, Sheriff
of Letcher County DEFENDANT.

* * * * * * * * *

The evidence reflects that the defendant, Ben Taylor, Sheriff of Letcher County, Kentucky, received notice that a bulldozer was being buried and believed to be stolen. Sometime thereafter, he received a call that a bulldozer was on the highway in the vicinity damaging the pavement. He proceeded to the area and discovered an endloader with tracks on it similar to those on a bulldozer, on the highway, causing damage to the road. He placed the operator under arrest and took him to jail. When he returned the endloader was gone. In investigating the missing endloader, approximately one-fourth or one-half mile therefrom, he came upon a bulldozer partially upon the highway. There was no operator on the bulldozer. The motor was warm and, the identification marks on the bulldozer, i.e., serial numbers, were mutilated. The Sheriff impounded the bulldozer. The Sheriff had the bulldozer taken to the county highway garage for storage. He did not order the release of the bulldozer until it was approved by the county legal representative, the County Attorney. The Sheriff requested that the Kentucky State Police and the Federal Bureau of Investigation check to determine if the bulldozer was stolen and the name of the owner. It took approximately seven weeks to conclude the investigation and the officers could neither prove nor disprove ownership of the bulldozer. Approximately eight weeks after it was impounded, the bulldozer was released to an individual, Bobby Boyd, who had a writing authorizing him to take possession of the bulldozer until he recovered his bill

for mechanical work performed on the bulldozer. A performance bond was filled with the county for the possession of the bulldozer.

The evidence reflects that the plaintiff received notice that the operator of the endloader had been arrested. The operator and his partner, the one who ultimately obtained possession of the bulldozer, did mechanical work on the bulldozer. They used the endloader to get the bulldozer out of the mud. They had a writing authorizing them to use the bulldozer until they recovered compensation for their time and expense. The plaintiff was not present before, during nor after the arrest. The plaintiff purchased the bulldozer from a company. He did not have a bill of sale but rather an invoice; the invoice contained mistakes. In response to an inquiry by the Sheriff, the vendor requested time to check its records regarding the alleged sale. No further evidence was received regarding this inquiry.

The day following the arrest of the operator of the endloader, the plaintiff presented his invoice to the Sheriff and demanded possession of the bulldozer. The Sheriff demanded a large sum of money from him as bond and/or security. He went to an attorney about representing the arrested endloader operator. The attorney went to the Courthouse and returned and informed him that the officials in the county were upset and that he could not represent him; that he should get an attorney outside the county. He discussed the matter with Bobby Austin, who promised him that he would engage an attorney and get possession of the bulldozer. He did not make any demand for the bulldozer thereafter but relied upon Bobby Austin's represenations. Bobby Austin, after filling bond and getting possession of the bulldozer, filed a legal action against the plaintiff for the value of the services and repairs performed on the bulldozer by himself and the endloader operator.

The plaintiff contends that the Sheriff of Letcher County violated the provisions of the Fourth Amendment by unreasonably seizing his bulldozer. The Sheriff of Letcher

County violated his procedural due process rights by not giving him a right to a hearing before the seizure nor thereafter.

Upon the conclusion of the plaintiff's evidence, the Court took under advisement the defendant's motion for a directed verdict. Upon conclusion of all the evidence the Court denied the plaintiff's motion for a directed verdict and granted the defendant's motion for a directed verdict for the following reasons:

Th plaintiff's sole evidence was his testimony. The evidence of the defendant was the testimony of numerous witnesses. Considering the evidence in a light most favorable to the plaintiff, the Court is unable to find a conflict in the relevant and substantial evidence. The exigencies of the circumstances under which the Sheriff became aware of the bulldozer establish that the actions of the officer in impounding the bulldozer were reasonable and based upon probable cause and the Court so finds.

The Sheriff wasn't unreasonable in requesting an investigation to determine the ownership of the bulldozer and if it was stolen. Nor was the sheriff unreasonable in requesting a bond for the release before the true owner cold be ascertained. The denial of possession during the period of investigation wasn't unreasonable unless the period extended for an unreasonable time. Notwithstanding this the plaintiff was aware that he was entitled to a legal hearing. In fact, he consulted an attorney whom he sought to engage to represent the incarcerated endloader operator. He was advised there was nothing against the bulldozer and to employ counsel outside the county. He discussed this with Boyd and elected to rely upon Boyd and his attorney to get the bulldozer. Boyd obtained possession of the bulldozer, after the investigation, by filling a performance bond. There was an absence of evidence from Boyd of any delay or difficulty in obtaining possession. The attorney for Boyd and the operator of the endloader testified but did not present any evidence of

delay or difficulty in obtaining possession or being denied due process. Understandably, the plaintiff is dissatisfied wih the actions of his erstwhile agent, Boyd, but the actions of Boyd are not attributable to the defendant, Sheriff Ben Taylor, nor under color of law as such to support a 1983 Action.

A judgment pursuant to this memorandum opinion will be entered in favor of the defendant and against the plaintiff, denying any relief by reason fo the plaintiff's complaint.

This 23rd day of August, 1983.

G. WIX UNTHANK, JUDGE

(4) During the rebuttal phase of the trial, the prosecution called Marchese's federal parole officer, Mr. Schwartz. Schwartz testified to a number of transactions he had with Marchese. The testimony contradicted the story Marchese had told the jury in his own defense.

Schwartz testified from handwritten notes which he distilled from Marchese's case file. The prosecution had seen the whole file. The defense moved, and the trial court ordered, that Schwartz should produce the entire file, in camera, so that the defense should have an opportunity to discover information in it which may have been valuable for cross-examination. Schwartz, on advice of an Assistant U. S. Attorney, refused to produce the file on the authority of 28 C.F.R. §§ 16.11–16.14. He was not held in contempt. Despite Marchese's objection, the trial court did not strike Schwartz's testimony.

Marchese claims that the ruling of the state court denied him his Fifth and Sixth Amendment rights. Marchese lost his state appeal on the state law question (that the trial court violated § 771, Calif.Evid.Code), and had to confront the adverse authority of *People v. Parham,* 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963), *cert. den.* 377 U.S. 945, 84 S.Ct. 1353, 12 L.Ed.2d 308 (1964).

[7] Again, our inquiry is limited to prejudicial error of constitutional proportion. While the procedure followed was unusual, we cannot say that Marchese was denied a sufficient opportunity to confront his accuser. Schwartz was on the stand and he was testifying from his own recollection, albeit refreshed, of the transactions between himself and Marchese. Schwartz made some mistakes on the stand which were easily demonstrated to the jury. True, a fishing expedition through Marchese's probation file might have made cross-examination on collateral issues more effective, but on the main issues of fact involved, Marchese had adequate opportunity to cross-examine. Marchese was allowed to see the notes from which Schwartz testified and to cross-examine Schwartz fully. Any failure to afford him a more perfect opportunity does not amount to error of constitutional magnitude. It is difficult to conceive of anything further that could have helped Marchese if the file had been made available.

Affirmed.

UNITED STATES of America, Plaintiff-Appellant,

v.

VERTOL H21C, REGISTRATION NO. N8540, in rem, Defendant,

Aviation Contractors, Inc., Claimant-Appellee.

No. 74–3071.

United States Court of Appeals, Ninth Circuit.

Nov. 1, 1976.

An order of the United States District Court for the Northern District of California, Robert F. Peckham, Chief Judge, granted a motion for release of a $6,000 certificate of deposit which had been exchanged for a helicopter seized by the Federal Aviation Administration for alleged violation of certain regulations relating to helicopters. The Government appealed. The Court of Appeals, Samuel P. King, District Judge, held that in absence of some showing of special need for very prompt action to protect the Government's interest in collecting a civil penalty sought by the FAA for alleged violation of certain regulations relating to helicopters, the seizure of

the helicopter, initiated by the FAA without filing any papers with any court, without seeking approval of any court officer, without filing of any bond and without provision for prompt postseizure hearing was violative of due process.

Affirmed.

1. Federal Courts ⇐585

Release of helicopter and substituted security ended in rem action against the helicopter, and order of release was "final decision" within appeal statute, notwithstanding contention that Federal Aviation Administration could then proceed to collect penalty. Federal Aviation Act of 1958, § 903(a), (b)(1–3), 49 U.S.C.A. § 1473(a), (b)(1–3); 28 U.S.C.A. § 1291.

2. Aviation ⇐31
Constitutional Law ⇐319

In absence of some showing of special need for very prompt action to protect Government's interest in collecting civil penalty sought by Federal Aviation Administration for alleged violation of certain regulations relating to helicopters, seizure of helicopter, initiated by FAA without filing any papers with any court, without seeking approval of any court officer, without filing of any bond and without provision for prompt postseizure hearing was violative of due process. Federal Aviation Act of 1958, §§ 609, 901(a)(1), 903(a), (b)(1–3), 1005, 1007, 49 U.S.C.A. §§ 1429, 1471(a)(1), 1473(a), (b)(1–3), 1485, 1487; 28 U.S.C.A. § 1291.

3. Constitutional Law ⇐278(1)

That deprivation of property was only temporary did not preclude finding that property owner was entitled to due process protections against such deprivation. U.S. C.A.Const. Amend. 5.

Richard I. Chaifetz, Atty. (argued), of Crim. Div., U. S. Dept. of Justice, Washington, D. C., for plaintiff-appellant.

Maribeth Halloran (argued), of Lorenz, Greene, Kelley & Halloran, San Francisco, Cal., for claimant-appellee.

Before MERRILL and HUFSTEDLER, Circuit Judges, and KING,* District Judge.

KING, District Judge:

On October 2, 1972, the Federal Aviation Administration (hereinafter "FAA") unilaterally determined that Aviation Contractors, Inc. (hereinafter "Aviation") had violated certain FAA regulations relating to helicopters.[1] Pursuant to its authority under 49 U.S.C. § 1471(a)(1) the FAA determined to seek $6,000 in civil penalties from Aviation. On October 13, 1972, acting under 49 U.S.C. § 1473(b)(2),[2] the FAA seized the defendant helicopter. On November 15, 1972, this *in rem* action against the helicopter was begun. The government sought to have the district court impose the $6,000 in civil penalties which the FAA claimed that Aviation should be assessed.[3] On the same day that the *in rem* action was begun the aircraft passed into the custody of the United States Marshal upon the issuance of a

* The Honorable Samuel P. King, Chief United States District Judge for the District of Hawaii, sitting by designation.

1. The regulations involved prohibit using helicopters "for compensation or hire" in external load operations without certain FAA licenses. *See* 14 C.F.R. § 91.39 and § 133.11. Aviation contends that the particular leasing arrangement under which it operated its helicopter did not come within the "compensation or hire" terms of the regulations.

2. 49 U.S.C. § 1473(b)(2) provides:

> Any aircraft subject to such lien may be summarily seized by and placed in the custody of such persons as the Board or Administrator may by regulation prescribe, and a report of the cause shall thereupon be transmitted to the United States attorney for the judicial district in which the seizure is made. The United States attorney shall promptly institute proceedings for the enforcement of the lien or notify the Board or Administrator of his failure to so act.

3. To collect a penalty, the FAA must begin an *in rem* or *in personam* action in the United States District Court; the FAA may not impose the penalty itself. *See* 49 U.S.C. § 1473(a), (b)(1) and Vol. III, pp. 28–30.

warrant of arrest by the court clerk. On May 31, 1974, acting pursuant to 49 U.S.C. § 1473(b)(3), the FAA released the helicopter to Aviation in exchange for a certificate of deposit in the amount of $6,000.

On June 5, 1974, the district court denied the government's motion for summary judgment ordering Aviation to pay the $6,000 penalty. At the same time, the court granted Aviation's motion for the release of the $6,000 certificate of deposit on the ground that the helicopter for which it had been substituted had been seized without affording Aviation due process of law. It is with the latter aspect of the district court's decision that this appeal is concerned.

[1] Preliminarily, we reject Aviation's contention that the district court's order was not a "final decision" within the meaning of 28 U.S.C. § 1291 and that therefore this court does not have jurisdiction to hear this appeal. As the first sentence of both the complaint and the district court's opinion make clear, this was an *in rem* action against the helicopter. The release of the helicopter (and the substituted security) ended the *in rem* action. *See American Bank of Wage Claims v. Registry of the District Court of Guam*, 431 F.2d 1215 (9th Cir. 1970), and *Seabord & Caribbran Transport Corp. v. Hafen-Dampfschiffahrt A.G. Hapag-Hadac Seebaderdienst*, 329 F.2d 538 (5th Cir. 1964). Aviation's argument that the FAA may now proceed to collect the $6,000 penalty, *see* 49 U.S.C.A. § 1473(b)(1), does not in any way defeat this court's jurisdiction.

Turning to the merits of this appeal, we agree with the district court that the procedure followed in effecting the seizure of the aircraft in this case denied Aviation due process of law.[4] There can be no dispute that Aviation was deprived of its property within the meaning of the Fifth Amendment and was therefore entitled to due process protections. That the deprivation was only temporary can make no difference. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). Finding this deprivation, however, only begins our inquiry since the Supreme Court has recently taken several different approaches in determining the necessity for pre-seizure hearings. In one case the Court stated:

> [w]e have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective. . . . It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 612, 94 S.Ct. 1895, 1902, 40 L.Ed.2d 406 (1972), quoting *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950).

On the other hand, the Supreme Court has also said that:

> There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. *Fuentes v. Shevin*, 407 U.S. 67, 90, 92 S.Ct. 1983, 1999, 32 L.Ed.2d 556 (1972) (citations and footnotes omitted).

In its most recent opinion in this area, the Supreme Court left unclear whether the "hearing at some stage" approach of *Mitchell* or the "extraordinary situation" requirement of *Fuentes* should guide the courts in the future. *See North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751. Fortunately, we need not choose between these approaches to resolve this case. Rather, we shall adopt still another approach utilized by the Supreme Court and determine the constitutionality of this seizure by comparing "the precise nature of the government function involved" with the "private interest that has been affected by governmental action". *See Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961).

4. *Compare Aircrane, Inc. v. Butterfield*, 369 F.Supp. 598 (E.D.Pa.1974) (three judge court).

The private interest in this case is substantial. We agree with the trial court's finding that the government "effectively paralyzed" claimant's business by seizing the helicopter. This deprivation certainly rivals in severity the seizure of various types of consumer products. *Compare Fuentes v. Shevin, supra,* 407 U.S. at 88, 92 S.Ct. 1983. Indeed, the seizure would appear to "drive [claimant] to the wall" as severely as the ex parte prejudgment garnishment procedures so roundly condemned in *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). We also note from the record the substantial possibility that the physical condition of the helicopter was allowed to deteriorate while in government custody.

There is little that the government can offer to counterbalance the substantial private interest at stake in this case. It appears that the sole justification for the seizure was to facilitate the collection of the penalty sought by the FAA. There is almost no evidence in the record which detracts from the district court's conclusion that this seizure was not directly related to public safety considerations. In addition, the government's contention to the contrary is belied by the statutory bonding procedure. *See* 49 U.S.C. § 1473(b)(3). This procedure, which was utilized in this case, permits the aircraft to be reclaimed and put back into operation upon deposit of a bond by the claimant. We further note that the FAA has a wide range of powers to act quickly when air safety is in fact directly threatened. *See* 49 U.S.C. § 1429 (permitting ex parte revocation of air-worthiness certificate)[5] and 49 U.S.C. § 1485 and § 1487 (authorizing ex parte orders by FAA when essential to air safety).

[2, 3] We are of the opinion that the government's interest in facilitating the collection of the $6,000 penalty is plainly insufficient to support the summary seizure of Aviation's helicopter. *Cf. North Georgia Finishing, Inc. v. Di-Chem, Inc., supra,* 419 U.S. 610, 95 S.Ct. 719. The government's interest in this case is not nearly as strong as it is in those situations in which prehearing seizures have been approved. *See, e. g., Ewing v. Mytinger, supra,* 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed.2d 1088 (seizure of misbranded food); *Fahey v. Mallonee,* 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed.2d 2030 (1947) (conservator may seize assets of failing bank); and *North American Storage Co. v. Chicago,* 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908) (seizure of contaminated foods). While in certain situations the Internal Revenue Service may utilize summary proceedings to ensure the collection of the internal revenue of the United States, *see Phillips v. Commissioner,* 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 738 (1931), we refuse to extend this rule to empower other governmental agencies to summarily take property as security for the eventuality that civil penalties must, in fact, be paid.[6]

Such a rule would be particularly inappropriate in this case since there has been no showing of a "special need for very prompt action," to protect the government's interest. *See Fuentes v. Shevin, supra,* 407 U.S. at 91, 92 S.Ct. at 2000 and *compare Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 679, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). There is no allegation or other indication in the record that Aviation would not, or could not, pay any penalty assessed against it unless the helicopter was seized. The power of the FAA to proceed *in personam* to collect the penalty further diminishes the necessity of summary action. *See* 49 U.S.C. § 1473(b).

This seizure embodied none of the procedural protections which the Supreme Court has emphasized in determining the constitutionality of prehearing seizures. These protections were most clearly articulated in

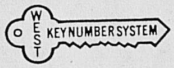
5. The FAA's authority to move summarily under 49 U.S.C. § 1429 has recently been upheld in *Morton v. Dow,* 525 F.2d 1302 (10th Cir. 1975) and *Air East, Inc. v. National Transportation Safety Board,* 512 F.2d 1227 (3rd Cir. 1975).

6. In addition, the government does not contend that violations of FAA regulations are so numerous that a requirement of pre-seizure hearings will unduly hamper FAA enforcement efforts. *See* Friendly, "Some Kind of Hearing", 123 U.Pa.L.Rev. 1267, 1303 (1975).

Mitchell v. W. T. Grant, supra, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, where the Court relied on four procedural requirements in upholding the constitutionality of a Louisiana sequestration statute. First, the Court attached considerable weight to the fact that the writ of sequestration was issued by a judge, not by a court clerk. *See id.* at 616, 94 S.Ct. 1895 and *see also North Georgia Finishing, Inc. v. Di-Chem, Inc., supra,* 419 U.S. at 607, 95 S.Ct. 719. Second, in view of the relatively simple and narrowly drawn questions relevant to the issuance of the writ, the Court found that the affidavits required by the Louisiana statute were sufficiently detailed to reduce the chance of a wrongful sequestration. *See Mitchell v. W. T. Grant, supra,* 416 U.S. at 617, 94 S.Ct. 1895. Another factor on which the Court relied was that the movant-creditor was obliged to post sufficient bond to protect the debtor in the event the sequestration was later declared to have been "improvident". *Id.* at 606, 94 S.Ct. 1895. Finally, the Court noted the availability of an early hearing at which the creditor could be required to prove the grounds upon which the writ was issued. *See id.* at 618, 94 S.Ct. 1895.

In this case, the FAA executed the initial seizure without filing any papers with any court and without seeking the approval of any court officer, much less the approval of a judge. To make matters worse, the warrant of arrest which was issued one month after the initial seizure was not issued by a judge but by the court clerk. The bare affidavit filed by the U.S. Attorney on which the clerk's action was based merely alleged that a violation of the Federal Aviation Act had been committed; it was not possible to determine from the affidavit whether the U.S. Attorney's view was correct or whether the seizure was warranted. There was no requirement that a bond be posted by the government before the seizure was approved. Finally, the statute does not provide for a prompt post seizure hearing to determine whether there is good cause to continue the aircraft in government custody. Thus, in all important respects, the seizure in this case lacks the protections which the Supreme Court emphasized in *Mitchell v. W. T. Grant, supra,* 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406.

For the reasons set forth above, the district court's order is affirmed.



WIDING TRANSPORTATION, INC., Petitioner-Appellant,

Bigge Drayage Company, and Mojave Transportation Co., Intervening Petitioners-Appellants,

v.

INTERSTATE COMMERCE COMMISSION and United States of America, Respondents-Appellees,

C & H Freightways et al., Intervening Respondents-Appellees.

No. 75-1849.

United States Court of Appeals, Ninth Circuit.

Nov. 1, 1976.

Motor carrier filed petition for judicial review of an order of the Interstate Commerce Commission denying its application for irregular route motor carrier authority, and other unsuccessful applicants intervened as petitioners. The Court of Appeals, Jameson, District Judge, held that determination of actual existing operations of each applicant was rational basis for choosing among applicants; that Commission was justified in denying applications of motor carriers who failed to present clear evidence of their past operations; and that evidence sustained decision of Commission granting applications of three motor carriers and denying remaining applications.

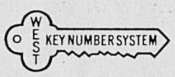
Affirmed: petitions dismissed.

because this appeal is moot. Our holding does not allow important constitutional questions to go unreviewed merely because the district court disposed of them on threshold jurisdictional grounds prior to certification and before the class representative's claim became moot. Any member of the class may still commence a suit in state or federal district court and raise the exact constitutional question posed by appellant in the present suit. In other words, the slate is clean for a constitutional onslaught on Hawaii's Workmen's Compensation scheme if any class member chooses to bear the standard.[4] (*See DeFunis v. Odegaard* (1974) 416 U.S. 312, 319; *United States v. Munsingwear, Inc., supra*, 340 U.S., at pp. 39–40, 71 S.Ct. 104.)

[7] Although the doctrine of mootness has firm roots in Article III, it also finds justification as a means by which we avoid the premature decision of a constitutional question. (*See Franks v. Bowman Transportation Co.*, 424 U.S. at 756, n. 8, 96 S.Ct. at 1260 ("[M]ootness [is] . . . one of the policy rules often invoked by the Court 'to avoid passing prematurely on constitutional questions. Because [such] rules operate in "cases confessedly within [the Court's] jurisdiction" . . . they find their source in policy, rather than purely constitutional, considerations.' ").) Appellant raises a complex Due Process claim which claim is inexorably intertwined with his contentions as to the applicability of the Three-Judge Court Act and the abstention doctrine. Given the moot posture of this appeal, we need not hasten to address this matrix of issues.[5]

Accordingly, we dismiss the appeal as moot and remand to the district court with instructions to vacate its orders and to dismiss the complaint.

APPEAL DISMISSED.



Richard STYPMANN et al., Plaintiffs-Appellees,

v.

The CITY AND COUNTY OF SAN FRANCISCO et al., Defendants-Appellants.

No. 74–1844.

United States Court of Appeals, Ninth Circuit.

July 21, 1977.

Class action was brought against officials of City and County of San Francisco, garage owners and others challenging constitutionality of California Vehicle Code statute authorizing removal of privately

4. On the other hand, the cause of action is foreclosed as to the Insurers because they only participated in this suit as insurers of Kuahulu's employer. But should the insurers also insure the employer of a class representative in a subsequent constitutional challenge to Hawaii's Workmen's Compensation scheme, nothing in our opinion prevents such a representative from joining the Insurers and litigating the Due Process claim against them.

5. Furthermore, should another class member raise the same Due Process claim posed by appellant in a later suit, we would, upon review thereof, be unhampered by the trappings of the now demised Three-Judge Court Act. *Franks v. Bowman Transportation Co., supra*, indicates that these considerations of judicial economy are relevant in applying the mootness doctrine. (*See* 424 U.S. at p. 757, n. 9, 96 S.Ct. at p. 1260) ("Nor are there present in the instant case nonconstitutional policy considerations . . . mitigating against review by this Court at the present time. Indeed, to 'split up' the . . . case . . . would be destructive of the ends of judicial economy . . .")

owned vehicles from streets and highways without prior notice or opportunity for hearing and establishing possessory lien for towage and storage fees and San Francisco ordinance granting a hearing within five days to persons who are unable to pay the storage and towage fee and who give notice of challenging underlying traffic citation. The United States District Court for the Northern District of California, Alfonzo J. Zirpoli, J., entered a judgment in favor of the plaintiffs and the defendants appealed. The Court of Appeals, Browning, Circuit Judge, held that: (1) a three-judge district court was not required; (2) there was a sufficiently close nexus between state and challenged action of towing companies so that actions of towing companies could be fairly treated as that of state itself; (3) due process protection applies to detention of private automobiles, and (4) statute deprived private owners of automobiles due process and was not saved by ordinance.

Judgment vacated and cause remanded for modification of judgment in accordance with opinion.

1. Federal Courts ⇐991

Generally, three-judge court need not be convened to determine whether declaratory judgment should issue. 28 U.S.C.A. § 2281 (Repealed 1976).

2. Federal Courts ⇐1002

Requirement of a three-judge district court applies only when injunction restrains action of any officer of state. 28 U.S.C.A. § 2281 (Repealed 1976).

3. Federal Courts ⇐1002

Where injunction granted by federal district court in action challenging validity of California statute and ordinance related to towing of privately owned automobiles from streets and highways ran only against private towing companies, a three-judge district court was not required. 42 U.S.C.A. § 1983; West's Ann.Cal.Vehicle Code, § 22851.

4. Civil Rights ⇐13.5(4)

Under California statute relating to the towing of privately owned automobiles from streets and highways by garage owners, since police officer made initial determination that car would be towed and summoned towing company which detained vehicle and asserted lien for towing and storage charges pursuant to statutory scheme, there was sufficiently close nexus between state and challenged action of towing company to require that action of towing company be treated as that of state itself for purpose of action under statute relating to violation of constitutional right. 28 U.S.C.A. § 1343(3); § 2281 (Repealed 1976); 42 U.S.C.A. § 1983; West's Ann.Cal.Vehicle Code, § 22851.

5. Constitutional Law ⇐278(1)

Loss of use of enjoyment of an automobile deprives owner of a property interest that may be taken from it only in accordance with due process clause.

6. Automobiles ⇐363
Constitutional Law ⇐300

California statute authorizing removal of privately owned vehicles from streets and highways on order of police officer without prior notice or opportunity for hearing and establishing possessory lien for towage and storage fees without hearing before or after lien attaches deprived private automobile owners of due process as did San Francisco ordinance providing that persons unable to pay towage fees may obtain hearing on underlying traffic citation within five days of notice that he intends to challenge citation. 42 U.S.C.A. § 1983; West's Ann.Cal.Vehicle Code, § 22851.

7. Constitutional Law ⇐305(2)

Fundamental requirement of due process is opportunity to be heard at meaningful time and in a meaningful manner.

8. Searches and Seizures ⇐1

Seizure of property without prior hearing is sustained only where owner is afford-

ed a prompt post-seizure hearing at which person seizing property must at least make a showing of probable cause.

James Murray, Tiburon, Cal., Burk E. Delvanthal, Deputy City Atty., San Francisco, Cal., argued, for defendants-appellants.

David C. Moon, S. F. Neighborhood Legal Assistance Foundation, San Francisco, Cal., argued, for plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of California.

Before BROWNING, ELY and ANDERSON, Circuit Judges.

BROWNING, Circuit Judge:

Appellees filed this class action under the Civil Rights Act, 42 U.S.C. § 1983, against officials of the City and County of San Francisco, California, a garage owner in San Francisco, a garage owner in Sausalito, California, and the president of the San Francisco Tow Car Association.[1] Appellees challenged the constitutionality of the provisions of the California Vehicle Code authorizing removal of privately owned vehicles from streets and highways without prior notice or opportunity for hearing, and of section 22851 establishing a possessory lien for towage and storage fees without a hearing before or after the lien attaches.[2]

In the course of the litigation, appellees abandoned their attack upon those provisions of the Vehicle Code authorizing the initial seizure and tow without a prior hearing, and confined their objection to the provision of section 22851 creating a possessory lien for towing and storage charges. Their complaint was then dismissed as to the city officials.

Also in the course of the litigation, and apparently in response to it, the City and

1. The class certified by the district court consists of all persons whose vehicles are withheld from them pursuant to the lien rights and powers of sale provided in California Vehicle Code § 22851. This certification is not challenged on appeal.

2. California Vehicle Code § 22650 provides that no peace officer shall remove any unattended vehicle from a highway except as provided in the code.

Other sections of the code permit state and local officers to remove vehicles in particular circumstances. Section 22651 authorizes removal of vehicles that are obstructing traffic, reported stolen, blocking a private entrance, blocking a fire hydrant, or left four hours on a freeway, or where the driver is incapacitated by injury or illness, arrest, or the vehicle has foreign licenses and has been issued five or more notices of parking violations within five or more days, or the vehicle is unlicensed and illegally parked. Section 22652 authorizes removal under local ordinances in a number of situations including that of a vehicle left on a highway for 72 consecutive hours.

Sections 22850–56 of the code establish procedures for the removal and storage of the vehicles. Section 22850 provides that when an officer removes a vehicle he shall deliver it to a garage or place of storage designated by the governmental agency. To implement these provisions, local authorities contract with private towing companies for the removal and storage of vehicles at the direction of police officers. Section 22851, the section challenged here, provides that whenever a vehicle is removed to a designated garage, the garage keeper "shall have a lien dependent upon possession for his compensation for towage and for caring and keeping safe such vehicle." The section further provides that after 20 days if the vehicle is appraised at $200 or less, or after 60 days if valued at more than $200, the garage keeper may sell a vehicle to satisfy his lien. Section 22851 reads in full as follows:

> "Whenever a vehicle has been removed to a garage under the provisions of this chapter and the keeper of the garage has received the notice or notices as provided herein, the keeper shall have a lien dependent upon possession for his compensation for towage and for caring for and keeping safe such vehicle for a period not exceeding 60 days and, if the vehicle is not recovered by the owner within said 60 days or the owner is unknown, the keeper of the garage may satisfy his lien in the manner and after giving the notices required in Sections 3071 and 3072 of the Civil Code. Notwithstanding the provisions of this section, if the vehicle is appraised at a value not exceeding two hundred dollars ($200) by a person authorized to make such appraisal, the keeper of the garage may, if the vehicle is not recovered by the owner within 20 days or the owner is unknown, satisfy his lien as provided in Section 3073 of the Civil Code or Section 22705 of this code." Cal.Veh.Code § 22851. (West Supp.1977).

County of San Francisco adopted an ordinance providing that a person "unable to pay" towage fees may obtain a hearing on the underlying traffic citation within five days of the time he notifies the Traffic Fines Bureau that he intends to challenge the citation and that he is financially unable to redeem his vehicle from storage. If the owner is found not guilty and the traffic citation dismissed, the vehicle is to be returned, and towing and storage charges are to be paid by the city. San Francisco Traffic Code § 160.01.

The district court granted summary judgment for appellees, striking down both section 22851 and the San Francisco ordinance, because they deprived vehicle owners of the use of their vehicles without prior notice or hearing and did not involve one of those "extraordinary situations" justifying deprivation of a property interest without prior notice and hearing. The court relied upon *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), and *Fuentes v. Shevin*, 407 U.S. 67, 90–92, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).[3] This appeal followed.

[1–3] There is no merit in appellants' suggestion that a three-judge district court was required to hear this case. *See* 28 U.S.C. § 2281.[4] Generally, a three-judge court need not be convened to determine whether a declaratory judgment should issue.[5] In this case injunctive relief was also sought and granted, but the three-judge requirement applies only when an injunction "restrain[s] the action of any officer of such State," *Hall v. Garson*, 430 F.2d 430, 433, 442 (5th Cir. 1970); *see Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 382 (2d Cir. 1973),[6] and the injunction granted by the district court runs only against private towing companies.

[4] Nor is there substance in appellants' argument that the state action required for jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 is lacking. A police officer makes the initial determination that a car will be towed and summons the towing company. The towing company tows the vehicle only at the direction of the officer. The officer designates the garage to which the vehicle will be towed. The officer notifies the owner that his vehicle has been removed, the grounds for the action, and the place of storage. The towing company detains the vehicle and asserts the lien for towing and storage charges pursuant to a statutory scheme designed solely to accomplish the state's purpose of enforcing its traffic laws. Thus, the private towing company is a "willful participant in a joint activity with the State or its agents," *United States v. Price*, 383 U.S. 787, 794, 86

3. The same analysis was applied and the same result reached in *Remm v. Landrieu*, 418 F.Supp. 542, 545–46 (E.D.La.1976); *Seals v. Nicholl*, 378 F.Supp. 172, 177–78 (N.D.Ill.1973), and *Graff v. Nicholl*, 370 F.Supp. 974, 985 (N.D. Ill.1974) (three-judge court).

4. Section 7 of Pub.L. 94–381, 90 Stat. 1119 (August 12, 1976), specifies that the repeal of § 2281 does not apply to actions, such as the present case, commenced on or before August 12, 1976.

5. *Hubel v. West Virginia Racing Comm'n*, 513 F.2d 240, 242 n.5 (4th Cir. 1975); *Age of Majority Educ. Corp. v. Preller*, 512 F.2d 1241, 1245 (4th Cir. 1975) (in banc); *Finnerty v. Cowen*, 508 F.2d 979, 985–86 (2d Cir. 1974); *see Mitchell v. Donovan*, 398 U.S. 427, 431, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970); *Wiren v. Eide*, 542 F.2d 757, 760 n.3 (9th Cir. 1976); *Mon Chi Heung Au v. Lum*, 512 F.2d 430, 431 (9th Cir. 1975).

6. Moreover, if the only question presented were the constitutionality of the San Francisco ordinance, as appellants insist, § 2281 would be inapplicable for that reason alone. The statute applies "only [to] enactments of statewide application." *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 97 n.14, 95 S.Ct. 289, 294, 42 L.Ed.2d 249 (1974). Accordingly, a three-judge court is not required to consider a challenge to a local ordinance. *Board of Regents v. New Left Educ. Project*, 404 U.S. 541, 542, 92 S.Ct. 652, 30 L.Ed.2d 697 (1972); *Moody v. Flowers*, 387 U.S. 97, 101, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967); *Clutchette v. Procunier*, 497 F.2d 809, 812 (9th Cir. 1974), *modified on other grounds*, 510 F.2d 613 (9th Cir. 1975), *reversed on other grounds sub nom., Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976).

S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966); *see Culbertson v. Leland*, 528 F.2d 426 (9th Cir. 1975); and there is a "sufficiently close nexus between the State and the challenged action of the [towing company] so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974).[7]

We turn to the merits of the constitutional claim.

[5] Appellants concede that due process protections apply to the detention of private automobiles. Loss of the use and enjoyment of a car deprives the owner of a property interest that may be taken from him only in accordance with the Due Process Clause.[8] Due process strictures must be met though the deprivation be temporary.[9]

[6] The parties disagree only as to the particular process that is due. We agree with the district court that the procedural protections afforded by the California statute and San Francisco ordinance are not constitutionally sufficient; but we reach this conclusion by a somewhat different route than that taken by the district court.

In our view this case does not present the issue of whether a hearing is required *before* the seizure occurs. The seizure depriving the car owner of use of his property occurs when the vehicle is taken under tow on the street. Appellees have elected not to contest the right of the state to seize vehicles summarily and tow them to a garage.[10] For purposes of this case, therefore, the towkeeper is in lawful possession.[11] The occasion for possible application of the "extraordinary situations" test has passed. Whether the *post*-seizure hearings available under the California statute and San Francisco ordinance satisfy due process requirements is to be determined by examining the process afforded in light of the interests of the private property owner and the government. *Lee v. Thornton*, 538 F.2d 27, 31 (2d Cir. 1976).[12]

The private interest in the uninterrupted use of an automobile is substantial. A per-

7. The same conclusion is reached on essentially the same facts in *Tedeschi v. Blackwood*, 410 F.Supp. 34, 41 (D.Conn.1976) (three-judge court).

8. *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976); *Guzman v. Western State Bank*, 516 F.2d 125, 132 n.8 (8th Cir. 1975); *cf. Wooley v. Maynard*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 752 (1977); *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

9. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 84–86, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *United States v. Vertol H21C Reg. No. N8540*, 545 F.2d 648, 650 (9th Cir. 1976).

10. The "extraordinary situation" standard justifying immediate removal without prior notice and hearing is clearly satisfied in some circumstances (a vehicle blocking a busy street during commuting hours, for example). *See Remm v. Landrieu*, 418 F.Supp. 542, 545 (E.D.La.1976); *Tedeschi v. Blackwood* 410 F.Supp. 34, 43, 44 (D.Conn.1976) (three-judge court). In other circumstances the need for summary action is not so clear. *See id.* at 44; *Graff v. Nicholl*, 370 F.Supp. 974, 982 (N.D.Ill.1974).

11. *Cf. Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 386–87 (2d Cir. 1973) (Timbers and Lumbard, JJ., concurring).

12. *See Dixon v. Love*, — U.S. —, —, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614, 630 n.12, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Arnett v. Kennedy*, 416 U.S. 134, 167–68, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (Powell, J., concurring); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

As the Supreme Court said in *Mathews v. Eldridge, supra*, 424 U.S. at 335, 96 S.Ct. at 903:

> "identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

son's ability to make a living and his access to both the necessities and amenities of life may depend upon the availability of an automobile when needed.[13]

The public interest in removing vehicles from streets and highways in the circumstances specified in the traffic code is also substantial, though differing in the various situations in which removal is authorized. Moreover, the government has a considerable interest in imposing the cost of removal upon the vehicle owner and retaining possession of the vehicle as security for payment. But neither of these interests is at stake here. The only government interest at stake is that of avoiding the inconvenience and expense of a reasonably prompt hearing to establish probable cause for continued detention of the vehicle.[14] The fact that San Francisco has undertaken to provide a hearing in some circumstances suggests that it is neither unduly burdensome nor unduly costly to do so.[15]

Despite the greater relative weight of the private interests involved, the statute affords virtually no protection to the vehicle owner. The vehicle may be recovered only by paying the towing and storage fees; there is no provision for obtaining its release by posting bond.[16] There is no provision that would mitigate the loss if the detention is unlawful or fraudulent.[17] The statute establishes no procedure to assure reliability of the determination that the seizure and detention are justified.[18] A police officer must authorize the tow, but he also "gathers the facts upon which the charge of ineligibility rests," and his judgment cannot be wholly neutral. *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970). Moreover, no official participates in any way in assessing the storage charges or enforcing the lien. No hearing is afforded and no judicial intervention is provided by section 22851 at any stage before or after seizure unless and until the vehicle is sold to satisfy the lien. The only hearing available under any other state procedure may be long deferred, and the burden of proof is placed upon the owner of the property seized rather than upon those who have seized it.[19]

[7, 8] "The fundamental requirement of due process is the opportunity to be heard

13. *See* cases cited note 8.

14. The California statutes afford a right to hearing before a vehicle is sold to satisfy a lien. *See* Cal.Civ.Code §§ 3071, 3073 (West Supp. 1977).

15. The cost of affording procedural protection is a relevant factor but is not controlling. *Mathews v. Eldridge*, 424 U.S. 319, 347–48, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

16. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 611–12, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) (Powell, J., concurring.)

17. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 606, 617–19, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974).

18. The validity of the detention depends upon the legality of the tow, a question "inherently subject to factual determination and adversarial input." *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 617, 618, 94 S.Ct. 1895, 1905, 40 L.Ed.2d 406 (1974); *see Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Each named appellee claims his vehicle was illegally towed. The vehicles of two of the named appellees were towed because they were allegedly parked on a San Francisco street for more than 72 hours (*see* Cal.Veh. Code § 22652). The vehicle of another named appellee was towed for an allegedly non-towable offense: "22502—Hazard." The vehicle of the fourth appellee (intervenor MacKenzie) was towed from its parking place on a street in Sausalito because MacKenzie had been arrested and taken into custody for earlier traffic violations (*see* Cal.Veh.Code § 22651(h)). Each of the four vehicles was towed to a garage and held pursuant to § 22850 without prior or subsequent hearing. The vehicles were later restored to their owners on stipulation that the return would not affect this litigation and that the vehicles would be returned to custody if appellants prevailed.

19. Appellants state that California provides the owner with "a civil remedy sounding in negligence for negligent, erroneous interference with his property" in the event "the court in the traffic citation hearing finds the tow erroneous." Apparently appellants refer to either (1) a regular court action for recovery of the vehicle (*cf. C.I.T. Corp. v. Biltmore Garage*, 3 Cal.App.2d 757, 36 P.2d 247 (1934)), or damages for conversion (*cf. Brown v. J. E. French*

'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge, supra*, 424 U.S. at 333, 96 S.Ct. at 902, quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). Seizure of property without prior hearing has been sustained only where the owner is afforded prompt post-seizure hearing at which the person seizing the property must at least make a showing of probable cause.[20] Neither this nor any other procedural protection is afforded here that might prevent or ameliorate a temporary but substantial deprivation of the use and enjoyment of a towed private vehicle.

An early hearing, on the other hand, would provide vehicle owners the opportunity to test the factual basis of the tow and thus protect them against erroneous deprivation of the use of their vehicles. The only state interest adversely affected by requiring an early hearing—avoidance of the administrative burden and expense—is not enough in these circumstances to warrant denying such a hearing. We conclude, therefore, that section 22851 does not comply with due process requirements.

Nor is the statute saved by the San Francisco ordinance.[21] A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. *Lee v. Thornton, supra*, 538 F.2d at 33, a case involving seizure and detention of automobiles in comparable circumstances,[22] held that due process required action on a petition for rescission or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours.

Although a five-day delay is clearly excessive, the record in this case does not contain the information necessary for a more precise determination of the exact schedule that would best balance the private and public interests involved. That task should be left in the first instance to

Co., 253 Cal.App.2d Supp. 1079, 60 Cal.Rptr. 646 (1967)), or recovery of the fees if the owner already paid them, or (2) a small claims court action if the amount involved is less than $750 and the owner so elects (*see Adams v. Dep't of Motor Vehicles*, 11 Cal.3d 146, 156, 113 Cal. Rptr. 145, 520 P.2d 961 (1974); Cal.Code Civ. Pro. § 116.2 (West Supp.1977)). A regular court action would entail considerable delay. Even a small claims court action is generally heard no earlier than 10 nor later than 40 days from the filing of the claim. Cal.Code Civ.Pro. § 116.4 (West Supp.1977). If the small claims hearing must await the traffic citation hearing, as appellants suggest, even greater delay may ensue. In addition, the greater speed of the small claims court action is available only at a cost, *e. g.*, the owner cannot be represented by an attorney. Cal.Code Civ.Pro. § 117.4 (West Supp.1977).

20. *See Dixon v. Love*, — U.S. ——, ——, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *id.* at ——— ——, 97 S.Ct. 1723 (Stevens, J., concurring); *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614, 629, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Laing v. United States*, 423 U.S. 161, 187, 96 S.Ct. 473, 46 L.Ed.2d 416 (1976) (Brennan, J., concurring); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606–08, 611–13, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) (Powell, J., concurring); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 665 n.2, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974); *Arnett v. Kennedy*, 416 U.S. 134, 170, 178, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White and Powell, JJ., concurring). *See also Carey v. Sugar*, 425 U.S. 73, 77–78, 96 S.Ct. 1208, 47 L.Ed.2d 587 (1976); *Boehning v. Indiana State Employees Ass'n*, 423 U.S. 6, 96 S.Ct. 168, 46 L.Ed.2d 148 (1975).

21. The ordinance applies only in the City and County of San Francisco. The vehicle of one of the named plaintiffs was seized in Sausalito, California (see note 18); a Sausalito garage owner is a defendant. The class certified by the district court includes vehicle owners throughout California.

The ordinance applies only to those "unable to pay" the towing fee; it provides no remedy for those able to pay.

22. In *Lee v. Thornton*, 538 F.2d 27, 33 (2d Cir. 1976), the vehicles were seized "at border points remote from a traveler's destination." However, San Francisco emphasizes its status as a tourist center and suggests that a material portion of the vehicles towed by the city belong to nonresidents, making collection of towing fees difficult unless the vehicle can be retained. Moreover, the greater availability of facilities should make it less difficult to provide an early hearing within the city than at a border point.

The Court's Copy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

F.H.C. COMPANY, INCORPORATED, Plaintiff	Civil Action No. 82-375
v.	Pikeville, Kentucky August 17, 1983
BEN TAYLOR, Sheriff, Letcher County, Defendant	

COURT'S EXAMINATION OF DEXTER CHURCH DURING TRIAL

Before the Honorable G. Wix Unthank, and a jury

APPEARANCES:

For the Plaintiff: CHRISTOPHER M. HILL, ESQ.
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Frankfort, KY 40602

For the Defendant: JAMES W. CRAFT, III, ESQ.
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Whitesburg, KY 41858

Court Reporter: SUSAN CHRYS LINDSTROM, RPR
Official Court Reporter
P. O. Box 531
Pikeville, KY 41501
(606)432-3906

THE COURT: All right. Now let me state this to the jury: I am going to ask this gentleman a few questions. Just because I ask him some questions doesn't mean I have any interest in this case. I am merely asking him these questions for information for myself and possibly for the jury and I don't want you to get any idea I have any leaning one way or the other. I am just merely trying to get information. Do all of you understand that?

JURORS: (Nodded their heads.)

THE COURT: I have no side here. I am the judge. I am supposed to be impartial. When I was an attorney like them I chose sides, but when I became judge I gave up taking sides. All right.

DEXTER CHURCH

a witness, being previously sworn, was examined and testified as follows:

EXAMINATION

BY THE COURT:

Q. Now, Mr. Church, let me ask you this. We have heard some way or the other that I think perhaps it was the opening statement that there was supposed to have been two pieces of equipment out there, an end loader and a dozer. Do you know anything about that end loader?

A. I understand the end loader belonged to Jimmy Boyd. He had it--

Q. But do you personally know? Did you personally see it?
A. No, sir.
Q. You never saw an end loader out there?
A. Not by the road, no, sir.
Q. You said you were out there the 8th, you were out there the 9th and you were out there the 10th?
A. Yes, sir.
Q. How come you to be out there on the 8th?
A. The 8th, if I am not mistaken in the dates, Jimmy Boyd called me up and told me that Bobby Austin had got put in jail and was in the hospital and I came over the next morning to see about him.
Q. He called you on the 8th and you went over on the 9th?
A. Well, I may be mixed up in my dates. He called me the night the dozer, you know, they were supposed to have brought the dozer in--
Q. Had you been over there prior to him calling you?
A. No, sir, I hadn't been on the job.
Q. Had you been over there in that vicinity?
A. Not that day. It had been a month I guess since I had been over there.
Q. So you were not personally aware of when they moved that bulldozer out of the mud and brought it over alongside the highway? You weren't there any time when they did that?
A. No, sir.

Q. And any time between them moving it out of the hole--I think you testified here, though, that you went over there and you saw the bulldozer on the other side of the Pond Creek bridge on one day and you came back another day and it was across that bridge on the other side.

A. Yeah.

Q. What day was that?

A. The next day after whatever the dates were Jimmy Boyd called me that night, said Bobby, the operator, had been put in jail.

Q. All right.

A. The next morning I went over. They said he's in the hospital.

Q. Where was your bulldozer at that time?

A. Sitting across the creek. This concrete bridge, it had never been brought across that bridge. It was sitting over there.

Q. All right.

A. It had been brought off of this job where I had last seen it a month ago or whatever and brought to the concrete bridge. But the next morning after I went and seen Bobby Austin in the hospital I went on to Whitesburg and saw a lawyer. The next morning I came back to see Bobby Austin and I swung by to see where the dozer was and it had been moved across the bridge.

And there was some fellows sitting there with a low boy

and they told me the sheriff had sent them to get the bulldozer and they had moved it across the bridge and turned it around. That was on, if I don't have my dates mixed up, I think--

Q. You got a call from Boyd and you went to the hospital and saw Austin?

A. Yes, sir. That was the next morning after he was locked up that night and--

Q. But you saw him in the hospital?

A. Yes, sir. I saw Bobby Austin in the hospital.

Q. Then you went and saw a lawyer?

A. Yes, sir.

Q. Who was the lawyer?

A. Mr. Smallwood.

Q. All right. Did you go-- What did you go see Smallwood about?

A. Bobby Austin wanted to bring a suit against getting beat up by the sheriff.

Q. Okay.

A. And I was, you know--

Q. You went to see a lawyer for Bobby Austin?

A. Yes, sir. Jimmy Boyd was with me.

Q. Okay. Did you mention to that lawyer about your bulldozer?

A. Yes, sir. He went over to the courthouse. He told us to wait in his office.

Q. But you didn't-- You waited in the office?
A. Not on that date I didn't. The next day after the--
Q. You went and saw the lawyer?
A. Yes, sir.
Q. At the time you talked to the lawyer about Bobby Boyd, I mean Bobby Austin--
A. Yes, sir.
Q. --you mentioned your bulldozer to Mr. Smallwood?
A. Yes, sir, I told him that the dozer was sitting up there where it was that morning.
Q. Now, Smallwood left you there in the office and went to the courthouse?
A. Yes, sir.
Q. Then came back?
A. Yes, sir.
Q. Did you ever go back to Smallwood after that?
A. No, sir, he told me not to. He said, "They have no charges against your dozer and I would advise you to get the dozer out of, you know, get it, take it on wherever you are going to. I talked to the county attorney, but the sheriff is really upset with Bobby Austin. He tried to fight him--"
Q. Yes, sir. Wait just a moment, now. Now, Mr. Smallwood told you, "There is nothing against the bulldozer"?
A. He said, "They have no charges against the bulldozer."
Q. Told you to get your bulldozer?

A. Yes, sir.
Q. When you went over to get your bulldozer and they wouldn't let you have it, did you go back to Mr. Smallwood?
A. No, sir. He said, "I will not handle your case. I live in Letcher County and you will have to get you a lawyer out of Letcher County."
Q. Did you get you another lawyer?
A. Yes, sir, I con-- Not right at that time. I contacted Mr. Kirkland. After--
Q. How long after-- Did you contact Mr. Kirkland before your bulldozer was released?
A. Yes, sir. Wait a minute, now. I am not-- Yes, sir, I did. I called, I will tell you when I called a lawyer was the day they had Bobby Austin up in court and I was there for the trial, and Mr. Frank Fleming was there and he come, I met him in the commonwealth attorney's office, and that was, I don't know what date that was, but they had moved Bobby Austin's case out of the big court back down to the county court.
Q. Were you present when Bobby Austin had his trial?
A. No, sir, I was there when they were supposed to have had some kind of hearing that day and I was in the courtroom but I wasn't, you know, they just went out and had a talk and then Bobby Austin and all of them got up and left out of the courtroom.
Q. Did Bobby have Mr. Smallwood as his lawyer?

A. No, sir.
Q. Who did Bobby have as his lawyer?
A. Fellow from Russell County as his lawyer. Best of my knowledge his name was Stamper or something I believe I have here.
Q. Did Mr. Stamper ever make a demand for the release of that bulldozer?
A. I understand Jimmy Boyd and Mr. Stamper--
Q. In that court proceeding?
A. Jimmy Boyd told me him and his lawyer would get the dozer.
Q. Yes, sir, but did they ever make a demand? You understand I am trying to find out what court proceedings went on.
A. I did not, I wasn't, I never heard him make no demand for the bulldozer in the court proceeding, no, sir.
Q. You never went to court and made a demand for your bulldozer, you never hired an attorney and went to court and made a demand for your bulldozer, did you?
A. No, sir.
Q. Why didn't you?
A. I just, I don't know that much about the law. I just called me a lawyer and filed a suit for damages, you know, when I could get a lawyer.
Q. When did you see Mr. Kirkland?
A. He has got the dates. I met him at the Cricket Inn when he said he was coming in from Frankfort and I met him at

Cricket Inn and paid him a--

THE COURT: When was this suit filed, Madam Clerk?

THE WITNESS: Sir, I don't remember the date.

THE COURT: She will get it.

THE CLERK: Suit was filed October 15, 1982, Your Honor.

THE COURT: October 15, 1982.

BY THE COURT:

Q. How long had you, how long before that had you contacted Mr. Kirkland?

A. I would say about a month. You know, I am just guessing. I don't want to tell something I am not sure about. I have been--

MR. HILL: If I can speak, Your Honor?

THE COURT: Yes, sir.

MR. HILL: My file indicates that date is September 16, 1982.

THE COURT: He contacted him September 16, 1982. Suit was filed in October of 1982.

BY THE COURT:

Q. And you said that you called him when and the sheriff told you the bulldozer was no longer in Letcher County?

A. I called him on Labor Day.

Q. Which is what? It is the first Monday in September?

A. I believe that's right.

THE COURT: What would have been the first Monday in September of '82?

THE CLERK: September 6th, Your Honor.

THE COURT: All right.

BY THE COURT:

Q. This appear to be about right, the first Monday in September, '82, would be the 6th?

A. Yes, sir. I would imagine that would be about right.

Q. All right. Now, between 6th of September, 1982, and was it June 10th that you went and saw Bobby there in the hospital?

A. Yes, sir, I saw Bobby several times.

Q. Mr. Smallwood?

A. That was on about the 8th or 9th I saw Mr. Smallwood.

Q. The 8th or 9th of June?

A. Yes, sir.

Q. All right. Between the 8th or 9th of June and the 6th of September you didn't see any attorney?

A. Mr. Boyd had--

Q. No, sir, I am asking you.

A. No, sir, I don't believe I did because Mr. Boyd said he would get the dozer with their attorney.

Q. You were leaving that up to Mr. Boyd?

A. Yes, sir, he had an attorney and he said he would get the dozer out.

Q. So in reliance upon Mr. Boyd's assurance to you that he

would get the bulldozer you did not consult an attorney between that time and in September 16th when you consulted Mr. Kirkland?

A. I imagine that's right.

Q. All right. That's all.

THE COURT: Any of you have any questions you want to ask him after the Court asked the questions?

MR. CRAFT: I don't have any, Judge.

MR. HILL: No, Your Honor.

THE COURT: All right, you may step down, sir.

I, Susan Chrys Lindstrom, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Susan Chrys Lindstrom — August 17, 1983

Official Court Reporter — Date

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

F.H.C. COMPANY, INCORPORATED	.	Civil Action No. 82-375
	.	
Plaintiff	.	
	.	
v.	.	Pikeville, Kentucky
	.	August 18, 1983
BEN TAYLOR, Sheriff, Letcher County	.	2:03 p.m.
	.	
	.	
Defendant	.	
. . . . .		

COURT'S FINDING AT CONCLUSION OF ALL THE EVIDENCE

Appearances:

For the Plaintiff:

CHRISTOPHER M. HILL, ESQ.
Kirkland Law Offices
300 State National Bank Bldg.
P. O. Box 1100
Frankfort, KY 40602

For the Defendant:

JAMES W. CRAFT, ESQ.
P. O. Box 786
Whitesburg, KY 41858

THE COURT: Now, ladies and gentlemen of the jury, you heard the evidence of the plaintiff and the defendant in this case. Upon the conclusion of all the evidence each of the respective parties have made a motion for what is called a directed verdict. A motion for a directed verdict is they are stating to the Court,

"Judge, we are entitled for you to take the case from the jury and direct a verdict in our favor because the evidence is wholly in our favor and there is no dispute."

The standard which the Court must apply in determining a motion for directed verdict either way is I first must consider the evidence most favorable to the person against whom the motion is made. Now, in other words, the plaintiff makes, the plaintiff makes a motion for directed verdict against the defendant and in considering his motion I must consider the evidence most favorable in a most favorable light to the defendant. On the other hand, when the motion is made by the defendant I must consider his evidence upon which he is making the motion for directed verdict in the light most favorable to the plaintiff.

Now, if there is no substantial conflict in the evidence-- Now, in considering this evidence I am not able to consider credibility. In other words, I am not able to say I would give more weight to this witness' testimony or I would give more weight to that. I must only consider the evidence as to whether or not there is or is not a substantial conflict in the evidence.

Now, if there is no conflict in the evidence or if there is not a substantial conflict in the evidence, then I must take the case from the jury and direct a verdict.

Now, if there is a substantial conflict in the evidence-- Now by what I mean is a conflict is that there is room for an honest difference of opinion regarding the evidence and that a reasonable person could get two different conclusions or opinions from the

evidence--then I must leave the case with the jury who is the trier of fact for them to decide which opinion they want to get. You understand?

JURORS: (Nodded their heads.)

THE COURT: The reason I am explaining this to the jury is you will be here again and most of the time we have that and in the Court making a decision, that if the Court of course makes a decision in favor of a directed verdict, then there is nothing for the jury to decide. But if I say there is a conflict of evidence, I am not saying that there is or is not a case. I am just saying it is up for the jury to decide which of the conflicts of the evidence they want to accept. Do you understand what I am saying there?

JURORS: (Nodded their heads.)

THE COURT: Now, so I must decide whether or not there is a substantial conflict in the evidence. If so, then it's a case for the jury. If there is not a substantial conflict in the evidence, then I must direct a verdict in accordance with the evidence.

Now, this is a case wherein there is charged that there is a-- It's a two element case. One is they claim that there is a violation of what is called substantive due process. That's-- And this is the Fourth Amendment. This is the right, the Fourth Amendment says no person shall be subject to an unreasonable search and seizure.

Now, the plaintiff claims that he was subject to an unreasonable seizure because a bulldozer belonging to him was taken from

him. Now, he claims that was unreasonable.

The next claim, the next element is he contends there was a procedural due process violation in that he was not given notice before his bulldozer was taken nor a notice and opportunity to be heard before it was taken or notice and an opportunity to be heard after it was taken. Now, that's, that of course is the claim of the plaintiff.

The claim of the defendant is that the Sheriff, they said they didn't violate against searches and seizures. They claimed that what they did was an exception to the unreasonable search and seizure rules, Fourth Amendment.

In other words, the Sheriff got a call someone had buried a bulldozer and they thought it was stolen. And then he gets a call that this bulldozer is out on the highway tearing the, or, rather, a bulldozer in the vicinity was on the highway tearing the highway up.

Now, he goes out and he doesn't find a bulldozer there but he finds an end loader which has bulldozer tracks on it. He places the operator of this end loader under arrest. And I think he also testified that there were two persons there at the scene when he placed the operator under arrest and the other person disappeared in the course of this.

And he testified he placed the operator of the end loader under arrest and took him back and charged him with destroying the highway. Now, this isn't disputed. He testifies that when he went back to find the end loader, lo and behold, the end loader was gone.

But in going down the road from there, which is approximately I think a quarter of a mile or a half mile from there, he came across a bulldozer and the motor of the bulldozer was still warm, no one was there, the bulldozer was partially out on the road and there was damage to the road in the vicinity of where the bulldozer was.

Now, he testifies further that he examined the bulldozer and in trying to find the serial number he found that the serial number was mutilated. So, the evidence is further that they went back up a side road in the vicinity of the side road leading to where the bulldozer allegedly was buried and they found two set of tracks. One set of tracks which was 24 inches wide concerned the big bulldozer, another which was approximately a foot wide was the end loader, but their tracks were in common coming out of this one lane.

Now, the evidence was that the bulldozer turned in one direction and the end loader turned in the opposite direction. Now, it appears that in one direction there was a light bridge. I think they said this is one like an army bridge. It was a light bridge. And in the other direction was a more substantial bridge, so it appears that the end loader, which would be the lighter vehicle, could have gone across the lighter bridge, whereas the bulldozer would have had to have gone across the more substantial bridge.

But, nevertheless, there isn't any dispute in the evidence at all and from that dispute the Court can only conclude that the officer had probable cause.

Now, the officer could not, the officer could not have impounded the bulldozer for the damage caused by the end loader. The bulldozer had nothing to do with the end loader.

Now, he, this young gentleman here, has introduced cases to the Court where they impounded a helicopter for another fine which the courts said they couldn't do.

In this case the officer had no justification of getting the bulldozer for damages done by Bobby Austin. However, here is an officer who comes down and finds an abandoned vehicle on a highway which could be an obstruction to traffic, a danger at nighttime someone running along this road and that bulldozer there with no lights on it, someone hit that bulldozer.

And not only that, the officer could conclude if they came down and the end loader was gone if he left the bulldozer there somebody would come and take the bulldozer away. So he saw the damage which was done to the highway.

The Court finds there was not a violation, this is one of the exceptions to the Fourth Amendment rule, but the Court finds there was no Fourth Amendment substantive violation in this officer impounding this vehicle and taking it back.

Now we get to the question of procedural due process of Mr. Church being entitled to a notice and opportunity to be heard. Now, procedural due process merely means that you have the opportunity to be heard, to present evidence, present your side of the case. That's your procedural due process.

Now, Mr. Church, he is the only one who presented evidence on behalf of the plaintiff. He said that Bobby Austin called him and said that the next day he went over there and that he went and met with the officials and he showed them his invoice and demanded the bulldozer.

Now, I think he said that Bobby also asked him to hire him an attorney, which he did. And the Court had the reporter type up an excerpt of Mr. Church's testimony. Let's see. I think he said on the 8th or 9th that he saw Mr. Smallwood, an attorney, and he said that this attorney went over to see about getting his bulldozer for him and the attorney came back and told him that he couldn't represent him, he was going to have to get another attorney and it should be someone out of Letcher County.

I think he said that Mr. Boyd told him not to worry about the bulldozer but that Mr. Boyd would get an attorney and he would get the bulldozer. Now, that's--now, let's see, I am trying to figure the date that Mr. Boyd, that was after Mr. Smallwood told him to get an attorney.

Now, you heard evidence here I think it was Mr. Boyd, let's see when he talked to Mr. Boyd. Let's see.

"Who did Bobby have as his lawyer?

"A fellow from Russell County, best of my knowledge his name was Stamper.

"Did Mr. Stamper ever make a demand for the release of the bulldozer?

"I understand Jimmy Boyd and Mr. Stamper in that

court proceeding, Jimmy Boyd told me him and his lawyer would get the bulldozer."

And he didn't do anything thereafter.

Now, the evidence of Letcher County was that I believe the Sheriff said that he impounded the vehicle and any time he was consulted after that he couldn't determine who the owner was, he turned it over to the state police. He said that and I think also there they alluded to the FBI as to determine who was the owner of this vehicle.

Now, a sheriff who impounds a vehicle, if the sheriff goes out pursuant to a search warrant, he is going out pursuant to an order of court, he impounds this vehicle, it's in custody and control of the court. The court will determine the release of it.

Now, if a sheriff goes out in an investigation and impounds property and then goes and gets a warrant for someone, this property is still in the possession of the court.

Now, if that sheriff goes and impounds some property and doesn't get a warrant for anyone, then that sheriff is still in charge of that property.

Now, the Sheriff did not impound this bulldozer on what had been done in Bobby Austin because this bulldozer was away from Bobby Austin. Now, if the Sheriff had impounded the bulldozer as to Bobby Austin's defense, then the bulldozer would have been in possession of the court. But this vehicle which was there was still in the possession of the Sheriff.

Now, however, you have here you have got one, you have got first, which is the real reasonable ground which isn't disputed. He didn't dispute there wasn't evidence that it's reasonable to a person to assume that this was a stolen vehicle because the VIN number was obliterated, the secret number was obliterated.

He had heard this was stolen and it isn't unusual in Eastern Kentucky for bulldozers and such as that to be stolen in Alabama and brought here and sold in the strip mining business, and it isn't unusual for construction equipment in Eastern Kentucky because there's quite a bit of it to be stolen.

The Sheriff was justified in having the opinion that this was stolen. He was justified in holding this until it was determined whether or not this was stolen property.

Now, after it was determined that it wasn't stolen, then this Sheriff would be obligated to turn it over to the rightful owner. Now we have two persons here. One which is Austin and Boyd contending they were entitled to it because they had worked on it and they had an interest in the thing and they had a paper that said they had a right to hold it until they got their money out of it.

On the other hand, this gentleman was the owner, he had an invoice and I never did, never could guite get the invoice. I think the Sheriff said he called a Mr. White, I don't know, and if he had sold him the bulldozer, and they said they didn't have any records or something, and I never did quite get the import of it.

But that's neither here nor there. The Sheriff, when you have got two people claiming to get this property, then the Sheriff

could reasonably require that a bond be filled because if it's given to the wrong person, then that bond would stand good for the person that got possession of it.

The Court, by reason of this the Court doesn't feel that there is a substantial conflict in the evidence as to a violation of the Fourth Amendment or a violation of the Fourteenth Amendment. I don't feel that there is, I don't feel there is any conflict between the testimony of Mr. Church and the testimony of the Sheriff. They each see it, but it doesn't, there is no substantial conflict in it.

Therefore, I am sustaining the defendant's motion for a directed verdict. I am denying the plaintiff's motion for a directed verdict. And by reason thereof, the Court will direct that judgment be entered in favor of the defendant and against the plaintiff, dismissing the complaint of the plaintiff.

Civil Action No. 82-375, F.H.C. v. SHERRIFF BEN TAYLOR (LETCHER CO)

Pre-Trial Conf. 4 Aug 83 at 2 PM (Trial set for 17 August)

Sheriff Taylor confiscated a bulldozer that had been transported on its treads over county roads, doing some damage to the road, and Taylor later swore out a criminal complaint against the driver of the dozer, one Bobby Austin, charging him with Criminal Mishcief in the First Degree (KRS 512.020). Austin was later indicted on the charge.

The alleged owner of the Bulldozer (no serial number on it - removed in some way, most probably) says that after the Sheriff illegally confiscated and impounded it, it was later turned over to some one not connected to FHC, and that they have thereby lost their Bulldozer.

Defendant states that the dozer was turned over to a person who can be proved to have some connection with FHC, and has acted in good faith at all times, etc.

Plaintiff has moved for summary judgment, but there are genuine issues of material fact to be resolved at this point.

TRIAL (JURY)
10 AM, 17 Aug

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TO: Judge
FROM: Donald
DATE: 3-22-83
RE: 82-375
FHC Company, Inc. v. Ben Taylor

PC, Wed., 3-2-83, at 1:00 p.m.

① Right to surge
② reasonable cause ??? to seize

Synopsis: Plff brings this action under 42 U.S.C. §1983, alleging as well diversity of c/ship and more than $10,000 in controversy.

Plff alleges that about June 8, 1982, defendant, acting under color of law as the Sheriff of Letcher County, caused its Terex bulldozier to be seized or impounded.

Plff alleges that neither pre-deprivation nor a post-deprivation hearing was held, that it had no knowledge beforehand that the equipment was going to be seized, and that it was seized unlawfully. Property seized w/out a warrant.

Plff alleges making repeated attempts to have bulldozier returned to it, to no avail, and that plff has no knowledge of the bulldozier's whereabouts. Apparently someone else, unrelated to plff, now has possession.

Plff's claim also involves conversion, which this Court would have through pendent jurisdiction.

Plff seeks a jury trial, $63,000 in compensatory damages, and $25,000 in punitive damages.

Pending Motions:

1. Plff has moved for summary judgment. Plff's memo sets forth that someone unrelated to plff was charged with damaging a road with plff's bulldozier, which seems to have lead to the impounding of the equipment.

Substantive Issues:

1. Was plff deprived of its property within the meaning of the 14th Amendment w/out due process of law?

* Def. has not filed his PC memo, but as the record stands, it seems pretty obvious that def. was acting under color of law and that plff has been deprived of its property. No warrant was issued, and no hearings were held.

Procedural Issues:

1. Plff has moved for summary judgment under Rule 56.

Comments:

1. Plff has advised the Court that its PC memo also serves as its memorandum in support of its motion for S/J.

2. Def. has failed to file his PC memo, although it was set 5 months ago.