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UCC 9-503 - Repossession - State Action - Does Repossession by a Secured Creditor Pursuant to Statutory and Contractual Provisions Constitute State Action?

Merrill A. Wasserman

COMMENT

UCC § 9-503 — REPOSSESSION — STATE ACTION — DOES REPOSSESSION BY A SECURED CREDITOR PURSUANT TO STATUTORY AND CONTRACTUAL PROVISIONS CONSTITUTE STATE ACTION?

INTRODUCTION

UNIFORM Commercial Code (UCC) section 9-503 authorizes the use of repossession, a self-help remedy, by secured creditors in instances of default on the part of the debtor.[1] In states where section 9-503 has been enacted into law, a number of suits have been brought in federal district courts attacking the constitutionality of the creditor's right to repossess without prior notice and an opportunity for a hearing.[2] The suits allege that such a procedure violates fourteenth amendment due process guarantees.

The purpose of this comment is to examine the arguments concerning the constitutionality of repossession pursuant to section 9-503. As will be seen, the central issue in the repossession cases is whether this "private" taking, when executed by a secured creditor pursuant to statutory and contractual provisions, can be said to be state action or action taken "under color of" state law. If so, courts can proceed to measure the taking against the fourteenth amendment guarantee of due process of law. Following an examination of the meaning of due process and a review of conflicting lower court decisions in repossession cases, two theories which support a finding of state action will be presented: One relies upon the "public function" doctrine, and the other derives from the concept of state sanction. Finally, the relationship between the statutory and contractual repossession provisions will be examined.

I. BACKGROUND: CHALLENGING UCC SECTION 9-503

A. *The Due Process Claim*

Since the Supreme Court announced its decision in *Snia-*

[1] UNIFORM COMMERCIAL CODE [hereinafter cited as UCC] § 9-503 provides:

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

In Colorado, UCC § 9-503 has been codified as COLO. REV. STAT. ANN. § 155-9-503 (Supp. 1965).

[2] Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972); Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672 (W.D. Va. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971).

dach v. Family Finance Corp.,[3] summary prejudgment remedies have been increasingly subjected to constitutional challenge.[4] The most recent major case in this area is *Fuentes v. Shevin*,[5] in which petitioners challenged the constitutionality of various state prejudgment replevin procedures under the due process clause of the fourteenth amendment. The challenged statutory proceedings permitted a private party, upon the posting of a bond, to obtain a prejudgment writ of replevin through an ex parte application to the court clerk without a hearing or prior notice to the other party. The sheriff would then execute the writ by seizing the property.[6] In broad language, the Court held that procedural due process requires notice and an opportunity for a hearing before the state may legitimately authorize its agents to seize property in the possession of one person upon the application of another.

The decision in *Fuentes* contained three strikingly expansive interpretations of the due process clause and represented a consolidation of the trend toward applying due process safeguards to any significant property interest. First, the Court held that even a temporary, nonfinal taking was nonetheless a deprivation within the meaning of the fourteenth amendment. As noted by the Court, a wrong cannot be permitted to be done simply because it can later be undone.[7] Second, even though lacking full legal title, the purchaser under a conditional sales contract has a sufficient property interest to trigger procedural due process protections. The Court declared that the fourteenth amendment has never been construed so narrowly as to shield only undisputed ownership; rather, the protection extends to "any significant property interest."[8] Third,

[3] 395 U.S. 337 (1969). In *Sniadach*, the Court held that Wisconsin's prejudgment garnishment of wages violated the fundamentals of procedural due process insofar as the garnishment procedure allowed a taking of property without notice and prior hearing. *See The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 113-18 (1969). For comments on the ramifications of *Sniadach*, see Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942 (1970).

[4] *E.g.*, Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971) (unsuccessful challenge to state replevin procedures); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) (distress sales under distraint procedures of state statute held unconstitutional); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (successful challenge to state replevin procedure); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (Innkeeper's Lien Law invalidated); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (sustained challenge to state claim and delivery law).

[5] 407 U.S. 67 (1972), *noted in The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 85 (1972).

[6] *See* Fuentes v. Shevin, 47 U.S. 67, 73-78 (1972), and replevin statutes cited therein.

[7] *Id.* at 82.

[8] *Id.* at 86.

the Court made clear that the application of procedural due process safeguards does not hinge upon value judgments with respect to the "importance" or "necessity" of the goods to the person from whom they are taken. Thus, the seized items involved in *Fuentes,* which included a stereo, bed, and table, came within the ambit of constitutional protection despite their arguably nonessential nature. In sum, a partial interest in nonessential property is protected against even temporary deprivation.

Since the property replevied was subject to fourteenth amendment guarantees, the requirements of the Constitution were clear: "'Parties whose rights are to be affected are entitled to be heard; and that in order that they may enjoy that right, they must be notified.'"[9] Moreover, the right to notice and an opportunity to be heard must be given at a meaningful time, in a meaningful manner. An opportunity for a hearing *after* the seizure does not come at a meaningful time. Thus, state replevin statutes which failed to provide notice and an opportunity for a hearing to the debtor *prior to* the issuance of the writ were held to be constitutionally defective.

B. *Repossession and the Repossession Cases*

As a practical matter, the replevin statutes at issue in *Fuentes* and repossession under UCC section 9-503[10] are functionally identical. Both authorize prejudgment seizure of property, and in each instance, the taking is effected by virtue of the unilateral decision of the creditor. The person from whom the goods are taken is afforded no opportunity to justify his possession. In short, both statutory replevin and repossession sanction seizure of property before final judgment without even a gesture of notice and hearing.

As the Court pointed out in *Fuentes,* the statutory replevin devices involved in the case bore slight resemblance to their common law ancestor.[11] At common law, replevin was a remedy by which to secure the return of a thing allegedly wrongfully taken from the replevisor.[12] The replevin statutes, however, extended the reach of the remedy to allow action under it to secure the return of goods allegedly wrongfully detained by the debtor.[13]

[9] *Id.* at 80.
[10] For text thereof, see note 1 *supra.*
[11] 407 U.S. at 78-80.
[12] *Id.*
[13] *Id.*

Similarly, UCC section 9-503 is used to effect the return of a thing allegedly wrongfully detained by the debtor. Indeed, the takings disputed in *Fuentes* were founded upon conditional sales contracts, a transaction within the purview of Article 9 of the UCC. In view of the close affinity between the two remedies, it appears that the statutory authorization to repossess under section 9-503 is for all practical purposes a duplicate of the replevin statutes held unconstitutional in *Fuentes*. Given the *Fuentes* decision, and assuming *arguendo* that the due process standards enumerated therein apply to repossession, it is difficult to imagine how the Court could avoid holding section 9-503 unconstitutional when the question reaches it.[14]

Of course, to maintain a claim under the fourteenth amendment, some significant state involvement must be found.[15] The fourteenth amendment erects no shield against private wrongful conduct.[16] This need to find state action in order to invoke the guarantee of due process provides the central area of dispute regarding the constitutionality of repossession pursuant to UCC section 9-503.

As mentioned earlier, statutory enactment of section 9-503 authorizes a secured creditor to repossess collateral upon default on the part of the debtor.[17] The crucial difference between replevin (*Fuentes*) and repossession (UCC section 9-503) lies in the actor who seizes the items. In the case of replevin, the creditor, through the use of a writ, invokes the machinery of the state, and it is an officer of the state, commonly the sheriff, who seizes the property.[18] In these circumstances, there can be no doubt as to the direct involvement of the state, and the application of the fourteenth amendment follows automatically. Repossession, on the other hand, does not directly involve any state official. When a creditor repossesses on this self-help basis, it is ostensibly a "private" taking effected by the creditor or his agent — not a state officer.[19]

The Court had no difficulty finding the requisite state

[14] This is not to say that *Fuentes* will be held to control. *Fuentes* was a 4-3 decision, and it is entirely possible that the two Nixon appointees who did not participate in that decision, Justices Powell and Rehnquist, will join the dissenters in a subsequent case, restrict *Fuentes* to its facts, and form a 5-4 majority against the debtor's position.

[15] Civil Rights Cases, 109 U.S. 3 (1883).

[16] Shelley v. Kraemer, 344 U.S. 1, 13 (1948).

[17] *See* note 1 *supra*.

[18] *See* Fuentes v. Shevin, 407 U.S. 67, 73-78 (1972).

[19] Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972); McCormick v. First Nat'l Bank, 322 F. Supp. 604, 606 (S.D. Fla. 1971).

action in *Fuentes* since the challenged statutes authorized a state actor, the sheriff, to do the seizing. But repossession under the UCC presents a more complex situation. The essential question is whether this ostensibly "private" taking constitutes state action sufficient to invoke due process safeguards. If state action is found, *Fuentes* would seem to dictate invalidation of UCC section 9-503.[20]

Lower court cases have split on the question of whether state action can be found in repossessions made pursuant to UCC section 9-503. Illustrative of this conflict are two California federal district court cases decided prior to *Fuentes*: *Adams v. Egley*[21] and *Oller v. Bank of America*.[22]

In *Adams*, the plaintiff received a bank loan in return for which he executed a promissory note and security agreement in favor of the bank. When he fell behind in his payments, the defendant, acting on behalf of the bank, repossessed two of the vehicles pledged as security under the agreement. The court held that the California statutory enactment of UCC section 9-503 and its impact on the security agreement (which explicitly incorporated the statute) constituted sufficient state involvement in the "private" taking to bring the due process clause into play. In arriving at that conclusion, the court relied heavily on the notion that a statute, as a form of state authorization and encouragement (discussed more fully *infra*[23]) constituted sufficient state involvement to bring acts taken under the statute within the ambit of the fourteenth amendment. Moreover, the *Adams* court refused to regard the security agreement as creating an independent contractual right to repossess but rather viewed the agreement as a mere embodiment of state policy. As such, repossession was action taken "under color of" state law. Once state action[24] was found, the court concluded that under *Sniadach* the taking violated the guarantee of due process of law.

Oller v. Bank of America never reached the due process question. The case involved an automobile repossession pur-

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[20] *See* note 14 *supra*.

[21] 338 F. Supp. 614 (S.D. Cal. 1972).

[22] 342 F. Supp. 21 (N.D. Cal. 1972).

[23] *See* text pp. 271-74 *infra*.

[24] The Supreme Court has held action "under color of" state law to be the equivalent of state action. United States v. Price, 383 U.S. 787, 794 n.7 (1966). In this note, the phrases will be used interchangeably. For a good discussion of the possible differences in the meaning of these phrases, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 211-12 (1970) (Brennan, J., concurring in part and dissenting in part).

suant to the terms of a conditional sale contract and UCC section 9-503. The court dismissed the case on jurisdictional grounds, holding no action "under color of" state law could be found, and thus the court had no jurisdiction under 28 U.S.C. section 1343(3)[25] and 42 U.S.C. section 1983.[26] The repossession was viewed as a purely private act done by a private party to protect its contractual security interest. The court rejected *Adams'* reliance on the notion of state authorization and encouragement, reasoning that since this concept of state action was derived from cases involving claims of racial discrimination — claims which seem to enjoy special status — it should be restricted to that type of case. The *Oller* court also alluded briefly to the difficulty of finding state action where the actor is not a state official or one acting in conjunction with a state official, or where state action did not compel the result, or where the power exercised was not of statutory origin.[27]

In *Oller* and subsequent decisions,[28] courts have been hesitant to regard the concept of state action as encompassing secured creditors' acts of repossession. However, existing precedents and theories supplementing those raised in *Adams* and historical facts regarding the origin of the right to repossess by private means shape a strong argument for the finding of state action in this area.

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[25] 28 U.S.C. § 1343(3) provides:

> The district courts shall have original jurisdiction of a civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or all persons within the jurisdiction of the United States.

[26] 42 U.S.C. § 1983 provides:

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

[27] 342 F. Supp. at 23.

[28] Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972); Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672 (W.D. Va. 1972).

In *Kirksey*, Judge Arraj held that the Colorado enactment of UCC § 9-503 did not constitute sufficient state involvement with the acts of the defendants (who repossessed plaintiffs' automobiles) to bring their actions "under color of" state law. The opinion examined numerous instances in which courts have found state action and held defendants' acts to belong in none of those categories.

II. State Action

The precise meaning of state action or action taken "under color of" state law is indeed elusive. In examining the equal protection clause of the fourteenth amendment, Mr. Justice Clark noted that the Court has found fashioning a "precise formula" for recognition of state responsibility to be an "impossible task," and each case must be decided by "sifting facts and weighing circumstances."[29] Two key theories of state action, the "public function" doctrine and the state sanction doctrine, provide the basis for finding state action in the repossession cases.

A. *The "Public Function" Doctrine*

Despite indications that it is very difficult to find state action or action "under color of" state law where the actor is not a state official,[30] courts have often found that "actions of a private citizen can and in some [instances] do, become the actions of the state for both the purposes of § 1983 and the due process clause."[31] One of the instances in which a so-called private act is transformed into an official one is explained by the "public function" doctrine. Should the private individual be performing a function traditionally performed by the state[32] or acting as an agent of the state,[33] the action taken by the individual may be said to be that of the state, and hence the individual is acting "under color of" state law.[34]

In *Hall v. Garson,*[35] for example, the court was faced with a challenge to the constitutionality of the Texas Landlord Lien statute. The court noted that while the alleged wrongful conduct was perpetrated by a person who was not a state officer or state agency official,

> the entry into another's home and seizure of another's property, was an act that possesses many, if not all, of the characteristics of an act of the State. The execution of a lien, whether a traditional security interest or a quasi writ of attachment or judgment lien has in Texas traditionally been the function of the Sheriff or constable. Thus Article 5238a vests in the landlord or

[29] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

[30] *E.g.*, Collins v. Hardyman, 341 U.S. 651 (1951); Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966); Warren v. Cummings, 303 F. Supp. 803 (D. Colo. 1969).

[31] Hall v. Garson, 430 F.2d 430, 439 (5th Cir. 1970) and citations therein.

[32] Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946). *But see* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) as an indication that the Court is reluctant to apply the public function doctrine.

[33] Smith v. Allwright, 321 U.S. 649 (1944).

[34] *Id.*

[35] 430 F.2d 430 (5th Cir. 1970).

> his agents authority that is normally exercised by the state and historically has been a state function.[36]

Thus, in the instant case, even though the seizure of a tenant's television set was made by her landlady and not a state official, the court found the state action required to invoke the protection of the fourteenth amendment.

This use of the "public function" doctrine is dealt with in *Magro v. Lentini Brothers Moving & Storage Co.*,[37] in which the court noted in dicta that in the past three decades another theory of state action had emerged whereby "private persons, when performing traditionally public functions, [have] become liable under section 1983. . . . Under this approach, state action can be found in defendant's execution of its own [Warehouseman's] lien."[38]

The quotations from *Hall* and *Magro* demonstrate that in order to raise the "public function" doctrine in repossession cases, it is necessary to examine the historical origins of repossession. If the right to repossession by private self-help and without the invocation of state machinery did not exist at common law, then the public function argument is applicable since the creditor has assumed a function traditionally performed by the state.

It is not clear that the right of secured creditors to repossess without judicial proceedings existed at common law.[39]

[36] *Id.* at 439.

[37] 338 F. Supp. 464 (E.D.N.Y. 1971), *aff'd*, 460 F.2d 1964 (2d Cir.), *cert. denied*, 406 US. 961 (1972). In *Magro*, the court refused to rule on whether or not state action existed in defendant's execution of its own Warehouseman's Lien, and rested its decision on the ground that the procedure did not violate due process.

[38] *Id.* at 466 n.7.

[39] *See* 1 & 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (1965) [hereinafter cited as GILMORE]. *But see* Annot., 36 A.L.R. 853 (1925).

A crucial point made explicitly in Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672, 675 (W.D. Va. 1972) and implicitly in Kirksey v. Theilig, 351 F. Supp 727, 730 (D. Colo. 1972) and Oller v Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972) is that the right to repossess without recourse to the courts existed at common law. For support, they refer to Fuentes v. Shevin, 407 U.S, 67, 79 n.10 (1972), which cites the common law recognition of self-help as a permissible remedy. *See* 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 572-75 (1st ed. 1895) [hereinafter cited as POLLACK & MAITLAND], and 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 278-87 (3d ed. 1923) [hereinafter cited as HOLDSWORTH]. But to derive from these treatises that a creditor had the right to self-help repossession may well be a misleading overgeneralization. Just as the *Fuentes* decision noted that replevin at common law was a far cry from the contemporary meaning of replevin, the same may be said of the nature and use of self-help at early common law, as discussed by Holdsworth and Pollack and Maitland. These authors emphasize at the outset that the very idea of self-help is antithetical to that of the rule of law (*see* 3 HOLDSWORTH at 278), and any self-help then recognized appears to be only in the cases of a wrongful *taking* (*see* 3 HOLDSWORTH at 278-80), analogous to the situation of early replevin being applicable to a wrongful taking, as opposed to a wrongful detention.

The right of a secured party to take possession of the collateral on default *without judicial proceedings* did not come to be recognized until the 19th century:[40]

> Until early in the nineteenth century the only security devices which were known in our legal system were the mortgage of real property and the pledge of chattels. *Security interests in personal property which remained in the borrower's possession during the loan period were unknown.*[41]

A number of security interest devices developed in response to growing commercial needs; they included the pledge, the chattel mortgage, the trust receipt, and the conditional sale.[42] As will be seen, these devices which vested the secured creditor with a right to self-help were largely legislative creations. Therefore it was through state action in the form of legislation, and not common law development, that creditors were permitted to use self-help, thereby performing what formerly had been a public function.

At common law, the pledgee-creditor could exercise the power of sale which had been coupled with the bailment and apply the proceeds to the debt without enlisting the aid of a court.[43] Since any agreement by which the debtor was accorded the right to possession of the collateral until default could not be a pledge,[44] pledge law has no application to the repossession cases.

The chattel mortgage, first recognized in England during the early 19th century,[45] was an exclusively statutory device in

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Both authorities note that the oldest formal form of self-help is the process of distraint; the two surviving forms of common law distraint that Holdsworth treats are distraint damage feasant (the person who finds beasts on his land doing damage may keep them until their owner pays for any consequential damage) and the landlord's right to distrain for rent (which stemmed from the peculiar nature of the landlord/tenant relationship). The latter was so highly regulated that Holdsworth regarded it as "a peculiar form in which legal proceedings may be initiated." *See* 3 HOLDSWORTH, at 283. In any case, these common law forms of self-help are ostensibly devoid of a commercial setting and seemingly have little bearing on a creditor's right to self-help in cases of a debtor's default. Since neither of these authorities may be said to directly deal with self-help in a commercial setting (which would be more germane to the question of a common law right of creditors to repossess), later treatises will be turned to in an effort to ascertain more specifically the commercial creditor's right to self-help at common law.

[40] 2 GILMORE § 44.1, at 1212.

[41] 1 GILMORE § 2.1, at 24 (emphasis added).

[42] *Id.* §§ 1.1 to 4.12. UCC § 9-105 now lumps these various devices together as "security agreements."

[43] 2 GILMORE § 43.2, at 1187.

[44] 1 GILMORE § 1.1, at 5.

[45] *Id.* § 2.1, at 24-25.

this country.[46] Indeed, the chattel mortgage is commonly thought to be inconceivable in the absence of statutory provision.[47] Statutes validating chattel mortgages were first enacted about 1820.[48] As such, the American chattel mortgage and the rights it conveys are not a function of common law development but a creation of the legislature.

Similarly, the trust receipt was inaugurated during the last quarter of the 19th century in response to perceived commercial needs.[49] But it did not receive widespread judicial recognition, and it was not until the proposal of the Uniform Trust Receipts Act and its adoption by the states (starting in the 1930's) that the use of a trust receipt as a security interest device was made possible.[50]

The final security interest device, the conditional sale, was historically not favored by law,[51] and in some states it was initialy held void for vaguely articulated reasons of public policy.[52]

The modern conditional sale derived in part from the law of sales at common law and reflects this heritage.[53] In the case of default on the part of the debtor, the creditor could either repossess and retain payments already made or sue for the balance due; he could not do both at common law.[54] The remedies of repossession or action on the debt were viewed as inconsistent and hence mutually exclusive by the courts.[55] Any agreement which permitted both remedies was treated as a chattel mortgage.[56]

This election of remedies requirement worked harshly upon creditors because of the strong possibility of a deficiency upon resale of the repossessed items, and it was not until the late 19th century that the conditional sale assumed any commercial significance.[57] At this juncture, most jurisdictions re-

[46] *See* 2 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 495 (rev. ed. 1940).

[47] Glenn, *The Chattel Mortgage as a Statutory Security*, 25 VA. L. REV. 316, 339 (1939).

[48] 1 GILMORE § 2.2, at 26. *See also* 1 L. JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES §§ 190-235 (R. Bowers ed. 1933).

[49] 1 GILMORE § 4.1, at 86.

[50] *Id.* §§ 4.2, 4.3, at 94-99.

[51] 3 L. JONES, *supra* note 48, § 905, at 7-9, § 938, at 43-46.

[52] *E.g.*, Turnbull v. Cole, 70 Colo. 364, 201 P. 887 (1921). 3 L. JONES, *supra* note 48, § 938, at 43 n.18, contains an extensive list of such cases.

[53] 1 GILMORE § 4.1, at 86.

[54] *Id.* § 3.2, at 66; 3 L. JONES, *supra* note 48, §§ 1308-10, at 379-86.

[55] *See* Note, 17 MINN. L. REV. 66 (1932).

[56] *E.g.*, *In re* Berghoff Printing Co., 62 F.2d 493, 494 (6th Cir. 1932). *See also* 2 G. GLENN, *supra* note 46, § 513.

[57] 1 GILMORE § 3.2, at 67-68.

acted by passing filing statutes which eliminated the doctrine of election of remedies and made the debtor liable for any deficiency after repossession while giving him the right to any surplus.[58]

This history reveals not only that "[t]he modern security device which we call conditional sale bore little resemblance to its common law ancestor,"[59] but also that the conditional sale, as we know it, was shaped through pre-Code or Code legislation. What had made the common law conditional sale undesirable for use — its requirement of election of remedies — was eliminated largely through legislative action which conferred a practicable right to "private" self-help.

Thus, far from being a clearly established right at common law, the right to retake by self-help arose essentially through legislative action. It was largely through legislation that secured creditors were vested with a practicable right of self-help; by authorizing repossession without invocation of state machinery, the legislation turned over to these creditors a function traditionally performed by the state. As such, action under such legislation can be said to be state action in the context of the "public function" doctrine.

B. *State Sanction*

In addition to the "public function" theory, a second rationale exists under which repossession pursuant to UCC section 9-503 can be found to be state action. It is not only true that if the state through legislative action vests a right to private action which did not exist at common law (in this case the use of private self-help to effect repossession of a defaulting debtor's goods),[60] then conduct taken pursuant to the statute is action "under color of" state law.[61] But, moreover, when the state *authorizes* and *encourages* (*i.e.*, sanctions) private action, then the private acts resulting from such authorization or encouragement constitute state action.[62]

State laws which compel a particular result clearly bring the actor's conduct "under color of" law.[63] Although when one moves away from compulsion, the law becomes less clear, the

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[58] *Id.* § 3.2, at 68. It should be noted that in some states the early doctrine of election of remedies was eliminated through case law; *see* Gilmore & Axelrod, *Chattel Security*, 57 YALE L.J. 517, 543 (1948).

[59] 1 GILMORE § 3.2, at 63.

[60] *See* Section A *supra*.

[61] Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); DeCarlo v. Joseph Horne & Co., 251 F. Supp. 935 (W.D. Pa. 1966).

[62] Reitman v. Mulkey, 387 U.S. 369 (1967).

[63] Peterson v. City of Greenville, 373 U.S. 244 (1963).

Supreme Court's decision in *Reitman v. Mulkey*[64] significantly illuminates this gray area.

The *Reitman* case involved litigation between private parties regarding a constitutional amendment passed by California voters which, in effect, repealed fair housing laws and gave private individuals absolute discretion in transferring property.[65] The Court affirmed the California Supreme Court's decision that such an amendment violated the equal protection clause of the fourteenth amendment.[66] The state court based its result on its determination that where the intent is to *authorize* private racial discrimination and to create a constitutional right to discriminate, "the section would *encourage* and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment."[67]

Thus, to find action taken under color of law, it is not necessary for state laws to compel the result. Rather, state action may be found in cases where state policy, as expressed in laws, merely "encourages" or "authorizes" private persons to violate fourteenth amendment guarantees.

Moreover, the state's role need not be active in the alleged wrongdoings; a passive stance which in effect sanctions wrongful results may lead to a finding of state action. *Burton v. Wilmington Parking Authority*[68] was an action for declaratory and injunctive relief involving the Eagle Coffee Shop, a lessee of the Parking Authority which in turn was an agency of the state. In finding sufficient state action to apply fourteenth amendment claims to the coffee shop's refusal to serve Negroes, the Court stated:

> By its *inaction*, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.[69]

In *Adickes v. S.H. Kress & Co.*,[70] Mr. Justice Brennan recognized and cogently articulated the broad scope of state action:

> Our prior decisions leave no doubt that the mere existence of efforts by the State, through legislation or otherwise, to authorize, encourage, or otherwise support racial discrimination in a particular facet of life constitutes illegal state involvement in those pertinent private acts of discrimination that subsequently

[64] 387 U.S. 369 (1967).
[65] *Id.*
[66] *Id.*
[67] *Id.* at 376 (emphasis added).
[68] 365 U.S. 715 (1961).
[69] *Id.* at 725 (emphasis added).
[70] 398 U.S. 144 (1970).

> occur. . . . This is so, as we noted in *Reitman v. Mulkey* . . . whether or not the private discriminator was actually influenced in the commission of his act by the policy of the State. Thus, when private action conforms with state policy, it becomes a manifestation of that policy and is thereby within the ambit of state action.[71]

The authorization and encouragement rationale of these cases, all of which involved racial discrimination, has been extended by some lower courts to include situations where racially motivated acts were not a factor. In *Klim v. Jones*,[72] the plaintiff sought to have California's Innkeepers Lien Law declared unconstitutional, alleging that it permitted a taking of property without due process of law. In this case, the plaintiff, who had allegedly fallen behind in payments for his hotel room, was padlocked out of the room, his personal belongings remaining inside. In holding the imposition of the lien without any sort of hearing violated due process, the court relied on *Reitman* to find the requisite state action. After noting that it was only by virtue of the statute that the defendant had the right to impose the lien (since no such right existed at common law),[73] the court added: "This is not just action against an amorphous background of state policy, but instead is action encouraged, indeed only made possible, by explicit state authorization."[74]

In holding the prejudgment repossession procedures complained of were executed "under color of" state law, the court in *Adams v. Egley*[75] also relied heavily on the rationale underlying *Reitman*. The UCC sections under scrutiny (9-503 and 9-504) "set forth a state policy, and the security agreements upon which the instant actions rest . . . are merely an embodiment of that policy."[76] Thus, it was apparent to the court that the acts of repossession were made "under color of" state law.[77]

When viewed against the backdrop of UCC Article 9 in its entirety, the state sanction approach gains additional potency. Part 5 of Article 9, which deals with default,[78] is arguably not

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[71] *Id.* at 202-03 (Brennan, J., dissenting in part and concurring in part).

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

[73] *Id.* at 114.

[74] *Id.*

[75] 338 F. Supp. 614 (S.D. Cal. 1972).

[76] *Id.* at 618.

[77] On the "imprimatur" of UCC § 9-503 coupled with the use of the court system "to grind out deficiency judgments" as constituting state action, *see* Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302, 329 (1972).

[78] UCC §§ 9-501 to -507.

neutral, and when enacted, establishes a state policy more favorable to the secured creditor than the debtor.[79] Moreover, Part 5 represents more than a recodification of existing law; rather, it provides "the first truly integrated system for realization by secured parties," by eliminating the technical differences among various forms of security agreements.[80] And through the establishment of an elaborate state mechanism for the filing of security interests (as provided for in the UCC[81]), the state becomes actively involved in aiding the secured creditor. In this sense, the state is more than an idle bystander in UCC transactions.

The involvement of the state through extensive legislation in this field, gives rise to another argument for the finding of action "under color of" state law. The argument is essentially an outgrowth of the notion of the security agreement as an embodiment of state policy, and involves the relationship between the statute and contract right.

III. EFFECT OF THE EXISTENCE OF BOTH CONTRACTUAL AND STATUTORY RIGHTS

The interaction between the statutory right to repossess (given by legislative enactment of UCC section 9-503) and the privately made contractual right to repossess upon default, a clause frequently found in standard form conditional sales contracts,[82] poses an interesting question regarding the extent of independence of the contractual right. May the secured creditor argue that he repossessed pursuant to the contract and not the statute and thus avoid the strictures of due process?

In *Santiago v. McElroy*,[83] a case dealing with that issue, the plaintiff alleged that the Pennsylvania statutory distress proceedings[84] were unconstitutional as violative of fourteenth amendment rights. The court narrowed the issue to distress sales, and held that such sales are executed "under color of" law and that they violated due process guarantees.[85] In so holding, the court had to deal with defendant landlord's contention that the taking and the sale were accomplished by a private party pursuant to a provision in a lease agreement be-

[79] *See* Clark, *supra* note 77, at 306.

[80] *See* Hogan, *The Secured Party and Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 253 (1962).

[81] *See* UCC §§ 9-401 to -407.

[82] *E.g.*, Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972).

[83] 319 F. Supp. 284 (E.D. Pa. 1970).

[84] Distress proceedings enable the landlord to seize the property of a tenant in arrears and sell the distrained goods. *Id.* at 286-87.

[85] Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970).

tween private parties.[86] Hence, argued defendants, the taking was private and not made pursuant to the distress statute, and thus there was no state action to measure against the fourteenth amendment.[87] The court did not agree:

> The lease provision permitting levies and sales does not purport to create an independent right in the landlord to distrain; rather, the tenant agrees only that the landlord has the right to act pursuant to [the relevant statute] . . . .[88]

In effect, the contract right was subsumed by the statutory right.

A similar result was reached in *Adams v. Egley*.[89] After noting that the security agreement in question was merely an embodiment of state policy, the California court, while hesitant to go as far as did the court in *Santiago*, concluded:

> Even if an independent right to repossess is created by the signed security agreement, that right is created under authority of state law, and consequently does not defeat the jurisdiction of this court.[90]

A finding that the contract right does not stand independently of the statutory right is particularly appropriate in cases of security agreements made pursuant to the UCC. As shown in Section II A, *supra*, the right contracted for (to repossess by self-help) was initially vested by statutory enactment, and thus the right is more of a function of the statute than an ordinary contractual provision. Moreover, the extensive legislation in this area governing the terms and effect of the security agreement also remove the security agreement from the realm of the traditional common law contract. Since it is the state filing mechanism which makes the system operative (in terms of effectiveness), security agreements made pursuant to the UCC rely heavily on state involvement in that field.

To carry this argument to an extreme and assert no contract right exists independent of the law because ultimately the right to contract is given by law and all contracts ultimately rely on the protection of the law for enforcement, would be to do the theory an injustice. What is suggested herein is that the special relationship that the statute as the creator and vestor of the right to repossess, and the reliance on the state filing system as a means of perfection of rights, bear on the contract right in an unusually heavy way. The contract right

[86] *Id.* at 294.
[87] *Id.*
[88] *Id.*
[89] 338 F. Supp. 614 (S.D. Cal. 1972).
[90] *Id.* at 618.

in this instance derives from the statute, depending upon its creating and sustaining force.

CONCLUSION

A compelling case can be made that where a secured creditor repossesses pursuant to contractual provision sanctioned by legislative enactment of UCC section 9-503, such action is taken "under color of" state law. The contractual right is subsumed by the statutory provisions, and the former does not stand as an independent ground for justification of the creditor's conduct. Since the secured creditor's right to private self-help did not exist at common law, it was only by virtue of statutory enactment that such right was vested and institutionalized. Because the state vested the secured creditor with the right to private self-help in lieu of the traditional remedies involving invocation of the machinery of the state, and because the state authorizes and encourages these private takings, the repossessing creditor's conduct falls within the ambit of action taken "under color of" state law. Once action "under color of" state law, and hence state action, is found, the due process clause will not tolerate takings without notice and an opportunity for a hearing.

Merrill A. Wasserman