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James R. McCall
UC Hastings College of the Law, mccallj@uchastings.edu

Author: James R. McCall

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THE PAST AS PROLOGUE: A HISTORY OF THE RIGHT TO REPOSSESS

JAMES R. MCCALL*

In *Sniadach v. Family Finance Corp.*[1] the United States Supreme Court held that Wisconsin's pre-judgment wage garnishment procedure violated the due process clause of the fourteenth amendment. Mr. Justice Black, in a vigorous dissenting opinion, remarked approvingly on the opinion of the Wisconsin Supreme Court in the case at bar:

> The Supreme Court of Wisconsin properly pointed out:
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> "The ability to place a lien upon a man's property such as to temporarily deprive him of its beneficial use, without any judicial determination of probable cause, dates back not only to medieval England, but also to Roman times." [citatious omitted]
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> The State Supreme Court then went on to point out a statement made by Mr. Justice Holmes in *Jackman v. Rosenbaum Co.* [citations omitted]:
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> "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for 200 years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by Owenbey v. Morgan [citations omitted].[2]

The majority opinion in *Sniadach* did not respond to the historical argument made by Mr. Justice Black.

The rationale of the *Sniadach* decision has subsequently been examined and extended by various courts in many creditors' rights

* Associate Professor of Law, University of California, Hastings College of the Law, San Francisco, California; B.A. 1958, Pomona College; J.D. 1962, Harvard Law School.

1. 395 U.S. 337 (1969).
2. *Id.* at 349.

contexts.[3] *Adams v. Egley*[4] represents one important recent application. In that case a United States District Court held that California Commercial Code sections 9503 and 9504,[5] which provide for self-

3. Prior to the United States Supreme Court's decision in Fueutes v. Shevin, 407 U.S. 67 (1972), numerous state and federal courts had passed upon the validity of various forms of governmentally executed pre-judgment remedies, such as replevin, claim and delivery, and detinue. These decisions were divided. Cases holding that the *Sniadach* rationale invalidated such pre-judgment remedies include: Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D. N.Y. 1970); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); Jones Press, Inc. v. Motor Travel Serv., Inc., 286 Minn. 205, 176 N.W.2d 87 (1970); Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969). Other courts took a more restricted view of the *Sniadach* decision and held such pre-judgment remedies to be constitutional: Brunswick Corp. v. J. & P., Inc., 424 F.2d 100 (10th Cir. 1970); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971); Almor Furniture & Appliances, Inc. v. MacMillan, 116 N.J. Super. 65, 280 A.2d 862 (1971). In *Fuentes*, the Supreme Court resolved the issue of whether *Sniadach* invalidated all such pre-judgment court-officer-administered remedies, where no pre-seizure hearing was provided, in the affirmative. The *Fuentes* Court held that a debtor's waiver of her right to object to repossession was invalid where the contract language did not specifically provide that the debtor had waived her right to a pre-seizure hearing of some kind. A waiver of such a right to pre-seizure hearing was held valid by the Supreme Court a few months prior to *Fuentes* in a situation where the waiver provision was contained in a negotiated contract and was "voluntarily, intelligently, and knowingly" made. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972). The question of whether "state action," which was clearly present in all the cases mentioned in this footnote, is required before the *Sniadach* rationale can be applied, has been raised not only in Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), but also in a number of other cases, including those listed in note 6 *infra*.

4. 338 F. Supp. 614 (S.D. Cal. 1972).

5. CAL. COMM. CODE §§ 9503-04 (West 1964). The California and UCC versions of these sections read as follows:

§ 9503:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9504.

§ 9504:

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the division on sales (Division 2). The proceeds of disposition shall be applied in the order following to

(a) The reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

help seizure and sale of collateral by a secured party upon default by a debtor and which are identical to Uniform Commercial Code sections 9-503 and 9-504, were unconstitutional under the due process clause of the fourteenth amendment.

(b) The satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) The satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) A sale or lease of collateral may be as a unit or in parcels, at wholesale or retail and at any time and place and on any terms, provided the secured party acts in good faith and in a commercially reasonable manner. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, the secured party must give to the debtor, and to any other person who has a security interest in the collateral and who has filed with the secured party a written request for notice giving his address, a notice in writing of the time and place of any public sale or of the time on or after which any private sale or other intended disposition is to be made. Such notice must be delivered personally or be deposited in the United States mail postage prepaid addressed to the debtor at his address as set forth in the financing statement or as set forth in the security agreement or at such other address as may have been furnished to the secured party in writing for this purpose, or, if no address has been so set forth or furnished, at his last known address, and to any other secured party at the address set forth in his request for notice, at least five days before the date fixed for any public sale or before the day on or after which any private sale or other disposition is to be made. Notice of the time and place of a public sale shall also be given at least five days before the date of sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held. Any public sale shall be held in the county or place specified in the security agreement, or if no county or place is specified in the security agreement, in the county in which the collateral or any part thereof is located or in the county in which the debtor has his residence or chief place of business, or in the county in which the secured party has his residence or a place of business if the debtor does not have a residence or chief place of business within this State. If the collateral is located outside of this State or has been removed from this State, a public sale may be held in the locality in which the collateral is located. Any public sale may be postponed from time to tiine by public announcement at the time and place last scheduled for the sale. The secured party may buy at any public sale and if the collateral is customarily sold in a recognized market or is the subject of widely or regularly distributed standard price quotations he may buy at private sale. Any sale of which notice is delivered or mailed and published as herein provided and which is held as herein provided is a public sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interest even though the secured party fails to comply with the requirements of this chapter or of any judicial proceedings

(a) In the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

From the moment that the *Sniadach* decision was rendered, it was clear that the constitutionality of self-help remedies available to lenders of money and credit sellers eventually would be placed at issue. Indeed, as of this writing, a number of other federal and state courts have spoken on the issue.[6] Considering the crucial role played by chattel security and related self-help remedies in the credit structure of the country, a definitive answer from the Supreme Court on the constitutional question is required in the near future.[7]

In resolving the constitutional issue, it is likely that the historical bases of self-help remedies will be examined.[8] Such remedies with

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(b) In any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this division.

6. A number of cases have held that self-help repossession pursuant to UCC §§ 9-503 and 9-504 is constitutional, either on the basis that state action was not involved or that the debtor had given a valid waiver in a conditional sale contract. *See, e.g.*, Colvin v. Avco Fin. Serv., CCH SECURED TRANSACTIONS GUIDE ¶ 52,046 (D. Utah 1973); Greene v. First Nat'l Exchange Bank, 348 F. Supp. 672 (W.D. Va. 1972); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (N.J. Super. Ct. 1972). At least one other decision has reached the same result as the *Adams* decision mentioned in the text: Chrysler Credit Corp. v. Dinitz, CCH SECURED TRANSACTIONS GUIDE ¶ 52,007 (N.Y. Civ. Ct. 1972).

7. Since none of the cases mentioned in note 6 *supra* have, as yet, reached the appellate court level, it appears likely that the first circuit court decision on the issue will be rendered in the *Adams* case. It also appears probable that, regardless of the outcome of that decision, a writ of certiorari to the United States Supreme Court will be requested.

8. The history of various legal rights and remedies has often been considered of great import in the Court's constitutional determinations. In Jackman v. Rosenbaum Co., 260 U.S. 22 (1922), the Court upheld a Pennsylvania statute which gave a property owner the right to build a party wall adjoining and encroaching upon a neighbor's property. It held there was no violation of the fourteenth amendment, as ". . . the custom of party walls was introduced by the first settlers in Philadelphia . . . and has prevailed in the State ever since." *Id.* at 30.

The quotation from *Jackman* has been cited with approval in a large number of cases. *See, e.g.*, Frank v. Maryland, 359 U.S. 360, 370 (1959) (upholding a Maryland health statute allowing inspection of a private dwelling where a homeowner was convicted under the statute for resisting inspection without a warrant); First Nat'l Benevolent Soc'y v. Garrison, 58 F. Supp. 972, 983 (S.D. Cal. 1945) (establishing that a state may regulate the interstate sale of insurance to its residents until or unless pre-empted by Congress); Coler v. Corn Exchange Bank, 250 N.Y. 136, 142, 164 N.E. 882, 884 (1928), *aff'd*, 280 U.S. 218 (1930) (upholding a New York statute allowing city official to seize the property of an absconding husband or father, without notice, and apply same to maintenance of his family).

Other recent examples of the *Jackman* premise include Wheeler v. Adams Co.,

respect to collateral were known and authorized in antiquity, and appear to have been a feature of the English common law for centuries, continuing to be recognized by English courts even during periods when the validity of nonpossessory security interest against claims of third parties was denied. Subject during this history only to such niceties as the equity of redemption and, in modern times, a prohibition against breaching the peace, the self-help remedies of a holder of a nonpossessory security interest in chattels is at least as time-honored as the right to a pre-judgment lien noted by Mr. Justice Black in *Sniadach*. The historical antecedents of the right to repossess embodied in section 9503 are, as this Article will point out, quite extensive.[9]

322 F. Supp. 645, 658 n.2 (D. Md. 1971) (the court, citing the dictum of Mr. Justice Holmes in *Jackman*, held that the replevin procedure did not violate the United States Constitution's prohibitions against unreasonable search and seizure or its requirements of procedural due process) and Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) (when plaintiff challenged the granting of property tax exemptions to religious organizations for properties used solely for religious worship, the Court stated that "an unbroken practice of according exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside" and held there was no violation of the religion clauses of the first amendment).

Other cases citing *Jackman* for the premise that historical longevity of a practice challenged under the due process clause is an important factor for consideration include: McGautha v. California, 402 U.S. 183, 203 (1970); Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 244 (1943); MacKenna v. Ellis, 280 F.2d 592, 605 (5th Cir. 1960) (dissent); Harris v. Anderson, 194 Kan. 302, 326, 400 P.2d 24, 43 (1965); Murray v. Comptroller, 241 Md. 383, 400, 216 A.2d 897, 907 (1966); Slansky v. State, 192 Md. 94, 106, 63 A.2d 599, 604 (1949); Lincoln v. Page, 109 N.H. 30, 31, 241 A.2d 799, 800 (1968); Staten Island Edison Corp. v. Maltbie, 296 N.Y. 374, 393, 73 N.E.2d 705, 714 (1947); La Flamme v. Milne, 127 Vt. 301, 302, 248 A.2d 692, 693 (1968); Family Finance Corp. v. Sniadach, 37 Wis. 2d 163, 172, 154 N.W.2d 259, 264 (1967), *rev'd*, 395 U.S. 337 (1969). *But see* Furman v. Georgia, 408 U.S. 238 (1972).

For a statement questioning the *Jackman* premise in general terms, *see* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 386 (1970) (commenting that there is no such thing as "automatic adoption" of an English rule; rather "only that portion applicable to . . . [the American] situation.")

The significance of historical treatment by the courts of replevin procedures is highlighted in Fuentes v. Shevin, 407 U.S. 67 (1972). In that case the Court overturned the replevin statutes of Florida and Pennsylvania on the grounds that allowing pre-judgment seizures without giving the debtor an opportunity to be heard violated his procedural due process rights. The Court carefully distingnished the procedure under the statute from the historical common law replevin actions. It found that while pre-judgment seizure was allowed by the common law, there was nevertheless notice and opportunity to be heard given to the debtor. In addition, a state official made at least a summary determination of the rights of the parties before seizure from one of them.

9. Section 9503 does not use the word "repossess" but speaks of ". . . the right to take possession of the collateral." In Adams v. Egley it is clear that in at

I. GREEK AND ROMAN LAW: SELF-HELP AND REPOSSESSION

During the classical period of Athenian history the Greek legal system generally regarded private self-help with benevolence. The state did not attempt to enforce the judgments of its courts; rather, a person obtaining a judgment in a private lawsuit was expected to exercise self-help to enforce it.[10] A judgment debtor who resisted a creditor's attempts to seize chattels to satisfy a judgment was treated as a public offender and subjected to a monetary fine equal to the value of the property which the holder of the judgment was seeking to recover. The disabilities which attached to the status of being a debtor of the state could be escaped by the resisting judgment debtor only when he satisfied *both* the private holder of the judgment and the state for the amount of the fine.[11] A judgment creditor, or any other person having the right to use self-help under the law of Athens, was legally entitled to exercise that right aggressively, even to the point of breaching the peace and causing physical injury to the debtor.[12]

There were three basic forms of security devices in the Greek legal system during the classical period—pledge, *hypothec*, and sale subject to redemption by the debtor.[13] The ancient Greek pledge was similar to the familiar common law device of the same name and consisted of a transfer of physical possession and title of the collateral by the debtor to the creditor, with the latter being required to restore possession of the property to the debtor upon discharge of the debt.[14] Under the *hypothec* device, the property remained in the debtor's possession and ownership, but the creditor had the right to take possession of the property from the debtor upon default of the debt.[15] The sale subject to redemption resembled the early form of English

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least one of the cases there was a loan of money unconnected with the sale of chattel so that the taking of possession by the secured party in that case did not, technically, amount to a "repossession." However, this is far from a significant point since the general public as well as the bar understand that "repossession" is most often used in a general sense to denote a creditor's self-help seizure of his chattel security upon default.

10. L. WHIBLEY, A COMPANION TO GREEK STUDIES 489-90 (3d ed. 1916).

11. *Id.*

12. F. PRINGSHEIM, THE GREEK LAW OF SALE 286-87 (1950) [hereinafter cited as PRINGSHEIM].

13. A. HARRISON, THE LAW OF ATHENS 258 (1968) [hereinafter cited as HARRISON].

14. *Id.*

15. J. JONES, THE LAW AND LEGAL THEORY OF THE GREEKS 238 (1956) [hereinafter cited as JONES].

bill of sale and American chattel mortgage, and was the earliest and most common method of chattel security for the repayment of money in Greek society.[16] A transaction in which this device was used required a transfer (by "sale") of ownership of the collateral to the creditor, subject to the debtor's right to reacquire ownership of the property upon payment of the debt. Possession was at all times retained by the debtor, with the creditor having the right to seize possession by self-help upon default in payment of the secured debt.[17] Thus, both *hypothec* and sale subject to redemption established valid nonpossessory security interests in a creditor who was allowed, upon default, to take possession of the mortgaged property by self-help, even of an aggressive nature.[18] After repossession of the property pursuant to either security device, the creditor was treated as the owner of the collateral; no formal procedure was required to terminate the debtor's interest in the property. If the creditor sold the property, he was not required to turn over to the debtor any funds received from the sale, even if that sale had produced a surplus over and above the remaining amount of the defaulted obligation.[19]

In the early development of the Greek law of sale there was no method available for creating a binding contractual obligation to pay for goods sold on credit.[20] Thus it was common practice for a credit seller to retain title to the property until the full purchase price had been paid, and this "security interest" was readily enforceable by a right to retake on the part of the seller-owner upon default.[21] The seller's right to retain title made it advisable for the buyer to include in a credit sales contract a provision giving him the right to seize the goods from the seller upon payment of all installments in those situations in which the seller retained possession as well as title during the period of payment.[22]

A study of the early Roman legal system discloses many similarities to the Greek law of chattel security. For example, the tolerance of self-help remedies was clearly established and a creditor had the right

16. *Id.* at 237.

17. HARRISON, *supra* note 13, at 258.

18. HARRISON, *supra* note 13, at 258-72, 282-83; JONES, *supra* note 15, at 237-38; Wigmore, *The Pledge-Idea: A Study in Comparative Legal Ideas III*, 11 HARV. L. REV. 18, 19 (1897) [hereinafter cited as Wigmore].

19. *See* HARRISON, *supra* note 13, at 280; JONES, *supra* note 15, at 241; Wigmore, *supra* note 18, at 19.

20. PRINGSHEIM, *supra* note 12, at 157.

21. *Id.* at 170, 244, 318-19.

22. *Id.* at 286 *et seq.*

to seize the person of a debtor without court action upon a default in payment.[23] After the development of Roman classical law chattel security was available to creditors in three principal forms: *pignus*, which was similar to the Greek pledge device and involved the transfer of possession to the creditor;[24] *hypothec*, which was identical to the Greek device of the same name;[25] and *fiducia cum creditore*, in which title, but not possession of the collateral, was transferred to the creditor as security for the payment of the debt.[26] Both of the non-possessory devices, *hypothec* and *fiducia cum creditore*, were used interchangeably to establish security interests in both movables and immovables.[27] *Fiducia cum creditore* survived as a fiduciary device throughout the classical period, but was severely restricted by reforms in the Roman legal system during the fourth century and was virtually nonexistent by the time of Justinian.[28]

In both *hypothec* and, during the period of its use, *fiducia cum creditore*, the creditor could repossess the collateral upon default in the payment of the underlying obligation and, if necessary, could institute a legal proceeding to obtain possession of the collateral.[29] The following statement of a 19th century commentator, regarding Roman chattel security law, describes the right to repossess:

> In the Roman law, if the debt was not paid at the time appointed, the creditor had the right to sell the property without the authority or intervention of a court of justice, provided he duly complied with the following conditions. If the contract of hypothecation gave him an express authority to take possession of the hypothecated property and appropriate it to his use in case of debtor's default, he might at once seize and sell it. If no such power was given him, he was bound to give notice to the debtor of his intention to sell two years before any sale could take place

23. W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 352 (1939) [hereinafter cited as BUCKLAND].

24. *Id.* at 352-53. *See also* W. BUCKLAND & A. MCNAIR, ROMAN LAW AND COMMON LAW 315 (1965) [hereinafter cited as BUCKLAND & MCNAIR].

25. W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 475 (2d ed. 1932); BUCKLAND & MCNAIR, *supra* note 24, at 314.

26. BUCKLAND, *supra* note 23, at 353.

27. Chaplin, *The Story of Mortgage Law*, 4 HARV. L. REV. 1, 5 (1890); Wigmore, *supra* note 18, at 22-23.

28. BUCKLAND & MCNAIR, *supra* note 24, at 314-17; COOPER, THE INSTITUTE[S] OF JUSTINIAN, 330 (3d ed. 1852). (*The Institutes of Justinian* contained mention of *pignus* and *hypothec*, but no mention of *fiducia cum creditore*.)

29. BUCKLAND, *supra* note 23, at 353-54; BUCKLAND & MCNAIR, *supra* note 24, at 252-54.

> and the debtor had during all that time the power of redeeming the charge.[30]

In early Roman law the debtor had no equity of redemption after the creditor had taken possession upon default by exercise of his rights under the device of *fiducia cum creditore*.[31] The creditor who used the *fiducia* device was, however, required to deliver to the buyer any surplus over the amount of the defaulted obligation which he received as a result of a sale of the collateral.[32] As indicated by the quotation above, a Roman creditor using a *hypothec* security device was well advised to insert a power of sale authorization in the security documents in order to avoid the two-year redemption period, and such a creditor was also accountable to the debtor for any surplus received from the sale of the collateral after taking possession.[33] As a result of reforms in the Roman legal system during the fourth century, restrictions such as the two-year redemption period were placed on the *hypothec* creditor's right to dispose of property after taking possession and, as previously mentioned, *fiducia cum creditore* disappeared as a security device.[34]

The rights of a conditional seller with regard to self-help remedies were not a concern of the Roman legal system because the conditional sale, or sale on credit, was unknown to the Romans.[35] In fact, the modern civil law jurisdictions whose codes are based upon Roman law came to accept the validity of the conditional sale only as a result of judicial interpretation within the last 100 years.[36]

II. THE DEVELOPMENT OF THE SELF-HELP REMEDY AND CHATTEL SECURITY DEVICES IN ENGLISH COMMON LAW

A. THE HISTORICAL DEVELOPMENT OF SELF-HELP AS A GENERAL CONCEPT IN ENGLAND

During the major portion of its history, the English common law took an extremely restrictive view toward any remedy involving self-

30. H. HERMAN, TREATISE ON CHATTEL MORTGAGES 479-80 (1877).

31. BUCKLAND & MCNAIR, *supra* note 24, at 314.

32. BUCKLAND, *supra* note 23, at 353.

33. BUCKLAND & MCNAIR, *supra* note 24, at 315, 323; BUCKLAND, *supra* note 23, at 354.

34. BUCKLAND, *supra* note 23, at 353-54; BUCKLAND & MCNAIR, *supra* note 24, at 316-17.

35. O'Neal & Cruz, *The Validity of the Conditional Sale in Civil Law*, 4 TUL. L. REV. 531, 533 (1930).

36. *Id.* at 565-69. The article notes that the Supreme Court of France ac-

help.[37] Violent or aggressive self-help which resulted in a breach of the peace was regarded as contempt of the King, and informal self-help was stringently prohibited until at least the end of the 13th century.[38] As stated by Pollock and Maitland:

> Had we to write legal history out of our own heads, we might plausibly suppose that in the beginning law expects men to help themselves when they have been wronged, and that by slow degrees it substitutes a litigatory procedure for the rude justice of revenge. There would be substantial truth in this theory. For a long time law was very weak, and as a matter of fact it could not prevent self help of the most violent kind. Nevertheless, at a fairly early stage in its history it begins to prohibit in uncompromising terms any and every attempt to substitute force for judgment. Perhaps we can say that in its strife against violence it keeps up its courage by bold words. It would prohibit utterly what it cannot regulate.
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> This at all events was true of our English law in the Thirteenth Century.[39]

As a general matter the right of self-redress became increasingly regarded with favor by the English common law judges during the 14th, 15th and 16th centuries.[40] By the last quarter of the 18th century, at least one judge is reported to have regarded any exercise of self-help in the retaking of chattels by their rightful owner as lawful so long as the method of recapture did not involve a felony.[41]

With the passage of another century self-help generally (and the recapture of chattels absent a security device specifically) had become accepted. One commentator, after reviewing the change in the attitude of common law courts from hostility to benevolence, stated the following theory for this evolution:

> When recaption finally made its appearance in the course of the Nineteenth Century, it did so released from all the restrictions of

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cepted the validity of the conditional sale in 1895 for the first time and the high courts of Spain and Italy reached similar conclusions by decisions in the years 1894 and 1912 respectively.

37. Branston, *The Forcible Recaption of Chattels*, 28 L.Q. REV. 262, 264-67 (1912) [hereinafter cited as Branston].

38. F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 52-53, 169 (2d ed. 1923) [hereinafter cited as POLLOCK & MAITLAND].

39. *Id.* at 574.

40. Branston, *supra* note 37, at 266.

41. *See* Goodhart v. Lowe, 37 Eng. Rep. 661, 662 (Ch. 1820); Branston, *supra* note 37, at 274.

> former times, and it is suggested that just as the curtailment of the right was rendered necessary in earlier times by the inability of the law to regulate extra-judicial remedies, so the release of the right from all these limitations in the Nineteenth Century was due to the reliance which it was felt could be placed in modern times on the legal machinery of our courts and the power of the executive as represented by the police, to whom the maintenance of the public peace might safely be entrusted.[42]

Throughout the period from the 13th to the 19th centuries the common law increasingly allowed self-help in certain limited contexts in which its use would not produce an injustice to the parties or a lawless breach of the peace.[43] The present tolerance of self-help remedies by the courts of England would have surprised a jurist of 200 years ago. However, this modern English judicial attitude toward quiet self-help is possible because the English legal system ". . . can safely allow this [quiet self help] for it has mastered the sort of self help that is lawless."[44]

B. REPOSSESSION AND THE ENGLISH BILL OF SALE

During the medieval period the possessory pledge was virtually the only personal property security device that was considered legally valid, since the Roman concept of *hypotheca*, which involved a division of the concepts of possession and ownership, had been rejected by English courts as foreign to the common law tradition.[45] However, the report in *Twyne's Case*[46] illustrated that, by the late 16th century, Englishmen were attempting to transfer the title to collateral to a creditor as security while the debtor retained possession and use of the chattel. The court in that case held that a transfer of owner-

42. Branston, *supra* note 37, at 275.

43. 2 W. BLACKSTONE, COMMENTARIES 1490 n.2 (Jones ed. 1916); POLLOCK & MAITLAND, *supra* note 38, at 574; *cf.* T. HOLLAND, THE ELEMENTS OF JURISPRUDENCE 323-25 (13th ed. 1924) [hereinafter cited as HOLLAND].

44. POLLOCK & MAITLAND, *supra* note 38, at 574.

45. *Cf.* Ryall v. Rowles, 27 Eng. Rep. 1074, 1080 (Ch. 1749), in which Judge Burnet indicates that

> the Roman hypotheca and an English mortgage are not of the same nature, for an hypotheca gave only a lien and no property . . . a mortgage with us is an immediate conveyance with power to redeem and gives a legal property. All that can be argued from the Roman law with regard to pawns will be foreign to the question for delivery is of the essence of an English pawn.

See also Donald v. Suckling, [1866] L.R. 1 Q.B. 585, 613, wherein Judge Blackburn states: "[T]he right of hypothec is not recognized by the common law. Till possession is given the intended pledgee has only a right of action on the contract, and no interest in the thing itself. . . ."

46. 76 Eng. Rep. 809 (Star Chamber 1601).

ship for security purposes without a transfer of possession was a secret transfer and as such ". . . always a badge of fraud . . . . [B]y reason of [the debtor's continued possession] he traded and trafficed with others and defrauded and deceived them."[47] Conveyances of property without a change in possession were thus rendered invalid against unknowing third parties due to the effect of the Statute of Frauds of 1571.[48] Consistent with this view, a 1749 Chancery Court bankruptcy decision established that a chattel mortgagee who allowed the debtor to remain in possession of the chattel security thereby lost any special claim to the security upon the debtor mortgagor's bankruptcy.[49]

Even with the restrictive view taken by the English courts toward nonpossessory security interests, the bill of sale device, in which ownership but not possession of collateral was transferred from debtor to creditor upon the condition that the "sale" or transfer would be void upon repayment of the debt, eventually became the most common form of personal property security device.[50] However, the problems caused by *Twyne's Case* and the 1749 bankruptcy law decision were not cured until the passage of the recording statutes of the 19th century under which the chattel mortgagee's ownership could be recorded, thereby becoming "notorious" and superior to the claims of all subsequent creditors or trustees in bankruptcy.[51]

As between the debtor and creditor, the bill of sale, which is strikingly similar to the contemporary chattel mortgage, or, in its practical effects, to the Greek and Roman *hypothec*, customarily included a clause providing that, upon default by the grantor (mortgagor) in the payment of the secured indebtedness, the grantee (mortgagee) could enter the grantor's premises, take possession of the property, and sell or dispose of it by public auction or private sale.[52] Such a clause within a bill of sale was construed as a license, allowing the grantee to seize possession of the collateral upon default by the grantor.[53]

47. *Id.* at 812-13.

48. Act of Elizabeth Stat., 13 Eliz. 1, c.5 (1570).

49. Ryall v. Rowles, 27 Eng. Rep. 1074 (Ch. 1749).

50. HOLLAND, *supra* note 43, at 238; 5 ENGLISH RULING CASES, BILL OF SALE 1 (1902).

51. Glenn, *The Chattel Mortgage As A Statutory Security*, 25 VA. L. REV. 316, 324-29 (1939) [hereinafter cited as Glenn].

52. J. BEAUMONT, THE LAW AND PRACTICE OF BILLS OF SALE AND BILLS OF SALE OF SHIP ch. 5, § 41, at 29 (1860) [hereinafter cited as BEAUMONT].

53. *See* Maughan v. Sharpe, 144 Eng. Rep. 179 (C.P. 1864); Simpson v. Wood,

In commenting on the effect and wisdom of a properly drafted repossession upon default clause in a bill of sale, one mid-19th century commentator stated as follows:

> Should they who are in possession of the goods comprised in the security refuse to allow the donnee to take the same [upon default] and he cannot do so without committing a breach of the peace, or using force or terror, and his bill of sale is not so prepared as to justify the breaking into the premises where his property may be, he [the donnee] must await the issue of legal proceedings by action of detinue or trover against those who retain possession, against him, but if the security be properly prepared, the donnee will be able to plea successfully "leave and license" to any action of trespass that may be brought against him by the donor of the bill of sale, by reason of any force or violence to which it may have been found necessary to resort to enable him to obtain possession of his property.[54]

Since the grantor (mortgagor) under the bill of sale granted "title" to the collateral to the grantee (mortgagee), there is late 19th century authority for giving the latter freedom to take possession on failure of the condition of payment and to sell the collateral to satisfy the debt without the necessity of a specific clause establishing such rights in the bill of sale.[55]

The repossession and sale rights of a holder of a bill of sale were subject to an equity of redemption in favor of the grantor (mortgagor) which was terminable by noticed sale of the property by the creditor, or by judicial foreclosure or lapse of time.[56] A series of three Bills of Sale Acts in the 19th century made a security interest created by that device unchallengeable by subsequent creditors if the bill was recorded in the statutorily prescribed manner.[57] The last of these was

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155 Eng. Rep. 982 (Ex. 1852); Martindale v. Booth, 110 Eng. Rep. 180 (K.B. 1832); 3 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW § 7, at 204 (Merrill ed. 1887); C. CAVANAGH, THE LAW OF MONEY SECURITIES 227 (2d ed. 1885); 38 HALSBURY'S LAWS OF ENGLAND, TRESPASS § 1247, at 758 (3d ed. 1962); F. POLLOCK, AN ESSAY ON POSSESSION IN THE COMMON LAW ch. 2, § 9, at 77 (1888); H. REED, THE BILLS OF SALES ACTS 123 *et seq.* (14th ed. 1926).

54. BEAUMONT, *supra* note 52, ch. 14, § 123, at 72.

55. Johnson v. Diprose, [1893] 1 Q.B. 512, 516, 517; Gilmore & Axelrod, *Chattel Security* I, 57 YALE L.J. 518, 532 n.30 (1948) [hereinafter cited as Gilmore & Axelrod]; Glenn, *supra* note 51, at 316, 330-32.

56. 3 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW § 18, at 205 (1887); Chaplin, *The Story of Mortgage Law*, 4 HARV. L. REV. 1, 9-10 (1890).

57. C. VAINES, PERSONAL PROPERTY 402 (4th ed. 1967) [hereinafter cited as VAINES].

the Bills of Sale Act of 1882 which amended the Act of 1878 and prescribed a standard form for such bills, limited the permissible causes for repossession of the collateral by the creditor, and provided that a creditor could not carry away the collateral until five days after seizure.[58]

C. Repossession and the English Conditional Sale Contract

Following Lord Mansfield's decision in the 1779 case of *Boone v. Eyre*,[59] which established the basis for distinguishing immaterial covenants from material conditions in a contract, the English law of conditional sale contracts was placed on a firm foundation. English courts proceeded over the next half century to develop the broad themes of conditional sales law. The seller, who retained title during the payment period, could retake possession upon breach of the condition of the buyer's timely payment. At the same time, the seller could not sue for a deficiency judgment and the buyer was denied any equity of redemption.[60]

For reasons relating to the validity of the vendor's interest in a conditional sale contract against third party creditors of the buyer, the transaction was often cast in the form of a "hire-purchase" agreement.[61] Under the terms of such an agreement, the owner leased the goods to the buyer on hire and agreed that the hirer could either return the goods and terminate the hiring or elect to purchase the goods when the payments had reached a sum equal to the purchase price stated in the agreement.[62] As in the case of the usual conditional sale contract, the hire-purchase agreement provided the title retaining owner-lessor with the right to take possession of the goods upon the default of the hirer, this right of self-help being recognized at common law.[63] Recent legislation designed to curb abuses associated with the use of hire-purchase contracts has limited the otherwise freely exercised

58. Bills of Sale Act of 1878, Amendment Act of 1882, 45 & 46 Vict., ch. 43, § 7; Manchester Sheffield & Lincolnshire Ry. v. North Central Wagon Co., 13 App. Cas. 554, 560 (1888). *See generally* Willis, *Observations on the Workings on the Bills of Sale Act 1878, Amendment Act 1882*, 3 L.Q. Rev. 300 (1887).

59. Boone v. Eyre, 126 Eng. Rep. 160 (1779); *see* the discussion of that case and Lord Mansfield's work at 1 G. Gilmore, Security Interests in Personal Property 64-66 (1965) [hereinafter cited as Gilmore].

60. *See generally* Gilmore, *supra* note 59, at 66-68.

61. *See* J. MacLeod, Sale and Hire-Purchase 329 (1971) [hereinafter cited as MacLeod]; Vaines, *supra* note 57, at 345-46.

62. *Cf.* 2 Chitty on Contracts 410-12 (23rd ed. 1968).

63. A. Guest, The Law of Hire-Purchase 219, 221-22 (1966); 19 Halsbury's Laws Of England, Hire-Purchase § 882, at 545-46 (3d ed. 1957); MacLeod, *supra* note 61, at 330; Green, *The Law of Hire-Purchase*, 19 L. Students J. 187 (1896).

right of repossession by prohibiting the owner-lessor from repossessing without first obtaining a court order if one-third or more of the total hire-purchase contract price has been paid by the hirer.[64]

III. THE RIGHT TO REPOSSESS IN THE LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES CONTRACTS IN THE UNITED STATES

A. COMMON LAW DEVELOPMENT

Both the bill of sale or chattel mortgage and the conditional sale contract were used extensively at an early date in the United States.[65] During the 19th century, the courts in most states viewed chattel mortgages in the same fashion as English common law judges regarded bills of sale; accordingly, it was held that the mortgage passed legal title to the collateral to the mortgagee, subject to divestment upon repayment of the underlying obligation.[66] This majority view is illustrated by the 1869 New York decision of *Stoddard v. Dennison*,[67] where the court stated:

> A mortgage of personal chattels *is a sale on condition.* The *legal* title to the chattel is vested in the mortgagee, subject to the right of the mortgagor to perform the conditions. Upon default there is no doubt of the mortgagor's right to perform, and upon performance to reinvest himself with the legal title . . . .
>
> The respective rights and interests of the parties, therefore, are—the legal title is vested in the mortgagee, subject to an absolute right of redemption upon performance of the condition; upon breach of the condition the *legal* title becomes absolute in the mortgagee, leaving a mere equity in the mortgagor.[68]

A minority of states adopted the "lien theory" of chattel mortgages, under which the execution of the chattel mortgage did not pass title, but merely conveyed a lien as security for payment of the indebted-

64. Hire-Purchase Act 1965, §§ 33-34. *See* discussion of the same provisions in the 1938 Hire-Purchase Act in Chorley, *The Hire Purchase Bill*, 2 MODERN L. REV. 51, 52 (1938).

65. Grant Gilmore states that chattel mortgages in the United States were exclusively statutory devices which were validated as early as 1820 in the eastern seaboard states. 1 GILMORE, *supra* note 59, at 26. The United States Supreme Court in Harkness v. Russell, 118 U.S. 663 (1886), recognized the validity of conditional sales and traced their use in the United States as early as 1808.

66. L. JONES, CHATTEL MORTGAGES 1-2 (5th ed. 1908) [hereinafter cited as CHATTEL MORTGAGES].

67. 38 N.Y. Pr. Rptr. (How. Pr.) 296 (1869).

68. *Id.* at 296, 301-02.

ness to the mortgagee.[69] As was the case at English common law, the seller under a conditional sale contract was considered the holder of the title to the goods.[70]

American courts, by the great weight of authority, held that the right of self-help repossession of the collateral upon default was valid when provided for in either the mortgage or the contract of sale. Regarding repossession and chattel mortgages, Judge Leonard A. Jones, a leading commentator during the late 19th century, stated:

> Upon default the mortgagee is entitled to take a peaceable possession, without a prior demand for the payment of the debt. . . .
>
> A provision in the mortgage, that the mortgagee upon default may take possession of the property and sell it, creates an implied contract that he may enter the place where the property is kept and take the same.[71]

This right to take possession upon default by the mortgagor was exercisable by the mortgagee regardless of whether the state was a "lien theory" or a "title theory" jurisdiction.[72]

Similarly, the right of a seller under a conditional sale contract to repossess the item sold was clearly established by the courts of this country.[73] As stated by Judge Jones:

> If the contract gives the vendor the privilege amounting to a license to enter upon premises for the purpose of removing the goods when default in payment has occurred, such license is generally considered as irrevocable, and the vendee has no legal right to change his mind when the time for recapture comes. When such a license has been given it is the prevalent judicial view that in ex-

69. 1 L. JONES, THE LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES § 1 (6th ed. 1933) [hereinafter cited as L. JONES].

70. *Id.* at §§ 1337-39; VOLD ON SALES 286-88 (1941).

71. 2 L. JONES, *supra* note 69, § 705, at 464. This edition restates the earlier conclusion of the author found in L. JONES, A TREATISE OF THE LAW OF MORTGAGES OF PERSONAL PROPERTY § 705 (1881). To the same effect, *see* 1 J. COBBEY, A PRACTICAL TREATISE ON THE LAW OF CHATTEL MORTGAGES § 482 (1893). An extensive note on the subject which cites a wealth of authority, primarily from 19th century cases in many states, is found in *Right of Chattel Mortgagee To Take Possession of Property Without Legal Process*, Annot., 57 A.L.R. 26 (1928).

72. CHATTEL MORTGAGES, *supra* note 66, at 888-91, 900-01.

73. A large number of early cases establishing this point are collected and set forth in *Right of Conditional Seller To Retake Property Without Judicial Aid*, Annot., 55 A.L.R. 184 (1928). *See* case collected at 2A UNIFORM LAWS ANNOTATED, COMMENTARIES ON CONDITIONAL SALES ch. 11, § 109, at 150 (1924) [hereinafter cited as UNIFORM LAWS].

> ercising it the vendor may use such force as may be necessary to accomplish the purpose intended by the contract—the removal of the goods.[74]

As might be expected, several courts did not take as sanguine a view as Judge Jones of repossessions which involved breach of the peace or violence.[75] However, courts generally allowed the seller to exercise the remedy of self-help repossession even without an express provision in the contract authorizing the right, on the basis of the intrinsic nature of a conditional sale contract in which the seller retains title, and, by implication, the right to repossess.[76] The widely adopted Uniform Conditional Sales Act, first proposed in 1918, gave the conditional seller the statutory right to repossess upon a default in payment or in the performance of any other material condition without prior agreement of the parties if the repossession could be accomplished without breaching the peace.[77]

The legislatures and courts in this country during the first half of the 20th century often acted to narrow the legal distinctions and practical differences between chattel mortgages and conditional sale contracts.[78] As early as 1918 the drafters of the Uniform Conditional Sales Act had seriously considered, but ultimately rejected, the suggestion that the conditional sale contract be equated with the chattel mortgage in all material respects, including establishing a right on behalf of the conditional buyer to an equity of redemption and eliminating the doctrine of "election of remedies" as applied to the conditional seller.[79] The distinction between chattel mortgages and conditional sales was seen as artificial by many jurists during the period, including Learned Hand, who stated that the distinction was "wholly barren,"

74. 3 L. JONES, *supra* note 69, § 1339, at 426.

75. *See, e.g.*, McCarty-Greene Motor Co. v. House, 216 Ala. 666, 114 So. 60 (1927); Abel v. M.H. Pickering Co., 58 Pa. Super. 429 (1914).

76. *See generally* L. JONES, *supra* note 69, § 1337, at 421 (6th ed. 1933); 2A UNIFORM LAWS, *supra* note 73, ch. 11, § 102, at 140.

77. *See* UNIFORM CONDITIONAL SALES ACT § 16. The Uniform Act was adopted in 12 states including the important commereial jurisdictions of New York and Pennsylvania during the period from 1919 through 1943. In 1943 the Act was withdrawn from the list of Uniform Acts recommended by the National Conference of Commissioners on Uniform State Laws for adoption by the states. This action was taken because of the participation by the Conference in the drafting of the Uniform Commercial Code.

78. Glenn, *The Conditional Sale at Common Law and as a Statutory Security*, 25 VA. L. REV. 559, 578 (1939) [hereinafter cited as *Conditional Sale*]; Gilmore & Axelrod, *supra* note 55, at 542-43.

79. *Conditional Sale, supra* note 78, at 578-79; *Codifying the Law of Conditional Sales*, 18 COLUM. L. REV. 103, 107 (1918).

being based upon a purely conceptual notion of "title," as to which: "I do not know what it [the concept of "title"] means and I question whether anybody does, except perhaps legal historians."[80]

B. THE UNIFORM COMMERCIAL CODE

The most significant event in the development of commercial law in this country during the 20th century was the promulgation and subsequent adoption of the Uniform Commercial Code.[81] The study and drafting which produced the UCC commenced in 1942 and continued for 10 years, culminating with the Official Draft of 1952. First adopted in Pennsylvania in 1952, the UCC is now the governing statute concerning the buying and selling of goods in the District of Columbia and every state except Louisiana.[82]

While most of the UCC merely restated existing law, Article 9 of the Code dramatically changed the traditional law of personal property security in the United States. Speaking in general terms, the UCC's Chief Reporter, Professor Karl N. Llewellyn, stated that the drafters of Article 9 sought to change the law of personal property security in order to establish greater clarity, simplicity, convenience, fairness, completeness, accessibility, and uniformity.[83] Whether the drafters of Article 9 succeeded in attaining these lofty goals or in establishing an improved law for personal property security was a matter of some debate during the drafting of the UCC; however, all commentators generally agree that Article 9 made more sweeping changes in the law which it codified than any of the other eight Articles of the Code.[84]

The state of the law of personal property security immediately prior to the drafting of the UCC was, to say the least, variegated. A welter of statutes and common law doctrines controlled the rights and

80. *In re* Lake's Laundry, Inc., 79 F.2d 326, 328-39 (2d Cir. 1935) (L. Hand, J., dissenting).

81. The UCC was a project jointly sponsored by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

82. *Preface* to R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE at iv (1970).

83. Llewellyn, *Problems of Codifying Security Law*, 13 LAW & CONTEMP. PROB. 687 (1948).

84. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 354-55 (1952); Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 LAW & CONTEMP. PROB. 27, 28 (1951) [hereinafter cited as *Secured Transactions*]; Kripke, *The Modernization of Commercial Security Under the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 182 (1951).

duties of parties who entered into personal property security transactions by signing various types of security devices, including chattel mortgages and traditional sales contracts.[85] The central idea of the drafters of Article 9 was to abolish the legal significance which previously attached to the different technical forms of security devices. Thus the Article establishes that the same legal results will follow regardless of the form of security device involved and substitutes a uniform terminology to be used by the courts in dealing with personal property security transaction problems.[86] These principal features of Article 9 are demonstrated in sections 9-503 and 9-504, which speak of self-help seizure of property without differentiating between the conditional seller who extends credit and, if unpaid, "repossesses" the item which he has sold, and the lender who takes a chattel mortgage upon certain items of personal property held by the borrower. This is reminiscent of the Greeks and Romans, who, like the Commissioners on Uniform State Laws, made no distinction between a credit sale or a loan of money as far as the rights of the security interest holder were concerned.

The statutory right of the secured party to repossess and sell the collateral upon default without a court hearing was a feature of the Uniform Conditional Sales Act, as noted previously.[87] The advisa-

85. *Secured Transactions, supra* note 84, at 29-34. For an elaborate and detailed review of the various security devices and controlling law in the field at the time, see Gilmore & Axelrod, *supra* note 55, at 517.

86. *See* UNIFORM COMMERCIAL CODE, § 9-101, Comment. Judicial recognition of this principle is illustrated by the following statement from United Thrift Stores, Inc., 363 F.2d 11, 14 (3d Cir. 1966):

> The [Uniform Commercial] Code has eliminated the older, technical and restricted categories of security agreements. Gone are the definitional difficulties and transactional fictions of the chattel-mortgage, the conditional sale, the trust receipt. In their stead is a general set of rules for the creation of a security interest in a secured party.

Although Article 9 was rewritten numerous times prior to the adoption of the Official Text in 1952, the basic idea providing for unitary legal treatment of all security devices remained constant, and only one major structural change was made in the Article from original draft to Official Text. *See Secured Transactions, supra* note 84, at 33-34. This structural change was made after the publication of the May, 1949 draft of the UCC. In that draft the Article governing secured transactions (Article 7) was divided into eight Parts, five of which dealt with specific forms of collateral, *i.e.*, inventory, consumer goods, and so forth. The next draft of the UCC in 1950 changed the number of the secured transactions Article from 7 to 9 and restructured the component Parts of the Article along functional lines, eliminating the division of Parts on the basis of the type of collateral involved. The structure of the proposed final draft of Article 9 remained unchanged in the Official Draft which was promulgated in 1952.

87. *See* note 77 *supra.*

bility of establishing a right of self-help repossession for all secured parties, regardless of the form of the security device involved, was unanimously accepted by all members and advisors of the drafting staff of Article 9, prior to the promulgation of the 1949 Draft.[88] That Draft reflects this basic agreement on the validity of unhampered self-help repossession, at least in those transactions involving businessmen.[89] However, the 1949 Draft also contained provisions requiring a secured party to give 20 days' notice by a prescribed form of written statement before repossessing if the collateral was a consumer good and the consumer-debtor had paid more than 60 percent of the purchase price or loan.[90] This requirement for a repossession of consumer goods was deleted from Article 9 in the 1950 Draft and the Official Draft of 1952. In this respect Article 9 may be viewed as a striking return to the almost unrestricted right of self-help repossession which existed in Greek and Roman law and in English common law during the 18th and 19th centuries. Formal statutory requirements for the enforcement of security agreements were to a large extent abandoned in the Article,[91] with the lender being given a great deal of freedom in disposing of the collateral after default.[92]

The decision of the drafters to delete the requirement of a strict procedure upon default in consumer goods transactions was one aspect of a general determination made by them to abstain from attempting a reformist codification in Article 9 of the law governing the sale

88. Gilmore, *Article 9 of the Uniform Commercial Code—Part V (Default)*, 7 CONFERENCE ON PERSONAL FINANCE L.Q. REP. 4, 7 (1952).

89. *See* UNIFORM COMMERCIAL CODE § 7-323 (May, 1949 Draft) (inventory as collateral), § 7-413 (business equipment as collateral), and § 7-515 (farm products as collateral).

90. UNIFORM COMMERCIAL CODE §§ 7-605, 7-606 (May, 1949 Draft).

91. Affidavits of good faith, notarization, verification, and other execution requirements, as well as specific descriptions of collateral, are no longer required. *See Secured Transactions, supra* note 84, at 35.

92. [T]here is in Article 9 no requirement of sale at public auction following pnblic notice; no requirement that repossessed collateral be held for a specif ed period before disposition or that collateral be disposed of within a specified period after repossession; no requirement even that the collateral *be* repossessed, since it is provided that a lender may deal with and dispose of it on the debtor's premises. In place of all tliese protective devices, designed to block the real and present danger of fraud or overreaching, there is erected only the flimsiest of safeguards: the lender, in dealing with the collateral, must observe a standard called "commercial reasouableness," an undefined term of no known legal meaning.

Secured Transactions, supra uote 84, at 35-36. Gilmore nonetheless defends UCC §§ 9-503 and 9-504 on the theory that the prior restrictions did not deter fraud and made it impossible to dispose of collateral at a decent price. The standard of "commercial reasonableness" deliberately leaves to the courts the issue of the fairness of the creditor's disposition of collateral. *Id.*

of consumer goods. This major policy decision was made for two reasons. First, the drafters came to believe that effective regulation of consumer credit sales could be obtained only by the establishment of state administrative agencies and this was felt to be beyond the authority of the promulgators of the UCC. Second, the drafters were eventually persuaded that a worthwhile reform of abusive practices in the field required the enactment of a code covering all consumer credit transactions, and not just those transactions involving security interests.[93]

Almost 20 years later, in 1968, the National Conference of Commissioners on Uniform State Laws approved the Uniform Consumer Credit Code (UCCC), which regulates all consumer loans and credit sales and provides for administrative enforcement and implementation. Interestingly, in light of the history previously mentioned, the UCCC contains no provisions which regulate the right of a secured creditor of a consumer to repossess upon default. However, the administrator established by the statute is given the power to bring a civil action to restrain a creditor of a consumer from engaging in fraudulent or unconscionable conduct in the collection of debt.[94] Except for possible action by the administrator under this section, the repossession rights of the creditor of a consumer are expressly unaffected by the UCCC and are to be governed by sections 9-503 and 9-504 of the Uniform Commercial Code.[95]

In the 1950 Draft of the UCC the default remedy sections of Article 9 were drafted in a way which would be carried forward substantially unchanged in the 1952 Official Draft. Section 9-503 codified the judicially established rule that a secured party could take possession of collateral upon default without legal process if this could be done without breaching the peace. As has been noted, this basic right of self-help repossession had been expressed in similar language in the earlier Uniform Conditional Sales Act and in the more specialized 1933 Uniform Trust Receipts Act.[96]

In drafting section 9-504, which governs the rights and duties of the repossessing secured party in realizing on the collateral by foreclosure sale, the drafters opted to follow the liberalized procedure of

93. *Secured Transactions, supra* note 84, at 45.

94. UNIFORM CONSUMER CREDIT CODE § 8.111(1)(c).

95. *See* UNIFORM CONSUMER CREDIT CODE, § 5.103, Comment 1.

96. 2 U.L.A. CONDITIONAL SALES 27-28 (1922) (UNIFORM CONDITIONAL SALES ACT § 16); 9A U.L.A. MISC. ACTS 297-98 (1951) (UNIFORM TRUST RECEIPTS ACT § 6).

the Uniform Trust Receipts Act, rather than the highly structured requirements of the Uniform Conditional Sales Act.[97] Section 6 of the Uniform Trust Receipts Act provided that a repossessing secured party could, after five days' written notice, sell the collateral at either a public or private sale with the right to claim a deficiency against the debtor or, correspondingly, the duty to account to the debtor for any surplus.[98]

On the other hand, the Uniform Conditional Sales Act required that an elaborate and precise public sale procedure be followed by a foreclosing secured party when 50 percent of the sales price had been paid by the debtor.[99] A mandatory 10-day redemption period was required by the Act unless the secured party had served a notice of intention to repossess not more than 40 nor less than 20 days prior to the physical repossession.[100] UCC section 9-507 establishes the right of a secured party to ". . . sell, lease or otherwise dispose . . ." of the collateral in any "commercially reasonable" manner with the secured party being required to give "reasonable notification" of the time and place of the public or private sale or other intended disposition.[101] The debtor's right to redeem continues until a secured party sells or disposes of the collateral, and the secured party is required to sell or dispose of the collateral only when it is a consumer good in which the secured party had a purchase money security interest.[102]

The decision of the drafters to accord great freedom to a repossessing secured party in section 9-504 was based on the strong belief that foreclosure sales under that section would henceforth generally be made through private or regular commercial channels which would make it more likely that the collateral would be sold for fair market value than was the case at restricted public sales under the Uniform Conditional Sales Act provisions.[103] Thus the drafters felt that the debtor

97. UNIFORM COMMERCIAL CODE § 9-504, Comment 1 (Proposed Final Draft, Spring 1950). The substance of this Comment remains the same in all subsequent drafts of the UCC.

98. 9A U.L.A. MISC. ACTS 297 (1951).

99. 2 U.L.A. CONDITIONAL SALES 30-31 (1922) (UNIFORM CONDITIONAL SALES ACT § 19).

100. 2 U.L.A. CONDITIONAL SALES 28-29 (1922) (UNIFORM CONDITIONAL SALES ACT, §§ 17-18).

101. UNIFORM COMMERCIAL CODE § 9-504.

102. *Id.* § 9-505.

103. *See* Gilmore, *Article 9 of the Uniform Commercial Code—Part V (Default)*, 7 *Conference on Personal Finance L.Q. Rep.* 4, 7, 8, 11 (1952). Professor Gilmore was, together with Professor Allison Dunham, one of the joint reporters for Article 9 of the UCC. UNIFORM COMMERCIAL CODE 597 (May, 1949 version). Professor Gil-

would ultimately benefit from these liberalized provisions in what they viewed as the vast majority of situations where the secured party is acting in good faith. For those instances of bad faith, which the drafters felt would be rare, resort by the debtor to court relief under section 9-507 is authorized when the secured party is not acting in a "commercially reasonable" manner.

IV. THE REMEDY OF SELF-HELP REPOSSESSION IN CALIFORNIA

The history of the repossession remedy in California does not vary in any significant detail from that in the United States generally. In adopting the English common law as legal precedent in 1850, California also adopted the common law title theory of chattel mortgages.[104] In 1872, the California Legislature adopted the lien theory of chattel mortgages and curtailed the right of the mortgagee to seize possession of the property unless a specific right to do so was given in the mortgage.[105]

With regard to conditional sale contracts, California courts historically took the view that, since the seller retained title until the conditions were satisfied, he was entitled to repossess upon default in payment, even without express provision in the contract.[106] In exercising the right to repossess the seller was permitted to use force so long as the repossession could be accomplished without assaulting or injuring the buyer or breaching the peace.[107] The seller was required

more has credited Professors Karl Llewellyn and Soia Mentschikoff as being additional members of the drafting staff of Article 9 in one of his many lucid publications on the subject of personal property security law. *Secured Transactions, supra* note 84, at 27.

104. On the general adoption of the common law of England in California see *Comm. on the Judiciary, Report on Civil and Common Law,* 1 Cal. 588, 600-01 (1850) and *An Act Adopting the Common Law,* ch. XL 186 [1850] Cal. Stat. which reads:

> The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the courts of this state.

On the establishment of the common law title theory of chattel mortgages in this state, see Heyland v. Badger, 35 Cal. 404 (1868); Wilson v. Brannan, 27 Cal. 258 (1865).

105. CAL. CIV. CODE § 2957 (1872) which read as follows:

> A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage, the mortgagor may agree to such change of possession without a new consideration.

106. See numerous California cases mentioned in Hines, *Rights and Remedies Under California Conditional Sales,* 23 CALIF. L. REV. 557, 571-72, 578, 582 (1935) [hereinafter cited as Hines].

107. Siverstin v. Kohler & Chase, 181 Cal. 51, 54 (1919); Hines, *supra* note 106, at 578.

to elect remedies upon default in payment, unless the conditional sale contract allowed him to repossess the property, sell it at a foreclosure sale, and sue for a deficiency judgment.[108] Upon adoption of the UCC in 1965, the legal distinctions between conditional sale contracts and chattel mortgages were eliminated in California, and the rights and duties of the holder of the security interest who would seek to repossess were established by sections 9-503 and 9-504.

V. CONCLUSION

The right to repossess upon default has been available to holders of a security interest in collateral either by statute, common law, or agreement of the parties in the United States virtually since the beginnings of the republic. In England, with a more extensive legal history, the remedy has been well established for several hundred years. The Greeks and Romans recognized the remedy during antiquity. How this right will fare when scrutinized by the United States Supreme Court for compliance with the dictates of the due process clause remains to be seen. If the short shrift which that Court gave to the right of prejudgment attachment with its similar historical lineage is an indication, the days of the free and widespread exercise of a secured creditor's right to repossess upon default may well be approaching an end.

108. Johnson v. Kaeser, 196 Cal. 686, 694 (1925); General Motors Acceptance Corp. v. Brown, 2 Cal. App. 2d 646, 649 (1934).