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PEACEFUL REPOSESSION UNDER THE UNIFORM COMMERCIAL CODE: A CONSTITUTIONAL AND ECONOMIC ANALYSIS

Soia Mentschikoff*

Peaceful repossession and private disposition of collateral after default is a remedy of ancient and honorable lineage. Indeed, this method of private realization on the security interests of secured parties has long been an equitable and inexpensive means of obtaining payment of the debt; as such, it was incorporated into the Uniform Commercial Code in sections 9-503 and 9-504.† The effectiveness of this remedy is due, in

* A.B., Hunter College; LL.B., Columbia University. Professor of Law, University of Chicago. This Article has been adapted from an amicus curiae brief filed by Professor Mentschikoff in the appeal of Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), appeal docketed No. 72-1484 (9th Cir. 1972), on behalf of the Permanent Editorial Board for the Uniform Commercial Code.
† Section 9-503 provides in pertinent part:

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. . . .

Section 9-504 provides in pertinent part:

(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 Article on Sales (Article 2).

. . . .

(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. . . .

. . . .

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. . . . but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. . . .
large part, to its private self-help characteristics, which eliminate the need for a judicial hearing before repossession takes place.

Recent Supreme Court decisions, however, have raised some doubt concerning the continued vitality of peaceful repossession. In Sniadach v. Family Finance Corp., and later cases, the Court has held that certain prejudgment seizures of property are violative of the due process clause of the fourteenth amendment because they allow a taking of the debtor's property without prior notice and a hearing on the merits of the creditor's claim. Among the statutes that have been declared unconstitutional are those that allow prehearing seizures of wages, household goods, welfare payments, and the like. Generally under these statutes, state officials have been involved at some stage of the seizure.

Following what it believed to be the implications of Sniadach, a California district court in Adams v. Egley and its companion case, Posadas v. Star & Crescent Federal Credit Union, reluctantly decided that private repossession and sale under self-help statutes, including sections 9-503 and 9-504 of the Uniform Commercial Code, were unconstitutional. On the other hand, the majority of courts ruling upon the constitutionality of these provisions have found them unobjectionable. The Adams case has been appealed to the Court of Appeals for the Ninth Circuit.

6. Id. at 622. The court determined that state action, a necessary prerequisite to any fourteenth amendment claim, was sufficiently involved, placing reliance primarily upon Reitman v. Mulkey, 387 U.S. 369 (1967). Other lower courts felt this reliance to be misplaced and reached an opposite result, holding sections 9-503 and 9-504 constitutionally valid. See cases cited in note 7 infra.
8. No. 72-1484 (9th Cir. 1972).
it poses serious legal questions that have substantial impact in a wide range of commercial transactions.

In *Adams*, the court is confronted with automobile financing, a subject of relative importance in our economy. This Article will be restricted to that frame of reference. An examination of the history and rationale behind the self-help provisions of the Code will evidence the propriety of the holdings of the majority of courts which have decided the matter and will commend the rejection of the district court's decision in *Adams*.

**Characteristics of Automobile Financing**

As developed more fully in this Article, automobile financing has these characteristics: (1) The number of cases in which an honest debtor dealing with an honest secured party would have a defense permitting retention of possession is infinitesimal in view of the limitation of remedies involved in the sale of new cars and the limited warranties which are customary for used cars; (2) The evil of the dishonest secured party-seller of automobiles would not be ameliorated by requiring judicial action prior to repossession; (3) The evil of the dishonest debtor who "skips" would be increased.

The economic and other consequences of requiring prior judicial action in this context are: (1) The number of repossessions as opposed to peaceful rescheduling of payment of delinquent accounts would increase; (2) The size of deficiency judgments to be paid by defaulting debtors would be increased by the additional costs involved; (3) The general interest rates charged to all debtors would rise to take care of the increased losses in salvage value of the collateral resulting from the inevitable delay attendant on any court procedure and the increased number of "skips"; (4) Additional burdens would be imposed on an already overburdened court system with higher taxes to be paid by the general public; (5) The number of buyers whose credit would preclude purchase would rise, thus affecting the total number of cars manufactured, with a consequent adverse impact on our total economy; (6) One

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9. As of April 30, 1972, almost $40 billion of credit was outstanding in this area, more than $22 billion had been extended by commercial banks; about $10.5 billion by finance companies; $6 billion by other financial lenders including credit unions; and $372 million by automobile dealers themselves. Federal Reserve Statistical Release on Consumer Credit, June 2, 1972.

10. At the writing of this Article, the decision on appeal had not yet been released.
in ten thousand defaulting debtors might conceivably be saved a week or 10-60 days temporary deprivation of the use of an automobile.

The issue raised in *Adams v. Egley* is whether under these circumstances the Constitution requires some type of judicial hearing prior to the pursuit of the self-help remedy of peaceful repossession. The Permanent Editorial Board for the Uniform Commercial Code believes it does not.

**Outline of the Argument**

I. The Uniform Commercial Code fairly allocates rights and duties in the case of default in secured transactions.

II. The nature of automobile sale and financing is such as to leave only a minute number of debtors with defenses which would entitle them to continued use of the automobile serving as collateral.

III. Prior judicial review with its consequent delays would enhance the evils involved in cases of bad faith or dishonest debtors while leaving untouched the evils involved in cases of bad faith or dishonest secured creditors.

IV. Prior judicial notice and hearing is not constitutionally required for the taking of possession of property after a debtor's default under a statutory scheme which also provides for immediate injunctive relief ordering return in the rare cases of improper taking when the economic and other consequences of such a requirement would be materially burdensome to all debtors and to the public at large.

**The Facts in Adams and Posadas**

*Adams v. Egley*

On June 17, 1968, a bank loaned the debtor $1,160.16, taking as security for the loan a security interest in three motor vehicles. Monthly installment payments were regularly made until January 22, 1970, when the debtor became unable to continue them. After constant requests for payment, accompanied ultimately by the threat of taking possession of the collateral, on July 23, 1970, six months after default, the debtor made a further payment of $50.00 and stated that he would make another payment or another payment and a half by the middle of August. He was told that unless payment was made in a sufficient amount to reduce his default to 90 days, the cars would be repossessed. No payment of any kind was in fact made by the middle of August, and on August 20, 1970, two of the vehicles were repossessed. The whereabouts of the
third car could not be ascertained and no repossession of it was made. The
two repossessed cars were sold and the expenses of repossession and sale
were deducted, leaving approximately the amount required to pay off
the balance of the debt.

The crucial fact in *Adams* is that the debtor had no defense that
would in any way have entitled him to continue in possession of the
cars. Assuming the plaintiff’s good faith inability to pay, this case evid-
dences the classic situation of an honest debtor who is in default on a
loan which can realistically be paid off only through the medium of a
sale of the automobiles he gave as collateral and who was himself un-
willing or unable to sell for a period of almost six months after his ina-
bility to pay became known to him. It is to be noted that in this case,
as in most other cases involving honest debtors and honest secured lend-
ers, the repossession did not take place immediately on default and oc-
curred only after repeated warnings to the debtor.11

*Posadas v. Star & Crescent Federal Credit Union*

The companion case also involved an honest debtor and an honest se-
cured lender. In *Posadas* the credit union made a direct loan to the
debtor to enable him to buy a truck which then became collateral for
the loan. This was followed by a second loan to the debtor to enable
him to buy a car which became the collateral for that loan. He failed to
make his payments in June, 1970, and there, too, no repossession of the
truck took place until September 25 and only after repeated warnings.
This case typifies the normal situation of loans made by third parties
to enable purchase of automobiles and trucks. Again there was no de-
fense possible or asserted which would have avoided repossession and
allowed the debtor to continue to use the truck.

Nonetheless, the district court held that the repossession in *Adams*
and in *Posadas*, though accomplished peacefully, were constitutionally
invalid.

These two cases exemplify two major types of automobile financing: *Adams*
illustrates the first, loans by a bank or other third party against
existing property of the debtor; *Posadas* is an example of the second,
loans made to enable the debtor to acquire the property which will be-

11. See Johnson, Denial of Summary Repossession: An Economic Analysis (A
recently completed and unpublished paper in the Purdue University Library). Dr.
Johnson is Professor of Industrial Administration, Purdue University, Lafayette, In-
diana. A copy of this paper was submitted to the Court of Appeals for the Ninth
Circuit.
come the collateral. There is a third type of security interest also affected by sections 9-503 and 9-504, a security interest in favor of the seller of the goods involved. As is shown below, the third kind of security interest is significantly different with respect to the existence of possible defenses of a type which would permit a debtor to continue to use the collateral.

I. Allocation of Rights and Duties in the Case of Default Under Article Nine of the Uniform Commercial Code

The aim or goal of any system which is adopted to regulate realization on security interests after default can be stated simply: disposition of the collateral at a fair price with the least possible delay and at the lowest possible cost. To the extent that the goal is achieved, the debtor's equity in the collateral will be protected and the threat of a deficiency judgment will be minimized while the secured party's right to repayment of his loan is maintained.

The implementation of this goal in a society composed of both honest and dishonest secured parties and debtors is more complex. History, however, has one constant despite the diversity of secured transactions involved: a movement from judicial supervision and control to self-help entry into possession and private sale. The reason is easy to see—the additional costs and delays inherent in judicial control have consistently led to deterioration of the debtor's equity in the collateral and to larger deficiency judgments against him with no corresponding benefit to the secured party or to the public as a whole. This verdict of history was accepted by the drafters of the Uniform Commercial Code, and the problem the drafters wrestled with was a fair allocation of the burdens, risks and rights of the parties to a secured transaction in a system of self-help and private disposition of collateral.

The protections afforded the defaulting debtor under the Code are varied and extensive. The only protection a secured party has in the collateral is the right to peacefully repossess it after default, a limited self-help remedy, since any refusal of the debtor to permit entry into the place where the collateral is kept effectively precludes its exercise.

12. See statement of historical background for sections 9-503 and 9-504 of the Uniform Commercial Code attached as Appendix B to the brief submitted to the Court of Appeals for the Ninth Circuit.

13. Self-help to recover possession of a chattel which has been wrongfully taken or wrongfully detained is an ancient right, probably applied primarily to horses, the ancient equivalent of the automobile. Blackstone described this right with its reasons as follows:
The secured party must exercise reasonable care in the preservation of collateral once he has taken possession of it and must dispose of it in a commercially reasonable manner after reasonable notification of the time and place of public sale if that be the selected commercially reasonable method of disposition of the goods, or reasonable notification of the time after which private sale will be made if that be the commercially

... But as there are certain injuries of such a nature, that some of them furnish and others require a more speedy remedy than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial, or eccentrical kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit: and to that end, shall distribute the redress of private wrongs into three several species: first, that which is obtained by the mere act of the parties themselves;...

Redress by act of the parties. — And, first, of that redress of private injuries, which is obtained by the mere act of the parties. This is of two sorts: first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both which I shall consider in their order.

Of the first sort, or that which arises from the sole act of the injured party, is,

Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace. The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If, therefore, he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; and, as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law.


reasonable course selected.\textsuperscript{15} Unless, \textit{after default}, the debtor has agreed in writing to waive his right of redemption, he may redeem the property at any time prior to its disposition.\textsuperscript{16} The secured party may not keep the property in settlement of the balance of the loan without the written consent of the debtor obtained \textit{after default}, and, if 60 percent of the loan has been paid, the secured party must dispose of the property within 90 days of repossession or be liable in conversion.\textsuperscript{17} In all cases of disposition, the debtor is entitled to any surplus as well as being liable for any deficiency.

If the secured party fails to send the required notices of resale or otherwise behaves in bad faith or in a commercially unreasonable manner or violates any of the other provisions of the Code, including taking possession where there is no default, he may be enjoined and ordered to behave in an appropriate way with appropriate damages to the debtor, including, in the case of consumer goods, penalty damages. If the secured party has already improperly disposed of the collateral, the debtor is entitled to recover for any loss he has suffered as a result of the secured party's wrongful action. In the case of consumer goods, (which is how the goods involved in \textit{Adams v. Egley} would probably be classified) the debtor can in any event recover the entire credit service charge or time price differential plus 10 percent of the amount of the loan.\textsuperscript{18}

The protections against secured parties who are sellers and their assignees include not only the provisions of Article 9 (sections 9-207, 9-504, 9-505, 9-506, and 9-507 referred to above), but also certain provisions of the Sales Article, Article 2.

Article 2 provides for voiding of unconscionable contracts\textsuperscript{19} and for revocation of acceptance of goods with material defects which have not been cured by the seller or which were not discoverable at the time of acceptance.\textsuperscript{20} Revocation of acceptance, like fraud or unconscionability, destroys the seller's right to the price. Following revocation, the buyer-debtor may himself resell the goods to reimburse himself for the amounts already paid.\textsuperscript{21} Limitations on remedies provided in the sales contract do not preclude revocation or any other remedy of the buyer-debtor if

\textsuperscript{15} Id. § 9-504.
\textsuperscript{16} Id. § 9-506.
\textsuperscript{17} Id. § 9-505.
\textsuperscript{18} Id. § 9-507.
\textsuperscript{19} Id. § 2-302.
\textsuperscript{20} Id. § 2-608.
\textsuperscript{21} Id. §§ 2-608 (3), 2-711 (3).
the limited remedies provided fail of their essential purpose. In effecting resale after revocation of acceptance the buyer has the same rights and duties vis-a-vis the seller-secured party as the secured party has vis-a-vis the debtor in cases of defaults.

Third party secured parties such as those involved in *Adams v. Egley* who make direct loans to debtors are not involved in the underlying sales transaction and are thus not made subject to the additional protections of the sales article. All secured parties, however, are under an obligation to act in good faith both in the performance and the enforcement of the security agreement and failure to do so will give rise to injunctive relief or damages or both under section 9-507.

On the other hand, the only protection a secured party has in the collateral itself as against a defaulting debtor is repossession of the goods under section 9-503 and their resale under the safeguards provided in section 9-504 with a resultant deficiency judgment. Of course, as indicated in Blackstone, these rights were of ancient origin and were not new rights conferred by the Code. These are the sections which the district court in *Adams* declared unconstitutional.

II. DEFENSES WHICH MAY ENTITLE DEBTORS TO CONTINUED USE OF THE COLLATERAL

We come now to the kinds of defenses which can arise between secured parties and debtors and the extent to which they involve the debtor's right to continue in possession of the collateral. As a basis for the debtor's right to continued possession, the simplest defense is a claim by the debtor that payment has been made and that, therefore, default has not taken place. Normally, this can be settled by production of cancelled checks, receipts and the like and thus almost never, if not never, leads to repossession.

The remaining claims all rest on a factual situation where payment has concededly not been made, that is, the "default" exists, but the debtor alleges some reason for the nonpayment. The first category of defense is that the goods are defective and that repairs have not been satisfactorily made or have been improperly charged for and payment is being withheld under a buyer's right of set-off. Under section 2-717, this defense of set-off requires prior notification to the seller and is

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22. *Id.* § 2-719.
23. *Id.* § 1-203.
24. See note 13 *supra*.
available only against a secured party-seller or possibly his assignees and not against secured parties such as those in *Adams* and *Posadas* who were not involved in any way in the underlying sales transaction. If true, it affords a basis for a claim to a continued right of possession and use by the debtor until the amount unpaid exceeds the amount claimed as set-off.

The second category of defense involved in non-payment is the claim that the sales contract was induced by fraud or was unconscionable. Again, this defense does not concern secured parties who were not involved in the underlying sales transaction, but applies only to secured party-sellers or their assignees. A finding of fraud or unconscionability, however, would not give the debtor a right to continued use of the collateral for it leads to an avoidance of the contract. It would, therefore, operate as a complete defense against any deficiency judgment for it destroys the debt and also is a basis for restitution of payments made less the reasonable value of the use of the collateral prior to the peaceful repossession, but it gives no right of continued use to the debtor.

The third possible defense is that the defects in the collateral are such as to materially impair the value of the collateral to the debtor so that he elects to revoke acceptance rather than trying to set off the diminution in value of the goods for failure to conform to warranties made. The debtor's right to possession of the collateral in this situation is for security only and, as in the unconscionable situation, gives no right to further use of the goods involved. In effect, the debt is discharged but the debtor may keep the goods for the purpose of realizing on his security interest in them by private sale.

We are left, therefore, with the fact that under the Code in cases of non-payment of an installment, the debtor's right to continued use of the goods is limited to situations where he has not elected the remedy of voiding the debt as a result of fraud, unconscionability or revocation of acceptance for material breach of warranty, but is simply asserting a right to set-off damages for breaches of warranty. This defense can, of course, only be asserted against the secured party-seller and, in some jurisdictions, against his assignees.

The next question is the degree to which, in fact, the set-off defense is available in automobile financing. On new cars, the normal and exclusive remedy provided in the sales contract is repair or replacement of defective parts. In turn, that means that unless the car proves to be a real

26. Id. § 2-608.
27. Id. § 2-711 (3).
"lemon," to the point where repair or replacement become remedies failing of their essential purpose under section 2-719, a breach of warranty will not give rise to set-off damages unless there is a wreck resulting in personal injury. An attempt by contract to limit damage for personal injury is prima facie unconscionable under the Code if the automobile is consumer goods. But this kind of damage is usually asserted in an independent action against the manufacturer and not by way of set-off to the price. Used cars are sold as is or on 60- or 90-day warranties with the same remedy limitations and after that period expires, no set-offs are possible. It is obvious that the set-off defense is virtually non-existent in automobile financing because of the nature of the sales patterns involved.

The figures on automobile financing released by the Federal Reserve on June 2, 1972 show almost 40 billion dollars outstanding as of April 30, 1972. Less than one percent of this amount is carried by sellers themselves. "Indirect loan" financing of automobiles, that is, financing by way of dealer assignment of chattel paper to a bank or finance company, accounts for about 61 percent of the balance. This type of financing may or may not expose the bank or finance company to set-off defenses available against the seller. On that point the Code takes no position. However, the increasing trend of legislation and decision is to make the defense available. Assuming what is not yet the fact, that in all states secured party-seller assignees are subject to set-off defenses, at least 39 percent of the volume of secured lending for automobiles is completely free of such defenses, and in the other 61 percent, because of the sales patterns involved, the defense is extremely rare.

As of February 29, 1972, direct bank automobile loans had a 30-day delinquency rate of .77 percent and indirect loans had a 30-day delinquency rate of 1.13 percent. The corresponding 60-day rates were .23 percent and .30 percent and for 90 days were an identical .17 percent. These declining rates of delinquency suggest that in the case of bank financing most defaults are made up or payments are rescheduled probably without repossession in the first 60 days. It must be remem-

28. Id. § 2-719 (3).
29. Federal Reserve Bulletin, May 1972, p. A57. The approximate 61% figure is based on the assumption that substantially all of automobile paper held by finance companies is indirect and substantially all of the automobile paper held by credit unions is direct.
bered that repossession is a last resort of secured parties and that good faith attempts by debtors to "become current" are received most sympathetically.\textsuperscript{31}

The number of repossessions by banks per 1,000 loans outstanding in November and December, 1970 were 1.52 for direct loans and 4.88 for indirect loans.\textsuperscript{32} The difference in the repossession figures reflects the nature of indirect automobile financing. When banks or finance companies buy automobile paper, the dealers typically agree to buy back the contracts only in cases where repossession takes place within 90 days of default. The time can range to as little as 60 days and as much as 120 days. The net thrust of this provision, however, is to push for more frequent repossession in indirect bank automobile financing. Any requirement that court action precede repossession would make these time provisions inoperable unless repossession proceedings were typically started immediately on default. Yet as the delinquency figures suggest, a large percentage of 30-day delinquencies are cleared up or rescheduled.\textsuperscript{33} It would be a sorry rule that forced an increase in the number of repossessions and deficiency judgments.

In addition, the delinquency figures (which decline rapidly with the number of days after default) disclose quite clearly that where direct or indirect bank loans are concerned, the debtors are not in fact asserting defenses of any kind. This confirms the theoretical analysis as to the scarcity of possible defenses against repossession in automobile financing made above. The necessity for prior judicial action to safeguard the debtor's right to continued possession in this kind of financing seems to be virtually non-existent. We would expect finance company indirect loan financing to have similar results, although the rates of delinquency and repossessions per thousand loans might be higher, reflecting a less credit-worthy class of debtors.

In conclusion, there does not seem to be any significant debtor's right to continued possession to be safeguarded by requiring judicial hearing prior to taking possession and, as indicated earlier, in the rare case of improper repossession, injunctive relief is immediately available. Stated in a different way, we can conclude that a requirement of prior judicial hearing might help keep one in ten thousand debtors from losing use of his automobile for 10 to 60 days.

\textsuperscript{31} See Johnson, \textit{supra} note 11.
\textsuperscript{32} Delinquency Rates Data, \textit{supra} note 30.
\textsuperscript{33} See Johnson, \textit{supra} note 11.
III. THE CONSEQUENCES OF IMPOSING PRIOR JUDICIAL REVIEW

The necessity of a rule requiring a judicial hearing prior to repossession involves also an inquiry into the evils which exist in automobile financing because of bad faith or dishonest secured parties and debtors. We have already shown that the impact in the "honest" case is likely to be an increase in the number of repossessions and deficiency judgments in situations of indirect financing. Repossession obviously is a poor substitute for rescheduling payments and other good faith attempts at making an account current. What then are the evils? How would affected parties fare under a requirement of prior judicial hearing?

Let us take first the case of the dishonest debtor. The evil here is that he secretes the automobile34 or "skips" out of sight. How would the delay inherent in prior hearing affect that evil?

Automobiles are consumer items which in fact are viewed and treated as genuine collateral by all secured parties, for they do have a second-hand market in which considerable value can be realized. They are most likely to be available for peaceful repossession, for they do appear on the streets. They also are most likely to suffer removal from the jurisdiction or resale by a dishonest debtor who knows repossession is imminent. The evil of the dishonest debtor can be handled, to the extent it can be handled at all, only by self-help. With notice of impending repossession, the dishonest debtor tends to disappear so that the collateral in fact relied on in making the loan is gone.35

A rule imposing a prior judicial hearing can have no impact on the evil of the dishonest debtor other than to enhance the number of skips and thus raise the cost of financing for all debtors.

Automobiles are also wasting assets—each day of continued operation not only lowers their resale value but also exposes them to the risk of deterioration and accident. Thus delay in any individual case also is

34. Other types of consumer goods such as clothing and other soft goods are either essentially worthless as collateral since they have no intrinsic resale value, or they cannot be reached over the objection of the debtor, e.g., household goods, stoves, refrigerators, and the like, for section 9-503 permits self-help only when this can be done peacefully, and a refusal by the debtor to permit entry into his home effectively blocks self-help by the secured lender.

35. The collection officer of a bank which makes only direct loans in automobile financing reported directly to the author of this Article that last year he attempted 80 repossessions in approximately 13,000 loans. Since this bank warns of and threatens repossession in an attempt to get the loan current again and does not move until there is about a 90-day default (a practice the bank in the instant case also seemed to pursue), his 80 attempts resulted in only 45 repossessions. The other 35 automobiles had been successfully secreted.
costly in terms of the amount which can be realized on resale. This cost is to the debtor in the first instance for it leads to larger deficiency judgments, and to the public at large in cases where the judgments are valueless and therefore result in higher credit charges to all debtors. 86

We now consider the case of the bad faith or dishonest secured party. The evils he generates outnumber those of the dishonest debtor. Are any of them helped by a rule of prior judicial hearing? The answer seems clearly to be in the negative. To collapse all evils into a single story, let us take a secured party-seller who, on the slightest delay in payment of one installment, accelerates the debt, repossesses, and then promptly disposes of the goods to another automobile dealer at a low price ending with a whopping deficiency judgment against a debtor who may be only technically and temporarily in default.

The evils here, however, are not primarily repossession, but (1) the bad faith acceleration of the debt thus making it financially impossible in the normal case for the debtor to make the necessary tender to redeem the goods and (2) the resale which is essentially fraudulent. For the first difficulty, the answer lies in the Code's general incorporation of the obligation of good faith in "the performance and the enforcement" of any contract. 7 It is not good faith action to repossess an automobile immediately on default in a single payment or to accelerate the debt unless there are extraneous factors showing a high probability of continued non-payment or tendency to "skip." The second difficulty—the essentially fraudulent resale—can be handled under section 9-507, which is why section 9-507 includes both injunctive relief and penalty provisions. It should be noted parenthetically that this kind of secured party-seller dishonesty is also typically accompanied by a highly inflated price, high credit and other charges and affects the least affluent and educated part of our society as debtors. Those accompaniments require special legislation which would be saved under section 9-203 of the Code. The existence of peaceful repossession, however, is irrelevant to their solution, for the debtor caught in that situation in fact typically has no defense which would permit his retention of possession for he has embarked on a schedule of payments he cannot meet. Discharge of his debt and return of the car is his best way out.

The net is that prior judicial hearing would have no impact whatsoever on the elimination of the evils arising from the practices of dis-

36. See Johnson, supra note 11.
37. Uniform Commercial Code § 1-203.
honest secured parties, would increase the evil arising from the conduct of dishonest debtors, and would raise costs for all defaulting debtors and credit charges to all debtors.

IV. THE CONSTITUTIONALITY OF SELF-HELP UNDER ARTICLE NINE

At the time of preparation and enactment of the Code, no question of the constitutionality of self-help provisions existed. It is now contended that the line of cases starting with Sniadach and culminating in Fuentes v. Shevin require a declaration outlawing this self-help remedy despite its ancient and honorable ancestry and regardless of the consequences on individual debtors and the total economy. The Permanent Editorial Board does not believe that this contention is sound.

Fuentes, decided by a four to three Court, is the most recent expression of the Supreme Court's views in this area. There is, of course, no doubt of the constitutionality of section 9-503 under the dissenting opinion of Mr. Justice White in which the Chief Justice and Mr. Justice Blackmun concurred, for it ends:

Third: The Court's rhetoric is seductive, but in end analysis, the result it reaches will have little impact and represents no more than ideological tinkering with state law. It would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all. Alternatively, they need only give a few days' notice of a hearing, take possession if hearing is waived or if there is default; and if hearing is necessary merely establish probable cause for asserting that default has occurred. It is very doubtful in my mind that such a hearing would in fact result in protections for the debtor substantially different from those the present laws provide. On the contrary, the availability of credit may well be diminished or, in any event, the expense of securing it increased.

None of this seems worth the candle to me. The procedure which the Court strikes down is not some barbaric hangover from bygone days. The respective rights of the parties in secured transactions have undergone the most intensive analysis in recent years. The Uniform Commercial Code, which now so per-

vasively governs the subject matter with which it deals, provides in Art. 9, § 9-503, that:

'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 . . .'

Recent studies have suggested no changes in Art. 9 in this respect. See Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9 of the Uniform Commercial Code, Final Report, § 9-503 (April 25, 1971). I am content to rest on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislatures that have considered and so recently adopted provisions that contemplate precisely what has happened in these cases.40

The question is whether the self-help procedure of the Code with its safeguards would also be deemed constitutional under the opinion of Mr. Justice Stewart in which Justices Douglas, Brennan and Marshall concurred.

Under the Code, repossession must be peaceful. As a practical matter, this means that it can never take place as to household or other goods located in a dwelling or plant over which the debtor has control if the debtor refuses entry which, in fact, is why in Fuentes the replevin statute was used. The automobile or truck in the street is the major item subject to self-help on the part of the secured party. As indicated earlier, because of the sales patterns involved, it is only in a truly infinitesimal number of cases involving automobiles that the defaulting debtor will have any defense justifying his continued use of the car. If self-help does result in repossession, a debtor with a right to continued use may immediately request a mandatory injunction restoring possession to him on such terms as a court of equity may decree.41 Unlike the replevin statutes involved in Fuentes, no posting of bond or the like is necessary under section 9-507. The deprivation of possession in the rare case of improper taking is thus truly temporary and might well be considered "de minimis." Certainly, the relatively slight character of the deprivation would be considered by the majority in Fuentes as one factor influencing constitutionality.

40. Id. at 2005, 2006.

41. The existence of legal service programs in poverty areas makes this a real, and not a theoretical, right, as does the continuing tendency in consumer legislation to add attorney's fees as an item of damage. See, e.g., Uniform Consumer Credit Code § 5.202(8).
The second factor the majority agrees is relevant is whether an important general public interest is being served by the procedure involved, and whether an important general public interest would be disserved by its outlawing. The discussion above indicates both the important general interest involved and the harm to the general public which would result from an elimination of the self-help remedy.

On its simplest and most direct level, requiring a prior hearing means:

1. the size of deficiency judgments to be paid would increase for all debtors in default;
2. the number of "skips" would increase with a consequent increase in credit charges to all debtors, defaulting and non-defaulting;
3. one defaulting debtor in 10,000 would not suffer an improper week or 10-day or at most a 60-day deprivation of use of his automobile, unless, of course, he had knowingly waived his right to prior hearing;
4. every security agreement involving automobiles would carry conspicuously a provision permitting repossession without prior hearing.

It is recognized that some consumer advocates are beginning to urge openly that there should never be any security for consumer debt and that consumer credit should only be extended in reliance upon creditor judgments of ability to pay. It is possible that in time society will adopt this view. However, if this abandonment of long standing and traditional concepts does take place, patterns of consumer credit will certainly change materially. Almost certainly in some areas consumer credit will decrease substantially.

In the financing of automobiles, reliance upon security interests in automobiles themselves is of basic importance and the termination of security interests in automobiles would be of major significance. Substantial interference with the possibility of repossession would not end automobile financing, but it would chip away a significant bastion of it.

The third factor which is in fact relevant, although the majority opinion in Fuentes lays no stress on it, is the hardship accruing to an individual from the improper temporary deprivation of use. The truly temporary deprivation of the right to continue to use an automobile has no inherent characteristic of hardship. In that respect, it differs from the other cases recently decided by the Supreme Court. One can, however, envisage a case of hardship in which absence of a car is the equivalent of
an inability to work, but that is only where there is no substitute public or private transportation available or the car is used on the job, as in the case of a door to door salesman in a territory of widely scattered housing. The debtor involved in this situation, however, must also be one of the rare debtors having a right of set-off before any unjustified hardship results. As a practical matter it must be remembered that the rare debtor having the right of set-off granted by section 2-717 must notify the secured party of his intention to assert it. If the right is contested by the secured party, a debtor who is able to pay and who knows that repossession will occur if he fails to pay, is highly unlikely to go into "default" if the car is genuinely needed to continue his earnings. So the debtor we are talking about is one who is unable to maintain his existent or re-negotiated schedule of payments except by the use of set-off. The case of true hardship is, therefore, truly a remote one.

Thus, in the automobile situation the following configuration of factors relevant to a determination of constitutional necessity for prior hearing is present: a very temporary deprivation of use easily reversed with penalty damages against the secured party; a very limited number of debtors likely both to suffer hardship and be entitled to continued possession; and an important set of general public interests likely to be adversely affected by a declaration outlawing self-help without prior hearing.

Since Mr. Justice Stewart has made clear in the majority opinion that prior hearing is not required in all cases, we must compare the combination of factors in this case to those existent in the prior cases.

The recent cases requiring prior notice and hearing all have very different configurations and are distinguishable from this case. In *Sniadach*, the right was to wages, deprivation of which would cause immediate and drastic hardship in most cases. There was no general public interest to be served and no important economic consequences flowing from delay in garnishment. In *Goldberg v. Kelly*, the right was to welfare payments and only the loss of payments made prior to adjudication was on the other side of the ledger. Even so, there was a three judge dissent. In *Bell v. Burson*, the right was to continued use of a license and no countervailing general public interest was involved. In *Fuentes*, the right was to the use of household goods with no cheap and simple way of reacquiring the goods and no showing of any economic consequences due to delay.

On the other hand, in *Coffin Bros. & Co. v. Bennett*, which was approved by the majority in *Fuentes*, summary process which could be reversed by the filing of an affidavit of illegality by the debtor was held constitutional where it was used to obtain an additional assessment of funds from the stockholders of a bank which had become insolvent. The public interest to be served by that assessment was said by the Court in *Fuentes* to be sufficient to warrant summary process. So, too, the *Fuentes* majority approved as a sufficient countervailing public interest, a summary attachment which was used in *Ownbey v. Morgan* for the purpose of obtaining *in rem* jurisdiction. We submit that neither of these interests is of greater moment to the general public than the increased cost of and limitations on obtaining credit which, among other consequences of a more direct nature, are involved in this case.

The Supreme Court also apparently considers the debtor's knowledge of the possible consequences of default as an important factor in determining the propriety of dispensation of notice and hearing by contract. In *Overmeyer v. Frick* a cognovit note was issued by a corporation. The court found the signature to be a voluntary waiver of hearing and upheld the entry of judgment without notice or prior hearing.

In *Swarb v. Lennox*, the court affirmed a decision of a district court that cast doubt on the Pennsylvania cognovit note practice but held that a debtor could effectively waive rights by a cognovit note if he understood what he was doing.

It cannot seriously be contended that buyers of automobiles on time are not fully aware that repossession by the secured party will follow default. In fact, the threat of speedy repossession is one major factor accounting for the low delinquency rates in this kind of financing. The other is the absence of defenses. If this kind of knowledge is relevant to constitutionality as well as to waiver by contract, it clearly exists. If an explicit statement is needed to bring it home to the buyer, it can easily be inserted into the security agreement and typically is. Section 9-503 simply recognizes this common knowledge of buyers on time that repossession follows default and makes unnecessary its statement in the contract. It cannot be that codifying a generally understood practice of ancient and honorable lineage and surrounding it with safeguards renders the practice unconstitutional.

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44. 277 U.S. 29 (1928).
45. 256 U.S. 24 (1921).
47. 405 U.S. 191 (1972).