

STUDENT COMMENTS

NON-JUDICIAL REPOSSESSION— REPRISAL IN NEED OF REFORM

In recent years there has been a considerable upsurge in credit sales involving consumer items pledged as collateral for their purchase price.¹ With this increase in credit purchasing there have been proportionate increases in the number of credit buyers defaulting under conditional sales contracts, and in the use by conditional sellers of their default remedies. One such remedy is the right to retake conditionally sold goods without resort to legal process if it can be accomplished peaceably. This remedy, often styled non-judicial repossession, has been invoked by conditional sellers with such frequency that in a recent decision a Florida court took judicial notice of its prevalence.²

Supporters of non-judicial repossession argue that it is both economical and necessary. They contend that a "self-help" system of repossession, which does not involve costly legal fees, is far more economical than formal legal process.³ From the stand-point of necessity, non-judicial repossession is justified as being essential to the protection of the creditor's collateral. Personal property, it has been pointed out, can easily be lost, sold or stolen before the creditor can obtain relief from the courts.⁴

Abuse of non-judicial repossession, on the other hand, often produces considerable hardship for the debtor. David Caplovitz, in his work on the plight of the low-income consumer, recounts that his investigations disclosed numerous cases of excesses and abuses perpetrated by repossessioners while attempting to reclaim goods.⁵ The abuses related included physical violence to the debtor or his family

¹ See Financial and Business Statistics, 56 Fed. Res. Bull. A 54 (Feb. 1970).

² Florida Indus. Sav. Bank v. Greene, 224 So. 2d 416, 418 (Fla. Dist. Ct. App. 1969).

³ Hogan, The Secured Party and Default Proceedings Under the U.C.C., 47 Minn. L. Rev. 205, 211 (1962).

⁴ Goodman v. Schulman, 144 Misc. 512, 514-15, 258 N.Y.S. 681, 683-84 (N.Y. City Ct. 1932). Blackstone indicates in his Commentaries that this rationale was also used to justify the practice of non-judicial repossession under the English common law:

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 . . . if he had no speedier remedy than the ordinary process of law.

⁵ W. Blackstone, Commentaries *4.

⁶ D. Caplovitz, The Poor Pay More 161-67 (1963). While the incidents related by Mr. Caplovitz generally occurred in the course of judicial repossessions, the potential for abuse is even greater in non-judicial repossession where the creditor proceeds at his own instance without the presumptive safeguard of having a peace officer present. The procedures used in non-judicial repossession have also been specifically criticized. Felsenfeld, Some Ruminations About Remedies in Consumer-Credit Transactions, 8 B.C. Ind. & Com. L. Rev. 535, 556 (1967).

and conversion of other goods not covered by the contract.⁶ Moreover, at least one merchant interviewed admitted to invoking the remedy on occasion not to regain his equity, but to punish a customer.⁷ Exposure to such abuses inevitably undermines the poor man's confidence in the legal system. Consequently, former United States Attorney General Nicholas Katzenbach has observed:

[T]he poor man sees the law only as something that garnishes his salary, that repossesses his refrigerator. . . . The poor man is cut off from this society—and from the protection of its laws. We make of him . . . a functional outlaw.⁸

This comment will examine non-judicial repossession in light of the techniques often employed, the bases for its utilization, and existing remedies for abuses in the course of non-judicial repossession. In addition, the purported need for this remedy will be critically analyzed with particular attention to the possibilities of either abolishing non-judicial repossession or of modifying the principles currently governing its use.

I. HISTORICAL DEVELOPMENT OF NON-JUDICIAL REPOSSESSION

The common law generally recognized the right of a conditional seller to retake collateral without recourse to the courts upon default by the buyer.⁹ Examples of this principle may be found in American cases dating from at least as early as 1809, when the New York Supreme Court, in a case involving possessory rights in a tract of real property, stated: "In a case bearing analogy to the present, of personal property, the right of recaption exists, with the caution that it not be exercised riotously, or by a breach of the peace"¹⁰ The New York Court of Common Pleas invoked this dictum 60 years later in upholding the right of a conditional seller to peaceably recapture a sewing machine without formal judicial process.¹¹ In so doing, the court noted that the applicable rule "permits a party to resort to every possible means for the recaption of his property short of a breach of the peace."¹²

⁶ D. Caplovitz, *supra* note 5.

⁷ *Id.* at 21. The threat of repossession is also often invoked by sellers for its in terrorem effect in forcing debtors to pay. Boyd, *Representing Consumers—The Uniform Commercial Code and Beyond*, 9 *Ariz. L. Rev.* 372, 397 (1968).

⁸ W. Crook & R. Thomas, *Warriors for the Poor* 150-51 (1969).

⁹ *Annot.*, 36 *A.L.R.* 853 (1925).

¹⁰ *Hyatt v. Wood*, 4 *Johns. Cas.* 150, 158 (N.Y. Sup. Ct. 1809). Compare the language in 3 *W. Blackstone, Commentaries* *4:

Recaption or *reprisal* is another species of remedy by the mere act of the party injured. This happens, when anyone hath deprived another of his property in goods or chattels personal . . . in which case the owner of the goods . . . 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.

¹¹ *Kinny v. Planer*, 9 *N.Y.C.P.* 131, 134 (1869).

¹² *Id.*

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The rule permitting non-judicial repossession was consistently recognized during the late 19th and early 20th centuries,¹³ and by 1919 had achieved general acceptance when the National Commissioners on Uniform State Laws, in promulgating the Uniform Conditional Sales Act (U.C.S.A.), authorized peaceable non-judicial repossession on the occasion of the debtor's default.¹⁴ The Uniform Commercial Code, which has superseded the U.C.S.A., also expressly authorizes non-judicial repossession. Section 9-503 of the Code provides: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action . . ."¹⁵ This provision "follows the provisions of the earlier uniform legislation in allowing the secured party in most cases to take possession without the issuance of judicial process."¹⁶ Thus, the Code rule as to non-judicial repossession is similar to that of the U.C.S.A. except that the U.C.S.A. was more specific as to the circumstances which constituted a default.

II. DEFAULT AS A PREREQUISITE FOR NON-JUDICIAL REPOSSESSION

Although most of the secured party's rights under the Code arise upon a default by the debtor, the term "default" is not specifically defined in the Code. As a result, courts and commentators have generally declared that the circumstances which constitute a default are a matter for contractual agreement between the parties.¹⁷ The Code supports this view since it expressly allows the parties by agreement to "determine the standards by which fulfillment of these rights and duties is to be measured."¹⁸

It is generally accepted that a default in the absence of a specific agreement occurs only upon a failure by the debtor to pay or perform

¹³ For cases allowing recaption see Annot., 146 A.L.R. 1331 (1943).

¹⁴ U.C.S.A. § 16 provides:

When the buyer shall be in default in the payment of any sum due under the contract, or in the performance of any other condition which the contract requires him to perform in order to obtain the property in the goods, or in the performance of any promise the breach of which is by the contract expressly made a ground for the retaking of the goods, the seller may retake possession thereof. Unless the goods can be retaken without breach of the peace, they shall be retaken by legal process; but nothing herein shall be construed to authorize a violation of the criminal law.

¹⁵ U.C.C. § 9-503. All references to the Uniform Commercial Code are to the 1962 Official Text.

¹⁶ U.C.C. § 9-503, Comment.

¹⁷ *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 818, 168 S.E.2d 827, 830 (1969); *Borochoff Properties, Inc. v. Howard Lumber Co.*, 115 Ga. App. 691, 696, 155 S.E.2d 651, 654 (1967); 1 CCH Secured Trans. Guide ¶ 250, at 3,206 (1969); Hogan, *supra* note 3, at 209; Hogan, *Pitfalls in Default Procedure*, 86 Banking L.J. 965, 968 (1969); Squillante, *Commercial Code Review*, 74 Com. L.J. 17 (1969).

¹⁸ U.C.C. § 9-501(3).

his obligations under law or contract.¹⁹ The U.C.S.A. expressly conditioned the right to repossess upon a default in a payment or in the performance of any other condition of the contract which the buyer was required to perform before he could obtain property in the goods.²⁰ The specified circumstances giving rise to a default closely paralleled the standard definitions of a breach of contract²¹ and suggested the conclusion that under the U.C.S.A. breach of an important contract term constituted a default sufficient to invoke the right of repossession, whether or not the contract so provided.²² This conclusion is supported by the holding in *Whisenhunt v. Allen Parker Co.*,²³ which involved an administrator's action against a financier of the decedent's mobile home business. One count of the complaint alleged trespass and conversion arising out of the defendant financier's repossession of a number of house trailers. The defendant contended that although the decedent was not behind in his payments, his death constituted a default within the meaning of the contracts, thus giving rise to a right of repossession. In reversing a summary judgment in favor of the financier, the Georgia Court of Appeals rejected this contention, commenting:

While death, among many other contingencies, may be included as a basis for default, it is not automatically so included. Absent a specific inclusion in the document, we give to the abstract term default as here utilized only its *generally accepted meaning of failing to perform or pay*.²⁴ (Emphasis added.)

Questions arise concerning the degree of default required in order to justify invocation of the non-judicial repossession remedy, and whether a minor or mere technical default would suffice for this purpose. It has been suggested that in dealing with this type of situation a court might well apply a "materiality" test to default, particularly in the case of consumer goods.²⁵ An analogy can be made between the concepts of "total breach" of the contract and default, since a total breach, like a default, usually terminates the obligations of the non-breaching party to carry on under the contract.²⁶ Professor Corbin has stated that "[a] total breach of contract is a non-performance of duty *that is so material and important* as to justify the injured party in regarding the whole transaction as at an end."²⁷ (Emphasis added.)

¹⁹ Squillante, *supra* note 17, at 17. *Nylen v. Geeraert*, 246 Md. 4, 10, 226 A.2d 878, 880 (1967).

²⁰ U.C.S.A. § 16.

²¹ Restatement of Contracts §§ 312, 314 (1932); 4 A. Corbin, Contracts § 943 (1951).

²² 2A G. Bogert, Commentaries on Conditional Sales, in Uniform Laws Annotated, § 102 (1924).

²³ 119 Ga. App. 813, 168 S.E.2d 827 (1969).

²⁴ *Id.* at 818, 168 S.E.2d at 830.

²⁵ 2 W. Willier & F. Hart, Forms and Procedures Under the Uniform Commercial Code ¶ 92.46 (1969).

²⁶ 4 A. Corbin, *supra* note 21, § 946.

²⁷ *Id.*

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This theory is applicable to the concept of default since the effect of a repossession executed under section 9-503 is to terminate the contract. The right to repossess and sell the collateral implicitly allows an acceleration of the balance due on the contract, and for all practical purposes the transaction between seller and buyer is summarily terminated.²⁸ In the absence of specific contract terms delineating the circumstances under which the seller may repossess, it would seem that the total breach theory should provide minimum standards for determining whether repossession, judicial or non-judicial, is warranted.²⁹

Where the parties have specifically included in the contract what constitutes a default for purposes of repossession, there should be some limitation with respect to the degree of default justifying actual repossession. In this connection it has been suggested that the obligation of good faith set forth in Section 1-203 of the Code might be used to test the secured party's motives in utilizing non-judicial repossession.³⁰ In assessing good faith and in evaluating the necessity for invoking non-judicial repossession in a given instance, the basic purpose for the remedy should be kept clearly in mind. The remedy is intended for use by a seller who reasonably deems his security to be threatened. In view of this underlying purpose it would seem that a slight or mere technical violation of even a specific default condition of a contract

²⁸ This generalization must be qualified in terms of U.C.C. § 9-506, which affords the debtor a right to redeem the collateral "by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking." Presumably, a consumer purchasing an item on credit would be unable to tender the whole balance due required for redemption under § 9-506; hence, a repossession does, for all practical purposes, "terminate" the transaction.

²⁹ The standard proposed by Corbin is similar to that incorporated into § 16 of the U.C.S.A. Bogert's commentary to that section notes:

The Uniform Act takes the position that there should not be an implication of a right to retake unless there has been a breach of an important term of the contract. . . . That the buyer has failed to do some trivial act, which he undertook to do by the terms of the conditional sale contract should not impliedly give cause for retaking.

G. Bogert, *supra* note 22, § 102.

³⁰ W. Willier & F. Hart, *supra* note 25. The results of a recent study of automobile repossession practices in Connecticut point up the potential for abuse in the default area. The study notes that the same autos are often repossessed and resold several times at high profits over a relatively short period of time and concludes:

Our data tend to show motivations for quick defaults and repossessions on the part of automobile dealers and their financiers, with special application to used cars presumably purchased on credit by similar low-middle-income groups. The employment of full-time repossessors by financiers and some of the larger volume dealers bespeaks anticipation of defaults that will occasion repossession, and in sufficient numbers. There are enough defaults to make economically worthwhile the salary of the night-type who accomplishes the actual physical retaking of the car. One cannot, in this context, dismiss the matter as the derelictions of a few "deadbeats."

Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 *Stan. L. Rev.* 20, 42 (1969).

should not give rise to the right of repossession unless, concomitantly, the circumstances would lead the seller reasonably to conclude that his security was threatened. For example, a common provision in form conditional sales contracts declares that the buyer shall be in default if he removes the collateral from the state without the written permission of the secured party.³¹ Technically the buyer would be in default if, for example, the collateral were an automobile and the buyer drove into another state on his vacation. Permitting the secured party to repossess the vehicle on the basis of such a default would be manifestly absurd, for even assuming that the debtor remained in another state without such written consent, so long as he continued to make timely payments on his obligations the secured party could hardly conclude that his security was threatened.

Once a default has occurred, the right to non-judicial repossession under Section 9-503 of the Code arises and, pursuant to the provisions of that section, recapture of the collateral may then be accomplished without judicial process if this can be done without breach of the peace. Since avoidance of breach of the peace is a fundamental requirement in implementing the remedy, examination of the connotation of this term is required.

III. THE BREACH OF THE PEACE LIMITATION ON NON-JUDICIAL REPOSSESSION METHODS

While a secured party's right to invoke non-judicial repossession is conditioned upon his ability to do so without a breach of the peace, that concept, like the concept of default, is not defined in the Code.³² The courts, in attempting to supply a workable definition for purposes of determining when the seller may proceed to repossess non-judicially, have disagreed as to whether a simple trespass or the use of fraud or deception in order to effect repossession, absent actual violence, constitute breaches of the peace. This disagreement is perhaps due to the fact that some courts have declined to adopt the traditional concept founded in criminal law that a breach of the peace must entail violence.

A. *Breach of the Peace as Requiring Violence or the Direct Threat of Violence.*

The classic definition of breach of the peace was formulated by the criminal courts generally as follows:

A breach of the peace is an offense well known to the common law. It is a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.³³

³¹ E.g., H. Bailey, *Modern Uniform Commercial Code Forms* § 15 (1963).

³² Hogan, *supra* note 3.

³³ *People v. Most*, 171 N.Y. 423, 429, 64 N.E. 175, 177 (1902). Accord, *People v.*

This early emphasis upon violence or the threat of violence has exerted considerable influence over the definitions of breach of the peace employed in some repossession cases. A Tennessee court of appeals, in *Harris Truck & Trailer Sales v. Foote*,³⁴ recently promulgated such a definition of breach of the peace in a fact situation involving the repossession of a trailer tractor. The purchaser of the tractor under a conditional sales contract had sued in conversion when the tractor was surreptitiously repossessed at night from a parking lot. The evidence showed that no other persons were around when the tractor was repossessed. The trial judge charged the jury that a breach of peace did not necessarily include an act of violence or the threat of violence, and the jury returned a verdict for the plaintiff. The appellate court reversed, holding that the charge was erroneous, since by its interpretation of Section 9-503 of the Code breach of the peace "must involve some violence, or at least threat of violence."³⁵

A similar definition of breach of the peace was employed by the New York Supreme Court in *Cherno v. Bank of Babylon*.³⁶ The case involved an action in conversion against a bank holding a security agreement. The bank's agents had repossessed the collateral by using a master key to gain entrance to the assignor's premises. The plaintiff contended that this clandestine use of an unauthorized key constituted a breach of the peace under section 9-503. In rejecting this contention, the court noted that the security agreement in question authorized entry by the secured party for purposes of repossession, and that:

[T]here was nothing in what they did that disturbed public order by any act of violence, caused consternation or alarm, or disturbed the peace and quiet of the community. Nor was the use of a key to open the door an act likely to produce violence; indeed, it produced from the landlord only (1) a call for the police and (2) a request to the bank employees that they leave the key when they were through. Under the circumstances that existed during the times the bank's employees entered the premises, there was as a matter of law no breach of the peace.³⁷

Although the focus in *Cherno* was upon violence or the threat of violence as a criterion for determining whether a breach of the peace had occurred, there is other authority which suggests that an unauthorized entry into the debtor's premises poses a sufficient threat of violence as to fall within the prohibition against breaches of the peace.

Halliday, 337 App. Div. 302, 303, 261 N.Y.S. 342, 344 (1932); 2 R. Anderson, Wharton's Criminal Law and Procedure § 802 (1957).

³⁴ 5 UCC Rep. Serv. 569 (Tenn. Ct. App. 1968).

³⁵ Id. at 573.

³⁶ 54 Misc. 2d 277, 282 N.Y.S.2d 114 (Sup. Ct. 1967).

³⁷ Id. at 281-82, 282 N.Y.S.2d at 120.

In *Girard v. Anderson*,³⁸ the plaintiff had purchased a piano from the defendant under a time-payment contract which, in the event of a breach, permitted the defendant to repossess the piano wherever it might be found. The plaintiff defaulted on the payments and, in his absence, the defendant repossessed the piano from his home. The plaintiff alleged that the house was locked at the time and that by breaking in to reclaim the piano the defendant's employees committed a trespass. The defendant maintained that his employees entered the home through an unlocked door and that therefore a trespass action could not be maintained. The appellate court, however, stated that the entry did constitute a breaking and entering.³⁹ The court then considered whether such a breaking and entering, despite the contract provision permitting repossession, constituted a trespass. In so doing the court discussed a number of cases dealing with breach of the peace in the form of unauthorized entry into the debtor's home, and in particular a Pennsylvania case⁴⁰ which declined to permit such entry in view of its "tendency to excite a breach of the peace and invite violent resistance."⁴¹ The Pennsylvania court reasoned that if a contract provision were so construed as to permit the seller to break into the premises while the buyer was absent, the same construction would allow him to do so while the buyer was at home. This result, the court concluded, "would be promotive of disorder and frequent breaches of the peace."⁴² In addition to these considerations, the *Girard* court was concerned with the constitutional implications of permitting repossessioners unrestricted latitude in entering homes. Following its consideration of previous cases involving private dwellings, the court summarized them as follows:

The views expressed in the foregoing cases recognize our state and national constitutional provisions protecting the sacredness of the home

. . . .

Under the rule as announced in this line of cases, the seller had only the right to take possession with the buyer's consent and not against his consent. If the consent was improperly withheld, the courts were open to him. The possession under authority of a contract may be exercised without recourse to the courts, only when the retaking can be done peaceably. If it becomes necessary to resort to force, then the courts of the state are open for the protection of his rights. An agreement permitting a family's home to be broken open and entered for the purpose of forcibly taking posses-

³⁸ 219 Iowa 142, 257 N.W. 400 (1934).

³⁹ *Id.* at 145, 257 N.W. at 401.

⁴⁰ *Stewart v. F. A. North Co.*, 65 Pa. Super. 195 (1916).

⁴¹ *Id.* at 200.

⁴² *Id.* at 201.

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sion of property therein is contrary to good public policy and void to that extent.⁴³

Thus, implicit in the *Girard* opinion is the theory that an unauthorized entry into the debtor's home, constituting as it does an illegal breaking, and posing a danger of exciting violent response, is a sufficient breach of the peace to preclude repossession without judicial process. Nor does the court's use of the conditional language "for the purpose of forcibly taking possession of property," contradict this view of the case. It must be recalled that the debtor was not home in *Girard* when the piano was repossessed. Accordingly, the reference to force reflects only the court's characterization of the unauthorized entry employed by the defendant's agents.

Under definitions of breach of the peace requiring violence or the threat of violence, courts have generally sanctioned repossession in the absence of the debtor when the collateral was not taken from within the debtor's home. Automobile repossessions are most frequently accomplished in this manner,⁴⁴ and it has often been held that the repossession of an automobile parked on a public street is not a breach of the peace.⁴⁵ Repossession from the debtor's driveway⁴⁶ or front lawn,⁴⁷ absent some showing of violence or willful wrongdoing, has also been held not to constitute a breach of the peace.

Under violence-oriented definitions of breach of the peace, some jurisdictions have also permitted a certain amount of mechanical alteration of the collateral by repossessors. In this connection it has been held that use of the technique known as "wiring around the

⁴³ 219 Iowa at 148, 257 N.W. at 402-03. Accord, *Hileman v. Harter Bank & Trust Co.*, 174 Ohio St. 95, 186 N.E.2d 853 (1962), which held that a contract provision similar to that in *Girard* was contrary to public policy and therefore void. While the court in *Girard* was specifically concerned with the issue of trespass to realty, if the rationale employed by the court is to have any real significance, the *Girard* decision must also be interpreted as supporting the proposition that repossession effected through an unlawful entry into the debtor's home constitutes a breach of the peace sufficient to render a non-judicial repossession unlawful. In *Cherno* the court acknowledged that its holding was squarely opposed to the holding in *Girard*, but made no attempt to distinguish *Girard*:

Except for the *Girard* case, the other cases are distinguishable on their facts, and while the *Girard* case is contrary to the decision now being reached, the instant decision is supported by *Malone v. Darr* (178 Okla. 443) holding as a matter of law that no breach of the peace was committed when an automobile dealer repossessed a car by taking the keys out of it.

54 Misc. 2d at 282, 282 N.Y.S.2d at 120. What parallel the court perceived between the repossession of a car by removing the keys and gaining entry to a building by unauthorized means is somewhat obscure. The court could have distinguished *Girard* on the fact that in *Girard* a home was entered, while in *Cherno* it appears to have been a business premises.

⁴⁴ See Shuchman, *supra* note 30, at 28.

⁴⁵ *General Motors Acceptance Corp. v. Shuey*, 243 Ky. 74, 47 S.W.2d 968 (1932); *Commercial Credit Co. v. Cain*, 190 Miss. 866, 1 So. 2d 776 (1941); *General Motors Acceptance Corp. v. Vincent*, 183 Okla. 547, 83 P.2d 539 (1938).

⁴⁶ *Dearman v. Williams*, 235 Miss. 360, 109 So. 2d 316 (1959); *Pioneer Fin. & Thrift Corp. v. Adams*, 426 S.W.2d 317, 320 (Tex. Civ. App. 1968).

⁴⁷ *Rea v. Universal C.I.T. Credit Corp.*, 257 N.C. 639, 127 S.E.2d 225 (1962).

ignition" employed in starting vehicles for which no keys are available does not constitute a breach of the peace when used in order to effect a repossession.⁴⁸ Use of a coathanger to unlock a car door was found to be a permissible repossession technique in one case,⁴⁹ and the unscrewing and removal of a small panel from the side of a truck in order to unlock the door was held to be "entirely peaceable."⁵⁰ Minor damage to the collateral in the course of repossession also has been rejected as grounds for claiming an unlawful repossession.⁵¹

The legality of repossessions in most jurisdictions continues to be determined on the basis of whether there has been some violence and, hence, a breach of the peace. As a result, in most jurisdictions virtually any techniques short of precipitating an actual altercation with the debtor are permissible. Indeed, one commentator has observed:

Between some secured parties and debtors, the act of taking possession has become almost a game. Stealth, master keys and tricksterism have become the tools of professional "re-possessors." Apparently, any method is tolerable so long as resistance is not met which results in an altercation.⁵²

An illustration of the latitude afforded professional repossessors operating under this standard appears in a recent article by Professor William Hogan:

There are other ways of getting the goods back if you want to repossess. My favorite one involves New York cab drivers. Imagine going up to a cab driver and saying, "I would like to repossess your cab." You no doubt know that there are professional repossessors, who have highly developed skills. They get another cab and follow the target cab down an avenue and at each stoplight they bump into the target cab. They keep repeating this procedure at several stoplights. Finally out jumps the debtor-driver of the first cab, fists ready. Meanwhile, a reposessor is jumping out of the pursuing cab into the target cab, and both cabs drive away. The Code says you may repossess the collateral without legal action if you do not threaten a breach of the peace. I am sure that on that street corner a breach of the peace would shortly occur, but the collateral is now gone.⁵³

While it would seem that repeatedly ramming another taxicab should qualify as a breach of the peace, and it is apparent that a physical altercation is averted only if the repossessors are agile enough to out-

⁴⁸ *Kroeger v. Ogsden*, 429 P.2d 781 (Okla. 1967), in which the court held that there would not be a breach of the peace if this technique was used to repossess an airplane.

⁴⁹ *Rea v. Universal C.I.T. Credit Corp.*, 257 N.C. 639, 127 S.E.2d 225 (1962).

⁵⁰ *Martin v. Cook*, 237 Miss. 267, 274, 114 So. 2d 669, 671 (1959).

⁵¹ *General Motors Acceptance Corp. v. Vincent*, 183 Okla. 547, 83 P.2d 539 (1938).

⁵² W. Willier & F. Hart, *supra* note 25.

⁵³ Hogan, *supra* note 17, at 969.

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maneuver the infuriated cab driver, this anecdote nevertheless illustrates the type of repossessionary conduct sanctioned by the definitions of breach of the peace employed in many jurisdictions.⁵⁴

The preceding cases and examples presumably provide only a meager glimpse of both the types of techniques employed in non-judicial repossession and the extent of their application. Non-judicial repossession, it must be recalled, originates, by definition, out of court. However, most repossessions involve low-income buyers⁵⁵ who generally lack both the sophistication to discern actionable abuses and the resources to seek redress in the event such abuses take place. Accordingly, so few repossessions are contested that existing appellate court decisions probably do not provide a true reflection of non-judicial repossession as it is practiced on a day-to-day basis. At best, the cases have attempted to set forth general guidelines for distinguishing permissible repossession techniques from those which are prohibited because they are breaches of the peace. It is submitted that the decisions concerned only with actual violence or the threat of violence fail to provide equitable guidelines in the non-judicial repossession area. Cases involving breach of the peace which sanction such questionable techniques as the use of master keys to enter private premises, wiring around ignitions, nocturnal sorties onto private property, incursions into the debtor's yard and damage to the collateral itself seem clearly to be beyond peaceable activity. Moreover, judicial sanction of these techniques raises obvious questions concerning the ultimate limits of permissible repossessionary conduct. Recognizing these problems, a number of courts have taken a somewhat broader view of breach of the peace and have declined to sanction conduct similar to that exemplified in some of the cases just discussed.

B. *Non-Violent Conduct as a Breach of the Peace*

Some jurisdictions have recognized the potential for violence inherent in certain repossession methods and have treated the use of such techniques as breaches of the peace, even when no actual violence or overt threat of violence is involved. Illustrative of this approach is *Manhattan Credit Co. v. Brewer*,⁵⁶ where a repossessioning agent arrived at the debtor's home and began attaching a tow bar to her car.

⁵⁴ For two cases illustrating violence erupting in the course of repossession of automobiles, see *Jonaitis v. General Motors Acceptance Corp.*, 374 F.2d 867 (7th Cir. 1967), where the debtor was denied recovery in assault and battery after a brawl with 3 repossessors, on the theory that repossessors were "withdrawing" and were defending themselves from a possible attack by the debtor; and *Westerman v. Oregon Auto. Credit Corp.*, 168 Ore. 216, 122 P.2d 435 (1942), where the debtor was denied recovery in simple trespass after an altercation in which repossessors broke a window in the car, attempted to deflate the tires, removed the spark-plug wires and finally retreated when the debtor threatened them with a brick.

⁵⁵ P. McCracken, J. Mao & C. Fricke, *Consumer Instalment Credit and Public Policy* 135 (1965).

⁵⁶ 232 Ark. 976, 341 S.W.2d 765 (1961).

The debtor immediately called her attorney who informed her that the reposessor could not take the car without judicial process. She and her husband then told the reposessor that they objected to his taking the car, but he disregarded these objections and proceeded to tow the car to a nearby service station. The debtor and her husband followed the car to the service station where they again demanded that the reposessor unhook the automobile. He disregarded these demands also and finally drove away with the automobile still in tow.

The debtor conceded that she was delinquent in the payments and that Manhattan Credit Company had the right to repossess the automobile in a proper manner. She contended, however, that the repossession was improper. The trial judge, sitting without a jury, awarded the debtor \$200 in damages for conversion. On appeal the Supreme Court of Arkansas affirmed, and stated that the applicable rule of law was that "there is a conversion if force or threats of force are used to secure possession of the automobile."⁵⁷ In finding that a "threat of force" had occurred, the court relied upon *Kensinger Acceptance Corp. v. Davis*,⁵⁸ which involved the repossession of a truck which the debtor had conveniently parked in a finance company's parking lot while he was inside discussing his account. When he returned to the truck he found that employees of the finance company had removed the keys and he was informed that the truck had been repossessed. When the debtor produced a spare key and attempted to start the truck, the manager of the finance company mounted the running board and told him, "he wasn't going to leave in the truck."⁵⁹ The *Kensinger* court held that a jury could find that this statement constituted a threat of violence because it was not shown how the manager could have prevented the debtor from leaving in the truck except through violence.⁶⁰ Accordingly, the debtor's judgment in conversion was sustained. The court in *Manhattan Credit* pointed out that, much like the situation in *Kensinger*, Manhattan Credit Company's reposessor could not have been prevented from towing away the debtor's car without resort to force.⁶¹ Moreover, the court noted, the underlying policy in permitting only peaceable non-judicial repossession was to discourage conduct which would create a risk of violence as well. In this connection the court stated:

The purpose of the rule against the use of threats of violence in these kinds of cases appears to be that the conditional vendors may retake possession without legal procedure where and when they can do so peaceably and without incurring the *risk* of invoking violence.⁶² (Emphasis added.)

⁵⁷ Id. at 978, 341 S.W.2d at 766.

⁵⁸ 223 Ark. 942, 269 S.W.2d 792 (1954).

⁵⁹ Id. at 945, 269 S.W.2d at 793.

⁶⁰ Id. at 945, 269 S.W.2d at 793-94.

⁶¹ 232 Ark. at 980, 341 S.W.2d at 767.

⁶² Id. Other courts, presumably on the theory of avoiding a risk of violence, have

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In some jurisdictions the increased risk of a violent response in situations involving repossession from the debtor's home has given rise to much stricter standards in such circumstances. This consideration emerged in the *Girard* case where the court, in addition to discussing the constitutional problems inherent in repossessions from private homes, noted that unauthorized entries into the debtor's home had an intrinsic tendency to excite a breach of the peace and invite violent resistance.⁶³

In *Kirkwood v. Hickman*,⁶⁴ a repossession case involving the removal of a stove from the debtor's home, the Supreme Court of Mississippi also expressed its concern over this type of non-judicial repossession. In *Kirkwood* the repossessors found at the debtor's home only a daughter-in-law who had not given them permission to take the stove; she requested that the repossessors wait until the debtor returned home. Ignoring this request, they entered the house without permission and removed the stove. In condemning this conduct the court quoted from an early Louisiana case⁶⁵ which warned that cases involving invasion of the home "constituted a gross outrage upon the rights and feelings of plaintiff, as a citizen and as a man, for which courts of justice must either grant redress or sanction the personal exaction of satisfaction by violence."⁶⁶ Recognizing the emotional aspect of repossession from the debtor's home, and the corresponding increased risk of violent resistance by the debtor, the *Kirkwood* court set forth very strict standards to be applied in such repossessions:

Where the repossession occurs in a private residence of the conditional vendee, the retaking must occur with the knowledge of and without objection by the vendee. Otherwise the conditional seller has an adequate remedy at law to retake the property. The important factors of the sanctity of a private home from invasion by others, and the right of privacy require, we think, a different rule as to the right of repossession from that applied in those cases not involving a private residence.⁶⁷

expressly condemned the use of "stealth or fraud," in addition to "breach of the peace," in regaining possession. See, e.g., *Malone v. Darr*, 178 Okla. 443, 446, 62 P.2d 1254, 1257 (1936). In *McCarty-Greene Motor Co. v. House*, 216 Ala. 666, 667, 114 So. 2d 60, 62 (1927), the court stated that "fraud, deception, trick or artifice" are not allowed in regaining possession. In *Commercial Credit Co. v. Cain*, 190 Miss. 866, 872, 1 So. 2d 776, 778 (1941), the court commented that repossession may only take place "when circumstances are such as to create no apprehension of any violence."

⁶³ *Girard v. Anderson*, 219 Iowa 142, 147, 257 N.W. 400, 402 (1934). See pp. 442-43 *supra*.

⁶⁴ 223 Miss. 372, 78 So. 2d 351 (1955).

⁶⁵ *Van Wren v. Flynn*, 34 La. Ann. *1158 (1882).

⁶⁶ 223 Miss. at 381-82, 78 So. 2d at 355.

⁶⁷ *Id.* at 384-85, 78 So. 2d at 356.

C. *Suggested Modifications of the Breach of the Peace Concept*

The cases in the preceding section applied a realistic definition of breach of the peace considering the specific social evils the concept is designed to prevent. Definitions purporting to ban only overt threats and actual physical combat between the debtor and reposessor encourage a highly dangerous form of tactical "brinkmanship" in which breach of the peace becomes a standard applied after the fact to determine whether the reposessor's conduct remained within the bounds of legal propriety, rather than a standard by which prospective conduct may be governed. The net result is the encouragement of experimentation in techniques of repossession which may directly affect public tranquility. The fostering of such an unstable atmosphere seems particularly unhealthy. Moreover, an examination of the cases illustrating the questionable techniques which non-judicial repossession often encourages, and analysis of current commercial practices, viewed in light of the general availability of judicial repossession, raise considerable doubt as to whether non-judicial repossession affords sufficient positive advantages to offset its obvious negative aspects and to justify its continued existence.⁶⁸ Even assuming that non-judicial repossession is essential to the protection of creditors, additional safeguards could nevertheless be devised which, while adequately protecting the creditor's legitimate interests, would simultaneously afford at least consumer buyers uniform protection against unwarranted abuses.

One such safeguard would be afforded by a practical Code definition of breach of the peace, which the Uniform Commercial Code does not now provide. This definition should specifically include as breaches of the peace the use of fraud, deception, stealth, theft, artifice, unauthorized entry upon the debtor's premises, or any other conduct posing a reasonable risk of violent reaction. The strict standard set forth in *Kirkwood*, prohibiting non-judicial repossession from a private home unless the debtor is present and consents, should be included as a specific limitation on the exercise of the remedy. In addition, a provision could be included to the effect that in any action for wrongful repossession brought by a consumer against a repossessing seller or financier, evidence of a non-judicial repossession would give rise to a rebuttable presumption that the repossession was wrongful. An amendment to section 9-503 would doubtless be the most effective and uniform method of accomplishing these changes.⁶⁹

These suggestions for reform in the area of non-judicial repossession, while balancing the essential interests of both the secured party and the debtor, would also encourage secured parties contemplating repossession to reflect seriously upon both the wisdom and necessity

⁶⁸ See pp. 457-61 *infra*.

⁶⁹ Such provisions would in no way prejudice the rights of reputable sellers, judiciously invoking non-judicial repossession out of a reasonable belief that their collateral is threatened. Only precipitate use of the remedy would be discouraged.

of proceeding non-judicially. In addition, the adoption of such provisions would, by placing the burden of proof as to the propriety of his conduct on the reposessing party, buttress the remedies available to the debtor for redress of wrongful repossession.

IV. DEBTOR REMEDIES IN REPOSSESSION CASES

The remedies available to the debtor may be categorized under four general headings: (1) when repossession involves a breach of the peace or conduct tending to excite a breach of the peace, (2) when misrepresentation and fraud are used as reposessory techniques, (3) when collateral torts are committed by a reposessor, and (4) punitive damages for wrongful repossession.

A. Remedies When a Breach of the Peace Occurs During Repossession

1. Trespass

Trespass, both to realty and to chattels, has often afforded debtors some recovery in repossession cases involving either a breach of the peace or conduct tending to excite a breach of the peace.⁷⁰ While trespass to realty has often given rise to recovery in cases involving a wrongful invasion of the debtor's home,⁷¹ it is unclear from the general language appearing in some of the cases whether the recovery was for trespass to chattels, realty, or both.⁷² At least one case, *Singer*

⁷⁰ In *Westerman v. Oregon Auto. Credit Corp.*, 168 Ore. 216, 225, 122 P.2d 435, 439 (1942), the court stated that "plaintiff may sue for trespass to the person, he may sue for wrongful invasion of real property, or he may sue for trespass de bonis asportatis to chattels."

Courts have allowed recovery on various trespass theories. See, e.g., *Evers-Jordan Furniture Co. v. Hartzog*, 237 Ala. 407, 187 So. 491 (1939), where remittitur was ordered reducing punitive damages to \$250 where the value of the goods removed from the plaintiff's home was only \$8; *Renaire Corp. v. Vaughn*, 142 A.2d 148 (D.C. Mun. Ct. App. 1958), where actual damages were recovered but unspecified in the report and punitive damages were denied; *Robinson v. Hook*, 1 So. 2d 336 (La. Ct. App. 1941), where \$265 was recovered of which \$65 was the debtor's equity in the furniture repossessed and \$200 was compensation for "embarrassment and humiliation"; *Kirkwood v. Hickman*, 223 Miss. 372, 78 So. 2d 351 (1955), where \$380 in actual and punitive damages was held not excessive; *Cecil Baber Elec. Co. v. Greer*, 183 Okla. 541, 83 P.2d 598 (1938), where damages were recovered but were unspecified in the report. For additional examples see Annot., 99 A.L.R.2d 358 (1965).

⁷¹ See *Kirkwood v. Hickman*, 223 Miss. 372, 78 So. 2d 351 (1955). In *Van Wren v. Flynn*, 34 La. Ann. *1158, *1160 (1882), the court stated:

[T]he unlawful invasion of the pauper's hovel and the abstraction of its scanty possessions, is an injury identical in character and magnitude with the like entry of a palace and the despoiling it of its gorgeous apparel.

See also *Renaire Corp. v. Vaughn*, 142 A.2d 148 (D.C. Mun. Ct. App. 1958).

⁷² See, e.g., *Evers-Jordan Furniture Co. v. Hartzog*, 237 Ala. 407, 187 So. 491 (1939), which involved an action supposedly in "trespass to realty" but in which the court appears to include the value of the goods repossessed in computing damages; *Kirkwood v. Hickman*, 223 Miss. 372, 78 So. 2d 351 (1955), where the court allowed recovery for "wrongful trespass and repossession of a stove" without clearly differentiating the counts. In *Girard v. Anderson*, 219 Iowa 142, 257 N.W. 400 (1934), the plaintiff alleged a con-

Sewing Mach. Co. v. Hayes,⁷³ expressly rejected trespass to chattels as a theory of recovery when it appeared that the debtor was in default in his payments. In *Singer* the debtor sought recovery on theories of both trespass to land and trespass to chattels when repossessors broke into her home and removed a sewing machine. Because the debtor was in default in the payments, the Alabama Court of Civil Appeals sustained a demurrer to the count in trespass to chattels. In so doing, the court noted that upon default by the debtor the seller once again became the rightful owner and was entitled to immediate possession. The court concluded that the debtor could not maintain an action in trespass to chattels against "the rightful owner," even if the retaking involved a breach of the peace, and that an action for trespass to the debtor's home would lie only if the reposessor committed a breach of the peace.⁷⁴

The simplicity of this result has a certain logical appeal. However, if there is a breach of the peace, the result is of questionable validity. Trespass to chattels may be committed either by dispossessing another of the chattel or by using or intermeddling with a chattel in the possession of another.⁷⁵ Wrongful dispossession is, therefore, always a trespass to chattels and subjects the actor to liability for at least nominal damages.⁷⁶ Since under Section 9-503 of the Code repossession without judicial process may take place only "if this can be done without a breach of the peace," a repossession involving a breach of the peace is a wrongful dispossession and an action for trespass to chattels will lie.⁷⁷ Moreover, it would seem that the language of section 9-503 implicitly creates not only a right on the part of the debtor not to be forcibly dispossessed without judicial process, but also a concomitant obligation on the part of the secured party to refrain from proceeding non-judicially if the use of force will be necessary. In this connection, Section 1-106(2) of the Code states: "Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect." Thus, it is the implicit policy of the Code to encourage recognition of the debtor's right to enforce the provisions of section 9-503 through affirmative action. An action in trespass to chattels is clearly one method of enforcement available to the debtor.

version of a piano and money, and wrongful breaking and entering of a house. The court stated that the allegations were broad enough to include damages for both trespass and conversion and it was immaterial what the cause of action was called. *Id.* at 145, 257 N.W. at 401.

⁷³ 22 Ala. App. 250, 114 So. 420 (1927).

⁷⁴ *Id.* at 251, 114 So. at 421. In *Westerman v. Oregon Auto. Credit Corp.*, 168 Ore. 216, 226, 122 P.2d 435, 439 (1942), the court stated that "[i]n an action for simple trespass [to chattels] in the taking of a chattel, the immediate right to possession on the part of the taker is a complete defense."

⁷⁵ Restatement (Second) of Torts § 217 (1965).

⁷⁶ *Id.* § 222, comment a.

⁷⁷ Squillante, *supra* note 17, at 18, states that "[a] trespass will always lie no matter who has the right to possession where there is a breach of the peace."

2. Conversion

Recovery by the debtor in conversion poses similar but more difficult problems. While Section 9-503 of the Code places an obligation upon the secured party to refrain from proceeding without judicial process if a breach of the peace will occur, the same section clearly shifts the right to possess and (implicitly) to control the collateral to the secured party once the debtor has defaulted. Accordingly, there is some question as to whether, even assuming a violent repossession by the secured party, the debtor would be able to maintain an action in conversion. Recovery in conversion is based upon interference with one's right to control the chattel,⁷⁸ and therefore, extends beyond the scope of trespass to chattels.⁷⁹ This is of considerable importance to aggrieved debtors since, from a practical standpoint, actions founded in trespass often yield recoveries so meager as to render the time and expense of litigation hardly worthwhile.⁸⁰ If recovery were only allowed on a trespass to chattels theory, and if the repossession involved a breach of the peace but no invasion of the debtor's home or conduct warranting punitive damages, recovery would be minimal and the prohibition against breach of the peace in section 9-503 would be but an unenforceable "policy."

Permitting recovery in conversion, however, would provide a mechanism for enforcement, since the debtor would be able to recover the fair market value of the chattel at the time of the taking, plus interest and demonstrable consequential damages.⁸¹ In most wrongful repossession cases the wrongdoer himself has an interest in the property taken. Accordingly, the dispossessed debtor's damages must be reduced by the amount of that interest.⁸² If the debtor could only recover on a trespass to chattels theory, the seller's deficiency judgment would exceed by a substantial margin any recovery the debtor might hope to obtain. On the other hand, if recovery in conversion were permitted, the debtor's position in the final accounting would be considerably improved. Thus, debtors who were victims of unlawful repossessionary techniques would acquire a direct pecuniary interest in enforcing the provisions of section 9-503, and the knowledge that debtors had this enforcement device at their disposal would discourage repossessioners from employing such techniques.

An early case permitting recovery in conversion for improper

⁷⁸ Restatement (Second) of Torts § 222A(1) (1965).

⁷⁹ Dean Prosser has termed trespass to chattels the "little brother of conversion." W. Prosser, *The Law of Torts* § 14 (3d ed. 1964).

⁸⁰ See the representative recoveries at note 70 *supra*.

⁸¹ C. McCormick, *The Law of Damages* § 123 (1935).

⁸² *Id.*; see 2 T. Sedgwick, *Measure of Damages* § 497(e) (9th ed. 1920):

If . . . the converter is one who himself holds the remaining interest in the chattel, as in case of the wrongful retaking and resale of an automobile by the seller under a conditional sale agreement, then the plaintiff recovers only the value of his limited interest.

repossession was *Ben Cooper Motor Co. v. Amey*,⁸³ in which a conditional seller repossessed an automobile while the buyer was present and objecting. The lower court awarded damages in conversion and the seller appealed. In affirming the finding of conversion, the Supreme Court of Oklahoma defined conversion as "any distinct act of dominion wrongfully asserted over another's personal property or inconsistent with his rights."⁸⁴ The court then stated that although the debtor was in default in the payments and the conditional seller had the right to retake the car, he had no right to take possession "by force or threats of violence and without consent of the mortgagor."⁸⁵ The court observed:

A man is not required in defending his property to use physical force to resist the taking thereof by another. If he tells the other not to take the property and the other person in the face of the instruction proceeds to take it, that may be conversion.⁸⁶

The rationale of *Ben Cooper* seems to be that the right to possession is intimately connected with the overriding requirement that the repossession be accomplished peaceably. This rationale emerges most clearly in the court's statement that "[t]he law will not permit a mortgagor [*sic*, mortgagee?] to threaten a breach of the peace, or commit a breach of the peace, and then to justify his conduct by trial of the right of property."⁸⁷ In effect the court said that the debtor retains the right to exercise dominion over the property until such time as he is rightfully dispossessed. By its very nature a forcible or threatening dispossession is a "wrongfully asserted" act of dominion "inconsistent with [the debtor's] rights," and hence, a conversion.

In *Beneficial Fin. Co. v. Wiener*,⁸⁸ the Supreme Court of Oklahoma, proceeding on a conversion theory, affirmed a lower court award of \$3,500 in actual and punitive damages to an elderly woman whose furniture was repossessed under a void writ of process. The repossessioners had dumped the contents of her furniture onto the floor and scattered clothing, dishes, books and linens about the house. In addition they damaged various items of furniture, and refused the infirmed debtor's request that one of four mattresses repossessed be left for her. The unfortunate woman was later found sick, lying on some quilts on the floor, with her home in a shambles. The repossessing financier maintained that, assuming the invalidity of the writ of process under which the furniture had been repossessed, it was nonetheless privileged by the terms of its chattel mortgage⁸⁹ to repossess the furniture with-

⁸³ 143 Okla. 75, 287 P. 1017 (1930).

⁸⁴ *Id.* at 76, 287 P. at 1018.

⁸⁵ *Id.* at 75, 287 P. at 1018.

⁸⁶ *Id.* at 76, 287 P. at 1018.

⁸⁷ *Id.* at 75-76, 287 P. at 1018.

⁸⁸ 405 P.2d 691 (Okla. 1965).

⁸⁹ An issue occasionally arises in cases involving chattel mortgages as to whether the

out judicial process. It was also argued that the debtor had consented to the repossession. The debtor testified, however, that she had only consented because a constable had been present and had told her that it was his duty to take the furniture. Since the constable had no authority to act under the invalid writ, the court reasoned that a jury question was presented as to whether the debtor had been intimidated.⁹⁰ Pointing out that repossession without process cannot be accomplished by oppressive conduct and intimidation,⁹¹ the court approved the lower court's instruction on conversion.⁹²

B. Remedies When Repossession Is Accompanied by Fraud

Various forms of fraud are occasionally used by professional repossessioners seeking to induce the debtor to surrender the collateral voluntarily. If this tactic is successfully utilized a fraudulent repossession involves little risk of a breach of the peace. However, the use of fraud can create other problems for the repossessioner, as illustrated by the case of *Rhodes-Carrol Furniture Co. v. Webb*,⁹³ which resulted in a recovery by the debtor for trespass. In *Rhodes-Carrol*, the plaintiff alleged that one of the agents seeking to repossess certain furniture from her house represented to her that he was a "detective." On the strength of this misrepresentation the plaintiff consented to allowing the men to take the furniture. The Supreme Court of Alabama upheld a lower court award of damages in trespass to the plaintiff, stating:

[T]he jury could reasonably infer from the proof that repossession was thus obtained against the consent of the wife, though without any act of resistance on her part. Possession thus obtained may nevertheless constitute a trespass, a wrongful taking⁹⁴

mortgagee upon default acquires title to the collateral or merely an actionable lien, that is, whether the jurisdiction in question subscribes to the lien theory or the title theory of mortgages. For example, the court in *Beneficial Finance* dismissed the defendant's authorities from title theory jurisdictions, pointing out that the lien theory obtained in Oklahoma. 405 P.2d at 694. In a conversion action by the debtor, the right to exercise dominion over or to control the property is the basic issue, and location of title could conceivably determine whether or not the debtor has a right to recover. Given the rationale of *Ben Cooper*, however, that the secured party's right to dominion may only be exercised *peaceably*, the location of legal title to the property should have no bearing upon the debtor's right to maintain an action in conversion.

The Code has rejected the title theory and instead focuses upon the respective "rights, obligations and remedies" of parties to a secured transaction. U.C.C. § 9-202 & Comment. Accordingly, in determining the legal status of the parties under § 9-503, technical concepts of title and ownership should yield to an equitable comparison of the rights of the parties as qualified by their respective obligations.

⁹⁰ 405 P.2d at 696.

⁹¹ Id. at 695.

⁹² Id. at 697. Other cases have also allowed recovery on a conversion theory. See, e.g., *Kensinger Acceptance Corp. v. Davis*, 223 Ark. 942, 269 S.W.2d 792 (1954); *Manhattan Credit Co. v. Brewer*, 232 Ark. 976, 341 S.W.2d 765 (1961).

⁹³ 230 Ala. 251, 160 So. 247 (1935).

⁹⁴ Id. at 252, 160 So. at 248.

Since unlawful force is required for a breach of the peace in Alabama,⁹⁵ the court in effect held that fraud constituted constructive force and therefore a breach of the peace.⁹⁶

Another fraudulent device occasionally employed by repossessors involves inducing the debtor to surrender the collateral on the strength of false assurances that his doing so will cancel the remaining debt.⁹⁷ Although one case⁹⁸ has sustained the seller's right to a deficiency judgment after such a repossession, an earlier case, *McCarty-Greene Motor Co. v. House*,⁹⁹ denied a deficiency judgment to the seller. *McCarty-Greene* involved a dispute surrounding the return of an automobile purchased on credit from a garage. The debtors testified that they had purchased the car jointly and had fallen behind in the payments. They claimed that they took the car back to the seller and told him that because they were behind in the payments they had decided to let him take the car back in full payment of what was owed on the car.¹⁰⁰ Whether the seller had acceded to this arrangement was unclear. The debtors claimed that the seller feigned acceptance of this proposal and instructed them to drive the car to the back of his garage. Then, once the garage manager had gained possession of the keys,

⁹⁵ *Singer Sewing Mach. Co. v. Hayes*, 22 Ala. App. 250, 251, 114 So. 420, 421 (1927).

⁹⁶ For a recent case permitting recovery in conversion when a sheriff was procured to assist the defendant in repossessing a Caterpillar tractor, see *Stone Mach. Co. v. Kessler*, 463 P.2d 651 (Wash. Ct. App. 1970), where the court held that the presence of a sheriff acting *colore officii* constituted "constructive force" amounting to a breach of the peace. In *Firebaugh v. Gunther*, 106 Okla. 131, 233 P. 460 (1925), the court allowed recovery where the reposessor procured a deputy sheriff who implied he was seizing the property under court order when, in fact, he had no such order. Contra, *Besner v. Smith*, 178 A.2d 924 (D.C. Mun. Ct. App. 1962), where the court denied recovery for wrongful repossession, shock, mental suffering, and loss of consortium, absent some showing of an actual physical assault upon the plaintiff wife, when a reposessor exhibited a "badge" and stated that he was a "marshall."

⁹⁷ *Hogan*, Pitfalls in Default Procedure, 86 Banking L.J. 965, 968-69 (1969).

⁹⁸ *Barnes v. Reliable Tractor Co.*, 117 Ga. App. 777, 161 S.E.2d 918 (1968). In so holding, the *Barnes* court did not discuss another Georgia case, *Moody v. Nides Fin. Co.*, 115 Ga. App. 859, 156 S.E.2d 310 (1967), decided during the previous year. *Moody* denied a deficiency judgment where a representative of the finance company obtained the keys to an automobile pledged as security by stating that he wished to test-drive the car and subsequently announced that the company had its "money's worth" in the car and was going to keep it. While the court in *Moody* stated that a jury could reasonably find accord and satisfaction on these facts, the decision seems to have turned more on the fact that the debtor was not notified when the deficiency sale of the automobile was held. This, the court indicated, violated U.C.C. § 9-504(3) and prejudiced the debtor's right to redeem the car or to make arrangements for someone else to buy it at a price most advantageous to the debtor. Accordingly, the court held that a deficiency judgment was precluded. For a later Georgia case emphasizing this aspect of *Moody*, see *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 700-01, 161 S.E.2d 420, 422 (1968). *Moody* might also be distinguished from *Barnes* on the fact that in *Barnes* the debtor surrendered the collateral in reliance upon the reposessor's representation that the debt would be cancelled, while in *Moody* the alleged representation was made only after the debtor's sister-in-law had surrendered the keys.

⁹⁹ 216 Ala. 666, 114 So. 60 (1927).

¹⁰⁰ *Id.* at 667, 114 So. at 61.

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the debtors claimed that the seller refused to release them from liability for past-due payments. The seller sued to recover the past-due payments and, on a plea of accord and satisfaction, the jury found for the debtors. The Supreme Court of Alabama affirmed the finding on the theory that the debtors' voluntary surrender of the collateral was sufficient consideration to bind the seller to an accord and satisfaction stating:

[T]he consideration necessary to support a release—or more properly, perhaps, an accord and satisfaction—is found in the benefit, or possibility of benefit, accruing to plaintiff by the regained possession and ownership of the automobile, of which benefit it must be held to have judged for itself at the time of the transaction involved.¹⁰¹

C. Remedies for Collateral Torts in the Course of Repossession

If in attempting to execute non-judicial repossession the reposessor commits some tortious act against the person or property of the debtor or a third party, the cases are in substantial agreement that he is liable for such conduct. Thus, if the reposessor intentionally inflicts physical injury upon the debtor or another person, he will be liable in assault and battery,¹⁰² or if he injures other property belonging to the debtor, he will be held accountable for the damages caused by his tortious acts.¹⁰³ Occasionally a debtor has recovered in conversion when the defendant "repossessed" items of personal property not subject to his security interest. If the collateral is unlawfully repossessed, any personal property of the debtor contained in it or otherwise appropriated in the course of the wrongful repossession is converted when it is taken. However, if the collateral is lawfully repossessed, such personal property of the debtor would not be converted until the debtor unsuccessfully demanded its return. This situation often arises when an automobile containing items of personal property belonging to the debtor is repossessed. In a recent case, *Southern Indus. Sav. Bank v. Greene*,¹⁰⁴ a Florida court of appeals upheld a verdict for the plaintiff in an action for conversion of certain items of personal property which were allegedly hidden in the plaintiff's car when the car was peacefully repossessed by the defendant. The plaintiff claimed that certain valuables and cash which she intended to use

¹⁰¹ Id. at 667-68, 114 So. at 62.

¹⁰² For a discussion of pre-Code cases illustrating recovery in such circumstances, see Annot., 99 A.L.R.2d 358, § 6[a] (1965).

¹⁰³ See *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969), in which the court held that recovery should be allowed where reposseors allegedly damaged water, sewer and electric lines and destroyed an "add-a-room" in reclaiming mobile homes from the debtor's property. In *Whisenhunt* the court held that "while defendant, through its agents, had the right to peacefully enter the premises and obtain its property, the defendant would be responsible for any tortious acts committed during the repossession." Id. at 819, 168 S.E.2d at 831.

¹⁰⁴ 224 So. 2d 416 (Fla. Dist. Ct. App. 1969).

as collateral for a loan were hidden in the trunk of the auto when it was taken. The appellate court held that recovery in conversion was permissible on the theory that upon repossessing the automobile the defendant bank became a "constructive bailee" of any items of personal property it contained. The court declared that, "once having chosen this [non-judicial repossession] remedy, the instituting party subjects *itself* to any liability due to negligence arising in the course of enforcement."¹⁰⁵

Repossessors may also be held liable if the debtor sustains an additional loss resulting from the reposessor's failure to exercise proper care. In *Renaire Corp. v. Vaughn*,¹⁰⁶ the reposessors gained entry to the debtor's house by breaking a window. The debtor alleged that they departed leaving the house unlocked and that a thief had later entered and removed certain tools belonging to the debtor. The court held that recovery against the reposessor for the lost tools was permissible since breaking the window and leaving it in its broken condition could be found to be a proximate cause of the theft of the tools.¹⁰⁷ Recovery in such circumstances is based upon a negligence theory under which the reposessors are held liable for conduct or omissions which would foreseeably result in harm to the debtor. Therefore, such recovery is possible whether or not the repossession itself entailed a breach of the peace.

D. Punitive Damages

In many of the preceding cases the debtors sought punitive damages against the reposessor for abuses in the course of repossession. For example, in *Beneficial Fin. Co. v. Wiener*,¹⁰⁸ the debtor whose home had been reduced to a shambles in the course of repossession was awarded \$1,500 in punitive damages against the offenders.¹⁰⁹ Also, in *Kirkwood v. Hickman*,¹¹⁰ where the reposessors entered the debtor's home without permission over the implicit objections of the debtor's daughter-in-law, an award of \$380 in punitive damages was approved by the appellate court.

¹⁰⁵ *Id.* at 418. For another recent case allowing recovery for personal property repossessed with the collateral and later lost, see *General Motors Acceptance Corp. v. Petrillo*, 253 Md. 669, 253 A.2d 736 (1969). Earlier cases approving recovery in conversion when other goods of the debtor were taken accidentally in the course of repossessing the collateral include: *Rea v. Universal C.I.T. Credit Corp.* 257 N.C. 639, 127 S.E.2d 225 (1962), where the court approved of recovery for tools contained in an automobile lawfully repossessed; *Associates Discount Corp. v. Parlier*, 98 Ga. App. 740, 107 S.E.2d 238 (1958), where the court allowed recovery for a diamond ring which was in a repossessed automobile; *A. B. Lewis Co. v. Robinson*, 339 S.W.2d 731 (Tex. Civ. App. 1960), where the court allowed recovery for a coupon book worth \$20 which was in a repossessed automobile.

¹⁰⁶ 142 A.2d 148 (D.C. Mun. Ct. App. 1958).

¹⁰⁷ *Id.* at 150. See also *Stewart v. F. A. North Co.*, 65 Pa. Super. 195 (1916).

¹⁰⁸ 405 P.2d 691 (Okla. 1965).

¹⁰⁹ *Id.* at 694-95.

¹¹⁰ 223 Miss. 372, 375, 78 So. 2d 351, 352 (1955).

While most states do allow punitive or exemplary damages in appropriate circumstances,¹¹¹ it is generally recognized that something more than the mere commission of a tort is required to justify punitive damages.¹¹² Usually the imposition of punitive damages is contingent upon a showing of aggravating or outrageous circumstances such as spiteful, malicious, fraudulent or intrinsically evil conduct on the part of the defendant.¹¹³ Accordingly, despite the success of some debtors in obtaining punitive damages, a number of appellate courts have either stricken or substantially reduced such awards in repossession cases.¹¹⁴ Reduction or reversal of punitive damages is generally predicated upon the court's belief that the defendant's conduct was not sufficiently malicious to warrant such measures.¹¹⁵ However, since the actual damages in wrongful repossession cases are often minimal compared to the humiliation suffered by the debtor, a better rule would be to allow jury awards of reasonable punitive damages. Such a rule would encourage the abused debtor to seek redress in the courts, and would discourage the unscrupulous from engaging in undesirable repossessionary practices. Commenting upon the salutary effect of punitive damages, Dean Prosser has noted that "it is precisely in the cases of nominal damages that the policy of providing an incentive for plaintiffs to bring petty outrages into court comes into play."¹¹⁶ If the courts are to provide truly equal protection for all, imposition of punitive damages in wrongful repossession cases should be allowed.

E. *Evaluation of Debtor Remedies*

A survey of the existing remedies for wrongful repossession and collateral abuses seems to suggest that an aggrieved debtor has several potential avenues of redress when a reposessor engages in tortious conduct. However, for most debtors who are likely to suffer repossession, the legal remedies and the practical realities do not coincide. It has been suggested that the debtor's position could be improved by reducing his burden of proof in affirmative suits for wrongful repossession, and by providing additional incentives for debtor action in the

¹¹¹ W. Prosser, *The Law of Torts* § 2 (3d ed. 1964). A few states, however, have rejected punitive damages entirely. *Id.* at n.60.

¹¹² *Id.* See also *Kirkwood v. Hickman*, 223 Miss. 372, 385, 78 So.2d 351, 356 (1955).

¹¹³ W. Prosser, *supra* note 111, § 2.

¹¹⁴ See, e.g., *Evers-Jordan Furniture Co. v. Hartzog*, 237 Ala. 407, 187 So. 491 (1939), where the verdict which included punitive damages was reduced to \$250; *General Motors Acceptance Corp. v. Petrillo*, 253 Md. 669, 253 A.2d 736 (1969), in which the appellate court reversed a jury award of \$5,000 in punitive damages; *Stone Mach. Co. v. Kessler*, 463 P.2d 651 (Wash. Ct. App. 1970), in which the appellate court reversed an award of \$12,000 in punitive damages.

¹¹⁵ See, e.g., *General Motors Acceptance Corp. v. Petrillo*, 253 Md. 669, 676, 253 A.2d 736, 740-41 (1969); see *Stone Mach. Co. v. Kessler*, 463 P.2d 651, 656 (Wash. Ct. App. 1970), in which the court found that there was not a "particularly aggravated disregard for the rights of [the plaintiff]" and that punitive damages would therefore be denied.

¹¹⁶ W. Prosser, *supra* note 111, § 2.

form of punitive damages and possible recovery in conversion. These suggestions, however, proceed upon the assumption that the typical dispossessed debtor is readily disposed to the protection of his rights through affirmative legal action. Such a presupposition is distinctly middle-class and, perhaps, inordinately naive. In a recently published article dealing with automobile repossession practices,¹¹⁷ Professor Philip Shuchman concluded that any reforms in that area should be predicated upon a "self-executing" legal model for, as he points out:

If the consumer is given rights and remedies that must be asserted in a court—any court within the framework of the present legal system—we might just as well do nothing. For the promises will be of no meaning to those who need help¹¹⁸

One self-executing approach suggested by Professor Shuchman was the elimination of debt actions and deficiency claims arising out of the installment sale of automobiles.¹¹⁹ Perhaps a similar self-executing approach would provide the solution to abuses in the area of non-judicial repossession as well. Many of the abuses in non-judicial repossession are traceable to lack of supervision by a peace officer when the repossession takes place. Thus, an ideal self-executing solution to such abuses would be the elimination of non-judicial repossession by requiring that all repossessions be effected by means of valid legal process executed by a duly authorized officer.

Apologists for non-judicial repossession continually assert that retention of the remedy is essential to the maintenance of a viable system of credit. The arguments against its abolition are generally similar to the following observations of the Supreme Court of Mississippi:

From the standpoint of mere social preference, it may well be thought that unless the surrender of possession is entirely agreeable to the mortgagor, it would be better to resort to legal process, but this entails costs, often considerable, and sometimes a delay which in itself under some circumstances might be dangerous to the security.¹²⁰

In weighing the merits of such contentions it is helpful to consider briefly the general status of repossession—judicial and non-

¹¹⁷ Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 *Stan. L. Rev.* 20 (1969).

¹¹⁸ *Id.* at 53.

¹¹⁹ *Id.* at 55. Professor Shuchman's article is concerned primarily with dealer and financier practices in conducting deficiency sales and not with the practice of repossession itself.

¹²⁰ *Commercial Credit Co. v. Cain*, 190 *Miss.* 866, 873, 1 *So. 2d* 776, 778 (1941). See also *Goodman v. Schulman*, 144 *Misc.* 512, 514-15, 258 *N.Y.S.* 681, 683-84 (N.Y. City Ct. 1932), where the court declared that without some provision for summary seizure of chattels pledged as security the credit system "would be imperilled and perhaps break down."

judicial—in the light of current commercial needs. A number of studies and commentators throughout the past 15 years have suggested that repossession of items other than automobiles is both undesirable and little-used by creditors.¹²¹ The consensus of these authorities seems to be that items such as household goods offer little prospect of profitable resale, that resort to repossession injures the business goodwill of the creditor and that, when the costs of retaking are considered, repossession generally results in a loss on the account.¹²² Thus, the argument that non-judicial repossession of household goods is particularly essential for the protection of the security must be viewed against this countervailing factor. As indicated earlier, non-judicial repossession of household goods produces the risks of unwarranted humiliation of the debtor and the possibility of violent reaction incident to invasion of private homes. These considerations have led one commentator to suggest that “the protection a secured party receives from the ability to repossess household goods without judicial process is probably not as important as the avoidance of undue humiliation and discomfort to the unfortunate family.”¹²³ It has also been pointed out that household goods are generally not of the mobile type, and that the householder who possesses them has little reason to willfully or negligently damage such goods.¹²⁴

Automobiles, however, are said to present a different problem since they are highly mobile and easily hidden or damaged.¹²⁵ Thus, it is claimed, promptness after default is of considerable importance in repossessing them. The necessity of being able to act quickly to recapture endangered collateral is frequently cited as a justification for non-judicial repossession,¹²⁶ and is predicated upon the assumption that recourse to the courts is inordinately time consuming. However, this assumption is questionable. Replevin proceedings in most states do not appear to be unduly complex, and advance notice to the buyer of impending repossession is generally not required.¹²⁷ Professor Shuchman reports that many automobile sellers and financiers who routinely handle automobile repossessions on a *judicial* basis have developed virtual assembly line methods for speedily processing such actions:

The accounts in default are handled in groups with printed forms leaving only a few blanks to be filled in.

¹²¹ 1 Board of Governors of the Federal Reserve System, *Consumer Instalment Credit*, Pt. I, at 75 (1957); P. McCracken, J. Mao & C. Fricke, *Consumer Instalment Credit and Public Policy* 122 (1965); Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 *Colum. L. Rev.* 443, 448 (1968).

¹²² 1 Board of Governors, *supra* note 121, at 75; P. McCracken, J. Mao & C. Fricke, *supra* note 121, at 122.

¹²³ Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions*, 8 *B.C. Ind. & Com. L. Rev.* 535, 557 (1967).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See p. 458 and note 120 *supra*.

¹²⁷ See, e.g., *Mass. Gen. Laws Ann.* ch. 247, §§ 7-22 (1959); *N.C. Gen. Stat.* §§ 1-472 to -484 (1953), as amended, (Supp. 1969).

Moreover, the suit papers are picked up by the sheriff or other process server in fair piles from lawyers who usually do little else for their livelihood and have the entire process organized in routines that are both aesthetically pleasing and economically worthwhile.¹²⁸

Even those financiers who do not customarily proceed through the courts in repossession cases often refer their delinquent accounts to professional repossession or "repo" agencies.¹²⁹ Presumably this procedure entails some lost time in terms of administrative processing by the "repo" agency and further delay if the agency has a backlog of referrals. Thus, the argument that non-judicial repossession affords the advantage of unparalleled speed is of questionable validity.

Non-judicial repossession has also been traditionally justified on the basis that proceeding informally reduces the costs of repossession. Certainly professional repossession agencies charge for their services and creditors who do their own repossessing often employ full-time personnel to perform this function.¹³⁰ In either event the expenses entailed are properly styled costs of repossession. However, if the creditor prevails in court, the costs of the action may be placed upon the debtor, and the Code permits the reasonable costs of repossession, including legal expenses, to be deducted by the creditor, on a first priority basis, from the proceeds of any deficiency sale.¹³¹ Since debtors ultimately bear the expenses of repossession, they should at least be afforded basic protection against extra-legal abuses in the event of default. Elimination of non-judicial repossession would provide such protection in the most effective way possible—by removing the source of such abuses.

To be effective, however, non-judicial repossession should not only be eliminated as a statutory remedy, but should be prohibited as a contractual remedy as well. While it might be argued that such a measure would infringe upon the consumer's freedom to contract, Professor Shuchman's response to this assertion appears reasonable:

The consumer's *freedom to contract* is a lie. The consumer needs *freedom from* such flexibility.

This is not to say that laws should protect the consumer from improvident bargains—although I do not know why that is so widely considered an improper function for a legal system—but that the consumer and the social order in which he lives should be spared the frightful consequences of his ignorance and inability to bargain. As matters are now, the legal system has created rights in secured parties that harm

¹²⁸ Shuchman, *supra* note 117, at 41.

¹²⁹ Squillante, *Commercial Code Review*, 74 *Com. L.J.* 72 (1969).

¹³⁰ Shuchman, *supra* note 117, at 42.

¹³¹ U.C.C. § 9-504(1) (a).

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many consumers. It would be better to prevent the harm by curbing these freedoms to contract . . . and cancelling rights improvidently created for creditors' benefit.¹³²

CONCLUSION

In view of the abuses it precipitates and the questionable arguments for its retention, at the very least a reappraisal of the need for non-judicial repossession is appropriate. In the event that such a reappraisal reveals grounds for its retention, additional safeguards should be adopted as minimum standards governing its use. A uniform definition of breach of the peace, specifically designed for use in the context of commercial repossession, should be developed. This definition should specifically preclude as repossession techniques the use of fraud, deception, stealth, theft, artifice, unauthorized entry or any other conduct posing a reasonable risk of violent reaction. Repossessions from private homes should be specifically prohibited unless the debtor is present and consents. Finally, in any action brought by a consumer-debtor for wrongful repossession, evidence of a non-judicial repossession should give rise to a rebuttable presumption that the repossession was wrongful. An amendment to the U.C.C. incorporating the foregoing provisions would be an expeditious means of attaining these ends. Victims of abusive repossession practices should also be permitted to sue in conversion and to collect punitive damages, thereby providing realistic mechanisms for enforcement of the breach of the peace limitation on the right to invoke non-judicial repossession. Adoption of these proposals would in no way prejudice the rights of reputable sellers, judiciously invoking the remedy out of a reasonable belief that their collateral is threatened. Their adoption would, however, discourage the precipitate use of a remedy which, in its current form, contains great potential for abuse.

F. ANTHONY MOONEY

¹³² Shuchman, *supra* note 117, at 53.