COMMERCIAL LAW-SELF-HELP REPOSSESSION—Section 9-503 OF THE U.C.C. HELD CONSTITUTIONAL

The Fifth Circuit Court of Appeals held in *James v. Pinnix*[1] that the state of Mississippi did not significantly involve itself in self-help repossession actions taken by creditors pursuant to section 9-503 of the Uniform Commercial Code; therefore, a constitutional attack upon the summary repossession provisions of section 9-503 failed because there was no state action to invoke federal jurisdiction.[2]

The factual settings of the cases involving litigation over section 9-503 are all very similar. The debtor, James in this case, executes a security agreement in the form of a chattel mortgage or conditional sales contract which gives the creditor, here Pinnix Used Cars, a security interest in the asset and forms the heart of the transaction. The security agreement contains a clause whereby the debtor agrees that the secured party can take possession of the asset,[3] here a used car valued at $495, upon the debtor's default in failing to meet payment obligations under the contract. Subsequently, the debtor defaults and the secured party allows private parties to repossess the asset without bringing a judicial action or enlisting the aid of any state officer or agent. Section 9-503 provides that this "self-help repossession" can occur without giving the debtor notice or opportunity for a preseizure hearing, as long as the repossession can be accomplished without a breach of the peace.

The district court allowed James' attack on the self-help repossession procedure to go forward as a class action, and the court enjoined Pinnix from taking the car without giving James notice and an opportunity for a hearing. The court also declared Mississippi Code §75-9-503 (1972) void and unenforceable because it authorized summary seizure.[4] In a case of first impression at the fifth circuit level,[5] the court reversed, holding that

1. 495 F.2d 206 (5th Cir. 1974).

2. *Id.* at 207. The plaintiff, James, sought to invoke federal jurisdiction under 28 U.S.C. §1343(3) (1970), alleging a 42 U.S.C. §1983 (1970) cause of action. The essence of plaintiff's jurisdictional claim was that Pinnix's repossession of his car was an act "under color" of state action within the language of section 1983. If the plaintiff does show a deprivation of constitutional rights in a civil action, then under 28 U.S.C. §1343(3) the federal courts have original jurisdiction. In *James*, the court held plaintiff did not meet these jurisdictional requirements.

3. The contract usually contains language to the effect that the creditor can take advantage of all the remedial provisions of the Uniform Commercial Code if the debtor is in default under the contract; thus section 9-503's self-help provision is incorporated into these contracts by reference as a repossession remedy of the creditor.

4. 495 F.2d at 207.

5. The holding of the Fifth Circuit in *James* has been reaffirmed twice; first in Bowman v. Chrysler Credit Corp., 496 F.2d 1322 (5th Cir. 1974), then in Brantley v. Union Bank & Trust Co., 498 F.2d 365 (5th Cir. 1974).

James had failed to state a claim under 42 U.S.C. §1983 (1970),[6] and like the other circuit courts[7] which have passed on the validity of section 9-503, the court held there was no state action upon which to invoke federal jurisdiction under 28 U.S.A. §1343(3) (1970). James' action was dismissed.

Constitutional due process attacks on section 9-503 of the U.S.C. began in 1971[8] in the wake of the Supreme Court's scrutiny of a creditor's right to seize a debtor's goods without compliance with constitutional due process requirements. The Supreme Court, in the now famous line of cases culminating with *Fuentes v. Shevin*[9] held that replevin of goods pursuant to a conditional sale contract by a credit or through a summary writ signed by a judicial officer was violative of fourteenth amendment due process. This procedure allowed a debtor's possessory interest in property to be summarily terminated by creditor repossession without notice to the debtor or opportunity for the debtor to be heard.[10] The case which laid the foundation for *Fuentes* and which spurred the first constitutional attacks upon section 9-503 was *Sniadach v. Family Finance Corp.*[11] The *Sniadach* case held that a state garnishment procedure permitting freezing of a debtor's wages without notice or opportunity to be heard violates procedural due process.[12]

Seizing upon the Supreme Court's apparent sensitivity[13] to summary seizure of property rights without regard to the holder's constitutional due process rights, the attack on section 9-503 began. However, the attackers failed to discern a key distinction in the *Fuentes* type repossession or seizure cases, and the type of seizure exemplified in *James*.

McCormick v. First National Bank of Miami,[14] the first case seeking to strike down section 9-503, pronounced the distinction between section 9-503 repossession and the *Fuentes* doctrine. In *McCormick*, the district

6. *See* note 2, *supra*.

7. Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973); Adams v. Southern California First Nat'l Bank, 492 F.2d 324 (9th Cir. 1974); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Gibbs v. Titelman, 502 F.2d 1107 (3d Cir. 1974); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974).

8. McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971) was the first federal case to litigate the constitutionality of section 9-503.

9. 407 U.S. 67 (1972).

10. *Id.* at 86-87.

11. 395 U.S. 337 (1969).

12. *Id.* at 342.

13. Even though the Court's position seemed clear, (*i.e.* summary seizures of property rights without notice or hearing were on their way out) this "apparent sensitivity" has taken a confusing turn. In Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), the Supreme Court upheld a Louisiana sequestration statute which allowed a creditor to sequester mortgaged property without giving the debtor notice or a chance to be heard. Justice Stewart believed the *Mitchell* case effectively overruled *Fuentes*. *Id.* at 629 *accord*, 503 F.2d at 610. However, the Supreme Court made special reference to self-help repossession and stated that opinion was reserved as to the constitutionality of section 9-503.

14. 322 F. Supp. 604 (S.D. Fla. 1971).

court held that private repossession under section 9-503 was not done under "color of state law";[15] in essence, self-help repossession did not require a state or judicial officer to activate or supervise the repossession process, as it did in the *Fuentes* replevin statute.[16]

The rationale of the *McCormick* decision, which found an analytical distinction in repossession by acts of a private party and repossession by acts sanctioned by a state judicial officer, was seriously undermined with the decision in *Adams v. Egly*.[17] In *Adams*, the California district court adhered strictly to the "broad dimensions"[18] of *Sniadach*. The court held that because California's adoption of the U.C.C. created the creditor's right to use section 9-503 self-help repossession, state action was present. *Adams* declared section 9-503 unconstitutional because it was not narrowly drawn within the confines of *Sniadach*.[19]

The enticingly persuasive power of *Adams*, based on *Sniadach* and the cases which followed, was quickly dealt a sharp blow by a trio of cases[20] which found no state action in section 9-503 repossession procedures. An oft cited case, perhaps the most antipodal to *Adams*, was *Pease v. Havelock*.[21] That case provided a very thorough and probing analysis of section 9-503 and its relation to state action, and the *Pease* court set out the three basic arguments used to uphold section 9-503, viz:

> (1) Self-help repossession under section 9-503 of the U.C.C. is accomplished purely through the actions of private parties taking collateral from a debtor through a contract right, without breach of the peace. There is no state or judicial involvement in this process and thus no state action. Since there is no state action, a constitutional attack in federal court, jurisdictionally based on a finding of state action, fails for lack of federal jurisdiction.[22]

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15. United States v. Classic, 313 U.S. 299 (1941).

16. 322 F. Supp. at 606.

17. 338 F. Supp. 614, *rev'd sub nom.* Adams v. Southern California First Nat'l Bank, 492 F.2d 234 (9th Cir. 1974).

18. The *Adams* court had no trouble with the state action concept which became such a key point in later section 9-503 cases. The district court decided that California's adoption of the Uniform Commercial Code created the right to use self-help and therefore there was state action. A good summary of the court's analysis is shown in this language:

> If the provisions of a contract can ligitimize summary repossession, wage garnishment might then be valid on the same theory, as long as a private agreement could be shown. This would fly in the face of the reasoning in *Sniadach*, and is rejected by the court. *Id.* at 621.

19. *Id.* at 621.

20. Green v. First Nat'l Exchange Bank of Virginia, 348 F. Supp. 672 (W.D. Va. 1972); Kirksey v. Theilig, 351 F. Supp. 727 (D. Col. 1972); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972).

21. 351 F. Supp. 118 (D. Neb. 1972).

22. *Id.* at 121.

(2) Further, the famous state action cases,[23] culminating with *Reitman v. Mulkey*,[24] deal with finding state involvement in racial discrimination suits, an area of constant strict scrutiny by the Supreme Court—conduct discriminatory and done "under color of state law." No racial considerations infest section 9-503 procedures, and these discrimination cases are not mandatory authority for finding state action in private commercial law repossession cases.[25]

(3) The codification of section 9-503 by a state does not mean that the state is creating a new right of creditor process; rather, section 9-503 merely codifies the common law practice of distraint,[26] a valid commercial law procedure of private repossession judicially upheld long before the advent of the U.C.C.[27]

Even though the trio of cases unwilling to support *Adams* weakened its position, the Supreme Court's decision in *Fuentes* added much greater influence to *Adams*' adherence to the principles in *Sniadach*. But the death knell to this position came in 1973 and 1974 when *Adams* was reversed on appeal by the prestigious Ninth Circuit[28] and the overwhelming majority of cases, including six circuit courts[29] refused to hold that section 9-503 involved state action. By far the most important two cases to be decided during this period were *Adams v. Southern California First National Bank*[30] and *Gibbs v. Titelman*.[31]

The major emphasis of Circuit Judge Trask in *Adams v. Southern California National Bank* revolved around weighing the facts of a repossession action under section 9-503 to determine if it "significantly involved the state . . . in the challenged repossession."[32] The court determined that the

23. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

24. 387 U.S. 369 (1967).

25. 351 F. Supp. at 121.

26. The process of distraint (or distress) is the taking of personalty without legal process from the possession of an alleged wrongdoer and placing it in the hands of the party aggrieved. For a favorable discussion of the process' promulgation in section 9-503 see Mayhugh v. Bill Allen Chevrolet, 371 F. Supp. 1 (W.D. Mo. 1973), *aff'd sub nom.* Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974), *cert. denied*, ___ U.S. ___, 43 U.S.L.W. 3277 (1974). For an argument against section 9-503's promulgation of a prior common-law commercial practice see Gibbs v. Titleman, 369 F. Supp. 38, 45-47 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (2d Cir. 1974).

27. 351 F. Supp. at 122.

28. Adams v. Southern California First Nat'l Bank, 492 F.2d 324 (9th Cir. 1974), *cert. denied*, ___ U.S. ___, 43 U.S.L.W. 3277 (1974).

29. *See* note 7, *supra*.

30. 492 F.2d 324 (9th Cir. 1974).

31. 502 F.2d 1107 (3d Cir. 1974).

32. 492 F.2d at 331.

Reitman line of cases was distinguishable as involving racial discrimination vis-a-vis state action, and that no "symbiotic relationship" existed between the state and the creditor who repossesses under self-help.[33] Judge Trask distinguished the all-important *Fuentes* case, stating:

> A final word about *Fuentes v. Shevin* . . . [o]n the face of it the court was there dealing with a state statute under which an action had been filed in court, a writ formally issued, and service of the writ [was] by a state agent. No question about state action. We do not read *Fuentes* so broadly that it encompasses all private actions between individuals pursuant to their consensual undertakings.[34]

Of the few cases in 1973 that declared section 9-503 unconstitutional[35] by far the most cogent reasoning was advanced in the district court opinion in *Gibbs v. Titelman*.[36] However, the reversal of this case by the Third Circuit toppled one of the last cornerstones for adherence to the supposed broad principles of *Sniadach* and *Fuentes*. The *Gibbs* court was not willing to take the state action concept so far as to include self-help repossession, stating:

> [A]ny encouragement or fosterage [by the state] of self-help repossession resulting, if at all, from statutory modification of safeguards surrounding this private remedy is *indirect* and *highly conjectural* and is simply far less significant than the state involvement in *Reitman*.[37]

The district courts during 1973-74 have overwhelmingly followed the circuit courts opinions, with many cases relying on the *Adams v. Southern California National Bank* and *Pease* decisions as the bases for their holdings.[38]

The clear trend of the federal cases to uphold self-help repossession has been equally clear in the state opinions which consider this question.[39] The first and most influential state court case upholding section 9-503 and

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33. *Id.* at 332-33.

34. *Id.* at 338.

35. Michel v. Rex-Noreco, Inc., 12 U.C.C. Rep. 543 (D. Vt. 1972); Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917 (D. Mass. 1973).

36. 369 F. Supp. 38 (E.D. Penn. 1973).

37. Gibbs v. Titelman, 502 F.2d 1107, 1111 (3d Cir. 1974) (emphasis in original).

38. Johnson v. Associates Fin., Inc., 365 F. Supp. 1380 (S.D. Ill. 1973); Calderon v. United Furniture Co., 371 F. Supp. 572 (S.D. Tex. 1973); Mojica v. Automatic Employees Credit Union, 363 F. Supp. 143 (N.D. Ill. 1973); Kinch v. Chrysler Credit Corp., 367 F. Supp. 436 (E.D. Tenn. 1973); Shelton v. General Elec. Credit Corp., 359 F. Supp. 1079 (M.D. Ga. 1973); Leisure Estates of America v. Carmel Development Co., 371 F. Supp. 556 (S.D. Tex. 1974).

The initial circuit court opinion in this area was Bichel Optical Laboratories v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973). It has subsequently been upheld in Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir. 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974), *cert. denied*, ___ U.S. ___, 43 U.S.L.W. 3277 (1974).

39. Burke, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment*, 47 So. CAL. L. REV. 1, 8 (1973).

finding no state action in a self-help repossession situation was *Messenger v. Sandy Motors, Inc.*[40] The later cases have generally adhered to *Messenger*,[41] and for the most part the commentators in this field have approved of the federal and state position that self-help repossession does not constitute state action and therefore is not subject to constitutional due process scrutiny.[42]

In light of the several authorities upholding section 9-503, it would appear that the Fifth Circuit's pronouncement in support of section 9-503 in *James v. Pinnix* is correctly decided. However, the *James* court, though it followed the great weight of authority in reaching its result, had to make some rather unusual and puzzling steps in getting there. One of the most obvious problems with the *James* opinion is that it failed to even mention *Sniadach* or *Fuentes*. Yet at least one commentator was certain that section 9-503 could not be upheld in the face of a frontal attack based on *Fuentes*.[43] It appears the Fifth Circuit had enough trouble distinguishing its former pronouncements in *Hall v. Garson*,[44] and coping with the admittedly sticky problem of state action.

Hall condemned as violative of due process a Texas statute which authorized a landlord to enter the private dwelling house of a tenant and seize goods to satisfy a lien for past due rent. The landlord argued this was a private act not subject to constitutional scrutiny. The *Hall* court seemed to agree that the seizure of the tenant's goods was accomplished through private avenues, but the court stated this was an act traditionally accomplished by the state through a judicial writ of execution.[45] *Hall* characterized the private act as a public act in which the state was involved. Such an analysis by characterization would seem to fit *James*, since repossession can be considered a function of state process. However, the *James* court skirted this apparent conflict by analogizing self-help repossession as a purely private act and one recognized as such at common law. The *James* explanation of this distinction is meager at best. It is enough to say that the court seemed to follow the third argument setout in *Pease*: common

40. 121 N.J. Super. 1, 295 A.2d 402 (1972).

41. Giglio v. Bank of Delaware, ___ Del. Chan. ___, 307 A.2d 816 (1973); Northside Motors of Florida, Inc. v. Brinkley, 282 So.2d 617 (Fla. 1973); Brown v. United States Nat'l Bank of Oregon, ___ Or. ___, 509 P.2d 442 (1973); Allied Sheet Metal Fabrications v. People's Nat'l Bank, 10 Wash. App. 530, 518 P.2d 734 (1974); Kipp v. Cozens, 40 Cal. App.2d 709, 115 Cal. Rptr. 423 (1974).

42. Burke, *supra* note 39 at 12-19; White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503 (1973); Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767 (1973).

43. Anderson, *Uniform Commercial Code* §9-503:5.1 (Cum. Supp. 1970-74). Anderson makes this query: "If repossession without a hearing is wrong, [*Fuentes*], is it any less a wrong when a creditor acts on his own and the courts are not involved?" *Id.* at 1354.

44. 430 F.2d 430 (5th Cir. 1970).

45. *Id.* at 439.

law distraint is a purely private creditor process, with no inherent incidents of state action.[46]

The Fifth Circuit followed the classical analysis of *Adams* and *Pease* in its discussion of state action and section 9-503. *James'* counsel attacked section 9-503 with a typical *Reitman* argument, and predictably, met with failure. The court felt *Reitman* and its aftermath represented "the outer boundaries of 'imputed' state action."[47] Even though the *James* court admitted that the *Reitman* analogy to *James'* plight had some arguable validity, because *Reitman* dealt with racial discrimination, the court refused to apply *Reitman* to a case devoid of racial overtones because this would "push out the frontiers" of state action.[48] This reasoning resembles closely the second argument proffered in *Pease*.[49] The Fifth Circuit concluded its state action analysis with this language:

> Some state involvement in the *Reitman-Moose Lodge* sense may be present here, but it is simply not enough, given the non-racial nature of the case, to constitute state action.[50]

Although a state action argument based upon a distinction between racial discrimination and commercial law can be attacked,[51] such a distinction has been drawn by the overwhelming majority of courts analyzing *Reitman*,[52] and there are strong comments in favor of enclosing the "boundaries" of state action far short of self-help repossession procedures.[53]

The *James* court ends its opinion with the discussion of state action, and no mention is made of the economic setting around which section 9-503 is established. It, like other courts, avoided the quagmire of attempting to analyze the validity of self-help repossession in the everyday workings of debtor-creditor relations. Those commentators who ask the questions of whether self-help should be sustained because of economic necessity in the marketplace of secured transactions have reached varying results none of which is entirely satisfactory.[54]

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46. 495 F.2d at 208. Circuit Judge Godbold felt that the *Hall* decision turned on the determination that the activity "was deemed an indicium of state-like behavior." *Id.* However, there seems to be no avoiding the fact that both cases involved private summary repossession of a debtor's property without notice or hearing.

47. *Id.*

48. *Id.*

49. *See also* Aller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972) in connection with this argument.

50. 495 F.2d at 209.

51. *See* note 43 *supra*.

52. *See* note 7 *supra*.

53. One commentator, for example, has observed:

> One hopes only that the Court will follow the pattern that it may have established in *Moose Lodge* v. *Irvis*, a pattern of greater hesitance to turn every issue into a constitutional case. White, *supra* note 42, at 507.

54. Note, *Self-Help Repossession: The Constitutional Attack, the Legislative Response,*

One thing seems all but certain if marked trends in the lower federal courts and inroads into *Fuentes*' seemingly explicit pronouncements[55] are vital indicators: no state action will be found in private self-help repossession of personalty under section 9-503.[56] Ultimately the Supreme Court holds the answer to this important issue.[57]

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and the Economic Implications, 62 GEO. L. J. 273 (1973).

55. *See* 416 U.S. at 629.

56. *Burke, supra* note 39, at 10.

57. *See* Justice Stewart's dissent in *Mitchell*, where he contends that one possible reason for the majority's nonadherence to *Fuentes* in deciding *Mitchell* is the change in make-up of the Court. 416 U.S. at 629. The fears of Justice Stewart may have been calmed, however, by the Supreme Court's latest promouncements in this area. In North Georgia Finishing, Inc. v. Di-Chem, Inc., ___ U.S. ___, 43 U.S.L.W. 4192 (Jan. 22, 1975), the Court held violative of procedural due process Georgia's wage garnishment statute. This case follows closely the admonitions of *Sniadach*, and it has probably caused even more confusion with regard to what will be the final decision on the constitutionality of section 9-503.