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THE DEBTOR'S **DUTY UNDER UCC 9-503** TO DELIVER COLLATERAL **UPON DEFAULT**

WESLEY GILMER, JR.*

Introduction

Attorneys who represent secured creditors and deal with the prob lems of repossessing chattel collateral following a default should not overlook this provision in the Uniform Commercial Code:

> If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.[1]

The remedies of replevin, claim and delivery and trover are at best of limited utility in some cases, and in many instances the collateral action probably will not be available because of the difficulty of obtaining it without a breach of the peace. [2] Under the traditional procedures for obtaining possession of chattel property, such as replevin, claim and delivery and trover, a secured creditor who desires to take possession of chattels must satisfy burdensome and technical requirements such as affidavits, bonds, sureties, court costs, officers' fees, storage, bills, labor, transfer expenses and sundry inconvenient and expensive war dances through which the secured creditor must gyrate before he can legally obtain effective possession of the collateral. A secured creditor seeking to possess chattel collateral has the burden of paying the expenses because he is the moving party, and thus he increases his anticipated economic loss. Usually, reposession of chattel collateral by a creditor is sought only when it appears to him that there is no other remedy available for the collection of the debt except to go against the collateral. The aid of the court officers under replevin, claim and delivery and trover statutes, is often limited to preventing assaults, battery and civil disorder. The court officer executing the writ often does no more than travel along with the creditor's agent to prevent a breach of the peace and to lend the weight of his good offices to a repossession that is essentially a matter of self-help.

A secured creditor taking possession prior to judgment, with or without court process, finds the procedure fraught with possible pitfalls. For example, consider *Skeels v. Universal* **C.** *L T. Credit Corp.,*[3] where damages of $55,000 awarded in a trial court were reduced to * Assistant Law Librarian, University of Cincinnati College of Law; Iember, Ohio and Kentucky bars.

1 UNIFORM COMMERCIAL **CODE** § 9-503 [hereinafter cited as **CODE.**] 2 *See* McGinniss v. First Nat1 Bank, 214 Ill. **App. 295 (1919),** and Holden v. Hoyt, 134 Mass. 181 (1883).

3 335 F.2d 846 (3d Cir. 1964).

$5,000, a sizeable amount nevertheless, when the secured party sum marily repossessed the debtor's automobiles thereby destroying the debtor's business; *Fort Knox National Bank v. Gustafson,*[4] where the creditor was more fortunate in the final outcome despite one of the debtor's alleged statements that she would "own the Ft. Knox Bank" as the result of a repossession, and where the lower court had entered a judgment against the bank on a jury's verdict for $35,000 damages; and *Bordeaux v. Hartman Furniture & Carpet Co.,*[5] where a furniture dealer who repossessed furniture was sued for damages on the allega tion that the dealer's actions resulted in the plaintiff's wife losing her mind following a repossession.

Because there have been numerous recorded occasions where debtors have been able to recover substantial sums from secured credi tors who sought to take possession of collateral before judgment,[6] the taking of possession before judgment is sometimes a dangerous game of chance.[7]

At times courts will not punish a debtor for contempt when he fails to surrender or disclose the whereabouts of property which the secured party is seeking to replevy.[8] These decisions are to some extent based on the alternative remedy provided for in the replevin statutes, whereby the property can be turned over to the secured party, or the debtor may pay a sum of money to the secured party in satis faction of his obligation. Some courts feel satisfied that they have done justice when they have entered a paper judgment for the value of the property. The fallacy in this reasoning is that a judgment for the value of the property is a remedy only when the debtor can be made to pay the judgment, and usually the creditor would not be seeking to obtain the property if the debtor had in the first instance been able to pay.

The *Restatement of Torts* suggests that a defendant ordinarily is not required to do more than *permit* the plaintiff to come and get chattel property and that even where the agreement under which the debtor is in possession requires him to transport and deliver it back to the plaintiff, his refusal to do so may be a breach of the contract but is not in itself a conversion, unless the circumstances indicate that he is refusing to surrender the chattel at all.[9] Although not directly on the point to which this article is

directed, it nevertheless states a **4** 385 S.W.2d 196 (Ky. 1964).

5 115 Mo. App. 556, 91 S.W. 1020 (1905). 6 *See* examples in 1 P. **COOGAN**, W. **HOGAN** & D. **VAGTS, SECURED** TRANSACTIONS **UNDER** THE UNIFORM COMMERCIAL **CODE** § 8.03[1], at 868-69 n.30 (1969); White, *Representing the Low Income Consumer in Repossessions, Resales and Deficiency Judgment Cases,* 64 Nw. U.L. REV. 808, 808-17 (1970). 7The innovation of computerized record keeping has not improved the lot of the secured creditor. *See* Ford Motor Credit Co. v. Hitchcock, 116 Ga. App. 563, 158 S.E.2d 468 (1967). **8** Annot., 130 A.L.R. 632, 634 (1941).

9 RESTATEMENT **(SECOND)** OF TORTS § 237 (1965), comment g at 465.

policy of requiring a creditor or secured party to resort to self-help or to initiate court action and limits the scope of court assistance. This policy is in need of change. The Uniform Commercial Code[10] appears to have changed that policy.

The Uniform Commercial Code joins the many statutes which have been enacted to give added security to the rights of creditors where the protection afforded to those rights under the prior law was insufficient. The purposes and objectives of the Uniform Commercial Code should be considered in the light of the defects which were intended to be remedied and the Code should be given a liberal interpretation to accomplish those objectives.[11] Although traditionally in the common law injustices and inadequacies have been from time to time corrected **by** appelate courts, the Uniform Commercial Code is a revolutionary vehicle of reform which bypasses the delay and uncertainty which are otherwise involved in affording relief reform to creditors.'[12] It gives to those jurisdictions which have enacted it within the last few years the combined experience and wisdom of all the enacting states.

A leading author has stated that the portion of Section 9-503 quoted above is unnecessary because one would have supposed that the secured party could require the debtor to assemble and deliver collateral whether or not there was an express provision in the security agree ment, and that the provision regarding assembling at a convenient place is akin to customary language in equipment trusts covering rail road rolling stock in which the trustees never repossess the rolling stock in which the clause has been merely a literary flourish.'[13] He suggests that the custom in the equipment trust cases inspired this provision but that "like the equipment trust clause [the provision] will in all probability continue to be merely a literary flourish."'[14]

In comparison, a different work, no less authoritative however, states:

> Although article 9 is silent on the question of the enformement of this contractual right to require the debtor to assemble the collateral,

§1-106 clearly invites a court to grant specific relief. Money damages in this context are hardly sufficient to put the secured creditor who already has a money claim "in as good a position as if the other party had fully performed."' [5]

It is toward an expansion of the proposition championed **by** the latter authority that this article is directed.

30 CODE, § 9-503.

:E See 3 **J. SUTHERLAND, STATUTES & STATUTORY** CONSTRUCTION § **7001,** at **258** (1943).

'1[2] *See* K. LLEWELLYN, **THE COMMON** LAW TRADITION, Appendix B, at 518 (1960). **32 G. GILMORE,** SECURITY INTERESTS **IN PERSONAL** PROPERTY § 44.1, at 1215 n.7 (1965).

14 Id.

'5 1 P. **COOGAN,** W. **HOGAN** & **D.** VAGTS, SECURED **TRANSACTIONS UNDER THE UNIFORM** COMMERCIAL CODE § 8.03 [1], at 869-70 (1969).

The short history of the Uniform Commercial Code, and the time delays incident to cases being filed, pled, tried, appealed, considered and reported have resulted in a shortage of primary authority and a limited amount of secondary materials.

In Maryland, Pennsylvania and Utah the official text of Section 9-503 was expanded by adding: "If a secured party elects to proceed by process of law he may proceed by writ of replevin or otherwise." [16] If the authors of the expansion had ended their sentence with the word "replevin," it would suggest that only one form of action is appropriate and that the subject provision of Section 9-503 is super fluous, but the addition of the phrase "or otherwise" suggests that there is some form of action which may be invoked, in addition to the traditional replevin action. The United States District Court for the

Southern District of New York,[1]" stated that there was no special procedure spelled out in the Uniform Commercial Code for the recov ery of collateral by a secured party in the event of a debtor's default. The court stated that creditors, must resort to remedies which are available outside of the Code and that a reclamation petition before a bankruptcy court was one such remedy.

The Uniform Commercial Code calls for its own liberal construction and the promotion of its underlying purposes and policies which include simplification, modernization, and expansion of commercial practices through custom, usage and agreement of the parties.' Considering this principle as a part of Section 9-503, rather than isolating Section 9-503 from it because it is at the other end of the Code, the intent is clear that the agreement which the parties make concerning assembly of the collateral and

making it available to the secured party at a place to be designated **by** the secured party should be enforced **by** the courts. The mandate is that the rights and obligations declared **by** the Code are enforceable **by** action unless the provision declaring them specifiies a different and limited effect. [19] This further charge is given to the courts: "The remedies provided **by** the Act are to be literally admin istered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed."[12] The only way that a secured creditor can be placed in as good a position as if the debtor had fully performed is for the Court to order that the debtor

16 3 U.L.A., UNIFORM COMMERCIAL CODE 321 (1968).

171z *re* Yale Express System, Inc., 250 F. Supp. 249 (S.D. N.Y. 1966), *ree'd,* 370 F.2d 433 (2d Cir. 1966). The case was reversed because of trial court questions concerning title and technical distinctions between old-style security devices. *See* 42 NOTRE DAME LAW. 258 (1966) and 21 S.W.L.J. 393 (1967). **Is** CODE, § 1-102.

19 Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc., 12 Pa. D. & C.2d **351** (C.P. No. **3,** Phila. County 1957) ; **CODE**, § 1-106(2).

20 **CODE**, § 1-106(1).

personally perform his express undertaking to assemble the collateral and make it available, *i.e.,* to deliver the collateral to the physical location designated by the secured party under Section 9-503, and to enforce its order by punishment for contempt if necessary.

The official comment [21] supports this point, saying that under sub section (2) a right or obligation described in the Act is enforceable by court action even though no remedy may be expressly provided unless a particular provision specifies a different and limited effect. It further declares that whether specific performance or other equit able relief is available is determined by the specific provision and supplementary principles, not by Section 1-106. Section 1-103 preserves the supplementary general principles of law and equity in existence prior to the adoption of the Uniform Commercial Code, unless the supplementary principles have been expressly displaced by the Code.[22] It is those general principles with which later parts of this article will be concerned: statutory construction, specific performance of contracts, and analogous cases under similar procedures for obtaining possession of property outside of the Uniform Commercial Code.

In *Lincoln Bank & Trust Co. v. Queelan,*[23] attempts to reconcile the pre-existing law with the provisions of the Uniform Commercial Code. The court chose to determine so far as possible the meaning of the Uniform Commercial Code from the Code itself without refer ence to anachronisms indigenous to pre-existing law. This case may set the stage for other courts to depart from conservative rules which are shown to be unrealistic in the

light of new thought and the public policy set forth by the legislatures which enacted the Code.

Under the official text and with the variations enacted in Maryland, Pennsylvania and Utah, the remedy of replevin should be considered to be one, but only one, of the remedies available to a secured party on the occasion of a default, and any other remedies within the contem plation or experience of law and equity should also be available as cumulative remedies, the choice depending upon the exigencies of the factual situation presented. [24]

The right of possession is inherent in every secured transaction which involves tangible collateral and the most important remedy to a

21 **CODE**, § 1-106, Comment *2.*
22 **CODE**, § 1-103.
23 344 S.W.2d 383 (Ky. 1961).
24 See 48 (pt. 2) OHIo **JUR.2d,** Secured Transactions § 239 (1966) ; **CODE**, § 9-501 (1); Adrian Research & Chemical Co., 269 F.2d 734 (3d Cir. 1959). The subject provision of § 9-503 is suggested in the *New York Consolidated Laws* as offering interesting possibilities for imaginative drafting to achieve a change of possession in situations of scattered or bulky collateral. 621/2 McKINNEY'S CONSOLIDATED LAWS OF **NEw** YORK ANNO. (Pt. **3).** McKinney's Uniform Commercial Code § 9-503. Practice Commentary by Henry Kripke.

secured party upon default is the right to take possession.[25] Although replevin is one source of relief,[26] it is contemplated that the plaintiff may use another procedure,[27] but under Section 9-503, the security agreement itself must expressly provide for the debtor's duty to assem ble the collateral and make it available to the secured party at the place designated by him if enforcement of such an obligation is to be had [8]

Statutory Construction

What happens when the secured party requires the debtor to assem ble and deliver the collateral and the debtor refuses?

The United States Supreme Court recently had before it a similar problem concerning the consequences which might flow from a violation of the Civil Rights Act of 1866.29 The court said that the statute could be enforced by injunction,"[0] and explained in a footnote that the fact that the statute was couched in declaratory terms and provided no explicit method of enforcement did not prevent a United States court from fashioning an effective equitable remedy. [31] There should be no difficulty in applying the same principle to the enforcement of obligations undertaken pursuant to Section 9-503.

The Code provides that any right or obligation declared by the Code is

enforceable by action unless the provision declaring it specifies a different and limited effect.[32] The meaning of that provision is that the right or obligation is enforceable by court action and that whether specific performance or other equitable relief is available is determined by specific provisions and supplementary principles. [33] Further, the remedies provided by the Code are to be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed. [34] This is required in order to negate unnecessarily technical interpretations.[35] Section 1-102 says that the Act must be liberally construed and applied to promote its under lying purposes and policies, which are to simplify, clarify and modern ize the law, to permit the continued expansion of commercial practices through custom, usage and agreement of the parties and to make the law uniform among the various jurisdictions. [36]

250. SPIVAK, **SECURED** TRANSACTIONS 134 (1963).
26Id.
27 *See Id.* at 134-35.
28 *Id.* at 144. *See also* Spivak's suggested form of provision to be inserted in the security agreement, ***Id.*** at 150-51.
29 Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
3o *Id.* at 414.
31 ***Id.*** at 414 n.13.
32 CODE, § 1-106(2).
33 CODE, § 1-106, Comment 2.
34 **CODE**, § 1-106(1).
35 CODE, § 1-106, Comment **1.**
36 Henson, *Interpretation of the* ***U. C. C.*** *Art. 9 in the Bankruptcy Courts,* 22 U. **MIAMI** L. REV. 101, 104 (1968).

DEBTOR'S DUTY-UCC 9-503

Although the subject provision of Section 9-503 is novel, the bench and bar must understand that the Uniform Commercial Code has oc casioned a revolution in the law.[37] The assertion that a power is granted to the parties to make an agreement which can result in specific enforcement of a duty to assemble and deliver the collateral should not be startling because, while rarely acknowledged, much commercial law is purely a matter of private contract.[38]

The underlying philosophy of any court which construes a statute is a matter to be considered in attempting to predict its decision. Some states have as part of their law, either by statute or judicial fiat, the underlying principle that statutes which are in derogation of the common law must be strictly construed.[39] This principle does not operate as a complete bar to liberal construction however, since strict construction can defeat the purpose of a statute and the courts generally look to the legislative intent.[40]

The enforcement of Section 9-503 is akin to the law of lien statutes. Sometimes a lien statute's purpose is to protect the creditor, because the creditor's peculiarly disadvantageous position is in special need of the

security afforded by the lien. This protection has been acomplished by express provisions which require a liberal interpretation,[4] as in the Code's Section 1-102. Legislation which creates liens has generally been given a liberal interpretation regarding the subject matter, the obligations and persons to which the lien is applicable, and the pro cedure by which it is enforced. [42] The analogy between the needs contemplated by lien statutes, and the needs generated by fact situa tions arising under Section 9-503, calls for a liberal interpretation regarding the procedure by which Section 9-503 is enforced. The fact that at times one may use the statutory remedies of claim and delivery, trover, or replevin, should not foreclose the right to other kinds of enforcement. There is no indication that the earlier statutory remedies should necessarily be exclusive rather than cumulative. [3] A philosophy that would disfavor a change in existing law is archaic. [44] The reason for the enactment of a statute is usually to change existing statutory or common law. Changing social and economic conditions call for a responsive interpretative technique recognizing that the best source of judicial enlightenment is the plan or policy set up by the legislature.[4 5]

3 ***Id.*** at **103** n.7.
38 Id. at 106 n.16.

39 West v. State *ex rel.* Benedict, 168 Ind. 77, 79 N.E. 361 (1907). 4o Dunn v. Means, 48 Ind. App. 383, 95 N.E. 1015 (1911). *4:'See* 3 **J. SUTHERLAND, STATUTES** & STATUTORY **CONSTRUCTION** § 7002, at 360 (1943).
42 *Id.* § 7002, at 358-60.
43 See H. **BLACK,** HANDBOOK **ON** THE **CONSTRUCTION &** INTERPRETATION OF LAWS *§* 35, at 86 (1911).
443 J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § **5502,** at 35 (1943). *4 Id.* § 5502 at 36.

An early 20th century author commented that the rule of strict construction of statutes which are in derogation of the common law has no foundation in reason and that it should be modified before it is applied to the interpretation of acts of the legislature.[46] He cited cases in which the rule was expressed and said that in each of them there was ample reason for choosing the construction adopted without any reference to the effect of the statutes on the common law. Efforts have largely been directed toward uprooting and destroying the common law, says he, adding that there is no reason that a statute which abrogates the common law should be any more strictly construed than a statute which abrogates another statute. The constitutions of the United States and of the several states constitute sufficient personal safeguards. There was no perfection in the common law and the application of a rule requiring strict construction hampers the work of the legislatures [7]

The Uniform Commercial Code is a manifestation of the people's representatives' concept of progress in justice and proper conduct as regards commercial transactions. There is little reason to oppose liberal construction of the Code. To make any canon of construction operative, the construction should be presented to a court for acceptance by some other means than the use of the canon itself, such as the reasonableness of the result to be achieved by the construction proposed, using the available language to achieve it from the words of the statute. [48] A compilation of the official remarks that have been made by courts show that the rules of construction may point in several directions at once, leaving the court to make a judgment in a particular fact situation.[49]

Courts repeatedly speak of discovering legislative intent. The views on the question of whether there is such an intent are conflicting.[50] One view is that there is no collective legislative intent. Another view is that the legislature does possess a collective intent because the statutes were passed by a large group of legislators who must have had a ,ommon purpose. **A** third view is that a legislature consciously consid- !ring a piece of legislation does not consciously consider every possible _3ituation which may arise under it. [5]1

It would be unreasonable for Section 9-503 to be held surplusage, inoperative or a literary flourish. A presumption should exist that the legislature intended to impart to its act such a meaning as would render it operative and effective and to prevent persons from eluding or defeating it. For this reason, where there is doubt or obscurity, the

46 H. BLACK, HANDBOOK **ON** THE CONSTRUCTION & INTERPRETATION OF LAWS § 113, at 369-79 (1911).

47E. CRAWFORD, **THE CONSTRUCTION** OF **STATUTES** § 253, at 495 (1940). **48** K. **LLEWELLYN, THE COM MON** LAW TRADITION 375 (1960). *d9* *Id.* at 528, Appendix C.

50 E. CRAWFoRD, **THE CONSTRUCTION** OF **STATUTES** § 163, at 251-58 (1940). **51** K. **LLEWELLYN, THE COMMON LAW** TRADITION 374 (1960).

construction should be one which will carry out the objective of the legislature.[5 2] **A** construction should be given to the subject portion of Section 9-503 which would implement its express words in the light of the principles concerning interpretation and enforcement of statutes.[5 3]

Analogous Execution, Replevin and Other Cases

As viewed by a secured creditor, the value of a debtor's personal obligation to deliver the collateral can be substantial. In instances in which the debtor is insolvent or out of the jurisdiction, or when the collateral is expensive or difficult to move or find, the loss which may be occasioned by the failure of the debtor to comply with his under taking under Section 9-503 can be monumental. In *Bank of California*

v. Clear Lake Lumber Co.,[54] the court entered a money judgment for $13,805.13 because of the failure of the conditional buyer to deliver property at a designated place. It noted that the parties by their contract provided that in case it became necessary to retake the subject of the contract, *i.e.,* rails, they would be delivered by the buyer to the seller at a specified location. The court said that there was no uncertainty or ambiguity in this provision and

> We think the law is so well settled as to require no citation of authority that upon the breach of such contracts the rights of the parties become fixed, and the defaulting party having failed to deliver his material at the place designated by the contracts, the injured party is entitled to receive the cost of such delivery.[55]

If the defaulting buyer had been insolvent or without funds to satisfy the judgment and the Uniform Commercial Code had been in effect, would it not have been appropriate to order specific performance of the promise to deliver the rails at the specified place?

An illustration of the value of the personal obligation of the debtor to deliver the collateral is contained in the comments concerning Section 17 of the Uniform Conditional Sales Act.[56] The comment remarks that Section 17 had the purpose of enabling a seller to avoid unnecessary

52 *See* H. BLACK, HANDBOOK ON THE CONSTRUCTION & INTERPRETATION OF LAWS § 47, at 132 (1911).

53 *See In re* Neagle, 135 U.S. 1 (1890) ; Neslin v. Wells Fargo & Co., 104 U.S. 428 (1882); Lynde v. Winnebago County, 83 U.S. 6 (1873); McCulloch v. Maryland, 17 U.S. (4 X1heat.) 316, 407 (1819) ; United States v. Kelley, 55 F.2d 67 (2d Cir. 1932) ; Stettner v. International Printing Pressmen & Assist ants Union of North America, 278 F. Supp. 675 (E.D. Tenn. 1967); Jentick v. Pacific Gas & Elec. Co., 105 P.2d 1005, 1009 (Cal. App. 1940); *In re* Warn er's Estate, 160 Fla. 460, 35 So.2d 296 (1948) ; Girard Trust Co. v. Tampa- shores Development Co., 95 Fla. 1010, 117 So. 786 (1928); Folks v. Barren County, 313 Ky. 515, 232 S.W.2d 1010 (1950); State *ex rel.* Ferguson v. Donnell, 349 Mo. *975,* 163 S.W.2d 940 (1942); Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968); State *ex rel.* Lockhart v. Rogers, 134 W.Va. 470, 61 S.E.2d 258 (1950); 3 **J.** SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 5501-02 (1943); H. BLACK, HANDBOOK **ON** THE **CONSTRUCTION** & INTERPRETATION OF LAWS § 35 (1911); and E. CRAWFORD, THE **CONSTRUCTION** OF **STATUTES** §§ 168-69 (1940).

54 146 Wash. 543, 264 P. **705** (1928).

55 264 P. at 707.

56 UNIFORM CONDITIONAL SALES ACT § 17, Commissioner's Note.

expense and trouble in regaining the collateral. In absence of Section 17, a seller would have to make one trip to the buyer's town to retake the goods, then store the goods at considerable expense during the redemption period, and lastly make a second trip to the buyer's town to resell the goods.

Recognition of the value of the debtor's physically delivering the chattel property to the lender upon default was also given in *Grucella v. General Motors Corp.,*[57] where an auto buyer had improperly but in good faith revoked his acceptance of a defective automobile. The buyer was granted leave to reinstate his contract on the condition that the automobile be redelivered by the buyer to the lender in the event of a future default. The court assigned no express reasons for its order except that the ends of justice would best be served.[58]

In discussing execution against the person as a remedy in the action of replevin, a 19th Century text states that at common law replevin was an action for tort and an execution could issue against the body of the defeated party in an action for tort.[59] Therefore, says the text, such an execution, known as *capias ad satisfaciendum,* could be sued out on a replevin judgment at common law unless the controlling statute restricting or abolishing imprisonment for debt forbade that it issue.

Equitable replevin, a seldom mentioned form of relief, has been granted where the object sought to be recovered was invaluable and could not be the subject of adequate monetary compensation.[60] The remedy is denied, however, when the object sought to be recovered is not unique and can be replaced by purchase on the open market.[61] Even if replevin or trover is available to recover a specific chattel that is wrongfully withheld, if the court believes that damages would be inadequate redress, equity can compel delivery.[62] Business letters and documents ;[63] items of sentimental value or antiquity ;[64] pen and pencil

5710 Pa. D. & C.2d 65 (C.P., Philadelphia County, 1955). *See also,* Jarecki Mfg. Co. v. Co. v. Fleming, 130 Okla. 95, 265 P. 628 (1928), and Universal Credit Ogburn, 173 Okla. 637,49 P.2d 517 (1935).

58The order said: "ordered and directed forthwith to deliver," adding that it should be unnecessary for General Motors Acceptance Corporation to rein state legal action in order to repossess the automobile in the event of future default.

59 R. SHINN, A TREATISE ON THE AMERIcAN LAW OF REPLEVIN § 743, at 679-80. (1899).

r0 Coven v. First Savings & Loan Ass'n, 141 N.J.Eq. 1, 55 A.2d 244 (Ch. 1947) *aff'd,* 142 N.J.Eq. 722, 61 A.2d 236 (Ct. Err. & App. 1948) (attorney's real property title examination files).

61 Charles Simkin & Sons, Inc. v. Massiah, 289 F.2d

26 (3d Cir. 1961). 62 *See* Industrial Electronics Corp. v. Harper, 137 N.J.Eq. 171, 43 A.2d 883 (Ch. 1945), *aff'd,* 137 N.J.Eq. 530, 45 A.2d 671 (Ct. Err. & App. 1946); *see also* Friedman v. Fraser, 157 Ala. 191, 47 So. 320 (1908). 63 Industrial Electronics Corp. v. Harper, 137 N.J.Eq. 171, 43 A.2d 883 **(Ch.** 1945), *aff'd,* 137 N.J.Eq. 530, 45 A.2d 671 (Ct. Err. & App. 1946). 64 Haydon v. Weltmer, 137 Fla. 130, 187 So. *772* (1939).

drawing and sketches ;65 notes and real estate mortgages ;6' and broom corn, some of which had been worked into brooms, some of which had been mingled with other broom corn and other parts of which had been sold either in the form of brooms or in its unfinished form,[6 7] have all been considered proper subjects for equitable replevin. The notable contribution of equitable replevin is the decree of the court which directs a party in wrongful possession to deliver the chattel to the party entitled to possession[6 8] similar to the proposed court order under Section 9-503.

The following considerations have all been considered significant in cases involving equitable replevin: the inadequacy of any relief other than possession of the specific item ; [9] the insolvency of the alleged wrongful possessor;70 the relative inconvenience which would result from granting or refusing the relief ;71 and the inability of the complain ant to obtain complete relief by a single action in replevin.[72]

It should be noted that the equitable claim of ownership and the right to actual delivery are but a single cause of action.[73] Replevin does not always restore possession, and when it fails to do so the owner is relegated to a judgment for the value of the property.[74] To compel the delivery of chattels having a somewhat special value has been a common method of equitable relief.[7 5]

Consider, however, *Ireland v. Loomis.*[76] A plaintiff had sued in equity to recover the possession of personal property (not described in the report of the case) claiming that the defendant was insolvent and had concealed the property. The trial court granted a possessory order, but on appeal the case was reversed for the reason that in Ohio there was no equitable action to recover personal property because there was no statute authorizing it. It was held that the claimant would have to resort to the statutes in aid of execution. This case

65 Lane v. Thacher, 48 App. Div. 313, 62 N.Y.S. 956 (1900). **66** Mayo v. Ford, *220* Ala. 426, 125 So. 684 (1930) ; Holden v. Hoyt, 134 Mass. 181 (1883). **67** Missouri Broom Mfg. Co. v. Guimon, 115 F. 112 (8th Cir. 1902). **68** Coven v. First Savings & Loan Ass'n, 141 N.J.Eq. 1, 55 A.2d 244 (Ch. 1947)

aff'd, 142 N.J.Eq. 722, 61 A.2d 236 (Ct. Err. & App. 1948) ; Haydon v. Welt mer,

137 Fla. 130, 187 So. 772 (1939) (wherein the court's order said: "It is further ordered, adjudged and decreed that . . . Hannah Reber Weltmer is entitled to possession and use of same, and the said Julian W. Haydon be and he is hereby authorized, directed and commanded to forthwith deliver up possession of the hereinabove described property to the said Hannah Reber Weltmer."); Lang v. Thacher, 48 App. Div. 313, 62 N.Y.S. 956 (1900). [69] Charles Simkin & Sons, Inc. v. 'Massiah, 289 F.2d 26 (3d Cir. 1961); Mayo v. Ford, 220 Ala. 426, 125 So. 684 (1930). [70] Friedman v. Fraser, 157 Ala. 191, 47 So. 320 (1908). [71] McGinnis v. First Nat'l Bank, 214 Ii. App. 295 (1919).

[72] Missouri Broom Mfg. Co. v. Guimon, 115 F. 112 (8th Cir. 1902).

[73] Lang v. Thacher, 48 App. Div. 313, 62 N.Y.S. 956 (1900).

[74] 'cGinnis v. First Nat'l Bank, 214 Ill. App. 295 (1919).

[75] Holden v. Hoyt, 134 Mass. 181 (1883). [76] 17 Ohio C.C.R. 37, 9 Ohio C.Dec. 393 (1893).

represents a minority view. The Ohio Supreme Court has not spoken on the question. However, the enactment of Section 9-503 by the Ohio General Assembly should constitute sufficient statutory authority for the equitable action in the context of a secured transaction.

An early case concerning the mandatory order of a court directing the delivery of specific property to a particular person is State *v. Becht,*[7] a habeas corpus action. A money judgment had been rendered and the defendant had also been ordered to deliver certain property to a receiver. Notice and demand were given the defendant and he failed to comply. Upon being faced with a contempt of court charge the defendant brought habeas corpus but the writ was discharged, and the defendant was remanded for commitment. The court found that a contempt had been committed, and said that it did not consist of the relator's neglect or refusal to pay a debt, but in his disobedience of the court's order which directed him to hand over certain property to the receiver. The court added that the fact that the property in question was to be handed over for the purpose of being applied to the payment of the judgment was in no way important. The commitment was held not to constitute an unlawful imprisonment for debt.

A similar case, *Ex parte Lilliland*[78] was decided two years later. In that case habeas corpus was sought to review a probate court pro ceeding in aid of execution. The probate court, in the presence and hearing of the petitioner, orally directed him to turn over a particular gold watch and chain to the sheriff as a receiver. The watch and chain were in the petitioner's possession. The petitioner failed to comply with this oral order and three days later transferred the watch and chain to another person who was out of the state. The court's written order was not served until after the transfer.

The probate judge found as a fact that Lilliland could comply. He was therefore committed to the county jail, "until he purged himself of such contempt." The action of the court was affirmed on review and the writ of habeas corpus denied.

In *Hammond v. Morgan*[79] the court, in considering a mandatory injunction directing the delivery of particular property, held that such an injunction is appropriate in certain circumstances. The court stated that if the action were one of replevin, the award should be for the property with damages in lieu of recovery of the property and that en forcement in such instances would be by execution, not contempt. In what is perhaps dicta, the court added,

77 23 Minn. 411 (1877).

78 7 Ohio Dec. Reprint 659, 4 Weekly L. Bull. 733 (Ohio C.P. 1879) ; *accord, In re* Jonas Concklin, 5 Ohio C.C.R. **78,** 3 Ohio C.Dec. 40 (1890). *See* Hawkins v. State, **125** Ind. 570, 25 N.E. 818 (1890) (real property subterfuge). **79** 101 N.Y. 179, 4 N.E. 328 (1886) ; *accord,* Cain v. Cain, 28 Abb. N. Cas. 423, 20 N.Y.S. 45 (Sup. Ct. 1892).

> [But] in peculiar cases, where from the nature of the case or of the property detained, neither of such actions will give proper or sufficient relief, an equitable action may be instituted for the specific delivery of the property, and judgment in such action may be enforced by punishment for contempt.

The court stated that before equitable relief could be granted, however, the facts conferring equity jurisdiction should be alleged and proved. The court remanded the case for determination as to whether it was an equity case.

The Iowa Supreme Court early recognized the same principle. In a proceeding auxiliary to execution,[80] the defendant was ordered to turn over certain notes to be sold in satisfaction of an execution. The notes were not in the defendant's possession, but were in the posession of a resident of a distant state. The court found, however, that the notes were under the control of the defendant, and held that the defendant was guilty of contempt of court for his disobedience of the order. "Although the notes were in the actual possession of another, yet they undoubtedly were so held for the use and benefit of the de fendant, and were under his control. The order, therefore, was fully warranted." Two judges dissented because of what they described as the summary nature of the proceedings. A specific order similar to the order suggested here for the implementation of Section 9-503 is ex pressly authorized by the Iowa Code, apart from the U.C.C., which provides that the court may order any property of the judgment debtor not exempt, in the hands of himself or others or due him, to be de livered up or in any other mode applied towards the satisfaction of the judgment.-' Although a similar

statute could more clearly express the legislative intention under the U.C.C., the absence of such a statute should not prevent a court from enforcing Section 9-503.

A leading case is *In re Milburn,*[82] wherein a writ of habeas corpus was filed by a petitioner who had been jailed by the circuit judge for contempt. The court affirmed his conviction for contempt. Petitioner argued that the statute under which he was jailed was unconstitutional because it amounted to imprisonment for debt founded upon a contract. The court did not accept that argument, however, saying that failure to deliver money and promissory notes to a receiver pursuant to court order in a proceeding supplemental to judgment, coupled with a failure to show cause or excuse for not obeying the order, is a sufficient ground to punish for contempt. The court concluded that the constitutional pro vision prohibiting imprisonment for debt was not designed to take

80 Eikenbury v. Edwards, **67** Iowa 619, 25 N.W. 832 (1885).

81 IOwA CODE § 630.6 (1946). The words "or judge" were deleted following "court" in 1967. **S2 59** Wis. 24, **17** N.W. 965 (1883). *But* see Second Nat'l Bank v. Becker, 62 Ohio St. 289, 56 N.E. **1025** (1900).

away the power of the court when it exercised equitable jurisdiction. [3] A defendant's refusal to comply with an order to deliver bonds to the plaintiff in a replevin action constituted civil contempt in *Lane v. Alexander."*[4] The court reasoned that if it had jurisdiction to render a judgment or decree, it also had the authority to make such orders and issue such writs as may be necessary to render the judgment or decree binding. Similar reasons are persuasive that a court may enforce an order by contempt proceedings under Section 9-503.

The availability of contempt proceedings is necessary for those situ ations in which the delinquent debtor physically removes the collateral from the state where the property was agreed to be kept. An analogous situation was present in *Wilson v. Columbia Casualty Co.,*[s5] where a trial court in Ohio ordered a judgment debtor to obtain $1,250 from his brother in Pennsylvania. The debtor had sent the money out of Ohio with the intent of preventing its being applied on the judgment. In a subsequent contempt proceeding the debtor was committed to jail until he should comply with the order which had directed him to pay the sum over to the sheriff to be applied on the judgment. The actions of the trial court were approved on appeal. Although the court had no jurisdiction over the brother in Pennsylvania or over the money which was also in Pennsylvania, the court did have jurisdiction over the debtor [5 6] The Ohio Supreme Court noted that the order was not to pay a debt but to apply a specific existing fund to the discharge of the judg ment. Imprisonment for the failure to obey the order was

held not to be a violation of the Ohio constitution. The court remarked that the debtor had an obligation from which he could not exonerate himself

83 The problem of imprisonment for debt arises under state constitutions and statutes, not under the Constitution of the United States. Concerning imprisonment for debt, see Shaiman, *The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common Law,* 4 **Am. J.** LEGAL HIST. **205** (1960) **;** Daniel, *Body Executions and the Jail Limits Bond in Michigan,* 34 U. **DET.** L.J. **273** (1956-57); *see also* Darling, *Imprisonment for Debt in 1969, 4* N.ENG. L. REv. **227** (1969) ; and Henning, *Arrest and Imprisonment of Debtors in the United States,* **27 LEGAL AID** BRIEFCASE 86 (1968) ; 25 GA. B.J. 102 (1962-63). Without violating the state constitution, imprisonment may be authorized in actions to recover specific property such as replevin or bail trover, 16 C.J.S., *Constitutional Law §* 204(1) n.62 (1956); *see also §§* 204(2), 204(3), and 16 Aa. JUR.2d, *Constitutional Law §* 388 (1964).

84 168 Ark. 700, 271 S.W. 710 (1925); *accord,* Meeks v. State, 80 Ark. 579, 98 S.W. 378 (1906). **85** 118 Ohio St. 319, 160 N.E. 906 (1928) ; *accord,* Muscogee Motor Co. v. Cook, 238 Ala. 178, 190 So. 71 (1939). **86** There is nothing novel in a court's directing a party who is personally before the court to take action, or to refrain from taking action, regarding real or personal propety located outside the jurisdiction of the court, even though compliance with the court's order requires that the party travel outside the jurisdiction of the court and across state or international boundaries. *See* Carpenter v. Strange, 141 **U.S.** 87, 106 (1891) ; Phelps v. MacDonald, 99 **U.S.** 298 (1878) ; Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810); California Development Co. v. New Liverpool Salt Co., ***172*** F. **792** (9th Cir. **1909)** *cert. denied,* 215 U.S. 603 (1909); Allen v. Buchanan, 97 Ala. 399, 11 So. 777

by simply sending the funds out of the state of Ohio. **A** similar obliga tion is created every time a debtor executes a security agreement under taking that the debtor will make the collateral available to the secured party at a place to be designated by the secured party under the pro vision of Section 9-503. A claim by the debtor that a requirement pursu ant to which he must travel extensive distances to deliver the collateral to the creditor at its place of business is unreasonable should be re jected for the reason that his duty in the initial undertaking of the se curity agreement was that he should make payment to the creditor, or else deliver the collateral, and the inconvenience resulting from re quiring the debtor to deliver the collateral to the scured party was fore seeable and is only brought about because of the debtor's default in the obligation.

In *Serviss v. TorinoV*[7] the judgment directed that the defendant turn

over to trustees a Studebaker automobile. The defendant had willfully rendered herself unable to comply with this judgment by selling the automobile. At a hearing to determine whether the defendant should be punished for contempt, the court said that she could be punished and that the fact that she was unable to comply with the exact terms of the judgment was no excuse. The debtor was permitted to purge her self of the contempt by paying to the trustee the sale price of the auto mobile in lieu of turning over the automobile itself.

In 1967 the Massachusetts Supreme Judicial Court affirmed a lower court order holding that a probate court had power to render a decree adjudging the respondent in contempt for his failure to deliver three items of personalty to the petitioner and to order the respondent to pay the petitioner the sum of $2,200 in lieu of the article.[88] In Illinois a fiduciary failing to obey an order to deliver up money or effects in his custody and control can be punished for contempt and the fiduciary's inability to pay is no defense to the contempt proceeding.[89] The court particularly noted that imprisonment had been upheld where the de fendant had the money in his hands or had wrongfully disposed of it, adding that it is no defense that the money has been wrongfully ex pended or converted or that the defendant is financially unable to pay.[90]

(1892); Bell v. Wadley, 206 Ark. 569, 177 S.W.2d 403 (1944); Gardner v. Ogden, 22 N.Y. 327, 78 Am. Dec. 192 (1860); Litchell v. Bunch, 2 Paige's Ch. (N.Y.) 606, 22 Am. Dec. 669 (1831); Lindley v. Reilly, 50 N.J.L. 636, 15 A. 379 (1888); Burnley v. Stevenson, 24 Ohio St. 474 (1873); Schmaltz v. York Mfg. Co., 204 Pa. **1, 53** A. **522** (1902). **87263** App. Div. 722, 30 N.Y.S.2d **652** (1941). **88** Villa v. Proia, 227 N.E.2d 743 (Mass. 1967). **89** Cox v. Rice, **375** Il1. 357, **31** N.E.2d **786** (1941). *But* see Tegtmeyer v. Tegtmeyer, **306** Ill. App. 169, 28 N.E.2d **303** (1940), wherein it was stated that if the defendant was unable to comply with the order, she would be released; Liberal Credit Clothing Co. v. Troop, **135** Pa. Super. 53, 4 A.2d 565 (1939), contains a similar statement. ***90*** *See* Annot., 134 A.L.R. 927 (1941), concerning the refusal or failure of a fiduciary to pay over or account for funds as contempt.

In the area of a receivership under state law, a refusal to deliver property to

the receiver as ordeed by the court constitutes a civil contempt.[91] *Sternberg v. Zaretsky*[92] was a memorandum decision in an action to foreclose a chattel mortgage wherein the defendant was directed to cause the chattels to be and remain at all times in the actual premises described in the mortgage and to make the same available for sale pursu ant to the judgment. Certain items were not made available for the sale and the court found the defendant's conduct to be contumacious with respect to those items. The court held that the defendant was in con tempt insofar as the items were not made available. The test for deter mining the defendant's contempt was: (1) whether the mandate was clearly expressed and (2) whether, when applied to the act complained of, it appeared with reasonable certainty that the mandate had been violated.

A word of caution is proper concerning the order which is entered under Section 9-503. The reasonably convenient place mentioned in the order should be detailed as to specific location. In *Sebbath v. Sebbath,*[93] defendant moved to punish plaintiff for contempt because of plaintiff's refusal to pay certain printing expenses incurred by plaintiff on appeal. The court order had directed plaintiff to pay the defendant "the reason able disbursements incurred by defendant in the printing of her brief on appeal." The defendant claimed $135.10 to be reasonable. The plain tiff claimed that charge to be excessive. The court said that the order required the payment not of a known sum but of a reasonable future disbursement and was not specific or definite enough to be enforced. It said that the contempt claim was based on a non-judicial unilateral determination by the defendant of what was reasonable, and that the precise amount to be paid should first be fixed by court order. The de fendant's motion to punish plaintiff was overruled, but without preju dice to renewing the motion after the fixing of the specific amount to be paid. To observe and comply with this principle will result in quicker enforcement of the claim of the secured creditor.

The particular form of the replevin statute in Nevada was control ling in *Application of Havas.*[94] The case held that the trial court did not have jurisdiction to cite the defendant for contempt of court in a reple vin action because of the defendant's failure to deliver an automobile.

91 McNealey v. Rouse, 264 S.W. 383 (Mo. 1924). *See* 2 J. MooRE & L. KING, COLLIER **ON** BANKRUPTCY, at ffs 23.10 and 41.03 (1968), concerning the re- sistance and disobedience of similar orders entered by referees in bank ruptcy as being contempts.

9220 App. Div. 2d 795, 248 N.Y.S.2d 180 (1964), *appeal dismissed,* 14 N.Y.2d 842, 200 N.E.2d 580 (1964). This case was pending and decided prior to September **27,** 1964, which was the effective date of the U.C.C.'s adoption in New York.

932 Misc. 2d 64, 149 N.Y.S.2d 749 (1956). **94** 78 Nev. *237,* 371 P.2d 30 (1962).

The trial court had entered a judgment which required the defendant to deliver the automobile to the plaintiff without providing for the alternate performance authorized by the statute. The appellate court required that a replevin judgment under the Nevada statute be in the alternative, either for the goods or the money, and held that the judgment in the case before the court being for the automobile only, it was not in con formity with the statute. **A** question arises as to whether this case leaves an insolvent debtor or a debtor without means of paying free to keep the automobile. This is doubtful, because the statute says that the alterna tive money judgment is operative only "in case a delivery cannot be had," making the delivery of the vehicle the prime remedy available and the money judgment only secondary. Since Section **9-503** does not provide for any alternative form of relief, would punishment for con tempt be proper in view of the Nevada case? It would appear so since the Nevada court seems to have assumed that punishment would other wise have been proper except for the imperfect form of the judgment under the mandate of the statute. We note, however, that the Nevada court said that a judgment in a replevin action is enforceable only by execution. That statement should be limited to the statutory remedy of replevin in Nevada, rather than extending it to the enforcement of court orders under Section 9-503.

An early Illinois case said that a defendant in a replevin action could not be punished for contempt of court, because the replevin writ was a command to the sheriff to take the property and did not order the defendant to deliver it.[95] **A** constable had taken possession of per sonal property under a writ. The property was afterwards claimed by the Chicago Furniture Company and the company brought a separate replevin action against the constable and the plaintiff in the first suit. In the second suit the sheriff took a replevin writ to obtain the property and read it to the constable, demanding the property of him. The con stable said that the plaintiff in the first suit had the property and that he did not have it. The constable was given more time to comply and when he did not do so, the trial court sentenced him to jail for con tempt. On appeal, the judgment was reversed. The appellate court pointed out that replevin in Illinois required nothing of the defendant in the way of affirmative action, but simply directed the sheriff to take. The reasons for this decision are overcome by the provisions of Section 9-503, because it says that the plaintiff can "require" that the "debtor • . . make it available," thus providing for an affirmative duty on a debtor if he is in default.

Specific Perfornwnce of Contracts

The subject portion of Section 9-503 requires that the security agree

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Horr v. People, 95 I1. 169 (1880).

ment state that the debtor may be required to assemble the collateral and make it available as a prerequisite to its being operative in the event of default. Such a security agreement is a contract supported by con sideration and enforcement should be pursuant to the doctrine of speci fic performance of contracts. [96]

We should clear the air of a possible misunderstanding about speci fic performance. It is not a rule that courts of equity will refuse to order specific performance of a contract because it concerns personal property.[97] It is a principle of equity that if there is an adequate remedy at law, then the court will not order specific performance. Where the loss concerning personal property cannot be adequately compensated by money damages in an action at law, specific performance is granted. The courts do this in the exercise of what they describe as a sound judicial discretion, selecting between conflicting arguments in the fac tual circumstances of the particular case. They consider the conscience of the party charged, moral and equitable duty, and they perhaps con clude that they favor a certain case alleged for specific performance because of a multitude of factors, which could include the ability of the complaining party to replace the items subject to the contract. [98] The older cases make reference to the availability of another remedy, and require the allegation of an irreparable injury supported by a state of facts which demonstrates that the injury is irreparable. [99]

The possessory actions of replevin, trover and claim and delivery are attempts to compel a performance instead of granting compensation in money. Sometimes the availability of these forms of action has been announced as a reason for refusing specific peformance, but the remedy afforded by these forms of action is inefficient and often ineffective. [100]

In many cases where possession is sought, a judgment for money dam ages is no remedy because the statutes exempting wages from garnish ment and assets from execution, coupled with the inability of the debtor to pay (which was probably the prime reason for the default in the contract) often make the judgment valueless even if the debtor does not obtain a discharge in bankruptcy.

The existence of a statute concerning the granting of specific per

96 Such a contract will probably be either a unilateral contract or a bilateral one which is fully performed one one side. Although in such instances there is no mutuality, nevertheless such contracts may be specifically enforced. 11 S. WILLISTON, A TREATISE **ON THE** LAW OF **CONTRACTS** § 1439, at 922 (3d ed. 1968).

97 Clark v. Flint, 39 Mass. (22 Pick.) 231, 238, 33 Am. Dec. 733 (1839) ; 5A A. CORBIN, **CONTRACTS** § 1146, at 150-1 (1964) ; 11 **S.** WILLISTON, A TREATISE **ON THE** LAW OF CONTRACTS § 1419 (3d ed. 1968) **;** 49 AM.JUR. *Specific Perform- ance §* 126 (1943), 81 C.J.S. *Specific Performance §§* 65, 66 (1953).

98 Downing v. Williams, 238 Ala. 551, 190 So. 221 (1939) **;** *see* Klitten v. Stewart, 125 Wash. 186, 215 P. 513 (1923).

99 Langford v. Taylor, 39 S.E. 223, 99 Va. 577 (1901).

109 5A. A. CORBIN, **CONTRACTS** § 1157

(1964).

formance is of some significance.[101] The Uniform Sales Act expanded the remedy of specific performance with respect to contracts for the sale of personalty so as to grant relief where the action for damages would be inefficient even though the chattel was not unique.[10 2] Under the Ohio Sales Act there was authority to maintain an action to compel specific performance of a contract for the sale of personal property. [10 3] The Act provided that when the seller had broken his contract to deliver specific or ascertainable goods an equity court could if it thought fit direct that the contract be specifically performed. [04]

The requirement continues to be repeated that specific performance will not be decreed unless the remedy in money damages is inadequate, but courts have become progressively liberal in granting specific per formance and have given less consideration to the requirement that the remedy be inadequate at law. Corbin says that where there is reasonable doubt as to the adequacy of damages as a remedy, the doubt should be resolved in favor of the granting of the decree of specific performance.[0 5] He states that in many modern cases the question of the adequacy of other remedies is not even mentioned in the opinion and the courts fail to explain why the remedies are not adequate even though there is no clear appearance of inadequacy in the facts. Regardless of the reason for courts doing so, the reader is given the impression that specific performance is readily available. [00] Another widely accepted commentator on the law of contracts observes that U.C.C. Sections 2-716(1) and (2) have the purpose of furthering a more liberal attitude in granting decrees of specific performance in connection with the sale of goods.[10 7] He states that the expression in U.C.C. Section 2-716(1) that in connection with the sale of goods "specific performance may be decreed where the goods are unique or *in other proper circumstances*" leads to the conclusion that the courts have a much wider discretion in the use of the equitable remedy than heretofore. [108] He suggests that the Uniform Commercial Code will

101 UNIFORM **SALES Acr** § **68** served to induce several courts to enlarge somewhat the type of cases in which a buyer might obtain specific performance. 11 S. WILLISTON, **A** TREATISE **ON** THE LAW OF **CONTRACTS** § 1419A n.13, at 694 (3d ed. 1968).

102 *See* Paullus v. Yorkbrough, 219 Ore. 611, 347 P.2d 620 (1960). ***103*** *See* Wioland v. Mayflower Motors, Inc., 80 Ohio App. 310, 75 N.E.2d 443 (1947); Eastern Rolling Mill Co. v. Michlovitz, **157** Md. 51, 145 A. **378** (1929); Hunt Foods, Inc. v. O'Disho, 98 F. Supp. 267 (N.D. Cal. [1951]). *'0 4See* Hughbanks v. Browning, 9 Ohio App. 114 (1917), recognizing a trial court's authority under the Act to order specific performance. **105 5A** A. CORBIN, **CONTRACTS** § 1139 (1964) ; *accord,* 11 S. WILUSTON,

A TREATISE ON THE LAW OF CONTRACTS § 1418, at 654 (3d ed. 1968).

106 5A A. CORBIN, CONTRACTS § 1139 (1964).

107 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1419A, at 695 (3d 1968) (emphasis by Williston).

log Id.

probably continue to strengthen the liberal tendency to extend the remedy of specific performance. [00]

There are no well defined rules of law in this sphere. The granting or withholding of specific performance rests upon what the courts hazily describe as sound or judicial discretion.[110] The unification of equity and law jurisdiction in one court tends to cause the court to hardly consider the adequacy of money damages before it determines whether the specific enforcement decree should be entered. Damages, restitution and specific performance are merely three remedies which the court can give, and it awards the one that it believes to be most effective to do full justice.'"

In the 1968 Open Housing Case the United States Supreme Court summarily announced that the Civil Rights Act of 1866, and hence the real estate purchase contract in question, could be enforced by injunc tion upon application of the buyer."' Numerous cases are reported involving the right of a buyer to equitable relief, and relatively few are seen involving the right of a seller to equitable relief. However, where it is shown that the remedy at law would not be complete and adequate, specific performance is granted to the seller.' [1 3] Only the rule of reason is applied in determining when an action at law is, or is not, an adequate remedy, each case depending upon its own facts."'

In determining whether there is an adequate remedy at law in the sale of personal property, the courts look to see whether the remedy at law is certain, prompt, complete, practicable, and efficient. [115] The ordinary ground on which specific performance is denied, unlike the fact pattern which would prompt a creditor to apply for enforcement of the undertaking under Section 9-503, is that the plaintiff can use money damages to buy in an open market and in that manner make himself whole. [11"G] A secured creditor would not be motivated to ask for specific recovery of the property under Section 9-503 if he could effectively use the easier method of suing for a judgment and collecting from the debtor.

An Examination of Specifiic Performance of Contract Cases

Specific performance was granted long ago when the subject of

109 *Id. at §* 1418.

110 5A A. CORBIN, CONTRACTS § 1136 (1964) *; accord,* 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1418, at 654 (3d ed. 1968).

511 5A A. CORBIN, CONTRACTS §

1136 (1964).

112Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414-15 (1968).

113 Annot., 152 A.L.R. 4, 8 (1944) *; accord,* 11 S. WILLISTON, A TREATISE **ON** THE LAW **OF CONTRACTS** § 1419, at 689-90 (3d ed. 1968).

114 Annot., 152 A.L.R. 4, 20 (1944). ***115*** *Id.* at 20-21.

116 *Id.* at 21.

the suit was a unique chattel. [17] "Unique" means without like or equal, very rare, uncommon or very unusual. [118] The collateral described in a security agreement is the only property from which the secured party is entitled to realize and collect the indebtedness owed to him under the peculiar machinery provided for in the Uniform Commercial Code" [9] and is without like or equal, very rare, uncommon, and very unusual. The automobile, bulldozer, television receiver or refrigerator which is the collateral in a security agreement is the only piece of property that can be subjected to the specific undertaking of the security agreement that the property should stand for the debt and in the event of default by the debtor be subject to liquidation to satisfy that debt under the procedures authorized by the Uniform Commercial Code. Such col lateral is thereby distinguished from assets of the debtor which may be subject to garnishment, execution, attachment, and other forms of application to the debt. Is it not reasonable that specific performance of the undertaking authorized by Section 9-503 be enforced, considering the fact that the secured creditor may experience considerable difficul ties in going out and retrieving the collateral where the debtor can deliver the collateral to the secured creditor with relative ease?

Where the plaintiff had purchased an entire stock of merchandise and paid for it, and the defendant had failed to deliver 30 per cent of it, had concealed it, and the plaintiff claimed that he could not obtain it by replevin for those reasons, the court ordered specific perform ance by the defendant, requiring that the plaintiff show that the balance of the stock had been concealed and secreted and was not subject to being reached by any common law process.20

Damages were held inadequate where a defendant had obtained possession of promissory notes and orally promised to collect them, because although damages could be awarded it would require an ex tensive inquiry to determine the value of the notes. The court held that the plaintiff should not be forced to give up the notes for what they might actually be worth at the time they were taken from him when it was possible that they would be worth more in the future. The court remarked that a legal remedy imposing such a hardship could not be a full, complete and ample one.'[21]

A theoretical availability of money damages was rejected as unreal istic in an case where a railroad sued another railroad for a declaration that the

defendant had no right to terminate an agreement by which

117 Pusey v. Pusey, 1 Vern. 273, 23 Eng. Rep. 465 (1684). No other similar item in the world could substitute for the horn in that action. **118** WEBSTER'S SEVENTH NEW COLLEGIATE **DICTIONARY** 970 (1965). **319 CODE,** §§ 9-504 and 9-505.

120 Raymond Syndicate v. Brown, 124 F. 80 (N.H. 1903). **121** Scorborough v. Scotten, 69 Ad. 137, 14 A. 704 (1888); 5A A. CoRmIST, **CONTRACTS** § 1157 n.64 (1964).

the plaintiff was promised the use of the defendant's passenger station for a stated annual rent for so long as the premises were used as a general passenger station. [122] The court said:

> In the interpretation and application of its rules the law cannot be impervious to the many considerations that make specific performance the only practical remedy. It is clear that a suit for damages is not an adequate remedy.[123]

A buyer was granted specific performance of a contract for the sale of high quality live mink which were proven good breeders, and which were not obtainable elsewhere, when the court found that a replevin judgment awarding possession of the mink or their reasonable value would not afford the buyer an adequate remedy because of the alterna tive nature of such a judgment.12[4]

Similarly, in a case concerning coal tar, [2 5] the facts that the subject of the contract could not be obtained elsewhere in the city, that there would be great expense in obtaining it from other cities, and that the coal tar was necessary in running the plaintiff's business, resulted in a decree which enjoined defendant from preventing the plaintiff from taking the merchandise. When a court concludes from the facts that it is virtually impossible for a plaintiff to prove his future damages it will grant specific performance. [126]

Of interest in the discussion of specific performance of an under taking pursuant to Section 9-503 is a collection of cases involving specific enforcement of contracts to sell automobiles, most of which arose during the period of scarcity of automobiles following World War II. These cases are particularly relevant because of the volume of financed sales of automobiles and the mobility of the chattel. The first case arose prior to World War II where suit for specific perform ance of a contract to assign and deliver a bill of sale to a used automo bile resulted in equitable relief.[12 7] The court's decision was based on the lack of value of the bill of sale, the fact that delivery of the vehicle had been made and title had passed to the dealer who had then sold **122** Illinois Central Railroad Co. v. Uichigan Central Railroad Co., 18

111. App. 2d 462, **152** N.E.2d 627 (1958). **123 152** N.E.2d at 630.

124 Titus v. Empire M'Xink Corp., 17 N.Y.S.2d 909 (Sup. Ct. (1939). There is a growing tendency to be less technical in the application of the principle that specific performance of a contract for the sale of personal property will be granted when the chattel is unique or not purchasable in the market. Where a special need on the part of the plaintiff, and at least a temporary monopoly on the part of the defendant, justify its application, the remedy is allowed for breach of contracts for the sale of personal property for which damages might otherwise be adequate. 11 **S.** WILLISTON, A TREATISE **ON** THE LAW OF CONTRACTs § 1419, at 689 (3d ed. 1698).

125Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co., 63 **'Md.** 285 (1885).

226 Dells Paper **&** Pulp Co. v. Willow River Lumber Co., **170** Wis. **19, 173 N.W. 317** (1919), and Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, **27 N.E. 1005 (1891).** In the latter case, the court ordered that the defendant deliver the subject of the contract to the plaintiff on demand.

the vehicle to the plaintiff, and the fact that the plaintiff had paid his money to the dealer upon the defendent's husband's promise to deliver the bill of sale upon request. The decision perhaps can be characterized as one based on promissory estoppel by attributing to the husband an agency for the wife and by applying the principle that evidences of ownership are unique and therefore a particular subject for specific performance. Although the subject of this action was the bill of sale, rather than the automobile itself, it is difficult to formulate a principle that applies to the written title without which there could be no effec tive ownership, without also generalizing the principle into one which controls the right to the possession of the vehicle. The analogy beckons.

An early post-World War II suit[28] requesting specific performance of a contract to sell an automobile resulted in the bill being stricken on defendant's motion, the court saying that the complaint did not men tion any characteristic which added a special value to the auto and which put it in the category of a unique chattel. The court remarked that although automobiles were difficult to procure under the conditions of the day, they were not unique.

The next reported case was decided otherwise.[29] Plaintiff had con tracted to purchase an automobile from defendant. He had paid $50 down, and on the failure of the defendant to deliver it, sued for specific performance. The court noted that automobiles were hard to get and one could not readily obtain a new automobile on the market. It con cluded that the defendant should specifically perform the contract to sell, saying of the plaintiff, "He does not seek damages, and in fact, due to the car market [he] has no adequate remedy at law."[130] The court ordered that the defendant

procure an automobile of the type in question for plaintiff within the next 30 days. In a similar case which was also decided in favor of the buyer, another court noted that if it appears that like chattels cannot be readily procured on the market at the time specified in the contract for delivery of the chattel, specific performance will generally be granted if the other necessary elements are present. [13,] By analogy these automobile cases are applicable here, because an automobile, when it is collateral in a security agreement, is unique since no other chattel is subject to foreclosure of the creditor's security interest.

127 Gaub v. 'Mosher, 3 N.J. MAisc. 605, 129 A. 253 (Ch. 1925).

128 Kirsch v. Zubalsky, 139 N.J. Eq. 22,49 A.2d 773 (1946). 129De'Ioss v. Conart Motor Sales, 34 Ohio Op. 535, 72 N.E.2d 158 (C.P., Summit County, 1947) *aff'd on other grounds,* 149 Ohio St. 299, 78 N.E.2d 675 (1948). **130 78** N.E.2d at *677.*

131 Heidner v. Hewitt Chevrolet Co., 166 Kan. 11, 199 P.2d 481 (1948) ; *accord,* Bowing v. Vandover, 240 Mlo. App. 117, 218 S.W.2d 175 (1949). See other examples of a chattel which is the subject of a contract being unique or not obtainable in the market in **11** s. WILLISTON, **A** TREATISE **ON** THE LAW OF COTRACTS § 1419 n.2, at 688-89 (3d ed. 1968).

When considering bills for specific performance under Section 9-503, the court should realistically appraise facts which show the inability of a secured creditor to obtain the satisfaction of the debt from any other property except that which is the collateral in the security agreement. Any remedy other than specific performance should be as complete and as efficient as the requested specific performance decree.'[1] The existence of the remedy of self-help or the traditional forms of relief which require affirmative acts by the creditor and are in effect simply provisionally approved self-help, should not prevent specific enforcement of the promise where in other respects specific enforcement is available, [133]

When a debtor has agreed to the undertaking authorized by Section 9-503, he must either pay the debt, which is the primary desire of the creditor or perform the contract under which he obtained the loan **by** assembling the collateral and making it available to the secured creditor at a place designated **by** the secured creditor which is reasonably convenient to both parties. If this performance were to constitute an unreasonable hardship on the debtor, the court could consider the hard ship claim and alter the details of the performance. The court can supervise this process.

A secured creditor goes to court in order to salvage whatever he may from the loss which he anticipates will result from the breach of the promise to pay a sum of money. If the money were otherwise available from the debtor, it is unlikely that the secured creditor would seek specific

performance. A money judgment will usually appear difficult or impossible to collect before the creditor will go against the collateral, since the creditor wants the money, not the collateral. There fore the reluctance of a court to grant specific performance should not be as prevalent in actions under Section 9-503 as in cases in which an ordinary commercial contract is the subject of the action. It may be that the threat of punishment for the failure to assemble the collat eral and make it available is the only way in which the creditor can obtain possession of his unique source of funds for payment [3 4] without expensive and time-consuming travel and labor.

The Influence of a Debtor's
Judgment-Proof Financial Condition

The judgment-proof condition of a debtor will be a consideration in counsel's decision as to whether he should file a bill for specific per formance under Section **9-503.135** Often a debtor is judgment-proof be [132] **5A** A. CORBIN, CONTRACTS § 1142 (1964).

[133] *See Id. at §* 1142.

[134] *See Id.* at *§* 1138.

135 The word "judgment-proof" is used as a generic term to describe all manner of persons against whom judgments for money recoveries are of no effect. *See* McClintock, *Adequacy of Ineffective Remedy at Law,* 16 **MINN.** L. REv. 233 (1932), wherein the author states that a common fact which renders a

cause he is legally insolvent, but he may be judgment-proof for other reasons: he may not have sufficient property within the jurisdiction of the court to satisfy a judgment; public opinion or a show of force may prevent enforcement of a judgment; it may be impossible for the sheriff to obtain the property as commanded by the writ given him; or the plaintiff may be unable to obtain satisfaction of a money judgment because of the protection afforded the defendant by laws which exempt wages and property from execution. [136]

There are contract cases in which the insolvency of a defendant was a sufficient reason for granting the decree of specific performance. Cor bin says that in a few early American cases insolvency was stated as a partial reason, perhaps in order to make weight for the granting of the relief, but that when those cases are examined they frequently reveal other reasons aside from insolvency; or if the relief was not granted the court made it clear that the debtor was not insolvent and that a remedy in damages was adequate. [13 7] He notes that other cases have said that the insolvency of the defendant alone is not enough to justify the specific enforcement of the contract, because a judgment for dam ages is claimed to be adequate even if it is impossible to collect. There is no more substance to such a statement by a court than there is in the already discarded theories that separation of minorities can be equal, [3] a child cannot recover for prenatal injuries after it is born alive because it was unborn at the time of injury, [39] or a city should

be immune from liability for its negligence. [40] It is repugnant to the concept of justice for a court to claim that a typewritten paper, certified by a clerk, with which the plaintiff cannot obtain his money, is a remedy. A remedy is genuine only when it heals the injury. A paper judgment which cannot be converted into money will not make good a creditor's money loss,' [41] and is no more a remedy than were some of the products sold by traveling medicine shows in an earlier era.

The judgment-proof condition of a debtor is a circumstance that should be considered in determining whether equity will act to order specific performance. Depending upon the circumstances it could be a

remedy ineffective in a particular case is the practical impossibility of collecting a judgment for money damages because the defendant is insolvent, "which is used in these cases in the sense of execution proof." **136** Id. 13 **5A** A. CORBiN, CO NTRACTS § 1156 (1964) ; *accord,* 11 S. WLLISToN, A TREATISE ON **THE** LAw OF CONTRACTS § 1421A (3d ed. 1968). '**38** Brown v. Board of Education, 347 U.S. 483 (1954).

139 William v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949), and Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951). **10** Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), and Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1965). *14'See also* Conley, *Insolvency of Defendant as Basis of Equity Jurisdiction,* 24 Ky. L. J. 318, 327 (1935-1936) ; Horack, *Insolvency and Specific Perform ance,* 31 HARv. L. REv. 702, 703, 719 (1918); and AcClintock, *Adequacy of Ineffective Remedy at Law,* 16 MINN. L. REv. 233, 254, 255 (1932).

contributing or controlling factor. The debtor's legal insolvency is a two-edged sword, however, because at times it results in specific per formance becoming an illegal preference of one creditor over another.'[42] However, when the original secured transaction does not constitute an unlawful preference, the enforcement of the security agreement entered into at the inception of the transaction will not constitute a preference.

In *H. Friedberg v. McClary'* [43] the plaintiff had sued for specific performance, asking that the defendant be compelled to deliver tobacco which had been purchased from the defendant. Among the grounds for relief was "[That] McClary is utterly insolvent; that plaintiff has no adequate remedy at law." The Court held that the insolvency of the defendant was a sufficient reason for granting an injunction compelling the tobacco's delivery, noting that in many cases an injunction is granted on the ground of the

insolvency of an obligor where, except for such insolvency, an action for damages would be an adequate remedy. The case was later distinguished by the same court on the following ground: "The damage can readily, even exactly, be ascertained in a single action at law and the solvency of the seller of the tobacco is admitted."[144]

Legal insolvency means that the debtor's available property cannot be liquidated for sufficient money to pay his debts.[145] Insolvency is also an expression of the inability of a person to pay his debts as they become due in the ordinary course of business, generally so applied to persons in commercial pursuits.[146] Similarly, when a debtor conceals his assets and is therefore judgment-proof or when the prospective loss to the creditor will exceed the debtor's assets, the situation is akin to insolvency. In such a situation substantial thought should be given to determining whether the remedy of a judgment for money damages would be an adequate one[147] and hence whether specific performance of a covenant to assemble and deliver under Section 9-503 should be ordered.

If a major portion of the debtor's assets are exempt from execu tion or located in another state, damages may not be an adequate remedy and the court would be willing to grant specific performance in lieu of requiring a claimant to accept a purported remedy which is difficult, doubtful or impossible of collection.[148] In *Meyer v. Reed*[149] the court considered material the lack of anything in the record about the finan cial responsibility of the debtor and said that whatever remedy might

14281 C.J.S. *Specific Performance §* 6(c) (1953).

143 173 Ky. 579, 191 S.W. 300 (1917).

144 American Snuff Co. v. Walker, *175* Ky. 149, 193 S.W. 1021 (1917).

145 *See* 5A A. CORBIN, **CONTRACTS** § 1156 (1964). 1-644 C.J.S. *Insolvency §* 1 (1945); 29 Aaf.JUR. *Insolvency §* 2 (1960). 147 *See* 5A A. CORBIN, **CONTRACTS** § 1142 (1964). *148* Id. 14991 N.J.Eq. 237, 109 A. 733 (1920).

be given at law would probably have to be sought in another state. Acknowledging that there would be considerable additional expense and loss of time in realizing the proceeds of such a judgment, the court granted specific relief. Realistic and far-sighted opinions such as this must be rendered in order to carry out effectively the meaning of Section **9-503.150**

In *Triebert v. Burgess*[151] an injunction restrained a debtor from disposing of his property, consisting of china and glass for resale. The plaintiff claimed an equitable lien based upon a parol contract for a mortgage on the merchandise. The debtor was insolvent and the court assigned that fact as a reason for granting the injunction, saying "[There] was no

reasonable ground to believe that the complainants could secure payment of their claim, except by enforcing their equitable lien." This is a reasonable appraisal of the plight in which a secured creditor found himself.

In *Klitten v. Stewart* [52] the plaintiff sold hotel furniture and equip ment to the defendant, with part of the payment in notes secured by a mortgage. The mortgage proved to be of little value and plaintiff be came concerned as to whether the notes would be paid. The defendant then gave a written statement that she would give a mortgage on the furniture as additional security for the notes. The notes were not paid on time, and the plaintiff sought specific performance of the agreement to give the mortgage as additional security. The court said that the allegation in the complaint that a judgment at law obtained against the defendant would be worthless, coupled with the proof of the fact that the defendant had no visible property other than the property which she had obtained from the plaintiff, was sufficient to justify the grant ing of a specific performance decree. This fact situation is better de scribed as one involving a judgment-proof debtor, rather than one in volving plain insolvency. The court found that there was a contract to secure the debt in a particular manner, and that the contingency under which the contract was to be performed had arisen. It said that there was nothing immoral or harsh in the contract and that it was one which the parties had a right to make. Rejecting a visionary approach, the court remarked:

> The remedy of an action at law was undoubtedly ample, in the sense that the respondents could have obtained a judgment for a breach of contract; but recovery upon the judgment is as essen tial to make the remedy at law adequate as is the right to obtain the judgment, and, as to this latter essential, the remedy at law was not in this instance ample . . . . It must be remembered, furthermore, that the decree compels the applicant to do nothing more than she specifically promised to do, and promised for the purpose of obtaining, and without which promise she could not have obtained, the very property which she is required to mort gage.

There are instances in which the fact that a defendant is genuinely insolvent is a sound reason for denying the remedy of specific per formance. For example, specific enforcement under the unique facts of a case may result in an unlawful preference. [5 '] It is important, how ever, to distinguish an insolvent debtor's obligations by way of simple contract from his

150 *See also* United States Stamping Co. v. Gale, 121 W. Va. 190, 2 S.E.2d 269 (1939).

15111 Md. 452 (1857). *152* 125 Wash. 186, 215 P. 513 (1923). *But* see Annot., 152 A.L.R. 4, 36 (1944).

obligations to surrender specific property because the legal or equitable ownership is in another. If, apart from the debtor's insolvency, equity regards the secured creditor as having an interest in the collateral, specific enforcement of the obligation to transfer that interest to the secured creditor should be granted.- [4]

Courts have expressed different views on the question of the signifi cance of the insolvency of the debtor in specific performance cases. They might be divided into the following groups.[155]

A. Those of the view that if damages can be accurately esti mated the legal remedy should be considered adequate and spe cific performance should be refused even though the debtor is insolvent and the damages are therefore uncollectable. B. Those holding that insolvency alone is a sufficient basis on which equity may act when the legal remedy is not adequate because it does not yield substantial results.

C. Those of the view that although insolvency alone will not result in a decree of specific performance, it may nevertheless, when combined with other matters of equitable cognizance, be come significant in supporting equitable relief. The view that the relief adjudged is more significant than whether

the damages can be collected (A, above) reflects an inability or un willingness to see the world as it is and to realize the responsibility of the courts to the people. It is an unwarranted technical approach. The courts announcing the view that insolvency alone is insufficient but that it can be coupled with something else that makes it material (C, above), offer an invitation for counsel to submit something else to -bolster the case and strerigthen the peg upon which the court hangs its hat when

'53 Annot., 154 A.L.R. 1201, 1202 (1945).

154 11 **S.** WILLISTON', A TREATISE **ON THE** LAW OF **CONTRACTS** § 1421A, at 752 (3d **ed.** 1968). Although the principle stated might be distinguished from the problem at hand on the ground that an adjudication of the right to the ownership or possession does not place a duty on the debtor to deliver, atten tion is called to the following statement in Lang v. Thacher, 48 App. Div. 313, 317, 62 N.Y.S. 956 (1900) **:** "The equitable claim of ownership and right to actual delivery is but a single cause of action although relief may be given upon different grounds."

155 Horack, *Insolvency and Specific Performance,* 31 **HARV.** L. REv. 702 (1918); *accord,* Annot., 154 A.L.R. 1201 (1945).

it grants the relief requested. The generalization contained in B, above, is an

oversimplification, although the courts stating it are on the right track. The cases should simply turn on their facts. The *Restatement* suggests that the correct principle is:

> Specific enforcement will not be decreed if the performance required will constitute a preference of one creditor over others that is inconsistent with the purpose of an existing bankruptcy statute or of other rules of law governing the distribution of insolvent estates. In cases where the performance required will not constitute such a preference, the existing or prospective insolvency of the defendant will be considered in determining the adequacy of the remedy in damages. [156]

The specific enforcement of a covenant in a security agreement authorized by the subject portion of Section 9-503 will not constitute an unlawful preference if the security agreement itself did not constitute an unlawful preference at the time of its execution, because the estate of the debtor will not be reduced if an already valid secured transaction is enforced. [157] For the property to be validly subject to the lien of a security agreement will as effectively remove it from the reach of unsecured creditors as will the later delivery of the same property to the creditor for him to liquidate. This is analogous to the situation where a preference is of property which is exempt from execution, because in each instance unsecured creditors will not be able to collect their claims from the property.[158]

In an early California case, [59] where the court was of the opinion that the action of detinue was available, it said that equitable jurisdiction to enforce specific performance is not based either in whole or in part upon the accident of insolvency. Instead, a court must refer to the general principle that in the cases where relief by specific performance is granted, it must appear that there is no adequate compensation by way of damages at law. More often than not, however, the judgment-proof condition of the debtor is not simply an accident to be ignored, but is an exceptionally material fact in determining the relief which the creditor must seek, because if the money could be obtained from the debtor's estate the issue of delivery of the collateral would not arise.

Jamison Coal & Coke Co. v. Goltra[160] was an action to establish an

[156] RESTATEMENT OF CONTRACTS § 362 (1932); *accord,* **5A** A. CORBIN, CONTRACTS § 1156 (1964).

[157] This statement is subject to the qualification that the facts to which it is applied be such that the reason assigned is appropriate. Thus, it would not hold true if the cost of the debtor's compliance with the Section 9-503 promise requires the expenditures of significant expenses which would diminish the insolvent debtor's

estate. **159** Annot., 154 A.L.R. 1201, 1204 (1945) n.15.

359 McLaughlin v. Piatti, 27 Cal. 451 (1865). **160** 143 F.2d 889 (8th Cir. 1944), *cert. denied,* 323 U.S. 769 (1944). *But see* Annot., 152 A.L.R. 4, 38-39 (1944).

equitable lien and to enforce it by specific performance. The dismissal of a petition seeking that relief was affirmed on appeal. In order to reach its decision the court discussed the effect of the debtor's in solvency, saying that the mere fact that a contract had been breached did not determine the character of the relief to be granted. The court treated the insolvency of the debtor as a circumstance to be considered in determining whether a remedy at law by way of a money judgment was adequate, and said that it was also a circumstance to be considered in connection with the question of whether specific performance would enable the plaintiff to obtain a preference over the debtor's other credi tors. The court said that it must appear that specific performance will result in no injustice. It found that the estate of the debtor was in solvent and that specific performance would have enabled the plaintiff to obtain an unlawful preference over the debtor's other creditors. The court held that no lien had been created by the facts which constituted the contract. The ruling is important because if there had been a lien previously created there would have been no preference resulting from the enforcement of it since the creation of the lien would have been the origin of any preference which might have existed; the changing of the lien into money constituted only a liquidation of the theretofore existing preference, whether it was a legal preference or an illegal **one.1[6]** [1]

Where an action was brought to compel a corporation and certain individuals to issue stock and for other relief, the court held that it was proper to grant an injunction *pendente lite,* remarking that if the stock were to be transferred to an innocent purchaser the loss to the plaintiff might be irreparable in view of the insolvency of the defend ant." [2] Similarly the potential for irreparable loss exists in secured transactions when the debtor is judgment-proof. These following ex amples are of particular note. The debtor has taken the collateral into a state different from the one in which the secured transaction con templated that it would be located and allowed it to remain there in excess of four months without the security interest being perfected in the new state and the collateral passed into the hands of an innocent purchaser for value.' [6] ' Motor vehicles located in states that do not have statutes which require the rotation of liens on titles or license

161 Not all preferences are illegal. Preferences are only illegal when declared to be so **by** statute, or under particular fact situations. 8A C.J.S. *Bankruptcy* § 213 (1962)

and 44 C.J.S. *Insolvency §* 11 (1945). *See* **RESTATEMENT** OF **CONTRACTS** § 362 (1932).

162 Zeiger v. Stephenson, 153 N.C. 528, 699 S.E. 611 (1910). Cases of contracts to transfer the stock of corporations are analogous in the context of specific performance bills based upon the obligor's insolvency. In such instances the obligor's insolvency has constituted a ground for holding the remedy at law to be inadequate, particularly when the purchase price was already paid. Annot., 22 A.L.R. 1032, 1053 (1923). **163 CODE**, § 9-103 (3).

certificates, or oversight on the part of a clerk, have resulted in a failure to note a lien on a title certificate or in a record book or index; in either case the motor vehicle has been transferred to an innocent purchaser for value. Consider, in addition, cases of consumer goods and farm equipment costing $2,500.00 or less in which the filing of financing statements is not required" and the goods or equipment have been transferred to an innocent purchaser for value. Although in some of these instances the secured creditor might be successful in litigation with the third party, it would be burdensome, time consuming, un certain and expensive for him to undertake the attempts to recover the collateral. Why should the judgment-proof debtor not be required to deliver the collateral to the secured creditor and thereby place the responsibility for those burdens upon him?

To generalize that insolvency is or is not significant in granting specific performance, and that if it is significant it either entitles the secured creditor to the equity decree or does not, and if not then whether something cognizable must be injected into the suit, is an attempt to set up valueless rules which are not supported by reason. The cases must turn on their facts, somewhat along these guidelines:

A. Even though the remedy of damages may be theoretically adequate, the courts must look through the facade of form and determine whether the award of legal damages against a judgment-proof debtor has a practical value to the secured creditor. [65]

B. Relief by way of specific performance should be denied to a secured creditor, where to grant the relief would give the secured creditor a favored position to which he is not entitled over other creditors of a genuinely insolvent debtor, would preclude the granting of the equitable relief.[166]

C. A detailed and far-sighted analysis of the facts of the case and the resulting consequences of the granting of specific relief as concerns the secured creditor, the debtor, and any other persons interested in the affairs of the debtor should be made in order to base the decision on fact rather than theory.[167]

D. Relief should be withheld in cases of genuinely insolvent debtors only to the extent that to grant specific relief would cause injury to others. [6]

The insolvency or other judgment-proof condition of a debtor is a proper matter for consideration when the bill requests the court to grant a specific decree of delivery in the nature of specific performance. The legal remedy cannot be adequate against an insolvent or anyone else who is judgment-proof even though it might be adequate against 164 CODE, § 9-302(1)(c).

105 *See* McClintock, *Adequacy of Ineffective Remedy at Law,* 16 *MiNN.* L. Rm,. 233,254 (1932). 1L66 *Id.* at 255.

167 *See* Horack, *Insolvency and Specific Performance,* 31 HARV. L. REv. 702, 703 (1918). *168 Id.* at 720.

a solvent and responsible debtor; but the prospect of injury to a third person as a result of the granting of specific orders of delivery should cause the court to withhold the relief but only to such extent that the injury would be canceled. [169]

Conclusion

The novelty of the suggestions made here should not detract from their value to attorneys who represent secured creditors. The worth of the suggested approach to obtaining delivery in cases of default by a debtor is especially apparent to a secured creditor who discovers that the collateral is scattered either in his own state or across a state line or both, or in a place or places unknown to the creditor. Examples of situations in which this approach could be useful include:

Example 1. Debtor *D* is in default. The collateral is either a single item or a combination of several items of consumer goods, *e.g.,* re frigerator, range, washer, dryer, or television set, called *goods.* Al though the loan was contracted with creditor *C* when the *goods* were located in town *T* in state X, and *D* was a resident of town *T* and state *X, D* later took the *goods* and moved them out of state X into state *Y.* If the creditor *C* finds it inconvenient to take possession of the *goods* in state Y, as where he is a casual or regular lender who does not have a place of business in Y, creditor *C* through an attorney could go into court in either state X or *Y* or in any other state where *D* might be personally summoned, and obtain a personal judgment directing *D* to deliver the goods to such place as was designated in the security agreement, *e.g.,* the place of business of *C* in town *T* and state X.

Example 2. Debtor *D* is in default. The collateral is a personal auto mobile or truck, called *vehicle.* Although the loan was contracted with creditor *C* when the goods were located in Town *T* and state X, and *D* was

then residing in town *T* and state X, the *vehicle* is now in state Y in the possession of *D,* a relative, a friend or a purported purchaser. Creditor *C* could go into court in whatever state in which ***D*** might be personally summoned and obtain a personal judgment directing *D* to deliver the *vehicle* to such place as was designated in the security agree ment, *e.g.,* the place of business of *C* in town *T* and state X.

Example 3. Debtor *D* is in default. The collateral consists of several self-propelled pieces of business equipment, *e.g., dump trucks.* Because of the scattered locations in which *D* uses the *dump trucks,* one piece is in town *T,* state X, where *C* does business and *D* lives, one piece is on a.job 50 miles away in state X, and a third piece is 600 miles away in state Y. Debtor *D* can from time to time be found in any of those locations. Creditor *C* could go into court in any of the places where *D* may be found, *e.g.,* in town *T,* elsewhere in state X, or in state Y, ***169*** *Id.* at **721.**

and obtain a personal judgment directing *D* to deliver the *dump trucks* to such place as was designated in the security agreement, e.g., the place of business of *C* in town *T* and state X.

Example 4. Debtor *D* is in default. The collateral consists of three pieces of equipment which are not self-propelled, *e.g., bulldozers.* Be cause of the scattered locations in which *D* uses the bulldozers, one piece is on a job in state X 20 miles outside of town *T, C's* place of business, one piece is on a job 200 miles away in state X, and a third piece is on a job 300 miles away in state Y. Debtor *D* owns a vehicle which he uses for the transportation of the *bulldozers,* and he can be found from time to time in any of the locations. Creditor *C* could go into court in any of the places where *D* may be found, either in town *T* or elsewhere in state X, or state Y, and obtain a personal judgment directing *D* to deliver the *bulldozers* to such place as was designated in the security agreement, *e.g.,* the place of business of *C* in town *T,* state X.

Example 5. Debtor *D* is in default. The collateral consists of 500 head of *cattle* located on a farm or several farms in state X or *Y* or both. Debtor *D* owns a cattle truck which he uses for the transportation of cattle, and he has access to farm labor that can assist him in rounding up, loading and transporting the *cattle.* Creditor *C* could go into court in whatever jurisdiction *D* may be found and obtain a personal judg ment directing *D* to deliver the cattle to such place as was designated in the security agreement, *e.g.,* a livestock yard in town *T* where *C* main tains his place of business and from which the *cattle* can be cared for and sold.

Example 6. Debtor *D* is in default. The collateral consists of his personal *automobile. D's* sole source of funds for the satisfaction of any judgment would come from his salary at factory *F.* If a judgment and garnishment of

D's salary were to be had at *F,* 50 per cent of the salary would be exempt from execution and the court costs of the judg ment would be $35.00. For each garnishment the court costs would be an additional $10.00. *D* is paid weekly and his take-home pay each week is about $100.00. On the first garnishment after judgment $50.00 would be exempt and the court costs would be $45.00, leaving a net recovery for creditor *C* in the amount of $5.00. On the second and future garnishments $40.00 would be *C's* net recovery. Because *D* owes several creditors, there is a possibility that other creditors can obtain priority any week through their own garnishments. Because the remedy of a judgment at law is doubtful, uncertain, and inefficient, *C* could go into court and obtain a personal judgment directing *D* to deliver the automobile to such place as was designated in the security agreement, *e.g., C's* place of business.

The value to the secured creditor in the proposed application of Section 9-503 in these examples lies in the freeing of the creditor from expense and the onerous problem of discovering the location of the collateral, going through the statutory "war dance" for replevin, trover or claim and delivery, the risk of being sued because of his or his agents' acts incident to the creditor's taking possession and the trans portation of the collateral to a location at which it can be safely stored and prudently sold **by** the secured creditor. In cases in which the place where the debtor may be summoned is far removed fom the creditor's place of business, either in the same state or another state, the use of telephone and mail communication with an attorney in the distant loca tion who handles the case can materially lighten the creditor's burden.

The debtor will sometimes be unable to perform his undertaking in the covenant to assemble and make available at the specific location. Whether such inability constitutes a defense to a bill in equity or a contempt motion must depend upon the unique facts of each case. If the collateral was accidentally destroyed or stolen and cannot be located, this seems to be a just defense. If the collateral was intentionally put beyond the reach of the creditor **by** the debtor's sale, gift, or destruction, this may be an unexcuseable breach. If the debtor is so financially em barrassed that he cannot pay the expenses necessary to make the trips and do the work, perhaps the courts will look to see if the financial embarrassment is fortuitous and excuse performance, but if it is wanton or deliberate, the courts might do otherwise. The authorities do not clearly set out a principle in some of these areas and it is probably best that the cases turn on their facts.

The two-edged sword of the insolvency of the debtor enters here. The factual pattern and the court's reaction to it will determine the decision. If

there are no significant expenses to be paid incident to the debtor's delivery of the collateral pursuant to Section 9-503, and if the security agreement did not constitute an illegal preference when it was executed, there appears to be no reason why specific enforcement should not be granted in an appropriate factual situation. Theoretically, the insolvency of the debtor coupled with significant expenses *(e.g.,* the hiring of labor and equipment) which would have to be incurred **by** the debtor in his accomplishment of the delivery could constitute an illegal preference if those expenses diminish his estate. However, the doctrine that the law does not consider small or trifling matters, *de minimis non curat lex,* suggests that if such expenses are to be a material considera tion resulting in an excuse for the debtor, they must be more than nominal expenses. In such cases, courts could enter orders directing the delivery upon condition that the creditor pay the reasonable ex penses of delivery and in that manner the creditor could obtain at least

partial performance of the debtor's duty. Although a debtor may not be genuinely insolvent, he might be judgment-proof. In cases of judgment proof debtors, there is ordinarily no problem of preference.

For what reasons should a court order the delivery of the collateral? Any of the following are important: (1) The unique attribute of the collateral in that it is the only item in the world subject to the credi tor's right to have it liquidated to satisfy the debt which it secures under the peculiar and valuable procedures established **by** the U.C.C.; (2) The placing of the burden of putting the creditor into possession on the party responsible for the default and who expressly undertook that responsibility pursuant to Section 9-503 in order to obtain the loan; (3) The fact that the debtor is judgment-proof; (4) The miti gation of the creditor's loss resulting from the default.

The mitigation of the creditor's loss resulting from the default might occur under any of the following circumstances: (1) The debtor is better able to transfer the collateral from one location to another be cause of his special skills, ownership of special equipment or access to assistance to do the job; (2) The debtor knows the specific location of the collateral while the creditor either does not know where it is located or knows only the general location of it; (3) The debtor should reason ably bear the risk of loss or damage in transit. The creditor is entitled to look to the debtor for assistance in salvaging as much of the prospec tive loss as as reasonably possible via reduction of labor and transfer fees, court costs, risk of suit for tort or other liability incident to taking possession, relief from the necessity of making bond and obtain ing sureties and sundry other incidental expenses and inconveniences.