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Uniform Commercial Code--9-503--Peaceable Repossession by Secured Party without Notice to Debtor is Constitutional When Security Agreement Specifically So Provides

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but it seems clear that it disagrees with those states which regard the nonviable fetus as a person or allow recovery for a stillborn fetus on the basis that it existed as a person.

The decisions on wrongful death because of prenatal injuries have eliminated either the requirement of live birth or viability but have not allowed an action when both are absent. Since it was the medical discovery that the child is never part of the mother that initiated the dramatic reversal in allowing recovery for prenatal injuries, it seems that the logical result is to allow recovery where the plaintiff can show that the tortious injury was the proximate cause of the death regardless if the fetus was viable at the time of injury or the child lived for a few moments after birth. Since medical science has established the separate existence of the fetus at the time of conception the law should protect the unborn child from a tortfeasor and allow the child to maintain an action without reference to its point of gestation or number of movements outside of the womb. Once the tort has been committed the only requirement for recovery should be in establishing a casual connection between the tort and the injury. Proof of that element should be determined by medical experts.

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UNIFORM COMMERCIAL CODE—§ 9-503—PEACEABLE REPOSSESSION BY SECURED PARTY WITHOUT NOTICE TO DEBTOR IS CONSTITUTIONAL WHEN SECURITY AGREEMENT SPECIFICALLY SO PROVIDES. *Giglio v. Bank of Delaware*, 307 A.2d 816 (Del. Ch. 1973).

In the recent case of *Giglio v. Bank of Delaware*,[1] the constitutionality of Delaware's Uniform Commercial Code § 9-503[2] was challenged. The issue raised was whether the Uniform Commercial Code's authorization of the taking of property without notice and without a hearing constituted a denial of procedural due process. In holding that DEL. CODE ANN. tit. 5A, § 9-503 was merely a codification of

1. 307 A.2d 816 (Del. Ch. 1973).
2. DEL. CODE ANN., tit. 5A, § 9-503 (1972).

the common law right of self-help, the Delaware courts have reinforced the majority opinion that U.C.C. § 9-503 is constitutional.

In this case, Giglio, the plaintiff, had entered into a conditional sales contract with the Kent County Motor Company for the purchase of an automobile. On the same day, Kent sold and assigned all its right, title, and interest in the contract and the automobile to the defendant, Bank of Delaware. At all times pertinent to the lawsuit the Bank had a perfected security interest in the automobile.

Giglio paid the monthly installments of the contract for a few months but then defaulted on a payment. At this time the Bank notified Giglio of his default. Subsequently, Giglio defaulted on the next installment payment.

The Bank then repossessed the automobile without Giglio's knowledge. This repossession was undertaken without giving Giglio notice of any intention to repossess; however, no breach of the peace was involved. The court said this repossession was somewhat surreptitious.[3] Nevertheless, the court's opinion was that this repossession by the Bank was not a deprivation of due process under the fourteenth amendment to the United States Constitution.

There were three important stipulations made by Giglio. They were: that he had breached the contract and was in default; that the Bank had not breached the contract nor had it waived Giglio's breach; and that there was no breach of warranty with respect to the sale of the automobile.

The Delaware statute that controlled specifically in this case provides that "unless otherwise agreed a secured party has on default the right to take possession of the collateral . . . ."[4] The statute further provides that possession may be had without judicial notice if it may be accomplished without a breach of the peace.[5] Oklahoma has enacted a statute, OKLA. STAT. tit. 12A, § 9-503, that is identical to Delaware's.

3. Giglio v. Bank of Delaware, 307 A.2d 816, 817 (Del. Ch. 1973), the court termed the repossession surreptitious because it was done by using a duplicate key, at 7:15 a.m. from the area of Giglio's home.

4. DEL. CODE ANN., tit. 5A, § 9-503 (1972).

5. *Id.*; the remainder of this statute reads:

> In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

The contract under scrutiny in this case not only did not provide otherwise, as allowed by the statute, but, in fact, expressly authorized the Bank "on default, to enter any premises without notice or demand on the plaintiffs, and without breach of the peace, to retake possession of the vehicle."[6] This is an extremely important fact as will be seen later.

Giglio's argument consisted of two contentions. First, he asserted that the repossession by the Bank without prior notice and without first affording him the benefit of a judicial hearing constituted a taking of property without due process of law. Second, insofar as the Delaware statute authorized such action, it was unconstitutional. Giglio supported his assertions with recent Supreme Court cases which held that certain takings of property or property interests without benefit of prior notice and hearing constituted a denial of due process.[7]

Giglio reasoned that these cases stood for "the proposition that no property can be retaken by a conditional seller, even on admitted default by the buyer, without first giving the defaulting buyer notice of the intention to retake and the opportunity to first be heard on the issue in an appropriate tribunal."[8] Further, though no state official was involved, DEL. CODE ANN. tit. 5A, § 9-503 authorized this action and thus it was accomplished through state action. To support this second line of reasoning, Giglio cited the case of *Adams v. Egley*.[9]

The Bank merely argued that this was an action between two private parties pursuant to a specific agreement and thus no state action nor denial of due process was involved.

The *Giglio* court began by discussing what constitutes state action for the purpose of the fourteenth amendment. It held that state action occurred "wherever there is state participation through any arrangement, management, funds or property, and the fact that conduct is 'formally private' does not insulate it from the amendment if it is 'im-

6. Giglio v. Bank of Delaware, 307 A.2d 816, 818 (Del. Ch. 1973).

7. *See* Goldberg v. Kelly, 397 U.S. 254 (1970), (state cannot arbitrarily terminate welfare benefits without a hearing); Sniadach v. Family Finance Co., 395 U.S. 337 (1969) (must give hearing to debtor before garnishing his wages to satisfy his debt); Bell v. Burson, 402 U.S. 535 (1972) (violation of due process to suspend driver's license without notice and hearing); Fuentes v. Shevin, 407 U.S. 67 (1972) (Replevin statutes authorizing state officials to recover property covered by conditional sales contract prior to hearing stage were held unconstitutional).

8. Giglio v. Bank of Delaware, 307 A.2d 816, 818 (Del. Ch. 1973).

9. 338 F. Supp. 614 (S.D. Cal. 1972). This case stands alone and is presently on appeal.

pregnated with a governmental character.' "[10] This characterization of state action could include private action done under authority of state law.

The court next discussed the history of the right to peaceful repossession by a secured creditor. The English common law has held for almost one hundred years that where it is provided in an agreement between parties, a conditional seller might repossess the collateral upon the buyer's default by means of retaking the property wherever it was located. The seller could even use force, if necessary, as long as he did not breach the peace. This was referred to as the right of self-help and ironically was mentioned in a case cited by Giglio in support of his claim.[11]

In Oklahoma the right of self-help has deep historical roots also. The comment to OKLA. STAT. tit. 12A, § 9-503 reads: "Oklahoma has previously allowed the secured party to take possession without judicial process so long as it was done without breach of the peace."[12] Recently, the 1967 case of *Kroeger v. Ogden*[13] has upheld the right of self-help. The *Kroeger* decision held that a mortgagee has a "right practically amounting to a license" to take possession of the collateral if the chattel mortgage contains a specific provision allowing him to do so upon any default by the mortgagor.[14] The only restriction placed upon the mortgagee's taking is that it must not involve any breach of the peace. There are no restrictions concerning entry upon the mortgagor's private property or any requirements of notice. Thus the right of self-help is still alive today.

In view of the continued recognition of self-help and the specific contract rights given to the Bank in *Giglio*, the Delaware court reasoned that the Bank's use of DEL. CODE ANN. tit. 5A, § 9-503 did not constitute state action. There was no creation of a new right in the secured creditor which he would not have had but for the statute. Rather, the statute in question was merely a codification of an old

10. Giglio v. Bank of Delaware, 307 A.2d 816, 819 (Del. Ch. 1973).

11. Fuentes v. Shevin, 407 U.S. 67, 79 n.12 (1972). The court acknowledged in a footnote that "the creditor could, of course, proceed without the use of state power, through self-help, by 'distraining' the property before a judgment."

12. OKLA. STAT., tit. 12A, § 9-503 (1971). See Firebough v. Gunther, 106 Okla. 131, 233 P. 460 (1925). The comment was based upon an implied negative of the Firebough decision, in which it was held that the repossession was not peaceable and therefore was conversion. For what is deemed a breach of the peace see, Malone v. Darr, 178 Okla, 443, 62 P.2d 1254 (1937).

13. 429 P.2d 781 (Okla. 1967).

14. Kroeger v. Ogden, 429 P.2d 781, 785 (Okla. 1967).

common law. That law was summarized by the *Giglio* court as being "[I]f the parties so provide in their agreement, a secured party may privately retake his collateral upon default by private means and without the necessity of judicial action, provided he can do so peaceably."[15] The court then cited several cases which held a like opinion.[16] The challenge to the constitutionality of U.C.C. § 9-503 was thus defeated by the Delaware court.

But was it really? The court's reasoning here is very circular considering the language of U.C.C. § 9-503. The basis of the reasoning in *Giglio* rested upon the holding that U.C.C. § 9-503 merely codifies the common law. Therefore, the reasoning continued, there is no creation of a new right in the secured party and consequently no state action prohibited by the fourteenth amendment.

It is proposed that U.C.C. § 9-503 does not merely codify the common law right of self-help. The right of self-help applies only when there is a specific agreement in the contract between the parties that the secured party may take possession of the property upon default by the debtor. U.C.C. § 9-503 provides that the secured party may have this right to take possession "unless otherwise agreed"[17] between the parties. It is asserted that there is a great deal of difference between these two rights and that U.C.C. § 9-503 creates a greater right in the secured party than the right of self-help has previously established.

It appears as if U.C.C. § 9-503 only codifies the common law right of self-help when the contract involved specifically mentions the secured party's repossession rights. But what if a contract makes no mention of the secured party's rights to possession upon default? Does U.C.C. § 9-503 then create a new right to take possession in the secured party that he would not have had under the common law? If so, and the secured party takes possession of the collateral pursuant to the statute, does not such a taking constitute state action, even if done peaceably? Arguably it does, since the taking was done under au-

15. Giglio v. Bank of Delaware, 307 A.2d 816, 819 (Del. Ch. 1973).

16. See, e.g., Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972); Greene v. First Nat'l Exchange Bank, 348 F. Supp. 672 (W.D. Va. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); McCormick v. First Nat'l Bank, 332 F. Supp. 604 (S.D. Fla. 1971); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (N.J. Super. 1972); Kipp v. Coyens, 11 U.C.C. Rep. 1067 (Cal. Super. 1972); Brown v. United States Nat'l Bank, 509 P.2d 442 (Ore. 1973); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972).

17. UNIFORM COMMERCIAL CODE § 9-503 (1972).

thority of state law and not pursuant to any private agreement between the parties or common law right.

The Delaware court did not have to face this problem, nor is this situation likely to arise. In business dealings of today, a contract involving a security interest would rarely fail to include explicit provisions detailing the rights of the secured party upon the debtor's default. Nonetheless, it may not be prudent to give blanket constitutional approval to U.C.C. § 9-503.

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