



**THE ROLE OF SELF-HELP REPOSSESSION UNDER ARTICLE 9 OF THE UCC:
LESSONS FOR NIGERIA**

BY

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EXECUTIVE SUMMARY

In the history of human existence, when Law was at its nascent stage, recovery of possession from another was mainly by self help. Later many legal systems abolished self help repossession and encouraged strongly that repossession be done through legal channels except where the law otherwise permits. Today, history is repeating itself as many legal systems have begun to go back to the old concept of recovery although with some elements of restriction.

The crux of this thesis examines how in particular, the United States (US) secured transactions law under Article 9 of the Uniform Commercial Code (Hereafter: Article 9) gives the creditor the license to either pursue recovery of possession of property subject of a security interest through court means or by self help.

This thesis seeks to examine the level of success of the US self help repossession concept especially when juxtaposed with the modern day commercial realities. In order to ensure the flow of credit in the market, the creditors must be assured strongly that they wouldn't in the end lose out completely in their investments. This strong assurance may not be completely given to the creditors if the only system of recovery of the collateral when the debtor defaults is through the court actions. Litigation is notoriously very slow due to the different levels of court an aggrieved party may appeal to. In Nigeria for instance, court proceedings are very slow and creditors are scared of recovering through the courts because the subject matter of litigation might wear out tremendously in value due to countless court adjournments before the final judgment is rendered. The US self help repossession concept therefore is a recommended concept for Nigeria considering that the US economy is very viable and supports credit flow

which wouldn't be possible if the grantors of credit were not sure of recovering their investments quickly.

Over the decades Article 9 is increasingly proving successful, and many other legal systems are envious although some are still very critical about it. Nigeria for instance wishes to follow the paths of Article 9 in view of its success in the United States. But being envious and desirous of Article 9 self help provision is not the end of the story. Many other factors must be considered and dealt with if a successful legal transplant must take place. What these factors are and how they could conveniently be addressed, are the essences of this thesis.

Dedication

This work is dedicated to **Professor Tibor Tajti**, from whose lips I first heard of “Article 9 of the Uniform Commercial Code.” Owing to his seminal lectures on Secured Transactions Law, I have immensely benefitted and have positively been transformed in the mind.

ACKNOWLEDGMENT

In academics, putting one's thoughts into writing appears to be the most onerous task. Thesis writing is like soup-making, which involves the skilful addition of some ingredients to make it tasty and presentable. In my own case, the needed *ingredients* came in the forms of CEU Fellowship, financial supplements from family, esteemed CEU Professors, CEU library resources and library officials and well wishers, to mention but a few for lack of writing space. My duty of assembling these ingredients has resulted in this thesis.

I thank my Professors in the CEU Legal Studies Department for their dedication in effective teaching that stimulated my understanding to make this research possible. My special thanks to Professors Tibor Tajti, Stefan Messmann, Tibor Varady, Caterina Sganga, Csilla Kollonay and all other professors of the department. Your efforts have been extraordinary and I strongly appreciate them all.

Sometimes due to my intense study and time-consuming writing which made me missed meals from the cafeteria; Carmen Tanasie always intervened and generously shared her food with me. In times of stress and the need for consolation and encouragement I found Carmen and Rene Eno-akpa greatly helpful friends. I thank them so much.

My dearest family members have been very supportive. Their regular phone calls and emails to check on me for example, help me to surmount nostalgia for home and remain focused on the adventures and enrichments of CEU and Budapest. They all know how much space they occupy in my heart and I will always remain grateful to them.

My adorable classmates in the Legal Studies Department have all been very loving and supportive. Each of us has gained immeasurably from one another through useful interactions and exchange of ideas. Also, our regular Friday Nights' get-to-together to mark the end of a hectic week were an out-of-class settlement terrain where differing legal opinions which generated during class lectures were argued out and reconciled, making each of us progressively enlightened the year long. My wish is that this network will support each one into commendable legal careers from now onwards.

I thank the CEU Budapest Foundation that sponsored my research trip to Rome where I researched at the UNIDROIT Library. I also thank members of this great Library and also the CEU Library that provided me with all the materials I needed for the research. I also use this opportunity to thank every friend and well-wisher who has not been acknowledged here due to space. Above all I thank all members of the Central European University and George Soros for their large hearts. You all are always in my heart.

Thank you very much.
Iheme Chima Williams.

April 14, 2013.

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List of Abbreviations

Afr. LR (Comm.)	African Commercial Law Report
Article 9	Abridged reference to the Article 9 of the Uniform commercial Code
ALL NLR	All Nigerian Law Report
CAMA	Companies and Allied Matters Act 2004
CAP	Chapter
CEAL	Center for Economic Analysis of Law
CJN	Chief Justice of Nigeria
ERNLR	Eastern Region of Nigeria Law Report
JCA	Justice of Court of Appeal
JSC	Justice of the Supreme Court
LFN	Laws of the Federation of Nigeria
NWLR	Nigerian Weekly Law Report
NLR	Nigerian Law Report
NSCC	Nigerian Supreme Court Cases
PMSI	Purchase Money Security Interest
PPSA	Personal Property Security Act
SME's	Small and Medium Scale Enterprises
SCN	Supreme Court of Nigeria
UCC	Uniform Commercial Code
UNCITRAL	United Nations Commission on International Trade Law
USC	United States Code
WACA	West African Court of Appeal
WRNLR	Western Region of Nigeria Law Report

Introduction

Both commonsense and logic would reveal that individuals, partnerships and corporate moneylenders desire to recover the money they lend since they are not charity bodies. In lending, they have a choice between relying on a borrower's promise to repay and asking for something in addition to the bare promise. Most prudent lenders realize the precariousness of a bare promise: the borrower may drop dead, he may become bankrupt, or he may simply refuse to pay. Consequently most shrewd lenders insist on something to assure them that on the borrower's default they would not have lost their investment.

The difference between a thriving economy and a lame one lies on the availability of credit to those who are willing to make investments. Many writers have acknowledged that credit is the livewire of every economy¹. It therefore goes without saying that those who are willing to provide credit must be adequately protected and assured of getting back their investments². This is where the law usually must step in by providing defined rights of debtors and creditors which

¹ According to the Black's Law Dictionary (9th edition 2009) "credit" is defined as "The availability of funds either from a financial institution or under a letter of credit". El Dean believes that credit is vitally important to every economic development. He elucidated this idea more clearly in his writing. See Bahaa Ali El-Dean, *Privatization and the creation of a market based legal system: The case of Egypt*. Koninklijke Brill NV, 2002, 80. Also Obama toed this belief that credit is vitally important in every economy and in his words "... You see, the flow of credit is the lifeblood of our economy. The ability to get a loan is how you finance the purchase of everything from a home to a car to a college education; how stores stock their shelves, farms buy equipment, and businesses make payroll..." The full speech is available at http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress/ last visited on the 11th of January, 2013. Also see Chianu E; LAW OF SECURITIES FOR BANK ADVANCES (MORTGAGE OF LAND), 2ND EDITION, AMBIK PRESS, 2004. PAGE 1. Also see Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558, para 10., where the Cork Committee put it "credit is the lifeblood of the modern industrialized economy."

² Neil, B. Cohen, *Harmonizing the Law Governing Secured Credit: The Next Frontier*. 33 Tex. Int'l L.J. 173. In this article Neil made an overwhelming argument on the need to adequately protect both the creditors and the debtors through the legal framework and the ugly consequences of a failure to do so.

clearly state what the creditor may do upon the debtor's default³. US Article 9 has incorporated the concept of self help in its provisions which gives the creditor the right to seek recovery of possession by self help⁴.

The concept of self help would not make much sense in possessory pledge transactions in the sense that the creditor is already in possession of the subject-matter of the transaction and upon the debtor's default, he sells it to make good his claim. Possessory pledges subject to some exceptions have received the condemnation of many scholars, and their views are reasonably justified⁵. In possessory pledges, the creditor keeps the debtor's property which probably is being used by the debtor for production, and the debtor is not left with any property through which he could effectively utilize the loan he got from the creditor. The result is that the possessed equipment become[s] redundant in the hands of the creditor and wear[s] off easily without being utilized to generate profits. More so, the debtor is seriously hampered, and may not be able to produce enough or at all with the few property left with him. The result is that both parties are frustrated, unable to make adequate profits and the economy finally collapses.

³ Michael Paul Vanderford, *SECURED TRANSACTIONS IN ARKANSAS, BANK OF BEARDEN v. SIMPSON: LIVING WITH BOTH THE REBUTTABLE PRESUMPTION AND THE ABSOLUTE BAR*, 12. 46 Ark L. Rev. 475 where the writer examined the various options available to the secured creditor upon the debtor's default.

⁴ Section 9-609 UCC, with its subparagraphs (a)(1) and (b)(2) confirm this assertion in the sense that it licenses the creditor to take possession of the collateral upon the debtor's default albeit without the breach of peace. Also see the seminal article written by where the author intelligently discussed the creditor's right to repossess upon the debtor's default. See Eugene J. Kelly, Jr., "*Secured Party Liability for the acts of Repossessors: Exposure, Protective Steps and Ethical Responsibilities*" 1. 55 Consumer Fin. L. Q. Rep.

⁵ However certain possessory pledges still have good economic relevance. For instance, certificated securities which the debtor would not ordinarily use in the day to day production activities can be retained by the creditor without hampering the debtor's production. The worry is usually when the possessory pledge is based on a non certificated security, such that the debtor's production is hampered by the creditor's continued possession of the security. Ulrich Drobni's article sufficiently dealt with the obvious disadvantages that may accrue from a possessory pledge transaction. See Ulrich Drobni, *Secured Credit in International Insolvency Proceeding*, 33 Tex. Int'l L.J. 53.

In a non possessory pledge transaction however, the debtor is allowed to be in possession of the property which is to assist him in maximum production and profit making so as to repay the creditor with interest.⁶ In this kind of arrangement where the risk lies heavily on the side of the creditor because the debtor is in possession of both the loan and collateral, Article 9 empowers the creditor with two sets of right involving either recovering through the court or by self help upon the debtor's default⁷. The latter is the subject of our discussion, and upon the debtor's default or when the creditor reasonably perceives that the debtor might default, the creditor could choose to directly repossess the property of the debtor by self help although without the breach of peace⁸.

This restriction of recovering possession only when the peace is not breached is strongly questionable because it is quite unrealistic that a debtor would stand mute and watch the creditor or his agent take away his factor of production. It is only natural that a man would at least offer some resistance no matter how subtle when his property which sustains his livelihood is being threatened to be taken away⁹. It therefore becomes very problematic when there is no legislative line of division between breach and non breach of peace, or when such a dividing line is at best imaginary and a mere guess work by the Judges. The cases of *Williams v Ford Motor Credit Co*,

⁶ Supra note 3.

⁷ Supra note 5.

⁸ Where the creditor perceives reasonably that the debtor is on the threshold of defaulting, he may act on that reasonable belief especially where an 'insecurity clause' is inserted in the security agreement. Acts like refusing to pick phone calls after an amount is due to be paid, not replying to emails or refusing to see the creditor may reasonably trigger the creditor towards repossession.

⁹ The courts have not been helpful by not interpreting liberally what constitutes a breach of peace. For instance in *Dixon v Ford Motor Credit Co*, (391 N.E. 2d 493 497(111. App. 1979) the court said "when a creditor repossesses in disregard of the debtor's unequivocal oral protest, the repossession may be found to be in breach of peace". This conclusion is disturbing and is capable of rendering the clause useless and far from realizing its original legislative intent. In like manner, the court decided in *Ford Motor credit Co v Herring*, 27 U.C.C Rep. 1448, 267 Ark. 201 that repossession violates the breach of peace standard if the debtor applies any resistance to the creditor during repossession. Also see *Watson v Hernandez*. 347 S.W. 2d 326 (Tex. Civ. App. 1963), where the court held a breach of peace was violated when the reposessor using his superior size and strength, talked the debtor into handing over the keys at an intersection and then required him to leave the vehicle. In the above cases, the debtors resisted the creditors' repossession acts, and the courts ruled in the debtors' favor.

and *Chapa v Traciers & Associates*¹⁰ are amongst the few cases where the court ruled that there was no breach of peace during the act of repossession because in *Williams' case*, Williams was able to testify in court about the reposessor's gentility in the entire process of repossession. While in *Chapa's case*, the difficulty which courts face in defining and applying the concept of "breach of the peace" was exemplified. In *Chapa* the reposessor had toed the debtor's car without knowing that the debtor's children were inside. The court ruled that there was no breach of the peace even though the debtor may likely have experienced some emotional distress emanating from the thought that her children were abducted.

The decisions in *Williams* and *Chapa*, were amongst the few decisions where repossession was successfully done without the breach of peace;¹¹ because in many other cases, some of which have been mentioned above in footnote 9, the debtors simply put up some resistance and that was sufficient to render the repossession act void.¹²

For self help repossession to be at all meaningful, the court must approach the interpretation of "breach of peace" with some appreciable level of liberality; to **only see "breach of peace" in the light of where the creditor or his agent during the repossession applies**

¹⁰ *Williams v Ford Credit Co.* 674 F.2d 717 US Court of Appeals, Eight Circuit (1982), *Chaper v Tracier & Associates* 267 S.W. 3d 386 (Tex. Ct. App. 2008).

¹¹ The concept has really given judges some trouble to appreciate and many a judge has become philosophical in interpreting the clause. This imbalance is finally touching negatively on the economy as lenders are discouraged towards giving credit. No wonder in one paragraph of the Obama's speech referred to in footnote 2 above, Obama lamented that credit is fast becoming unavailable to citizens of the United States in these words: "*But credit has stopped flowing the way it should. Too many bad loans from the housing crisis have made their way onto the books of too many banks. With so much debt and so little confidence, these banks are now fearful of lending out any more money to households, to businesses, or to each other. When there is no lending, families can't afford to buy homes or cars. So businesses are forced to make layoffs. Our economy suffers even more, and credit dries up even further. That is why this administration is moving swiftly and aggressively to break this destructive cycle, restore confidence, and re-start lending...*"The full speech is available at http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress/ last visited on 12th of January, 2013. More cases which are akin to the decision in *Williams' case* would be discussed fully in the chapter three of this work.

¹² *Dixon V Ford Motor Credit Co*, (391 N.E. 2d 493 497(111. App. 1979).

some degree of force which may likely harm the debtor or put him into a physical danger of being hurt as held in *Harris Truck and Trailer Sales v Foote*.¹³ Not to interpret the clause this way is to plunge back to the pre Article 9 era, and creditors would sink back into discouragements and fear over their investments since almost every debtor would resist on the face of repossession.

One great lesson can however be learnt from the Williams' and Chapa's cases. In *Williams* the repossessioners whom the creditor hired went into Williams' premises by 4:30am to repossess the car, an hour they thought was probably the best time sleep was enjoyed and the debtor in her deep sleep probably would not be awakened by the noise. The reason for choosing this hour is to avoid the possible contact with the debtor who might resist the acts of the repossessioners. While in *Chapa*, it can be gleaned that courts do not usually put emotional distress of the debtor into an account while determining whether the "breach of peace" was violated¹⁴ Repossession does not authorize or shield the repossessioner and his employer from any tortious or criminal liability of burgling/trespassing into the garage of the debtor to take the car because

¹³ *Harris Truck and Trailer Sales v Foote*, 436 S.W.2d 460, where the court said that "a breach of the peace must involve some violence, or at least threat of violence." –at page 464.

This line of reasoning was also followed in [Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171, 1174 \(Ill. App. Ct. 1996\)](#), where the court said ("[W]e reject [the debtor's] invitation to define 'an unequivocal oral protest,' without more, as a breach of the peace."). It is strongly suggested by the researcher that the clause 'breach of the peace' should not be interpreted literally. Where a literal interpretation will lead to absurdity, the court should interpret by looking more inwardly to see what the real legislative intent was and what the provision was set to achieve. In this case it is not in doubt that the concept of self help was incorporated to enable grantors of credit recover their investments so as not to be discouraged in lending credits. But we have rather seen from the cases is that the courts seize every opportunity to strike the clause down through a very literal interpretation of the clause. For instance in *Morris v First National Bank & Trust; 674 F2d 717(8th Cir. 1982)* the court held that there was a breach of the peace when some other person but not the debtor resisted to the creditor's repossession.

¹⁴ It is difficult to really measure emotional distress. The breach of peace although not defined in Article 9, to my belief does not mean breach of the mind's peace. What the drafters probably mean is limited to any act leading to chaos that may result to social tension.

such an act might be interpreted as stealing and the intervening policemen might find it difficult to believe otherwise.¹⁵

Considering that this thesis focuses mainly on Article 9 transactions, as far as the US position is concerned, the properties subject to Article 9 self help repossession must meet with the definition of properties which the Article governs. For instance, Article 9 governs only the use of personal properties to be used as securities for transactions. What qualifies as a personal property however was not defined in the Article 9 and could sometime be dicey in distinguishing, apart from the most obvious distinction that a personal property is any other property that is not real or intangible.¹⁶ An example of this dilemma is the consideration of whether a mobile home is a real or a personal property. A mobile home will shift away from the precincts of Article 9 if it is considered as a real property; but the result will be different if it is considered as personal in the sense that it can be sold and repossessed by the governance of Article 9.

¹⁵ Repossessors must be extremely careful in their repossessing activities because the attitude of the courts has shown that the benefit of doubt resides in the debtor's favor. Repossessors must put on some measure of civility while repossessing because there is a thin line division between repossessing the debtor's car at night and stealing same. An unlucky reposessor might be shot or harmed by the debtor who may reasonably mistake him for a criminal. The debtor's dogs or some other security gadgets might injure the reposessor at his expense or the reposessor might be liable for other damage caused in the debtor's premises during his act of repossession. See footnotes 80 and 115 below, to read the unfortunate death stories between debtors and repossessors. Over the years, creditors who know that the acts of the repossessors affect them also following their agency relationship, insist that repossessors must repossess for instance automobiles when the debtor's car is out of his garage and parked in a public place. For a firmer understanding, see Michael W. Dunagan, REPOSSESSION ISSUES, DEFICIENCY JUDGMENTS AND BANKRUPTCY CONSIDERATIONS FOR SUB-PRIME AUTO LENDERS , 10. 49 Consumer Fin. L.Q. rep. 384.

¹⁶ Raymond T. Nimmer, *REVISED ARTICLE 9 AND INTELLECTUAL PROPERTY ASSET FINANCING* Raymond T. Nimmer 53 Me. L. Rev. 287.

Also, in the US, some personal properties are not subject to the grips of Article and therefore cannot be repossessed through self help by the creditor when the debtor defaults¹⁷. For instance under the Service Members Civil Relief Act, military men who are in active military service or their family members¹⁸ cannot lose their properties to the secured creditor except by court order, if the debtor has paid at least an installment or a deposit before engaging in the active service.¹⁹

If we shift attention to discuss self help as it relates to the Nigerian legal system, it is discernible from the cases that opinions are strongly divided. Nigeria has no statutory regulation of self help as it relates to general commercial transactions, such that what is available for discussion is the conglomeration of judicial decisions.²⁰ In one case, Aniagolu JSC stated that the laws of civilized nations have always frowned at self help because if for no other thing they engender the breaches of peace.²¹ Yet almost a decade after this famous remark, the same Judge

¹⁷ This is very well captured in Section 50 U.S.C app. Section 532(a)(2) which provides as follows: “After a service member enters military service, a contract by the service member for (a) the purchase of real property or personal property may not be rescinded or terminated for a breach of terms of the contract occurring before or during that person’s military service, nor may such property be repossessed for such breach without court order (2) This section applies only to a contract for which a deposit or installment has been paid by the service member before the service member enters military service” This provision has received judicial attentions in the following cases: In Re Burnell, 230 B.R. 309 (Bankr. E.D. Tex. 1999); Charles H. Jenkins & Co v Lewis, 259 N.C 86, 130 S.E. 2d 49 (1963)

¹⁸ The idea of family here refers to the nuclear family system including only the spouse and children of the debtor. Other relations that would have qualified as family members under the extended family system are excluded from this purview.

¹⁹ Active service under this Act includes members of the Army, Navy, Air force, Marine Corps or Coast Guard. See 50 U.S.C App. Sections 511(2)(1).

²⁰ What is currently available is an avalanche of court decisions. The major drawback has been that Nigerian judges have not been up and doing in going through previously decided cases to overrule them before rendering a judgment, and in particular as it relates to self help. In the last analysis what is available is a set of contradicting positions on self help which render great uncertainty in the commercial world. This is one of the major reasons why a statutory law must be enacted or adopted to define categorically when the right to self help may be available or not in order to restore confidence in transacting parties.

²¹ Ellochim Nig. Ltd & Ors v Mbadiwe (1986) (part 14)47 at 165. The Justice in his further lamentation against the use of self help also said “It is no doubt annoying, and more often than not, frustrating, for a landlord to watch helplessly his property in the hands of an intransigent tenant who is paying too little for his holding, or is irregular in his payment of rents or is otherwise an unsuitable tenant for the property. The temptation is very strong for the landlord to simply walk into the property and retake immediate possession. But that is precisely what the law forbids” Also during the time Nigeria was under military rule, the military Governor disobeyed the court injunctive order to refrain from taking over the property of the plaintiff. In the judgment of the court, the court vehemently

in the case of *Umeobi v Otukoya*,²² admitted that self help is lawful without overruling his previous decision. The result of this is that both debtor/defendant and creditor/plaintiff in the heat of self help repossession flags respectively either of the decisions that favors them as the reason for the self help repossession or the offered resistance.

After the decision in *Ellochim* and *Umeobi* by the same Supreme Court Justice, subsequent judges have been divided in their views, with some toeing the path of *Umeobi* while some others remain with the traditional view expressed in *Ellochim*. For instance in the Supreme Court decision in *Civil Design Construction Nig. Ltd v SCOA Nig. Ltd*, Justice Onnoghen who delivered the lead judgment condemned self help in harsh tones when he said “that even under the Common Law the respondent is in breach in that it never [sic] a court order before it repossessed the rig in issue”²³

The Nigerian Supreme Court has always battled with one serious fault, which is the fact that they hardly overrule previous decisions that contradict the current view of the court when the opportunity presents. In the end, divergent Supreme Court opinions litter the law reports and opposing parties become armed on equal footing in their masterful arguments for the lawfulness of self help or otherwise.²⁴ This attitude of the Supreme Court in failing to overrule previous contradicting cases which they decided was clearly exhibited by Bello, Chief Justice of Nigeria

condemned the act of the military Governor for taking the law into his own hands without due recourse to the court. During this time, it was in the nature of the military to disobey court orders and be violent on civilians as this case and some others would aptly show. See the case at *Ojukwu v Military Governor of Lagos State* (1985) 2 NWLR (part 110) 806.

²² (1978) 1 Law Rep of Nig 172 (SCN), where the Justice “circumstances may exist in which a person may take an extra judicial remedial action to enforce his rights and still remain within the bounds of the law” see also the case of *Nkume v Registered Trustees of the synod of the Diocese on the Niger*, (1998) 10 NWLR (pt. 570) 514 which toed this line of thought.

²³ The Judgment is available at <http://www.nigeria-law.org/Civil%20Design%20Construction%20Nigeria%20Ltd%20v%20SCOA%20Nigeria%20Limited.htm> I visited it last on the 1st of February, 2013.

²⁴ This line of discussion will be discussed more fulsomely in the chapters to come.

in the case of *Awojugbagbe Light Industries Ltd v Chinukwe*.²⁵ In *Awojugbagbe*, upon the mortgagor's default the mortgagee took possession of premises by force and arms through the use of security men and Alsatian dogs. The court held that such mode of recovery was not unlawful because the mortgagee was doing so in pursuit of his legal rights.²⁶ It is surprising that the Supreme Court did not use the opportunity in *Awojugbagbe* to overrule preceding decisions that were contradictory.

In this thesis, an effort will be made to see the possibility of harmonizing self help as contained in Article 9, and self help as we presently have in Nigeria. Since this thesis is comparative in nature, that is, examining the positions in two legal systems the use of terminologies may significantly differ. For instance "movable" and "personal", "credit" and "loan", "borrower and debtor", "creditor" and "lender", "secured party" and "secured creditor", "immovable" and "real", "security" and "collateral, etc, would be interchangeably used. Where it is reasonably believed that the reader would encounter some difficulty in appreciating the difference or otherwise, concerning a particular term, efforts would be made to provide some measure of clarity in the footnotes.²⁷

The Anatomy of the Thesis

²⁵ [1995] 4 NWLR (part 390) 379.

²⁶ Here is an excerpt of the lead judgment delivered by Bello, CJN at page 410 of the Report. "A mortgagee, like a landlord exercising his right to possess after the expiry of his tenant's lease, or his agent who entered and took possession of the mortgage property in exercise of his right under the mortgage agreement is not liable for damages for the forcible entry because the right to possess the property had become vested in the mortgagee and his agent, the receiver, and the forcible entry was done in furtherance of their rights to possession" However, earlier on in England, Lord Denning whose sympathy for the weaker contracting party was legendary said in *Quennell v Maltby*[1979] 1 App Case 414, 426 "A mortgagee will be restrained from getting possession except when it is sought bona fide and reasonably for the purpose of enforcing the security and then only subject to such conditions as the court thinks fit to impose (underlining mine)..." Lord Denning's view was followed five years after in the Supreme Court decision of *Badejo v Sawe* [1984] NSCC 481, 482, but Bello CJN chose to follow a different part.

²⁷ The writer however strongly believes that no much difficulty may be encountered since both systems under reference are of common law heritage and have some appreciable similarities in their market economic systems. However, attempt would be made to clear any doubt that might arise in the use of terms as the writer has promised.

This thesis is divided into five chapters. Chapter one will seek to examine the US approach to secured transactions, involving mainly a brief statement of how the UCC came about. Considering that the examination of the entire Article 9 is very much beyond the scope of this work, part of chapter one will only be dedicated to discussing self help as it's contained in Article 9 and the role of self help within the framework of modern secured transactions. Lastly under chapter one, the researcher will look at how secured transactions law has become a crucial and an integral part of the legal system of countries with market based economies and then conclude by looking at the self help in general particularly as it relates to the enforcement of the secured creditor's right under Article 9.

In chapter two, the thesis will look at Default and what constitutes it under Article 9. The relationship between debtor and creditor begins to get sour from the moment of default by the debtor, and therefore must be carefully analyzed considering that it wasn't defined in Article 9. The position in Nigeria as it concerns default in legal mortgage transactions would be analyzed as an example of how the concept of default is viewed. In this chapter efforts would be made to look at the remedies available to an Article 9 creditor, and a legal mortgagee in Nigeria.

Next is chapter three which will be devoted to discussing self-help repossession by the secured creditor and the so-called "without breach of the peace" concept. Self -help repossession companies will also be discussed to see how institutionalized they have become in the United States. Finally in chapter three, the issue of the constitutionality of self-help under the United States constitution would be examined. The chapter will conclude by briefly looking at the Nigerian position of self help repossession by the secured party after the debtor's default.

Chapter four will look at the Post repossession avenues for the secured creditor including strict foreclosure under Article 9. The issue of disposition under Article 9 including the concept of ‘commercial reasonableness’ standard which the secured party must apply in the disposition of the collateral would be examined. It will conclude by looking at the liability of a secured party for the non compliance of disposing under commercial reasonableness standard.

Finally in chapter five, the thesis will examine self help law in Nigeria as it relates to secured transactions. It will consider the possibility of transplanting Article 9 self help provision to Nigeria and why Article 9 self-help and not the English equivalent should be preferred. In general the thesis will look at the possible challenges that might be encountered in the transplanting process and how best to address them. The thesis will also discuss possible advantages the adoption of the Article 9 self help would yield to the Nigeria’s economy and finally opinions and conclusion will follow to mark the end of the thesis.

Limitations of the Research

No research is easy, and putting one’s thoughts into writing to perfectly reflect as his mind conceives the facts is incontrovertibly difficult, and probably the most difficult in academics. This difficulty is double-fold when the undertaken research is comparative in nature. Comparing two legal systems as we have in this research could be challenging in the sense that the writer must make a considerable effort to ensure that there is clarity in the use of terminologies. Terminologies when misused can backfire and inspire a strong resistance towards understanding the researched work by an average reader. Even though both Nigeria and the United States share a common heritage of common law in their legal systems, the United States

has far more developed laws and this implies that legal terminologies of both countries would be significantly different. Another challenge that the writer would encounter is that part of the research would examine the Nigeria's position, and not too many Nigerian text materials are available for consult in the area of secured transactions law. The paucity of the relevant text materials is made worse by the fact that the researcher is not currently in Nigeria and may not have the same access to the needed materials as he would if he were in Nigeria.

Chapter One- The Importance of Credit in a Market Economy

1.1. Credit and Secured Transactions Law: The Livewires of Countries with Market Economies

Every successful market economy owes its success to credit, and this success is only fully achieved when every segment of the economy has sufficient supply of credit.²⁸ All forms of business organization require credit facility in order to thrive and expand new lines of businesses. In the case of corporations their financial needs are supplied by borrowing from lending institutions, and cannot be funded from the personal savings of the owners or directors because of the corporate personality principle- the owners are detached from the corporation and the corporation would have to borrow in its own name and pledge its assets as collateral.²⁹

²⁸ No economy can move meaningfully forward if those who desire to invest their time and skills do not obtain enough credit to run the businesses. Medium and small scale businesses are usually the utmost beneficiaries in a credit friendly society because they constitute the bulk owners of the businesses in many economies. Therefore many economies continue to strive towards providing adequate legal framework that encourage lending. Credit in this sense means “a contractual agreement in which a borrower receives something of value now and agrees to repay the lender at some date in the future, generally with interest...” Read more at: <http://www.investopedia.com/terms/c/credit.asp#ixzz2J5V9CZIZ>. The English Consumer Credit Act 1974, s. 9(1) defines credit as including a “cash loan, and any other form of financial accommodation” cited in Tibor Tajti, Comparative Secured Transactions Law (Akademiai Kiado 2002), p.65, footnote 156. For further insight, please see James A, Wilcox, *The Increasing Importance of Credit Unions in Small Business Lending*, at page 7. The article is available at <http://www.sba.gov/sites/default/files/files/rs387tot.pdf> last visited on 14/01/2013 last visited on the 14th of January, 2013. Also in some developing countries, where the legal systems have not brazen up with the challenges of providing adequate legal framework that encourages lending, like the writer’s country(Nigeria) for example, some forms of generating credit have been recognized. In Nigeria, apart from the fact that some medium and small businesses are financed by community and micro finance banks, “Esusu” which involves the regular contribution by members of a group who take the bulk of everyone’s contribution in the group albeit rotationally to sponsor themselves in individual project is in existence. In Cameroon, the same concept of ESUSU is known as “Njangi”, and in Ghana it is known as “Nanemei Akpee”. For more insight in Esusu, Njangi, and Nanemei Akpee, see the article of Gladson, I. Nwanna, *Rural Financial Markets in West Africa: Roles, Experiences, Constraints and Prospects for Promoting Rural Development*, at page 16, available at <http://msuweb.montclair.edu/~lebelp/CERAFRM060Nwanna1996.pdf> last visited on the 15th of January, 2013.

²⁹ On the authority of *Salomon v Salomon & Co Ltd* [1897] AC 22, which established the doctrine of corporate personality, that corporations are distinct from their owners, and the owners cannot generally be liable for the debts incurred by the corporation. This means that even large corporations borrow in order to expand their scope of business, and in doing so the corporation secures the loan with its assets which creditors of the corporation fall back

Furthermore, the economy thrives when those who are willing to invest obtain credit at a reasonably low rate.³⁰ The result of making credit available is that investors at various levels are able to put their skills into gainful actions, maximize profits, create employments and pay taxes. This definitely boosts the economy, and it is vitally important therefore, that a well functioning legal framework on secured transactions must make it possible for various categories of personal property to be used as security so as to conveniently suit the Small and Medium Scales investors (SMEs).³¹

How this level of progress can be achieved is exactly why any type of personal property should qualify to be used as collateral since the lenders of credit must require something at least

on when the corporation becomes insolvent. Salomon was an early English decision. See *Berkley v Third Railway Avenue* 244 N.Y. 602, 155 N.E. 914 (1927) for the United States equivalent.

³⁰ David K. Hales, *REALLOCATING CREDIT: AN ECONOMIC ANALYSIS OF THE NEW CRA REGULATION*, 15 Ann. Rev. Banking L. 571, In this article the author examines how the Community Reinvestment Act (the CRA) strongly encourages bankers to loan to low income individuals; individuals that the banking industry perceives as higher risk borrowers. However, the CRA has received vehement criticisms. In the Prepared Statement of James M. Culberson, Jr., on behalf of the American Bankers Association, before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Banking and Financial Services U.S. House of Representatives, Federal Information Systems Corporation, Mar. 9, 1995, available in LEXIS, Fednew Library, News File; Culberson said “[...] performance has to be geared to the underlying reality of the community” and forcing banks to lend to groups that it normally would not lend to is not realistic as “no amount of lending can build the infrastructure that a community needs to survive, much less prosper [...] Allocation of credit by governmental fiat rather than by the marketplace will inevitably lead to inefficient use of resources and will, in the end, not help the communities for which they were intended.” Also See Jonathan R. Macey & Geoffrey P. Miller, The Community Reinvestment Act: An Economic Analysis, 79 Va. L. Rev. 291, 295 (1993) (stating that the CRA encourages banks to make unprofitable investments and deters transactions that would otherwise improve the efficiency and solvency of the nation's banking system).

³¹ What is here meant by “various categories of personal property” are for instance: (a) **inventory goods**: goods in the debtor’s possession for sale or lease, but not for production; example: cars, articles in the shelves (b) **consumer goods**: Things bought for personal, or household use; example: furniture, electronics (c) **equipment**: property used as a factor of production by the debtor but not for sale ; example: lathes, and so on. The clause also includes intangible properties like Receivables which are intangible and are also futuristic in the sense that they refer to the future income which the debtor will earn. See generally UCC 9-102 (44) for an elaborate list. Also see the paper presented by Robert K. Weiler to the Onondaga County Bar Association (September 2006) titled “*BASICS OF CREATION AND PERFECTION OF SECURITY INTERESTS UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE*” precisely at page 5; available at http://www.gslaw.com/resources/pdf/Article%209_Weiler.pdf last visited on the 17th of January, 2013.

to back up the borrower's bare promise to repay, lest the lender's investment may crumble if the borrower reneges in fulfilling his promise. Again, if lenders must be encouraged to give out credit at all, and at a reasonably low interest rate, they must have some kind of assurance that they would recover their investment when the debtor defaults. This assurance to the creditors can only be meaningful if the country makes available a suitable legal framework that can assure both parties a fair play.³²

It is commonsensical that when the risk of non repayment is low, the cost of lending is as well low, and vice versa. Lenders are more disposed to lend if they are allowed to have *in rem* rights or security interest³³ over the collateral provided by the borrower. This doubles the creditor's chances of recovery from the debtor upon default, since the creditor can pursue to

³² This is exactly what Article 9 has achieved by balancing the equation. On one side of the equation, which favors the debtors, Article 9 amongst other innovations abolished the Benedict Rule which invalidated non possessory pledge transactions and encouraged policing of the debtor by the creditor, by introducing the filing system; By making every imaginable personal property, intangibles and fixtures to be capable of being used as collaterals which now greatly favor the SMEs. On the other side of the equation which favors the creditors, Article 9 provides the creditor with two sets of enforcement rights; hence the use of self help or court means to recover collateral. For the secured creditors' rights, see Section 9-609 UCC. Professor Sir Roy Goode said "Security in personal property has become enormously important both within a country and in relation to cross-border transactions. Without an adequate legal regime for personal property security rights, it is almost impossible for a national economy to develop." See R Goode, *Security in Cross-Border Transactions*. (1998) 33 Texas ILJ 47, referred to in Iwan Davies, *The reform of English personal property security law: functionalism and Article 9 of the Uniform Commercial Code*, (2004) 24 LS 295.

³³ The researcher promised in the introductory part of this thesis to make efforts to reconcile any ambiguity which may arise in the use of terms. Here however the researcher believes that a reader of this work who has no legal background may not fully appreciate the difference between "security interest" and "security" within the context of this thesis. Both are not synonymous and in essence "security interest" is an *in rem* right on the debtor's personal property, features, or intangibles which entitles the creditor to take hold of the affected properties upon the debtor's default of his obligation to repay. This kind of right is the exact opposite of *rights in personam* which is a right the creditor has over the "body" of the debtor towards satisfying his (the creditor's) claim. Ready examples are injunctions because they directly affect the debtor to do or refrain from doing an act. On the other hand, a "security" within the context of Article 9 is synonymous with "collateral" which is the personal property, fixtures or intangibles which the debtor used in securing the credit advanced to him by the creditor such that upon the debtor's default, the creditor could lay hold of the security to satisfy his claim. See generally Section 1-201 (b) (35) UCC for a firmer grasp of the terminology.

recover the property and when the recovered property is unable to satisfy the creditor's claim, he can sue the debtor for the deficient difference.³⁴

Now that the researcher has raised the issue of securing a transaction with all manner of personal properties in the last paragraph, maybe a few more sentences should be dedicated towards explaining what was really meant. Most advanced economies recognize that both tangible and movable properties could be used to secure a transaction, and this recognition favors mostly those business entities that ordinarily do not have sufficient value of real property to secure their loans but are skilful and willing to do business; and can use their inventory and receivables as security.³⁵ Receivables are future-acquired in nature and if utilized as security, it could provide the debtor the opportunity to do business with his property and be able to invest the acquired loan in his existing factor of production, while at the same time satisfying the loan from his future incomes. This right of the creditor over the debtor's receivables is also capable of being assigned.³⁶ This however can only be possible if there is a legal framework that can recognize and enforce this nature of secured transaction.

³⁴ Nearly always creditors do not resist the temptation of hastily or fraudulently selling the debtor's property at a very gross undervalue which did not reflect the open market value of the property; and then turn around to ask the debtor for the deficient difference. The debtor who has been financially stripped due to bankruptcy or other reasons which led to his inability to repay usually would resist the deficiency claim. However, where the court perceives that the creditor did not act in good faith in the disposition of the debtor's property, the prayer for the deficient difference would most likely be refused. The creditor who wants a favorable judgment must therefore approach the court with clean hands since whoever wants equity must first do equity; by complying with the commercial reasonableness rule. Captain Darryll K. Jones, captured vividly in his article how the disposition of the courts has always been as it relates to creditors' deficiency claims. He equally examined several cases in this regard, and the researcher feels that a consult of Captain's article would generate a firmer understanding. In that case, see: Captain Darryll K. Jones, COMMON SENSE AND ARTICLE 9: A UNIFORM APPROACH TO AUTOMOBILE REPOSSESSIONS; 22. 1988-DEC Army Law. 8, especially footnote 40.

³⁵ Supra, footnote 30.

³⁶ "The Assignment of receivables is an important financing technique the regulation of which varies from legal system to legal system. In December 2001, the Convention on the Assignment of Receivables in International Trade

1.2. Self Help Enforcement of the Secured Creditor's Right: An Overview

If every debtor were to each time honor his part of the transaction through a timeous repayment of the loan, there probably wouldn't be any need to discuss recovery of possession by self help at all. However, this is not always the case, because nearly always, debtors dishonor promises and do not pay back to the creditors as at when due. Commercial transactions would not come to a halt merely because the debtors' have a propensity to default in payment, rather legal systems over years have tried to offer a strong antidote to checkmate this aspect of debtors' behavior in order that confidence in doing business is not totally eroded.

The traditional wisdom in many legal systems is that self help repossession is not lawful because it contradicts in the first place the core underlining reason of establishing courts. If creditors were allowed to take laws into their own hands without stringent restrictions, no one

made by the United Nations Commission on International Trade (the UNCITRAL Convention) was adopted by the General Assembly. The UNCITRAL Convention was prepared for the purposes of establishing a model for the modernization of domestic assignment law and as a first substantive step towards the overall harmonization of the law of assignment of receivables in international trade. The key objective of the Convention is to facilitate the cross-border flow of credit and to lower the cost of credit through harmonization of rules that govern assignments which will lead to greater predictability and certainty in the assignment of receivables contracts” curled from the article written by N. Orkun Akseli, *The UNCITRAL Convention on the Assignment of Receivables in International Trade, assignment of future receivables and Turkish law*; I.B.L.J. 2006, 6, 767-787. The writer is personally overwhelmed by the degree of interest which a famous writer has demonstrated in the area of Receivables Financing. His name is Spiros Bazinas and he has been one of the brains behind many of the United Nations Conventions as it relates to international business transactions. He is currently willing to assist Nigeria, which is the writer's country, towards acceding to the *United Nations Convention on the Assignment of Receivables in International Trade*. See the letter he wrote to Mr. Ekedede in furtherance to this assistance; available at <http://nigeria.ceal.org/docs/> last visited on the 20th of January, 2012. Spiros is well published and he remains a strong authority in the area of Receivables Financing. For further reading of his works; see generally, Spiros Bazinas, *Key Policy Issues of the United Nations Convention on the Assignment of Receivables in International Trade*, 11 *Tul. J. Int'l & Comp. L.* 275 (2003); Spiros Bazinas, *An International Legal Regime For Receivables Financing: UNCITRAL's Contribution*, 8 *Duke J. Comp. & Int'l L.* 315 (1998); Spiros Bazinas, *Lowering the Cost of Credit: the Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade*, 9 *Tul. J. Int'l & Comp. L.* 259 (2001); Spiros Bazinas, *UNCITRAL's Contribution to the Unification of Receivables Financing Law: The United Nations Convention on the Assignment of Receivables in International Trade*, *Uniform L. Rev.* 49 (2002).

would know exactly how they would each time exercise this right, and the society would become what Thomas Hobbes described as the State of Nature where life was short, nasty and brutish.³⁷

A fear against the occurrence of the Hobbesian theory is probably why some judges are reluctant in giving their full blessings on the use of self help to recover collaterals by interpreting the ‘breach of the peace’ requirement very strictly with benefit of doubt residing always with the debtor.³⁸

However Article 9 empowers the secured creditor to choose between recovering possession by self help or through court means.³⁹ Recovering through the court means could be costly⁴⁰ because the secured creditor would have to hire legal services to pursue his claim up to the time the court delivers judgment. Most times, before the judgment is delivered in the creditor’s favor usually after a long time of the commencement of action, the collateral might have depreciated in market value if the collateral is outdated in technology, or might have been seriously tampered with or removed out of the creditor’s reach and thereby making the

³⁷ Hobbes says that the State of Nature is a hypothetical state of affairs existing prior to the formulation of 'society' (which arises with the signing of the hypothetical 'Social Contract'). In the State of Nature, Hobbes thinks everyone acts selfishly. He calls it a war of all against all, and life in the State of Nature is 'solitary, poor, nasty, brutish and short'. See http://wiki.answers.com/Q/What_is_state_of_nature_according_to_Thomas_Hobbes last visited on the 21st of January, 2013.

³⁸ For instance even when Article 9 provided for the use of self help but “without the breach of peace”, many judges construe it strictly to favor the debtors in the circumstances. This assertion is evident from the long line of reported cases. See, *Ford Motor credit Co v Herring*, 27 U.C.C Rep. 1448, 267 Ark. 201. Also see *Watson v Hernandez*, 347 S.W. 2d 326 (Tex. Civ. App. 1963), where the court held a breach of peace was violated when the reposessor using his mere superior size and strength, talked the debtor into handing over the keys at an intersection and then required him to leave the vehicle.

³⁹ See Section 9-609(a) UCC.

⁴⁰ Especially when compared with the value of the property in question, it is against commonsense for instance that the creditor uses the court means to recover access to a property which ordinarily worth less than the legal services fees incurred in the process of recovery; unless the creditor has some kind of motive which can only be satisfied by laying hold of the collateral.

satisfaction of the creditor's judgment difficult to realize. In view of these reasons, creditors may prefer to fall back to their right of repossession by self help as a more attractive channel. Self help repossession is as well not without costs on the side of the creditor considering that the creditor may want to hire independent contractors⁴¹ so as to stay out of any civil or criminal liability arising from the illegal act[s] perpetuated during their repossession⁴². So what most creditors do is to first appeal to the debtor to voluntarily return the collateral while at the same time reminds the debtor of his right to under Article 9 to repossess by self help. Voluntary surrender of the property is cost efficient to both parties, and the creditor considering this might waive his right to insist on asking the debtor to make up the deficient value if the collateral was finally sold and not enough money was realized to offset the creditor's claim.

Also, voluntary surrender is capable of suggesting that the debtor has a good heart, and that his inability to make a timeous repayment was not exactly fraudulent. This might preserve the existing relationship of both parties and thereby making future transactions possible. It is therefore the writer's opinion that the right to self help should be administered sparingly usually after due consideration of all key factors; namely: when recovery through court would prove nonsensical especially when the value of the collateral would depreciate drastically before

⁴¹ Especially when compared with the value of the property in question, it is against commonsense for instance that the creditor uses the court means to recover access to a property which ordinarily worth less than the legal services fees incurred in the process of recovery; unless the creditor has some kind of motive which can only be satisfied by laying hold of the collateral. However see the subhead: 3.2.2., below to see if a hired reposessor can make his employer liable through his repossession act.

⁴² Where the creditor does the repossession himself or through another who is not an independent contractor, the creditor is exposed to civil or criminal liability if he or his agent oversteps the lawful boundary during repossession on the doctrine of vicarious liability. Hence the legal maxim: *whoever acts through another acts in person*. However the trend since 1970 has been that the secured party is held liable for the act of the reposessor probably due to the 'deeper pocket' principle. However see a masterful discussion of this in the subhead: 3.2.2. , below.

judgment is delivered due to socio-economic factors⁴³, and when the debtor is merely buying time during the out-of-court negotiation by both parties, and the creditor reasonably senses an imminent fraud on the part of the debtor.

Under the Nigerian law there is no statutory equivalent of Article 9 that authorizes the use of self help by the secured creditor. What is available on self help is scattered into case law, and sometimes harmonization is difficult considering that the courts' opinions about self help are very varied. However all of this would be fulsomely discussed in the chapter three of this thesis.

⁴³ A change in technology can make equipment outdated and low-priced. This is possible if the creditor allows the debtor to be in possession of the collateral for too long or where the creditor opted to recover through court means and is waiting for the court's final judgment.

Chapter Two

“Default” under the Secured Transactions Laws of Nigeria and the United States

2.1 Default under Article 9

It is the primary anticipation of every lender interested in making profits out of his investment that the debtor repays the loan timely with interest. It is this legitimate motive that makes lenders to carry out background checks⁴⁴ to ensure that the debtor is not credit unworthy.⁴⁵ Where the debtor is not credit worthy, the lender is usually very reluctant to advance a credit to him except in cases where the lender chose not to act in good faith.⁴⁶ However, considering the fact that debtors sometimes default in the repayment of loans due to so many reasons, astute lenders usually require the debtor from the outset of the transaction to provide collateral to back up his bare promise to repay. Having a security interest right on the collateral is what distinguishes a secured party from a non secured one. It is based on this right that the secured party proceeds to ‘pounce’ on the collateral to make good his claim upon the debtor’s default.

The process of recovering the collateral by the secured party in a secured transaction is ignited by the debtor’s default in repayment of the loan as stipulated by the security agreement.

⁴⁴ Background checks here refer to the acts of the lender in making inquiries about the prospective borrower to ascertain his/her past business dealings with other lenders. Where it comes to the knowledge of the lender that the prospective borrower has previously defaulted to repay a borrowed loan given by other lenders, the lender may not extend any credit to the borrower since he stands a high risk of losing his investment.

⁴⁵ Being credit worthy refers to the potential ability of the borrower of credit to repay the loan on or before the due date.

⁴⁶ Some lenders have bad motives and do not actually want the debtor to repay on the due date so that they can ‘pounce’ on the collateral. This usually happens where the value of the collateral far more outweighs the loan.

However instances may exist where the secured party especially upon agreement with the debtor, makes collections against certain types of collaterals without necessarily waiting for the debtor to be in default. Such instances are where the security interest is created on payment intangibles, chattel paper, promissory notes and sale of accounts. The most probable reason for this kind of arrangement is that the transaction *ab initio* is regarded as a sale of the asset to the secured party which gives him the right to make such collections irrespective of whether or not a default on the part of the debtor has occurred.⁴⁷

The definition of ‘default’ or a clue of what might constitute it is nowhere found in Article 9. Instead what constitutes a default was left for the parties to stipulate in their agreement⁴⁸ based on the freedom of contract rule in Section 1-103(a) (2) UCC, which must however comply with the standards of good faith and reasonableness contained further in Section 1-304 UCC and 1-205 UCC respectively.

In cases where the parties did not agree as to what may constitute a default, courts have not found it any difficult in proffering a solution which in essence anchors on the traditional perception that ‘default’ occurs when the debtor fails to repay as at when due. This view is in line with Gilmore’s first perspective as to what might constitute a default, when he considered the mandatory aspect of default to be the debtor’s failure to make timely a repayment or interest. The second approach according to Gilmore actually gives the parties a leeway to designate as

⁴⁷ See Linda J. Rusch, Stephen L. Sepinuck, *Problems and Material on Secured Transactions* (Thomson West, 2006), p. 127 cited in Nwogu, Tochi Obinna, *Secured Transactions Laws of Nigeria and Cameroon Through the Lens of Article 9*, being an SJD Thesis submitted to CEU.

⁴⁸ See official comment 3 to the Article 9-601. It provides that “this Article leaves to the agreement of the parties the circumstances giving rise to default.”

default whatever they like. In the words of Gilmore, “[t]he principal, basic, classical event of default is the debtor’s failure to make timely payments of principal or interest. Since paying on time is of the essence of the debtor’s obligation, his failure to do so leaves him in default whether the security agreement spells the matter out or not. Beyond that point default is, within reason, a matter of contract and can be best defined as being whatever the security agreement says it is.”⁴⁹

One writer has identified the following acts as acts of default which are amongst the frequently seen in any security agreement. In the words of this writer they include:

“(1) failure to pay the secured obligation (or any installment) when due, or to perform any promise made in the security agreement; (2) breach of any warranty made in the security agreement or any concurrently executed document (such as a loan agreement); (3) any misrepresentation in either the security agreement or any other document delivered by or on behalf of the debtor to the secured party in the course of financing; (4) any event accelerating the maturity of other indebtedness of the debtor under another undertaking; (5) creation of any encumbrance upon the collateral;” (6) any levy, judicial seizure or attachment of the collateral; (7) any uninsured loss or theft of or damage to the collateral; (8) death or dissolution of the debtor; and (9) insolvency of the debtor, or his or its subjection to a receivership, an assignment for the benefit of creditors or a bankruptcy proceeding.”⁵⁰

From the above examples, it is obvious that what might constitute a default supersedes the mere inability of the debtor to make a timely payment to the secured party. This was probably why

⁴⁹ See Grant Gilmore, *Security Interest in Personal Property* (The Lawbook Exchange Ltd, Union New Jersey Reprint 1999), p. 1193 cited in Nwogu, Tochi Obinna supra note 47.

⁵⁰ William B. Davenport, *Default, Enforcement and Remedies Under Revised Article 9 of the Uniform Commercial Code*, 7 Val. U. L. Rev. 265 (1973). Available at: <http://scholar.valpo.edu/vulr/vol7/iss3/1> last visited on the 2nd of February, 2013.

Article 9 left the task to the parties to a security agreement to decide on their own what a default may mean considering that no straight jacket definition would fit all parties.

Since the future is fluid and knowing all acts of default in a transaction may not easily be known in advance, what seasoned draftsmen drafting in favor of the secured party usually do is to capitalize on the “insecurity clause” contained in Section 2A-401 UCC as a shorthand formula of covering all the events of default and even more, that might arise in the future after the conclusion of a security agreement. What this “insecurity clause” means in essence is that the secured party may stipulate that he possesses the right under the security agreement to declare the debtor as having defaulted and may in fact proceed to enforce his right of recovery of collateral if he (the secured party) feels insecure about the debtor at any point in time. However this right to declare the debtor as having defaulted based on insecure feelings must be exercised in good faith and reasonableness⁵¹. Where the insecure feeling is based on a flimsy excuse or adjudged to have been exercised on bad faith calculated to ‘injure’ the debtor, the secured party may likely be held liable in damages.⁵²

⁵¹ It seems that the concept of good faith which has more inclination with the Bible (E.g, Matthew 22:39, states that a person must love his neighbor as himself) crept into legal systems during the early centuries when law and morals were strongly intertwined. However acting upon good faith in the context of this research refers to an objective construction of the debtor’s act which in the eyes of a reasonable man is sufficient to give a signal that the debtor is on the threshold of default. An example may be where the debtor stops to pick the creditor’s phone calls or reply emails sent by the creditor. Or where the creditor who visits the debtor’s place of business to see the latter is repeatedly being told by the latter’s secretary that he is not available to either speak or see the creditor. For a thorough discussion on the concept of good faith, see the article written by Susan A. Wegner, “*Section 1-208: “Good Faith” and the Need for a Uniform Standard*”, 73 Marq. L. Rev. 639 (1990). Available at: <http://scholarship.law.marquette.edu/mulr/vol73/iss4/552> last visited on the 19th of January, 2013.

⁵² “*See, e.g., Parks v. Phillips*, 71 Nev. 313, 289 P.2d 1053 (1955) (upholding verdict for buyer under a conditional sales contract where he claimed damages arising out of repossession of his vehicle by the seller 30 days before any default in payments); *compare Roy v. Goings*, 96 Ill. 361 (1880) (holding that the foreclosure of a mortgage on crops by a mortgagee under an insecurity clause was not in good faith where the mortgagee claimed insecurity because the mortgage was defective and inoperative), *and Furlong v. Cox*, 77 Ill. 293 (1875) (holding that the mortgagor and mortgagee could not have intended to give the latter an uncontrolled option to repossess collateral under a mortgage with an insecurity clause where the collateral was property indispensable to the carrying on of a business)” taken from footnote 14 of William B. Davenport, *Default, Enforcement and Remedies Under Revised Article 9 of the Uniform Commercial Code*, supra note 50.

The practice of inserting an “insecurity clause” in a security agreement shares a similarity with that of inserting an “acceleration clause” in agreements securing money claims in the sense that both are ways by which the right of the secured party to proceed against the debtor for the recovery of debts quickly ripens to be exercised before the actual due date. The Black's Law Dictionary⁵³ defines an acceleration clause as “a loan-agreement provision that requires the debtor to pay off the balance sooner than the due date if some specified event occurs, such as failure to pay an installment or to maintain insurance”. The main difference between an ‘acceleration clause’ and an ‘insecurity clause’ is that while in the former, the clause is triggered off by the debtor’s actual default in fulfilling a part of his full obligation, the latter is triggered off by the secured party’s insecure feeling of the debtor prior to the debtor’s actual default before the due date.

In security agreement embodying an ‘acceleration clause’, the default of the debtor to pay an installment warns the secured party of the debtor’s level of faithfulness in the installment payments and he may based on this warning signal call for the remaining installments to be paid before the actual due date. This practice saves the secured party the high expenses he would have incurred if he were to wait and only sues the debtor each time the debtor defaults in any of the installments.⁵⁴

⁵³ (9th edition, 2009.).

⁵⁴ See Schwartz, Allan & Scott, Robert E; COMMERCIAL TRANSACTIONS, (Foundation Press 1982), p. 816. It is good not to forget that in an installment contract which does not contain an ‘acceleration clause’, the debtor can only be sued for the defaulted installment and not the entire payment obligation in the contract. For example if X is to pay Y the sum of \$12,000 by equal installments beginning from January of a particular year to December of that year; if X defaults in February, Y can only sue him for the February installment and nothing more. Therefore the possibility exists that Y can sue X 11 times if the latter chooses to default each month. This situation would be so expensive for X. This ugly situation in installment contracts is what the “acceleration clause” has cured by making it possible for Y to call for the entire money after X’s default in February.

It is interesting to note that Article 9 did not leave parties to a security agreement entirely alone to deal with the issue of default. Even though the definition of ‘default’ was not provided by Article 9, remedies which follow upon the occurrence of what the parties did identify as default were adequately provided although the parties are at liberty to add to the list of these provided remedies.

2.2 The Remedies of a Secured Party under Article 9 after the Debtor’s Default

Recall that Article 9 did not define what ‘default’ means. Essentially, it means whatever the parties have designated it to mean under the security agreement. Article 9 did however provide four basic remedies which the secured party may utilize to recover his money from the debtor when the latter defaults. These remedies are: (1) the right to take possession of the collateral, or without removal, the right to render the equipment unusable and to dispose the collateral on the debtor’s premises,⁵⁵ (2) the right to retain the collateral,⁵⁶ (3) the right to sell or dispose the collateral,⁵⁷ and (4) an action for the debt.⁵⁸

All of the above rights which accrue to the secured party due to a default by the debtor are cumulative in nature⁵⁹ and a secured party can pursue all of them concurrently against a debtor. The decision in *Philips v. Ball and Hunt Enterprises Inc.*⁶⁰ was a judicial confirmation of the stipulation under UCC section 9-501 [now UCC section 9-601(c)] which states that the remedies available to a secured party upon the default of the debtor are cumulative in nature. In

⁵⁵ See Section 9-609 UCC.

⁵⁶ See generally section 9-620 UCC, particularly Official Comment 2 in Thomson and Reuters, Uniform Commercial Code, 2009-2010 edition, p.1074.

⁵⁷ See Section 9-610 UCC.

⁵⁸ See Section 9-601(a) UCC.

⁵⁹ See Section 9-601 (c) UCC.

⁶⁰ (WDVa 1996) 933 FSupp. 1290. Cited in Nwogu, Tochi Obinna supra note 47, p. 261.

the words of the court “The creditor was not barred from asserting his rights under the security agreement because the claim was reduced to judgment. UCC section 9-501 makes clear that the secured party is not barred by any doctrine from asserting his rights under the security agreement after a judgment has been obtained because the creditor’s rights and remedies are cumulative.”

One note of warning may be sounded. The secured party in exercising his cumulative rights against the debtor must not turn it into a windfall such that he obtains from the debtor more than he is being owed. Where the secured party obtains more than he is being owed from the debtor, he is under a duty to account for the excess and make any restitution to the debtor so as to avoid an unjust enrichment. Even the official comment 5 to section 9-601 UCC provides as follows: “...Moreover, permitting the simultaneous exercise of remedies under subsection (c) does not override any non-UCC law, including the law of tort and statutes regulating collection of debts, under which the simultaneous exercise of remedies in a particular case constitutes abusive behavior or harassment giving rise to liability.”⁶¹ All this goes to show that the cumulative rights of the secured party in a security agreement are meant to serve as a shield and not a sword.⁶²

So far Article 9 has really made it easier for secured parties in a security agreement to effectively enforce their rights against debtors through the remedial provisions. This provides strengthened confidence amongst lenders, who are now more willing to advance credits knowing full well that they wouldn’t lose out their investments when the debtor defaults. The good news is that the economy booms as a result.

⁶¹ Thomson and Reuters, Uniform Commercial Code, 2009-2010 edition, p. 1045.

⁶² In other words, the secured party must not use it arbitrarily and must be guided by the concept of good faith throughout the exercise of his cumulative rights against the debtor.

2.3 Default and Its Implications under the Nigerian Law

It is difficult to come across the definition of ‘default’ or all the instances that might constitute it in any Nigerian statute that governs secured transactions. This is because parties are at liberty to choose what may constitute a default under a security agreement. The Black’s Law Dictionary (supra) however provides a general guideline as to what ‘default’ means as “The omission or failure to perform a legal or contractual duty; especially the failure to pay a debt when due.”

In Nigeria, the remedies that accrue to a secured party upon the debtor’s default are determined largely by the nature of the transaction. Remedies vary depending on if the secured party is a fixed chargee, floating chargee, a legal mortgagee or an equitable mortgagee. All of this nature of transactions and their concomitant remedies upon the debtor’s default will not be discussed in detail here except that of the legal mortgagee. I now turn to the remedies of a legal mortgagee in Nigeria when the mortgagor defaults.

2.4 The Remedies available to a Legal Mortgagee upon the Mortgagor’s Default in Nigeria

A legal mortgagee in Nigeria has two remedial rights against the mortgagor upon the latter’s default in payment, namely, the right to sell the collateral without recourse to the court and the right to recover the debt through a court action.⁶³ Incontrovertibly, the mortgagee’s right to sell without recourse to the court is the most potent of his remedies because it is the easiest manner he realizes his money without going through all the delays that attach to a recovery by a

⁶³ *Union Bank of Nigeria Plc v Olori Motors Co. Ltd.* [1998] 5 NWLR (part 554) 652.

court action⁶⁴. On the other hand, an equitable mortgagee must obtain a court's order before he is able to sell the mortgaged property.⁶⁵

Section 19 of the Covenancing and Law of Property Act 1881 (CLPA) which is equivalent to section 123(1) (i) of the Property and Conveyancing Law (PCL) reads as follows: “A mortgagee, where the mortgage is made by deed⁶⁶ has a power, when the mortgage money has become due, to sell the mortgaged property”. Two things could be gleaned from the above section. First is that the legal mortgagee must wait until the due date of repayment has passed and the mortgagor was unable to pay. Second, the clause “when the mortgage money has become due” was interpreted by Lord Hanworth in the case of *Payne v Cardiff Rural Council*⁶⁷ to also mean a situation in which a part of the debt is due especially in cases of mortgage agreements where the parties agreed that the mortgagor pays the debt in installments.

With regards to payment by installments, the Nigerian Supreme Court has given a decision that automatically inserts the “acceleration clause” in every agreement that allows the debtor/mortgagor to repay by installments. Thus in *Nigerian Housing Development Society Ltd. v*

⁶⁴ See Chianu, E, Law of Securities for Bank Advances (Mortgage of Land), supra note 1, P. 107.

⁶⁵ Where the mortgage is equitable, for instance by deposit of title deed to the mortgagee, the mortgagee must first obtain an order of court in order to validly sell the collateral. Michelin J in *Adjei v Dabanka* (1930) WACA 63, 67., confirmed this in his dictum “it was essential for the equitable mortgagee to have come to the court to obtain an order of foreclosure before a sale of the mortgaged property could have been legally effected. Not having done so, the sale was an invalid sale, and amounts in law to a nullity.”

⁶⁶ It is a common knowledge in law that requires no authority that any mortgage created by deed is deemed to be a legal mortgage. However, Black's Law Dictionary (9th edition 2009) defines a ‘deed’ as “...at common law, any written instrument that is signed, sealed, and delivered and that conveys some legal interest in property.”

⁶⁷ [1932] 1 KB 251-2. A non Nigerian trained lawyer that reads this thesis might probably be worried about the continued relevance of some of the cases and statutes mentioned here that were respectively decided or promulgated before the 20th century. However, they are still relevant today in Nigeria because Nigeria adopted all the statutes in force in England on or before January 1st 1900 as statutes of General Application. It therefore follows that the English court decisions based on these statutes of general application are still relevant under the Nigerian law.

Mumuni,⁶⁸ the principal and interests were being repaid by monthly installments. The mortgagee covenanted not to call in for the principal sum provided the mortgagor was faithful in repaying the monthly installment. When the mortgagor defaulted, the mortgagee attempted to sell, and this triggered the mortgagor to pay all the arrears and the next installment due. Notwithstanding this effort, the mortgagee went ahead to sell the collateral. The Supreme Court held *inter alia* that the right to repay by installments is lost as soon as one default is made. In other words, once a default occurs in installment payment, the secured party can call for the entire debt to be paid, or deem it as a default of the obligation to repay and proceed to exercise his available remedies.

It is interesting to note that the remedies of a legal mortgagee in Nigeria are cumulative just like Article 9 provided under UCC section 9-601(c). Hence, a legal mortgagee can concurrently seek to recover his money against the mortgagor by both his right to sell the collateral without recourse to the court and by a court action- That is, the mortgagee may institute a debt recovery action against the mortgagor and while the action is pending, he may go ahead to sell the property without been regarded as having abused the court process. This cumulative nature of the legal mortgagee's rights was given a judicial approval in the Court of Appeal case of *Union Bank of Nigeria plc v Olori Motors Co. Ltd.*⁶⁹ In this case; the legal mortgagee obtained a judgment against the mortgagor/respondent for the sum due on the respondent's loan and checking accounts. The respondent/mortgagor however appealed and while his motion for stay of execution was yet to be argued, the legal mortgagee went ahead to sell the collateral relying on his right to sell without recourse to the court which the mortgage deed also conferred on him. The respondent/mortgagor's attempt to set the sale aside on the

⁶⁸ 1977] Nig Comm. LR 241, SC.

⁶⁹ Supra at note 63, p.663.

ground that it was an abuse of court process failed. Mohammed JCA stated that the legal mortgagee's right to sell the mortgaged property is distinct from his right to recover same through a court action. In other words both can be utilized either separately or simultaneously provided the secured party acts in good faith and does not turn the opportunity into a windfall.

2.5 Is the Mortgagor entitled to a Notice before the Legal Mortgagee exercises His Right to Sell?

Last to be discussed under the remedies of a legal mortgagee upon the mortgagor's default is whether the latter is entitled to be informed before a sale of the mortgaged property is carried out. The answer is neither a strict 'No' nor 'Yes'. Instead what is usually first considered is whether the mortgage deed provided any such right in favor of the mortgagor or not.⁷⁰

In practice, the legal mortgagee is the one who drafts the mortgage agreement. This is because he is in a stronger position being that he is the one advancing the loan and needs to adequately ensure that he wouldn't lose his investment when the mortgagor defaults. Usually legal mortgagees do not fail to include that the mortgagor contracted to waive his right to be notified regarding any sale of the collateral upon his default. Where this is the case, the mortgagor cannot seek to invalidate the sale of a mortgaged property carried out without his notice,⁷¹ except there is the existence of a fiduciary relationship between the parties.⁷²

⁷⁰ This practice rests on the freedom of contract rule. The choice of the parties should generally prevail in contractual dealings.

⁷¹ *Oluku v Niyekemi* (1976) 6 ECSLR 181. Even the Court of Appeals, per Salami, JCA has held in *Gbadamosi v. Kabo Travels Ltd* (2000) 8 N. W. L. R. pt. 668 p. 243, that once a mortgage debt is due, even though the stipulated notice to sell the collateral was not given by the mortgagee to the mortgagor, a buyer of such collateral from the mortgagee will acquire a valid title.

Where the mortgage deed is silent on the issue of notice, both the CLPA and the PCL provide that the mortgagee must not exercise his right to sell the collateral until “a notice requiring payment of the mortgage money has been served on the mortgagor and default has been made in payment of the mortgage money, or of part thereof, for three months after such service”,⁷³

In sum, the issue of the mortgagor’s right to be notified before the collateral is sold as contained in the above laws could be contracted out to render the statutory provisions ineffective. However where the mortgage agreement is silent about notice, the statutory provisions would be fully activated against the mortgagee who sold without a prior notice to the mortgagor.

⁷² For instance in *Cockburn v Edwards* [1881] 18 Ch D 449, the mortgagee was the solicitor to the mortgagor/client. The mortgage agreement did not embody any ‘notice clause’ in favor of the mortgagor before the mortgagee could sell. The court considered such a sale by the mortgagee without a notice to the mortgagor as improper and void because both parties were in a fiduciary relationship and the mortgagee ought to have duly notified the mortgagor before the sale.

⁷³ Section 20(1) of CLPA and section 125(1) PCL. Note that CLPA is a statute of general application as explained in footnote 65 supra. The statutes of general application apply to the Eastern and Northern parts of Nigeria including some parts of Lagos State. While the PCL applies to the Western part of Nigeria including the former Bendel states of Edo and Delta, but does not apply in Lagos state.

Chapter Three

Self-help Repossession

3.1. Self-Help Repossession under Article 9

You would recall that earlier on in chapter two, the remedies available to a secured party under Article 9 were pointed out.⁷⁴ Under this chapter, much of the attention will be on the remedy available to a secured party to exercise, to recover collateral after the debtor's default as stipulated under section 9-609 UCC. Under this section, the secured party may take possession of the collateral or without removal, render the equipment unusable and dispose the collateral on the debtor's premises.⁷⁵

Self help repossession is one of the avenues by which a secured party can recover collateral after the debtor's default without the assistance of court.⁷⁶ This avenue is frequently being used by a secured party in recovering collateral after the debtor's default because it is faster and obviates the rigorous processes involved in seeking to recover collateral by a court action.⁷⁷ Once a default has occurred, the relationship between the secured party and the debtor

⁷⁴ See supra notes 55-58.

⁷⁵ See section 9-609 (a) (1) UCC.

⁷⁶ See section 9-609 (b) (2) UCC.

⁷⁷ For instance according to Rule 3 of the Federal Rules of Civil Procedure, a civil action is commenced by filing a complaint with the court. This requires the defendant to file his statement of defence. Also where a matter commences at the lowest court of a state a dissatisfied party has the right to appeal to the state's apex court. "The specific structure of court systems will vary from state to state, but every state court operates on a number of levels, usually differentiated either by the type of matter being heard or the amount of money that is at stake. Using the state of Massachusetts as an example, the structure of its state court system is as follows from highest to lowest level: Massachusetts Supreme Judicial Court-Massachusetts Appeals Court-Massachusetts Trial Courts - Second Level: consisting of the Superior Court (which hears civil matters where over \$25,000 is at issue; and handles most felony cases), the Housing Court, and the Land Court. Massachusetts Trial Courts - First Level: consisting of the District Court (which hears civil matters where under \$25,000 is at issue; handles all criminal misdemeanors, and certain lower-level felonies; also includes small claims and traffic courts), the Juvenile Court, and the Probate and Family Court." Taken from this website: <http://litigation.findlaw.com/legal-system/state-courts-in-depth.html> last visited on the 10th of February, 2013.

begins to speedily get soured. At this time, especially where the secured party opts to recover through the court action, most debtors would capitalize on the slowness of litigation to fine-tune their plans towards hiding the collateral or keeping it out of the secured party's reach.⁷⁸

Recovering by self help at such a time therefore, is the best form of counteracting a debtor's dubious plans before they are hatched. Again, where the collateral is perishable and would speedily depreciate in value before the outcome of the litigation, self help repossession remains the most potent avenue by which the secured party could ensure against his huge or total loss.⁷⁹

However records have shown that this method of recovery (self help) may constitute a lot of danger against those who opt for it, if proper care is not utilized in the recovery process.⁸⁰ In

⁷⁸A secured party who has opted to use the court to recover possession must approach the court to obtain an Injunction, preferably a Mareva Injunction which is an equitable remedy. The essence of this is to restrain the debtor from removing the asset from the reach of the debtor or the court's jurisdiction, until the matter is determined in court. The secured party however may be asked by the court to satisfy some conditions which include but not limited to depositing some amount which would be forfeited if the matter turns out to be frivolous and abuse of court process. For more discussion on Mareva Injunctions, see Tibor Tajti, Comparative Secured Transactions Law, supra note 28, pp. 250-252.

⁷⁹ Goods like canned tomatoes, juices, milk, etc, which may serve as the debtor's inventory may be used to secure a loan under Article 9. If that be the case, the best thing to do by the secured party may not be to seize and keep those goods through the court's assistance until judgment is determined as he would if the collateral for instance was a motor vehicle or a lathe. In the case of canned tomatoes, juice, etc, their shelf lives are limited and a secured party must act fast to turn them into cash or else they might expire in his hands and he would lose out totally.

⁸⁰ consider this story which was reported by NBC News in 2009: "...Alone in his mobile home off a winding dirt road, Jimmy Tanks heard a commotion at 2:30 a.m. just outside his bedroom window: Somebody was messing with his car. The 67-year-old railroad retiree grabbed a gun, walked out the back door and confronted not a thief but a repo man and two helpers trying to tow off the Chrysler Sebring. Shots were fired, and Tanks wound up dead, a bullet in his chest. The man who came to repossess the car, Kenneth Alvin Smith, is awaiting trial on a murder charge in a state considered a Wild West territory even by the standards of an industry that's largely unregulated nationally. Since Tanks' death last June, two other repo men from the same company Smith worked for were shot, one fatally..." The full story is available at: http://www.nbcnews.com/id/29427734/#.UQ_hLme4y5c last visited on the 11th of February, 2013.

exercising the remedy of repossession⁸¹ by self help the secured party may choose to do it himself or may engage the services of a reposessor to act on his behalf.⁸²

3.2. Liability of the Secured Party for the acts of the Independent Contractor

3.2.1. Introduction

From the case law perspective, courts across the US have insisted that where a secured party engages the service of a reposessor who acts independently, such a secured party is not shielded against liability for the acts of the reposessor if the latter breaches the peace or causes injury to the debtor during repossession. The courts in other words mean that the secured party cannot rely on the long established doctrine that an employer is generally not liable for the acts

⁸¹ A good repossession clause usually takes this form “After an Event of Default has occurred and is continuing, the Secured Party shall, without any other notice to or demand upon the debtor, thereafter have in any jurisdiction in which enforcement hereof is sought, in addition to all other rights and remedies, the rights and remedies of a secured party under the Uniform Commercial Code of a state or any other relevant jurisdiction and any additional rights and remedies as may be provided by applicable law, including the right to take possession of the collateral, and for that purpose the Secured Party may, so far as the Debtor can give authority therefore, enter upon any premises on which the collateral may be situated and remove the same therefrom. The Secured Party may in its discretion require the Debtor to assemble all or any part of the Collateral at such location or locations within the jurisdiction(s) of the Debtor’s principal office(s) or at such other location or locations as the Secured Party may reasonably designate. Unless the Collateral is perishable or threatens to decline speedily in value or is a type customarily sold on a recognized market, the Secured Party shall give to the Debtor at least ten days prior written notice of the time and place of any public sale of Collateral or of the time after which any private sale or any other intended disposition is to be made. The debtor hereby acknowledges that ten Business days prior written notice of such sale or sales shall be reasonable notice. In addition the Debtor waives any and all rights that it may have to a judicial hearing in advance of the enforcement of any of the Secured Party’s rights and remedies hereunder, including, without limitation, the Secured Party’s right after an Event of default has occurred and is continuing to take immediate possession of the Collateral and to exercise its rights and remedies with respect thereto.” See Cindy J. Chernuchin, (ed.), *Forms Under Article 9 of the UCC*, Uniform Commercial Code Committee, (American Bar Association Publication, 2nd ed., 2009). p.63.

⁸² See official comment 3 to section 9-609 UCC in *Uniform Commercial Code*, Thomson Reuters, 2009. p. 1054, which suggests that courts should hold a secured party vicariously liable for the act of a hired reposessor. This means that a hired reposessor notwithstanding the fact the he acts on his own discretion towards the best way to execute the repossession can make the secured party liable through his acts. This reasoning has been followed in a long line of cases. See subheads 3.2.2 and 3.2.3 below.

of the independent contractor whom he has employed.⁸³ Instead, as an exception, such a secured party is vicariously liable for the acts of an independent contractor/repossessor because according to the courts, the right of the secured party contemplated under section 9-609 UCC is non delegable. All this is exemplified in the following cases which are hereunder discussed.

3.2.2. Holding the Secured Party liable for the act of the Independent Contractor: State Supreme Court Decisions

In *General Finance Corp. v. Smith*,⁸⁴ the debtor sued the secured creditor and sought for damages because of the wrongful repossession of the truck which served as collateral in the security agreement. The Supreme Court of Alabama affirmed the Jury's findings and awarded damages to the debtor. The court posited that the secured creditor was liable for the wrongful repossession carried out by the reposessor even though the latter was a hired independent contractor. TORBERT, Chief Justice concurring with the lead judgment captured the mood of the court in these words: "...I agree that the defendant creditor is liable for the wrongful acts of the independent contractor in repossessing in a non-peaceful manner because a creditor has a non-delegable duty to repossess the collateral in a peaceful manner..."⁸⁵

Next is *Mbank El Paso N.A v. Sanchez*,⁸⁶ In this case the bank hired the service of an independent contractor (El Paso Recovery Service) to repossess Sanchez's automobile because of her default in payment. Two men belonging to the independent contractor went to Sanchez's

⁸³ RESTATEMENT 2d OF TORTS, section 409 (1965).

⁸⁴ 505 So. 2d 1045 (Ala. 1987).

⁸⁵ Ibid, at 505.

⁸⁶ 836 S.W.2d 151 (Tex. 1992).

premises and hooked the car to a tow-van. Sanchez protested and demanded them to cease action and leave her premises but this fell on deaf ears. Before the men could tow the car into the street, Sanchez jumped into the car, locked the doors and refused to leave. The men nevertheless towed the car at a high speed rate with Sanchez inside, and parked it at their repossession yard which was fenced. They also locked the gate of the fence. Sanchez remained in the repossession yard, where a dog was let loose to guard the yard, until she was later rescued by her husband and the police.

Sanchez filed a suit against Mbank, alleging that it was responsible for the wrongful act of the independent contractor who did not repossess the automobile peacefully. The Mbank moved for a summary judgment arguing that El Paso Recovery Service was an independent contractor and the bank therefore was not liable for the acts of El Paso Recovery Service. The trial court granted summary judgment in favor of MBank. The court of appeals reversed the decision, and the Supreme Court of Texas affirmed the holding of the court of appeals that the secured party's right to repossess peacefully is non delegable and the secured party was therefore liable for the independent contractor's act of non peaceful recovery of the automobile.

Lastly, in *Williamson v Fowler Toyota, Inc.*,⁸⁷ a plaintiff/automobile repairer who was given a car to repair sued the defendant/dealer to recover for damages incurred when an independent contractor employed by the defendant broke the plaintiff's lock and chain and trespassed onto the latter's premises to repossess a car. The defendant claim of \$45 being actual damages was granted. Also punitive damages of \$15,000 was awarded in favor of the plaintiff and this was approved by the Supreme Court of Oklahoma. The court reasoned that the applicable law imposed a non delegable duty on the secured party to refrain from breaching the

⁸⁷ 956 P.2d 858 (Okla. 1998).

peace while repossessing the secured collateral, and on that ground, the secured party is liable even though the wrongful act was actually done by a hired independent contractor.

3.2.3. Holding the Secured Party liable for the act of the Independent Contractor: State Appellate Court Decisions

The decisions of the Supreme Courts no doubt have tremendous effects on the lower courts. The researcher has included this subheading to show that the lower courts have also been towing the line of the apex courts to hold that the secured party's right to repossess collateral is non delegable; and that the delegation of this right does not shield him from liability for damages incurred by his delegate. Thus, in *Nichols v. Metropolitan Bank*⁸⁸, the second appellant borrowed the sum of \$10,342.22 from the Metropolitan Bank to buy a car which he gave to his daughter- the first appellant. After the second appellant defaulted in the timely repayment of the loan, the Bank employed the services of R. J Control [R.J] to repossess the automobile.

One afternoon, while the first appellant had parked in her driveway, an employee of the R.J reached into the car, forcefully collected the keys from the first appellant's hand, and repossessed the automobile, leaving the first appellant with a bruised wrist that caused her to lose some days of work. The Minnesota Court of Appeal held that the Mbank being the secured party in this case had the non delegable duty to repossess the collateral without breaching the peace. And having employed R.J to do the repossession, the bank was not shielded from liability against any damages incurred by the R.J's non-peaceful repossession.

⁸⁸ 435 N.W.2d 637 (Minn. App. 1989).

Similarly in *Sammons v. Broward Bank*⁸⁹, while the debtors, a married couple (the two appellees) was in the church, the repossessioners slashed the tires of the collateral vehicle which the debtors did not notice until they had driven off. After they had driven off, the repossessioners pursued them, and accused them of attempting to run over them. The husband (the first appellee) who was driving the collateral vehicle was arrested by the police and was charged for aggravated assault. The first appellee was later discharged and acquitted. The couple then brought an action against the secured party (the Broward Bank) for not repossessing peacefully. The Florida Court of Appeals reversed the summary judgment that was in favor of the secured party and held that the secured party had the non delegable duty to repossess the collateral peacefully and would therefore be liable for the act of the repossessioners who had breached the peace while repossessing the collateral.

Lastly, in *Robinson v Citicorp National Services, Inc*⁹⁰ the appellant's husband died of a heart attack after the deceased had unsuccessfully told the employees of M & M who were attempting to repossess the collateral vehicle to get off the property and leave the premises. While the debate was going on between the M&M employees and the deceased, the latter suffered a heart attack and died. The appellant brought an action against the respondent for wrongful death, breach of the peace and trespass. The Missouri Court of Appeals reversed the summary judgment for the secured party and held that the secured party's duty to repossess

⁸⁹ 599 So. 2d 1018 (Fla. App. 1992); see also *Nixon v. Halpin*, 620 So. 2d 796 (Fla. App. 1993), where the court held that a "...Party which held security interest in motor vehicle could not delegate its duty of peaceful possession to independent contractor, who repossessed vehicle upon debtor's alleged default, and, thereby, avoid liability for injuries caused to debtor's friend when he and debtor resisted; if secured party had not already peacefully removed vehicle when debtor objected, then its continuation with attempt at repossession was no longer peaceable and without breach of the peace and it then faced liability when its independent contractor caused injury".

⁹⁰ 921 S.W.2d 52 (Mo. App. 1996).

peacefully is non delegable and the secured party must therefore be liable for the acts of the M&M employees.

In the forgoing discussion, a lot of reference has been made to this clause, **“without breach of the peace”**. It is evident from the cases that the implication of its non observance by the secured party during repossession was that the repossession acts became null and void and the secured party in some cases became liable for damages sustained by the debtors. It is to this clause that the researcher now turns to examine in detail.

3.2.4. “Without breach of the peace” standard

The secured party’s right under section 9-609 (a) 1 & 2 of the UCC to repossess collateral after the debtor has defaulted was seriously qualified by section 9-609 (b) (2) which mandates the secured party to carry out the repossession without breach of the peace. Article 9 however did not give a definition of what “breach of the peace” means and left it for the courts to determine based on circumstances. Charles Evans Hughes, the two-time Supreme Court Justice of the United States once said “We are under a Constitution, but the Constitution is what the Judges say it is”⁹¹ This statement confirms the great liberty that Judges have towards statutory interpretations and this liberty to the researcher’s view has been *over exercised* in respect of Article 9’s “without breach of the peace” concept (hereafter: the clause). Today, the clause has been quite recondite and fluid in its meaning. It’s meaning at any one time, depends on how the

⁹¹ See http://c250.columbia.edu/c250_celebrates/remarkable_columbians/charles_hughes.html last visited on the 11th of February, 2013.

Judge perceives the facts of a particular situation and how emotional he is about them; such that no one can say for sure from the cases what the clause exactly means.

The best way according to the researcher's view on how a discussion about the clause can best hold, is to discuss on case by case basis what the Judges have considered it to mean, and on that basis reach out to a conclusion. The followings cases have been carefully selected to reflect the minds of Judges as it relates to the clause over a period of nearly four decades.⁹² For ease of discussion, the line of cases are divided into two groups, namely; **instances where the courts ruled that the clause was breached**, and other **instances where the courts ruled that the clause was not breached** with cases of both groups having almost similar facts.

3.2.4.1. Instances where the “clause” was breached

In 1970, the Supreme Court of Ohio held in *Morris v. National Bank*⁹³ that the repossession of a lawnmower by the secured party's agents after the debtor's son confronted them to stop efforts towards repossessing the collateral constituted a breach of the peace and trespass. Similarly in 1979, the Appellate Court of Illinois, First District, Second Division held in *Dixon v Ford Motor Credit Co*,⁹⁴ that “when a creditor repossesses in disregard of the debtor's unequivocal oral protest, the repossession may be found to be in breach of the peace”. This means that words alone, which express one's disagreement over the reposessor's act are sufficient to constitute a violation of the clause if the reposessor disregards them and goes ahead

⁹² *Morris v National Bank's* case is arguably one of the earliest decisions that discussed the meaning of the clause and was decided in 1970. *Chapa v Tracia & Associates* is quite recent, having been decided in 2008. From 1970-2008 is a period of 38 years.

⁹³ Supra note 13, p.617.

⁹⁴ Supra note 9, p. 497.

to repossess. Also, in *Martin v Dorn Equip. Co*⁹⁵ the court held that a reposessor would breach the clause if it goes into a restricted area owned by the debtor without the latter's prior consent to repossess the collateral. In this case the reposessor removed the collateral from the ranch by using a bolt cutter to dismantle the lock.⁹⁶

Lastly under this heading, one case, namely *Mckee v State*,⁹⁷ although does not involve repossession of collateral and does not have a direct concern to Article 9 repossession, however gives a little clue as to what the clause might mean. In this case, a fight erupted between some religious members of the Jehovah Witnesses and some people who attacked them on the street during their preaching activity. Here the court gave an insight of what might constitute a breach of the clause when it said, quoting the 8th Ruling Case Law, which defines breach of the peace as:

“A violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence or tending to provoke or excite others to break the peace... By ‘peace’ as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the right of all persons in political society. It is, so to speak, that invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted. It is not necessary that the peace be actually

⁹⁵ 821 P2d 1025, 1026 (Mont. 1991).

⁹⁶ These facts are similar to those in *Williamson v Fowler, Inc.* (supra note 86), where the court awarded an exemplary damages of \$15,000 against the defendant because the hired reposessor repossessed the collateral automobile which was parked in the garage of the plaintiff by cutting the lock and chain which secured the garage.

⁹⁷ 75 Okla.Crim. 390, 132 P.2d 173.

broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required.”⁹⁸

However, *McKee* was partly discussed here to only provide an insight as to how the clause might be viewed and does not directly fall into our analysis for two reasons. First it was decided in 1942 which predates Article 9 and second, it was decided in the light of criminal law.

3.2.4.2. Instances where the “clause” was not breached

In *Radge v. Peoples Bank*,⁹⁹ Radge’s financial debt to the Bank became due and the Bank sought to protect its interest by repossessing two of the collaterals which served as part of the security. The Bank engaged the services of Seattle Recovery Services, Inc., (SRS) to recover the collaterals. At about 5 a.m on May 23, 1985, two SRS tow vans retrieved the cars from Radge's driveway. No confrontation or verbal exchange took place between the repossessors and the debtor during the exercise. It was also in evidence that a man was seen at the front door of Radge’s house during the repossession but he did not protest in any way. Radge alleged that due to the proximity of his bedroom to where the repossession act was taking place, the noise caused a “tremendous ruckus” which awakened him, causing him to leap out of bed and sustain some serious injuries which caused him partial paralysis. He contended further that considering that his house was in a remote and quiet residential area, the act of the repossessors broke the peace and therefore rendered the repossession null and void.

⁹⁸ page 284, Section 305.

⁹⁹ 173, 767 P2D 949.

Having considered the facts thoroughly, the court said, “So long as the law permits automobiles to be repossessed from residential property, it is reasonable to allow the repossession to occur in the early morning hours. At that hour, a confrontation with the debtor is likely avoided, and the debtor is not subjected to the humiliation of having his or her automobile repossessed from a public place. Moreover, the business community must be given some latitude to pursue reasonable methods of collecting debts even though such methods often might result in some inconvenience or embarrassment to the debtor.”

Also in *Oaklawn Bank v. Baldwin*¹⁰⁰, the court held for the bank, stating that the reposessor who acted for the bank did not breach the peace when he repossessed the automobile in the dead of the night. In the words of the court, “There was no trespass or violation of law by repossession of truck from owner's driveway in the absence of evidence that reposessor entered any gates, doors, or other barricades to reach the truck and in view of fact that there was no confrontation with the owner.” But the question one would readily ask is whether proof that the reposessor entered the gates or any barricade to repossess is necessary in order to prove trespass when it was evident that the car was parked in the debtor’s enclosed compound and it is self evident that the reposessor could only have repossessed the car by entering unto the debtor’s enclosed compound. In the researcher’s opinion, whenever a matter is self evident, it does not require any evidence in order to be proved, and the reposessor in this case should have been held liable for trespass at least.

Again, in *Global Casting Industry, Inc v Daley-Hodkin Corp.*¹⁰¹, the security agreement between the debtor and the Bank read as follows: “Bank shall have the rights and remedies of a

¹⁰⁰ 289 Ark. 79, 709 S.W.2d 91.

¹⁰¹ N.Y.S.2d 453 (Sup. Ct. 1980).

secured party when a debtor is in default under a security agreement as provided under the Uniform Commercial Code, and it shall be then lawful for, and Debtor hereby authorizes and empowers Bank, with the aid and assistance of any person, to enter upon the premises, or such other place as the goods may be found and take possession and carry away the goods without process of law ...”[underlining mine]. It was based on this clause in the security agreement that the court had this to say:

“The short answer to it is that there was no breach of the peace ... The classic definition of breach of the peace is ‘a disturbance of public order by an act of violence, or by an act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community’ ... Thus, when in the course of repossession, the conditional vendee received a black eye, it was a question for the jury whether a breach of the peace had occurred ... Here, however, the bank's employees entered by use of a key, unauthorizedly obtained. Such an entry, the assignor's consent aside, would constitute a breaking, but it is at least questionable whether in view of the consent to entry set forth in the security agreement (and to which the assignee took subject) the acts of the bank's employees could be held to be a breaking ...But, breaking or not, there was nothing in what they did that disturbed public order by any act of violence, caused consternation or alarm, or disturbed the peace and quiet of the community. Nor was the use of a key to open the door an act likely to produce violence ... Under the circumstances that existed during the times the bank's employees entered the premises, there was as a matter of law no breach of the peace...” [Underlining mine].¹⁰²

¹⁰² Ibid 453.

In *Trapa v Tracier Associates*,¹⁰³ the court held that the reposessor who drove the car without realizing that the debtor's children were inside did not breach the peace and the emotional distress which was caused to the debtor as a result cannot attract any liability to the secured party. In the words of the court: "Repossession agent, who removed an apparently unoccupied vehicle from a public street when the driver was not present, did not commit a "breach of the peace" under statute allowing secured creditors to take possession of collateral upon default without judicial process...though children of defaulting debtor were in the car at the time vehicle was removed; agent was unaware of children's presence in the vehicle, did not behave violently or threaten physical injury to anyone, and he immediately ceased any attempt to repossess the vehicle and drove the children back home upon discovering their presence"

Lastly under this heading, the case of *Williams v Ford Motor Credit Co*,¹⁰⁴ would be examined. In this case, Ms. Cathy Williams, was a divorcee and the automobile which was repossessed was given to her by the Divorce Court which instructed her former husband to continue to make payment towards offsetting the debt which the automobile secured in favor of Ford Motor Credit Co.(FMCC). Williams' former husband defaulted in payment and consented that the car be repossessed. At about 4:30 a.m, the FMCC employees went into the unenclosed driveway of Williams, hooked the collateral automobile up and towed it away. While they were still not far away, Williams came out having been awakened by the noise and hollered at them. They stopped and informed her that the vehicle was being repossessed on behalf of FMCC, and upon Williams' request, they handed her the documents which were inside the automobile. In court Williams testified that the repossessors were gentle throughout the process and did not threaten or harm her in any way. The court held that based on the facts; there was no breach of

¹⁰³ Supra note 10, p.267.

¹⁰⁴ Supra note 10, p.674.

the peace. It further said “Appellees deserve something less than commendation for the taking during the night time sleeping hours, but it is clear that viewing the facts in the light most favorable to Williams, the taking was a legal repossession under the laws of the State of Arkansas. The evidence does not support the verdict of the jury. FMCC is entitled to judgment notwithstanding the verdict.”

Having discussed some court decisions spanning over a period of thirty eight years, from the decisions of the court in *Morris (supra)* in 1970 to that of *Chapa (supra)* in 2008, one can figure out smoothly a trend of inconsistencies that the courts have battled with over the interpretation of the clause. It is not the researcher’s intention to go over the cases again in order to pinpoint the inconsistencies. However, it would be interesting to share with the reader these two directly opposite decisions that were reached in respect of the clause. In *Watson v Hernandez*¹⁰⁵ the plaintiff and her sister testified in the court that the reason they gave the defendant/reposessor the car keys was because they were afraid of his body size and feared that they might be hurt if they provoked him. On this basis essentially, the court held that the peace was breached. Meanwhile in *Harris Truck and Trailer Sales v Foote*,¹⁰⁶ the court said that “a breach of the peace must involve some violence, or at least threat of violence.” This view of the court in *Harris* was also followed in *Teeter Motor Co. v. First National Bank of Hot Springs*,¹⁰⁷ where the court said that the disregard of an unequivocal oral protest by the debtor does not constitute a breach of the clause. In the words of the court: “We reject the debtor's invitation to define ‘an unequivocal oral protest,’ without more, as a breach of the peace.” Meanwhile, the

¹⁰⁵ Supra note 9, p.347.

¹⁰⁶ Supra note 13, p. 464.

¹⁰⁷ 260 Ark. 764, 543 S.W.2d 938.

court's view in *Teeter* contradicts the view expressed in *Dixon v Ford Motor Credit Co*,¹⁰⁸ where the court said that “when a creditor repossesses in disregard of the debtor’s unequivocal oral protest, the repossession may be found to be in breach of the peace”.

The disharmonies that exist amongst the various court decisions make the clause quite recondite and it becomes difficult for Attorneys to advise their clients as to the exact limits of their actions during repossession of collaterals. Courts therefore must interpret this clause very liberally with any benefit of doubt residing always with the creditor/reposessor. This is commonsensical and in essence captures the legislative intent towards the clause which is to allow the lenders of credit to recover their money each time, so that the economy would not crumble while trying to over protect the debtors.

3.2.4.3. Repossession Companies- independent contractors?

Essentially, “Repossession is generally used to refer to a financial institution taking back an object that was either used as collateral or rented or leased in a transaction. This is usually done in accordance with a purchase contract or credit contract, in which the consumer agrees that the seller may repossess the object if the signers are past the grace period (generally for prime lenders the critical number is 30 days late making [sic] an installment payment but can vary based on how many payments have already been made, the length of the business relationship, reason why past due, etc.).”¹⁰⁹ A secured party who wishes to repossess the collateral in the debtor’s possession can choose to either institute an action, recover by self help or do so

¹⁰⁸ Supra note 9, p. 497.

¹⁰⁹ Collected this description of what repossession is from <http://www.quickrepo.com/about-repossession/what-is-repossession.htm> last visited on the 10th of February, 2013.

simultaneously since the two rights are cumulative.¹¹⁰ Where the secured party chooses to recover by self help, he must do so without breaching the peace.¹¹¹ From the case law perspective which has been copiously discussed above,¹¹² it was seen that repossession of collateral from the debtor is fraught with a lot of technicalities which almost always render the act null and void with damages sometimes.

In a large number of the cases that have been reported concerning repossession, the secured parties have always been financial institutions, say the banks. In the nascent stage of Article 9 self help repossession, banks and other financial institutions were using their employees to repossess collateral which endangered the employees' safeties,¹¹³ and also made the financial institution vicariously liable because of the direct principal and agent relationship. Also, the employees of banks are not trained specially for repossession acts, and this yielded unpleasant results as they were not always able to cross the 'Rubicon'.¹¹⁴ Over the years, secured parties have seen the dire need to use more qualified hands to recover collaterals and this has caused an

¹¹⁰ See Section 9-609 (b) (1) and (2) UCC. These rights are cumulative in nature. See Section 9-601 (c) UCC.

¹¹¹ See Section 9-609(b) (2) UCC.

¹¹² See the cases discussed under the subheads above titled "Instances where the 'clause' was breached" and "Instances where the 'clause' was not breached."

¹¹³ "While it was once the norm for banks, finance companies, and other secured parties to use their own employees or poorly-trained part-timers to grab the collateral, the majority of repossessions are now carried out by trained professionals who go out of their way to avoid violence." Quotation taken from the article written by Robert M. Lloyd, "*WRONGFUL REPOSSESSION IN TENNESSEE*", 65 Tenn. L. Rev. 761. Also in *Manis v. Haun*, No. 03A01-9505-CH-00154, 1996 Tenn. App. LEXIS 20 (Tenn. Ct. App. Jan. 12, 1996, a pawnshop owner had used his employee to carry out repossession and the employer was held liable. Although one doubts if the result would have been different if the pawnshop owner hired an independent contractor. However, even if the result would be same, an employer may be liable to pay huge compensation to his employee who sustains an injury while carrying out the employer's instruction[s].

¹¹⁴ "Rubicon" in the sense it was used here refers to the technicalities posed by the "without breach of the peace" clause set forth under section 9-609) which made it uneasy for those who are not specially trained to repossess collaterals to successfully repossess.

increase in the growth of repossession companies who handle repossession issues more professionally.¹¹⁵ The repossession companies upon being engaged send out their agents known as the repo men. In a simple description, the repo men are to the repossession companies what bailiffs are to the courts because both are used as agents to carry out some tasks which their employers have instructed them to do. In the case of the repo men, they go about to search and locate the collateral. Having located it, they must do their best to play safe during the recovery¹¹⁶ and at the same time ensure that they do not break the peace.

There is one line of judicial reasoning over the last two decades¹¹⁷ that is of interest to our discussion, namely; the interpretation of the secured party's right to repossess without breaching the peace as being non delegable. This has already been fulsomely discussed in two subsections above,¹¹⁸ and will not be repeated here. If one can rightly conclude from a litany of cases that the secured party is liable for damages incurred by the repossession agent, the question then is to what extent is the secured party liable from the acts performed by the hired reposessor throughout the repossession. If this question is not properly answered to limit the extent a secured party would be liable for the act of a repossession agent during repossession, it would mean that the secured party stands the chance to incur triple losses in a security agreement. *First,*

¹¹⁵ Repossession companies have become much institutionalized in the US, and are governed by laws. They even have website and operate in all the states in the US. Here is one their websites: <http://www.quickrepo.com> last visited on the 11th of February, 2013.

¹¹⁶ Considering the delicate nature of this task, the repo men protect themselves adequately and they sometimes are armed with guns and may shoot if their lives are in extreme danger. See the NBC news which confirms this, available http://www.nbcnews.com/id/29427734/#.UQ_hLme4y5c earlier referred to in supra note 79. Also in another case which occurred in November 20, 2012 –“Just before 2pm in the afternoon, 45 year old Repo Man Todd Showell was shot and killed by an 81 year old man that claimed they had the wrong vehicle.” Full story is available at <http://blog.cucollector.com/hot-topics/sc-repo-man-shot-and-killed/> last visited on 11th of February, 2013.

¹¹⁷ The first case that decided that the secured party right to repossess collateral peacefully was in 1987 in *General Finance Corp. v Smith*, supra note 83.

¹¹⁸ See subheads 3.2.2., and 3.2.3., above.

the secured party pays the reposessor who acts independently, and discretionarily. *Second*, the secured party pays for any damages incurred by the reposessor during repossession of the collateral. *Third*, even if it is conceded that the secured party can recover from the hired reposessor the money he paid to a third party due to the hired reposessor's negligence; this means that the secured party will hire legal services in order to recover through a court action.

In the researcher's opinion, there is no justifiably good reason why the court should include the secured party's right to repossess peacefully as one of the non delegable duties because there's nothing in the entire section 9-609 UCC which suggests so. Also, when this trend¹¹⁹ first developed in 1987 in *General Finance Corp's case (supra)*, many repossession companies were not yet financially strong and the courts most likely reasoned that financial institutions were in a better position to shoulder the financial damages that would be incurred by the repossession companies in their repossession activities. However, the continued relevance of this line of thought is questionable today because the repossession companies have grown financially strong with branches across the United States and environs.¹²⁰ It is high time therefore; the courts start to hold them exclusively liable for their own acts. Currently, the burden is placed very heavily on the secured party whose continuous existence is still of utmost interest to the growth of the economy.

Therefore it is an inimitable conclusion that repossession companies are not independent contractors in the real sense, in respect of repossession acts carried out by them on behalf of the

¹¹⁹ The trend of judicial reasoning which included the secured party's right to repossess peacefully as a non delegable duty.

¹²⁰ Visit <http://www.quickrepo.com/about-repossession/what-is-repossession.htm> to see the adverts posted by the quick repo company boasting that they have branches in the 50 states of America and capable employees. This is likely the case with all repo companies.

secured party.¹²¹ In very many reported cases, the secured party was vicariously liable for acts of the hired reposessor.

3.2.4.4. The Constitutionality of Self-help Repossession in the US

About a decade after the birth of Article 9 self help repossession, many lawsuits flew into the courts' dockets to test the compatibility or otherwise of self help repossession with the Fourteenth Amendment requirement of due process contained in the US constitution in the following words: “[n]o person shall be deprived of life, liberty, or property, except by due process of law.”

The attack on self help repossession to check its constitutional compatibility is traceable to the group of cases where the debtors successfully annulled ex parte summary remedies which were regulated by the state laws. The attack on self help repossession therefore was rested on improper understanding and inability to distinguish between states regulated remedies and those that are privately regulated. The following cases would make the distinction very clear.

In *Sniadach v Family Finance Corp.*¹²² the US Supreme Court held that the Wisconsin's prejudgment remedy which entitles the garnishor to garnish the debtor's wages without either notifying the debtor or first allowing the matter to be heard in court runs counter to the 14th

¹²¹ However even though their repossession acts make the secured party liable to a third party, it is doubtful if the secured party will be liable for acts done after the repossessors have left the debtor's premises. For instance, if the hired reposessor drives negligently and hits down a pedestrian who is walking on the pedestrian lane, it is doubtful if the secured party would be held liable for the negligent driving. The secured party's liability therefore should be restricted to acts done during the actual repossession in the debtor's premises or when there's a physical confrontation with the debtor during repossession which leaves the debtor injured. In the researcher's opinion, there is no need to hold the secured party liable at all when he has employed the services of a repossession company that is legally licensed to carry out business.

¹²² 395 U.S. 397 (1969).

Amendment due process requirement contained in the US constitution. This led to the revision of Wisconsin state's statutes which regulate wage garnishment.

However, in *Flagg Bros v Brooks*,¹²³ a tenant/plaintiff was evicted from her apartment but was permitted to store her belongings somewhere in the apartment because she had no alternative of where to store them. After she was unable to pay the storage fees, the storage warehouse owner threatened to sell the belongings and indeed sold them without further recourse to the owner. The warehouse owner/defendant argued that the sale was authorized under the New York self help repossession statute. The court held that since there was no state official who was involved in the sale of the plaintiff's belonging, there was no state action which could bring it within the contemplation of the 14th Amendment requirement of due process. In contrast to the holding in *Flagg Bros*, the court in *Sharrock v Dell Buick-Cadillac, Inc.*¹²⁴ held that the ex parte sale of an automobile by a garage man which the state statutory lien authorized violated the automobile owner's right of due process guaranteed under the constitution.

In another case, *Fuentes v Shevin*¹²⁵, the Supreme Court of the US, per Mr. Justice Stewart who delivered the opinion of the court, stated "that the prejudgment replevin statutes worked a deprivation of property without procedural due process of law insofar as they denied the right to prior opportunity to be heard before chattels were taken from their possessor." The Black's Law Dictionary defines replevin as "an action for the repossession of personal property

¹²³ 436 US. 149 (1978).

¹²⁴ 379 N.E.2d 1169 (N.Y. 1978).

¹²⁵ 407 U.S. 67 reh'g denied, 409 U.S. 902 (1972).

wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it.”¹²⁶

Having considered the cases above, one must distinguish them carefully in order to answer correctly whether the self help repossession under Article 9 violates the 14th Amendment. The simplest answer is “NO”. This is because where repossession is carried out with the assistance of a state’s agent as the law requires, say the bailiff, such an action is brought within the purview of the 14th Amendment of the US constitution which stipulates that the state shall not deprive anyone of his/her property without following the due process of law. This particular requirement of the US constitution towards the repossession of property has already been given a judicial meaning in the cases of *Sniadach*, *Sharrock* and *Fuentes*, all discussed above. The distinguishing factor therefore to know whether a particular repossession violates the 14th Amendment rule, is whether the state’s machinery was used in the repossession of the debtor’s property. Where the state’s machinery was not used, and the reposessor was acting privately, his repossession acts fall away from the purview of the 14th Amendment and cannot therefore be said to have violated the debtor’s constitutional rights.

Therefore, whenever a secured party or his agent acts under his right to repossess without the breach of peace accorded to him under Article 9, such a secured party is only acting privately without the assistance of the state, and cannot therefore be regarded as violating the debtor’s constitutional rights of due process. Self help repossession under Article 9 is therefore not unconstitutional.

¹²⁶(9th ed. 2009). An essential feature of Replevin is that the matter is heard without the knowledge of the adverse party. Although most times the courts ask the party bringing the replevin action to deposit some money which would be used to compensate the other party for his losses of time and money which he invested in the frivolous suit. The monetary deposit acts as a “punishment” for bringing a frivolous suit should the case indeed turn frivolous.

3.3. Self-help Repossession in Nigeria

As it concerns self help repossession by private persons in Nigeria, no statute has yet accorded the secured party the right to repossess without recourse to court. Instead the secured party who is usually a mortgagee¹²⁷ has always fashioned his actions according to the available courts' decisions which contradict themselves from time to time.¹²⁸ The Nigerian Judges have not been unanimous in their views and this has become very problematic as no legal certainty exists. For instance many court decisions have insisted that the secured party/mortgagee must turn to the court when the debtor/mortgagor defaults¹²⁹ while some others believe that the mortgagee must be adequately protected at all costs.¹³⁰ Disappointed by these contradictions and the slowness of court proceedings generally,¹³¹ most mortgagees have resorted to self help repossession as the most viable means of realizing their money. They violently confront the defaulting mortgagors on the streets or enter their homes to disdain chattels or whatever that is of value they could lay their hands on in a bid to satisfy their money claims. This approach however is quite extreme and

¹²⁷ In Nigeria, considering that there is no law which separately regulates the use of personal and intangible properties to secure a transaction, unlike the UCC Article 9 does, most creditors demand land or landed properties to secure loans. This is why Nigerian secured transactions law cannot be discussed without talking about mortgages.

¹²⁸ The cases of *Ellochim Nig. Ltd & Ors v Mbadiwe*, supra note 21, and *Umeobi v Otukoya*, supra note 22, were decided by the same Justice in respect to self help within the period of 8 years. In the former he condemns the use of self help, while in the latter he conceded that self help can be used. This leaves the Nigerian legal world with uncertainty in view of the contradictions.

¹²⁹ *Civil Design Construction Nig. Ltd v SCOA Nig. Ltd*, the case is available at <http://www.nigeria-law.org/Civil%20Design%20Construction%20Nigeria%20Ltd%20v%20SCOA%20Nigeria%20Limited.htm> I visited it last on the 11th of February, 2013.

¹³⁰ For Example, Bello CJN, in *Awojugbagbe Light Industries Ltd. v Chinukwe*, supra note 25, p. 410.

¹³¹ For instance in *Bokini v John Holt & Co Ltd* (1937) 13 NLR 109, - a case concerning a mortgage transaction. It began 1930 and was decided in 1937 (7 years), *Bank of the North v Muri* (1998) 2 NWLR (part 536) 153, a matter concerning a mortgage transaction. It commenced in 1988 and was finally decided in 1998 by the Court of Appeal. (10 years from the High Court to the Court of Appeals which was just one step). *Ojikutu v Agbonmagbe Bank Ltd* (Now called: Wema Bank Plc) (1996) (2) Afr LR (comm.) 433. Also a matter concerning a mortgage transaction, it commenced at the high court in 1985 and was decided finally by the same court. (11 years) Although in this case, the parties tried to settle out of court several times. These few cases are just to show how slow litigation can be in Nigeria.

does not for instance resemble the secured party's right to repossess under Article 9 which must pass the "without breach of the peace" test.

However in 1995, the Nigerian Supreme Court came up with a landmark decision that stirred a great joy in the lending industry. This was the decision in *Awojugbagbe Light Industries Ltd. v Chinukwe*¹³² and it brought a lot of certainty in the Nigerian mortgage transactions and by extension the status of self help repossession. In *Awojugbagbe*, upon the mortgagor's default, the mortgagee exercised his right under the mortgage by appointing a receiver who took possession of the mortgaged property with the aid of armed security men and Alsatian dogs. The mortgagor's claim for trespass and wrongful repossession was dismissed. Bello CJN who delivered the lead judgment said:

"A mortgagee, like a landlord exercising his right to possess after the expiry of his tenant's lease, or his agent who entered and took possession of the mortgage property in exercise of his right under the mortgage agreement is not liable for damages for forcible entry because the right to possess the property had become vested in the mortgagee and his agent, the receiver, and the forcible entry was done in furtherance of their rights to possession."¹³³[underlining mine].

With respect, the researcher thinks that his Lordship in this case went too far in his opinion. It is admitted that the mortgagee's interest should be protected being that he is the provider of credit which is needed for a good economic growth. However, the use of armed security men and Alsatian dogs to recover possession as was in *Awojugbagbe* is uncivil and can endanger human safety in the society. As far as the researcher thinks, this decision is a blank check which leaves

¹³² *Awojugbagbe Light Industries Ltd. v Chinukwe*, supra note 25. P.379.

¹³³ *Ibid*, at 410.

every mortgagee the freedom to use any means no matter how horrible to recover possession and it should not be so.

Chapter Four - Post Repossession Avenues for the Secured Creditor

4.1. An Overview

When the debtor in a security agreement defaults, the secured party may take over collateral in exercise of one of his rights guaranteed under section 9-609. This chapter focuses on what the secured party may do with the collateral when he chooses to repossess without the judicial assistance. The expectation from the secured party is that he would sell the property to make good his claim (disposition).¹³⁴ Sometimes also, the secured party may want to keep the repossessed collateral as either fully satisfying his claim against the debtor (strict foreclosure) or in partial satisfaction of the claim except in consumer goods.¹³⁵

Where the secured party chooses to dispose the collateral in order to recover his money, he must do so, following the “commercial reasonableness standard” requirement.¹³⁶ Where a disposition is made following the “commercial reasonableness standard” standard, the debtor is liable for any deficiency claim, as well as entitled to any surplus arising from the disposition.¹³⁷ On the other hand, where a disposition, does not follow the “commercial reasonableness” standard, the secured party is faced with the onus to rebut the presumption that the disposition would have yielded enough money to offset the debt had the disposition complied with the “commercial reasonableness” standard.¹³⁸ Before a disposition of collateral is made by the secured creditor, the debtor’s right to redeem remains viable, such that the debtor can redeem by tendering the full amount and any reasonable expenses already incurred by the secured party.¹³⁹

¹³⁴ See section 9-610 UCC.

¹³⁵ See section 9-620UCC.

¹³⁶ See section 9-610(b)UCC.

¹³⁷ See section 9-608(a)(4) UCC.

¹³⁸ See generally section 9-626UCC.

¹³⁹ See section 9-623UCC.

As has been pointed out in the first paragraph above, the secured party may want to retain the collateral as satisfying his entire claim against the debtor. The secured party must however in compliance with Article 9-620 send out notification[s] to all parties interested in the collateral, and also the debtor who must give an authenticated acceptance to the plan of the secured creditor.¹⁴⁰

4.2. Secured Creditor's Rights – Strict Foreclosure under Article 9

A better way to open up this discussion may be to refer to the words of Professor Gilmore, when he referred to strict foreclosure as involving the secured creditor “to keep the collateral as his own free of the debtor’s equity, waiving any claim to a deficiency judgment.”¹⁴¹ Strict foreclosure is recognized under Article 9 in sections 9-620 - 9-622.

The idea behind a strict foreclosure is for the secured party to acquire title of the collateral by retaining possession of same.¹⁴² Such retention which is in view of total satisfaction of claim against the debtor is very advantageous to the secured party because the burden placed on him under Article 9-610(b) to dispose collateral following commercial reasonableness, plus the possible expenses that would be incurred in disposition are jettisoned. Also, the debtor escapes the possibility of being called upon for a deficiency judgment if the secured party in compliance with the relevant provisions of Article 9, later disposes the collateral below the debt the collateral secured.¹⁴³

Strict foreclosure is simpler in procedure when the secured creditor wanting to take the collateral in full satisfaction of his claim sends a proposal to the debtor who may reject within

¹⁴⁰ See section 9-620 (c) UCC.

¹⁴¹ Grant, Gilmore, Security Interest in Personal Property, supra note 49, at 1220.

¹⁴² The combined effect of sections 9-609(a)(1) and 9-620(a)UCC.

¹⁴³ See section 9-608(a)(4) UCC.

twenty days, accept expressly or accept impliedly if his silence exceeds a period of 20 days after the proposal was sent.¹⁴⁴ Note however, that the secured party is required to secure the debtor's acceptance "in a record authenticated after default" both where the debtor wishes to take the collateral as a partial satisfaction or in full satisfaction.¹⁴⁵ Also as earlier hinted, apart from the fact that the secured creditor must obtain the debtor's acceptance to his proposal, the secured party has the onus to also send the proposal to any other person who has indicated interest in the collateral and wait for any objection against the proposal, or deem the silence of that other party as acceptance after the lapse of twenty days from the day the notification was sent.¹⁴⁶

There could be a situation when Article 9 imposes a duty on the secured party to compulsorily dispose of the collateral. This occurs in consumer-goods transactions following the 60% rule, which in the case of purchase money security interest, the debtor has paid at least 60% of the cash price;¹⁴⁷ or has paid at least 60% of the principal amount securing the obligation where the transaction involves a non-purchase money security interest.¹⁴⁸ Where this is the case, the secured party assumes two obligations, namely the obligation to dispose of the collateral following the commercial reasonableness standard, and the obligation to dispose of the collateral within ninety days after he had taken possession of the collateral,¹⁴⁹ unless the debtor and all the interested parties agreed in an authenticated record after default that the collateral may be disposed after ninety days.¹⁵⁰ The rationale behind mandating the secured party to sell collateral where 60% of the money has been paid by the debtor is more or less moral, and is to protect the

¹⁴⁴ See the entire subsection 9-620(c) UCC.

¹⁴⁵ Ibid.

¹⁴⁶ See section 9-621(a) UCC.

¹⁴⁷ See section 9-620(e)(1) UCC.

¹⁴⁸ See section 9-620(e)(2) UCC.

¹⁴⁹ See section 9-620(f)(1) UCC.

¹⁵⁰ See section 9-620(f)(2) UCC.

debtor from losing out the so much he has already paid to the secured creditor who might later sell the property far above the 40% balance. Based on this, there is the hope on the side of the debtor that the collateral if sold would surely yield more than the balance (40% or less) owed to the secured creditor, thereby entitling him (the debtor) to the surplus.

Where chattel paper, accounts, payment intangibles or promissory notes form the collateral, the acceptance of the collateral as being a full or partial satisfaction of the of the secured creditor's claim, would constitute a sale in favor of the secured creditor which in essence is tantamount to a strict foreclosure.¹⁵¹ Once a strict foreclosure either full or partial is properly constituted in favor of the secured party, it extinguishes all other competing titles including that of the debtor, and a valid title is then vested on the secured creditor.¹⁵²

In conclusion, strict foreclosure is not popular in the US.¹⁵³ On the other hand, strict foreclosure is not used at all in Nigeria.¹⁵⁴ What is rather available is judicial foreclosure which entails that the mortgagee applies to the court which after review of facts, grants mortgagee the right to take over collateral and be entitled to it. This entitlement of collateral which the court gives to the mortgagee bars him from suing the debtor/mortgagor against any deficient amount. It is imperative however to note that the mortgagor must be given a grace period to redeem the

¹⁵¹ See official comment 10 to section 9-620 UCC.

¹⁵² See section 9-622 UCC.

¹⁵³ See GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 569-70 (5th ed. 2007) p. 597.

¹⁵⁴ Nwogu, Tochi, supra note 47, 294.

collateral after the due date of redemption has passed. This is known as the mortgagor's equitable right to redeem.¹⁵⁵

4.3. Disposition under Article 9

With the exception of strict foreclosure of collateral in full satisfaction of debt, the secured party's next step after repossession of collateral following the debtor's default is "disposition."¹⁵⁶ Disposition entails the selling of the collateral by the secured party in order to apply the proceeds on the debt owed by the debtor. The stage of disposition of collateral is more or less, the most delicate time for the secured creditor as both the law and the debtor are in observance of his conduct in the disposition, whether or not it followed the law. A disposition therefore must comply with some legal stipulations and standards some of which are hereunder analyzed.

One of such stipulations as enshrined under Article 9-610(b) is that a secured creditor must dispose collateral in a commercially reasonable manner, which also entails the possibility of disposing in both private and public sales.¹⁵⁷ Case law which have developed around this section favor the commercially reasonable disposition of collateral by private sales in belief that dispositions made under private sales are more likely to yield more proceeds which will be in the

¹⁵⁵ Its timeframe differs from jurisdiction to jurisdiction. In Nigeria, the mortgagor's equitable right to redeem after the legal due date is three months, after which the mortgagee's right to sell or foreclose fully ripens. See section 20 Conveyancing and Law of Property Act 1881.

¹⁵⁶ See section 9-610(a) UCC, which says: "after default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing."

¹⁵⁷ This can be gleaned from wordings of section 9-610(c) UCC.

interest of all concerned parties.¹⁵⁸ Closely linked to this is the fact that under subsection (a) of 9-610, the secured party has been given some leverage, not to restrict disposition to sales. In addition to sales, the secured party could also lease, license, or “dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.”

The next question that may burg the reader’s mind is as to whether or not there is a timeframe within which a secured creditor must dispose of collateral. Considering the fact that the drafters of Article 9 aimed at ensuring that all the interested parties derive utmost benefit from the disposition of collateral, a secured party is not compulsorily required to sell within a timeframe in order to afford him the opportunity to sell when the market is most favorable and would yield the best price. The liberty to wait and sell when the market is favorable also entails that the secured party may elect to sell in piecemeal over a time period rather than in bulk, provided such election is the best under the circumstance and could pass the test of “commercial reasonableness.” As just said, this discretion which the secured party may exercise, must be commercially reasonable and includes the “method, manner, time, place and other terms”.

The discretion of the secured party towards disposition is equally governed by the general obligation of good faith contained in section 1-203 and the “commercially reasonable” requirement enshrined under section 9-610 (b). This goes to say that if the secured party keeps collateral for a long time to depreciate without any justifiable reason for not promptly disposing immediately after repossession, the secured party may be deemed to have breached the “good faith” and ‘commercially reasonable’ standards.

¹⁵⁸ See the general attitude of the court in *Burns v Anderson*, 123 Fed.Appx. 543, 2004 WL 2897943 (C.A.4 (Va.)), 55 UCC Rep.Serv.2d 440. See also [Cole v. Manufacturers Trust Co., 164 Misc. 741, 299 N.Y.S. 418, 420–29 \(1937\)](#).

Closely following the “good faith” requirement is the requirement to dispose the collateral “following any commercially reasonable preparation or processing” as section 9-610 (a) reveals. This is not however compulsory considering the fact that the same section also authorizes the secured party to dispose collateral “in its present condition.”¹⁵⁹ Even though, there is no statutory duty to cleanup or to repair, cases which have developed under section 9-610 (a) have strongly voiced in favor of cleanup and repair, by holding sales to be commercially unreasonable where cleaning or repairing was not first carried out before disposition. This judicial attitude is supported by the general obligation of good faith under section 1-203. In essence, when a minimal cleaning or repair on collateral would make it well priced, the secured party should do so “especially if that is the general practice.”¹⁶⁰

It is vitally important to note that disposition right is not only available to the senior creditor. A junior creditor whose right to repossess and dispose has arisen under a security agreement may go ahead to repossess, dispose and apply the proceeds in settlement of the debt owed him by the debtor.¹⁶¹ Section 9-615 stipulates how a junior creditor can apply proceeds of sale¹⁶² and in essence does not force a junior class creditor to first of all pay “homage” to the senior class creditor as it concerns distribution of proceeds of sale.¹⁶³ Subsection (g) further builds on subsection (a) when it stipulated that: “a secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder

¹⁵⁹ See section 9-610(a) which states: “After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition [underlining mine] or following any commercially reasonable preparation or processing.”

¹⁶⁰ See generally James J. White & Robert S. Summers, Principles of Secured Transactions (Thomson West, 2007). Page 231.

¹⁶¹ The phrase “secured party” as used under section 9-615 UCC, refers to any class of secured creditor, either a junior or senior class secured creditor.

¹⁶² See official comment 2 of section 9-615 UCC.

¹⁶³ This is the possible meaning of section 9-615 (a) UCC. Also see comment 5 to section 9-607 which says: “A secured party who holds a security interest in a right to payment may exercise the right to collect and enforce under this section, even if the security interest is subordinate to a conflicting security interest in the same right to payment...”

of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made: (1) takes the cash proceeds free of the security interest or other lien; (2) is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and (3) is not obligated to account to or pay the holder of the security interest or other lien for any surplus.” However, where the junior creditor repossesses collateral, he has the duty under section 9-611 to inform the senior creditor of the intended disposition.

Recall that the senior creditor by virtue of its right enjoys priority over the common collateral.¹⁶⁴ In exercise of this right of priority therefore, he can take possession of collateral from the junior creditor and sell same by himself, provided that under the security agreement, the senior creditor has the right to repossess collateral from the debtor as generally enshrined under section 9-609(b).¹⁶⁵ Be it noted that the failure of the junior creditor to notify the senior creditor about the disposition, does not extinguish the senior’s security interest, except if the senior creditor authorized the disposition and clear of it interest.¹⁶⁶ If this is not the case, the senior creditor whose right under the security agreement empowers him to repossess collateral from the debtor can as well recover the collateral from the transferee, except the transferee obtained collateral *bona fide*. One notable exception here which is in the favor of the junior creditor who has only one collateral from which to satisfy his debt, (assuming the secured party has security interests in more than one collateral of the common debtor) is the invocation of the

¹⁶⁴ See section 9-322 UCC, which specifies how seniority is determined. Generally, seniority is determined by who first filed/perfected the security interest. Also see the official comment 5 of section 9-608 which says: “The application of proceeds required by subsection (a) does not affect the priority of a security interest in collateral which is senior to the interest of the secured party who is collecting or enforcing collateral under section 9-607...”

¹⁶⁵ Also see official comment 5 to section 9-610UCC.

¹⁶⁶ See generally section 9-611, but pay particular attention to subsection (d) which provides for exceptions in relation to notice.

equitable doctrine of Marshalling, which the Supreme Court in *Meyer v United States*,¹⁶⁷ has explained as a doctrine which “rests upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds.” In *Meyer*, the court quoting *Sowell v Federal Reserve Bank*¹⁶⁸ said that the essence of the doctrine is “to prevent the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security.”¹⁶⁹ In view of the fact that it is an equitable doctrine, it functions more as an intervener and “is applied only when it can be equitably fashioned as to all of the parties” that have interests in the property.¹⁷⁰ The courts are free under section 1-103 to apply equitable doctrines to achieve maximum justice, and application is based on the peculiarity of cases. However, the situation is more complicated where two security interests enjoy equal rank.¹⁷¹

4.3.1. Public vs. Private Dispositions

The crux of this subhead proceeds from section 9-610 (c) which stipulates that “a secured party may purchase collateral: (1) at a public disposition; or (2) at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.” One point must be got very clearly here as it relates to subsection (c). It is the fact that the secured party can purchase freely in a public disposition, but must purchase in a private disposition only on a condition that “*the collateral is of a kind that is*

¹⁶⁷ 375 U.S. 233, 236 (1963).

¹⁶⁸ 268 U.S. 449, 456-57 (1925).

¹⁶⁹ *Id.* at 237.

¹⁷⁰ *Id.*

¹⁷¹ See official comment 6 to section 9-610UCC, particularly at the given illustration.

customarily sold on a recognized market or the subject of widely distributed standard price quotations.” Closely connected to the foregoing, is the requirement of notification under section 9-613 (1) (E) which requires the secured party to issue a notification which the contents amongst others, include the time and place of the public disposition or “the time after which any other disposition is to be made.” Under section 9-617, when a disposition has complied with some of the stipulations already mentioned above, a secured party’s disposition of collateral “transfers to a transferee for value all of the debtor’s rights in the collateral and discharges the security interest under which the disposition is made...” However, where a transferee acted in good faith towards the acquisition of the collateral from the secured party, such transferee would obtain a valid title even though the secured party did not comply with the legal requirements.¹⁷² This is traceable to the equitable maxim that *equity will not allow a statute to be used as an engine of fraud*. Recognizing this, the drafters of the US Uniform Commercial Code (the code) provided for the use of equitable doctrines and the general principle of good faith to advert any unconscionable difficulty that would accrue to an innocent transferee in the event the code was not fully complied with by a secured party.¹⁷³

Subsections (c) of section 9-610(1) and (d) of section 9-611 respectively mentioned “recognized market.” It is imperative that a few words be said towards its meaning and implications in the disposition of collaterals. According to comment 9 to section 9-610, “a recognized market as used in subsection (c) and section 9-611(d), is one in which the items sold are fungible¹⁷⁴ and prices are not subject to individual negotiation. For example, the New York

¹⁷² This is strongly supported by the case of *C.I.T Corp. v Lee Pontiac Inc.* 513 F.2d 207.

¹⁷³ See generally sections 1-103, and 1-203 UCC.

¹⁷⁴ Black's Law Dictionary (9th ed. 2009) defines “fungible” as “Commercially interchangeable with other property of the same kind. Example, corn and wheat are fungible goods, whereas land is not”. Section 1-201 UCC defines it as “(a) goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or (b) goods that by agreement are treated as equivalent.”

Stock Exchange is a recognized market...” Recall that earlier on and somewhere in the preceding pages, it was mentioned that a secured party disposing the debtor’s collateral is required under section 9-611(b) and (c) to send out notifications to all interested parties. However, there are two notable exceptions to this requirement of sending out notification[s], namely when the collateral is perishable and when the collateral is the type customarily sold in a recognized market.¹⁷⁵

Finally under disposition, the researcher wishes to talk about the issue of “price.” Whenever the debtor’s collateral is sold by the secured party, the debtor’s suspicion about the price arises, because nearly always he believes that the collateral would have worth more had the secured party been more diligent and compliant with the provisions of the Article. On the other hand, “low price”¹⁷⁶ alone is not sufficient to conclude that a disposition was fraudulent or did not comply with the provisions of the Article. Considering that the secured party has the right to dispose collateral ‘as is’¹⁷⁷ and also anytime after repossession, such collateral may worth low in the market (immediately after repossession) when the market is unfavorable, even though the secured party complied with the rules under Article 9.

However, Article 9 has provided a somewhat guideline for determining a disposition that was not compliant with the spirit of Article 9. Thus, section 9-615(f) (1) and (2) provides:

“The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if: (1) the

¹⁷⁵ Section 9-611(d) UCC provides: “subsection (b) does not apply if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.”

¹⁷⁶ See section 9-627UCC.

¹⁷⁷ See section 9-610(a) UCC.

transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and (2) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have bought.”
[underlining mine].

Two major points which help to expose a non compliant disposition under section 9-615(f) are the facts that the secured party or his crony purchased the collateral and at a low price. When these two points combine in one transaction, it would be difficult for the secured party to rebut the presumption of collusion or improper disposition. However, there would be no qualms or raise of the eyebrow if the secured party or his crony purchased the collateral but at a high/best price because in that case, the spirit of Article 9 provisions for a proper disposition which aim at obtaining the best price for all concerned parties would have been met.¹⁷⁸ The end could justify the means.

4.3.2. “Commercial Reasonableness” Standard and the Implications of Its Breach

The phrase “commercial reasonableness” was not defined in Article 9 and was left for the courts to determine based on the circumstances of each case which defer from one another. The “commercial reasonableness” standard which nicely accommodates acts of the secured party which geared towards achieving the best price possible for the collateral is determined by looking at the entire process of disposition in terms method, manner, time, place etc; to determine if the

¹⁷⁸ The Courts in their equity jurisdiction are usually reluctant to allow mere formalities to defeat the substance or justice in case. It will be unfair to annul a sale which achieved the best possible price on the ground that it did not follow certain formalities in the code. After all, the whole intent of laying down the formalities in the first place is to achieve the best price. So the end can justify the means.

disposition indeed satisfied the spirit of Article 9. The problem here is that its meaning at any one time is dependent upon the perceptions of the judge/jury; and therefore is complicated to define or determine. The problem is further complicated when the term “good faith” which is another vague standard is brought in to assist in determining whether a disposition was “commercially reasonable.” In that case, two vague and imprecise terms are muddled up into one meaning.

The drafters of Article 9 however alleviated the vagueness of the “commercial reasonableness” standard by providing some guidelines which aid in unmasking the difficulty. Under section 9-627, the drafters made it clear that low price is insufficient in determining a breach of the standard. Subsection (a) said it all when it said that “the fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.”

In case a secured creditor is confused as to what may amount to commercial reasonableness or otherwise, such a secured creditor may further take a look at section 9-627 (b) where the drafters of Article 9 created “safe harbors”¹⁷⁹ for the secured party. Indeed, subsection (b) states that “a disposition of collateral is made in a commercially reasonable manner if the disposition is made: (1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.” Furthermore, subsection (c), stands on the shoulders of subsection (b) and proclaims that “a collection, enforcement, disposition, or acceptance is commercially reasonable if it has

¹⁷⁹ This phrase “safe harbors” was taken from White & Summers, supra note 160, p.228.

been approved: (1) in a judicial proceeding; (2) by a bona fide creditor's committee; (3) by a representative of creditors; or (4) by an assignee for the benefit of creditors. Subsection (d) however sounds a caveat that "approval under subsection (c) need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable."

It is admitted that the meaning of "commercial reasonableness" is fluid especially when section 9-627(b)(3) is considered.¹⁸⁰ But then, some factors which weigh heavily in the minds of the judges/juries in determining a commercially reasonable disposition are obvious. First, is to determine if the disposition happened too quickly or too long without any justifiable reason. Also, whether the collateral was purchased by the secured party or his crony at an unreasonably low amount is another factor which is closely knitted to the first. Both factors when combined are sufficient to trigger off the court's suspicion which usually leads to declaring the disposition as not being commercially reasonable.

Second, the secured party is required to advertise the disposition in an appropriate newspaper¹⁸¹ specifying time and place of disposition so that the general public is better informed about the disposition. The essence is to attract bidders and to give members of the public equal opportunity to respond to the call for disposition. Where an advertisement was not placed in respect of the collateral, the court will likely believe that fraud was contemplated by the secured party and therefore deem the disposition not being commercially reasonable because secrecy is

¹⁸⁰ The section states: "...otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition."[underlining mine]. The subsection gave a wide room to accommodate developing and future trade practices.

¹⁸¹ White & Summers supra note 160, p. 230 said "advertising a drilling rig in the county newspaper will not do where all others would advertise in a trade journal..." Essentially what is appropriate would largely each time be determined by the reasonable man's sense. The bottom line is that the secured party should advertise in a medium that will reach a wide audience who would usually be interested in the collateral.

usually the badge of fraud. Closely connected to this factor is the requirement on the secured party to notify all parties that are interested in the collateral and the location of the disposition must be in a proper place with public access.

Third, the creditor should consider some cleanup and repair of the collateral before disposition especially if that is the usual business practice. Here, the good conscience of the secured creditor is demanded to ensure that he puts the collateral in a better condition than it was when he repossessed it in order to attract the best price. Although this is not mandatory since section 9-610(a) authorized disposition “as is”, the secured creditor is not under a strict obligation to clean and repair. But not carrying out a cleanup or repair would however weigh heavily in the court’s mind towards determining a commercially reasonable disposition.¹⁸² The secured creditor should also allow inspection to be conducted by prospective bidders especially when such inspection[s] would help them to make up their minds towards making high bids for the collateral.¹⁸³

In view of the fact that every disposition must be done in a commercially reasonable manner, one question which begs to be asked is: what are the implications of noncompliance with the “commercial reasonableness” standard by the secured creditor? To answer this question, reference is here made to section 9-626(a) which provides that “in an action arising from a

¹⁸² You would recall that the court has the discretion to determine whether or not a disposition was commercially reasonable. Therefore, even though cleanup or repair of collateral before disposition is not mandatory on the part of the secured creditor, following section 9-610(a), the court might use his inability to cleanup or repair to make up their mind that the disposition was not commercially reasonable. It is therefore in the best interest of all concerned parties that cleanup or repair is made so that best price is achieved. From the perspective of the secured party, although he would incur expenses in the repair or cleanup, he would invariably recoup the expenses after achieving the best possible price. This obviates the hectic exercise of going back to sue the debtor who is now probably impecunious for the deficient amount. It is also not a guarantee that the secured party would scale the “rebuttable presumption” rule in a deficiency claim.

¹⁸³ For a firmer understanding on this, see the seminal article by Jack F. Williams, “*DEBUNKING THE MYTH ENGULFING ARTICLE 9 COLLATERAL DISPOSITIONS*” 9. *Am. Bankr. Inst. L. R.* 703. In this article the author exhausted the possible grounds (which originated from case law) under which a disposition could be deemed commercially unreasonable.

transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the following rules apply: (1) A secured party need not prove compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue." Cases which developed under the former Article 9, fashioned out three rules.

First, the "absolute bar" rule¹⁸⁴ which denied a deficiency judgment to a secured creditor who did not comply with the provisions of the Article. It prevented the secured party from exercising the right to be heard on his claim for deficiency against the debtor provided he had breached the "commercial reasonableness" standard in the collateral disposition. It was closely connected to the equitable maxims that "he who seeks equity must first do equity" and "he who comes to equity must come with clean hands."

Second, some courts followed the "offset" rule which "held that the debtor can offset against a claim to a deficiency all damages recoverable under former section 9-507 resulting from the secured party's noncompliance."¹⁸⁵

Third, some courts developed the "rebuttable presumption" rule by holding "that the non-complying secured party is barred from recovering a deficiency unless it overcomes a rebuttable presumption that compliance with former part 5 would have yielded an amount sufficient to satisfy the secured debt..."¹⁸⁶

¹⁸⁴ See the case of *Hartford-Carlisle Sav. Bank v Shivers*, 566 N.W.2d 877, where the Supreme Court of Iowa, applied the rule to preclude the secured party from claiming deficient amount, having failed to fully comply with the relevant state law.

¹⁸⁵ See Comment 4 to section 9-626. The United States Court of Appeals, Eight Circuit, confirmed its use in *Boatmen's National Bank of St. Louis v Sears, Roebuck & Co.* 106 F.3d 277.

¹⁸⁶ See official comment 4 to section 9-626UCC.

The “rebuttable presumption” rule survived under the revised Article 9. Hence, section 9-626(a) (3) and (4) are illustrative. Paragraph (3) provides that “Except as otherwise provided in section 9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney’s fees exceeds the greater of: (A) the proceeds of the collection, enforcement, disposition, or acceptance; or (B) the amount of proceeds that would have been realized had the non-complying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition or acceptance.” Paragraph (4) states that “For the purpose of paragraph (3)(B), the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses and attorney’s fees unless the secured party proves that the amount is less than that sum.”

The beauty of the “rebuttable presumption” rule is that it allows the debtor to be heard on his reason for noncompliance, and as well as mitigate or avoid the hardship that accrued under the “absolute bar” rule.

Aside the fact that a secured creditor who is unable to jump the “rebuttable presumption” rule is precluded from claiming the deficient amount from the debtor as a consequence of noncompliance with the provisions of Article 9, other consequences also abound. Section 9-625(a) provides that “if it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on

appropriate terms and conditions.”¹⁸⁷ Subsection (b) further provides for damages in favor of the debtor where a secured party is noncompliant with the provisions (section 9-625(b) provides that: “Subject to subsections (c), (d) and (f), a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor’s inability to obtain, or increased costs of, alternative financing.”

Lastly, although not expressly provided in Article 9, courts can under their inherent powers to see that justice is manifestly done award punitive damages against a secured party whose acts towards disposition were noncompliant with the provisions of the Article. For instance in *Davidson v First Bank Trust Co*,¹⁸⁸ the court awarded punitive damages against the bank for disposing in a non-commercially reasonable manner. According to the court, the “bank’s act in private sale of property for less than stipulated value were malicious and willful”¹⁸⁹

4.3.3. Disposition under the Nigerian Law

Nigerian law towards disposition of collateral is anchored strongly on the Auctioneers’ Laws (or Sale by Auction Laws). Auctioneers are licensed¹⁹⁰ to conduct public sales and their licenses can be suspended or revoked by the court if the Auctioneer is involved in an act or acts that are incongruous with his ethical duties.¹⁹¹ There is no liberty unlike Article 9 does allow, for the secured party to dispose privately because the Nigerian law still believes that private dispositions are fraught with fraud. A public disposition therefore gives the disposition more credibility because it affords the general public the opportunity to participate in the transaction as

¹⁸⁷ See the case of *Cox v Galigher Motor Sales Co*. 213 SE2d 475 (W. Va. 1975) where the court granted an injunctive order to restrain a foreclosure sale because the repossession was done wrongfully.

¹⁸⁸ 609 P2d 1259 (Okla. 1976).

¹⁸⁹ *Ibid*.

¹⁹⁰ Section 4 of the Auctioneers’ Law.

¹⁹¹ Section 27 of the Auctioneers’ Law. Examples of such acts are: aiding and abetting fraud and collusion with the purchaser to defraud the debtor.

well as prevents any possible collusion by the secured party; which is likely to occur in private dispositions. As the saying goes, “secrecy is the badge of fraud.”¹⁹²

Just as Article 9 provided for notification to all concerned parties before disposition,¹⁹³ the Auctioneers’ Law provided for notification. Section 19(1) thereof, requires that a disposition of collateral (including land) shall not take place until a seven-day public notice in writing has been made to the town where the land/collateral is located.¹⁹⁴ The notice must state the name of the secured party and his residence. Section 20 further provides that, two days before the disposition, the auctioneer shall give every detail in writing concerning the lots that are to be disposed.

Furthermore, the section provides that within sixty hours after disposition of the lots, the auctioneer shall present to the Commissioner¹⁹⁵ under oath, a document showing how much each lot was sold. This provision of the law was tested in *Oseni v American International Insurance Co Ltd* (supra),¹⁹⁶ where on February 28, 1984; the auctioneer advertised in a newspaper that the collateral would be sold on February 29, 1984 (one day’s notice). The mortgagor/debtor objected to the disposition on the ground of insufficient notice. When the matter came on appeal, the Court of Appeal ruled in favor of the debtor, for want of sufficient notice as section 20 of the Auctioneers’ Law mandates. This was also the same reaction which Justice Uwaifo expressed in *Okonkwo v Cooperative & Commerce Bank (Nig) Plc.*¹⁹⁷ The facts of the case showed that the collateral was sold just two days after an advertisement for its disposition appeared in a local

¹⁹² This is common knowledge.

¹⁹³ Except where the collateral is perishable or one “that is customarily sold in a recognized market” - section 9-611(d) UCC.

¹⁹⁴ The courts have extended the meaning of this section to include newspaper adverts. See *Oseni v American International Insurance Co Ltd*, [1985] 3 NWLR (part11) 229, which first introduced the extension.

¹⁹⁵ A commissioner of oath is a judicial worker who has the relevant authority to administer oaths. A person who presents false facts before him shall be liable to the offence of perjury.

¹⁹⁶ Citation available at supra note 194.

¹⁹⁷ [2003] 8 NWLR (part 822) 347.

newspaper. Justice Uwaifo made an important remark which sums up this discussion. It therefore deserves an extensive quotation:

“[A]n auction is a manner of selling or letting property by bids at a place open to the general public, usually to the highest bidder by public competition. The prices which the public are asked to pay are the highest which those who bid can be tempted to offer by the skill and tact of the auctioneer under the excitement of open competition... However, there are certain acts which will affect the proper conduct of an auction sale. These are the property put up from realizing its fair value. Collusion or want of good faith is an obvious one...It is also recognized as another, any act which is likely to ‘chill’ the sale, for example, the solicitor in a cause in which property is sold bidding for it...I have held that section 19 of the Auctioneer’s Law was not complied with. The effect of this would have been perhaps that an important condition for, what I might call, a proper auction sale not having been met, the sale would be held invalid.”¹⁹⁸

The above dictum of Justice Uwaifo, has some resemblances with section 9-615(f) (1) and (2) UCC, which was also reproduced above. Both the dictum of Justice Uwaifo and the provision of Article 9 on disposition agree that the secured party must not act fraudulently in the disposition of the debtor’s collateral.

On the issue of notice to the debtor before disposition which section 19 of the Auctioneers’ Law mandates, the case of *Okonkwo v Cooperative & Commerce Bank (Nig) Plc* (supra)¹⁹⁹ is still illustrative. In *Okonkwo*, one of the issues which the court was asked to decide was the validity or otherwise of a contract clause. The secured party contracted with the debtor,

¹⁹⁸Ibid at 388.

¹⁹⁹ Citation available at supra note 197.

such that the debtor waived his right to be notified before the disposition of his collateral. The contract clause was couched in this manner: “The Borrower hereby expressly waives his rights to be given notice by the Bank under section 19 of the Auctioneer’s Law or under any law or custom in operation in any part of the Federal Republic of Nigeria before the sale of the mortgaged property.” Reacting on this clause the same Justice Uwaifo had this to say:

“[T]he purpose of the provision is for the mortgagee to give adequate notice to the public of the proposed sale. It is not a notice intended to be given to the mortgagor. This is to ensure that a true public auction, where everyone interested in the property may have the opportunity to bid for it, is conducted for a fair deal, devoid of unconscionable bargain through connivance or collusion. Actually, it does not lie with him to do so as it is not meant for him. The court below was therefore in error to have held that the waiver contained in the mortgage deed extended to section 19.”²⁰⁰

In sum, the Nigerian law is similar to the provisions of Article 9 on disposition except on waiver of right of the debtor to be notified before disposition. Article 9-624(a) provides that “a debtor or secondary obligor may waive the right to notification of disposition of collateral under section 9-611 only by an agreement to that effect entered into and authenticated after default.” This provision recognizes the debtor’s freewill and the freedom of contract doctrine, unlike Uwaifo’s dictum above. However, section 9-624(a) which recognizes waiver of right to notification is only an exception because section 9-602 gives a litany of rights and duties which are not subject to waiver by parties to a security agreement under Article 9.

The Nigerian law also ensures fairness on the weaker party/debtor by insisting on public dispositions. But the Nigerian law is silent as to when a notice to the debtor would not be

²⁰⁰ Ibid.

necessary as Article 9-611(d) stipulates.²⁰¹ No Nigerian court decision has discussed the relevance of notice as it relates to perishable collateral; and this is obvious. Considering that Nigerian secured transactions law still focuses on real property as collaterals, parties to a security agreement do not usually use personal properties to secure debts.

Also it is the researcher's opinion that the use of private disposition of collateral should not be entirely forbidden in Nigeria unlike Article 9 did. Instead, the law should strengthen its watch when private disposition is used, to ensure that the interests of the debtor and all other interested parties are not hampered. This is to say that private dispositions which realize the best price for the collateral should not be jettisoned just because of the manner of disposition.

Finally, it is needless to mention that where a disposition is properly conducted under the Nigerian law, the debtor is entitled to the surplus after due expenses have been settled as well as responsible to provide the deficient value if the collateral fell short of the debt value. This was discussed and approved in the court's decision: *Salako v Federal Loans Board*²⁰²

²⁰¹ Section 9-611(d) provides that where the collateral is perishable or “threatens to decline speedily in value” or “is of a type customarily sold in a recognized market”, then the need to notify the debtor before disposition will no longer be necessary.

²⁰² [1967] Nig. Comm. LR 266, 268.

Chapter Five- The Exportability of Article 9 Self help Repossession to Nigeria: Reactions and Recommendations

5.1. Introduction

The preceding chapters have discussed the functionality of self help repossession under Article 9. The discussion analyzed through court decisions the degree of acceptance of the self-help concept, and how the courts have sought to balance between the possible abuse of self-help right of a secured creditor under a security agreement and the debtor's general rights. Generally, one's claim of right against another should pass through an institutional channel, where the courts would have the power to decide on the matter. Self help therefore is a recognized exception, which the courts have warned must be used with caution, and in the case of Article 9 should be evaluated with the "breach of the peace" standard.²⁰³

Self help is an important aspect of Article 9 because it touches on the enforcement of the secured creditor's right. An improper enforcement of rights under security agreements which leads to the loss of the secured creditors' investment would in the long run result to an erosion of confidence in lending.

So in order to have a flourishing economy, as well as restrain the abuse of rights, the courts must strike a balance between the protection of the debtor's rights and those of a secured creditor in a security agreement.

Nigeria is a member of commonwealth in the sense that it was colonized by England. Nigeria which has the common law type of legal system, borrowed some of its laws from the English

²⁰³ Section 9-609(b) (2) UCC.

law²⁰⁴ and looks up to England for law reforms. One question which may burg the mind of the reader is why Nigeria is not looking up to England for laws on secured transactions, particularly as it concerns self help repossession. Unfortunately this time, England cannot be of good help because it currently does not have a codified law which governs secured transactions. Recently, the Law (Reform) Commission of England and Wales²⁰⁵ is working on providing both countries with a law on secured transactions. No doubt, especially as some experts have noted,²⁰⁶ Article 9 of the UCC is generating a lot of influence over the law reform on secured transactions which England and Wales are about to have. Currently, England still uses its common law principles to resolve the issue of rights and remedies of a secured party under a security agreement pending when it acquires its Personal Property Security Law.

Canada is another commonwealth country which Nigeria could look up to in certain regards for law reforms due to unity of legal system. Canada has promulgated the Personal Property Security Act (PPSA)²⁰⁷ in 1970 which governs secured transactions, and which law

²⁰⁴ These laws include all statute laws in force in England on or before January 1st 1900, the common law and the principles of equity.

²⁰⁵ “In [England and Wales](#) the **Law Commission** is an independent body set up by [Parliament](#) by the [Law Commissions Act 1965](#) in 1965 to keep the [law](#) of [England and Wales](#) under review and to recommend reforms. The organization is headed by a Chairman (currently [Sir David Lloyd Jones](#), a [judge](#) of the [Court of Appeal](#)) and four Law Commissioners. It proposes changes to the law that will make the law simpler, more accessible, fairer, modern and more cost-effective. It consults widely on its proposals and in the light of the responses to public consultation, it presents recommendations to the [UK Parliament](#) that, if legislated upon, would implement its law reform recommendations.” Curled from: http://en.wikipedia.org/wiki/Law_Commission_%28England_and_Wales%29 last visited on March 21st, 2013.

²⁰⁶ See the Article written by Iwan Davies “The Reform of English Personal Property security Law: Functionalism and Article 9 of the Uniform Commercial Code” L.S. 2004, 24(3), 295-321.

²⁰⁷ “The *Personal Property Security Act* (“PPSA”) is the name given to each of the statutes passed by all [common law](#) provinces, as well as the territories, of Canada. They regulate the creation and registration of [security interests](#) in all [personal property](#) within their respective jurisdictions. It is similar in structure to [Article 9](#) of the [Uniform Commercial Code](#) in the United States, but there are important differences.” Curled from http://en.wikipedia.org/wiki/Personal_Property_Security_Act_%28Canada%29 last visited on March 21st, 2013.

derived so much from the provisions of Article 9. Article 9 is over five decades old, has influenced many countries' secured transactions law, has survived a lot of challenges and reforms and therefore appears more suitable to be transplanted to Nigeria at least some of the agreeable provisions.

5.2. Notable Differences between Article 9 and PPSA on the Rights and Remedies of Secured Party

In some ways Article 9 differs with the PPSA as it concerns the secured party's rights and remedies, and these differences are some of the main reasons why the PPSA is less suitable for transplant to Nigeria than the provisions of Article 9 concerning the rights and remedies of a secured party in a security agreement. *First*, as it concerns notice of disposition which a secured party intending to dispose collateral must give the debtor and or other interested party or parties,²⁰⁸ Article 9-611(d) provides some exceptions to the effect that notice shall not be required where the collateral is perishable, or "threatens to decline speedily in value or is of a type customarily sold on a recognized market." However under the PPSA, section 59(18) thereof provides: "Notice under subsection (8) or (11) need not be given if (a) the collateral is perishable; (b) the secured party believes on reasonable grounds that the collateral will decline substantially in value if not disposed of immediately after default; (c) the cost of care and storage of the collateral is disproportionately large relative to its value; (d) the collateral is of a type that is customarily sold on an organized market that handles large volumes of transactions between many different sellers and many different buyers; (e) the collateral is money, other than a medium of exchange authorized by the Parliament of Canada as part of the currency of Canada; (f) for any other reason, the court, on an application made without notice to any other person, is

²⁰⁸ See Article 9-611(a) and (b) UCC.

satisfied that a notice is not required; or (g) after default, every person entitled to receive a notice of disposition under subsection (8) or (11) consents in writing to the immediate disposition of the collateral.” The researcher believes that the provision of the PPSA as it concerns the exceptions to notice is more cumbersome than the simpler version under Article 9.

Second, as it concerns disposition of collateral by the secured party after the debtor’s default, Article 9 provided that every disposition of collateral “including the method, manner, time, place, and other terms, must be commercially reasonable.”²⁰⁹ The equivalent of this provision under the PPSA which is section 65(2) provides “All rights and obligations arising under this Act, any other applicable law or a security agreement shall be exercised and discharged in good faith and in a commercially reasonable manner.” [underlining mine]. Here again, Article 9 restricts the standard of “commercial reasonableness” only to the disposition of collateral in a security agreement, while the PPSA imposes two standards, namely “good faith” and “commercial reasonableness” which must be observed in all dealings under the Act. Recall that both standards are fluid and do not have precise definitions. Parties to a security agreement would always rely on the courts for interpretations which differ from case to case. In the researcher’s opinion, the imposition of two vague standards to govern the entire PPSA is unnecessary because all provisions of the Act do not deserve equal treatment.

Third, where a secured party under a security agreement realizes from the sale of collateral, a sum beyond the balance being owed by the debtor, Article 9 provides for a formula by which the surplus would be distributed.²¹⁰ A combined effect of both sections of Article 9 just mentioned above only requires the secured party to pay the surplus to junior secured parties who before the distribution of proceeds is completed, sent the secured party *an authenticated demand*.

²⁰⁹ See section 9-610(b) UCC.

²¹⁰ See sections 9-607 and 9-615 UCC.

In contrast, under section 60(2) PPSA, it is provided that “Where a security agreement secures an indebtedness and the secured party has dealt with the collateral pursuant to section 57, or has disposed of it, the secured party shall account for any surplus and shall, subject to subsection (5) or the agreement otherwise of all interested persons, pay any surplus in the following order to (a) a creditor or person with a security interest in the collateral whose security interest is subordinate to that of the secured party and (i) who has registered, before the distribution of the surplus, a financing statement that includes the name of the debtor or that includes the serial number of the collateral if the collateral is goods of a kind that are prescribed as serial numbered goods, or (ii) whose security interest was perfected by possession when the secured party seized or repossessed the collateral; (b) a judgment creditor whose interest in the collateral is subordinate to that of the secured party and who has registered, before the distribution of the surplus, a notice of judgment that includes the name of the debtor or that includes the serial number of the collateral if the collateral is goods of a kind that are prescribed as serial numbered goods; (c) any other person with an interest in the surplus who has given a written notice to the secured party of that person’s interest before the distribution of the surplus; and (d) the debtor and any other person who is known by the secured party to be an owner of the collateral.”²¹¹

[underlining mine].

With regard to the distribution of surpluses realized from collateral sales, the Article 9 version is simpler in the sense that it only requires the secured party to only pay the subordinate secured parties who sent it an authenticated demand before the distribution of profits is completed. In other words, the subordinate secured party has the onus to initiate the act of receiving a share from the surplus made from the sale of collateral by first sending an authenticated demand. The position is however different under the PPSA. Thus section 60(2)

²¹¹ Section 60(2) PPSA.

PPSA (*supra*), merely stipulates that the secured party shall account and pay surplus to a subordinate secured party without the subordinate's initial act of filing an authenticated demand as Article provided.²¹² The implication of this to a secured party who has conducted a disposition and realized any surplus is that he would go about searching for subordinate secured parties so as to pay them their due of the surplus. This to the researcher's mind is a cumbersome process and quite burdensome on the part of the secured party.

Fourth, with regard to the right of the debtor or any interested party to a security agreement to be notified before a secured party disposes of collateral, Article 9 under section 9-624, particularly subsection (a) provides that "a debtor or secondary obligor may waive the right to notification of disposition of collateral under section 9-611 only by an agreement to that effect entered into and authenticated after default." The PPSA however, particularly section 56(4) does not permit the debtor or any interested party to waive his right to be notified before the disposition of collateral by a secured party. On a comparative analysis, Article 9 is on this issue more liberal and recognizes the debtor's freedom in commercial transactions. In the researcher's opinion, it is sufficient if an authenticated document is signed by the debtor or any interested party after default, which waives his notification right.

Fifth, as it concerns the secured party's retention of a consumer good in full satisfaction of a debt owed by the debtor under a security agreement, Article 9-620(e) stipulates that where the debtor has paid at least 60 percent of the total debt, the secured party must not retain the collateral in satisfaction of debt but must dispose it and remit the balance to the debtor.²¹³ This stipulation is built on the belief that the collateral to be disposed would at least worth more than

²¹² See sections 9-607 and 9-615 UCC.

²¹³ Section 9-620(e) UCC should be jointly with section 9-620(f) which states that "to comply with subsection (e), the secured party shall dispose of the collateral: (1) within 90days after taking possession; or (2) within any longer period to which the debtor and all secondary obligors have agreed in an agreement to that effect entered into and authenticated after default."

the 40 percent or less which the debtor still owes as balance to the secured party. Under the PPSA, the rule is slightly different and hence, the secured party is not allowed to retain consumer good collateral in satisfaction of debt where the debtor has paid at least two-thirds (66.6%) of the total debt.

Both the PPSA and Article 9 have a unity of rationale on this issue but the percentage which the debtor must have paid to activate the rule under the PPSA is higher.²¹⁴ The implication is harsh on the debtor who has paid a little less than 66.6 percent of the total debt and in the end loose out the collateral in a foreclosure plan. Section 61(1) PPSA provides that “after default, the secured party may propose to take the collateral in satisfaction of the obligation secured by it and shall give notice of the proposal to (a) the debtor or any other person who is known by the secured party to be an owner of the collateral...” Subsection (3) provides further that “subject to subsections (6) and (7),²¹⁵ where a notice of objection is given pursuant to subsection (2),²¹⁶ the secured party shall dispose of the collateral pursuant to section 59.” Section 59 which section 61(3) referred to above only provided those entitled to notification and the contents of a notice to the debtor and other interested parties before the disposition of collateral is made. This means that a debtor who has rejected a foreclosure plan only has the choice to redeem the collateral by paying of his debt under the security agreement as section 59(9) (h) PPSA stipulates. PPSA

²¹⁴ It is 60 percent under Article 9. See section 9-620(e) UCC.

²¹⁵ Section 61(6) and (7) PPSA provides “(6) The secured party may require any person who has made an objection to the proposal to furnish proof of that person’s interest in the collateral and, unless the person furnishes the proof within ten days after the secured party’s request, the secured party may proceed as if no objection had been made by that person. (7) On application by a secured party, the court may determine that an objection to the proposal of a secured party is ineffective because (a) the person made the objection for a purpose other than the protection of an interest in the collateral or in the proceeds of a disposition of the collateral; or (b) the market value of the collateral is less than the total amount owing to the secured party together with the estimated expenses recoverable under clause 59(3)(a).”

²¹⁶ (2) Where the interest in the collateral of any person entitled to a notice under subsection (1) would be adversely affected by the secured party’s proposal, that person may give to the secured party a notice of objection within fifteen days after the notice under subsection (1) is given.

provides a haven for the debtor who has right to object to the secured party's seizure of consumer goods except in cases of purchase money security interest (PMSI), where the secured party advanced the money that resulted in the purchase of the consumer goods. Apart from PMSI situations, a secured party must not proceed to seize if the debtor proves any of the conditions listed under section 58(3) PPSA.²¹⁷

5.3. Why Article 9 Self help Repossession should be exported to Nigeria

Nigeria and United States have a common heritage of legal system. Both countries practice the common law type of legal system inherited from England and it is a good ground to start any contemplation of a legal transplant. Apart from the unity of legal system, both countries also practice the market economy system, and the federal system of government. Although both countries differ on social values there is no doubt that they both have similar economic orientation and goals which are the research's primary concern at the moment. The following reasons to be discussed which are derived from Article 9 show why the provisions of Article 9 on self help should be exported to Nigeria. Embedded in the reasons are also going to be recommendations and the pointing out of possible challenges in the transplanting exercise.

²¹⁷ Section 58(3)PPSA states: "Subject to subsection (7), a debtor may claim the following items of collateral to be exempt from seizure by a secured party: (a) furniture, household furnishings and appliances used by the debtor or a dependent to a realizable value of \$5,000 or to any greater amount that may be prescribed; (b) one motor vehicle having a realizable value of not more than \$6,500 at the time the claim for exemption is made, or not more than any greater amount that may be prescribed, if the motor vehicle is required by the debtor in the course of or to retain employment or in the course of and necessary to the debtor's trade, profession or occupation or for transportation to a place of employment where public transportation facilities are not reasonably available; (c) medical or health aids necessary to enable the debtor or a dependent to work or to sustain health; (d) consumer goods in the possession and use of the debtor or a dependent if, on application, the court determines that (i) the loss of the consumer goods would cause serious hardship to the debtor or dependent, or (ii) the costs of seizing and selling the goods would be disproportionate to the value that would be realized."

5.4. Reasons for proposing to export Article 9 Self help Provisions to Nigeria/Recommendations

5.4.1. (i) The Provision of Credit in a Market System

In the chapter one of this work, “credit” and its importance was discussed in detail. Here however, it is pertinent to reiterate that Article 9 is partly responsible for the success of the United States economy. It is admitted that credit is vitally important in the success and development of any economy, but then credit availability does not originate or fall from the sky. For it to occur, a country must design its laws and legal system to be favorable for the supply of credit. This was what Article 9 did. By making personal properties to qualify for collateral in a security agreement, borrowing and paying back were made more feasible to the average business entity in the American society, thereby encouraging the supply of credit. Nigeria therefore must follow suit, by adopting a favorable legal regime that would as it relates to secured transactions, allows the use of personal properties as collaterals in a security agreement. It is only when every member of the society wanting to do business can afford to borrow, secure the loan and pay back that confidence in lending would be solidified thereby making credit very available.

5.4.2. (ii) Remedies of a Secured Party in a Security Agreement upon the Debtor’s Default

Traditionally and as most legal systems still insist, dispute of any form between parties should be submitted to the courts of competent jurisdiction to determine. Self help especially with respect to criminal law was only reserved for extreme situations where a person’s life was in imminent

danger or where he stands to lose irreparably if it were to wait for the irreparable damage to be caused and thereafter sue.

However one innovation which Article 9 introduced was the empowerment of a secured creditor under a security agreement to resort to self help towards the repossession of collateral when the debtor has defaulted.²¹⁸ It is pertinent to note however that the same Article 9-609 which gave the empowerment also restricted it by imposing a standard which the self help repossession right of a secured party must abide by. What is rather important in essence here is that a secured party can recover collateral by self help provided the recovery is peaceful.²¹⁹ This power is the most potent of his remedies because it is the effortless method by which the secured party quickly ensures that he does not lose out his investment upon the debtor's default. Judicial processes are fraught with many formalities which result in delays, and this is quite antagonistic to a speedy growth of commerce.

By granting self help power to a secured party therefore, lenders are no longer discouraged by the slow judicial processes and usually go ahead to lend since they are almost sure of recovering the collateral upon default by the debtor. Coupled with the allowance by Article 9 for the use of acceleration and insecure clauses,²²⁰ a secured party only needs to prove reasonable fear to fully activate and justify his repossession of collateral where such clauses were inserted in the security agreement. This is where Nigeria lags seriously behind. The Nigerian legal system is yet to appreciate that self help when well regulated in commerce can be more of good than evil. Currently under the Nigerian law, opinions about the use of self help by a secured

²¹⁸ See section 9-609UCC.

²¹⁹ See section 9-609(b) (2) UCC.

²²⁰ According to the 9th Edition of the Black's Law Dictionary, Insecurity Clause means "A loan agreement provision that allows the creditor to demand immediate and full payment of the loan balance if the creditor has reason to believe that the debtor is about to default, as when the debtor suddenly loses a significant source of income."

party to recover collateral are strongly varied amongst the Nigerian judges and scholars thereby causing uncertainty of legal position. It is recommended therefore that the self help provision in Article 9 be included when Nigeria decides to adopt the transplantable provisions of Article 9.

5.4.3. (iii) The Use of “Commercial Reasonableness” and “Good Faith” Standards

Somehow Article 9 diluted the power it accorded the secured party under a security agreement, namely, the power to repossess collateral without judicial assistance by mounting two “watch dogs” to observe the secured party’s use of the power. Where a secured party repossesses collateral, Article 9 requires him to sell following “commercial reasonableness”²²¹ standard and the general principle of “good faith.”²²² These standards especially the “good faith” standard is more or less fluid and its true meaning lies in the hands of the court to determine based on the circumstances of each case. With these two “dogs” that bark only in the conscience of the secured party, the latter is better guided in his actions throughout the process of collateral disposition. Nigeria equally lags behind here in the sense that there is no statutory regulation of a secured party’s manner of disposition. The Nigerian cases that have pronounced particularly on this, share the same guilt of disunity which make the position of law quite uncertain.²²³

Therefore, if and when Nigeria adopts the transplantable provisions of Article 9, it is advised that it should not fail to statutorily incorporate these two standards to regulate the

²²¹ See section 9-610 (b) UCC.

²²² See section 1-201(20) UCC; which says that good faith “except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.” [underlining mine]. It is the researcher’s point of view that the underlined phrases in the definition which the Code gives to “good faith” are fluid and have no definite meaning except in context.

²²³ For instance see two Nigerian Supreme Court cases *Ellochim Nig. Ltd & Ors v Mbadiwe*, supra note 21 and *Awojugbagbe Light Industries Ltd v Chinukwe*, supra note 25, p.410. These two cases sharply contrast each other on the legality of self help use. While *Ellochim* condemns the use of self help, *Awojugbagbe* on the other hand strongly encourages its use. The result is legal uncertainty, especially as both decisions came from the apex court of the country.

secured party's conduct in disposition. By keeping the standards not totally defined as Article 9 did, it affords the courts the discretion to expand and mitigate harsh situations for the sake of achieving justice in every case.

5.4.4. (iv) Strict Foreclosure

As hinted in chapter four of this work, Nigeria does not yet practice strict foreclosure in a security agreement. What it currently has is judicial foreclosure which is different in meaning from the subhead under examination. Judicial foreclosure entails the secured party/mortgagee to apply to the court and notify it of its intention to take possession of the real property/collateral in full satisfaction of the debt owed. The mortgagee successfully takes possession following the court's approval. On the other hand strict foreclosure under Article 9 entails that the secured party [except in consumer goods where the debtor has paid up to 60 percent of the owed debt], makes a proposal to the debtor and all concerned parties that he would like to take over the debtor's collateral in full or partial satisfaction of the debt which the debtor owes him.²²⁴ The proposal by the secured party to strictly foreclose collateral in full or partial satisfaction of debt may be accepted or rejected by the debtor and/or other interested parties.

Especially with strict foreclosure in full satisfaction of debt, it has notable advantages which would prosper in the Nigerian "commercial soil." First, by taking collateral in full satisfaction, the secured party is precluded from asking the debtor to pay any deficient amount as well as not obligated to account for any surplus realized from the disposition. Second and more importantly is the fact that the secured party who has opted to take collateral in full satisfaction is not under a duty to dispose collateral in a commercially reasonable manner and timeframe as he

²²⁴ See generally section 9-620 UCC.

would have been had he not chosen strict foreclosure.²²⁵ The secured party in a strict foreclosure plan may decide to delay and wait for when the market is most favorable. This is good in a market economy which Nigeria practices where the scarcity of supply usually skyrockets prices.

For instance, certain goods are seasonal and would sell at a low price during their off seasons. A discreet secured party would wait for the season when the collateral is most sought after to come before he disposes. That way he stands a chance of making a fantastic sale with mouthwatering profits. Nigeria should therefore include the strict foreclosure provision as one of the transplantable provisions of Article 9 as a viable means of its economic growth.

5.5. Conclusion

This work has so far discussed a chain of interdependent topics about the self help remedy rights of a secured party in a security agreement. From the success stories about the United States economy and the easy growth of businesses in the United States, it is evident that the easy provision and accessibility of credit facility are largely responsible. Closely linked to that fact is the fact that the United States Article 9 provided the necessary “fertile soil” for business and economic growth by making personal properties to qualify for use as collaterals under any security agreement.

Article 9 recognizes that for there to be an unshakable confidence in lending, the lenders, who are like *the geese that lay the golden eggs*, must be greatly assured that they would not in the end lose out their investments. Article 9 further recognizes the fact that court processes are fraught with protocols and delays, and allowing the courts to be the only channel of enforcement would distort one of the fundamental rationales behind Article 9, which is to provide credit to

²²⁵ See section 9-622 UCC.

business entities, by encouraging lenders to be more willing to lend. Thus, the self help right under Article 9 is meant to serve as a fast track lane by which a secured party gets rid of the court's slowness and still arrives at the desired destination in time.

However, Article 9 of course contemplated a possible abuse of this self help right and provided some checkpoints in the form of standards, which are designed to regulate the secured party's conduct. These standards in the names of "good faith", "without breach of the peace", and "commercial reasonableness" guide the secured party from the moment of self help repossession of the debtor's collateral up to disposition. This is because Article 9 expects the secured party to always act equitably and in good conscience in his dealings with the debtor's collateral and a failure to act in that manner usually results to amongst others, to the resolution of any doubt in favor of the debtor.

Article 9 made it simpler for both parties to a security agreement when a default occurs, by providing the possibility of opting for a strict foreclosure rather than the secured party to go through the hassles of disposition. Also the possibility of the debtor's liability to provide for a deficient value in the event that the disposed collateral did not measure up to the debt owed is obviated. Take note however, that strict foreclosure is inapplicable in consumer goods collateral where the debtor has paid at least 60 percent of the owed debt.²²⁶

The issue has also now been settled that self help repossession right which Article 9-609 provided a secured party in a security agreement is not a violation of the Fourteenth Amendment due process right of an individual under the United States law. The courts have held in a plethora of cases that for the due process right to be violated, the state must be used as machinery to assist in the self help repossession. Where a secured party following a default under a security agreement, privately repossesses the debtor's collateral without the assistance of the state, then

²²⁶ See section 9-620(e) UCC.

such repossession cannot be interpreted as a violation of the Fourteenth Amendment due process right under the United States law.

Now Nigeria comes to the picture. With Nigeria's interest to adopt the transplantable provisions of Article 9, the country has a lot of preparations to make before the advent of Article 9 which includes but not limited to teaching Article 9 based secured transactions law in its higher institutions. It has somewhere been noted in this work that Nigeria has not been able to maximize its economic potentials because of the absence of a secured transactions law which regulates the use of personal properties as collateral in a security agreement. Also self help remedy is still viewed as barbaric and many Nigerian judges and scholars still believe that no amount of regulation could cure the inherent defect in it.²²⁷ These are some of the issues the advent of Article 9 transplantable provisions including those of self help rights would correct in Nigeria. Above all, the idea of rejecting self help especially in Nigeria as a viable means of enforcing a secured party's right in a security agreement needs to be seriously reconsidered.

²²⁷ The Nigerian approach to self help remedy is akin to what Warren and Walt said in their book about Europeans- "Europeans tend to see self help as another example of American barbarism" see Warren, William D. & Walt, Steven D, SECURED TRANSACTIONS IN PERSONAL PROPERTY (Foundation Press, 7th Edition, 2007) p. 269.

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