

Chattel Mortgages and Judgment Satisfaction— The Security Agreement as an Exemption from Execution in Missouri

The problem this note analyzes is that which an unsecured judgment creditor¹ faces when he attempts judgment satisfaction² out of personal property owned by the judgment debtor³ subject to a chattel mortgage in favor of a third person. Generally, such property is exempt from judgment satisfaction although there is no authority in the statutes for such an exemption. From the perspective of the creditor holding a judgment against an average working-man, the problem is particularly acute because virtually all of his property is likely to be exempt under the statute,⁴ leaving the debtor's automobile, in the typical case, as the only substantial non-exempt property. But, typically also, the automobile is beyond the reach of the creditor because it is under a chattel mortgage given by the judgment debtor to finance its purchase.

His problem is, however, likely to be diminished because the Uniform Commercial Code, which was proposed in the 1961 session of the Missouri General Assembly,⁵ and seems likely to be enacted soon, contains a section which, although ambiguous, could be interpreted as

1. Throughout this note "judgment creditor" means not only one who holds an unsatisfied judgment but also includes two other types of creditors. First, it is intended to include a plaintiff in an attachment suit, even though he has not yet prosecuted it to judgment. Second, it is intended to include a plaintiff using a creditor's bill, even one who falls within one of the exceptions to the rule that there must be a judgment at law before a creditor's bill in equity can be used.

In the context of this note, an "unsecured judgment creditor" is simply one of the persons indicated in the preceding paragraph who has no lien on the particular property which he wishes to sell in satisfaction of his judgment, even though he may have a statutory judgment lien upon the judgment debtor's realty.

2. By "judgment satisfaction" is meant the seizure of a property interest of the judgment debtor by or on behalf of the judgment creditor in an attempt to sell the interest or otherwise utilize it in payment of the amount of the judgment. It is intended to cover the four methods of judgment satisfaction most often used in Missouri: execution, attachment, garnishment and creditor's bill.

3. "Judgment debtor" is intended to include a defendant in an attachment suit and a defendant in a creditor's bill suit in equity, as well as one against whom there is an unsatisfied judgment. See note 1 *supra*.

4. See MO. REV. STAT. §§ 513.425-530 (1959).

5. THE UNIFORM COMMERCIAL CODE was introduced into the 1961 Missouri General Assembly as Senate Bill No. 1. It was passed by the Senate but not until late in the session, so that the House of Representatives had little time to consider it and it died on the House calendar at *sine die* adjournment. Letter from William R. Nelson, Director of Research, Committee on Legislative Research, State of Missouri, to author, June 15, 1962.

radically changing the law. This note, then, will consist of an analysis of the present Missouri law followed by a discussion of the changes which might result from the enactment of the Uniform Commercial Code.

I. THE PRESENT MISSOURI LAW

The chattel security device most commonly used in Missouri is the chattel mortgage. Under this agreement title to the property is conveyed by the mortgagor to the mortgagee, subject to being divested upon timely payment of the debt which gave rise to the transaction.⁶ The present practice is for the mortgagor to retain possession of the mortgaged chattel. The mortgagee has the right without special agreement to take possession upon default without judicial process.⁷ It is also possible, as will be developed below,⁸ to provide other conditions which give the mortgagee the right to take possession of the property.

The mortgagor thus has a double legal interest in the property: the possibility of legal title reverting to him, and present possession. He also has the so-called equity of redemption. The question is whether these interests are subject to the processes of judgment satisfaction. This question will be answered initially assuming that the judgment satisfaction process utilized is attachment or execution and, later, assuming it to be garnishment or creditor's bill.

A. Attachment and Execution

The Missouri statute provides that "all goods and chattels not herein exempted . . . shall be liable to be seized and sold upon attachment and execution. . . ."⁹ Although the phrase "all goods and chattels" would seem to include mortgaged chattels, it has been construed to be declaratory of the common law.¹⁰ Writs of attachment and execution, because they are legal devices, could not at common law reach equitable interests.¹¹ Hence, if mortgaged chattels are subject to process of attachment or execution, the mortgagor must retain some legal interest in them. The Missouri courts have consistently held that if, and only if, the mortgagor has the right of possession at the time of the levy as against the mortgagee, he has an interest in the chattel of such a nature as to make it subject to levy and sale under a writ of

6. See Gilmore & Axelrod, *Chattel Security: I*, 57 YALE L.J. 517, 530 (1948).

7. *Id.* at 532-33.

8. See text accompanying note 19 *infra*.

9. MO. REV. STAT. § 513.090 (1959).

10. See, e.g., *Young v. Schofield*, 132 Mo. 650, 34 S.W. 497 (1896).

11. 1 FREEMAN, EXECUTIONS § 116 (2d ed. 1888); *Young v. Schofield*, *supra* note 10. In many states the common law has been abrogated by statute, permitting writs of attachment and execution to reach equitable as well as legal interests. 1 FREEMAN, *op. cit. supra* § 116.

attachment or execution.¹² In addition, curiously enough, the equity of redemption also may be sold.¹³

As indicated above,¹⁴ virtually all chattel mortgages now reserve the right of possession to the mortgagor until condition broken. In general, the conditions are of two types: default and insecurity. Clauses in which these conditions are set out must be examined in order to determine the interest of the mortgagor.

The default clause¹⁵ provides that if the mortgagor fails to make any payment on the principal or interest when due, the mortgagee may declare the entire indebtedness overdue and may repossess the chattel. If the mortgage instrument contains a default clause—but not an insecurity clause—and the mortgagor has not defaulted in his payments at the time of the levy, then he retains the right of possession as against the mortgagee. Hence, the chattel is subject to judgment satisfaction by either attachment or execution.¹⁶ If, on the other hand, the mortgagor defaults before the levy, this is a breach of the condition set out in the default clause, and the right of possession immediately passes to the mortgagee.¹⁷ Consequently, the chattel is not subject to attachment or execution.¹⁸

It is far more likely, however, that the mortgage instrument will

12. *E.g.*, *Foster v. Potter*, 37 Mo. 525 (1866); *Yeldell & Barnes v. Stemmons*, 15 Mo. 443 (1852); *Green v. Powell*, 46 S.W.2d 915 (Mo. Ct. App. 1932); *Wyeth Hardware Co. v. Carthage Hardware Co.*, 75 Mo. App. 518 (1898); *State ex rel. Pape Bros. Moulding Co. v. Althaus*, 60 Mo. App. 122 (1894); *Brown v. Hawkins*, 54 Mo. App. 75 (1893); *Springate ex rel. Nelson Distilling Co. v. Koppelman Furniture Co.*, 51 Mo. App. 1 (1892); *Hickman v. Dill*, 32 Mo. App. 509 (1888); *Merchants' Nat'l Bank v. Abernathy*, 32 Mo. App. 211 (1888).

13. *Foster v. Potter*, 37 Mo. 525 (1866). This, of course, entitles the purchaser to any surplus in the hands of the mortgagee if the latter forecloses on the chattel and satisfies the mortgage debt by selling it.

14. See note 7 *supra* and accompanying text.

15. For examples of typical default clauses, see the chattel mortgage forms set out in 6 PETERSON & ECKHARDT, MISSOURI PRACTICE §§ 496-98 (1960).

16. *Wyeth Hardware Co. v. Carthage Hardware Co.*, 75 Mo. App. 518 (1898); *F. O. Sawyer Paper Co. v. Mangan*, 60 Mo. App. 76 (1894); *Springate ex rel. Nelson Distilling Co. v. Koppelman Furniture Co.*, 51 Mo. App. 1 (1892); *Hickman v. Dill*, 32 Mo. App. 509 (1888); *cf. Boeger v. Langenberg*, 42 Mo. App. 7 (1890).

17. *Steele ex rel. Milroy v. Farber*, 37 Mo. 71 (1865); *Burge v. Hunter*, 93 Mo. App. 639, 67 S.W. 697 (1902). If the debt was due at the time the mortgage instrument was executed, there was an automatic default and the mortgagee had the right of possession from the beginning. *Pollock v. Douglas*, 56 Mo. App. 487 (1894).

18. *Young v. Schofield*, 132 Mo. 650, 34 S.W. 497 (1896); *State ex rel. Milroy v. Farber*, *supra* note 17; *Green v. Powell*, 46 S.W.2d 915 (Mo. Ct. App. 1932); *Burge v. Hunter*, *supra* note 17; *State ex rel. McGrath v. Carroll*, 24 Mo. App. 358 (1887).

contain both a default clause and an insecurity clause. The latter consists of a long list of conditions, the occurrence of any of which would tend to endanger the value of the chattel. A typical insecurity clause might contain all of the following conditions:

[I]f the Mortgagor shall be adjudicated a bankrupt, or make a general assignment for the benefit of creditors, or take advantage of any insolvency law; or if any of the property hereby mortgaged shall be attached or levied upon by any person other than the Mortgagee; or if the Mortgagor shall die or become incompetent; or if the Mortgagor shall sell or dispose of or attempt to sell or dispose of any of said property, or remove or attempt to remove the same from its present location without the written consent of the Mortgagee; or if the Mortgagee shall deem itself insecure because of an unreasonable depreciation in value thereof, then the Mortgagee may, at its option, and without any notice whatsoever, declare the whole of the indebtedness secured hereby due and payable, and may take possession of the property hereby mortgaged or any part thereof¹⁹

If the mortgage instrument contains an insecurity clause, then even if there were no breach of condition under the default clause at the time of the Levy, such a levy itself works a breach of condition.²⁰ The Missouri courts have utilized the following condition from the long list contained in the insecurity clause to reach this unusual result: "if the mortgagor shall sell or dispose of or attempt to sell or dispose of" the mortgaged chattel, the mortgagee is entitled to repossess it.²¹

The theory utilized by the courts is that "sell" in the insecurity clause includes an involuntary alienation of the mortgagor's interest in the chattel. Since the only purpose for which a public officer may levy upon property under a writ of attachment or execution is to sell it at a public sale, the act of levying by the officer constitutes an attempted sale. An attempted sale is a breach of the condition, and it was agreed in the instrument that the mortgagor was to retain the right of possession only until condition broken. Since the levy could be valid only if the mortgagor had the right of possession, the levy invalidated itself.²² In light of the fact that modern instruments in-

19. 6 PETERSON & ECKHARDT, MISSOURI PRACTICE § 496 (1960). (Emphasis added.) See also 6 PETERSON & ECKHARDT, *op. cit. supra* §§ 497, 498.

20. *State Bank v. Keeney*, 134 Mo. App. 74, 114 S.W. 553 (1908); *Straub v. Simpson*, 74 Mo. App. 230 (1898); *State ex rel. Jones & White v. White*, 70 Mo. App. 1 (1897); *State ex rel. St. Louis Brewing Ass'n v. Murphy*, 64 Mo. App. 63 (1895); *State ex rel. Pape Bros. Moulding Co. v. Althaus*, 60 Mo. App. 122 (1894); *Brown v. Hawkins*, 54 Mo. App. 75 (1893).

21. See text accompanying note 19 *supra*.

22. *State ex rel. Jones & White v. White*, 70 Mo. App. 1 (1897); *State ex rel. St. Louis Brewing Ass'n v. Murphy*, 64 Mo. App. 63 (1895); *Brown v. Hawkins*, 54 Mo. App. 75 (1893). The same reasoning has been used, with equal efficacy, when the clause in question was "removal, or attempt to remove" property from

variably contain such a condition,²³ this means for all practical purposes that attachment and execution can never reach a chattel mortgagor's interest.

B. Garnishment and Creditor's Bill

A similar result is obtained in garnishment. Since garnishment is a proceeding for reaching property of the judgment debtor in the possession of a third party,²⁴ it is, of course, theoretically available anytime the mortgagor does not have possession of the collateral. It would seem to be the logical procedure to use when the mortgagee has possession of the collateral or when the collateral is in the possession of a trustee under a deed of trust or deed of assignment.²⁵ This is not the case, however. Thus, in *Beckham v. Carter*,²⁶ the judgment debtor executed a chattel mortgage to the garnishee. There was a default and the garnishee repossessed the collateral and was in the process of selling it when he was summoned in an attachment suit against the judgment debtor. The court, in holding that the mortgagor's interest was not subject to garnishment, said:

On what, then, did the garnishment operate, unless it was the equitable interest of the mortgagor? That was all that then remained. No rule of law is more firmly rooted than that the process of garnishment is essentially a proceeding at law. It extends only to legal assets, and intercepts only legal credits. It is not equitable in its nature or procedure, and never can touch mere equitable interests and assets in the hands of the garnishee.²⁷

It thus appears that the surplus in the possession of a mortgagee is not subject to garnishment because the judgment debtor's interest is merely equitable (or at least so the court, somewhat inaccurately, described it). Further, relief is denied in garnishment proceedings on the basis of the rule that garnishment will not reach contingent in-

the place where then situated. (*Huiser v. Beck*, 55 Mo. App. 668, 674 (1894); *Kennedy v. Dodson*, 44 Mo. App. 550 (1891). See also *Yellow Mfg. Acceptance Corp. v. Rogers*, 142 S.W.2d 888 (Mo. Ct. App. 1940).

23. See notes 7 & 19 *supra*.

24. *Nacy v. LePage*, 341 Mo. 1039, 111 S.W.2d 25 (1937). MO. REV. STAT. § 525.080 (1959) provides:

If it appears that a garnishee, at or after his garnishment, was possessed of any property of the defendant, or was indebted to him, the court . . . may order the delivery of such property, or payment of the amount owing by the garnishee. . . .

25. For purposes of determining whether or not his interest is subject to judgment satisfaction by an unsecured creditor, a chattel mortgagor and a grantor under a deed of trust or deed of assignment are identically treated by the courts. *Woodson v. Carson*, 135 Mo. 521, 35 S.W. 1005 (1896); *Hausmann v. Hope*, 20 Mo. App. 193 (1886).

26. 19 Mo. App. 596 (1885).

27. *Id.* at 603.

terests. In *McCord & Nave Mercantile Co. v. Bettles*,²⁸ the court, on facts substantially similar to those in the *Beckham* case, said:

At the time of the service of the garnishment . . . the garnishee owed the defendant nothing. Whether he would ever owe him anything depended entirely upon the future contingency as to whether the garnishee would proceed a step further in selling the chattels, and if he did, whether there would be any surplus remaining after satisfying the debt.²⁹

The court did not base its decision entirely upon the contingency argument, however, but managed to combine it with the rule that equitable interests cannot be subjected to garnishment.

We think the rule may now be regarded as fairly settled that the process of garnishment is confined to arresting and impounding in the hands of the garnishee at the time of the notice, existing legal credits which are due or to become due by efflux of time as contradistinguished to those that are contingent or equitable in their nature.³⁰

It seems clear, then, that the surplus over the amount of the mortgage debt is not, after default, subject to garnishment. Although there are no holdings on the point, it would seem that if the mortgagee acquired possession of the collateral before default the same result would obtain.³¹ Since the mortgagor is out of possession, his only interests in the collateral are equitable and contingent.

On the basis of the discussion thus far, it can be concluded that, generally, a judgment creditor is not able to reach a chattel mortgagor's interest by way of attachment, execution or garnishment.

In other words, any legal remedy is inadequate. Thus, the possibility of equitable relief is presented. The appropriate remedy in equity is the creditor's bill.³² Writers have suggested that the creditor's

28. 58 Mo. App. 384 (1894).

29. *Id.* at 388.

30. *Id.* at 389.

31. See generally Annot., 134 A.L.R. 853 (1941); Annot., 83 A.L.R. 1383 (1933); 4 AM. JUR. *Attachment and Garnishment* § 238 (1936). For an indication to this effect, see *Zeltman v. Commercial Bank*, 67 Mo. App. 672 (1896), where the court rejected the appellant's argument that while a mortgagee is not subject to garnishment a pledgee is. The court said in either event the interest of the debtor is contingent and, hence, not garnishable.

In *Donk Bros. Coal and Coke Co. v. Kinealy*, 81 Mo. App. 646 (1899), plaintiff attempted to garnish property held under a deed of trust. He was successful, but only because the court found the deed fraudulent, saying, however, "No proposition of law is better settled than, that trust funds are not the subject of garnishment." *Id.* at 652.

32. McCLINTOCK, *EQUITY* 358-60 (1936).

A creditor who has obtained a common-law judgment which he is unable to satisfy by common-law process may maintain a bill in equity to discover concealed assets of the debtor, to subject equitable assets to the payment of the judgment, or to set aside fraudulent conveyances. *Id.* at 358.

bill should be utilized as a method of plugging "gaps" left by legal processes of judgment satisfaction.³³ Indeed, Missouri courts have suggested to the non-prevailing party attempting to reach the mortgagor's interest by attachment, execution or garnishment that his remedy is a creditor's bill in equity.³⁴ There are, however, no reported Missouri cases in which an attempt was made to obtain such relief. The remedy, then, is theoretical, or, at least, untried in Missouri. On the other hand, there seems no special reason to doubt that Missouri would follow the rule in other states which permits the creditor's bill to be used to reach a mortgagor's interest.³⁵

Finally, other types of security agreements which are available as substitutes for the chattel mortgage must be considered. The conditional sale contract, the substitute most nearly like the chattel mortgage, is rarely if ever used in Missouri.³⁶ The trust receipt is used primarily in the field of inventory finance and is unlikely to be used by the wage-earner judgment debtor.³⁷ The pledge³⁸ is a more likely de-

See also 4 POMEROY, EQUITY JURISPRUDENCE § 1415 (5th ed. 1941); 14 AM. JUR. *Creditors' Bill* § 2 (1938); 21 C.J.S. *Creditors' Suits* § 1 (1940).

33. 1 FREEMAN, EXECUTIONS § 116 (2d ed. 1888); Jones, *The Uses of Equity: Creditors' Bills*, 16 Mo. B.J. 182 (1960).

34. Yeldell & Barnes v. Stemmons, 15 Mo. 443 (1852). In *Ball v. Peper Cotton Press Co.*, 141 Mo. App. 26, 121 S.W. 798 (1909), the court said:

In treating the subject of creditors' bills a standard work says as a rule every species of property belonging to the debtor, which is inaccessible on execution, can be subjected in equity for the satisfaction of his debts. . . .

Many states have enacted statutes bringing such interests within the reach of executions, attachments, and garnishments; but, as said, we have no statute of the kind, and when this is true the remedy is in equity. *Id.* at 803.

35. See authorities cited note 32 *supra*.

36. MO. REV. STAT. § 428.110 (1959) requires the vendor to refund 75% of the payments made as a condition precedent to repossessing the collateral. See 2 VOLZ, LOGAN & BLACKMAR, MISSOURI PRACTICE § 2587 (1961).

Although the matter has not been litigated in Missouri, it seems safe to say that the interest of a conditional vendee is subject to judgment satisfaction whenever the interest of a chattel mortgagor under a similarly worded instrument could be reached. See notes 14-19 *supra* and accompanying text. See also ESTRICH, *INSTALLMENT SALES* § 480 (1926); Annot., 61 A.L.R. 781 (1929); AM. JUR. *Attachment and Garnishment* § 253 (1936).

37. See Gilmore, *Chattel Security: II*, 57 YALE L.J. 762 (1948); Carter, *The Trust Receipt and the Problem of Recordation or Notice Filing*, 1951 WASH. U.L.Q. 30; Comment, 7 Mo. L. REV. 302 (1942); Comment, 12 Mo. L. REV. 189 (1947).

It is probable that the debtor's interest under a trust receipt could never be reached for judgment satisfaction in Missouri. See *Globe Securities Co. v. Gardner Motor Co.*, 337 Mo. 177, 85 S.W.2d 561 (1935); *Commercial Credit Co. v. Interstate Securities Co.*, 197 S.W.2d 1000 (Mo. Ct. App. 1946); 9 NICHOLS, *CYCLOPEDIA OF LEGAL FORMS* § 9.01(B) (1925).

38. See Gilmore & Axelrod, *Chattel Security: I*, 57 YALE L.J. 517, 522 (1948); 1 FREEMAN, EXECUTIONS § 120 (2d ed. 1888).

vice, but the few cases have treated pledges, for purposes of determining whether the pledgor's interest is subject to judgment satisfaction, as a chattel mortgage with the mortgagee in possession of the collateral. The result is that the pledged chattel cannot be reached.³⁹

C. *The Rationale of the Cases*

Most of the cases were decided by simply noting that it is the settled law in Missouri that a chattel mortgagor's interest is not subject to attachment, execution or garnishment unless he retains the right of possession against his mortgagee. To the extent that any reasons are given for this rule (and they appear in only a few early cases) they are based on the court's characterization of the mortgagor's interest after condition broken as being equitable and contingent.

The rule that legal processes will not reach equitable interests in chattels was arrived at by interpreting the statute which subjects to attachment and execution:

(1) All goods and chattels not herein exempted;

. . . .

(5) All real estate whereof the defendant, or any person for his use, was seized, in law *or equity*⁴⁰

Comparison of these subsections led the court to conclude that:

[A]t common law the equitable interest of a debtor in chattels was not the subject of sale under execution. Our statute . . . while it subjects equitable interests in *lands* to sale, lets the common law as to equitable interests in chattels or personal property remain as it was.⁴¹

A careful analysis of the court's conclusion is needed. First of all, even though the statute does not expressly subject equitable chattel interests to attachment and execution, it does expressly exclude exempt property from the reach of those processes. Thus it is inferable that the legislature intended to include *all* goods and chattels not exempted, whether the interest be characterized as equitable or legal. If the legislature intended to exclude equitable interests it would have said so, just as it expressly excluded exempt property. A second point is that the Missouri courts are probably in error when they characterize the mortgagor's interest as equitable. Historically it was not—at least it was not in the case of the real property mortgage of which the

39. *Sexton v. Monks*, 16 Mo. 156 (1852); *Evens & Howard Fire Brick Co. v. Gammon*, 204 S.W. 832 (Mo. Ct. App. 1918); *Zeltman v. Commercial Bank*, 67 Mo. App. 672 (1896). *But see* *Ball v. Peper Cotton Press Co.*, 141 Mo. App. 26, 121 S.W. 798 (1909), where the court enjoined transfer of a documentary pledge until the performance of the obligation secured at the instance of an unsecured judgment creditor of the pledgor who had brought a creditor's bill in equity.

40. MO. REV. STAT. § 513.090 (1959). (Emphasis added.)

41. *Young v. Schofield*, 132 Mo. 650, 669, 34 S.W. 497, 501 (1896).

chattel mortgage is a copy.⁴² The third point is that while it is true that legal processes would not reach equitable interests at common law, this was the result of two separate and more or less independent court systems,⁴³ a structure which was changed long ago in Missouri.⁴⁴ There seems to be no reason for limiting attachment, execution and garnishment to legal interests simply because at one time law courts would not recognize equitable interests. This hard and fast division is out of step with the merger of law and equity. A final point is that even Missouri courts have not consistently excluded equitable interests from the reach of legal processes. An outstanding example is that attachment, execution and garnishment will reach fraudulent conveyances of personal property.⁴⁵ If the equitable interest of the conveyor can be reached, why cannot the "equitable" interest of the chattel mortgagor be reached? The upshot is that even though the mortgagor's interest may be equitable, that fact is not really a compelling reason for the rule. It is, at best, a poor one.

A slightly less technical reason for the rule is the contingent nature of the mortgagor's interest after condition broken. This second basis was expounded in the 1852 cases of *Yeldell & Barnes v. Stemmons*⁴⁶ and *Boyce v. Smith*,⁴⁷ and has not seriously been criticized (or even

42. See DURFEE, CASES ON SECURITY 485-89 (1951).

43. The common-law rule [that the legal processes of attachment, execution and garnishment could not reach equitable interests] was sustained by the theory that at law only legal interests could be recognized and enforced. It was not founded on any tenderness for equitable titles, but rather upon a desire to ignore them altogether. By proceedings in equity, equitable interests could always be made to contribute to the satisfaction of a judgment against the owner. If such interests are to be subjected to forced sale, it is better to allow them to be taken under *feri facias* than to compel the creditor to resort to a separate suit; for the suit, after subjecting both parties to delay and expense, without any compensatory advantages, does precisely what might long before have been done under a *feri facias*. 1 FREEMAN, EXECUTIONS § 116, at 272-73 (2d ed. 1888).

44. Missouri "merged" law and equity in 1849. Mo. Laws 1848-49, ch. 73, § 1. This provision currently appears in Mo. REV. STAT. 506.040 (1959) and SUP. CT. RULE 42.01. See Crawford, *Equitable Defenses to Actions at Law Under the Missouri Code*, 25 WASH. U.L.Q. 60 (1939).

45. *Woodson v. Carson*, 135 Mo. 521, 35 S.W. 1005 (1896) (dictum).

Whoever goes out with an execution to seek the fruits of his judgment is too apt to find that fraud has forestalled him. It then becomes his business to pursue those fruits, wherever fraud has taken them; to wrest them from the possession of his adversary, wherever they may be found; and to prepare himself to show that the refuge whence he has wrested them is still the refuge of fraud. In many instances the aid of equity is invoked. But generally this is unnecessary; for a transfer made to hinder, delay, or defraud creditors, while as between the parties it conveys the title, has as against a creditor proceeding under execution no such effect. As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. 1 FREEMAN, EXECUTIONS § 136, at 337-38 (2d ed. 1888).

46. 15 Mo. 443 (1852).

47. 16 Mo. 317 (1852).

noted) since that time. In the first of these cases, the supreme court, in holding void a levy of execution upon three slaves and a ferry-boat, said:

The great sacrifice resulting from sale of such interests, has caused their prohibition. The interest of the debtor may be great or small, and as it is uncertain what will be realized by the purchase, there is almost invariably a ruinous sale. . . . It does not comport with the dignity of the law, that such evanescent interests should be the subject of sale. It is unwarrantable interference with the rights of others. . . . The rule prohibiting a sale of the equity of redemption under execution, is designed to protect the property of the debtor from sacrifice; to prevent gambling about uncertainties⁴⁸

Later the same year, in *Boyce v. Smith*, the supreme court, citing the *Stemmons* case said:

It is against policy that uncertain interests of the debtor in property should be exposed to sale. Experience shows that such sales generally result in great sacrifices, both to the debtor and creditor. The debtor is stripped of his property and no satisfaction is made of his debts.⁴⁹

There is some merit to this reasoning. It is clear that the more uncertain the interest, the lower the bidding is likely to be at a public sale. On the other hand, full value is rarely received for property sold at a public sale, yet no suggestion is made that they be abolished as an instrument in judgment satisfaction. Second, when the court permits the sale of the mortgagor's interest before condition broken, it is permitting the sale of a contingent and uncertain interest, for it is uncertain whether or not the mortgagor will default on the debt and if so whether or not the mortgagee will choose to repossess the chattel or to sue the defaulting debtor. All that can be said is that the mortgagor's interest is more uncertain after condition broken than it was before. The fact that a mortgagor's interest before condition broken is leviable indicates that the court is not drawing a line between contingent and non-contingent interests, but rather between interests with different degrees of contingency or uncertainty. A final point should be made concerning the supposed disastrous consequences of selling uncertain interests. It was at one time the rule that choses in action could not be levied upon and sold for much the same reason.⁵⁰ This rule has since been changed in Missouri,⁵¹ and no one seriously contends that the old rule be reinstated, for the results have not been disastrous at all. There has instead simply been a broadening of the debtor's liability for his debts.

48. *Yeldell & Barnes v. Stemmons*, 15 Mo. 443, 445-46 (1852).

49. *Boyce v. Smith*, 16 Mo. 317, 323 (1852).

50. 1 FREEMAN, EXECUTION § 112 (2d ed. 1888).

51. MO. REV. STAT. §§ 513.090, .105 (1959).

In summary, rationale is only infrequently given for the rule, and, when given, is based on either a technical argument concerning the legal-equitable dichotomy in the English court system or on imagined undesirable consequences. Opposite these reasons must be placed the fact that a court has determined in a judgment that a debt exists and ought to be paid. The scales, it must be concluded, are unevenly balanced.

The chances of the rule being overturned by judicial decision are nil. Almost all the cases were decided in the nineteenth century, and the issue has scarcely been litigated in recent decades. The factual reasons are doubtless clear enough. If a debtor permits a judgment to be unsatisfied, it is likely he will default on his mortgage as well and the mortgagee will repossess. There will almost never be a surplus. If the estate is a large one, bankruptcy is likely and the trustee will succeed to the debtor's interest for the benefit of all creditors. It might be thought in consequence that the issue is of no importance. However, the dispute over the section of the Uniform Commercial Code which would abolish this rule⁵² indicates that many finance people regard it as a current issue. In addition, the very problem with which we are dealing here—the problem of small judgment satisfaction from a wage-earning judgment debtor—is extremely unlikely to reach the appellate courts. It must undoubtedly be the case, however, that holders of small judgments daily find that the judgment debtor has an automobile which is not exempt from execution only to find upon further investigation that the most recent Missouri cases exempt such property from judgment satisfaction because it has a chattel mortgage on it.

II. THE UNIFORM COMMERCIAL CODE

It is the purpose of this section to explore the possibility of the demise of this law by way of enactment of the Uniform Commercial Code in Missouri.

As of June 1, 1962 the Uniform Commercial Code had been enacted in eighteen states.⁵³ It was introduced into the 1961 session of the Missouri General Assembly, and was passed by the Senate, but failed to pass the House.⁵⁴ Consequently, the chances of enactment are considerable, especially since New York has recently enacted it.⁵⁵ Section 9-311 is the section pertinent to this discussion. It provides (in the draft submitted in Missouri) :

The debtor's rights in collateral may be voluntarily or involun-

52. See text accompanying note 71 *infra*.

53. Letter from Frances D. Jones, Executive Secretary, National Conference of Commissioners on Uniform State Laws, to author, June 22, 1962.

54. See note 5 *supra*.

55. Letter from Frances D. Jones to author, *supra* note 53.

tarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default.⁵⁶

A. Possible Judicial Interpretations of 9-311

There are at least three possible judicial interpretations of this section: (1) it simply codifies the existing Missouri law; (2) it makes no change in the Missouri law other than prohibiting a suit for damages by the mortgagee in certain situations; or (3) it abrogates the Missouri law and permits the mortgaged property to be used for judgment satisfaction like any other property.

(1) Section 9-311 works no change in the present Missouri law, because the debtor's interest is currently alienable by creditor's bill.⁵⁷ That section provides that "The debtor's rights in collateral may be . . . involuntarily transferred (by way of . . . attachment, levy, garnishment or other judicial process) . . ."⁵⁸ This interpretation is based on the premise that it was the concern of the drafters of the code to provide that the debtor's interest could be reached in one way or another, and they were not particularly concerned with the specific remedy. Since the drafters wanted to change existing state law as little as possible,⁵⁹ they listed the three principal methods of reaching this interest at law—attachment, execution, garnishment—and used the term "other judicial process" to cover such procedures as sequestration, trustee process and creditor's bill. Hence, the provisions of this section are satisfied if the debtor's interest can be reached in any one of these ways even though it can be reached in no other way. Finally, although there are no Missouri cases granting relief in the form of a creditor's bill, there are none denying it.⁶⁰ This, coupled with the fact that equity traditionally is liberal in granting remedies, means that there is a remedy in Missouri law by way of a creditor's bill. Therefore, the requirements of this section are satisfied even though the debtor's interest cannot be reached by attachment, execution or garnishment.

Support for this interpretation is found in the official comment:

Some jurisdictions have held that when a mortgagee or conditional seller has "title" to the collateral, creditors may not proceed against the mortgagor's or vendee's interest by levy, attachment or other judicial process. This Section changes those rules by

56. S. 1, 71st Gen. Assem. of Mo. § 9-311 (1961).

57. See text accompanying note 35 *supra*.

58. UNIFORM COMMERCIAL CODE § 9-311; S. 1, 71st Gen. Assem. of Mo. 9-311 (1961).

59. UNIFORM COMMERCIAL CODE § 1-103 and comment.

60. See text accompanying note 35 *supra*.

providing that in all security interests the debtor's interest in the collateral remains subject to claims of creditors *who take appropriate action. It is left to the law of each state to determine the form of appropriate process.*"⁶¹

It was apparently this interpretation which the Committee on Legislative Research had in mind when it reported that "No change is evoked by this Section,"⁶² because it said: "Since by Missouri Law, the mortgagor or pledgor has title to the property, his interest may be reached by creditors by appropriate judicial process."⁶³

(2) There is another possibility. According to present Missouri law, collateral under a chattel mortgage containing an insecurity clause is not alienable involuntarily because an attempted levy invalidates itself.⁶⁴ If the collateral is seized, the secured party may regain possession of it,⁶⁵ or, as an alternative, he may sue for damages.⁶⁶ Contrast the rules which exist when the security agreement contains only a default clause. If there has been no default, the collateral may, of course, be legally seized and sold.⁶⁷ If the debtor subsequently defaults in payments, the secured party may regain possession of the collateral just as if there had been an insecurity clause.⁶⁸ But unlike his counterpart who had an insecurity clause, this secured party may not sue for damages without making a demand since the levy was valid.⁶⁹ This distinction can be utilized in the second interpretation of Section 9-311. Under this interpretation, the collateral could be seized and sold, and the mortgagee could at any subsequent time regain possession by virtue of the insecurity clause, although he could not sue for damages. This interpretation would change the present Missouri law only by removing the mortgagor's damages remedy.

This interpretation was written into the code when it was proposed in California. The following comment appears on the amendment to Section 9-311 which effected the change:⁷⁰

61. UNIFORM COMMERCIAL CODE § 9-311, comment 2. (Emphasis added.)

62. Comm. on Legislative Research, *Proposed Uniform Commercial Code: Its Effect Upon Cognate Missouri Statutes*, REPORT No. 15, 67th Gen. Assem. of Mo. 300 (1954).

63. *Ibid.*

64. See note 20 *supra* and accompanying text.

65. See note 20 *supra*.

66. *State ex rel. Jones & White v. White*, 70 Mo. App. 1 (1897); *State ex rel. St. Louis Brewing Ass'n v. Murphy*, 64 Mo. App. 63 (1895).

67. See note 16 *supra* and accompanying text.

68. *Yellow Mfg. Acceptance Corp. v. Rogers*, 235 Mo. App. 96, 142 S.W. 888 (1940).

69. See cases cited in note 66 *supra*, basing the right to sue for damages on the invalidity of the levy.

70. CAL. CIV. CODE § 19311 (proposed).

The secured party has a legitimate interest . . . in the identity of the person who holds the collateral. California has therefore amended section 9-311 to state explicitly that a provision in the security agreement making the transfer constitute a default is valid. *The same result seemingly obtained prior to the amendment*, although it could be contended that since the section validated the transfer "notwithstanding a provision . . . prohibiting any transfer *or* making the transfer constitute a default" the meaning was to invalidate both provisions. . . . Since the transferee acquires such rights in the collateral as the debtor had, the obligation may become accelerated under a stipulation that a transfer constitutes a default; and tender of payment must then be made by the transferee to the secured party. Although the debtor has an interest which he can dispose of and which his creditors can reach, protection of the secured party's interest is maintained. Furthermore, the creditors of the debtor are not apt to be effected so long as the debtor's equity is sufficient to cover their claims. Even if the secured party takes possession, any surplus proceeds would have to be remitted to the subsequent purchasers or secured parties of the debtor.⁷¹

(3) It is also possible, however, to interpret 9-311 as declaring insecurity clauses void. The primary support for this position lies in the language of the section itself in the light of its evolution from the 1949 Draft to its current form in the 1958 Official Text. Although parts of current Section 9-311 appeared prior to 1949,⁷² it was not until that year that it became important for purposes of this interpretation. The section then read:

Notwithstanding any forfeiture or title retention terms in a lien agreement, the borrower's interest in the collateral may be reached by attachment, levy or other appropriate judicial process. . . .⁷³

The provision relating to insecurity clauses first appeared in the Official Draft of 1952:

The debtor's rights in collateral

- (a) are alienable, although the security agreement may make disposition without the secured party's consent a default; and
- (b) may be reached by attachment, levy, garnishment or other appropriate judicial process.⁷⁴

The section as it appears in the 1958 Official Text was introduced in 1956:

71. *Project*, 8 U.C.L.A.L. REV. 806, 976 (1961). (Emphasis added.)

72. See THE AMERICAN LAW INSTITUTE AND THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, THE CODE OF COMMERCIAL LAW, Tentative Draft No. 2, art. VII, § 316 (1948).

73. UNIFORM COMMERCIAL CODE § 7-113 (1949).

74. UNIFORM COMMERCIAL CODE § 9-311 (1952).

The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default.⁷⁵

The section has undergone an evolution from no reference to the insecurity clause, through a reference to it and, finally, to an emphasis upon it. It is arguable that the successive amendments to Section 9-311 show a growing appreciation of the existence and importance of insecurity clauses, resulting in the final form of the section, which should be interpreted as declaring them void. A second support for this interpretation is based on the section as it appeared in 1952 and as it appeared in 1952 and as it appeared after the 1956 amendment. In the 1952 section, the reference to the insecurity clause was placed in subsection (a) relating to voluntary alienation, while subsection (b) related exclusively to involuntary alienation.⁷⁶ Thus, it was inferable that the reference to the insecurity clauses did not relate to involuntary alienation. After the 1956 amendment, voluntary and involuntary alienation were grouped together, and the reference to the insecurity clause follows both of them, clearly applying to both.⁷⁷ A third support arises from the language of the section itself. It provides that "The debtor's rights . . . may be . . . involuntarily transferred . . . notwithstanding a provision . . . prohibiting any transfer or making the transfer constitute a default."⁷⁸ If the debtor's interest can be transferred even though the security agreement prohibits such a transfer, then such prohibitions must be declared void by this section. But the same section refers to provisions making the transfer a default. Hence, they must be void also, or the contrary would have been indicated.⁷⁹

The fact that three inconsistent interpretations of the same section can be constructed, each tenable to a greater or lesser degree, is strong evidence that Section 9-311 is ambiguous. Once this is determined, the next step is to suggest a clarifying amendment. That is the purpose of the final section of this note.

75. AMERICAN LAW INSTITUTE AND NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE § 9-311 (1956).

76. See text accompanying note 74 *supra*.

77. See text accompanying note 75 *supra*.

78. *Ibid.*

79. See note 71 *supra*. Such clauses have long been held to be void in Pennsylvania. See *Rutherford Nat'l Bank v. Safian*, 6 Monroe L.R. 22 (Monroe County Ct., Pa. 1943).

B. A Proposed Amendment

The legal doctrine which permits the rules with regard to judgment satisfaction from collateral to exist is the doctrine that attachment, execution or garnishment will not reach an equitable or contingent interest. Thus, reform can best be implemented as a part of an overall plan of revamping the Missouri law of judgment satisfaction. On the basis of the criticism expressed in the examination of the cases,⁸⁰ the amendment which is proposed here has the effect of making the mortgagor's interest subject to judgment satisfaction whether or not there has been a default, and, in addition, makes insecurity clauses void.

The debtor's rights in collateral may be voluntarily or involuntarily transferred *whether or not there has been a default* (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default. *A clause in a security agreement which provides that any act other than non-performance of the obligation secured constitutes a default or breach of condition is, to the extent it applies to involuntary transfers, hereby declared to be void.*⁸¹

80. See text accompanying notes 40-52 *supra*.

81. Amendatory portions indicated by italics.