Right of a Mortgagee to Recover Damages from a Third Party for Injury to Mortgaged Property in Ohio

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An early Ohio case[1] is cited in a note in a law treatise[2] as the leading case in support of the principle that a mortgagee may recover from third parties in an action on the case "on the theory that the wrong is done to property of which plaintiff has neither the possession nor the right of possession, and, since trespass, detinue, or trover will not lie, the law for the injury to plaintiff's rights will afford a remedy by an action on the case." A recent Ohio case[3] very broadly declares that a mortgagee, whether he is in possession or has the right of possession, may bring an action for the impairment of his mortgage security, and, since his action is based on the impairment of his mortgage security, he need not allege or prove the insolvency of the mortgagor. It, therefore, would appear that the law of Ohio in reference to this very important question should be well settled. An examination of the cases, however, shows that many questions which arise concerning the right of a mortgagee to recover from a third person for damage to the mortgage security have not been decided, and that the theory on which the decided cases are based is not clearly defined or well settled.

What is the basis of the action? And closely connected, what is the measure of recovery by the mortgagee? Is it necessary to bring a foreclosure action to establish damages? The theory of mortgages in Ohio is that the mortgagor retains the legal title

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[1] *Allison* v. *McCune*, 15 Ohio 726 (1846); *Carpenter* v. *Canal*, 35 Ohio St. 307 (1880).

[2] 11 C.J. 4.

[3] *City of Toledo* v. *Brown*, 130 Ohio St. 513 (1936).

and the mortgagee has a lien as security for the payment of the debt at least until condition broken, and, as to third parties, even subsequent to condition broken[4]. None of the Ohio cases mentions this lien theory as affecting the decision in reference to recovery against third persons but it is submitted that this theory furnishes the background of the Ohio decisions which carefully avoid awarding damages on the basis of injury to the physical mortgaged property. The Ohio courts have based the recovery of the mortgagee on: the lessening of the mortgage "security" of another "to the extent of any actual injury sustained"[5]; the value of fixtures removed, "if thereby the security is rendered insufficient" and "if it be afterward found that the value of the remaining security is insufficient to pay the purchase money due"[6]; "the impairment of his mortgage security, and, since his action is based on the impairment of his mortgage security, he need not allege or prove the insolvency of the mortgagor"[7]; the "mortgage security" cannot be taken by public authorities without compensation[8].

A simple and direct meaning of the term "mortgage security" defines it as the physical "res" subject to the mortgage lien. Another meaning of the term seems to include only such incidents which are necessary to the "mortgage as a security" for the mortgage debt[9]. It is not clear in what sense the Ohio courts have used this term. There appears to be some hazy, very flexible meaning attached to the term "mortgage security" as distinguished from the mortgaged property. In the case of *Smith* v. *Altick*[9a] the court appears to have attached to this term

[4] *Martin* v. *Alter*, 42 Ohio St. 94 (1884); *Kerr* v. *Lydecker*, 51 Ohio St. 240 (1894); *Ely* v. *McGuire*, 2 Ohio 223 (1826); *Philly* v. *Sanders*, 11 Ohio St. 490 (1860); *Allen* v. *Everly*, 24 Ohio St. 97 (1873); *Bradfield* v. *Hale*, 67 Ohio St. 316 (1902).

[5] *Allison* v. *McCune*, *supra*, note 1; *Building and Savings Co.* v. *Cincinnati*, 12 Ohio Dec. 218 (1901).

[6] *Smith* v. *Altick*, 24 Ohio St. 369 (1873).

[7] *City of Toledo* v. *Brown*, *supra*, note 3.

[8] *State Avenue Loan and Building Co.* v. *Spiegel*, 131 Ohio St. 488 (1936).

[9] *Jackson* v. *Turrell*, 39 N.J.L. 329 (1877).

[9a] See note 6, *supra*.

the meaning that the mortgagee must first foreclose to determine whether the security was rendered insufficient by the acts of the third parties to pay the money. The requirement of a foreclosure action to determine the insufficiency of the security in order to ascertain whether there has been "actual injury sustained" is not mentioned in the earlier case of *Allison* v. *McCune*[9b]. The principles announced in *City of Toledo* v. *Brown*[9c] are broad enough not to require a foreclosure sale to establish the insufficiency of the security as a prerequisite to recovery. The peculiar fact situation in that case, however, led the court to advise that the mortgagee join as parties defendant in the foreclosure action the mortgagor and the City of Toledo, which city had appropriated part of the mortgaged property for a public use and had compensated the mortgagor in the full sum of $23,500.00, the damages assessed in the appropriate proceedings, so that the amount of recovery to which plaintiff was entitled might be ascertained. Had it not been for the circumstance that full compensation had already been paid the mortgagor without notice to the mortgagee, a direct recovery against the city without the necessity of a prior foreclosure action is indicated by the language of the court. Jones, J. states that "the many reported cases touching the impairment of a mortgage security evince the difficulty of adopting any rigid and abstract rule that will govern the remedy that should be employed in individual cases. We are content to announce the principle that should apply to the case at bar." In the case of *State Avenue Loan and Building Company* v. *Spiegel*[10] the mortgagor had obtained a judgment against the City of Cincinnati in a suit for damages caused to his property by excavations made by the city causing his property to slide and the foundation and walls to crack. The mortgagee was not a party to the action at the time the judgment was obtained but was later made a party defendant and permitted to file an answer which alleged

[9b] See note 1, *supra.*
[9c] See note 3, *supra.*
[10] *State Avenue Loan and Building Co.* v. *Spiegel, supra,* note 8.

that the damages caused to the premises had impaired its mortgage security and asked payment of the money in the hands of the court as partial satisfaction of its mortgage. The assignee of the judgment contested the mortgagee's rights. The court held that as between the mortgagor and mortgagee the mortgagee was entitled to the proceeds of the judgment, and that since the assignee was not an innocent purchaser for value that he acquired no greater rights than the original mortgagor and that the court would not order foreclosure proceedings in the hope that the mortgage might be satisfied by sale of the premises. It, therefore, appears that the Supreme Court of Ohio does not consider a foreclosure action establishing a deficiency due on the mortgage to be an essential element to the mortgagee's right to recover damages for the impairment of the mortgage security, and that the requirement of a foreclosure proceeding will be made on equitable grounds where the facts of the case require it.

It is submitted that whether or not the remaining security is ample to pay the debt is not a valid test for determining the amount of recovery by the mortgagee. If the value of the remaining security is to be considered, the solvency or insolvency of the mortgagor also should be considered, and it is thus clearly apparent that those elements totally disregard the fundamental principle that the mortgagee has a right which is infringed by a person who injures the mortgaged property and for which he is entitled to recover in a tort action against the wrongdoer.

Another problem to be considered in determining the basis of the action is whether the act causing the injury to the mortgaged premises must be wilful, with the intent to injure the mortgagee, or whether the mortgagee can recover for negligent acts. All of the Ohio cases involve the intentional injury to the mortgaged property, i. e., removal of fixtures or taking of property for public use. It is suggested, however, that the reasoning of the Ohio decisions as well as the nature of the action, which is *ex delicto* permits recovery for negligent injuries. No logical nor practical reasons appear to support the

New York rule[11] in reference to negligent injuries. It often occurs that serious injuries are done to mortgaged premises by negligence of third parties, such as by blasting, trucks and automobiles running into mortgaged houses, and of course in the case of chattel mortgaged property the greatest source of danger is from negligent injuries.

Basis of Action

It is interesting to consider the decisions in other jurisdictions to determine the basis of the action for recovery by the mortgagee, and the measure of damages for such recovery. The historical background of the action by the mortgagee appears to be based on the theory that although the mortgagee did not have the legal title or the right to possession on which to base an action in trespass "quare clausium fregit"[12], that nevertheles the mortgagee had a contingent interest in the mortgaged property which would support a special "action on the case"[13]. Such an action in modern times is understood to be an action *ex delicto* and is always classed among the actions in tort. It, therefore, appears that the action should lie for injuries caused by both wilful, fraudulent acts, by negligent acts, and by acts where there is liability without negligence or intention to harm under the doctrine of *Rylands* v. *Fletcher*[14].

There is a diversity of authority, however, concerning the question whether negligent injuries form the basis of an action by the mortgagee. The New York rule denies recovery against a third person for negligently injuring the mortgaged premises whereby the mortgagee loses his security.[15] The New York rule requires that the defendant know of the existence of plaintiff's mortgage, and that he wilfully and intentionally impair

[11] See note 15 *infra*.

[12] *Gooding* v. *Shea*, 103 Mass. 360 (1869).

[13] *Allison* v. *McCune*, *supra*, note 1; *Ehrman* v. *Oates*, 101 Ala. 604, 14 So. 361 (1893); *Morgan* v. *Waters*, 106 N.Y.S. 882 (1907).

[14] *Rylands* v. *Fletcher*, L.R. 3 H.L. 330 (1868).

[15] *Gardner* v. *Heartt*, 3 Denio (N.Y.) 232 (1846).

the security of the lien.[16] The reason for this rule does not appear to be well founded. The *per curiam* opinion in the early case of *Yates* v. *Joyce*[17] states: "Plaintiff has sustained damage by the act of the defendant, which he alleges was done fraudulently, and with intent to injure him. It is the pride of the common law that wherever it recognizes a private right, it also gives a remedy for the wilful violation of it." Quaere, is it not just as much the pride of the law that wherever it recognizes a right it gives a remedy for the negligent violation of it? In the case of *Jackson* v. *Brandon Realty Company*[18] the security was impaired by the defendant's intentionally taking away a part of the realty but the evidence fell short of showing that the defendant knew of plaintiff's mortgage, therefore, the plaintiff was denied recovery. Since every person is assumed to be responsible for the natural consequences of his acts,[19] it is not logical nor just that the mortgagee be denied recovery merely because the wrongdoer had no knowledge of the lien.

The weight of authority holds that a mortgagee may recover from a third person who has injured the mortgaged premises either intentionally,[20] negligently,[21] or in cases where there is absolute liability,[22] without intention or negligence. Negligent injuries most often occur to mortgaged chattels, especially automobiles. The cases universally hold that the chattel mortgagee may recover for negligent injuries.[23]

[16] *Yates* v. *Joyce*, 11 Johns. 135 (1814); *Gardner* v. *Heartt*, *supra*, note 15; *Ogden* v. *Busse*, 86 N.Y.S. 1098, 92 App. D. 143 (1904); *Jackson* v. *Brandon Realty Co.*, 100 N.Y.S. 1005 (1906); *Cootle* v. *Wright*, 251 N.Y.S. 699 (1931).

[17] *Yates* v. *Joyce*, *supra*, note 16.

[18] *Jackson* v. *Brandon*, *supra*, note 16.

[19] *Ridenour* v. *State*, 38 Ohio St. 272 (1882); *Searles* v. *State*, 6 Ohio C.C. 331 (1892).

[20] *Jackson* v. *Turrell*, 39 N.J.L., 329 (1877); *Mathews* v. *Silsby Bros.*, 201 N.W. 94 (Sup. Ct. Ia. 1924); *Morgan* v. *Gilbert*, 2 Fed. 835 (C. C. W. D. Mich. 1880); *Arnold* v. *Brood*, 62 Pac. 577 (1900); *Hurlinger* v. *Central Trust Co.*, 94 Fed. 788 (8th Cir. 1899).

[21] *Jackson* v. *Turrell*, *supra*, note 9.

[22] *James* v. *Worcester*, 141 Mass. 361, 5 N.E. 826 (1886); *Jersey City* v. *Kiernan*, 50 N.J.L. 246 (1888).

[23] *Harris* v. *Seaboard Air Line R. R. Co.*, 190 N.C. 480, 130 S.E. 319 (1925); *Lloyd* v. *Northern R. R. Co.*, 61 A.L.R. 307, 181 Pac. 29 (Wash. 1919).

Measure of Damages

The measure of damages established by the Massachusetts courts, known as the Massachusetts Rule, is clear cut and easily ascertainable. The mortgagee's damages are measured by the extent of the injury to the property, thus allowing to the mortgagee the full amount of damages to the physical res.[24] The right of the mortgagee to recover does not depend upon the sufficiency or insufficiency of his security. The mortgagee has a right to his security unimpaired until his whole debt is paid; he cannot be deprived of any substantial part of his entire security without full redress therefor; even though in its damaged condition it is of sufficient value to satisfy the mortgage debt[25]. The right to recover, further, is not limited by whether the mortgagee be in or out of possession or whether there has been a breach of the condition of the mortgage.[26]

It is possible that the Massachusetts Rule as to the measure of damages is directly based upon the Massachusetts theory of mortgages, that as between the mortgagor and mortgagee the legal title passes to the mortgagee in order to give the mortgagee an effectual security by the pledge of real estate for the payment of a debt.[27] The rule is practical, however, regardless of whether the lien theory or legal title theory of mortgages applies, for as stated in *Gooding* v. *Shea*,[28] the claim "when recovered applies in payment *pro tanto* of the mortgage debt, and thus, ultimately for the benefit of the mortgagor, if he redeem . . . Due satisfaction will discharge all claims if made to a party having a prior right." If it is considered that this rule is based upon the theory that as between the mortgagor and mortgagee the legal title is in the mortgagee, this rule is applicable in Ohio

[24] *Gooding* v. *Shea, supra,* note 12; *James* v. *Worcester, supra,* note 22; *Wilslow* v. *Moulton,* 127 Mass. 509 (1879); *Searle* v. *Sawyer,* 127 Mass. 491 (1879).

[25] *Gooding* v. *Shea, supra,* note 12; *Delano* v. *Smith,* 206 Mass. 365 (1910); *Byron* v. *Chapin,* 113 Mass. 308 (1873).

[26] *Wilslow* v. *Moulton, supra,* note 24; *Searle* v. *Sawyer, supra,* note 24.

[27] *Ewer* v. *Hobbs,* 5 Metc. 1 (Mass. 1842).

[28] *Gooding* v. *Shea, supra,* note 12.

in all cases where the condition of the mortgage has been broken.[29]

In New York, a lien theory state, the rule is that the measure of damages is the diminution in the market value of the whole property by reason of the injury, unless such amount is greater than the reasonable cost of repairing the injury, in which case such cost only will be allowed.[30] The New York courts had held that the insolvency of the mortgagor is immaterial,[31] overruling an earlier decision[32] as to the necessity of insolvency. Under this rule it follows that foreclosure of the mortgage to determine the deficiency is not necessary. It, therefore, appears that in New York, a strict "lien theory" state, the measure of damages is almost identical with that in Massachusetts, i. e. the recovery of the mortgagee is based on the diminution of the value of the physical property.

The rules in other states are not so definite nor so easily understood or aplied. In a leading New Jersey case[33] the court held that in such an action, the damages recoverable are to be measured by the injury to the mortgage as a security. In the same case the court repudiated the suggestion that the insolvency of the mortgagor must be proved and that a foreclosure should be required to determine the deficiency. The evidence showed that both before and after the injury the premises were ample security for the first mortgage but insufficient to meet, also, the whole of the second mortgage, and that, consequently, the entire depreciation resulting from defendant's acts was so much stripped from the security of the second mortgagee. It, therefore, appears that the sole distinction between this rule, and the Massachusetts and New York rule is that the sufficiency of the remaining security was taken into consideration in determining the measure of recovery. Quaere, would not the same ultimate result be accomplished had the first mortgagee

[29] See note 4, *supra.*
[30] *Ogden Lumber Co.* v. *Bussee*, 86 N.Y.S. 1098 (1904).
[31] *Ibid.*
[32] *Gardner* v. *Heartt*, 3 Denio 232 (1846).
[33] *Jackson* v. *Turrell*, 39 N.J.L. 329 (1877).

have recovered damages measured by the extent of the injury to the property, and thus discharged the first mortgage debt *pro tanto* and thereby improved the security held by the second mortgagee? Other cases adopt the rule that the mortgagee may recover for the "injury to the security."[34] Just as in the Ohio cases, it is not clear what elements are included, and what elements rejected by such test.

Parties to the Action

It is clear that the only necessary parties to the action are the mortgagee plaintiff and the tortfeasor defendant.[35] It appears, however, that it may be desirable in certain cases to join other lien holders or the mortgagor either as plaintiff or defendant,[36] and the court in the exercise of its equitable powers may in a proper case, if the objection is made in time, require the joinder of other parties having an interest in the mortgaged premises.[37] Although a mortgagor and a second or third mortgagee as well as a first mortgagee also have sufficient interest in the estate to maintain an action for such injury,[38] the defendant cannot resist either by showing that another may also sue, or has sued.[39] "The stranger, however, is not liable to all, successively. The superior right is in the party having superiority of title. The demand is not personal to either the mortgagor or any of the mortgagees, but arises out of and pertains to the

[34] *Mathews* v. *Silsby*, *supra*, note 20; *Huringer* v. *Central Trust Co.*, 94 Fed. 788 (8th Cir. 1899); *Morgan* v. *Gilbert*, 2 Fed. 835 (C. C. W. D. Mich. 1880); *Arnold* v. *Broad*, 62 Pac. 577 (Colo. 1900); *Planters Bank* v. *Lummus Cotton Gin Co.*, 132 S.C. 16, 41 A.L.R. 592 (1925); *Sloss-Sheffield Sheet and Iron Co.* v. *Wilkes*, 231 Ala. 511, 165 So. 754 (1936); *Jersey City* v. *Kierman*, 50 N.J.L. 246 (1888).

[35] *Craig* v. *Kansas City Terminal Ry. Co.*, 197 S.W. 141 (S.C. Mo. 1917) and cases cited *supra*, note 34.

[36] *Carpenter* v. *Canal Co.*, 35 Ohio St. 307 (1880); *Sloss-Sheffield* v. *Wilkes*, *supra*, note 34.

[37] *Commercial Securities Co.* v. *Mast*, 29 Pac. (2d.) 635 (Oregon 1934); *Craig* v. *Kansas*, *supra*, note 35.

[38] *Lightcap* v. *Bradley*, 186 Ill. 510 (1900); *Van Dyke* v. *Grd. Trunk R. R.*, 78 Atl. 958 (1911).

[39] *Gooding* v. *Shea*, *supra*, note 12.

estate; and, when recovered, applies in payment *pro tanto* of the mortgage debt, and thus ultimately for the benefit of the mortgagor if he redeems. . . . Due satisfaction will discharge all the claims if made to a party having the prior right."[40] A reasonable satisfaction made in good faith to a prior mortgagee for damage done to the mortgaged property, bars an action brought for such damage by a subsequent mortgagee.[41] Recovery in an action by a mortgagor does not bar a subsequent recovery by a mortgagee of realty.[42] A recovery by either the mortgagor or mortgagee of chattels, in the absence of fraud or collusion is a bar to an action by the other.[43] This rule in reference to chattel mortgages is based on the law of bailments and has no applicability to real estate mortgages.

[40] *Ibid.*

[41] *Byrom* v. *Chapin*, 113 Mass. 308 (1873).

[42] *Toledo* v. *Brown*, *supra*, note 3; *Chauteon* v. *Baughton*, 100 Mo. 406, 13 S.W. 877 (1890).

[43] *Harris* v. *Seaboard Air Line R. R. Co.*, 190 N.C. 480, 130 S.E. 319 (1925); *Miller* v. *Hartman*, 145 So. 786 (La. 1933).