

## CONDITIONAL VENDOR'S RIGHT TO SUE A THIRD PARTY FOR INJURY TO HIS SECURITY INTEREST

*Bell Fin. Co. v. Gefter,*  
147 N.E.2d 815 (Mass. 1958)

The conditional vendor's assignee sued the defendant, who was not a party to the conditional sales contract, for negligently damaging the automobile under contract. The court held that the assignee could recover for the full damage to the automobile, notwithstanding the conditional vendee was not in default when the action was brought and it was not shown how much was owed to the vendor under the contract.

Where a conditional vendee<sup>1</sup> is in default on his contract payments, it is generally held that the conditional vendor may sue a third-party tort-feasor for injury to the chattel<sup>2</sup> since, it is reasoned, he then has a right to possession of the chattel.<sup>3</sup>

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<sup>1</sup>The vendee's remedy is usually treated separately from the vendor's and a vendee in possession may sue a tortfeasor for the whole damage to the property since he has a right to beneficial enjoyment. If the vendee is in default he may sue as bailee of the property. *J. P. (Bum) Gibbins, Inc. v. Utah Home Fire Ins. Co.*, 202 F.2d 469 (10th Cir. 1953); *Rasmus v. Schaffer*, 230 Ala. 245, 160 So. 244 (1935); *Smith v. Louisville and Nashville R. Co.*, 208 Ala. 440, 94 So. 489 (1922); *Bradley v. Wood*, 207 Ala. 602, 93 So. 534 (1922); *Pickwick Stages Corp. v. Gil*, 38 Ariz. 7, 296 Pac. 269 (1931); *General Contract Purchase Corp. v. Row*, 208 Ark. 951, 188 S.W.2d 507 (1945); *Smith v. Gufford*, 36 Fla. 481, 18 So. 717 (1895) (dictum); *Miller and Kizer v. Des Moines City Ry.*, 196 Iowa 1033, 195 N.W. 600 (1923); *Downey v. Bay State St. Ry.*, 225 Mass. 281, 114 N.E. 207 (1916); *Dyer v. Great Northern Ry.*, 51 Minn. 345, 53 N.W. 714 (1892); *Lacey v. Great Northern Ry.*, 70 Mont. 346, 225 Pac. 808 (1924) (dictum); *Union Ry. v. Remedial Fin. Co.*, 163 Tenn. 130, 40 S.W.2d 1034 (1931) (dictum); *Carolina C.&O. R.R. v. Unaka Springs Lumber Co.*, 130 Tenn. 354, 170 S.W. 591 (1914); *Lord v. Buchanan*, 69 Vt. 320, 37 Atl. 1048 (1897); *Helf v. Hansen and Keller Truck Co.*, 167 Wash. 206, 9 P.2d 110 (1932); *Oros v. Allen*, 133 Wash. 268, 233 Pac. 314 (1925); 47 AM. JUR. SALES § 879 (1943); VOLD, SALES 274 (1931); 2 WILLISTON, SALES § 333a (1948).

<sup>2</sup>*Louisville & Nashville R. Co. v. Miller*, 209 Ala. 378, 96 So. 322 (1923); *Malden Center Garage, Inc. v. Berkowitz*, 269 Mass. 303, 168 N.E. 916 (1929) (equitable replevin); *First Nat. Acceptance Corp. v. Annett*, 121 N.J. Law 356, 2 A.2d 650, *aff'd*, 124 N.J. Law 78, 11 A.2d 106 (1938) (by implication); *Commercial Credit Corp. v. Satterthwaite*, 107 N.J. Law 17, 150 Atl. 235 (1930), *aff'd*, 108 N.J. Law 188, 154 Atl. 769 (1931); *Union Ry. v. Remedial Fin. Co.*, 163 Tenn. 130, 40 S.W.2d 1034 (1931) (by implication). The following courts also require that there be a default, stating that the vendor must have the right to possession: *Universal Credit Co. v. Collier*, 108 Ind. App. 685, 31 N.E.2d 428 (1941); *Gas City Transfer Co. v. Miller*, 107 Ind. App. 210, 21 N.E.2d 428 (1939), (by implication, requires a default); *Tower v. Haslam*, 84 Me. 86, 24 Atl. 587 (1891) (conversion); *C.I.T. Corp. v. Morse*, 42 Ohio App. 94, 181 N.E. 265 (1931) (replevin).

<sup>3</sup>The carefully drawn conditional sales contract usually provides in express terms that upon default the vendor may retake. However, even without the clause

In a few cases, where there had not been a default by the vendee, the vendor's action against a third-party tortfeasor was dismissed on the ground that he did not have the right of possession.<sup>4</sup> However, in other cases, a vendor has been allowed to sue the tortfeasor where there was no default<sup>5</sup> or where there was a subsequent default,<sup>6</sup> on the theory that a vendor has a sufficient interest in the chattel as holder of legal title.<sup>7</sup>

The present case is significant in two respects. First, the vendor's assignee was allowed recovery where the vendee was not in default on the theory that his legal title was sufficient in itself to maintain suit.<sup>8</sup> Second, recovery of the full amount of damage by the vendor was permitted without regard to or inquiry concerning the amount still due. The court stated that any recovery in excess of the debt would be held for the benefit of the vendee.<sup>9</sup> Prior to this case, the authority on the subject restricted the recovery by the vendor to the unpaid

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the same result is reached by interpretation of the general clause which reserves the property to the seller. See *VOLD, SALES* 287 n.n. 28, 29 (1931).

<sup>4</sup> *Gas City Transfer Co. v. Miller*, 107 Ind. App. 210, 2 N.E.2d 646 (1939). Also see *Louisville & Nashville R. Co. v. Miller*, 209 Ala. 378, 96 So. 322 (1923) and *Universal Credit Co. v. Collier*, 108 Ind. App. 685, 31 N.E.2d 646 (1941).

<sup>5</sup> *First Nat'l Acceptance Corp. v. Annett*, 121 N.J. Law 356, 2 A.2d 650, *aff'd*, 124 N.J. Law 78, 11 A.2d 106 (1938) ("Obviously it is no concern of the third party whether . . . there has or has not been a default. . ."); *Ryals v. Seaboard Air-Line Ry.*, 158 Ga. 303, 123 S.E. 12 (1934) (no default); *Rentz v. Huckabee Auto Co.*, 53 Ga. App. 329 (1936); *Kent v. Buck*, 45 Vt. 18 (1872).

<sup>6</sup> *Commercial Credit Corp. v. Satterthwaite*, 107 N.J. Law 17, 150 Atl. 235 (1930), *aff'd*, 108 N.J. Law 188, 154 Atl. 769 (1931). In this case the contributory negligence of the vendee did not bar the vendor. Since any recovery by a vendor would be applied to the debt, a vendee might get around the contributory negligence rule by purposely defaulting and urging the vendor to sue the third party. This situation has been overruled by statute in New Jersey where contributory negligence of a vendee, bailee or other owner of special property is a valid defense and bar to an action by the conditional vendor or bailor. N.J. STAT. ANN. § 46:36-1 (1939). In *Lacey v. Great Northern R. Co.*, 70 Mont. 346, 225 Pac. 808 (1924), the contributory negligence of the vendee was said not to be a bar to the vendor. However, this case was reversed on other grounds.

<sup>7</sup> *Smith v. Gufford*, 36 Fla. 481, 18 So. 717 (1895); *Ryals v. Seaboard Air-Line Ry.*, 158 Ga. 303, 123 S.E. 12 (1924); *Rentz v. Huckabee Auto Co.*, 53 Ga. App. 329, 185 S.E. 575 (1938); *Lacey v. Great Northern R. Co.*, 70 Mont. 346, 225 Pac. 808 (1924); *Carolina C.&O. R. Co. v. Unaka Springs Lumber Co.*, 130 Tenn. 354, 170 S.W. 591 (1914) (dictum—the vendee sued in this case).

<sup>8</sup> The court in the present case quotes the opinion of *Delano v. Smith*, 206 Mass. 365, 369-70, 92 N.E. 500, 501 (1910). In allowing a mortgagee to sue a third-party tortfeasor, the court in the *Delano* case said: "Such a right of action is founded not on right to present possession, but on title to the estate." See also note 5, *supra*.

<sup>9</sup> Apparently there was doubt as to the amount still owed the vendor and the court allowed \$250, full damage to the automobile. *Cf. Harris v. Seaboard Air-Line Ry.*, 190 N.C. 480, 130 S.E. 319 (1925); *Lord v. Buchanan*, 69 Vt. 320, 37 Atl. 1048 (1897) where the vendee holds in trust for the vendor any amount of recovery in excess of his own interest.

balance<sup>10</sup> unless the vendee had consented to full recovery. A recovery or settlement in good faith by either the vendor or vendee should bar the other if it was for the full damage caused.<sup>11</sup>

The Uniform Commercial Code expressly covers this problem and may have influenced the court's decision since it had been adopted in Massachusetts although it is not effective until October 1, 1958.<sup>12</sup> Section 2-722 provides:

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

- (a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest, or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;
- (b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit, or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

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<sup>10</sup> Ryals v. Seaboard Air-Line Ry., 158 Ga. 303, 123 S.E. 12 (1924); Rentz v. Huckabee Auto Co., 53 Ga. App. 329, 185 S.E. 575 (1936) (dictum); Ellis Motor Co. v. Hancock, 38 Ga. App. 788, 145 S.E. 518 (1928) (dictum); Lacey v. Great Northern R. Co., 70 Mont. 346, 225 Pac. 808, 38 A.L.R. 1331 (1924); Carolina C. & O. R. Co. v. Unaka Springs Lumber Co., 130 Tenn. 354, 170 S.W. 591 (1914) (dictum).

<sup>11</sup> Harris v. Seaboard Air-Line Ry., 190 N.C. 480, 130 S.E. 319 (1925); Carolina C. & O. Ry. Co. v. Unaka Springs Lumber Co., 130 Tenn. 354, 170 S.W. 591 (1914) (dictum); Lord v. Buchanan, 69 Vt. 320, 27 Atl. 1048 (1897). See also Motor Fin. Co. v. Noyes, 139 Me. 159, 28 A.2d 235 (1942); Stotts v. Puget Sound Traction, Light & Power Co., 94 Wash. 339, 162 Pac. 519 (1917) (a conditional vendor who appears as a witness for the buyer in an action for damages waives his right to maintain a separate action); Universal Credit Co. v. Collier, 108 Ind. App. 685, 31 N.E.2d 646 (1941); Rentz v. Huckabee Auto Co., 53 Ga. App. 329, 185 S.E. 375 (1936); Ellis Motor Co. v. Hancock, 38 Ga. App. 788, 145 S.E. 518 (1928) (a fair settlement with the vendee is a bar to the vendor). Cf. French v. Osmer, 67 Vt. 427, 32 Atl. 254 (1895). In Union Ry. v. Remedial Finance Co., 163 Tenn. 130, 40 S.W.2d 1034 (1931), the administrator of the vendee, in suing the tortfeasor, failed to present evidence on damage to the automobile, although he recovered for personal injuries to the vendee. A later suit by the vendor for value of the auto was held to be barred—the court rejecting the argument that it had not been tried on the “merits.” Query, could the vendor sue the administrator for negligence in prosecuting the suit.

<sup>12</sup> MASS. ANN. LAWS c. 106 (1957) (eff. October 1, 1958).

(c) either party may with the consent of the other sue for the benefit of whom it may concern.<sup>13</sup>

The Ohio statute<sup>14</sup> does not cover this problem and no case in Ohio has been found which parallels the present one. Analogies, however, may be drawn to bailments, real estate mortgages, and chattel mortgages.<sup>15</sup> A bailor,<sup>16</sup> as owner of the general property and entitled to future possession, may maintain an action against a third party and recover for full damage done to the chattel. A real estate mortgagee, as holder of the security title, may also maintain an action for injury to his security interest.<sup>17</sup> There is a conflict of authority whether the mortgagee's "interest" includes any damage to the land or whether the sufficiency of the unimpaired portion will be considered in awarding damages to the security interest.<sup>18</sup> Although analogies to real estate mortgages and bailments tend to support the result reached in the present case, a similar comparison with existing Ohio law on chattel mortgages will not. In *Commercial Credit Co. v. Standard Baking*

<sup>13</sup> The comment to the section states that one of the purposes is: "To adopt and extend somewhat the principle of the statutes which provide for suit by the real party in interest."

<sup>14</sup> OHIO REV. CODE §§ 1319.11-16 (1953). Section 1319.14 (1953) requires, upon retaking of possession, a tender to the vendee of not less than fifty per cent of the amount paid after deducting a reasonable amount for the use of the chattels. If twenty-five per cent or less has been paid, the vendor does not need to return any money to the vendee. From this it might be argued that the vendee must sue since allowing the vendor to sue would be, in effect, to allow repossession without compliance with the statute. If there has been no default by the vendee it would be repossessing illegally. Of course, this argument has less chance of success when made collaterally by the tortfeasor.

<sup>15</sup> Cf. UNIFORM COMMERCIAL CODE art. 9 (1957), which treats all security devices the same.

<sup>16</sup> *Nosse v. Rose*, 45 Ohio App. 54, 186 N.E. 622 (1933) (dicta). In *Gfell v. The Jefferson Hardware Co.*, 10 Ohio App. 427, 31 C.C.R. (n.s.) 214 (1917), the court held that the owner of property in the hands of a bailee may recover from a third person damage caused to such property by the negligence of the third person, even though the bailee is guilty of contributory negligence in the handling of the property and even if the bailee, in an action brought by him, might be met with the defense of contributory negligence. See 7 OHIO JUR.2d *Bailments* § 37 (1954), RESTATEMENT, TORTS §§ 220, 243 (1934). See also annot. 166 A.L.R. 206 (1947) and annot. 113 A.L.R. 1333 (1939).

<sup>17</sup> *Toledo v. Brown*, 130 Ohio St. 513, 200 N.E. 750 (1936); *Carpenter v. Cincinnati & C.W. Canal Co.*, 35 Ohio St. 307 (1880); *Smith v. Altick* 24 Ohio St. 369 (1873); *Allison v. McCune*, 15 Ohio 726 (1846); *Yahrus v. Stevens*, 7 Ohio L. Abs. 200, 29 Ohio L. Rep. 81 (Ohio App. 1929); *Massachusetts Institute of Tech. v. Spitzer*, 5 Ohio L. Abs. 549 (Ohio App. 1927); *Harrison v. Village of Sabina*, 1 Ohio C.C. Dec. 30, 1 Ohio C.C. 49 (Ohio App. 1885). See *Denton, Right of a Mortgagee to Recover Damages from a Third Party for Injury to Mortgaged Property in Ohio*, 3 OHIO ST. L.J. 161 (1937). In *Denton, op. cit. supra* at 164, it is pointed out that the Ohio cases have dealt with wilful tort injuries and not injuries caused by negligence.

<sup>18</sup> See the discussion in *Denton, op. cit. supra* at 167, n. 17.

*Co.*<sup>19</sup> it was held that the chattel mortgagee was not the "real party in interest"<sup>20</sup> and could not sue a third party for negligently injuring the chattel—even though the condition, which gave the mortgagee a right to possession, had been broken. It was declared that the mortgagee had "temporarily waived his legal right to declare the mortgage condition broken" by failing to foreclose.<sup>21</sup> The court seemed to be concerned mainly with an avoidance of the rule of contributory negligence and recovery from insurance companies through connivance with an insolvent mortgagor. The real estate mortgage cases were distinguished since they dealt with willful torts and not negligence and the injury was to land and not to chattels. Other than the argument of avoidance of contributory negligence, it is difficult to find a logical basis for these distinctions.<sup>22</sup>

The result of the present case and the Uniform Commercial Code—allowing the vendor to sue before default and recover total damages—raises several problems. (1) It is not clear whether both the vendor and vendee may sue in two different actions or whether the first party to sue will recover full damage which would bar further suits. Two separate suits seem undesirable due to additional time and expense required plus the possibility of overlapping damages being awarded by different juries.<sup>23</sup> (2) A recovery by the vendor before default accelerates future installment payments to which, although his security may be damaged, he is not then entitled. This may impose hardship on the vendee if he does not have sufficient funds to repair the chattel which otherwise may not be usable.<sup>24</sup> (3) The vendor may be over-compensated if the court does not discount any prospective recovery to its present value in applying it to the installment debt. (4) Any recovery in excess of the debt is to be held for the benefit of the vendee which may not be adequate protection for the vendee if the vendor breaches his fiduciary duty.

The physical injury to the vendee's possession and the impairment of the vendor's security, are the interests which are to be protected.

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<sup>19</sup> 45 Ohio App. 403, 187 N.E. 251 (1933). *Cf.* *Capital-Loan & Sav. Co. v. Baltimore & Ohio R. Co.*, 44 Ohio App. 251, 184 N.E. 862 (1933), where a settlement with the tortfeasor by the mortgagor was held to be a bar to the mortgagee.

<sup>20</sup> OHIO REV. CODE § 2307.05 (1953).

<sup>21</sup> A caveat is added in the case that there is no consideration of the question of the situation where a mortgagee first made demand on the mortgagor to sue and had been refused.

<sup>22</sup> There may be a way to draft a chattel mortgage to avoid this case. Since the language in the opinion indicates that the intent of the parties may be given effect, it would be wise to insert a clause which gives permission to the mortgagee to sue for the benefit of himself and the mortgagor.

<sup>23</sup> *Cf.* WILLISTON, SALES § 333a (1948) where it is said that the tortfeasor should not be obliged to pay more than full value of the goods.

<sup>24</sup> Insurance coverage may alleviate the vendee's plight. However, in some cases the vendor only may be covered by a policy and the insurance company would be subrogated to his rights.

It is here suggested that where it is feasible the vendor and vendee be joined; otherwise the party suing should be required to give adequate assurance for the other party's protection. Where there is joinder the vendee should be allowed the option of receiving the recovery upon condition of assuring the court that the vendor will have the proper security for the unpaid balance, or of applying the amount of recovery, discounted to its present value, to the unpaid balance.<sup>25</sup>

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<sup>25</sup>The parties may agree in the contract that one will sue as agent for the other. See UNIFORM COMMERCIAL CODE § 2-722(b), (c). Usually a vendor is in a much stronger position because a "form" contract is often used which a vendee agrees to without modification. The prudent drafter should cover this problem and also the problem of who will bear the expense of attorney's fees in suing a third party for injury to the chattel.