Chapter 9: Security and Mortgages

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Chapter 9

Security and Mortgages

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§9.1. Conditional sales and chattel mortgages: Rights against negligent third parties. Two recent cases clarify the rights of conditional vendors and chattel mortgagees when a third party negligently damages the collateral or property subject to the security interest. Bell Finance Co. v. Gefter held that a conditional vendor can proceed against a third party negligently damaging the security even though the vendee is not in default. Under these circumstances the vendor can recover the entire amount of damage, even though the damages exceed the debt. The decision is based upon the principle that a secured party is entitled to unimpaired security. Any amount in excess of the debt would be held for the benefit of the conditional vendee or secured party. The effect of contributory negligence would be controlled by the 1958 Survey year decision of Harvard Trust Co. v. Racheotes.

In Massachusetts a conditional vendor can recover from a third person even though the conditional vendee was concurrently negligent. This principle was reached by analogy to bailment cases in Morris Plan Co. v. Hillcrest Farms Dairy, Inc. However, the Morris case did not determine whether this rule applied when the damage to the security was greater than the debt. The Racheotes case held that the mortgagee may sue for damage to the security caused by a third person although the mortgagor was concurrently negligent and even though the damages exceeded the debt. The amount of recovery was not governed by the Gefter case; the recovery is limited to the amount of the debt. The result of the decision is twofold: (1) the mortgagee is not bound by the negligence of the mortgagor (or conditional vendee) and (2) the mortgagor gains to the extent that the debt is reduced by the collection of the judgment.

§9.2. Conditional sales: Waiver of defenses. In Quality Finance Co. v. Hurley a blanket waiver provided:

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2 1958 Mass. Adv. Sh. 309, 147 N.E.2d 817. This case and the Gefter case, note 1 supra, are fully discussed in §§3.2 and 7.2 supra.
3 323 Mass. 452, 82 N.E.2d 889 (1948).

If this contract is purchased from the Seller, the purchaser shall have all the rights of the Seller, and in any suit the Buyer waives as against any such purchaser . . . all rights, remedies and defenses which the Buyer may now and at any time have hereunder against the Seller to set off . . . rescission . . . and otherwise.

The waiver was held invalid as in conflict with the policy of G.L., c. 231, §5, which subjects the assignee of a non-negotiable legal chose in action to all the defenses and rights of counterclaim, recoupment or set-off to which the defendant would have been entitled had the action been brought in the name of the assignor. The Supreme Judicial Court indicated that there was a strong public policy of protecting conditional vendees against imposition by conditional vendors and installment houses. To uphold the waiver clause would give a non-negotiable agreement the attribute of negotiability.

Section 9-206 of the Uniform Commercial Code recognizes waiver of all defenses except defenses of a type that can be asserted against a holder in due course of a negotiable instrument under Article 3, in transactions other than those in the consumer field. As to consumer goods, the section subjects waiver to any statute or decision that establishes a different rule for the buyer of consumer goods. Paragraph 2 of the Uniform Commercial Code Comments to Section 9-206 states that the article takes no position as to the effect of such waivers in consumer goods cases, but subjects such waivers to statutes or decisions restricting the waivers' effectiveness. Under this interpretation of the Uniform Commercial Code the Hurley case would control as a "decision which establishes a different rule for buyers of consumer goods."

§9.3. Conditional sales: Trade-ins. General Laws, c. 255, §12 requires that there be included in a conditional sales agreement a description of the property to be traded in, "if any," and the trade-in allowance thereon. In Lepore v. Atlantic Corp. it was contended that the statute required that the contract contain affirmative statements that no property was traded in and that there was no credit allowance or prepayments. This contention was rejected by the Supreme Judicial Court. It was held that, although the Conditional Sales Act was enacted for the benefit and protection of the consuming public and conditional vendees and is to be strictly construed in their favor, the words "if any" in the statute indicated that such information need be stated only if there was a trade-in or trade-in allowance. The same result will obtain under the Uniform Commercial Code.

§9.4. Foreclosure of mortgage: Publication of notice. General Laws, c. 244, §14 provides that foreclosure of a mortgage under a power of sale is ineffective unless notice has been published


2 G.L., c. 255, §§11-13H, now partly amended and partly superseded by the Uniform Commercial Code, G.L., c. 106.

3 UCC §9-203(2) will require the application of G.L., c. 255, §12.
in a newspaper, if any, published in the town where the land lies. If no newspaper is published in the town the notice may be published in a newspaper published in the county where the land lies. A newspaper which by its title page purports to be published or printed in such town, city, or county, and having a circulation therein, shall be sufficient for the purpose.

In *Gladstone v. Treasurer and Receiver General* ¹ the plaintiff sought relief on the grounds that foreclosure by power of sale of the mortgage on her lands in Billerica required that notice be published in the “Billerica News,” whereas notice was actually published in the “Lowell Sun.” The Supreme Judicial Court held that the place of publication of a newspaper was one of fact and the evidence adduced in the Land Court showed that the “Billerica News” was not actually published in Billerica but was published in Lowell. On these facts the plaintiff could not prevail since, if no newspaper was actually published in the town where the land lies, the mortgagee has his choice of selecting any paper published in the county where the land lies. The statutory provision that the mortgagee may use “a newspaper which by its title page purports to be published or printed in [the] town” is merely permissive.

§9.5. Chattel mortgages: Foreclosure. Two recent chattel mortgage cases were concerned with the validity of foreclosure proceedings and in both the mortgagor prevailed. In *Francis v. Mogul* ¹ the mortgagee was estopped from foreclosing because of his assurances that he would leave the mortgage in status quo until the truck, which was the security, had been repaired and put into operation, and that he would apply the insurance proceeds for the repair of the truck. In *Salter v. Leventhal*,² after notice of foreclosure had been delivered, the mortgagee stated “Don’t be alarmed over it, it is just a matter of formality. Take it home and don’t show it to anyone.” He subsequently stated to the mortgagor that it was just a formality and that “he [the mortgagee] wasn’t going to do anything about it.” These statements and other conduct were sufficient to estop the mortgagee from relying upon the notice of foreclosure. The facts in the *Salter* case are very interesting with respect to the question of a fair sale. It was held that there were sufficient facts to show a controlled sale in bad faith.

§9.6. Liens and attachments. Certain points in relation to the general heading of creditor’s rights have been decided in several 1958 Survey year cases. *North End Auto Park, Inc. v. Petringa Trucking Co.*¹ held that a garage keeper’s lien under G.L., c. 255, §§25 and 26 was not lost by temporary surrender, even though there was a daily surrender of possession and daily use of the vehicles by the owner. A

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bona fide purchaser or attaching or levying creditor without knowledge of the lienor's interest would have superior rights. *Marrs v. Barbeau* ² held that an attachment of an airplane would be valid although it was unrecorded under the Civil Aeronautics Act of 1938.³ In *Valentine Lumber & Supply Co. v. Thibeault* ⁴ it was held that a mechanics lien was defeated by failure to file an attested copy of the subpoena, although the bond to dissolve the lien was filed and recorded, and contained all the information that would have been contained in the subpoena. Under the requirement of strict compliance with the statute the bond would not be deemed a substitute for the subpoena.

² 336 Mass. 416, 146 N.E.2d 353 (1957). See further comment on this case in §7.4 *supra*.

³ 49 U.S.C. §§401(18), 523(c).