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Workmen's Compensation -- Subrogation -- Defenses Available to Negligent Third Parties

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as a bailment. The most approved distinction is that a conditional sale contemplates passage of title to the vendee and payment of the price by him, while a bailment contemplates that title shall remain in the bailor and that the property shall be returned to him.[11] Seemingly the contract in the present case falls under the concept of a conditional sale. The provision that the finance company may demand possession before default does not prevent a conditional sale from resulting.[12] However, in practically all cases where an ostensible bailment was held a conditional sale the possessor had the right of use or disposal of the property to some extent, while in the principal case the possession of the dealer was limited to storage. Nevertheless, many courts have held certain trust receipt agreements in which the vendor retains title and the vendee holds the property in trust for storage only to be in effect conditional sales.[13]

The bailment in the principal case seems colorable. The clear intent of the parties appears to be that the claimant should not demand possession unless the dealer defaulted in payment. The facts present an especially deceptive situation, since the cars are the very ones over which the dealer has formerly exercised control by selling to customers. Good policy demands recordation of such agreements.

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Workmen's Compensation—Subrogation—Defenses Available to Negligent Third Parties.

While driving a truck of *X* Company across the defendant's railroad track, an employee of the company was killed by a train. While

[11] Morris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971 (1917); Vermont Acceptance Corp. v. Wiltshire, 103 Vt. 219, 153 Atl. 199 (1931).

[12] Emerson-Brantingham Implement Co. v. Lawson, 237 Fed. 877 (S. D. Iowa 1916); *In re* Shiffert, 281 Fed. 284 (E. D. Pa. 1922). Certainly a right in the finance company to demand possession before default would not prevent a conditional sale under a dictum of the North Carolina court giving any conditional vendor such a right. See State v. Stinett, 203 N. C. 829, 167 S. E. 63 (1933) criticised in (1933) 11 N. C. L. REV. 321.

[13] *In re* Cullen, 282 Fed. 902 (D.Md. 1922); Commonwealth Finance Co. v. Schutt, 97 N. J. L. 225, 116 Atl. 722 (1922).

However, a tripartite trust receipt agreement, in which the vendee was to hold for storage, was not to use or dispose of cars, and was to deliver to finance company on demand was held merely a bailment. General Motors Acceptance Corp. v. Hupfer, 113 Neb. 228, 202 N. W. 627 (1925). In *In re* Otto-Johnson Mercantile Co., 52 F. (2d) 678 (D. N. M. 1928) the court held a similar agreement to be a bailment intimating it could not be a conditional sale because the manufacturer was the real dealer. In Hanna, *Trust Receipts* (1929) 29 COL. L. REV. 545 it is noted that some courts regard the trust receipt as *sui generis*. See (1931) 9 N. C. L. REV. 468.

an action by the deceased's administrator was pending, an award was made under the Workmen's Compensation Act. The complaint was then amended so as to make the *X* Company a real party in interest. The defendant set up the contributory negligence of *X* Company in allowing its employee to use a truck with defective brakes. *Held:* Valid defense.[1]

As the Workmen's Compensation Acts are never exactly alike in any two states, the jurisdictions differ materially on the question of who has the right to bring an action against a third party whose negligence has caused the injury or death of an employee operating under the Act. Most of them, however, may be placed within one of the following categories: (1) Those in which there is a statutory provision to the effect that, if the negligent third party is operating under the Workmen's Compensation Act, his liability is limited to the amount of the award specified in the Act, and the employer or his insurance carrier has the exclusive right to maintain an action against the third party for injury to or death of an employee.[2] (2) Those in which the action may be maintained either by the employer or the employee.[3] (3) Those in which the employee has the option of maintaining an action against the third party or against the employer; but if he elects to do the latter and an award is made, he is considered to have given up his right to sue the third party.[4] North Carolina adopts the latter view, and the employee, or his representative, is privileged to begin both actions at once, with the employer being subrogated to the rights of the employee, or his representative, after an award has been made.[5] It has been held that if the employer fails to take advantage of his right of subrogation, the employee, or his representative, may sue the third person.[6]

When the employer does exercise his right, it is held, with the exception of a few cases,[7] that his concurring negligence is not a

[1] Brown v. Southern Ry. Co., 204 N. C. 668, 169 S. E. 419 (1933).
[2] Wendt & Crane Co. v. Traff, 262 Ill. App. 58 (1931).
[3] McKenzie v. Mo. Stables, 327 Mo. 88, 34 S. W. (2d) 136 (1930).
[4] Holmes v. Henry Jennings & Sons, 7 Fed. (2d) 231 (D. C. 1921); State v. Francis, 150 Md. 285, 134 Atl. 26 (1926).
[5] Phifer v. Berry, 202 N. C. 388, 163 S. E. 119 (1932); Prigden & U. S. Fidelity & Guarantee Co. v. Ry. & Carolina Delivery Service, 203 N. C. 62, 164 S. E. 325 (1932); McCarley v. Council and Sutton 205 N. C. 370, 171 S. E. 323 (1933).
[6] Chesapeake & O. Ry. Co. v. Palmer, 149 Va. 560, 140 S. E. 831 (1927).
[7] Thornton v. Reese, 246 N. W. 527 (Minn. 1933); Corey & Son, Lt'd. v. France, Fenwick & Co., Lt'd. (1911) 1 K. B. 114; Canadian P. R. Co. v. Alberta Clay Products, Lt'd., 8 B. W. C. C. 675 (Can. 1914) (cited and distinguished in

valid defense.[8] This result is reached through the following process of reasoning: (1) No exceptions are made in the statutes to the rule that for the purpose of this suit the employer is subrogated to every right of the employee, or his representative.[9] (2) As the right of the employee, or his representative, to compensation exists solely because of the Workmen's Compensation Act and not because of the negligence of the employer, the latter should not be precluded from a recovery against a negligent third person by his own contributory negligence.[10] (3) As evidence of the amount of compensation paid is not admissible in the third party action, it is impossible to measure the effect of the employer's contributory negligence.[11] The cases in the United States holding that the defense is available to the third party maintain that the statutes providing for subrogation do not contemplate a situation in which the employer's negligence contributed to the injury. The actual rights of the employee, or his representative, are transferred to the employer only when his hands are clean.[12] In view of the fact that not one of the statutes makes exception to the rule that the employer is subrogated to the rights of an employee, or his representative, it would seem that the holding of the principal case is fallacious.

Following the reasoning of the majority holding, it has been held that the statute of limitations begins running on the employer's right of action from the time of the injury.[13] As the North Carolina statute provides that the employer may institute action before payment of an award in order to protect the loss of his rights by the

Milosevich *et. al.* v. Pacific Electric Ry. Co., 68 Cal. App. 662, 230 Pac. 15 (1924).

[8] Otis Elevator Co. v. Miller & Paine, 240 Fed. 376 (C. C. A. 8th, 1917); Milosevich *et. al.* v. Pacific Electric Ry. Co., *supra* note 7; Fidelity & Casualty Co. v. Cedar Valley Electric Co., 187 Ia. 1014, 174 N. W. 709 (1919); City of Shreveport v. Southwestern Gas & Electric Co., 145 La. 679, 82 So. 785 (1919); General Box Co. v. Mo. Utilities Co., 55 S. W. (2d) 442 (Mo. 1932); Graham v. City of Lincoln *et al.*, 106 Neb. 305, 183 N. W. 569 (1921).

[9] General Box Co. v. Mo. Utilities Co., *supra* note 8.

[10] See Fidelity & Casualty Co. v. Cedar Valley Electric Co., *supra* note 8, at 1019 ("A discussion of the right of one joint tort-feasor to contribution from another, or of the right of one injured person, who has recovered judgment against, made settlement with, one joint tort-feasor to recover against another, is not germane to the question.").

[11] Milosevich *et al.* v. Pacific Electric Ry. Co., *supra* note 7.

[12] Thornton Bros. v. Reese, *supra* note 7; Brown v. So. Ry., *supra* note 1.

[13] Employer's Liability Assur. Corp. v. Indianapolis & Cinc. Traction Co., 195 Ind. 91, 142 N. E. 856 (1924); Maryland Casualty Co. v. Ladd, 121 Kan. 659, 249 Pac. 687 (1926); U. S. Fidelity & Guaranty Co. v. Blue Diamond Coal Co., 170 S. E. 728 (Va. 1933); *Contra:* Star Brewing Co. v. Cleveland, C. C. & St. L. Ry. Co., 275 Fed. 330 (C. C. A. 7th, 1921).

passage of time,[14] it is reasonable to infer that we would adopt this view. It is generally conceded that as against the employer the third party can not avail himself of the defense that a settlement has been made with the employee, unless the employer has consented thereto.[15] Since he is considered to stand in the position of the employee as against a third party,[16] any defense which would be available to the third party in an action by the employee, or his representative, is valid when the employer brings the action.[17]

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[14] N. C. CODE ANN. (Michie, 1931) §1081(r).
[15] Pizcz v. Schultz *et. al.*, 236 App. Div. 552, 261 N. Y. S. 198 (1932); Smith v. Yellow Cab Co., 288 Pa. 85, 135 Atl. 558 (1927). *Contra:* Gones v. Fisher, 286 Ill. 606, 122 N. E. 94 (1919) (on the grounds that there being only one cause of action, any settlement will destroy it).
[16] General Box Co. v. Mo. Utilities Co., *supra* note 8.
[17] Maryland Casualty Co. v. Ladd, *supra* note 13; (1933) 33 COL. L. REV. 550.