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# Sales

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ant's property. The opinion of the court of appeals on law from judgment for the defendants on the pleadings contains a good summation on the law of easements.

The opinion notes that an easement may be acquired only by grant, express or implied, or by prescription. For an easement to exist by virtue of an implied grant, as contended by plaintiff, there must be a showing of necessity, and not merely hardship or inconvenience.

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# SALES

## *Liability for Injuries Arising Out of Defective Condition of Goods Purchased*

Probably more opinions are written on one comparatively narrow area of the whole law of sales than on all the rest of this subject — liability for injuries arising out of defective condition of the goods sold. The difficulties of proving negligence on the part of the retailer and of applying the doctrine of *res ipsa loquitur* when suit is against the manufacturer have led many lawyers to attempt recovery on the basis of the warranty provisions of the Uniform Sales Act.[1] But even here there are problems, centering around the doctrine of privity.

In *Welsh v. Ledyard, d.b.a. Western Auto Store*,[2] the Supreme Court had before it the problem which arises when the article purchased causes harm to one other than the purchaser thereof. Previously, in *Canton Provision Co. v. Gauder*,[3] the Supreme Court had permitted a recovery against the retailer by the daughter of the purchaser of allegedly unwholesome food, but only on a tort theory. In *Wood v. General Electric Company*[4] the court specifically held that while a subpurchaser from the manufacurer of an inherently dangerous article (here an appliance) might recover from the manufacturer for negligence in its manufacture which caused harm to the subpurchaser or his property by reason of a latent defect therein, no recovery could be had against the manufacturer based upon implied warranty of fitness.

An analogous situation arises when the injury is caused to a member

1. OHIO REV. CODE §§ 1315.13, 1315.14.
2. 167 Ohio St. 57, 146 N.E.2d 299 (1957).
3. 130 Ohio St. 43, 196 N.E. 634 (1935).
4. 159 Ohio St. 273, 112 N.E.2d 8 (1953).

of the purchaser's family. There is no privity of contract in the ordinary sense and recovery is often denied on warranty, even against the retailer. Such was the result in the *Welsh* case, in which a wife was injured when an electric cooker sold to her husband by defendant retailer exploded. She sued on breach of an express warranty of fitness, as the court construed her petition. It found neither express nor implied warranty, no allegations of agency of the husband in making the purchase and none of a contract for the benefit of the wife as a third party beneficiary, and affirmed a judgment of the trial court on an instructed verdict for defendant.

In some other areas, however, new law was made with respect to the nature and extent of warranties, both express and implied. In *Rogers v. Toni Home Permanent Co.*,[5] decided two months after *Welsh v. Ledyard*, the Supreme Court unanimously held that when one purchases an article (here not food) from a manufacturer who in his advertising makes representations as to the quality and merit of his product aimed directly at the ultimate consumer, urging such consumer to purchase the product from a retailer, and the consumer does so in reliance on and pursuant to the inducements of the manufacturer, the ultimate consumer may maintain an action for damages directly against the manufacturer based on express warranty for injury suffered in the use of such product by reason of deleterious ingredients in the product. The Supreme Court did not have before it for decision the question whether such a plaintiff could recover on an implied warranty. The Court of Appeals for Cuyahoga County, about two months after the *Rogers* case, so held in *Markovich v. McKesson and Robbins, Inc.*[6] Here, too, plaintiff sued the manufacturer. The product, as in the *Rogers* case, was a permanent wave package, containing chemicals. Plaintiff's petition contained allegations sounding in negligence, express warranty and implied warranty. By virtue of the direction by the trial court of a verdict for defendant manufacturer in the *Markovich* case, the question of negligence and implied warranty was squarely presented to the court of appeals. The issue before the appellate court was whether plaintiff should have been allowed to go to the jury on the implied warranties of merchantability and fitness.

The court of appeals held that plaintiff was entitled to go to the jury on negligence pursuant to *Sicard v. Kremer*,[7] on express warranty pursuant to *Rogers v. Toni Home Permanent*, and on implied warranty pursuant to dictum in the *Rogers* case to the effect that ". . . should a case come

5. 167 Ohio St. 244, 147 N.E.2d 612 (1958); see also 9 WEST. RES. L. REV. 511 (1958), and discussion in TORTS section, *infra*.

6. 106 Ohio App. 265, 149 N.E.2d 181 (1958).

7. 133 Ohio St. 291, 13 N.E.2d 250 (1938).

before this court with facts resembling those in the Wood case, it would then be time to re-examine and re-appraise that decision."[8]

The court of appeals mentioned *Welsh v. Ledyard*,[9] but seemed to feel that the *Rogers* case, following closely on its heels, has greatly weakened it and *Wood v. General Electric.*

Of course, the *Wood* and *Welsh* cases are not on all fours with the *Rogers* and *Markovich* cases. They are distinguishable on the ground that the injured persons in the former cases had not made the purchases of the defective articles, whereas in the latter cases they had. But basically, all four cases have been decided on a question of privity of contract. It would seem that if privity is not necessary, then no contract at all should be necessary and rather the test should be foreseeability of harm to the person actually harmed.

## Certificate of Title Act

Another case appeared in the reports during the period covered by this survey, dealing with the Ohio Certificate of Title Act.[10] It is questionable in this writer's mind whether the legislature had in mind, when it passed the act, the effect which has been had on such collateral fields as insurance coverage. It is probably fair to say that at least the primary purpose of the registration acts was to prevent fraud, particularly in the areas of the sale of stolen cars and other cases of sale beyond authority to do so. But the injunction of the legislature that:

> . . . No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle sold or disposed of, or mortagaged or encumbered, unless evidenced:
>
> (A) By a certificate of title or a manufacturer's or importer's certificate. . . .
>
> (B) By admission in the pleadings or stipulation of the parties . . .[11]

has had a vital bearing on numerous cases in which the issue was not so much the ownership of the auto involved in the technical sense of two different parties contending therefor, but rather whether the auto was covered by a particular insurance policy, usually that of a dealer in automobiles.

In *Brewer v. DeCant*[12] an insurer had issued a standard garage liability policy to a dealer in automobiles. "Insured" was defined to in-

8. 106 Ohio App. 265, 273, 149 N.E.2d 181, 187 (1958).

9. 167 Ohio St. 57, 146 N.E.2d 299 (1957).

10. OHIO REV. CODE ch. 4505.

11. OHIO REV. CODE § 4505.04.

12. 167 Ohio St. 411, 149 N.E.2d 166 (1958). See also discussion in INSURANCE section, *supra* and TORTS section, *infra.*

clude any person using an automobile covered by the policy, with the permission of the named insured. The dealer in this case sold a used automobile to one Armitage. He executed a chattel mortgage to a loan company, but failed to pay the amount due and the loan company repossessed and placed the car on the dealer's lot for resale. For some reason the title was never acquired by the finance company and it remained in Armitage. The dealer then negotiated with DeCant for the purchase of this automobile, as a result of which DeCant contracted to buy it and in turn traded in an automobile owned by him. He signed a power of attorney authorizing the dealer to sign the application for a title, arranged for the transfer of the chattel mortgage and drove away in his new "purchase." Twenty-four days later DeCant was involved in an accident in which the plaintiff received injuries. It appears that "title" at such time was still technically in Armitage.

The Supreme Court held that the insurance coverage of the dealer extended to DeCant and that the insurance company was liable to plaintiff on a supplemental petition filed against it after a judgment by default against DeCant. There appear to be several bases for the result, that the "bailment" to DeCant of the car pending sale was an "operation 'necessary or incidental' to the purpose of the . . . dealer" within the terms of the policy and that the words of the policy covering "the use of any automobile in connection with" the insured's business were broad enough to cover an automobile not titled in the insured's name. But the court also felt it necessary to admit that for all intents and purposes it was overruling *Workman v. Republic Mutual Insurance Co.*[13] and *Automobile Finance Co. v. Munday.*[14] If *Mielke v. Leeberson*[15] and *Garlick v. McFarland*[16] did not do so, it appears that this latest case has accomplished that result. Whether necessary to the decision or not, the court specifically held that no title to the automobile could pass to DeCant until the certficate of title had been issued to him.

Likewise, the supreme court, in *Veltri v. City of Cleveland, Cleveland Transit System*[17] relied on Section 4505.04 of the Revised Code in reaching a conclusion opposite to that of the Franklin County Court of Appeals in *Peitsmeyer v. Omar Baking Company.*[18] In the *Peitsmeyer* case it had been held that a bailee in possession of an automobile could sue and recover for damages done to it by a defendant, which was certainly

13. 144 Ohio St. 37, 56 N.E.2d 190 (1944).
14. 137 Ohio St. 504, 30 N.E.2d 1002 (1940).
15. 150 Ohio St. 528, 83 N.E.2d 209 (1948).
16. 159 Ohio St. 539, 113 N.E.2d 92 (1953).
17. 167 Ohio St. 90, 146 N.E.2d 442 (1957).
18. 95 Ohio App. 37, 117 N.E.2d 184 (1952).