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Sales

Sheldon I. Berns

course as opposed to man-made drainage means can have a substantial effect on the legal rights involved. It is interesting to note that the *Johnson* court, in dictum, endorsed the "capacity of the stream" rule mentioned earlier. While no major changes appeared in this area, more litigation will arise from drainage problems and perhaps in the year 1961 some major decisions will be forthcoming.

JOHN H. WILHARM, JR.

SALES

CERTIFICATE OF TITLE

The certificate of title is the thing . . . but not always. That appears to be the state of the law in Ohio as indicated by the cases decided during 1960.

In *Young v. Emanaker*,[1] plaintiff had instituted an action for damages sustained to his automobile. At the time the damages occurred, plaintiff not only had possession of the automobile and an assignment of the seller's interest therein, but had, as well, made application for the issuance of a certificate of title. The Butler County Court of Common Pleas, following the decision of the Ohio Supreme Court in *Brewer v. DeCant*,[2] held that plaintiff was not entitled to maintain an action for damages to an automobile purchased by him, where at the time such damages were sustained he did not have a certificate of title to the automobile in his name. This decision is clearly consistent with the mandate of section 4505.04 of the Revised Code, which provides in part that:

> No person acquiring a motor vehicle from the owner thereof, whether such owner is a manufacturer, importer, dealer, or otherwise, shall acquire any right, title, claim, or interest in or to said motor vehicle until such person has had issued to him a certificate of title to said motor vehicle. . . .

Not clearly consistent with the foregoing section are two cases[3] decided by the Court of Appeals for Cuyahoga County, in which that court considered the same issues as were presented to the court of common

1. 164 N.E.2d 473 (Ohio C.P. 1960).

2. 167 Ohio St. 411, 149 N.E.2d 166 (1959). "Under the Ohio Certificate of Title Act, a change in ownership of an automobile is not consummated until a certificate of title is issued in the name of the purchaser." *Id.* at syllabus 2.

3. Mutual Fin. Co. v. Municipal Employees Union Local 1099, 110 Ohio App. 341, 165 N.E.2d 435 (1960); Mutual Fin. Co. v. Kozoil, 165 N.E.2d 444 (Ohio Ct. App. 1960). See also discussion in 12 WEST. RES. L. REV. 630 (1961).

pleas in *Mutual Finance Company v. Meade*,[4] discussed in last year's survey.[5]

In *Mutual Finance Company v. Municipal Employees Union Local 1099*,[6] plaintiff had attempted to replevy from defendant certain automobiles purchased by defendant from an automobile dealer who had failed to cause certificates of title to the automobiles to be issued in the name of defendant. Unknown to defendant at the time of the sale, plaintiff held a manufacturer's statement of origin to secure a wholesale or "floor plan" mortgage executed by the dealer for each of the automobiles in question. Plaintiff subsequently accepted the assignment of a retail mortgage executed by defendant to the dealer, and, in so doing, remitted to the dealer the funds secured by the retail mortgage instead of applying them in payment of the wholesale mortgage. There had been imposed upon the dealer by the terms of the wholesale mortgage the duty to hold in trust all funds received upon the retail sale of each automobile and remit them to plaintiff. Upon the dealer's failure to do so, plaintiff instituted the action in replevin against defendant, and the dealer was adjudicated a bankrupt.

The court of common pleas[7] had held for defendant on the ground that (1) the "floor plan rule"[8] of estoppel had not been terminated by section 4505.13 of the Code; (2) that defendant was justified in relying upon the apparent authority to sell which had been vested in the dealer by plaintiff; and (3) that plaintiff was guilty of constructive fraud by failing to retain the funds secured by the retail mortgage and in failing to apply the same in payment of the wholesale mortgage.

In affirming the judgment of the lower court, the court of appeals held that: (1) no estoppel could operate against plaintiff in favor of defendant for the reason that section 4505.13 of the Revised Code creates an exception to the "floor plan rule"; (2) no relationship of agency or joint venture existed between plaintiff and the automobile dealer; (3) there was no actual or constructive fraud on the part of plaintiff; (4) defendant was presumed to have known that in the absence of the issuance of a certificate of title, it could acquire no interest in the automobiles, nor could any court in law or equity recognize such an interest; (5) defendant was presumed to have known that the automobile dealer would be unable to provide defendant with the certificates of title unless

4. 161 N.E.2d 561 (Ohio C.P. 1959), *aff'd sub nom.* Mutual Fin. Co. v. Municipal Employees Union Local 1099, 110 Ohio App. 341, 165 N.E.2d 435 (1960).

5. Berns, *Sales, Survey of Ohio Law — 1959*, 11 WEST. RES. L. REV. 417 (1960).

6. 110 Ohio App. 341, 165 N.E.2d 435 (1960).

7. Mutual Fin. Co. v. Meade, 161 N.E.2d 561 (Ohio C.P. 1959).

8. Under the "floor plan rule," an owner who has placed for sale an automobile in a retail dealer's showroom is estopped to deny the title of an innocent purchaser who bought the automobile in the regular course of trade and without actual notice of the floor plan mortgage.

he had possession of the manufacturer's statements of origin; (6) plaintiff was negligent in paying to the dealer the funds which plaintiff should have applied toward the liquidation of the wholesale mortgage, and, as such,

> the loss must fall on Mutual under the well known equitable rule that where one of two persons must suffer by the fraud of a third person whom each trusted, the one who first trusted the third person and placed in his hands the means which enabled him to commit the wrong must suffer the loss.[9]

The second of the cases decided by the Court of Appeals for Cuyahoga County was *Mutual Finance Company v. Kozoil.*[10] The facts in that case were, with one major exception, substantially the same as those set forth above. In *Kozoil,* the defendant paid the price of the automobile purchased by him from the dealer in cash. Thus, plaintiff was not in the inconsistent position of holding both a wholesale and a retail mortgage on the automobile sold to defendant, nor was there ever in the hands of plaintiff any funds which it might have applied toward the liquidation of the wholesale mortgage.

In affirming the decision of the common pleas court in favor of defendant, the court of appeals, one judge dissenting,[11] held as follows: (1) that the "floor plan rule" of estoppel had not been terminated by section 4505.13; (2) that the automobile dealer was acting as agent for plaintiff; (3) that plaintiff was a party to the active fraud practiced on defendant by the automobile dealer.

The *Mutual Finance Company* cases indicate the pressing need for revision of the Certificate of Title Act. However, it is suggested that such revision is properly the function of the legislature rather than that of the courts.

Breach of Warranty

In *Allen v. Grafton,*[12] the Ohio Supreme Court was called upon to decide whether the presence of a piece of oyster shell approximately one and one-fifth inches by four-fifths of an inch contained in a serving of six fried oysters would justify a legal conclusion that the serving of fried oysters constituted "adulterated" food, within the meaning of section 3715.59 of the Revised Code, or that such a serving constituted food not "reasonably fit for" eating within the meaning of section 1315.16.[13]

9. Mutual Fin. Co. v. Municipal Employees Union Local 1099, 110 Ohio App. 341, 353, 165 N.E.2d 435, 443 (1960).

10. 165 N.E.2d 444 (Ohio Ct. App. 1960), *motion to certify granted,* No. 36654, Ohio Sup. Ct. (Nov. 2, 1960).

11. Judge Kovachy, who wrote the opinion for the court in the *Employees Union* case, dissented for the reasons set forth there.

12. 170 Ohio St. 249, 164 N.E.2d 167 (1960).

13. Uniform Sales Act § 15.

Plaintiff had been served the fried oysters in defendant's restaurant, and as a result thereof had suffered a puncture of his small intestine, requiring surgical removal of the oyster shell. His petition was framed to allege a breach of implied warranty as to fitness for use,[14] and to allege a violation under the Pure Food and Drug Act.[15] A demurrer to the petition was sustained by the trial court, and upon plaintiff's failure to plead further, he suffered final judgment against him. The Court of Appeals for Hamilton County reversed the judgment of the trial court and an appeal was taken to the Ohio Supreme Court.

The portions of the Pure Food and Drug Act relevant to the court's decision are contained in sections 3715.52 and 3715.59 of the Revised Code. The former section provides in part that:

> The following acts and the causing thereof are hereby prohibited:
> (A) The manufacture, sale, or delivery, holding or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded. . . .

The latter section states in part as follows:

> Food is adulterated within the meaning of sections 3715.01 and 3715.52 to 3715.72, inclusive, of the Revised Code, if:
> (A) (1) It bears or contains any poisonous or deleterious substance which may render it injurious to health; *but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health.* . . . (Emphasis added.)

In a four-to-three decision, the supreme court held as a matter of law that the presence of the *one* piece of oyster shell would not justify the conclusion that the serving of oysters was "adulterated" food under the definition of that term set forth in section 3715.59, or that the serving was not "reasonably fit for" eating within the meaning of section 1315.16 of the Code.

The basis of the court's decision is found in the following excerpt from its opinion:

> In our opinion, the possible presence of a piece of oyster shell in or attached to an oyster is so well known to anyone who eats oysters that we can say as a matter of law that one who eats oysters can reasonably anticipate and guard against eating such a piece of shell, especially where it is as big a piece as the one described in plaintiff's petition.[16]

The minority of the court[17] viewed the issues raised under the Pure

14. OHIO REV. CODE § 1315.16(A).
15. OHIO REV. CODE ch. 3715.
16. Allen v. Grafton, 170 Ohio St. 249, 259, 164 N.E.2d 167, 174 (1960).
17. *Id.* at 259, 164 N.E.2d at 175 (dissenting opinion).

Food and Drug Act[18] and under the Uniform Sales Act[19] as questions which properly should be determined by the jury.

In *Kennedy v. General Beauty Products, Incorporated*[20] the Court of Appeals for Cuyahoga County made clear its position as to the liability of a manufacturer to a subpurchaser under the theory of implied warranty of fitness. The court held that it was bound by the supreme court case of *Wood v. General Electric Company*,[21] which stated in part that:

> no action may be maintained [by a subpurchaser] against a manufacturer for injury, based upon implied warranty of fitness. . . .[22]

The court stated that *Rogers v. Toni Home Permanent Company*[23] did not modify the decision in *Wood*. Not mentioned in the court's opinion was a decision by the same court of appeals in *Markovich v. McKesson & Robbins, Incorporated*,[24] which heretofore had been interpreted by many practicing attorneys as an acceptance by the court of the now famous dictum in the *Rogers* case,[25] wherein the supreme court stated that it would be willing to re-examine its holding in the *Wood* case.

CHATTEL MORTGAGES

In *Friedman Finance Company v. Stolzenburg*,[26] plaintiff had obtained judgment against the defendant on a cognovit note of which he was the co-maker. In defendant's action to vacate the judgment, he tendered an answer alleging that the note was secured by a chattel mortgage on an automobile which had been repossessed and sold by plaintiff without defendant's knowledge and without the ten-day notice to defendant, required by Revised Code section 1319.07. The Columbus Municipal Court sustained a demurrer to the answer, but the Court of Appeals for Franklin County reversed, stating that, given a liberal construction, the answer stated a defense.

Although not specifically stated in the court's opinion, it appears that the defendant was not the owner of the automobile which had been repossessed and sold by plaintiff. Apparently, the automobile had been owned by the maker of the note upon which defendant was co-maker.

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18. OHIO REV. CODE ch. 3715.
19. OHIO REV. CODE ch. 1315.
20. 167 N.E.2d 116 (Ohio Ct. App. 1960).
21. 159 Ohio St. 273, 112 N.E.2d 8 (1953).
22. *Id.* at syllabus 2.
23. 167 Ohio St. 244, 147 N.E.2d 612 (1958).
24. 106 Ohio App. 265, 149 N.E.2d 181 (1958).
25. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 249, 147 N.E.2d 612, 616 (1958) (dictum).
26. 110 Ohio App. 211, 167 N.E.2d 533 (1959).