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Sales

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use is contrary to a deed restriction; the same rule does not hold true when the restriction is imposed by zoning laws.[15] Thus, the supreme court held that compensation for land taken pursuant to an exercise of the power of eminent domain, and for damages to the residue thereof not taken, can properly be based upon evidence as to its value for commercial use, notwithstanding that such land was held under a deed containing restrictions against using the land except for a children's home and against selling it.

The reasoning of the court appears sound. The owner, by being compensated on possible commercial use contra to his deed restriction, is to some extent getting a windfall, but the appropriating agency is paying no more than the property is worth. Certainly the original restricting grantor did not contemplate benefiting an appropriating agency by reducing the otherwise fair market value of the premises. However, when use of the property is restricted by zoning laws, obviously evidence as to the most valuable use must contemplate the zoning restrictions, to be realistic.[16]

Rights of Riparian Owner

From antiquity, water right fights have plagued the courts. Each year Ohio is blessed with its fair share of definitive cases. *Bey v. Wright Place, Incorporated*[17] is of value in distinguishing between a defined and the absence of a defined watercourse.[18] While the lower riparian owner must accept natural surface drainage and discharge into a defined watercourse,[19] the lower owner has an action for damages by reason of an unnatural accumulation of surface water not being discharged into a defined watercourse.

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SALES

Certificate of Title Act

Two cases were decided in 1959 which limit the scope of the Ohio Certificate of Title Act.[1] Both cases involved the interpretation of section 4505.04 of the act, which provides in part:

> No person acquiring a motor vehicle from the owner thereof, whether such owner is a manufacturer, importer, dealer, or otherwise,

15. City of Euclid v. Lakeshore Co., 102 Ohio App. 96, 133 N.E.2d 372 (1956).
16. *Ibid.*
17. 108 Ohio App. 10, 160 N.E.2d 378 (1956).
18. Rights of lower riparian owner to free flow of stream in defined watercourse with case law on definition can be found in Kistler v. Watson, 156 N.E.2d 833 (Ohio Ct. App. 1957).
19. 41 Ohio Jur. *Waters* § 46 (1935).

> 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, or delivered to him a manufacturer's or importer's certificate for it; nor shall waiver or estoppel operate in favor of such person against a person having possession of such certificate of title, or manufacturer's or importer's certificate for said motor vehicle, for a valuable consideration.
>
> 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 mortgaged or encumbered, unless evidenced . . . by a certificate of title or a manufacturer's or importer's certificate. . . .

In *Sun Finance & Loan Company v. Hadlock*,[2] the Cuyahoga County Court of Appeals ruled that an unpaid mechanic who had performed repairs on an automobile could assert a common-law artisan's lien despite the mandate contained in section 4505.04. It appears that the right to possession under an artisan's lien is a "right" encompassed by the language in this section. However, the court stated that in the absence of clear legislative intent, it would not hold the Certificate of Title Act to have destroyed common-law artisan's liens.[3]

In *Mutual Finance Company v. Meade*,[4] plaintiff instituted actions in replevin against the purchasers of several automobiles. Unknown to the defendants at the time of sale, the dealer from whom the cars were purchased had executed, pursuant to a floor plan agreement, wholesale chattel mortgages to plaintiff, the latter holding as security manufacturer's statements of origin or Ohio certificates of title to each automobile.

As part payment for his automobile, each purchaser had issued a note and a chattel mortgage to the dealer, who subsequently assigned the same to plaintiff. Instead of accepting the purchaser's note in payment of the dealer's indebtedness and cancelling the wholesale mortgage, plaintiff paid the amount of the note to the dealer, and, thus, held both the wholesale and retail mortgages on each car. Thereafter, the dealer became bankrupt, having failed to deliver a certificate of title to any of the purchasers.

The plaintiff asserted ownership by virtue of Ohio Revised Code section 4505.04, noted above, and section 4505.13, which provides in part:

> . . . Exposure for sale of any motor vehicle by the owner thereof, with the knowledge or with the knowledge and consent of the holder of any lien, mortgage, or encumbrance thereon, shall not render such lien, mortgage, or encumbrance ineffective as against the creditors of such

1. OHIO REV. CODE ch. 4505.

2. 162 N.E.2d 131 (Ohio Ct. App. 1959).

3. See also a discussion of this case concerning election of remedies by a purchase-money mortgage in *Personal Property* section, p. 413 *supra*.

4. 161 N.E.2d 561 (Ohio C.P. 1959).

> owner, or against the holders of subsequent liens, mortgages, or encumbrances upon such motor vehicle. . . .

In ruling in favor of the defendants, the court held that (1) section 4505.13 was not intended to terminate the "floor plan rule" in Ohio, whereby 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; (2) that the doctrine of agency by apparent authority is still available under the Certificate of Title Act to a purchaser who can prove to the satisfaction of a jury that he was justified in relying upon authority apparently vested in the vendor of an automobile by the owner thereof; and (3) that when a finance company approves and accepts retail notes and mortgages given by innocent purchasers of automobiles on which wholesale mortgages are retained by the finance company, the latter is guilty of constructive fraud, and "must be deemed to have extinguished its floor plan or wholesale mortgage liens . . . ."[5]

What legal or equitable principle the court intended as a basis for the statement quoted immediately above is not disclosed by the court's opinion. Further, this holding appears to be of less legal significance when it is noted that in an unreported addendum to the *Meade* case, the court rendered a decision against the same plaintiff in actions instituted for the recovery of several automobiles from purchasers who either had paid cash for their cars or had financed the purchase of them with a company other than the plaintiff.

Although the court's position in the *Meade* case can be justified on moral grounds, it appears to be unsupportable in view of the language contained in Ohio Revised Code sections 4505.04 and 4505.13.[6]

The decisions in *Hadlock* and *Meade* indicate the need of legislative revision of the Certificate of Title Act in order to bring it in line with popular concepts of justice, and to alleviate the necessity for Ohio courts to emasculate the language of the act in order to protect the purchaser from the fraud which the act was intended to prevent.

Breach of Warranty

Of the four cases concerning breach of warranty reported during the period of this Survey, three are worthy of comment.

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5. *Id.* at 565.

6. Subsequent to the completion of this article, the lower court decisions were affirmed by the Cuyahoga County Court of Appeals both as to those cases wherein plaintiff held the wholesale and retail mortgages on each automobile, and as to those cases wherein plaintiff held only the wholesale mortgage. Mutual Fin. Co. v. Municipal Employees Union Local 1099, 165 N.E.2d 435 (Ohio Ct. App. 1960); Mutual Fin. Co. v. Kozoil, 165 N.E.2d 444 (Ohio Ct. App. 1960). [Ed.]

Because privity of contract was lacking, the Court of Appeals for Madison County, in *Steele v. Westinghouse Electric Corporation,*[7] refused to allow an action for wrongful death to be tried upon a theory of breach of warranty where an allegedly defective milk cooler manufactured by defendant resulted in the death by electrocution of the purchaser's tenant, for whose use the purchaser supplied the cooler. The court failed to consider dictum by the Ohio Supreme Court in *Rogers v. Toni Home Permanent Company*[8] to the effect that the court would be willing to reconsider a prior holding[9] that privity of contract was necessary for an action based upon implied warranty of fitness.[10]

Two cases reported concerned the damages recoverable in actions involving misrepresentations made by dealers in the sale of automobiles. The first of these, *Crabbe v. Freeman,*[11] was an action in fraud. In deciding an issue of first impression in Ohio, the Municipal Court of Columbus held that all the elements of fraud were present, and, thus, that punitive damages were recoverable by plaintiff where the speedometer of a used automobile purchased by him was set back with the knowledge of the dealer, who failed to disclose that fact to plaintiff. Fraud was stated to be an exception to the doctrine of *caveat emptor.*

In the second case, *Craig v. Spitzer Motors of Columbus, Incorporated,*[12] the Franklin County Court of Appeals held that punitive, as well as compensatory damages were recoverable in an action for breach of warranty where an automobile, knowingly misrepresented by defendant to be a "demonstrator," actually had been used to pull a trailer from Ohio to Florida. The court ruled that Ohio Revised Code section 1315.70, which provides that the measure of damages in an action for breach of warranty is the difference between the value of the goods received and the value as represented, "does not exclude the right to punitive damages . . . if the facts justify such result."[13] In support of its conclusion, the court cited Ohio Revised Code section 1315.71, which allows the recovery of special damages, and section 1315.74, which states that "in any case not provided for

7. 107 Ohio App. 379, 159 N.E.2d 469 (1958). For a further discussion of this case, see *Torts* section, p. 436 *infra.*

8. 167 Ohio St. 244, 249, 147 N.E.2d 612, 616 (1958) (dictum). For a discussion of the *Rogers* case, see 9 WEST. RES. L. REV. 511 (1958).

9. Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953).

10. In Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958), the Court of Appeals for Cuyahoga County, relying upon the dictum in the *Rogers* case, concluded that it was permissible to allow an action to be tried upon the theory of breach of implied warranty in the absence of privity of contract. See Sonenfield, *Sales, Survey of Ohio Law — 1958,* 10 WEST. RES. L. REV. 436 (1959).

11. 160 N.E.2d 583 (Ohio Munic. Ct. 1959).

12. 160 N.E.2d 537 (Ohio Ct. App. 1959).

13. *Id.* at 540.