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CHATTEL MORTGAGES IN FLOOR FINANCING-VALIDITY OF RECORDED CHATTEL MORTGAGE AS AGAINST PURCHASER IN ORDINARY COURSE-EFFECT OF CERTIFICATE OF TITLE ACT WHEN CERTIFICATE RETAINED BY MORTGAGE

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CHATTEL MORTGAGES IN FLOOR FINANCING—VALIDITY OF RECORDED CHATTEL MORTGAGE AS AGAINST PURCHASER IN ORDINARY COURSE—EFFECT OF CERTIFICATE OF TITLE ACT WHEN CERTIFICATE RETAINED BY MORTGAGEE—Plaintiff, buyer of an automobile from a used-car dealer, brought suit against the dealer and a bank, to which the dealer had given a duly filed chattel mortgage covering the automobile, to have the mortgage declared invalid as to the automobile in question, and for specific enforcement of the promise by the dealer to deliver the certificate of title to the buyer. The mortgage contained a clause giving the dealer-mortgagor the right to sell automobiles mortgaged to the bank-mortgagee, but the bank retained possession of the certificate of title to the automobile. The Circuit Court in Chancery entered judgment for plaintiff. On appeal, *held*, reversed. *Bayer v. Jackson City Bank and Trust Co.*, 335 Mich. 99, 55 N.W. (2d) 746 (1952).

The court refused to give the plaintiff the certificate of title to the automobile, stating that a suit for specific performance would not lie for chattels unless *pretium affectionis* existed,[1] because plaintiff could have returned the automobile and pursued a damage remedy which was adequate.[2] While it is true that specific performance is not the usual remedy for breach of contracts to sell chattels, because the legal remedy is adequate, it must be recognized

[1] The court cites Cole v. Cole Realty Co., 169 Mich. 347, 135 N.W. 329 (1912). This rule is undoubtedly a correct statement of the law and has been upheld even where automobiles were extremely scarce due to a strike in the industry, Poltorak v. Jackson Chevrolet Co., 322 Mass. 699, 79 N.E. (2d) 285 (1948).

[2] Query if plaintiff should be required to return the automobile and risk a damage action in the light of the dealer's pending insolvency and bankruptcy?

that there is an exception to this rule when the chattel is a muniment of title.[3] A suit for the delivery of a certificate of title to an automobile has been recognized in the District of Columbia,[4] and the Michigan Supreme Court recently indicated that it would entertain such a suit.[5]

However, the most shocking aspect of the principal case is its effect on the doctrine which the court seemed to announce just five years before in *Daas v. Contract Purchase Corporation*.[6] In that case the court clearly based its decision on *Fogle v. General Credit, Inc.*,[7] and apparently adopted the majority view that a purchaser in the ordinary course of business when the mortgagee has allowed the dealer-mortgagor to display the mortgaged chattel for sale is not charged with notice of a recorded mortgage. Soon after the *Daas* case, the court began to limit that decision to its facts,[8] and the principal case may be the final step in overruling the Fogle view and charging the purchaser with notice from the record.[9] The principal case, however, may be limited to situations where the certificate of title is retained by the mortgagee. The court maintained that no interest could pass to the purchaser since there was no transfer of the certificate of title,[10] as required by the Certificate of Title

[3] Muniments of title have been recognized to be exceptional, since they have little or no intrinsic value, and the property with which they are associated is often useless without a muniment of title. 1 POMEROY, EQUITY JURISPRUDENCE, 4th ed., §185 (1918).

[4] Fogle v. General Credit, Inc., (D.C. Cir. 1941) 122 F. (2d) 45.

[5] In the case of Fullwood v. Catsman, 329 Mich. 120, 44 N.W. (2d) 898 (1950), the court said that a purchaser was entitled to a certificate of title as against a vendor. This was interpreted as meaning that a suit to compel delivery of the certificate of title would lie, Lusk, "Effect of Registration and Certificate of Title Acts on the Ownership of Motor Vehicles," INDIANA BUSINESS STUDIES No. 21, p. 126 et seq. (1941).

[6] 318 Mich. 348, 28 N.W. (2d) 226 (1947), noted in 46 MICH. L. REV. 255 (1947). In this case the mortgagor-dealer had possession of the certificate of title and delivered it to the purchaser. However, the court seemed to disregard this fact completely in saying that a purchaser was not expected to search the record before purchasing an automobile and that the risk should be on the financier who is familiar with the practices of the trade. The court emphasized the distinction between those who are familiar with the complicated financing transaction common in the automobile industry and the ordinary purchaser.

[7] Note 4 supra, noted in 42 COL. L. REV. 154 (1942). The rule of the Fogle case was first stated in Boice v. Finance and Guaranty Corp., 127 Va. 563, 102 S.E. 591 (1920). A note in 88 UNIV. PA. L. REV. 367 at 368 (1940) states that the law is settled in favor of the Fogle case, but questions the policy of its doctrine because "The purchase of an automobile is an event sufficiently infrequent to justify requiring the purchaser to examine the records to make sure that the title is clear." In 1949, 5,119,000 *new* automobiles were sold, STATISTICAL ABSTRACT OF THE UNITED STATES 487 (1951).

[8] The Daas case was first limited to the fact that the mortgagor-dealer had possession of the certificate of title in Carr v. National Discount Corp., (6th Cir. 1949) 172 F. (2d) 899, and this limitation was applied in Jackson City Bank and Trust Co. v. Blair, 333 Mich. 399, 53 N.W. (2d) 493 (1952) (another case arising out of the bankruptcy of the mortgagor in the principal case).

[9] For cases charging the purchaser with constructive notice from the record see Utica Trust and Deposit Co. v. Decker, 244 N.Y. 340, 155 N.E. 665 (1927); Finance and Guaranty Co. v. Defiance Motor Truck Co., 145 Md. 94, 125 A. 585 (1924). For a discussion of both views see 2 ROCKY MT. L. REV. 261 (1930).

[10] By treating a sale without a transfer of the certificate of title as a complete nullity, the court makes it possible for a purchaser to use the car and damage it, and then return it and sue for the purchase price. Lusk, "Effect of Registration and Certificate of Title Act on the Ownership of Motor Vehicles," INDIANA BUSINESS STUDIES No. 21, p. 70 (1941).

Act;[11] however, it does not necessarily follow that the court should have treated the transaction as a nullity in this situation. The court had previously declared that the purchaser had the obligations of ownership, even though he did not yet have the certificate of title, when he negligently injured a pedestrian,[12] and also that a purchaser had a right to the certificate of title when the vendor agreed to sell the automobile.[13] By ignoring the proviso allowing the mortgagor to sell the automobile, which was expressed in this mortgage, the court overlooked the usual basis for allowing the purchaser to take title.

If the earlier *Daas* case is to be limited to its precise facts, then the holding in the principal case raises several serious problems. If purchasers in the ordinary course of business are to be charged with notice of recorded chattel mortgages on merchandise which is not under the Certificate of Title Act (e.g., television receivers, washing machines, stoves), then the number of people who should daily require the use of the records may well create an impossibly crowded situation.[14] Although the court had previously decided that the Certificate of Title Act does not relieve the mortgagee of the duty of recording the mortgage,[15] the principal case makes the effect of a failure to record when the mortgagee retains possession of the certificate of title unclear, since the purchaser has no rights in the automobile, even though the mortgagee has not recorded the mortgage.[16] Finally, the court has wrought a drastic change in the theory of selling by requiring the delivery of a certificate of title to accomplish a sale. Hereafter, the dealer-mortgagor can no longer close the transaction as soon as the purchaser indicates his assent, but must ask the purchaser to return the following day so as to give the dealer an opportunity to deliver the certificate of title. The applicability of these conclusions to *some* transactions arising after September 18, 1952, is dependent upon the interpretation given by the Michigan Supreme Court to section 16 of the Uniform Trust Receipts Act, recently enacted by the Michigan Legislature. In the right kind of case chattel mortgage and conditional sales law is changed and the court may well construe section 16 to change Certificate of Title law as well.[17]

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[11] Mich. Pub. Acts (1949) No. 300; Mich. Stat. Ann. (1952) §§9.1933 and 9.1935.
[12] Kimber v. Eding, 262 Mich. 670, 247 N.W. 777 (1933).
[13] Fullwood v. Catsman, note 5 supra.
[14] Durfee, "Traffic Problem," 1 CASES ON SECURITY 530 (1951).
[15] Nelson v. Viergiver, 230 Mich. 38, 203 N.W. 164 (1925).
[16] This problem was settled in North Carolina in the case of Carolina Discount Corp. v. Landis Motor Co., 190 N.C. 157, 129 S.E. 414 (1925). The court did not treat the transaction void in this case and the purchaser took free of the lien.
[17] Act 19 of 1952, effective Sept. 18, 1952. Mich. Comp. Laws (1952 Supp.) § 555.401. Section 16 reads in part, ". . . buyers in the ordinary course of trade . . . shall be protected . . . although the compliance of the entruster be with the filing or recording requirements of another act." The problem will be whether or not the Certificate of Title act will be construed to be an "act requiring filing or recording." Since the transaction in the principal case took place before September 18, 1952, section 16 was not applicable.