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RECENT DECISIONS

CHATTEL MORTGAGE—VALIDITY OF RECORDED CHATTEL MORTGAGE AS AGAINST ORDINARY PURCHASER—POSSESSION ENTRUSTED TO MORTGAGOR-DEALER REGULARLY ENGAGED IN SALE OF SIMILAR ARTICLES—Plaintiffs purchased from a retail dealer, in the ordinary course of trade, automobiles which were subject to properly recorded mortgages given by the dealer to defendant finance company. The certificates of title which the mortgagor-dealer had been permitted to retain indicated that the vehicles were free from lien. Claiming default in payments by the dealer, the defendant seized the automobiles. Plaintiffs brought actions seeking repossession and damages. As the evidence clearly disclosed, defendant anticipated that the dealer would make no disclosure of the encumbrance at the time of sale, but rather expected that the lien would subsequently be discharged with the proceeds of sale. Defendant contemplated that the chattel mortgage recording act [1] would protect his security and that loss occurring through default by a dishonest dealer could be recovered from the purchaser. In addition, the evidence failed to explain satisfactorily why a part of the $100,000 paid over to the defendant during the two and a half month period following these sale transactions had not been applied to the discharge of these particular mortgagees. The trial court, on the theory that loss should fall on the party making the perpetration of the fraud possible, granted relief to the plaintiffs. On appeal, *held*, affirmed. By the course of its previous transactions with the dealer and its methods of doing business, the defendant waived its right to enforce the lien against purchasers having no actual notice. *Dass v. Contract Purchase Corporation*, 318 Mich. 348, 28 N.W. (2d) 226 (1947).

There is a sharp conflict of authority on the question of the rights of a purchaser as against the holder of a properly recorded security interest where, with the tacit assent of such holder, a retail dealer has been enabled to transfer an apparently unimpeachable title. The rule that recording constitutes constructive notice, when extended to its logical extreme, will afford protection to the mortgagee.[2] This implication has been avoided, however, on the ground that as a result of his conduct the mortgagee has waived his interest in the property or is estopped to claim benefit of the recording statute.[3] The precise issue had been expressly reserved in two previous Michigan cases.[4] But the language of the recording statute which avoids only instruments not properly recorded,[5]

[1] Mich. Comp. Laws (1929) § 13424; Mich. Stat. Ann. (1937) § 26.929.

[2] Utica Trust & Deposit Co. v. Decker, 244 N.Y. 340, 155 N.E. 665 (1927); Finance & Guaranty Co. v. Defiance Motor Truck Co., 145 Md. 95, 125 A. 585 (1924). See also cases collected in 136 A.L.R. 821 (1942).

[3] Boice v. Finance & Guaranty Corp., 127 Va. 563, 102 S.E. 591 (1920); Fogle v. General Credit, Inc., 71 App. D.C. 338, 122 F. (2d) 45 (1941). See also Cases in 136 A.L.R. 821 (1942).

[4] National Bond & Investment Co. v. Union Investment Co., 260 Mich. 307, 244 N.W. 483 (1932) and People v. Etzler, 292 Mich. 489, 290 N.W. 879 (1940).

[5] "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an

common law concepts of priority, and dicta in prior decisions, all gave support to the instant defendant's claim. The general rule that filing constitutes constructive notice and precludes a bona fide purchase is well established.[6] Where a finance company had taken by assignment a conditional sales contract covering an automobile upon which there was an outstanding recorded chattel mortgage, the court held that the assignee took subject to the equity of the mortgage.[7] An insurance company was permitted to avoid liability on a policy of automobile theft insurance on the ground of a breach of warranty in that the owner failed to disclose an outstanding lien.[8] The owner was a dealer in used cars and the vehicle had been purchased from another dealer who discharged the encumbrance three months after the sale. The court pointed out, however, that had the policy not provided for forfeiture "the insurer upon paying the loss, if the car was recovered, would not be entitled to it by subrogation or assignment except subject to the lien of the holder of the duly recorded mortgage." [9] These cases are distinguishable from the instant one in that they did not involve as assignees or purchasers members of the general buying public.[10] And tenuous though this distinction may at first appear, the position of retail purchasers is inherently different from that of dealers and finance companies. The latter are cognizant of the practices of the trade. They may take appropriate action to protect themselves. But, the very name "floor plan mortgage" denotes an arrangement whereby a charge may be imposed on goods to be placed in the dealer's regular stock for the purpose of retail sale. Obviously, this method of financing can operate effectively only if the purchaser, trusting in the dealer's apparent ownership, fails to search the record. To penalize the ordinary purchaser for this expected omission seems grossly inequitable and it can only be hoped that the rationale of this case will not be limited to its particular and rather shocking facts. The ordinary citizen, when buying at retail, should be afforded the law's protection. Loss through the defalcations of a dealer should be regarded as a business risk, legitimately borne by the loan agency. As the Pennsylvania court has said, "the complicated dealings between many of those

immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void . . . as against subsequent purchasers . . . unless the mortgage or a true copy thereof shall be filed . . . . " Mich. Comp. Laws (1929) § 13424, Mich. Stat. Ann. (1937) § 26.929.

[6] Saginaw Financing Corp. v. Detroit Lubricator Co., 256 Mich. 441, 240 N.W. 44 (1932); Pinconning State Bank v. Henry, 258 Mich. 44, 241 N.W. 913 (1932).

[7] National Bond & Investment Co. v. Union Investment Co., 260 Mich. 307, 244 N.W. 483 (1932).

[8] Stamler v. Universal Insurance Co., 305 Mich. 131, 9 N.W. (2d) 33 (1943).

[9] Stamler v. Universal Insurance Co., 305 Mich. 131 at 136, 9 N.W. (2d) 33 (1943).

[10] A similar distinction has been adopted by the Ohio courts. In National Guarantee and Finance Co. v. Pfaff Motor Car Co., 124 Ohio St. 34, 176 N.E. 678 (1931), the court, while indicating approval of the estoppel doctrine as applied to ordinary purchasers, limited its application by denying protection to another and subsequent mortgagee. And in Colonial Finance Co. v. McCrate, 60 Ohio App. 68, 19 N.E. (2d) 527 (1938), a recorded mortgage was enforced as against an automobile dealer who had purchased from another dealer at wholesale. See Boehm, "The 'Floor Plan Rule' in Ohio," 5 OHIO ST. UNIV. L. J. 422 (1939).

trafficking in and loaning money on automobiles has reached a point where the courts must strip transactions of their pretenses . . . . Those who buy and sell, bail and loan money on motor vehicles must be given to understand that the realities of their transactions will be sought for by the courts." [11]

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[11] Root v. Republic Acceptance Corp., 279 Pa. St. 55 at 57, 123 A. 650 (1924).