of fees out of the proceeds of the sale, there would seem to be adequate grounds for denying him a priority over an intervening mortgagee's interest. There would also seem to be ample authority for such a holding on the basis of *Young* v. *Stone, supra.* In that case the assessment of the fees against the property of those who might have received some tenuous benefit was denied because all the parties did not benefit. Although there was a definite contract for compensation, the court said that the fact that the service was not for the "common benefit of all" was equally decisive of the case. In *Klosterman* v. *Klosterman* there was no apparent benefit to the other defendants nor to the mortgagee.

A zealous attorney can usually find a speculative or theoretical benefit on which to base the allowance of fees when the allowance tends to be made on the basis of custom and inertia without a strict examination of the merits of the claim. The general rule in other proceedings in this country is to have each party pay his own attorney. If the question of benefit is put in issue it would seem reasonable to make the plaintiff's attorney bear the usual burden of proof as to the existence and amount of benefit conferred on the defendant.

ARTHUR N. MINDLING

SALES

TRANSFER OF TITLE TO AUTOMOBILES UNDER NEW CERTIFICATE OF TITLE ACT

The Ohio Supreme Court in *State ex rel. The City Loan & Savings Co.* v. *Taggart, Recorder,* 134 Ohio St. 374, 17 N.E. (2d) 758, decided November 16, 1938, upheld the constitutionality and validity of sections 6290-2 to 6290-17 of the General Code enacted in 1937 which repealed code sections 6310-3 to 6310-14 relating to motor vehicles and requiring a bill of sale to be executed in accordance with the provisions of the act which imposed a penalty in case of failure to comply. The new *Certificate of Title Act* provides that title to all motor vehicles owned and operated in Ohio be represented by certificates of title. Code section 6290-2 provides that "no manufacturer, importer, dealer, or other person shall sell or otherwise dispose of a new motor vehicle to a dealer to be used by such dealer *for purposes of display and resale* without delivering to such dealer a manufacturer's or importer's certificate duly executed in accordance [with the act] and with such assignments thereon as may be necessary to show title in the purchaser thereof; nor shall such dealer purchase or acquire a new motor vehicle without obtain-

ing from the seller thereof such manufacturer's or importer's certificate." Code section 6290-4 adds: "nor shall any *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 in law or in equity shall recognize the right, title, claim or interest of any person in or to any motor vehicle, hereafter sold or disposed of, or mortgaged or encumbered, unless evidenced by [such certificates]." (Italics supplied). The act then authorizes the forms to be used and methods of securing the same, making it mandatory upon the transferor to record liens and encumbrances thereon. It is expressly stipulated that code sections 8560 to 8572, inclusive, relating to the deposit of chattel mortgages with the county recorder, shall not be construed to apply to motor vehicles. Code section 6290-17 makes the operation of a motor vehicle without a certificate of title unlawful. The court in the instant case stated at p. 375, 17 N.E. (2d) 759:

"It is apparent that the primary object of the new law is to afford an effective means of transferring and recording the evidence of title to motor vehicles in one continuous chain from the beginning to the end of their existence in Ohio . . . and to eliminate several well known and flagrant types of abuse which were perpetrated under the old 'Bill of Sale Law'."

The old *Bill of Sale Law* did not expressly provide that title could not pass in any other manner than provided therein and the courts were reluctant to decide at first whether the common law relinquishment of possession with intent to pass title was sufficient to vest title in the purchaser or donee thereof. *Ferris* v. *Langston,* 253 S.W. 309 (Tex. Civ. App. 1923). There are many lines of authority on the effect of noncompliance with such statutory requirements.

One group of cases holds that a statute merely prohibiting or making unlawful a sale without requisite formality, does not affect the validity of a civil contract, but is merely regulatory within the police powers of the state. *Moore* v. *Wilson,* 18 S.W. (2d) 873 (Ky. 1929); *Gaub* v. *Mosher,* 3 N.J. Misc. 605, 129 Atl. 253 (1925); *Willys-Overland, Inc.* v. *Holliday,* 284 S.W. 973 (Tex. Civ. App. 1926). Other courts have held that noncompliance with the statute does not render the sale void *ab initio* but that noncompliance is a suspicious circumstance sufficient to put purchasers upon inquiry as to the vendor's title, *Wallich* v. *Sandlovich,* 111 Neb. 318, 196 N.W. 317 (1923); while others have held the sale void unless the statute was complied with. *Hammond Motor Co.* v. *Warren,* 113 Kan. 44, 213 Pac. 810 (1923); *Bos* v.

Holleman De Weerd Automobile Co., 246 Mich. 578, 225 N.W. 1 (1929). See 37 A.L.R. 1465; 52 A.L.R. 701; 63 A.L.R. 688; 94 A.L.R. 948.

The Supreme Court of Ohio at first adhered to the view that noncompliance with the statute renders the sale void. *Ohio Farmers Ins. Co.* v. *Todino*, 111 Ohio St. 274, 145 N.E. 25 (1924), overruled by *Commercial Credit Co.* v. *Schreyer*, 120 Ohio St. 568, 166 N.E. 808 (1929). The *dicta* in the *Todino* case pointed out that "where a statute is enacted to protect the public against fraud or imposition or to safeguard the public health or morals, a contract in violation thereof is void, even though a money penalty also is enacted . . . the [statute's] sole purpose was to prevent, in so far as possible, the stealing of automobiles . . . " and a recorded chattel mortgage by one who has no title has no priority over a mortgagee in good faith for value from the owner. *Ohio Finance Co.* v. *McReynolds*, 27 Ohio App. 42, 160 N.E. 727 (1927). It was held in *Helwig* v. *Warren State Bank*, 115 Ohio St. 182, 152 N.E. 298 (1926) that filing of a bill of sale was notice of the grantee's rights and subsequent holders of interest took subject to the grantee's rights though the grantee left the car with the grantor who sold to an innocent purchaser. However, in *Commercial Credit Co.* v. *Schreyer*, *supra*, the court overruled the *Todino* and *Helwig* cases and the rule was settled that any assent or transfer of a motor vehicle not violative of the Uniform Sales laws of the state, is, nevertheless, a valid contract between the parties thereto, although no bill of sale was issued in compliance therewith. *Gutridge* v. *State*, 37 Ohio App. 1, 173 N.E. 447 (1930), petition in error dismissed, 122 Ohio St. 623, 174 N.E. 140 (1930); *Willey* v. *Willey*, 23 Ohio L.R. 305 (1924); *In re Greenbaum*, 26 Ohio L.R. 607 (1928); *Frankel Chevrolet Co.* v. *Snyder*, 37 Ohio App. 378, 174 N.E. 751 (1930). *The Commercial Credit Co.* case held the statute to be penal and did not declare the contract for sale unlawful if delivery had been made, although one or both of the parties may be criminally prosecuted for a violation of such statutes in making the transfer [*Fitzgerald* v. *National Bond Co.*, 10 Ohio L. Abs. 181 (1931)] since a bill of sale is *prima facie* evidence of ownership. *Cope-Shanks Motor Co.* v. *Herzig*, 33 Ohio App. 345, 169 N.E. 581 (1929).

The Ohio courts have repeatedly stated both by way of decision and by way of *dictum* that the *Bill of Sales Act* was enacted for the purpose of preventing traffic in stolen automobiles. *McMillan & Seiler Weil Motor Co.*, 5 Ohio Op. 84 (1936); *Willey* v. *Willey*, *supra*. "The sale of the automobile does not itself constitute *malum prohibitum*.

There is nothing . . . in the usual automobile sale which *per se* endangers the public safety or public morals. . . . The purpose of the automobile bill of sale law, viewed as a whole, was not to prohibit transactions in automobiles but to throw safe-guards around those transactions." *In re Greenbaum, supra,* at p. 614.

The greatest difficulty under the *Bill of Sales Act* arose under the *Floor Plan Rule* whereby an owner of an automobile, who placed a car on the floor of a retail dealer's showroom for sale, was estopped to deny the title of an innocent purchaser, who had purchased from such dealer in the ordinary retail dealing, without knowledge of any conflicting claim. *National Guarantee & Finance Co.* v. *Pfaff Motor Car Co.,* 124 Ohio St. 34, 176 N.E. 678 (1931) (holding such estoppel did not apply to a pledgee or mortgagee). *Accord: Cincinnati Finance Co.* v. *First Discount Corp.,* 59 Ohio App. 131, 12 Ohio Op. 42 (1938), holding that a mortgagee who allowed automobiles to remain in the possession of a mortgagor automobile dealer and permitted him to place them in his display room for the ultimate purpose of sale, authorized the dealer to negotiate for a sale, but did not authorize a sale free of the mortgage. The mortgagee would lose his lien if the mortgagor had actual authority to sell free of the lien or if the mortgagee had clothed the mortgagor with apparent authority. In order that estoppel arise the purchaser must have acted upon the appearance of authority. It is an element of estoppel that the party claiming his opponent estopped must show that he himself has done some act to his prejudice and has been misled by the appearance set up by his opponent. *Kokenge* v. *Whetstone,* 26 Ohio L. Abs. 398, 11 Ohio Op. 213 (1938). The dealer, in transactions of this nature, could, by issuing a bill of sale to an innocent purchaser, vest title in such purchaser, where, in fact, the title was in a third party. The courts, in developing the rule, have said that the owner, or one who has advanced the money to pay for the car, who permits it to be kept in the salesroom of a dealer who holds himself out to the world as the owner thereof and exhibits it for sale, thereby clothes the dealer with such apparent ownership and authority to sell that he is estopped to assert his own superior title as against a purchaser from the dealer in good faith and for value in the regular course of business, who was without knowledge or notice of the adverse claim thereto, *Glass* v. *Continental Guaranty Corp.,* 81 Fla. 687, 88 So. 876 (1921); *Missouri Finance Corp.* v. *McCowan,* 108 Kan. 622, 196 Pac. 614 (1921); *National Guarantee & Finance Co.* v. *Schenke,* 8 Ohio Op. 36, 24 Ohio L. Abs. 236 (1937); *Clark* v. *Flynn,* 120 Misc. 474, 199 N.Y. Supp. 583 (1923); *Carmack* v. *Gordon,* 13 Ohio Dec. Rep. 979

(1893) (personal property of any sort), notwithstanding an agreement by the dealer to deliver the car to no one except the owner or his order, *Missouri Finance Corp.* v. *McGowan, supra,* and, on the same principle, the owner is estopped as against one to whom the dealer assigns a contract of conditional sale of the car to an innocent purchaser. *Rogers Lamb Co.* v. *Coast Securities Co.,* 58 Cal. App. 744, 209 Pac. 246 (1922). Under the new *Certificate of Title Act,* there will be less fraud perpetrated by the dealer. While there was ample opportunity to avoid encumbrances and liens under the old act as against *bona fide* purchasers for value, it would appear that a purchaser would not be a purchaser *in good faith* if no certificate were obtained pursuant to the provisions of the statute. No dealer would be authorized to vest title without it, all mortgages, liens, and other encumbrances being noted thereon; and a purchaser, being negligent in not requiring compliance, would be precluded from asserting estoppel. *Kokenge* v. *Whetstone, supra.*

However, in order to determine whether the estoppel theory will be applied, it will be necessary to determine whether the procedure required by the statute is mandatory to pass title or whether it is merely a regulatory measure. The Nebraska statute, Neb. Comp. Stat. sec. 60-325 (1929), provides that upon the transfer of ownership of any motor vehicle, the title shall not pass until the certificate of registration, properly executed, shall be duly filed. This statute was invoked in *Jensen* v. *Wroth,* 125 Neb. 832, 252 N.W. 322 (1934), which held that property does not pass unless there is absolute compliance with the statute. Iowa, Iowa Code sec. 4964 (1930), and California, Cal. Gen. Laws (Deering, 1931) act 5128, sec. 45, have similar provisions; but the Iowa court, in *Abraham* v. *Hartford Fire Ins. Co.,* 215 Iowa 1, 244 N.W. 675 (1932), held that the transfer of a registration card under the statute is merely *prima facie* evidence of a transfer of title; while the provisions of the California statute suggest that some property interest passes irrespective of the law, *Swing* v. *Ling,* 129 Cal. App. 518, 19 P. (2d) 56 (1933), although in earlier cases the court interpreted the statute strictly. *San Joaquin Valley Sec. Co.* v. *Prather,* 123 Cal. App. 378, 11 P. (2d) 45 (1932). Michigan has held that the transfer of an automobile without delivery of a certificate of title is void. *Kimber* v. *Eding,* 262 Mich. 670, 247 N.W. 777 (1933). Missouri also has adopted the strict view, requiring absolute adherence to the provisions of the statute. *Robertson* v. *Snider,* 63 S.W. (2d) 508 (Mo. 1933). Another group of cases has held that the failure to conform does not *per se* render the sale void. *Thiering* v. *Gage,* 132 Ore. 92, 284 Pac. 832

(1930); *Parrot* v. *Gulick*, 145 Okla. 129, 292 Pac. 48 (1930); *Commercial Credit Co.* v. *McNelly*, 171 Atl. 446 (Del. 1934); *In re Lowry*, 40 F. (2d) 321 (Va. 1930). But it would seem that the legislature in abrogating the *Bill of Sales Act*, which had proved ineffective in preventing fraudulent transfers, intended this act to be applied strictly and unless a certificate of title is issued, intended no valid title to pass.

ZENDA L. LIEBERMAN

WARRANTIES — WATER AS FOOD

Plaintiff sued a restaurant keeper as a result of illness suffered by him from eating a dinner purchased and served at defendant's restaurant. The illness was caused by bacteria present in the water furnished by defendant from its own well. Plaintiff alleged breach of implied warranty and negligence. *Held*, the trial court committed prejudicial error (1) in refusing to charge the jury on the question of implied warranty[1]; (2) in refusing to charge the jury that a violation of the pure food and drug laws[2] of Ohio is negligence *per se*[3]. *Yochem* v. *Gloria, Inc.*, 134 Ohio St. 427, 17 N.E. (2d) 731, 13 Ohio Op. 29 (1938).

The pure food and drug laws are statutes passed for the protection of the public and neither intent to violate them nor knowledge of their violation are elements of the crime.[4] If these sections are invoked in this case, it is necessary to determine that drinking water is "food"[5] and that

[1] Ohio G. C. sec. 8395 in part: "Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"1. When the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

[2] Ohio G. C. sec. 5774 in part: "No person, within this state, shall manufacture for sale, offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is adulterated within the meaning of this chapter, . . . "

Ibid., sec. 5775, in part: "The term 'food' as used in this chapter, includes all articles used by man for food, drink, flavoring extract, confectionery, or condiment, whether simple, mixed or compound."

Ibid., sec. 5778, in part: "Food, drink, confectionery or condiments are adulterated within the meaning of this chapter (1) if any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its quality, strength or purity; . . . (5) if it consists wholly, or in part, of a diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article, whether manufactured or not in the case of milk, if it is the product of a diseased animal; . . . (7) if it contains any added substance or ingredient which is poisonous or injurious to health; . . . "

[3] *Portage Markets Co.* v. *George* 111 Ohio St. 775, 146 N.E. 283 (1924); *Taugher* v. *Bennington*, 127 Ohio St. 142, 187 N.E. 19 (1933).

[4] *Portage Markets Co.* v. *George*, and cases cited therein, note 3, *supra*.

[5] Ohio G. C. sec. 5775, note 2, *supra*.