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Securities - Effect of Certificate of Title Acts of Sales on Encumbered Vehicles to Purchasers in Ordinary Course

Charles G. Williamson, Jr. S.Ed.
University of Michigan Law School

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SECURITIES—EFFECT OF CERTIFICATE OF TITLE ACTS ON SALES OF ENCUMBERED VEHICLES TO PURCHASERS IN ORDINARY COURSE—Motor vehicle registrations in 1954 totaled 57,876,000.¹ In the years 1950 to 1954 there were factory sales of more than five million vehicles annually.² From the time it leaves the assembly line until its useful life is ended, each of these vehicles is a potential source of civil litigation or criminal prosecution involving almost every aspect of the law. This comment is concerned with the portion of the law of chattel securities pertaining to the determination of rights between the purchaser of an automobile in the ordinary course of trade³ and the lender who finances the dealer from whom it was purchased.⁴ Litigation may arise either as to new or used vehicles, and sometimes the results may vary depending upon which type is involved. The typical case arises after the dealer has become an unprofitable subject of suit by either party and, alternatively, either the creditor seeks to assert his security interest against the purchaser or the purchaser seeks to compel delivery of the title to him by the mortgagee, who, in accordance with general provisions of most certificate of title statutes, holds it as the first lienor.⁵

To settle the issue thus raised, reference must be made to statutory provisions for registration of automobiles and certificates of title, and to the recording acts which require filing of security instruments for personal property. The primary purpose of this

¹ BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 76th ed., 551 (1955). This figure includes both automobiles and trucks, but excludes publicly owned vehicles.

² *Ibid.*

³ For the purposes of this comment the definition of a purchaser as a "buyer in the ordinary course of trade" will be adopted. See the Uniform Trust Receipts Act, 9A U.L.A. §1, p. 284 (1951).

⁴ No attempt will be made to discuss the impact of certificate of title legislation on other litigious problems, such as attachment, artisan's liens, insurable interests, or tort liability. Nor will there be any attempt to deal with the conflict of laws problems which may arise under such legislation. For a detailed discussion of the conflicts problem, see Leary, "Horse and Buggy Lien Law and Migratory Automobiles," 96 UNIV. PA. L. REV. 455 (1948).

⁵ The use of the terms lienor or mortgagee herein refers to those creditors whose interest is secured by a chattel mortgage, conditional sale or any other encumbrance, except those which depend upon possession. Corresponding use of the terms lien or mortgage is also made.

comment will be to examine the various legislative schemes in use and the bearing of the certificate of title acts on the case of mortgage v. purchaser in ordinary course.

I. *Origin of the Acts and Source of the Problem*

Early registration statutes were passed for the purpose of identification and owner regulation and with no intention of altering existing property law.⁶ In time, annual registration was found to be a convenient method of assessing personal property taxes on motor vehicles.⁷ The tremendous increase in automobile registration in the ten-year period from 1915 to 1925⁸ was accompanied by a corresponding rise in automobile thefts. In an effort to curb these thefts, some legislatures sought to attach property incidents to their registration certificates, while others adopted separate instruments to serve as documentary evidence of ownership, the registration certificate continuing to be, in effect, an annual tax receipt.⁹ Although the separate certificates of title were intended as an anti-theft device,¹⁰ it seems natural that it occurred to the legislators to use them to indicate all ownership interests. For instance, the Michigan statutes, the earliest of the acts, provided for notation of liens and encumbrances on the certificate.¹¹ However, there was no expression of intent that this latter requirement should supersede existing laws pertaining to the registry of encumbrances on personalty. Even though provision was made for the notation of liens, the problem of where to record remained. It was recognized in some states that, although local recording was perfectly suitable for real property and acceptable for infrequently moved chattels, it was not the solution for a highly mobile chattel such as a motor vehicle.¹² Recognition of this fact led to statutes providing for exclusive and centralized recording of liens,¹³ usually

⁶ Lusk, "Effect of Registration and Certificate of Title Acts on the Ownership of Motor Vehicles," in *INDIANA BUSINESS STUDIES*, No. 21, p. 8 (1941).

⁷ *Id.* at 12.

⁸ BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES*, 76th ed., 551 (1955). During this period registrations increased from two and one-half million to nearly twenty million.

⁹ Lusk, "Effect of Registration and Certificate of Title Acts on the Ownership of Motor Vehicles," in *INDIANA BUSINESS STUDIES*, No. 21, pp. 13-18 (1941).

¹⁰ The original act adopted by the Commissioners on Uniform State Laws was known as the Uniform Motor Vehicle Anti-Theft Act. Adopted in 1926, the act provided for notation of liens on a certificate of title but had no provision for notice to be imparted thereby. The act was withdrawn by the commissioners in 1943, after being adopted by only nine states. *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS* 69, 150 (1943).

¹¹ Mich. Acts (1921), No. 46, §§2, 3.

¹² See 1 *DURFEE, CASES ON SECURITY* 510 (1951).

¹³ See note 44 *infra*.

with the secretary of state or with a specially created motor vehicle department.¹⁴ Other jurisdictions followed the pattern of the Michigan act and provided for notation of the liens on the certificate while retaining the local recording provisions for automobile liens.¹⁵ The remainder of the jurisdictions require only registration and have made no provision for certificates of title.¹⁶

The introduction of the certificate of title brought a new factor into the classic conflict between the purchaser in ordinary course and the mortgagee who has left the encumbered goods with a mortgagor engaged in the sale of such goods. In general, a purchaser of a chattel other than a motor vehicle is protected against the claim of such a mortgagee on theories of agency, estoppel and waiver.¹⁷ All that is required to complete a sale in the usual situation is delivery of possession. However, in a certificate of title jurisdiction, when an automobile is involved, it is generally provided that the certificate of title be transferred at the time of sale to validate the transaction.¹⁸ This requirement, together with the further requirement that liens must be noted on the certificate of title, suggests that the result reached in a general sales situation should be varied in the certificate of title jurisdictions on the ground that one receiving the certificate should be warned of the dealer's lack of perfect title. Also raised is the related problem of whether possession of the certificate by the mortgagee in accordance with the provisions of most statutes¹⁹ should afford the mort-

¹⁴ In Montana this duty is performed by the warden at the state penitentiary. Mont. Rev. Code Ann. (1954) tit. 53, §§3-101.

¹⁵ See note 24 *infra*.

¹⁶ See note 20 *infra*.

¹⁷ See, generally, 2 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES, Bowers ed., §§422, 458, 466 (1933); 2, 3 WILLISTON, SALES, rev. ed., §§312-323, 516 (1948). See also 136 A.L.R. 821 (1942). The draftsmen of the various uniform statutes have been particularly concerned with the protection on the purchaser in ordinary course against liens on the stock in trade of a recognized dealer in goods and the various acts are unanimous in granting such protection. See Uniform Sales Act, 1 U.L.A. (1950) §23 (1); Uniform Conditional Sales Act, 2 U.L.A. (1922; Supp. 1955) §9, p. 62; Uniform Trust Receipts Act, 9A U.L.A. (1951); §9, p. 303; Uniform Commercial Code (1952) §9-307.

¹⁸ For example, Kan. Gen. Stat. Ann. (Corrick, 1949) §8-135 (c) (6), makes assignments without transfer of the certificate of title fraudulent and void. On the validity of a transaction without a transfer of the certificate of title, see 36 MINN. L. REV. 77 at 78 (1951).

¹⁹ Delivery of the certificate in the following jurisdictions is made to the lienor or the person indicated, with implications or expressions from other provisions that such person may be the lienor: Alaska Sess. Laws (1953) c. 73, §5 (7); Ark. Stat. (1947; Supp. 1951) §75-139 (e); Cal. Veh. Code Ann. (Deering, 1948; Supp. 1955) §197 (mortgagee registered as legal owner); Colo. Rev. Stat. Ann. (1953) c. 13, §13-6-23; D.C. Code (1952) tit. 40, §40-708; Fla. Stat. Ann. (1953; Supp. 1954) §319.24 (2); Idaho Code (1948) §49-406; Ill. Rev. Stat. (1955) c. 95½, §78 (a) (delivery to person designated); Ind. Stat. Ann. (Burns, 1952; Supp. 1955) §47-2501; Iowa Code (1954) §321.24; Kan. Gen. Stat. Ann. (Corrick, 1949) §8-135 (c) (1) (delivery to applicant); La. Rev. Stat. (1950; Supp. 1954) tit. 32, §708A; Mich. Comp. Laws (1948; Supp. 1952) §257.222 (c) (delivery to applicant); Mo. Rev. Stat. (1952) §301-190 (2) (delivery to applicant); Neb. Rev. Stat. (1952) §60-107; Nev. Comp.

gagee protection against a purchaser who negligently or inadvertently fails to obtain the certificate at the time of sale. Unhappily, no certain or uniform answers to these questions can be given. The problem is essentially one involving the placement of the risk, the solution often resting on principles of notice. Whether protection is to be given to the purchaser or to the dealer's mortgagee depends upon the various legislative provisions and the interpretations given them by the courts, particularly as they bear on the question of notice.

II. *The Legislative Schemes*

A. *The Registration Jurisdictions.* All of the American jurisdictions require annual registration of automobiles. Thirteen states²⁰ and Hawaii²¹ provide for no other title instrument. In none of these fourteen jurisdictions is there any provision for notation of liens on the registration certificate.²² Thus the problem of the effect of such notation in a dispute between a purchaser and

Laws (Hillyer, 1929; Supp. 1943-1949) §4435.14d (mortgagee registered as legal owner); 6 N.J. Sess. Laws (1955) c. 209 (original to holder of encumbrance, copy to mortgagor); N.M. Stat. Ann. (1953; Supp. 1955) c. 64, §64-4-1 (owner to assign on transfer of interest); N.C. Gen. Stat. (1953) §20-57 (f); N.D. Laws (1951) c. 250 (distinction made between legal and registered owner, certificate issued to legal owner); Ohio Rev. Code (Baldwin, 1953; Supp. 1955) §4505.08; Okla. Stat. (1951; Supp. 1955) tit. 47, §23.3 (delivery to applicant); Ore. Rev. Stat. (1955) c. 481, §481.410 (1); Pa. Stat. Ann. (Purdon, 1953) tit. 75, §33; S.D. Code (1939; Supp. 1952) tit. 44, §44.0203; Tenn. Code Ann. (Williams, 1934; Supp. 1952) §5538.135 (d); Tex. Pen. Code (Vernon, 1953) art. 1436-1, §31; Utah Code Ann. (1953) tit. 41, §41-1-39; Va. Code (1950) tit. 46, §46-74; Wash. Rev. Code (1953) tit. 46, §46.12.170. In the following delivery is made as indicated: Ariz. Code Ann. (1939) §66-231 (c) (to the mortgagee by implication); Del. Code Ann. (1953) tit. 21, §2306 (c) (to the registered owner with option to the mortgagee); Maryland has no provision for delivery of certificate of title. Md. Code Ann. (Flack, 1952) art. 66½, §23, provides for application for registration and certificate of title but §27 only provides for issuance of the registration certificate; Mont. Rev. Code Ann. (1947; Supp. 1955) tit. 53, §53-107 (certificate of ownership must be surrendered to person entitled to possess and operate). Delivery to the owner is required in the following cases, with the implication that the registered owner is intended: W.Va. Code (1955) §1721 (130); Wis. Stat. (1953) c. 85, §85.01 (3); Wyo. Comp. Stat. Ann. (1946; Supp. 1955) §60-207.

²⁰ Alabama, Connecticut, Georgia, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New York, Rhode Island, South Carolina and Vermont.

²¹ Technically, this statement is untrue as it pertains to Hawaii. Hawaii Rev. Laws (1945) c. 138, §§7340, 7342, provide for a certificate of ownership as well as a certificate of registration, with requirements that the certificate of ownership be issued to the legal owner. No provision is made for the notation of liens on the certificate of ownership, however. Section 12758 of the chattel mortgage statute provides that a mortgage otherwise void because unrecorded shall not be so in the case of a mortgagee or transferee of a motor vehicle who is registered as legal owner. Hawaii Rev. Laws (1945) c. 308, §12758. Hawaii has thus attempted to perfect the certificate of ownership as a security device by giving protection to the physical holder of the certificate.

²² Ga. Code Ann. (1937; Supp. 1954) tit. 68, §68-207, requires that a sworn statement regarding liens be made when an assignment is made of the registration. 1 Ga. Laws (1955), No. 204, struck out a previous requirement in tit. 68, §68-205, that a statement of liens accompany an application for registration.

the dealer's mortgagee would not arise in these jurisdictions. In a contest involving priority between a holder of a recorded chattel mortgage and a purchaser in ordinary course, local interpretations of personal property law involving chattel mortgages, conditional sales and other encumbrances would be applicable.²³

B. *States in Which Lien Notation Does Not Impart Constructive Notice.* Because transfer of a certificate of title is a general requirement where used cars are concerned, it is convenient to consider the operation of the statutes where such vehicles are involved prior to a consideration of the problem as it relates to new vehicles. The majority of jurisdictions have statutory provisions requiring the acquisition of a certificate of title²⁴ in addition to compliance with the registry requirements. Indeed, the acquisition of a certificate of title is generally a prerequisite to obtaining a registration certificate in all certificate of title states. In fifteen states²⁵ it is expressly or impliedly²⁶ required that notation of liens be made on the certificate of title, but in none of these states is it provided that constructive notice is imparted by such notation.²⁷ Many of these states have declared that the notation provisions do not supersede the general chattel mortgage recording

²³ It would be remiss not to mention that one of the most satisfactory solutions of the problem under consideration has been achieved in a state falling within this group. 32 N.Y. Consol. Laws (McKinney, 1940; Supp. 1955) §230c. This section establishes a dealer mortgage system which provides protection to a mortgagee against other creditors and lienors, but specifically provides that buyers in the ordinary course of trade shall take free and clear of mortgages. Compare the earlier position of the buyer in New York as shown by *Utica Trust & Deposit Co. v. Decker*, 244 N.Y. 340, 155 N.E. 665 (1927). See 136 A.L.R. 821 (1942), for other decisions in these states.

²⁴ Certificates of title are generally issued for the life of an automobile or until the owner transfers all or part of his interest, at which time a new certificate is issued. Registration certificates are renewed annually.

²⁵ Del. Code Ann. (1953) tit. 21, §2302; Ill. Rev. Stat. (1955) c. 95½, §78; Ind. Stat. Ann. (Burns, 1952; Supp. 1955) §47-2501; Kan. Gen. Stat. Ann. (Corrick, 1949; Supp. 1953) §8-129 as amended by Kan. Laws (1955), c. 45, p. 137; Md. Code Ann. (Flack, 1952) art. 66½, §21; Mich. Comp. Laws (1948; Supp. 1952) §257.216; N.J. Stat. Ann. (1940; Supp. 1954) §39:10-11 as amended by 6 N.J. Sess. Laws (1955), c. 209; N.C. Gen. Stat. (1953; Supp. 1955) §20-50; N.D. Rev. Code (1943) tit. 39, §39-0504; Okla. Stat. (1951; Supp. 1955) tit. 47, §23.3; Ore. Rev. Stat. (1955) c. 481, §481.110; Wash. Rev. Code (1953) tit. 46, §46.12.010; W.Va. Code (1955) §1721(119); Wis. Stat. (1953) c. 85, §85.01; Wyo. Comp. Stat. Ann. (1946; Supp. 1955) §60-203.

²⁶ Ore. Rev. Stat. (1955) c. 481, §481.115, declares the contents of the certificate are to contain such information as the department deems proper, together with the name of the owner and legal owner. Subsequent sections indicate that notation of liens is to be made thereon. E.g., §§481.405, 481.410.

²⁷ The Texas certificate of title act [Tex. Pen. Code (Vernon, 1953) art. 1436-1] has no provision making compliance the exclusive method of recording, nor is constructive notice expressly imparted. This statute has been construed to be the exclusive method of filing. *Higgins v. Robertson*, (Tex. Civ. App. 1948) 210 S.W. (2d) 250. For this reason, Texas is not included among the states in the group in which constructive notice is not imparted by notation of liens on the certificate of title.

requirements, while in the remainder the question of whether the certificate of title act impliedly repeals the general recording acts is unanswered.²⁸ It seems advisable, however, in light of the decisions holding the general recording statutes not to have been superseded, that all security instruments be recorded with the appropriate county or city officer before notation on the certificate of title is accomplished. It is then incumbent upon the mortgagee to have the local officer make the appropriate notation, or the mortgagee must forward a copy of the mortgage²⁹ or other instrument to the motor vehicle department or similar office for notation at the state level.³⁰ In all of these states, except one,³¹ transfer of possession of the automobile must be accompanied by the "endorsement of an assignment and warranty of title with a statement of all liens and encumbrances"³² on an appropriate place in the certificate of title. Inasmuch as the transfer of the certificate is thus necessary to validate the transaction, it would appear to matter little whether constructive notice is imparted, since the purchaser would have actual notice of any liens noted thereon, assuming he

²⁸ *Delaware*: Del. Code Ann. (1953) tit. 21, §2306, indicates that local filing shall not constitute notice until notation is made on the certificate of title. *Illinois*: In *American States Ins. Co. v. White*, 341 Ill. App. 422, 94 N.E. (2d) 95 (1950), it was held that the Uniform Motor Vehicle Anti-Theft Act was not a recording act. *Indiana*: the chattel mortgage recording act [Ind. Stat. Ann. (Burns, 1951) §51-501 (k)] expressly includes motor vehicles. *Kansas*: see note 33 infra. *Maryland*: no state decisions, although federal courts have held that the registration (which includes notation on a certificate of title) does not take the place of recording required by the chattel mortgage act. In *re Rosen*, (D.C. Md. 1928) 23 F. (2d) 687. *Michigan*: In *Nelson v. Viergiver*, 230 Mich. 38, 203 N.W. 164 (1925), it was held that the chattel mortgage act was not superseded by the certificate of title act. In addition, Mich. Comp. Laws (1948; Supp. 1952) §257.238 (a), requires an affidavit of local filing before notation is made on the certificate. *New Jersey*: 6 N.J. Sess. Laws (1955), c. 209, requires dual filing. *North Carolina*: In *Carolina Discount Corp. v. Landis Motor Co.*, 190 N.C. 157, 129 S.E. 414 (1925), it was held that the mortgage registration statute was not affected or repealed by the certificate of title notation provisions. The certificate of title act was held to be a police regulation measure only. *North Dakota*: no decisions. *Oklahoma*: In *King Godfrey, Inc. v. Rogers*, 157 Okla. 216, 11 P. (2d) 935 (1932), it was held that the certificate of title provisions do not supersede the chattel mortgage filing provisions. *Oregon*: no decisions. *Commercial Finance Corp. v. Burke*, 173 Ore. 341, 145 P. (2d) 473 (1944), indicates that it is apparently the custom to record locally despite the notation provisions. *Washington*: In *Merchants Rating & Adjusting Co. v. Skaug*, 4 Wash. (2d) 46, 102 P. (2d) 227 (1940), local recording by itself was not sufficient to protect the lienor. The court refused to answer the question of whether the notation on certificate provisions superseded the general recording provisions. The decision indicates that it would be advisable to comply with both acts. *West Virginia*: no decisions. *Wisconsin*: in *Commercial Credit Corp. v. Schneider*, 265 Wis. 264, 61 N.W. (2d) 499 (1953), local filing was required to validate the lien. *Wyoming*: no decisions. *Steffy v. Teton Truck Line Co.*, 44 Wyo. 345, 11 P. (2d) 1082 (1932), indicates that local recording is apparently the custom.

²⁹ E.g., Wyo. Comp. Stat. Ann. (1946; Supp. 1955) §60-208 (f).

³⁰ E.g., Mich. Comp. Laws (1948; Supp. 1952) §257.217.

³¹ W.Va. Code (1955) §1721 (144), allows five days for the certificate to be delivered.

³² These are words most frequently found in certificate of title acts. See, e.g., N.C. Gen. Stat. (1953) §20-72.

acquires the title as the law demands. Nevertheless, these statutes have received a variety of interpretations. It has been held almost uniformly that compliance with the local recording act is necessary, but this will not avail the mortgagee unless he has also noted his lien on the certificate.³³ On the other hand, it has been held that notation on the certificate alone is not enough and the failure to record locally will invalidate the mortgage as to the purchaser.³⁴ Even where the double recording has been accomplished the purchaser has been protected in some jurisdictions where he did not acquire the title certificate upon purchase.³⁵ Conversely, it has been held that compliance with the statutory scheme will protect the mortgagee.³⁶

When new cars are involved, an additional factor complicates the situation. In all but three³⁷ of the states in the no-constructive-notice-by-notation group a dealer is not required to have a title in his possession for a new vehicle. The first title on a new car is secured either by the purchaser evidencing his ownership with a bill of sale or by the dealer on behalf of the purchaser. In such a case it would appear that the certificate of title statute should have no effect and the purchaser would be protected against the mortgagee on the grounds of waiver and estoppel. The new Wisconsin Factors Act³⁸ also seems broad enough to protect bona fide retail purchasers against dealers' mortgagees.³⁹

Three of the states in this group require manufacturers' certificates to be in the possession of dealers for all new cars held in stock.⁴⁰ Liens must be noted on these certificates, and it would thus appear that actual notice would be given to the new car pur-

³³ Kansas decisions appear to hold that the title act supersedes local recording, but no case has been found wherein local recording was omitted and notation made only on the certificate. See *General Motors Acceptance Corp. v. Davis*, 169 Kan. 220, 218 P. (2d) 181 (1950).

³⁴ *Sayre & Fisher Brick Co. v. Dearden*, 23 N.J. Super. 453, 93 A. (2d) 52 (1952); *King Godfrey, Inc. v. Rogers*, 157 Okla. 216, 11 P. (2d) 935 (1932).

³⁵ *Buttinghausen v. Rapoport*, 131 N.J. Eq. 252, 24 A. (2d) 877 (1942); *Al's Auto Sales v. Moskowitz*, 203 Okla. 611, 224 P. (2d) 588 (1950); *Merchants Rating & Adjusting Co. v. Skaug*, 4 Wash. (2d) 46, 102 P. (2d) 227 (1940).

³⁶ *Bayer v. Jackson City Bank & Trust Co.*, 335 Mich. 99, 55 N.W. (2d) 746 (1952). The report of this case does not disclose whether notation was ever made on the certificate. The mortgagee did, however, retain possession of the certificate after accomplishing the local recording, and this was enough to perfect the lien. The court imposed a duty on the purchaser to acquire the certificate at the time of purchase or be on notice from his seller's lack of possession.

³⁷ Illinois, Indiana, and Maryland.

³⁸ Wis. Stat. (1953) c. 241, §241.145 (5) (a).

³⁹ The possible effect of section 16 of the Uniform Trust Receipts Act should not be ignored where the act is in effect. See 52 MICH. L. REV. 276 (1953).

⁴⁰ Ill. Rev. Stat. (1955) c. 95½, §76a; Ind. Stat. Ann. (Burns, 1952) §47-2503; Md. Code Ann. (Flack, 1951) art. 66½, §46.

chaser in these three states, assuming compliance with the provision requiring transfer of the certificate.

Those no-notice-by-notation type statutes which require double recording have been criticized as being without justification,⁴¹ and, indeed, have created new problems. Where all requirements have been complied with and the mortgagee holds the title in accordance with the general provisions concerning delivery of the certificate,⁴² the problem to be resolved is whether the failure of the purchaser to acquire the certificate should cast the loss on him, or whether the actual or implied consent of the mortgagee to the sale of the encumbered automobile estops him from asserting his lien.

C. *The Constructive Notice by Notation Jurisdictions.* The most desirable statutes are those adopted by twenty-one states, Alaska, and the District of Columbia. These statutes provide that constructive notice is imparted by notation of the lien on the certificate of title, by establishing a centralized system of filing liens and encumbrances on automobiles and declaring that such filing is exclusive of all other recording acts.⁴³ By judicial interpretation, Texas has included itself in this group.⁴⁴ Under the provisions of these statutes, a copy of the security instrument must accompany the application for the certificate of title. Recording and indexing is accomplished in a central office.⁴⁵ Generally, the certificate with the appropriate notation is issued to the prior lienor.⁴⁶ Assuming compliance with the requirements for transfer in these jurisdictions, it would appear that an adequate and safe system of transfer, at least for used cars, has been established. Nevertheless, the same factors noted under the no-notice-by-notation statutes come into play where used cars are concerned. Several states have held a mortgagee estopped to assert his lien against one who has

⁴¹ Lusk, "Effect of Registration and Certificate of Title Acts on the Ownership of Motor Vehicles," in *INDIANA BUSINESS STUDIES*, No. 21, p. 136 (1941).

⁴² See note 19 *supra*.

⁴³ Alaska Sess. Laws (1951), c. 124, §§5, 7; Ariz. Code Ann. (1939) §66-231; Ark. Stat. (1949; Supp. 1951) §75-161; Calif. Veh. Code Ann. (Deering, 1948; Supp. 1955) §§195, 198; Colo. Rev. Stat. Ann. (1953) c. 13, §13-6-19; D.C. Code (1952) tit. 40, §40-702; Fla. Stat. Ann. (1953; Supp. 1954) §319.23; La. Rev. Stat. (1950; Supp. 1954) tit. 32, §710A; Mo. Rev. Stat. (1949) §443.480; Mont. Rev. Code Ann. (1947) tit. 53, §53-110; Neb. Rev. Stat. (1952) c. 60, §60-110; Nev. Comp. Laws (Hillyer, 1929; Supp. 1943-1949) §4435.14e; N.M. Stat. Ann. (1953) c. 64, §64-5-2; Ohio Rev. Code (Baldwin, 1953) §4505.13; Pa. Stat. Ann. (Purdon, 1953) tit. 75, §33; S.D. Code (1939; Supp. 1952) tit. 44, §44.0203; Tenn. Code Ann. (Williams, 1934; Supp. 1952) §5538.169; Utah Code Ann. (1953) tit. 41, §41-1-87; Va. Code (1950) tit. 46, §46-71.

⁴⁴ See note 27 *supra*. See also 1 *REP. ATTY. GEN. OF TEX.*, No. 1539 (1939).

⁴⁵ In some states recording is with a local agent of the director with a copy being forwarded to the central office. E.g., Iowa Code Ann. (1954; Supp. 1955) §321.50.

⁴⁶ See note 5 *supra*.

purchased from a dealer-mortgagor with possession of the car (and, therefore, with apparent power to sell) even though the purchaser himself failed to acquire the certificate as the law commands.⁴⁷ It is significant to note that one of the most recent states to adopt a centralized filing system, Louisiana, has amended its act and now expressly protects the bona fide retail purchaser from any mortgage on a dealer's stock.⁴⁸ Arkansas specifically provides that dealer mortgages shall be valid except as to bona fide retail purchasers.⁴⁹ These statutes stand by themselves in this group of states. Almost a third of the states in the group expressly provide that no waiver or estoppel shall operate in favor of a "transferee" who does not obtain a certificate of title against a person having possession of such a certificate,⁵⁰ no distinction being made in the case of dealers. It should be noted, however, that two of these same states, in addition to the no-waiver section, specifically provide that exposure for sale by the mortgagor with the knowledge of the lienholder shall not render the lien ineffective against "creditors" of the mortgagor or holders of subsequent liens upon the vehicle.⁵¹ In these two statutes no mention is made of "purchasers," thus suggesting that estoppel might operate in favor of a purchaser in the proper fact situation. In none of the remainder of the states having no-waiver statutes is there any indication that "transferees" consist only of creditors and junior lienors. The Texas statute does not name the parties as to whom there will be no waiver. Rather, it provides that a mortgagee's rights shall not be affected by exposure for sale.⁵² This broad provision would seem to cover any transferee, whether purchaser or creditor.

As in the case of the no-notice-by-notation states, the foregoing statements do not apply with the same validity to new car transfers. Although it may be easier for a court to find estoppel in the case of an untitled new car than it would be to ignore the title transfer

⁴⁷ *Siegel v. Bayless*, 113 Cal. App. (2d) 661, 248 P. (2d) 968 (1952); *Fogle v. General Credit*, (D.C. Cir. 1941) 122 F. (2d) 45; *Rasmussen v. Lee & Co.*, 104 Mont. 278, 66 P. (2d) 119 (1937); *Snyder v. Lincoln*, 156 Neb. 190, 55 N.W. (2d) 614 (1952); *General Credit, Inc. v. Winchester, Inc.*, 196 Va. 711, 85 S.E. (2d) 201 (1955).

⁴⁸ La. Rev. Stat. (1950; Supp. 1954) tit. 32, §710B. See also La. Rev. Stat. (1950; Supp. 1954) tit. 9, §5354, which extends the provisions of the certificate of title act into the chattel mortgage act to protect purchasers in the ordinary course where the chattel mortgage is used by dealers and lending agencies. Compare the earlier position of the Louisiana court on this matter in *Palmisano v. Louisiana Motors Co.*, 166 La. 416; 117 S. 446 (1928).

⁴⁹ Ark. Stat. (1947; Supp. 1951) §51-1007.

⁵⁰ Fla. Stat. Ann. (1953; Supp. 1954) §319.22 (1); Idaho Code (1948) §49-404; Iowa Code (1954) §321.45; Neb. Rev. Stat. (1952; Supp. 1953) c. 60, §60-105; Ohio Rev. Code (Baldwin, 1953; Supp. 1955) §4505.04; S.D. Code (1939; Supp. 1952) tit. 44, §44.0202.

⁵¹ Neb. Rev. Stat. (1952) c. 60, §60-110; Ohio Rev. Code (Baldwin, 1953) §4505.13.

⁵² Tex. Pen. Code (Vernon, 1953) art. 1436-1, §45.

provisions in the case of a used car, two significant types of statutes directly bear on such a possibility. Missouri has expressly exempted untitled new cars from the certificate of title provisions⁵³ and this exemption has been interpreted to give priority to the local recording of a lien in the nature of a purchase money mortgage on a dealer's new stock as against all transferees, including purchasers.⁵⁴ Florida has adopted a similar statute, but extends its provision to cover used cars as well.⁵⁵ Six of the states in this notice-by-notation group provide for manufacturer's certificates on new cars held for first sale.⁵⁶ It is significant to note that four of these states⁵⁷ are among those previously mentioned as having statutes providing that no waiver or estoppel shall operate in favor of a transferee who does not obtain a certificate of title. Inasmuch as both new and used cars are required to have title certificates, the no-waiver provision emphasizes the legislative command that passage of the certificate is necessary to validate a transfer of ownership or interest.

Although shortcomings exist in the centralized filing scheme, especially with regard to untitled new cars, the system is decidedly superior to other systems and tends toward more certainty than the other existing plans. This is true because the elimination of double filing provides a more convenient method of affording notice and involves less confusion to the purchasing public.

III. *Policy Considerations Bearing on the Mortgagee-Purchaser Conflict*

Many of the policy arguments concerning the determination of rights between the purchaser and mortgagee are illustrated by the recent case of *General Credit, Inc. v. Winchester, Inc.*⁵⁸ This case involved an action brought by a finance company in a notice-by-notation state against a retail purchaser for value without actual notice. The court held that the asserted lien was invalid against a purchaser without actual knowledge even though the statute provided that issuance of a certificate of title showing the existence of a lien shall be deemed adequate notice that the lien exists. In so hold-

⁵³ Mo. Rev. Stat. (1949) §443.480.

⁵⁴ Interstate Securities Co. v. Barton, 236 Mo. App. 325, 153 S.W. (2d) 393 (1941).

⁵⁵ Fla. Stat. Ann. (1953; Supp. 1954) §319.27 (3) (b).

⁵⁶ Iowa Code (1954) §321.50; Neb. Rev. Stat. (1952) c. 60, §60-103; N.M. Stat. Ann. (1953) c. 64, §64-4-5; Ohio Rev. Code (Baldwin, 1953) §4505.05; S.D. Code (1939; Supp. 1952) tit. 44, §44.0202 (2); Tex. Pen. Code (Vernon, 1953) art. 1436-1, §§22-23.

⁵⁷ Iowa, Nebraska, Ohio, and South Dakota. In addition to these four states, Texas provides that exposure for sale shall not affect a mortgagee's rights. See note 52 supra.

⁵⁸ 196 Va. 711, 85 S.E. (2d) 201 (1955), noted in 41 VA. L. REV. 418 (1955).

ing, the court relied on a previous Virginia case⁵⁹ involving a similar conflict in regard to a recorded chattel mortgage which arose prior to the passage of the certificate of title act. In the earlier case the court had declared that a mortgage on a stock of goods was null and void because to uphold such a lien on articles left in the hands of a dealer for sale would be to allow dealers' mortgagees to perpetrate fraud on purchasers. Reiterating this view the court in the *General Credit* case added that, although compliance with the recording requirements was declared to be adequate notice, the principle of equitable estoppel does not turn on the adequacy or inadequacy of the notice.⁶⁰ In addition, the court suggested that to find estoppel where an encumbered refrigerator is involved and not to find it in the case of a motor vehicle would lead to an incongruous and inequitable result which could not have been intended by the legislature. The dissent argued that, having done all the law requires to perfect a lien, the mortgagee should be protected.⁶¹

Another argument frequently advanced against the protection of lienors relying on compliance with the statutory provisions is that it is common knowledge in sales of automobiles that dealers frequently take care of title transfers and registration, often completing these matters after receipt of payment and delivery of the automobile.⁶² A purchaser is thus lulled into a false sense of security by a force put in motion by the mortgagee. This argument is frequently coupled with the objection that excessive delay in commercial transactions would result if a search were required of all the pertinent records involved in every sale of hard goods.⁶³ It is not likely that the system of centralized filing used for automobiles in some jurisdictions will be extended to these other types of hard goods. It is the very mobility of the automobile which has led to the introduction of certificates of title for them. The at-

⁵⁹ *Boice v. Finance & Guaranty Corp.*, 127 Va. 563, 102 S.E. 591 (1920).

⁶⁰ *General Credit v. Winchester, Inc.*, 196 Va. 711 at 718, 85 S.E. (2d) 201 (1955). In this case the Virginia court may have decided more than was necessary to dispose of the issues in a manner favorable to the purchaser. Va. Code (1950) tit. 46, §46-106, is the only statutory provision of its kind and has the effect of making acquisition of certificates of title for new vehicles in a dealer's stock optional. Inasmuch as there is no mandatory requirement that a new automobile be titled, the purchaser conceivably would be under no duty to request such a title upon purchase of a new vehicle and could rely on appearances resulting from the dealer's possession and display of the automobile. The court could then have applied ordinary doctrines of estoppel or waiver.

⁶¹ *General Credit, Inc. v. Winchester, Inc.*, 196 Va. 711 at 721, 85 S.E. (2d) 201 (1955).

⁶² *Fogle v. General Credit*, (D.C. Cir. 1941) 122 F. (2d) 45 at 50.

⁶³ See 1 DUFFEE, *CASES ON SECURITY* 530 (1951). See also 36 MINN. L. REV. 77 at 82 (1951), suggesting that, in Minnesota, at least, a search for a lien on an automobile would necessitate a search of the records in every county and first class city in the state.

tempt to perfect these instruments as a security device by giving protection to one indicating his interest thereon or possibly maintaining physical possession of it has created the problem of conflicting interests in the struggle between lending agencies and purchasers. Given the absence of any need for certificates of title for other hard goods, it is doubtful that the contest between lienor and purchaser, as opposed to other types of transferees, would arise.

IV. *Other Legislative Solutions and Suggestions*

The ultimate solution to the difficult problem of whether to favor mortgagees or protect purchasers lies in deciding where to impose the risk of loss. Once this question has been decided, the goal then becomes one of making this decision known to the affected public. Beyond this, there is something to be said for uniformity among the states to take care of the occasional out-of-state purchaser or person who has recently moved from a state applying a rule contrary to that of his new residence. There seems little likelihood of adopting a national centralized recording plan such as has been achieved for aircraft⁶⁴ although the adoption of such a plan for automobiles would give greater certainty. The Uniform Trust Receipts Act⁶⁵ which has been adopted in many jurisdictions⁶⁶ bears on the problem and would protect the purchaser in ordinary course in the usual case.⁶⁷ The clearest solution, should the policy decision be reconciled in favor of the purchaser, would be the adoption of a statute similar to the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act⁶⁸ adopted by the Com-

⁶⁴ 52 Stat. L. 1006 (1938), 49 U.S.C. (1952) §523, establishes a national recording system for security instruments concerning aircraft. 52 Stat. L. 1005 (1938), 49 U.S.C. (1952) §521, provides that the terms of the act shall pertain to all civil, state, and federal aircraft excepting aircraft of the defense forces registered by their own department.

⁶⁵ 9A U.L.A. §§1 to 22, p. 274 et seq. (1951).

⁶⁶ The Uniform Trust Receipts Act had been adopted in 33 jurisdictions as of December 1, 1954: Alabama, Alaska, Arizona, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, and Wyoming. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 227 (1954).

⁶⁷ See 52 MICH. L. REV. 276 at 286 (1953), for a persuasive argument that §16 of the Uniform Trust Receipts Act was intended to protect the purchaser in ordinary course in the situation herein considered even though the financing agency had not used the trust receipt method of financing.

⁶⁸ This act was approved for adoption at the Annual Conference of Commissioners on Uniform State Laws, August 15-20, 1955. The handbook of the Conference has not been published as of this writing. The provision of the act pertinent to the matter under consideration is found in §3, which provides: "This act does not apply to or affect: . . . (c) a security interest in a vehicle created by a manufacturer or dealer who holds the vehicle for sale [, but a buyer in the ordinary course of trade from the manufacturer or

missioners on Uniform State Laws. This act provides a centralized filing plan but specifically excludes dealers and manufacturers from the benefit of notice given by notation of liens on the certificate of title.

Adoption of the Uniform Commercial Code would have no bearing on the problem under consideration.⁶⁹

V. *Conclusions*

The present conglomeration of certificate of title acts, although locally successful in some instances, is unsatisfactory when considered as a whole. The attempt to perfect these instruments as a security device has led to confusing and contradictory policies. One policy would emphasize education of the purchasing public to the necessity of acquiring a certificate of title in all cases before paying for an automobile. The other treats the case of mortgagee v. purchaser in ordinary course as basically a problem of credit risk and places that risk on the finance company as a cost of doing business. That cost, it is argued, can be spread on those dealers taking advantage of the extension of credit. If the former policy is to be adopted in a given jurisdiction, it can be accomplished simply. The purchase of an automobile is generally an important event and the traffic of title searchers at the filing agency is not so great that it would be inconvenient to require one to ascertain who really owns that which it is his intent to buy. On the other hand, if the policy chosen is that which imposes the loss on the finance companies, there would be adequate judicial and legislative support for such a decision; most of the uniform acts dealing with business transactions tend to offer protection to the purchaser in ordinary course. Further than this, both the form of business organization and the resources common to most credit agencies allow them to absorb losses much more easily than the individual automobile purchaser. Under this general policy, any reward to the finance companies for statutory compliance would be limited to protection against other creditors and subsequent encumbrancers. Unfortunately, there appears to be no legislative trend toward protection of

dealer takes free of the security interest]." A comment suggests that a state permitting a security interest created by a manufacturer or dealer to be superior to the rights of a buyer in the ordinary course of trade should enact the language in brackets.

⁶⁹ The Uniform Commercial Code (1952) §9-302 (2), makes the filing provisions of the code inapplicable where a statute provides for indicating security interests on a certificate of title. To date only Pennsylvania has adopted the code, and the comment in Pa. Stat. Ann. (Purdon, 1952) tit. 12A, at p. 298, indicates that ambiguities from the past have been carried over into it.

either party—acts favoring the purchaser being offset by acts providing that no waiver shall operate against a lienor who has complied with the certificate of title act—but the judicial interpretations tend toward protection of the consumer. Until the statutes are clarified so as to accord with one or the other policy, the most courageous judicial approach is to treat the dispute between purchaser and lender as, essentially, one of credit risk and to hold that this risk should be borne at the financing level.

Charles G. Williamson, Jr., S.Ed.