

## INCONSISTENCIES AND UNNECESSARY INJUSTICES UNDER THE MISSOURI CERTIFICATE OF TITLE STATUTE: MO. REV. STAT. Sec. 301.210 (1949)

The automobile is a highly mobile chattel with a ready resale market for its disposal and thus is often the prey of thieves. In an attempt to prevent traffic in stolen automobiles, most states have passed statutes requiring a transfer of the certificate of title to a used automobile as part of the transaction involving its purchase and sale.<sup>1</sup> This is a departure from the common law which did not require the transfer of a certificate manifesting ownership of a chattel to perfect a purchaser's title.<sup>2</sup>

To compel compliance by the parties to a purchase and sale of a used automobile with the statutory requirement of transfer of certificate of title, states have generally imposed one of two sanctions: (1) a monetary penalty;<sup>3</sup> and (2) a designation of the transaction as void.<sup>4</sup> The Missouri legislature has incorporated the latter sanction into its title transfer statute and has further designated an improper sale as fraudulent and unlawful.<sup>5</sup>

In Missouri, the certificate of title in a legitimate sale is passed in the following manner. When the used automobile is sold,<sup>6</sup> the seller's

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1. See Comment, 10 Ark L. Rev. 143 (1955-56).

2. See Brown, Personal Property §§ 66-72 (2d ed. 1955).

3. E.g., Okla. Stat. Ann. tit. 47, § 23.11 (1941). "It shall be unlawful for any person . . . to sell or dispose of . . . a used vehicle without delivering to the purchaser an Oklahoma certificate of title in such purchaser's name or one properly and completely assigned to him at the time of sale.

"Anyone violating any of the provisions heretofore enumerated . . . shall be guilty of a misdemeanor and upon conviction . . . shall be fined . . ."

4. E.g., Colo. Rev. Stat. Ann. § 13-6-8 (1953). "[N]o person shall sell or otherwise transfer a motor vehicle to a purchaser or transferee thereof without delivering to such purchaser or transferee the certificate of title to such vehicle . . . and, no purchaser or transferee shall acquire any right, title or interest in . . . a motor vehicle . . . unless . . . he shall obtain from the transferor the certificate of title thereto . . ."

5. Mo. Rev. Stat. § 301.210 (1949). "4. It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void."

6. This note will only be concerned with the sale of used automobiles. The sale of a new car may be made without a certificate of title. See Mo. Rev. Stat. § 301.200 (1949).

certificate of title is given to the purchaser, who sends it to the state agency in charge of motor vehicle registration. The change of ownership is then recorded and a new certificate of title issued to the purchaser. It is important to note that for a seller to pass good title there must be, in addition to delivery of the certificate,<sup>7</sup> a proper assignment<sup>8</sup> and acknowledgment<sup>9</sup> of the certificate. Nothing short of exact compliance with the statute will suffice.

A few simple illustrations of the effect of the statute will be useful to understand the problems that are the subject of this note. Suppose defendant-purchaser acquires possession of an automobile from an intermediate seller without receiving the certificate of title, the intermediate seller having acquired his possession from the plaintiff who presently holds the certificate. The following situations might exist: (1) the intermediate seller fraudulently acquired possession of the vehicle from the plaintiff;<sup>10</sup> (2) plaintiff placed the intermediate seller in a position which indicated that he had ostensible ownership of the vehicle;<sup>11</sup> (3) there was neither fraud nor ostensible ownership, but the defendant would have been a bona fide purchaser at common law.<sup>12</sup>

In situations one and two, it was well established at common law that the intermediate seller could convey good title.<sup>13</sup> In the fraud situation this result was reached by viewing the intermediate seller's title as voidable rather than void, which enabled him to perfect title in a bona fide purchaser. The rationale of the ostensible ownership situation is that the original owner, by placing the intermediate seller in a position which indicated to the world that the latter could convey title, was estopped from claiming that the seller could not pass good title. In effect the seller was in the same position as one holding voidable title.

The Missouri statute abolishes the distinction between void and voidable titles and under its provisions the common law result would not be reached in situations one and two—the plaintiff-holder of the certificate would prevail. The questions presented in the third situa-

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7. *Pruitt Truck & Implement Co. v. Ferguson*, 216 Ark. 848, 227 S.W.2d 944 (1950) (applying Missouri law); *Counts v. Metzger*, 228 S.W.2d 395 (Mo. App. 1950); *Quinn v. Gehlert*, 291 S.W. 138 (Mo. App. 1927); *Muzenich v. McCain*, 220 Mo. App. 502, 274 S.W. 888 (1925).

8. *Payne v. Strothkamp*, 153 S.W.2d 402 (Mo. App. 1941).

9. *Wills v. Shepherd*, 231 S.W.2d 843 (Mo. App. 1950).

10. *Ibid.*; *Muzenich v. McCain*, 220 Mo. App. 502, 274 S.W. 888 (1925).

11. *Payne v. Strothkamp*, 153 S.W.2d 402 (Mo. App. 1941); *Quinn v. Gehlert*, 291 S.W. 138 (Mo. App. 1927).

12. *Robinson v. Poole*, 232 S.W.2d 807 (Mo. App. 1950); *Counts v. Metzger*, 228 S.W.2d 395 (Mo. App. 1950).

13. See *Brown*, *Personal Property* §§ 70-71 (2d ed. 1955).

tion is whether the statute constitutes notice that a certificate is necessary to perfect title. Following the plain meaning of the statute, the courts have taken the position that, notwithstanding the equities of a given situation, one can not be a bona fide purchaser unless he receives the certificate of title.<sup>14</sup>

As illustrated above, regardless how unjust one's position might be, he will prevail if he has the certificate of title. However, when terms like "void," "fraudulent," and "unlawful" appear in a statute, one may expect unusual consequences. In fact, there are several instances where Missouri courts have reached inconsistent results in applying the statute. There are also certain areas where the results, though consistent with the statutory wording, appear unnecessarily harsh in view of the ultimate purpose of the statute, i.e., to prevent traffic in stolen automobiles. This note, while not intended to be exhaustive, will discuss some of the more important of these *inconsistent* and *harsh* results.

#### INCONSISTENT RESULTS

##### *The replevin-tender back case*

In *Perkins v. Bostic*<sup>15</sup> plaintiff traded his Chevrolet to the defendant for a new Dodge, the remainder of the purchase price being a note secured by a chattel mortgage on the Dodge. No certificate of title to the Chevrolet was given by the plaintiff to the defendant. Subsequently, plaintiff sought to replevy his Chevrolet. The court held that return of the consideration received, i.e., a tender back by plaintiff, was a condition precedent to the maintenance of an action for replevin. Before the plaintiff could recover his Chevrolet he would have to return the Dodge.<sup>16</sup>

Because sales in contravention of the statute are declared void, it is theoretically difficult to justify the requirement of prior tender. It is well established that no prior tender is required to maintain a replevin action after a void sale, since title has never left the owner, who has a right to immediate possession without first restoring the other party to status quo.<sup>17</sup>

Apparently the court's chief concern in the *Perkins* case was that,

14. *Robinson v. Poole*, 232 S.W.2d 807 (Mo. App. 1950).

15. 227 Mo. App. 352, 56 S.W.2d 155 (1933).

16. *Id.* at 354, 56 S.W.2d at 156.

17. "A void contract is no contract at all . . . . It requires no disaffirmance to avoid it . . . ." 12 Am. Jur., *Contracts* § 10 (1938). "A void contract need not be rescinded." *Id.* at § 437. And see *id.* at § 451, which states "the very idea of rescinding a contract implies that what has been parted with shall be restored on both sides. . . . Hence, the general rule is that a party who wishes to rescind an agreement must place the opposite party in statu quo."

without a requirement of prior tender, defendant might be deprived of both an automobile and his money, the plaintiff being unjustly enriched. Therefore, it is submitted that this decision was fair even though the tender requirement as set forth by the court is *inconsistent* with the common law concerning void contracts.

### *Secured note cases*

The cases of *CIT Corp. v. Byrnes*<sup>18</sup> and *Robertson v. Snider*<sup>19</sup> present a major inconsistency in results reached under the statute.

In the *CIT* case, defendant purchased an automobile without obtaining a certificate of title from the vendor and gave his note secured by a chattel mortgage on the automobile in payment. Subsequently the vendor, without delivering the certificate of title, sold the note and the mortgage to plaintiff-finance company, who brought an action for replevin to get the car when defendant defaulted on the note. The court stated that, although the sale of the automobile was void for non-compliance with the statute, "the statute does not declare void a note, or other indebtedness, given in the sale of an automobile where no certificate of title changes hands."<sup>20</sup> The court further stated that plaintiff, being a holder in due course, "is entitled to recover possession of the car."<sup>21</sup> In the *Robertson* case, a similar situation, the court held that under the statute the sale and the chattel mortgage were void, and thus plaintiff-finance company could not bring replevin.<sup>22</sup>

In both of these cases plaintiff held a note and a chattel mortgage. In the *CIT* case, the court said that the note was not void but failed to mention the effect of the statute on the chattel mortgage, whereas in the *Robertson* case, the court said that the mortgage was void but omitted any pronouncement on the note.

The court in the *CIT* case in effect held that the chattel mortgage was valid, since it is well established that the holder of a note has only the possessory rights that are given to him by the chattel mortgage securing the note.<sup>23</sup> The note itself gives the holder no right to possession.<sup>24</sup> In the *Robertson* case, even if the court had held the note valid, the result of the case in denying plaintiff recovery of the

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18. 38 S.W.2d 750 (Mo. App. 1931); cf. *National Bond & Inv. Co. v. Miller*, 76 S.W.2d 703 (Mo. App. 1934).

19. 63 S.W.2d 508 (Mo. App. 1933). In this case the certificate transferred by the dealer contained an incorrect motor number. The court, as a result, treated the case as if no certificate of title had been transferred.

20. 38 S.W.2d at 752.

21. *Ibid.*

22. 63 S.W.2d at 508.

23. *Brown*, *Personal Property* § 107 (2d ed. 1955).

24. *Ibid.*

automobile would probably have been the same, since the note alone gives the holder no possessory rights. Thus, in two cases having similar factual situations the courts have reached inconsistent decisions and contradictory results. For reasons to be considered in the section on *Remedies*, it is submitted that the decision in the *CIT* case is more equitable.

#### UNNECESSARY INJUSTICES

##### *Insurance contracts*

The statute has had a pronounced impact where insurance contracts have been involved and its application in these instances appears to be extremely harsh.<sup>25</sup> In one case in which the purchaser received an unacknowledged certificate of title and subsequently acquired an insurance policy the court held that the purchaser had no insurable interest in the automobile which would enable him to prevail in an action on the policy.<sup>26</sup> The same result was reached where a purchaser acquired a proper certificate of title after obtaining an insurance policy but prior to suffering the damage to his automobile.<sup>27</sup> Also where a seller delivered several automobiles to a purchaser, without the certificates of title, the seller's insurance company was held liable when the purchaser damaged the automobiles in transit.<sup>28</sup>

Thus, it is clear in Missouri that for one to have an insurable interest in an automobile he must have a proper certificate of title in his possession at the time the insurance policy is purchased. This result appears needlessly harsh because it overlooks the basic purpose of the statute—to prevent traffic in stolen automobiles. The extent to which the denial of an insurable interest to a non-holder of a certificate of title prevents auto thefts seems negligible. In fact, the better view would be to allow a thief to insure the automobile which he steals.<sup>29</sup> This would protect the true owner who may not have insurance or whose insurance may not cover damage done to the automobile while in possession of a thief. Recently, in *Hadley v. Smith*,<sup>30</sup> the court held that although the purchaser had not received a properly

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25. See *Mackie & Williams Food Stores, Inc. v. Anchor Cas. Co.*, 216 F.2d 317 (8th Cir. 1954); *Evens v. Home Ins. Co.*, 231 Mo. App. 932, 82 S.W.2d 111 (1935); *Mathes v. Westchester Fire Ins. Co.*, 6 S.W.2d 66 (Mo. App. 1928); *State ex. rel. Connecticut Fire Ins. Co. v. Cox*, 306 Mo. 537, 268 S.W. 87, 37 A.L.R. 1456 (1924).

26. *In re Cox*, supra note 25.

27. *Evens v. Home Ins. Co.*, 231 Mo. App. 932, 82 S.W.2d 111 (1935); *Mathes v. Westchester Fire Ins. Co.*, 6 S.W.2d 66 (Mo. App. 1928).

28. *Robertson v. Central Manufacturers' Mut. Ins. Co.*, 239 Mo. App. 1169, 207 S.W.2d 59 (1947).

29. See Comment, 4 Mo. L. Rev. 212, 215 (1939).

30. 268 S.W.2d 444 (Mo. App. 1954).

acknowledged certificate of title to his automobile, he had a special property interest in it which would enable him to maintain an action against the defendant who had damaged his car.<sup>31</sup> This special property interest was the right to recover the purchase price paid by tendering back the automobile if the seller refused or was unable to deliver the certificate of title.<sup>32</sup>

It is submitted that the courts of Missouri should extend this last holding to give the injured party under any of the insurance situations above a "special property interest," which would be insurable.

### *Remedies*

The statute, as construed by the courts, leaves a party injured by a void contract few remedies. Those remedies that are available are often inadequate. It has been held, however, that under proper circumstances an action of fraud may be maintained.<sup>33</sup> In *Schroeder v. Zykan*<sup>34</sup> defendant sold his automobile to plaintiff, fraudulently misrepresenting an intention to deliver the certificate of title in the near future. The certificate was never delivered and plaintiff brought an action for fraud. Plaintiff prevailed, the court reasoning that although the contract was illegal and void, the elements of fraud were present, and as long as plaintiff repudiated the contract and tendered back the automobile, he could recover damages for the fraud.<sup>35</sup> Without passing on the unusual language of "repudiating," and "tender back," in the case of a void contract<sup>36</sup> it is submitted that this remedy, though available, is limited. Many times the failure to comply with the statutory requirements is occasioned by inadvertance or innocent mistake and the injured party cannot maintain an action for fraud.

Money had and received is the remedy most often relied upon by parties injured by contracts void under the statute.<sup>37</sup> This remedy is available if the complainant tenders back the automobile within a reasonable time and in substantially the same condition as it was when he received it.<sup>38</sup> Many times, however, when plaintiff discovers the void transaction and desires to recover his purchase price this

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31. *Id.* at 450-51; cf. Restatement, Torts § 248 (1934).

32. 268 S.W.2d at 450-51.

33. *Schroeder v. Zykan*, 255 S.W.2d 105 (Mo. App. 1953).

34. *Ibid.*

35. *Id.* at 109-12.

36. See text at notes 15-17 *supra*.

37. See *Kesinger v. Burtrum*, 295 S.W.2d 605 (Mo. App. 1956); *Cantrell v. Sheppard*, 247 S.W.2d 872 (Mo. App. 1952); *Fowler v. Golden*, 240 Mo. App. 627, 212 S.W.2d 93 (1948); *Riss & Co. v. Wallace*, 239 Mo. App. 979, 195 S.W.2d 881 (1946); *Boyer v. Garner*, 15 S.W.2d 893 (Mo. App. 1929).

38. *Ibid.*

requirement cannot be satisfied. Although one court implied that where there is good excuse for failure to tender back what has been received in substantially the same condition, the action may lie,<sup>39</sup> the law is still unclear in this area. A further limitation is that this remedy only returns the parties to status quo, and does not, like the action for fraud, compensate the injured party for damages.

The courts have consistently held that an action for breach of contract will not lie, since a contract made in contravention of the statute is unlawful and void.<sup>40</sup> In *Winscott v. Frazier*,<sup>41</sup> an excellent example of the injustices that result from this position, plaintiff traded his Packard to the defendant for a new car without receiving the certificate of title; plaintiff giving defendant a chattel mortgage, signed in blank, to secure the remaining purchase price. Defendant subsequently filled in the chattel mortgage at more than the agreed price and sold the paper to a loan company. Plaintiff, upon receiving notice from the loan company of the amount due, brought an action against defendant for breach of contract, claiming that defendant failed to deliver a certificate of title to him at the time of the transaction, and that when delivery was made, the certificate was not properly acknowledged. The court stated that one cannot bring suit for breach of an illegal and void contract.<sup>42</sup> The court further reasoned that plaintiff could not maintain an action for money had and received, since he had not made a tender back within a reasonable time, and when tender was made the car was not in the same condition as when first received.<sup>43</sup> It does not appear whether the plaintiff raised the contention of fraud because there is no mention of it in the opinion. Fraud was probably not considered because the evidence was too tenuous to support that means of relief. Plaintiff was left *without* a proper certificate of title to his car, *with* a car the purchase price of which greatly exceeded its value, and *without* a remedy to correct this situation.

Considering that the purpose of the statute is to prevent traffic in stolen automobiles, is there any reason that as between two parties to a transaction recovery could not be allowed? Is it conceivable that the legislature was attempting to give the same effect to otherwise perfectly good contracts between innocent parties as is given to gam-

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39. *Cantrell v. Sheppard*, 247 S.W.2d 872, 875 (Mo. App. 1952). What a good excuse would be was left unanswered by this court.

40. See *Lebcowitz v. Simms*, 300 S.W.2d 827 (Mo. App. 1957); *Winscott v. Frazier*, 236 S.W.2d 382 (Mo. App. 1951); *Craig v. Rueseler Motor Co.*, 159 S.W.2d 374 (Mo. App. 1942).

41. 236 S.W.2d 382 (Mo. App. 1951).

42. *Id.* at 383.

43. *Ibid.*

bling contracts, where moral turpitude is involved?<sup>44</sup> Indirectly, when discussing the availability of an action for money had and received one court has answered this question in the negative by stating that the attempted contract, which was void under the statute, involved no moral turpitude and was simply *malum prohibitum* rather than *malum in se*.<sup>45</sup>

It is submitted that the courts should allow actions on the contract to avoid the result reached in the *Winscott* case, especially since terming a contract "void" as between two parties, when the rights of third parties have not intervened, in no way helps to carry out the legislative purpose.

#### CONCLUSION

No one would doubt the effectiveness of the certificate of title statute in curbing illegal traffic in automobiles. There have been, however, injustices which could be corrected without making the statute less effective. The more harsh results appear in those decisions involving insurance contracts, where failure to have the certificate of title at the time of obtaining insurance will preclude one from having an insurable interest, and in the area of remedies, where the courts have read the statute as preventing actions for breach of contract. It is difficult to see how these results help further the legislative purpose.

The courts have declared that full effect must be given to the void provision of the statute, yet they have been inconsistent. For example, they require prior tender before certain actions may be maintained, even though by established law there need be no tender where a void contract is involved. However, by requiring the tender back, the courts have prevented certain injustices. It is submitted that more equitable results would be reached, if the courts in other instances would make a more flexible application of the statute and apply it only in situations where the results would be consonant with the statutory purpose.

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44. See Mo. Rev. Stat. § 434.010 (1949).

45. *Boyer v. Garner*, 15 S.W.2d 893 (Mo. App. 1929).