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North Carolina National Bank v. Robinson: A Missed Opportunity to Reconcile Provisions of the Motor Vehicle Act with the Uniform Commercial Code

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North Carolina National Bank v. Robinson: A Missed Opportunity to Reconcile Provisions of the Motor Vehicle Act With the Uniform Commercial Code

North Carolina's Motor Vehicle Act (MVA),[1] like that of many other states,[2] renders a motor vehicle transfer ineffective unless the statutory requirements regarding certificate of title are met at the time the vehicle is delivered to the buyer.[3] The Uniform Commercial Code (UCC), however, endeavors to minimize the role of "title" in sales of goods[4] and to protect innocent purchasers.[5] Thus, according to the UCC, as interpreted by the North Carolina Court of Appeals in *North Carolina National Bank v. Robinson*,[6] title does not determine ownership. "A buyer in ordinary course of business takes free of a security interest created by his seller,"[7] and prevails over a party who entrusts goods to a merchant.[8]

The apparent conflict between the MVA and UCC was the crux of *Robinson*, which posed the question: Who should bear the loss caused by a used car dealer's failure to repay a lender when the dealer purports to sell a car financed by the lender, but does not comply with North Carolina Motor Vehicle Act requirements regarding transfer of title to the purchaser? In holding that the UCC governs when automobiles are used as collateral and are held in inventory for sale, the North Carolina Court of Appeals expanded on the position taken by the North Carolina Supreme Court in *American Clipper Corp. v. Howerton*.[9] In *American Clipper* the supreme court held that the UCC should govern conflict-

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1. N.C. GEN. STAT. §§ 20-1 to -397 (1983 & Supp. 1985).

2. *See, e.g.*, CAL. VEH. CODE § 5600 (West 1971 & Supp. 1987); HAW. REV. STAT. § 286-52 (1976); IOWA CODE ANN. § 321.45(2) (1985); LA. REV. STAT. ANN. § 32:706 (West Supp. 1987); NEB. REV. STAT. § 60-105 (1985); TENN. CODE ANN. § 55-3-118(a) (Supp. 1986); UTAH CODE ANN. § 41-1-72 (1981).

3. N.C. GEN. STAT. § 20-72(b) (1983). Certificate of title statutes require registration of automobiles with the State, which then usually issues a written certificate of title. Note, *The Application of the North Carolina Motor Vehicle Act and the Uniform Commercial Code to the Sale of Motor Vehicles by Consignment*: American Clipper Corp. v. Howerton, 63 N.C.L. REV. 1105, 1105 n.4 (1985).

4. *See* N.C. GEN. STAT. § 25-2-101 official comment (1986); ("The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible nature."). Section 25-2-401(2) states, "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . even though a document of title is to be delivered at a different time or place . . . . "

5. *Id.* § 25-9-307. The statute provides that "A buyer in ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." *Id.* § 25-9-307(1).

6. 78 N.C. App. 1, 336 S.E.2d 666 (1985).

7. N.C. GEN. STAT. § 25-9-307(1) (1986); *see also id.* § 25-1-201 (A buyer in the ordinary course of business is one who "in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in the ordinary course from a person in the business of selling goods of that kind . . . .").

8. *Id.* § 25-2-403(2).

9. 311 N.C. 151, 316 S.E.2d 186 (1984). For a discussion of *American Clipper*, see *infra* text accompanying notes 53-66.

ing security interests in a consignment transaction involving the manufacturer, dealer, lender, and buyer of a recreational vehicle.[10] This Note examines how *Robinson* fits into the patchwork of cases dealing with the apparent MVA/UCC conflict. The Note concludes that by analyzing the issue under Article 9 of the UCC, the court of appeals could have meshed the two statutory systems, thus avoiding the necessity for either the MVA or the UCC to prevail over the other.

Defendant Barclays American Credit, Inc. (Barclays) had a dealer inventory security agreement, in effect since 1970, under which Barclays loaned money to Colclough, a used car dealer, to finance his purchases of used automobiles.[11] Colclough executed collateral promissory notes giving Barclays a security interest in the vehicles.[12] Colclough would sell a car, then pay Barclays for the vehicle sold. Barclays retained the title certificate in the name of Colclough.[13]

The Robinsons purchased a used 1979 Pontiac automobile from Colclough, and they agreed to pay $1000 in cash and to obtain a $4500 loan from intervening plaintiff North Carolina National Bank (NCNB).[14] Neither NCNB nor the Robinsons asked Colclough to produce the certificate of title, but a branch manager of NCNB called Colclough, stated that NCNB was issuing a check to Mr. Robinson and Colclough, and asked that title show a lien in favor of NCNB. The branch manager's failure to inquire about the status of the title conformed to standard practice.[15]

Mr. Robinson received a bill of sale and a twenty-day marker receipt from Colclough. Colclough, however, did not pay Barclays and did not notify it of the sale.[16] When Barclays noticed the car was missing from the lot, its representative told Colclough that he had "one day to put the car back on the lot or [Barclays] would want to be paid."[17] Colclough then informed the Robinsons that the car must be returned "for the State man to come in and read the odometer."[18] Although "completely puzzled,"[19] Robinson complied, leaving the car at the dealership when he was not driving it. This arrangement continued for over a month.[20] Subsequently, Barclays' district manager confronted Mr. Robinson at the Colclough lot and asked if he had the title certificate or a bill of sale for the car. Robinson could not produce either. The Barclays district manager told Robinson that Barclays had title, whereupon Robinson voluntarily gave him the keys. The car was removed to the Barclays lot.[21]

Barclays filed a certificate of repossession with the Department of Motor

10. *American Clipper*, 311 N.C. at 163-65, 316 S.E.2d at 193-94.
11. *Robinson*, 78 N.C. App. at 2, 336 S.E.2d at 667.
12. *Id.* at 2-3, 336 S.E.2d at 667.
13. *Id.* at 3, 336 S.E.2d at 667.
14. *Id.*
15. *Id.* at 3, 336 S.E.2d at 667-68.
16. *Id.* at 3, 336 S.E.2d at 668.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

Vehicles, stating that the car was repossessed from Colclough.[22] Certificate of title was then issued in Barclays' name.[23] After losing possession of the car, the Robinsons discontinued payments to NCNB.[24] Colclough apparently absconded with the money and later underwent involuntary bankruptcy.[25]

The Robinsons sued Barclays for wrongful conversion, and moved for partial summary judgment on the issue of ownership of the car.[26] Barclays responded with a motion for summary judgment on all issues against NCNB and the Robinsons. The trial court held for Barclays.[27] The court of appeals reversed.[28]

To comprehend fully the significance of *Robinson*, it is first necessary to review the history and purpose of North Carolina's motor vehicle and commercial code statutes. The 1937 version of the MVA[29] provided that transfer of a motor vehicle was effective upon tender of payment to the seller and delivery of the vehicle to the buyer.[30] Transfer without delivery of the certificate of title with existing liens recorded thereon was a misdemeanor, but did not invalidate the transaction.[31] In *Carolina Discount Corp. v. Landis Motor Co.*[32] the North Carolina Supreme Court, characterizing the MVA as a police regulation whose purpose was to protect the public, reaffirmed the common-law rule that sales of personal property were not required to be evidenced by writing. Therefore, certificate of title to motor vehicles did not determine the rights of parties.[33]

In 1960 the *Landis* rule was reaffirmed in *Southern Auto Finance Co. v. Pittman*.[34] Despite its affirmation of *Landis* the supreme court noted that considerations of public policy might lead the general assembly to establish a different system of determining ownership and encumbrances on motor vehicles.[35] This suggestion was acted upon by the general assembly in the following session

22. *Id.* at 4, 336 S.E.2d at 668.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 11, 336 S.E.2d at 672.
29. Act of March 23, 1937, ch. 407, 1937 N.C. Pub. Laws 787 (codified as amended at N.C. GEN. STAT. §§ 20-1 to -397 (1983 & Supp. 1985)).
30. *See* Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 626, 174 S.E.2d 511, 513 (1970); Act of March 23, 1937, ch. 407, § 38, 1937 N.C. Pub. Laws 787, 804-05 (codified as amended at N.C. GEN. STAT. §§ 20-1 to -397 (1983 & Supp. 1985)). For an excellent historical summary of the North Carolina MVA, see Note, *supra* note 3, at 1110-12.
31. *See* Act of March 23, 1937, ch. 407, §§ 36-38, 1937 N.C. Pub. Laws 787, 804-05 (codified as amended at N.C. GEN. STAT. §§ 20-1 to -397 (1983 & Supp. 1985) (penalty for failure to register for transfer of title was a $2.00 fine)).
32. 190 N.C. 157, 129 S.E. 414 (1925). *Landis* was decided under the predecessor to the MVA, *see* Act of March 5, 1923, ch. 236, 1923 N.C. Pub. Laws 554, 554-59, which required centralized registration of all motor vehicles with the North Carolina Department of Revenue, but did not invalidate transfer of a vehicle made without transfer of the title certificate. *See* Note, *supra* note 3, at 1110 n.56.
33. *Landis*, 190 N.C. at 160, 129 S.E. at 414. *See also* Kunz, *Motor Vehicle Ownership Disputes Involving Certificate of Title Acts*, 39 BUS. LAW. 1599, 1624-25 (1984) (policy of UCC Article 2 is to de-emphasize the role of title in sales transactions).
34. 253 N.C. 550, 553-54, 117 S.E.2d 423, 425 (1960).
35. *Id.* at 553, 117 S.E.2d at 425.

when it passed amendments to the Motor Vehicle Act. The purpose of the amendments was to provide a method by which all legal interests in motor vehicles could be determined easily.[36] In 1963 the general assembly further strengthened the language of the transfer provisions by making them clearly mandatory: "[N]o title shall pass or vest until such assignment [of the title certificate] is executed and the motor vehicle delivered to the transferee."[37]

When the Uniform Commercial Code was enacted in North Carolina in 1965,[38] its "most basic departure from previous law . . . [was] the abandonment of the concept of title as a tool for resolving sales problems."[39] The UCC, both when enacted and presently, fixes the time of transfer of goods from seller to buyer at the time the goods are delivered, whether or not the document of title is delivered at the same time.[40]

Arguably, the UCC and the MVA are in conflict if they both apply to motor vehicles. Indeed, the North Carolina Supreme Court in *Nationwide Mutual Insurance Co. v. Hayes*[41] examined the question of "[w]hether title to an automobile can pass pursuant to the terms of the Uniform Commercial Code and without compliance with pre-existing motor vehicle regulations and transfer statutes . . . ."[42] In *Hayes* two insurance companies attempted to deny liability for an automobile accident.[43] Only one company would be liable for coverage, depending on ownership of the vehicle at the time of the accident.[44] Under the

36. Act of June 15, 1961, ch. 835, 1961 N.C. Sess. Laws 1134 (codified at N.C. GEN. STAT. § 20-52 to -85 (1983 & Supp. 1985)). Prior to 1961, the lien recordation statutes provided a separate system for establishing liens on motor vehicles, under which many mortgages on personal property were to be recorded in the office of the register of deeds in the county where the property was located. *See* Note, *supra* note 3, at 1110. For current provisions, see N.C. GEN. STAT. § 47-20.2 (1984). The 1961 amendments exempted motor vehicles from these recordation statutes, requiring instead that all mortgages be recorded directly on the title certificate. Act of June 15, 1961, ch. 835, § 12, 1961 N.C. Sess. Laws 1134, 1140 (codified as amended at N.C. GEN. STAT. § 47-20.2 (b) (1984)). The 1961 amendments stated "a certificate of title that can be relied upon as a ready means by which all legal interests in motor vehicles may be determined would be to the public interest." *Id.* at 1134. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962) was the first case to interpret the 1961 amendments.

37. Act of May 24, 1963, ch. 552, § 4, 1963 N.C. Sess. Laws 648, 648 (codified as amended at N.C. GEN. STAT. § 20-72(b) (1983)). Under the new provisions, for transfer to be effective, (1) the certificate of title must be assigned and transferred to the purchaser, (2) the vehicle must be delivered, and (3) the purchaser must apply for a new certificate of title.

38. Act of May 26, 1965, ch. 700, 1965 N.C. Sess. Laws 768 (codified at N.C. GEN. STAT. §§ 25-1-101 to -11-108 (1986)).

39. Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 632, 174 S.E.2d 511, 518 (1970).

40. N.C. GEN. STAT. § 25-2-401(2) (1986). "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place . . . ." *Id.*

41. 276 N.C. 620, 174 S.E.2d 511 (1970).

42. *Id.* at 632, 174 S.E.2d at 519. Defendant, who had a nonowner's policy that provided for expiration of the policy 30 days after the acquisition by the insured of an automobile, contracted to buy a car and took delivery on December 26, 1967. *Id.* at 622-23, 174 S.E.2d at 513. Defendant paid for the car on December 27, and on December 28 the seller assigned and delivered the title certificate to defendant. *Id.* at 623, 174 S.E.2d at 513. On January 27, 1968, defendant was involved in an accident with the automobile. *Id.* at 623-24, 174 S.E.2d at 513. The question for the court was whether defendant acquired ownership on payment and delivery of the automobile, or on delivery of the certificate of title.

43. *Id.* at 622-23, 174 S.E.2d at 512.

44. *Id.* at 626, 174 S.E.2d at 514.

MVA one company was liable; under the UCC the other company was liable.[45] The North Carolina Supreme Court held that, for purposes of tort and insurance coverage, the MVA governed.[46]

The court, after a survey of other jurisdictions' approaches to conflicts between the UCC and certificate of title acts,[47] supported its ruling with several arguments. First, the court noted that section 20-72(b) of the MVA contains explicit and mandatory language relating to transfer of legal title and ownership of a motor vehicle.[48] Although the UCC was enacted subsequent to the amended MVA provisions, the UCC did not repeal any part of the MVA, either specifically[49] or in its general repealer.[50] Second, the court referred to the official comment to North Carolina General Statutes section 25-2-401, concluding that if the UCC, which was essentially a "private law" applicable to dealings between private parties, were to be applied to an area of public regulation such as motor vehicles, there should be a "clear and concise definitional reason for so doing."[51] Last, the court applied the statutory construction principle that, absent legislative intent to the contrary, a "specific" statute such as the MVA should prevail over a "general" statute such as the UCC.[52]

Hayes involved tort law and a dispute between insurance companies. In *American Clipper*, however, the North Carolina Supreme Court examined whether both the MVA and *Hayes* requirements applied to questions of ownership in an automobile transfer dispute,[53] and held that they did not.[54] In *Ameri-*

45. *See id.* at 622-23, 174 S.E.2d at 514.

46. *Id.* at 640, 174 S.E.2d at 524. The court noted that requirements for transfer of title were (1) the vendor must execute assignment of certificate of title to the purchaser, (2) there must be actual or constructive delivery of the vehicle to the purchaser, and (3) the duly assigned title certificate must be delivered to the purchaser or lienholder. *Id.*

47. In other jurisdictions, the UCC has been held to control over certificate of title acts, and title has been held to pass under the UCC regardless of compliance with the MVA registration requirements. *See, e.g.*, Indiana Ins. Co. v. Fidelity Gen. Ins. Co., 393 F.2d 204 (7th Cir. 1968) (applying Illinois law); Semple v. State Farm Mut. Auto. Ins. Co., 215 F. Supp. 645 (E.D. Pa. 1963); St. Paul Fire and Marine Ins. Co. v. Boykin, 251 S.C. 236, 161 S.E.2d 818 (1968) (title to vehicle passes notwithstanding want of compliance with title certificate law); Park County Implement Co. v. Craig, 397 P.2d 800 (Wyo. 1964).

Several jurisdictions have decided that ownership does not pass until MVA statutory requirements are satisfied. *See, e.g.*, Merchants Produce Bank v. Mack Trucks, 411 F.2d 1174 (8th Cir. 1969) (applying Missouri law); Melton v. Prickett, 203 Kan. 501, 456 P.2d 34 (1969); Roe v. Flamegas Indus. Corp., 16 Mich. App. 210, 167 N.W.2d 835 (1969); McIntosh v. White, 447 S.W.2d 75 (Mo. 1969); Irion v. Glens Falls Ins. Co., 154 Mont. 156, 461 P.2d 199 (1969); Forman v. Anderson, 183 Neb. 715, 163 N.W.2d 894 (1969).

48. *Hayes*, 276 N.C. at 638-39, 174 S.E.2d at 522-23. The relevant language of the statute provides that in order to "assign or transfer title or interest in any motor vehicle . . . the owner shall execute . . . an assignment and warranty of title on the reverse of the certificate of title . . . and no title shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee." N.C. GEN. STAT. § 20-72(b) (1983).

49. The UCC lists statutes repealed by its provisions; the list does not include the MVA. N.C. GEN. STAT. § 25-10-102(1) (1986).

50. *Id.* § 25-10-103.

51. *Hayes*, 276 N.C. at 639, 174 S.E.2d at 523.

52. *Id.* at 639-40, 174 S.E.2d at 523.

53. The conflict involved N.C. GEN. STAT. § 20-52.1 (1983) and N.C. GEN. STAT. § 25-2-401(2) (1986). Section 20-52.1 deals with the requirements for the proper assignment of the manufacturer's certificate of origin, without which record title to the new vehicle cannot pass or vest. For the relevant text of § 25-2-401(2), see *supra* note 40.

can Clipper, a recreational vehicle was delivered by the manufacturer (Clipper) to a dealer, Adventure America, Inc. According to the agreement between Clipper and Adventure America, the dealer would find a buyer, then pay Clipper for the vehicle. The court characterized this arrangement as a consignment.[55] Clipper retained the manufacturer's statement of origin (MSO); no security agreement was executed with Adventure, nor did Clipper file a financing statement with the State of North Carolina.[56] Defendant Howerton agreed to purchase the vehicle from Adventure, and Adventure agreed to arrange financing through defendant Finance America, Inc. Adventure and Howerton executed an installment sales contract. Adventure then assigned its interest in the installment sales contract to Finance, which paid the purchase price to Adventure.[57] After Howerton forwarded the application for certificate of title to Adventure, Adventure failed to submit it with the appropriate MSO to the Department of Motor Vehicles.[58]

Howerton maintained that the MVA governed, while Finance argued that the UCC should apply.[59] The North Carolina Supreme Court held that the UCC and not the MVA should govern.[60] The court distinguished *Hayes* on the

54. *American Clipper*, 311 N.C. at 162-63, 316 S.E.2d at 192-93.

55. *Id.* at 163, 316 S.E.2d at 193. " '[T]he hallmark of the consignment . . . is the absence of an absolute obligation on the part of the consignee to pay for the goods.' " Nasco Equip. Co. v. Mason, 291 N.C. 145, 153, 229 S.E.2d 278, 284 (1976) (quoting Hawkland, *Consignment Selling Under the Uniform Commercial Code*, 67 COM. L.J. 146, 147 (1962)). Consignments are subject to the provisions of N.C. GEN. STAT. § 25-2-326(3) (1986). *American Clipper*, 311 N.C. at 164, 316 S.E.2d at 193.

56. *American Clipper*, 311 N.C. at 154, 316 S.E.2d at 187-88. For the relevant filing provisions of Article 9, see N.C. GEN. STAT. § 25-9-302 (1986).

57. *American Clipper*, 311 N.C. at 155, 316 S.E.2d at 188.

58. *Id.* at 154-55, 316 S.E.2d at 188. North Carolina requires the owner of a new vehicle to submit to the Division of Motor Vehicles (DMV) an application for a certificate of title, including the owner's name and address, a description of the vehicle, and a description of the owner's title and of all liens on the vehicle. The application must be accompanied by the manufacturer's statement of origin, assigned to the owner. N.C. GEN. STAT. § 20-52 (1983). The DMV then issues a certificate of title on which is recorded all the information supplied by the application. *Id.* § 20-57. Security interests may be noted on the certificate. *Id.* §§ 20-58 to -58.10. It is unlawful to operate a vehicle for which a certificate has not been issued. *Id.* § 20-111.

59. Clipper argued that under the MVA a dealer could not transfer title to a purchaser without proper assignment of the MSO. *American Clipper*, 311 N.C. at 166, 316 S.E.2d at 194-95. Because the MSO was not passed to Howerton, he did not have title. Therefore, Clipper retained title. Alternatively, Clipper argued that if title had in fact passed to Howerton, Clipper nevertheless had reserved a security interest by retention of the MSO; this interest had attached to the installment sales contract and gave Clipper title superior to that of Finance. *See id.* at 165-68, 316 S.E.2d at 194-95.

On the other hand, Finance argued that the UCC should apply, not the MVA. Under the UCC, title passed to Howerton when he took delivery of the vehicle. Therefore, Clipper could not prevail against either Howerton or Finance. *See id.* at 165, 316 S.E.2d at 195.

The court did not address the question of whether retention of the MSO by Clipper created a security interest. *Id.* at 167, 316 S.E.2d at 195. Under the UCC, "any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to reservation of a security interest." N.C. GEN. STAT. § 25-2-401(1) (1986). Other North Carolina cases have stated that retention of documents of title creates nothing more than a security interest. *See, e.g.*, Toyomenka, Inc. v. Mount Hope Finishing Co., 432 F.2d 722, 728 (4th Cir. 1970) (applying North Carolina law); Nasco Equip. Co. v. Mason, 291 N.C. 145, 155, 229 S.E.2d 278, 285 (1976). For cases holding that automobile certificates of title are not conclusive proof of ownership, see Semple v. State Farm Mut. Ins. Co., 215 F. Supp. 645 (E.D. Pa. 1963); *Hayes*, 276 N.C. 620, 174 S.E.2d 511.

60. *American Clipper*, 311 N.C. at 163, 316 S.E.2d at 193. Judge Becton, who wrote the *Robin-*

grounds that it involved third parties—insurance companies—not involved in the sales transaction itself,[61] and on the grounds that *Hayes* was limited to cases of tort and insurance coverage.[62]

American Clipper, like *Hayes*, relied on the official comment to section 25-2-401, but emphasized the concept of "abandonment of title"[63] as the dispositive element in sales disputes. To buttress its position, the court examined two pre-Code cases, *Hawkins v. M & J Finance Corp.*[64] and *King Homes, Inc. v. Bryson*,[65] which illustrated that sales disputes traditionally were settled on common-law principles of agency and entrustment, not title. The *American Clipper* court maintained that "the title transfer provisions of the MVA were not designed to resolve the kind of question here presented. The UCC, which generally has supplanted the principles relied on in *Hawkins* and *King Homes, Inc.*, was so designed and should have been . . . employed by Clipper in this case."[66]

When the North Carolina Court of Appeals began its analysis in *Robinson*, it defined the issue in terms of a conflict between the MVA and the UCC.[67] The court first demonstrated that under the MVA Barclays would prevail.[68] The court then illustrated how the UCC would permit the Robinsons to prevail.[69]

Under the MVA a dealer is required, when transferring a vehicle registered under Chapter 20 of the MVA, to execute a reassignment and warranty of title on the reverse side of the certificate of title, to deliver the vehicle to the purchaser, and to deliver the duly assigned certificate to the transferee or lienholder at the same time.[70] Until these requirements are met, "no title shall pass or vest."[71]

Indisputably, the Robinsons had not complied with the MVA requirements for passing or vesting of title. Although the Robinsons took delivery of the vehicle, Colclough did not reassign the certificate of title to them or to NCNB. Thus, the court stated, under the MVA Barclays was not liable for conversion

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son opinion, also wrote the unanimous court of appeals decision in *American Clipper*. American Clipper Corp. v. Howerton, 51 N.C. App. 539, 277 S.E.2d 136 (1981), *rev'd*, 311 N.C. 151, 316 S.E.2d 186 (1984).

61. *American Clipper*, 311 N.C. at 161, 316 S.E.2d at 192.

62. *Id.* at 162, 316 S.E.2d at 192.

63. *Id.* at 161-62, 316 S.E.2d at 192; *see* N.C. GEN. STAT. § 25-2-401 North Carolina comment (1986).

64. 238 N.C. 174, 77 S.E.2d 669 (1953).

65. 273 N.C. 84, 159 S.E.2d 329 (1968).

66. *American Clipper*, 311 N.C. at 163, 316 S.E.2d at 193.

67. *Robinson*, 78 N.C. App. at 4, 336 S.E.2d at 668.

68. *Id.* at 4-5, 336 S.E.2d at 668-69.

69. *Id.* at 5-9, 336 S.E.2d at 669-71.

70. N.C. GEN. STAT. § 20-72(b) (1983); *see also id.* § 20-75 (nearly identical language when transferee is a dealer or insurance company).

71. *Id.* § 20-72(b). In addition to the MVA statute, Barclays relied on two 1970 cases, International Serv. Ins. Co. v. Iowa Nat'l Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970) and *Hayes*, 276 N.C. 620, 174 S.E.2d 511. These cases held that title to a motor vehicle does not pass until the certificate of title has been assigned by the vendor, the certificate has been delivered to the purchaser or his agent, and application has been made for new certificate of title. *See Robinson*, 78 N.C. App. at 5, 336 S.E.2d at 668. The 1963 amendments to the MVA, however, eliminated the requirement of application for new title. *See Hayes*, 276 N.C. at 640, 174 S.E.2d at 524 (citing N.C. GEN. STAT. § 20-72 (1963)).

when it repossessed the Pontiac from its debtor Colclough, who still held title.[72]

Examining the result under the UCC, the court maintained that North Carolina General Statutes section 25-2-401(1) limited Barclays' interest at the time of the repossession to no more than a security interest.[73] Barclays' security interest, however, was unperfected.[74] The court further ruled that Barclays was not secured by possession of the certificate of title.[75] The court stated that even if Barclays' interest was perfected the Robinsons would be protected purchasers under North Carolina General Statutes section 25-9-307(1),[76] because a buyer in the ordinary course of business[77] takes free of a security interest created by his or her seller even if perfected and the buyer knew of its existence.[78] Moreover,

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72. *Robinson*, 78 N.C. App. at 5, 336 S.E.2d at 668.

73. *Id.* at 5, 336 S.E.2d at 669. A "security interest" is defined by the UCC as "an interest in personal property or fixtures which secures payment or performance of an obligation." N.C. GEN. STAT. § 25-1-201(37) (1986).

The original version of the UCC expressly provided that the provisions of the MVA relating to priorities among competing security interests applied to security interests in automobiles. *Id.* § 25-9-302(3)(b) (1965). The statute was revised in 1975 to apply the UCC filing provisions to any vehicle held in inventory for sale by a person who is in the business of selling goods of that kind. Act of July 1, 1975, ch. 862, 1975 N.C. Sess. Laws, 1240 1240-41 (codified at N.C. GEN. STAT. § 25-9-302(3)(b) (1986)); *see also* N.C. GEN. STAT. § 20-58.8(b) (1986) ("The provisions of the MVA shall not apply to or affect . . . a security interest in a vehicle created by a manufacturer . . . who holds the vehicle in his inventory. Such security interest shall be perfected by filing a financing statement under Article 9 of the Uniform Commercial Code.").

74. *Robinson*, 78 N.C. App. at 6, 336 S.E.2d at 669. Barclays had a perfected security interest until 1975 when the financing statement lapsed with no subsequent filing of a continuation statement. *See* N.C. GEN. STAT. §§ 20-58.8(b), 25-9-302(3)(b)(1), 25-9-403(2) (1986); *accord* Bank of Alamance v. Isley, 74 N.C. App. 489, 492, 328 S.E.2d 867, 869 (1985) (Article 9 of the UCC inapplicable to motor vehicles unless "held as inventory and the security is created by the inventory seller") (citing N.C. GEN. STAT. § 25-9-302(3)(b) (1986)). Furthermore, Barclays did not note its lien on the certificate.

75. Mere possession of the certificate of title was not sufficient to secure the debt. *Robinson*, 78 N.C. App. at 5, 336 S.E.2d at 669. The North Carolina Court of Appeals distinguished Wachovia Bank and Trust Co. v. Wayne Fin. Co., 262 N.C. 711, 138 S.E.2d 481 (1964), in which the mortgagee retained actual possession of the vehicle, not merely certificate of title. *Robinson*, 78 N.C. App. at 5, 336 S.E.2d at 669.

The court of appeals also rejected Barclays' implication that the time for determining the rights of the parties was after Barclays took possession of the vehicle. *Id.* at 6, 336 S.E.2d at 669. Plaintiff's action was for wrongful conversion, and therefore the time for determining the rights of the parties occurred at the time of repossession, not afterwards. *Id.*

76. *Robinson*, 78 N.C. App. at 6, 336 S.E.2d at 669.

77. For the statutory definition of buyer in the ordinary course of business, see N.C. GEN. STAT. § 25-1-201(a) (1986). The official comment to § 25-9-307(1) points out that even if a buyer knows of the security interest, he or she takes free of it unless the buyer also knows the sale occurs in violation of some term of the security agreement. N.C. GEN. STAT. § 25-9-307(1) official comment (1986). Furthermore, official comment 2 states that "[i]f the secured party has authorized the sale in the security agreement or otherwise, the buyer takes free without regard to the limitations of this section." *Id.*; *accord* Bank of Alamance v. Isley, 74 N.C. App. 489, 493, 328 S.E.2d 867, 870 (1985) (§ 25-9-307(1) inapplicable to a security interest in any personal property required to be registered pursuant to Chapter 20 of the North Carolina General Statutes, entitled "Motor Vehicles," unless such property is held as inventory and the security is created by the inventory seller). In *Robinson* the car was held in inventory and displayed for sale without any indication of Barclays' interest in the vehicle. *Robinson*, 78 N.C. App. at 7, 336 S.E.2d at 670.

78. N.C. GEN. STAT. § 25-9-307(1) (1986). Although the court of appeals did not refer to the official comment to § 25-9-307, the comment notes that prior to the enactment of the UCC, in only three instances could a buyer in the ordinary course of business take free of a security interest, one being when a buyer purchased an automobile from a dealer. *Id.* § 25-9-307 North Carolina comment. The superseded statute was found at N.C. GEN. STAT. § 20-58.9 (*repealed by* Act of June 16, 1969, ch. 838, 1969 Sess. Laws 936).

under North Carolina General Statutes section 25-2-403, by entrusting the automobile to Colclough, Barclays gave Colclough the power to transfer all Barclays' rights to a buyer in the ordinary course of business.[79] The court of appeals noted that " 'the three essential elements [that] must be present to make [section 25-2-403] operative [are]: (1) entrustment of goods (2) to a merchant dealing in goods of that kind, followed by a sale by that merchant (3) to a buyer in the ordinary course of business.' "[80] Under the UCC, therefore, " '[t]he sale by the entrustee makes a definitive transfer of the entruster's title.' "[81] Thus, in *Robinson* Barclays had "entrusted" the Pontiac to the car dealer Colclough, who sold it in the ordinary course of business to the Robinsons.[82]

Having projected results under the MVA and the UCC, the *Robinson* court next determined that the UCC, not the MVA, should apply when automobiles are used as collateral and are held in inventory for sale.[83] The court held that a purchaser may be a buyer in the ordinary course of business for purposes of section 25-2-403 and section 25-9-307 even though the certificate of title has not been reassigned.[84] Echoing *American Clipper*, the court distinguished *Hayes* on the grounds that it involved third parties not engaged in the actual sale of the vehicle. In addition, the court noted that *Hayes* expressly limited its holding to cases involving tort and insurance coverage, thus leaving open the " 'question whether the MVA, as opposed to the UCC, would control in all circumstances.' "[85]

Thus, in questions of title, the *Robinson* court followed the lead of *American Clipper*, which grew out of pre-Code reliance on the general law of sales, bailment, and entrustment.[86] Because *Robinson* primarily involved a security interest in and entrustment of an automobile, the court held that the UCC

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79. N.C. GEN. STAT. §§ 25-2-403(2), (3) (1986). The statute reads as follows:

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

Id.

80. *Robinson*, 78 N.C. App. at 8, 336 S.E.2d at 670 (quoting *American Clipper*, 311 N.C. at 165, 316 S.E.2d at 194).

81. *Robinson*, 78 N.C. App. at 8, 336 S.E.2d at 671 (quoting 3 R. ANDERSON, UNIFORM COMMERCIAL CODE, § 2-403:59, at 600-01 (1971)). The statute protects "any purchaser who has bought in the ordinary curse [sic] of business any item entrusted to a 'merchant' who deals in goods of the kind entrusted, whether the merchant had any apparent authority to sell or whether or not there was any indicium of title." N.C. GEN. STAT. § 25-2-403 North Carolina comment (1986).

82. *Robinson*, 78 N.C. App. at 2-3, 336 S.E.2d at 667.

83. *Id.* at 10-11, 336 S.E.2d at 672.

84. *Id.* at 10, 336 S.E.2d at 672.

85. *Id.* at 9, 336 S.E.2d at 671 (quoting *American Clipper*, 311 N.C. at 162, 316 S.E.2d at 192). Part of the reason for the *Hayes* decision was that the MVA comprised "public regulations" as opposed to UCC "private law." But the court in *Hayes* stated that the sales act, Article 2 of the UCC, "may be applicable to public regulations when a court can define 'a clear and concise definitional basis for so doing.' " *Id.* at 9, 336 S.E.2d at 671 (quoting *Hayes*, 276 N.C. at 639, 174 S.E.2d at 523).

86. *See, e.g.*, Hawkins v. M & J Fin. Corp., 238 N.C. 174, 77 S.E.2d 669 (1953).

should apply.[87] This result ignored the tort cause of action, which normally would have brought *Robinson* under the *Hayes* rule. The court characterized the dispute as one over a "business transaction" rather than an automobile accident, and therefore the "private" law of the UCC was more appropriate than the "public" regulations of the MVA.[88]

The *Robinson* decision reflects the ongoing problems of meshing the requirements of the MVA with provisions of the UCC, especially when the rights of an innocent buyer are involved. Even though the cause of action was in tort (conversion), the court distinguished *Hayes*, which had mandated application of the MVA to tort cases, in order to find in favor of the Robinsons. This illustrates the difficulty of confining cases to categories that are clearly "regulatory," or that apply to security interests and priorities. The problem stems from both the basic purpose of the MVA, which is primarily regulatory, and the failure of the UCC to address the special questions of motor vehicles. The MVA was not designed to deal with security interests, and the UCC drafters virtually abandoned any attempt to deal with motor vehicles.[89] This conflict between the MVA and the UCC, however, has led to a policy of determining ownership or security interests according to one set of statutes for some purposes and another set of statutes for other purposes. Such an inconsistent approach is unwise, especially when the chattel involved is as expensive, mobile, heavily financed, and ubiquitous as a motor vehicle. A better approach would be to reconcile the MVA and UCC whenever possible.

The court in *Robinson* reached an arguably correct result, but by way of faulty analysis. The entrustment analysis is fundamentally flawed because Barclays was not, under either the MVA[90] or the UCC,[91] an "owner." In fact Bar-

87. *Robinson*, 78 N.C. App. at 10-11, 336 S.E.2d at 672.

88. *Id.* at 10, 336 S.E.2d at 672; *see Hayes*, 276 N.C. at 639-40, 174 S.E.2d at 523-24.

In a footnote, the *Robinson* court acknowledged language in *Hayes* "suggesting" that the provisions of § 20-72 of the MVA were not meant to be repealed by the UCC, but asserted that *Robinson* was a "specific instance when the UCC was meant to override the MVA." *Robinson*, 78 N.C. App. at 10 n.2, 336 S.E.2d at 672 n.2. To support this proposition, the court noted that under the UCC's entrustment provisions, title could have passed to the Robinsons even if Colclough had stolen the car from Barclays. *Id.*

Chief Judge Hedrick, however, argued that the *Hayes* analysis, emphasizing the public as opposed to private nature of the MVA, should prevail, especially as the MVA contained "specific, definite and comprehensive terms concerning the transfer of ownership of an automobile" while the UCC dealt with goods in general. *Id.* at 12-13, 336 S.E.2d at 673 (Hedrick, C.J., concurring in part and dissenting in part). Chief Judge Hedrick also distinguished *American Clipper* on the grounds that the manufacturer in that case actually had violated the statute regarding the manufacturer's statement of origin. *Id.* at 13-14, 336 S.E.2d at 673-74. He further dissented on the grounds that the Robinsons should have had knowledge that the sale was in violation of a security agreement when Colclough did not give them the certificate of title. *Id.* at 14, 336 S.E.2d at 674. Finally, Chief Judge Hedrick dissented on the grounds that even if the Robinsons were the owners of the car, summary judgment was improper because a conversion claim requires a showing of (1) ownership in plaintiff and (2) wrongful possession or conversion by defendant. *Id.* Because the Robinsons voluntarily surrendered the car to Barclays, a genuine issue of material fact arose as to whether a conversion had occurred. *Id.* at 14-16, 336 S.E.2d at 674-75.

89. For an excellent discussion of the UCC drafters' decision to eliminate coverage of motor vehicles, see Kunz, *supra* note 33, at 1615-24.

90. *See* N.C. GEN. STAT. § 20-72(b) (1983).

91. N.C. GEN. STAT. § 25-1-201(37) (1986).

clays did not even argue that it had title. At best, Barclays had only a security interest, and therefore no right to entrust *possession* of the vehicle to Colclough.[92] In characterizing the case as one of entrustment, the court ignored an Article 9 analysis under which the MVA and UCC can be reconciled, thus avoiding the necessity for finding that one or the other governs.

In approaching the problem under Article 9, the first question must be whether Article 9 applies. Section 25-9-102(1)(a) states that Article 9 applies "to any transaction . . . which is intended to create a security interest in personal property . . . ."[93] Further, "[t]he main purpose of this Section is to bring all consensual security interests in personal property" under Article 9.[94] Barclays' dealer inventory security agreement[95] clearly fell within the scope of section 25-9-102(1)(a).

If Barclays was a secured party, then what rights did it have on Colclough's default? Under the "self-help" provisions of section 25-9-503, Barclays had the right to take possession of the Pontiac, even "without judicial process if this can be done without breach of the peace . . . ."[96] Barclays in fact followed this procedure when it repossessed the auto. Thus, under section 25-9-503, Barclays was in rightful possession, but faced questions of priority as against the Robinsons and NCNB. Priority may in turn depend on perfection of the security interests.[97]

The situation in *Robinson* consisted of a conflict between a party with a security interest[98] and a buyer without title. Under the UCC analysis title is not determinative:[99] the role of the MVA is to define who has title[100] and the method of perfecting a security interest in a motor vehicle.[101] Simply because a party has title does not guarantee first priority among competing claims.[102]

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92. *Id.* § 25-2-403(2). "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." *Id.* Even if § 25-2-403(2) were applicable, § 25-2-403(4) brings buyers who are not in the ordinary course of business under Article 9. *See* § 25-2-403(4) & official comment 4. The Article 9 entrustment section, § 25-9-307(1), also applies only to buyers in the ordinary course of business. *See supra* text accompanying note 82.

93. N.C. GEN. STAT. § 25-9-102(1)(a) (1986). Section 25-9-103(2) deals specifically with goods covered by certificate of title in multi-state situations. *Id.* § 25-9-103(2); *see infra* note 109.

94. N.C. GEN. STAT. § 25-9-102 official comment (1986).

95. *Robinson*, 78 N.C. App. at 2-3, 336 S.E.2d at 667.

96. N.C. GEN. STAT. § 25-9-503 (1986).

97. Perfection involves record notice, which in most cases means possession by the secured party or the filing of a financing statement. The MVA, however, requires perfection of a security interest in a motor vehicle by indication of the security interest on the certificate of title. N.C. GEN. STAT. § 20-58(2) (1983). The UCC reiterates this position, but specifically brings under Article 9 any collateral held in inventory for sale by a person in the business of selling goods of that kind. *Id.* § 25-9-302(3)(b) (1986).

98. *See id.* § 25-9-201 (general validity of security agreement). In addition, Barclays' security interest was not subject to exclusion under Article 9. *See id.* § 25-9-104.

99. *See, e.g., id.* §§ 25-1-201(37), 25-2-401(1) to -401(2), 25-9-202 (1986); *see also* Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976) (traditional concepts of title abandoned by UCC).

100. *See* N.C. GEN. STAT. § 20-72(b) (1983).

101. *Id.* §§ 20-72(b), 20-58.8 (1983); *id.* § 25-9-302(3)(b) (1986).

102. Moreover, even under the mandatory title provisions of the MVA, security interests may be perfected when there is no certificate of title under special circumstances. *See id.* § 20-58(2) (1983).

Thus, two main questions will decide the issue: (1) Was Barclays' security interest perfected?; and (2) were the Robinsons buyers in the ordinary course of business?

Barclays could have perfected its security interest by compliance with the MVA requirements, which require perfection by proper notation of the security interest on the certificate of title.[103] Alternatively, Barclays could have perfected its interest under the UCC by possession or by a properly filed financing statement.[104] Because Barclays did not comply with the requirements of either the MVA or the UCC, its security interest was not perfected.

The next critical question, which the *Robinson* court did not address, was whether the Robinsons were buyers in the ordinary course of business.

> A '[b]uyer in the ordinary course of business' means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in the ordinary course from a person in the business of selling goods of that kind . . . .[105]

This definition presents two issues. First, could it be said the Robinsons had knowledge that the sale was in violation of Barclays' security agreement? Judge Hedrick argued that the Robinsons "should have had knowledge that the sale . . . was in violation" when the dealer, Colclough, failed to provide them with certificate of title.[106] But section 25-1-201(25) defines "knowledge" to mean "actual knowledge," and "knowledge" is expressly distinguished from "notice."[107] Consequently, from the evidence presented the Robinsons could not be said to have had knowledge that the sale was in violation of Barclays' security agreement.

Second, does noncompliance with the MVA preclude the Robinsons from the status of buyers in the ordinary course of business? Arguably, the MVA sets the minimum standard—compliance with the certificate of title requirements[108]—beneath which a buyer is not in the ordinary course of business. Thus, the Robinsons' failure to obtain the certificate of title would deprive them of this protected status.[109]

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103. *Id.* §§ 20-58(2), -58.8.

104. *Id.* §§ 25-9-302(1), -302(3)(b).

105. *Id.* § 25-1-201(9).

106. *Robinson*, 78 N.C. App. at 14, 336 S.E.2d at 674 (Hedrick, C.J., concurring in part and dissenting in part).

107. N.C. GEN. STAT. § 25-1-201(25) (1986). "A person 'knows' or has 'knowledge' of a fact when he has actual knowledge of it." *Id.*

108. *Id.* § 20-72(b) (1983).

109. The Code deals with an analogous situation in which goods subject to certificate of title statutes are brought into a state from another jurisdiction. If a new certificate of title is issued in the second state (through forgery or other improper means, for example) without showing valid security interests perfected in the goods in the first state, then the security interests are "subordinate to the rights of a buyer . . . who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest." *Id.* § 25-9-103(2)(d) (1986). Mere knowledge of the security interest, not of a violation of the security agreement, is all that is necessary to defeat the buyer. By implication, the buyer without a certificate of title—one who fails to satisfy the requirements of § 25-9-103(2)(d)—cannot defeat a secured party.

Application of these principles demonstrates the manner in which the MVA and the UCC actually mesh, rather than conflict. If Barclays' security interest had been perfected, the Robinsons could prevail if (1) the transfer to the Robinsons by Colclough was authorized by Barclays[110] even though the Robinsons were not buyers in the ordinary course of business, or (2) the Robinsons were buyers in the ordinary course of business.[111] If, however, Barclays' interest was not perfected, the Robinsons could prevail under section 25-9-307(1)[112] if they were buyers in the ordinary course of business; under section 25-9-301(1)(c)[113] if they were not buyers in the ordinary course of business; or under section 25-9-306(2) if the sale was authorized by Barclays.[114] Thus, even if the MVA deprives the Robinsons of their status as buyers in the ordinary course of business, they are thrown into the equitable provisions of section 25-9-301(1)(c), under which Barclays' failure to perfect its interest gives the Robinsons priority.

The effect of *Robinson*, in widening the substantial chink made by *American Clipper* in a uniform approach to motor vehicle problems, is to undermine further the attempt to create a reliable statutory guide for determining legal interests in motor vehicles. If, instead, the MVA and the UCC can be made to mesh, far less violence is done to the statutory framework. An Article 9 analysis, hinging on the definition of buyer in the ordinary course of business, allows the reconciliation of apparently conflicting provisions of the MVA and UCC.

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110. "[A] security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise . . . ." *Id.* § 25-9-306(2).

111. *Id.* § 25-9-307(1); *see supra* note 77.

112. *See supra* note 77.

113. "[A]n unperfected security interest is subordinate to the rights of . . . in the case of goods . . . a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business . . . to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected." N.C. GEN. STAT. § 25-9-301(1)(c) (1986).

114. *See supra* note 110.