
INTRODUCTION

In *First National Bank & Trust Co. v. Ohio Casualty Insurance Co.*,¹ the Nebraska Supreme Court determined the effect of a Nebraska certificate of title² issued upon an automobile held by a bona fide purchaser for value whose chain of title originated in a thief.³ Consistent with common law doctrine,⁴ the Nebraska court held that the assignee of a rightful owner prevails over the subsequent good faith purchaser of stolen goods.⁵ Whether the common law doctrine should be viable in view of the Nebraska Certificate of Title Act⁶ and modern economic realities is the subject of this case-note.

At common law, one could not convey title which he did not possess.⁷ A thief had no title;⁸ an innocent purchaser of goods from or through a thief had to surrender them to the rightful owner.⁹ This contest between the rightful owner and the subsequent pur-

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¹ 196 Neb. 595, 244 N.W.2d 209 (1976).
² NEB. REV. STAT. §§ 60-101 to -117 (Reissue 1974).
³ *First Nat'l* at 597, 244 N.W.2d at 212. In terms of this note, theft is the fraudulent taking of personal property belonging to another, from his possession or one holding for him, without his consent, to deprive the owner of the value and appropriate it for the taker's own use. Black's Law Dictionary 1647-48 (4th rev. ed. 1968). For the Nebraska definition of theft, see generally NEB. REV. STAT. § 28-522 (Reissue 1975); State v. Blotzer, 188 Neb. 143, 195 N.W.2d 199 (1972).
⁵ *First Nat'l* at 602, 244 N.W.2d at 214.
⁶ The principal section in controversy was NEB. REV. STAT. § 60-105 (Reissue 1974).
⁸ Id.
⁹ Id. The doctrine is now a part of the Uniform Commercial Code: A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. . . . U.C.C. § 2-403(1). See also U.C.C. § 2-403, comment 1, which expresses the framer's intent to continue the "basic policy" of transferring only such title as the transferor had.
chaser from a thief was especially apt to arise over title to an automobile, the uniqueness of which made it susceptible to theft. Legislatures responded with comprehensive certificate of title laws governing motor vehicles. Nebraska enacted its Certificate of Title Act in 1939 with the purpose of identifying motor vehicles, ascertaining their owners, and preventing theft or fraud in the transfer of such vehicles. To achieve these ends, the Legislature provided for an exclusive means of transferring title.

The principal issue in First National was whether the exclusive means for transfer of automobiles rendered a certificate of title conclusive in the hands of a bona fide purchaser whose chain of title originated in a thief.

FACTS AND HOLDING

The automobile in question originally was purchased by a husband and wife in Oregon who obtained a valid Oregon certificate


For a comprehensive list of the certificate of title states and the various attributes of their acts, see Note, Interstate Movement of Motor Vehicles: Certificate of Title Acts and the Uniform Commercial Code, 9 CREIGHTON L. REV. 373, 376 n.26 (1975).

12. Title and Transfer of Motor Vehicles Act, 1939 Neb. Laws 328 (current version at NEB. REV. STAT. §§ 60-101 to -117 (Reissue 1974)). In Loyal's Auto Exch. v. Munch, 153 Neb. 624, 637-38, 45 N.W.2d 913, 919-20 (1951) the act was upheld as an authorized exercise of the police power by the state legislature and not in violation of the state or federal constitutions. See 30 NEB. L. REV. 656 (1951).

Any reference to Iowa's certificate of title law should be applicable to Nebraska's law since both acts are "substantially alike." See Federated Mut. Implement & Hardware Ins. Co. v. Rouse, 133 F. Supp. 226, 230 (N.D. Iowa 1955).


14. Snyder v. Lincoln, 156 Neb. 190, 55 N.W.2d 614 (1952). The court held that a certificate of title "is simply the exclusive method provided by statute for the transfer of title to a motor vehicle." Id. at 195, 55 N.W.2d at 617.

15. First Nat'l at 597, 244 N.W.2d at 212.

16. For purposes of this note, the term "conclusiveness" means that the validity of the title is irrefutable, and no one will inquire into the question of ownership when the certificate is issued bearing the individual's name. See BLACK'S LAW DICTIONARY 362 (4th rev. ed. 1968).
of title. They assigned the certificate to their insurer, the appellant, after being paid for a claim arising from the theft of the automobile. The car was later brought to Nebraska where a Nebraska certificate of title was issued upon the presentment of a forged Arizona certificate. The car was sold to a dealer, and then purchased by an individual under an installment sales agreement. The lienor, First National, had its interest noted on the certificate of title.

Sometime later, an agent of the insurer-appellant removed the vehicle to California and sold it for $5,500. First National sued for conversion of the car, but the Nebraska Supreme Court held "that the true owner, and his lawful successors in interest, have rights paramount to those of a subsequent bona fide purchaser of a stolen automobile holding a Nebraska certificate of title . . . based upon a chain of ownership originating with the thief of the car."

THE COURT'S REASONING

In holding that the original owner of a stolen car has rights superior to a good faith purchaser for value, the court emphasized that the Legislature had not intended a certificate of title to be conclusive of ownership. While a certificate of title is essential in order to transfer ownership of a motor vehicle, this exclusive method of transfer did not create title where none existed.

17. First Nat'l at 596, 244 N.W.2d at 211.
18. Id.
19. Id.
20. Id. at 597, 244 N.W.2d at 211.
22. First Nat'l at 597, 244 N.W.2d at 212. The car was sold by the insurance company under sealed bids.
23. Id. at 602, 244 N.W.2d at 214.
24. Id. at 598, 244 N.W.2d at 212 (citing Snyder v. Lincoln, 156 Neb. 190, 55 N.W.2d 614 (1952)).
25. First Nat'l at 598, 244 N.W.2d at 212.
26. Id.
court reasoned that to hold otherwise would defeat the legislative purpose of preventing theft of automobiles.\textsuperscript{27}

In arriving at this result, the court classified prior cases into three distinct categories.\textsuperscript{28} In some cases the certificate of title was "conclusive of ownership."\textsuperscript{29} In others, the certificate was "generally conclusive" of ownership.\textsuperscript{30} But cases most persuasive to the \textit{First National} Court were those where the certificate was found "not conclusive" of ownership.\textsuperscript{31} The Nebraska Supreme Court noted that it had "never stated that the certificate of title is always conclusive of ownership."\textsuperscript{32}

Demonstrative of this last category was \textit{Snyder v. Lincoln}.\textsuperscript{33} There, an individual paid for an automobile with a worthless check and then resold it to an innocent purchaser.\textsuperscript{34} While the \textit{Snyder} court focused on whether the title exchanged for the check was void or voidable,\textsuperscript{35} the court also considered the situation where property had been taken by a thief.\textsuperscript{36} In dicta,\textsuperscript{37} the court stated

\begin{itemize}
\item[27.] \textit{Id}. at 599, 244 N.W.2d at 213 (citing Burns v. Commonwealth Trailer Sales, 163 Neb. 308, 79 N.W.2d 563 (1956)).
\item[28.] \textit{First Nat'l} at 598, 244 N.W.2d at 212.
\item[31.] Allstate Ins. Co. v. Enzolera, 164 Neb. 38, 42-43, 81 N.W.2d 558, 592 (1957); Burns v. Commonwealth Trailer Sales, 163 Neb. 308, 316, 79 N.W.2d 563, 568 (1956); Snyder v. Lincoln, 156 Neb. 190, 195, 55 N.W.2d 614, 616-17 (1952).
\item[32.] \textit{First Nat'l} at 599, 244 N.W.2d at 213.
\item[33.] 156 Neb. 190, 55 N.W.2d 614 (1952); 153 Neb. 611, 45 N.W.2d 749 (1951); 150 Neb. 580, 35 N.W.2d 483 (1948).
\item[34.] \textit{Id}. at 583, 35 N.W.2d at 496.
\item[35.] Snyder v. Lincoln, 156 Neb. 190, 196, 55 N.W.2d 614, 617 (1952); Snyder v. Lincoln, 153 Neb. 611, 623-24, 45 N.W.2d 749, 756 (1951).
\item[36.] Snyder v. Lincoln, 156 Neb. 190, 195, 55 N.W.2d 614, 616 (1952); Snyder v. Lincoln, 153 Neb. 611, 623-24, 45 N.W.2d 749, 756 (1951); Snyder v. Lincoln, 150 Neb. 580, 588, 35 N.W.2d 483, 488 (1948).
\item[37.] Snyder v. Lincoln, 156 Neb. 190, 195, 55 N.W.2d 614, 616 (1952).
\end{itemize}

The common law doctrine stated in \textit{Snyder} was never actually applied in reaching the decision. In the first \textit{Snyder} case the trial court failed to distinguish between theft and fraud. Thus the appellate court reversed a judgment for the defendant. \textit{Snyder} v. Lincoln, 150 Neb. 580, 35 N.W.2d 483 (1948).

In the subsequent \textit{Snyder} decisions the taking was determined on re-
that the original owner still had the right to recover his stolen automobile from the good faith purchaser and that passage of the certificate of title "conveys no greater interest than the grantor actually possesses."

The apparent clarity of the state of the law as enunciated in Snyder was obfuscated by a later Nebraska decision, State Farm Mutual Automobile Insurance Co. v. Drawbaugh. The only factual distinction between Drawbaugh and First National was the action taken by the insurance companies. In Drawbaugh the company after paying the owner of the stolen automobile for his loss failed to obtain title in its own name until after the action was initiated. Reading the act literally, the court held that this failure allowed the innocent purchaser to prevail even though his title was derived from a thief. The court found the certificate of title to be "generally conclusive."

Unable to reconcile the Snyder and Drawbaugh decisions, the First National court overruled the latter, criticizing its failure to heed those cases dealing with stolen vehicles. Hence, situations involving stolen automobiles fall within the "not conclusive" rather than "generally conclusive" category.

To bolster its conclusion that the Snyder dicta survived Drawbaugh to be fraudulent. Thus the court was not faced with the "theft" issue. Snyder v. Lincoln, 156 Neb. 190, 55 N.W.2d 614 (1952); Snyder v. Lincoln, 153 Neb. 611, 45 N.W.2d 749 (1951).

39. Id., 55 N.W.2d at 617.
40. 159 Neb. 149, 65 N.W.2d 542 (1954).
41. Id. at 152, 65 N.W.2d at 544. In First Nat'l the insurance company received title in its own name on August 3, 1973, prior to the initiation of the action. First Nat'l at 596-97, 244 N.W.2d at 212.
43. Id. But see Simmons, C.J. (dissenting opinion), 159 Neb. at 159-68, 65 N.W.2d at 548-52.
44. Id. at 157, 65 N.W.2d at 547.
45. First Nat'l at 602, 244 N.W.2d at 214.
46. Id. at 600-01, 244 N.W.2d at 213. The Drawbaugh court relied on Loyal's Auto Exch. v. Munch, 153 Neb. 624, 45 N.W.2d 913 (1951) (a case not involving a stolen automobile). The failure of Drawbaugh to recognize the fact the car was stolen and apply the appropriate rule enunciated in Snyder was instrumental in the First Nat'l court's overruling of Drawbaugh.
47. First Nat'l at 598-601, 244 N.W.2d at 212-13. The fact the car was stolen ended the determination and the bona fide purchaser lost.

The appellee argued that the prior cases were illustrative of a lack of dependence on the common law distinction. Brief for Appellee at 9-11, First Nat'l Bank & Trust v. Ohio Cas. Ins. Co., 196 Neb. 595, 244 N.W.2d 209 (1976).
baugh, the court cited *Allstate Insurance Co. v. Enzolera*, where a bona fide purchaser bought a stolen automobile and obtained a Nebraska certificate of title through a duplicate out-of-state certificate of title. Holding that the original owner prevailed against the bona fide purchaser the court in *Enzolera* adopted the dicta of *Snyder* without mentioning *Drawbaugh*.

Finally, the court looked to the Nebraska Certificate of Title Act itself. Section 60-109 requires the Department of Motor Vehicles, upon receipt of a certificate covering a stolen vehicle, to notify the original owner of a stolen vehicle and to cancel the certificate of title if it is “improperly issued.” From this provision, the court inferred that the Legislature intended to subject the rights of the bona fide purchaser to the rights of the true owner.

**ANALYSIS**

In holding that the Certificate of Title Act did not abrogate the common law rule that one cannot derive title through a thief, the decision in *First National* accords with the majority of jurisdictions. The courts advance several grounds in support of these
decisions. Some express the view that the common law rule furthers the deterrence of automobile thefts.\textsuperscript{66} Other decisions turn on an interpretation of the certificate of title acts, holding that those acts were not designed to impart conclusiveness to certificates of title.\textsuperscript{67} Finally, certain courts reflect a concern that their jurisdictions could become a "dumping ground" for stolen vehicles if the certificate of title were to be found conclusive.\textsuperscript{58}

Wholesale incorporation of the common law rule into the certificate of title acts is not compelling, however.\textsuperscript{59} The common law rule that one cannot convey title which he does not possess has been qualified by other doctrines.\textsuperscript{60}

For example, qualification to the general rule has evolved with respect to negotiable instruments.\textsuperscript{51} Negotiability connotes a merging of the title to goods into the instrument.\textsuperscript{62} Thus, if negotiable,

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\item \textsuperscript{\textsection 319.22 (1968); Iowa Code \textsection 321.45 (2) (1973); Ohio Rev. Code Ann. \textsection 4505.04 (Baldwin 1975). See generally Annot., 18 A.L.R. 2d 813, 839 (1951).}
\item Commercial Credit Corp. v. Pottmeyer, 176 Ohio St. 1, —, 197 N.E.2d 343, 350 (1964) (dissenting opinion); Moch v. Kaffits, 75 Ohio App. 305, 309, 62 N.E.2d 172, 174 (1944). See also Hudson, 1953 Iowa Motor Vehicle Certificate of Title Law, 3 Drake L. Rev. 3 n.3 (1953).
\item Hudson, supra note 57, at 40. Professor Hudson noted that in a contest between the original owner and the bona fide purchaser the problem is not what the rule is at common law but, whether the statute will give the purchaser greater rights than he would have obtained prior to its enactment.
\end{itemize}

He further reasoned that when statutory law is certain, clear, and subject to only one meaning, then it should not be displaced by common law which will destroy its true intent. See also Hudson, Iowa Certificate of Title Law VI, 23 Drake L. Rev. 585, 595 (1974).

60. R. Brown, supra note 4, at 194. In England, one exception to the general rule is the sale in market overt. In a market overt any sale at a fair or open market is good between the parties and binding upon any individual who may have a claim to such property. Thus a purchaser from a thief could prevail over the original owner. This exception, however, was never adopted in the United States. Id. \textsection 9.4, at 194. See also S. Williston, supra note 4, \textsection 13-12, at 365-66; Hudson, supra note 57, at 45. Recognizing the validity of transfers of stolen property in a market overt, Professor Hudson noted that preferring the rights of the good faith purchaser over the original owner is "not unknown in American Law" although the market overt doctrine has not been adopted in the United States. Id.

61. R. Brown, supra note 4, \textsection 9.5, at 195.

62. Documents or writings evidencing ownership and having the attribute of negotiability, if transferred, will cut off certain equities. The title to the thing is thought to be merged in the writing. 42 Iowa L. Rev. 72, 81-82 (1956). See also R. Brown, supra note 4, \textsection 9.5, at 195.
the transfer of the instrument will be given the same effect as the transfer of the property itself.\textsuperscript{63} Negotiable instruments generally include such things as money,\textsuperscript{64} warehouse receipts,\textsuperscript{65} and bills of lading.\textsuperscript{66} Due to commercial necessities, the transferee who was a holder in due course\textsuperscript{67} of a negotiable instrument took it free "from all claims to it on the part of any person" subject to various specified exceptions.\textsuperscript{68} Thus, innocent purchasers of stolen negotiable instruments prevailed over the original owners of the instruments.\textsuperscript{69}

While a certificate of title is not a negotiable instrument under the Uniform Commercial Code, various commentators construing certificate of title acts in other jurisdictions contend that a certificate of title could have attributes of "negotiability".\textsuperscript{70} One commentator noted that the certificate of title represents the chattel itself in transferring ownership.\textsuperscript{71} Since the certificate of title is the exclusive method for transferring ownership, no transfer of ownership of the chattel can be accomplished without indication of the transfer on the certificate of title.\textsuperscript{72} Thus, the certificate

\textsuperscript{63} Id.

Under the Uniform Commercial Code an instrument, to be negotiable, must be in writing "signed by the maker or drawer;" must contain "an unconditional promise or order to pay a sum certain in money;" must "be payable on demand or at a definite time;" and must "be payable to order or bearer." U.C.C. §§ 3-104 to -111. See also U.C.C. § 7-104.

\textsuperscript{64} See U.C.C. § 1-201(24); U.C.C. § 3-107; R. Brown, supra note 4, § 9.5, at 195-96.

\textsuperscript{65} See U.C.C. § 1-201(15); U.C.C. § 7-104(1); U.C.C. §§ 7-501 to -509. See also R. Brown, supra note 4, § 9.5, at 197; J. White & R. Summers, Uniform Commercial Code at 667-709 (1972).

\textsuperscript{66} See U.C.C. §§ 1-201(15), 7-104(1)(2), 7-501 to -509. See also J. White & R. Summers, Uniform Commercial Code at 710-53 (1972).

\textsuperscript{67} Under the Uniform Commercial Code a holder in due course of a negotiable instrument is protected against all other claims except those specified in the Code. See U.C.C. § 3-305.

To be a holder in due course, the holder must take the instrument for value, in good faith, and without notice that it is overdue or of any other defense or claim against the instrument. U.C.C. §§ 3-302 to -304. See generally J. White & R. Summers, Uniform Commercial Code at 456-91 (1972).

\textsuperscript{68} R. Brown, supra note 4, § 9.5, at 195-96. See also U.C.C. § 3-305 for various enumerated exceptions.

\textsuperscript{69} Id.

\textsuperscript{70} Hudson, supra note 57, at 45; 49 Iowa L. Rev. 338, 341 (1964); 42 Iowa L. Rev. 72, 81-84 (1956); see also Commercial Credit Corp. v. Pottemeyer, 176 Ohio St. 1, —, 197 N.E.2d 343, 345 (1964); contra Hardware Mut. Cas. Ins. Co. v. Gall, 15 Ohio St. 2d 261, —, 240 N.E.2d 502, 505 (1968).

\textsuperscript{71} 49 Iowa L. Rev. 1338, 1343 (1964).

\textsuperscript{72} Id.
of title becomes "negotiable", and a person should be able to rely on the certificate without having to check behind it.\textsuperscript{73}

One court has concluded that the literal words of a certificate of title act imparted "negotiability" to the certificate of title.\textsuperscript{74} That court, holding for the good faith purchaser, stated that a title certificate was comparable to various negotiable instruments which protected the rights of the bona fide purchaser against the original owners.\textsuperscript{75} This holding was overruled in \textit{Hardware Mutual Casualty Co. v. Gall},\textsuperscript{76} the court there reasoning that the act never contemplated such a result.\textsuperscript{77}

Attributing negotiability to a Nebraska certificate of title, however, is not persuasive since the Act requires that physical possession of the vehicle accompany the certificate of title at the time of transfer of ownership.\textsuperscript{78} Seemingly, the requirement of transferring physical possession weakens the reliance that may be placed upon a certificate of title as evidence of ownership.\textsuperscript{79} Further, the requirement of transferring both physical possession and the certificate of title hinders the free transferability which the Act attempted to attain.\textsuperscript{80}

In addition to the exception to the common law rule in the area of negotiable instruments, a more amorphous exception has

\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Commercial Credit Corp. v. Pottmeyer, 176 Ohio St. 1, —, —, 197 N.E.2d 343, 345, 349 (1964), commented upon in 34 U. CIN. L. Rev. 199 (1964).}
\textsuperscript{75} \textit{175 Ohio St. 1, —, 197 N.E.2d 343, 349-50 (1964). The court held in favor of the purchaser by a majority of four justices over a strong dissent. One commentator noted that \textit{Pottmeyer} was a pre-code decision; therefore, the future of the holding was doubtful. \textit{See 34 U. CIN. L. Rev. 199, 201-02 (1964).}}
\textsuperscript{76} \textit{15 Ohio St. 2d 261, 240 N.E.2d 502 (1968).}
\textsuperscript{77} \textit{Id. at —, 240 N.E.2d at 505. The court stated that if the certificate of title statute were intended to impart negotiability to titles, the act would have been written that way.}
\textsuperscript{78} \textit{L.B. 1174, 1969 Neb. Laws 2018. Other states with comparable certificate of title laws do not require physical possession of the automobile to be passed at the time of transfer of the certificate. Thus attributing negotiability to such certificates is arguable. \textit{See Iowa Code § 321.45(2) (1973)}; \textit{Ohio REV. CODE ANN. § 4505.04 (Baldwin 1975).}}
\textsuperscript{79} \textit{See 49 Neb. L. Rev. 632, 634 (1970).}
\textsuperscript{80} Prior to the amendment the parties to the transaction merely had to transfer the certificate of title. \textit{See generally Loyal's Auto. Exch. v. Munch, 153 Neb. 624, 45 N.W.2d 913 (1951).} The amendment was actually enacted to minimize the problem of fixing liability in the event of automobile accidents. The amendment has been criticized as not the best solution to the problem. \textit{See 49 Neb. L. Rev. 632 (1970).}
arisen with the development of the doctrine of voidable title. The difficulty with this class of cases is to distinguish “void” from “voidable” title. An owner who has been induced by fraud or trick to dispose of his goods conveys voidable title. While the owner and bona fide purchaser are innocent with respect to the wrongdoing, the original owner’s acts or omissions enable the wrong to occur. In making a choice between the two innocent parties, the courts have looked at the original owner’s intent. If the original owner intended to part with possession and by his own act clothed the wrongdoer with title, title was voidable and the subsequent bona fide purchaser prevails. If the original owner did not intend to part with his goods, title was void, and the original owner prevails over subsequent purchasers.

The voidable title concept, as well as the special features of negotiable instruments, has limited the effect of the common law doctrine that one cannot convey title which he does not possess. These qualifications illustrate that “the preference for a purchaser from a thief is ... not unknown to American law.”

Reliance on the common law doctrine to determine who prevails in a contest between the original owner and the innocent purchaser should depend on an interpretation of the Act to ascertain whether the Act gives the certificate holder better rights than he would have

81. R. Brown, supra note 4, § 9.6, at 197; see generally Ames, Purchase For Value Without Notice, 1 Harv. L. Rev. 1 (1887).
82. R. Brown, supra note 4, § 9.6, at 199-201. The three Snyder cases illustrate the problems in distinguishing void from voidable title. See note 37 supra.
It is a general rule that where one of two innocent persons must suffer by the acts of a third, he whose conduct, acts or omissions enables the third person to occasion loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment.
Id. at 119, 69 N.W.2d at 366.
85. R. Brown, supra note 4, § 9.6, at 198.
87. First Nat’l at 599, 244 N.W.2d at 213; see also R. Brown, supra note 4, § 9.6, at 200; U.C.C. § 2-403.
89. Hudson, supra note 57, at 45.
Arguably, the Nebraska Certificate of Title Act could be subjected to varying interpretations favoring either the original owner or the bona fide purchaser.

In First National the court found that prior interpretations of section 60-105 of the Act had never held that a certificate of title was always conclusive. Furthermore, the court relied on section 60-109 to bolster its conclusion that a certificate of title is not conclusive because that section directs the county clerk to cancel a certificate of title improperly issued upon a stolen vehicle. Therefore, since a certificate of title was not conclusive, the doctrine that one could not take title from a thief was consistent with the legislative purpose of preventing automobile theft. Thus the original owner prevailed over the innocent purchaser.

On the other hand, a literal interpretation of section 60-105 could impart conclusiveness to a certificate of title, thus favoring the bona fide purchaser. The court deemed only the first portion of 60-105 as pertinent:

No person, except as provided in section 60-110, acquiring a motor vehicle . . . from the owner thereof, whether such owner be a manufacturer, importer, dealer, or otherwise, shall acquire any right, title, claim, or interest in or to such motor vehicle . . . until he shall have had delivered to him physical possession of such motor vehicle . . . and a certificate of title or a manufacturer’s or importer’s certificate duly executed in accordance with the provisions of this act . . . (emphasis added).

The remaining portion of the section was omitted from the court’s opinion.

No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle . . . sold or disposed of, or mortgaged or encumbered, unless there is compliance with this section . . .

90. See note 59 supra.
91. First Nat’l at 599, 244 N.W.2d at 213.
92. See note 52 supra.
93. Id.
94. See note 13 supra and accompanying text.
95. First Nat’l, at 602, 244 N.W.2d at 214.
97. First Nat’l at 597-98, 244 N.W.2d at 212.
99. Id. This was the same section not considered by the Iowa Court in Northern Ins. Co. of N.Y. v. Miller, 256 Iowa 764, 129 N.W.2d 28 (1964). See Iowa Code § 321.45(2) (1973).
Seemingly, the omitted portion of 60-105 forces the court to recog-
nize an enforceable right in the person who complies with this sec-
tion. Upon compliance with the Act only those interests indi-
cated on the certificate of title would be recognized and none
other. Thus a certificate of title issued by a state official to an
applicant would conclusively establish an ownership interest in him
on which others would be able to rely.

Arguably, other sections of the Act bolster this interpretation
of "conclusiveness" of the certificate. Sections 60-106 and 60-113,
pertaining to issuance of original or duplicate certificates, merely
require that the county clerk be satisfied as to the genuineness and
regularity of the application for a certificate. These sections do
not suggest that subsequently a court should go behind the clerk's
determination.

CONCLUSION

In *First National* the Nebraska Supreme Court was faced with
the difficult problem of determining which of two innocent parties
should prevail as owner of a stolen automobile. The difficulties
inherent in the decision are magnified when one notes the qualifica-
tions superimposed upon the common law rule that one cannot con-
vey title which he does not possess. Furthermore, the applicable
statute, the Nebraska Certificate of Title Act, is subject to varying
interpretations, making the issue even more difficult.

Presumably, the Nebraska Legislature could reexamine the un-
derlying interests and problems in an innocent purchaser's attempt
to buy a used motor vehicle. The Nebraska Legislature has already
shown some concern for the plight of the bona fide purchaser who
buys subject to an unknown security interest by adding section 9-

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102. *Id.* Professor Hudson reasoned that the first part of the section
was sufficient to impart conclusiveness. He further commented on the
omission of the second part of the statute in *Northern Ins. Co. of N.Y.*

[T]he final portion of the sub-section which the Court failed to
quote should literally apply to this situation and ... the Iowa
certificate issued by the public official to the Iowa purchaser
should conclusively establish an ownership interest in him. The
phrase that "no court in any case at law or equity should recog-
nize any right, title, claim or interest unless evidenced by a cer-
tificate" is too unequivocal, exhaustive of the language, to admit
of any other conclusion.

*Hudson*, *supra* note 57, at 38.
104. *Id.* See *Hudson*, *supra* note 57, at 38, 43.
103(2)(d) to the Nebraska Uniform Commercial Code. However, the purchaser who unwittingly takes title to a stolen vehicle has not received such favorable treatment by the Legislature. The untoward consequences of *First National* may be impetus for legislative attention to the problem.

*First National* exacerbates the problems for the innocent purchaser. The purchaser is forced to ascertain the status of every prior owner in his chain of title out of fear that the vehicle could be reclaimed by another. This burden of tracing the chain of title is difficult, if not impossible. Furthermore, the decision may undermine the reasonable expectations which an individual derives from a document issued by the state. Finally, placing the loss on the bona fide purchaser does not necessarily deter the theft or resale of stolen vehicles.

The Legislature should consider the economic realities in determining which of the innocent parties could bear the loss. From an economic standpoint, the innocent purchaser should be favored over the original owner. The original owner can take precautions against theft losses by obtaining theft insurance. On the other hand, the bona fide purchaser's theft insurance would not cover the loss resulting from reclamation by the original owner, nor is title insurance for automobiles available.


107. *See* Hudson, *supra* note 57, at 45; 49 *Iowa L. Rev.* 1338, 1343 (1964). While the courts might be following the legislative purpose of preventing theft of automobiles, the "statute should protect the bona fide purchaser who, but for a breakdown in the title system which permitted the issuance of a title certificate to a thief, would not have changed his position." 49 *Iowa L. Rev.* 1338, 1343 (1964).


109. 11 *Couch, Cyclopaedia of Insurance Law* § 42.262, at 78 (2d ed. 1963).

110. 11 *Couch, Cyclopaedia of Insurance Law* § 42.262, at 95-96 (2d ed. 1963).

Where the person taking the automobile from the possession of the insured is in fact the rightful owner who is entitled to possession, there is by definition neither larceny under criminal law nor a theft within the coverage of an automobile theft policy. Accordingly, there is no theft where the true owner takes his automobile, originally stolen from him, from the possession of the insured, who was the ultimate transferee of the car.

111. The good faith purchaser may have a remedy, on the theory of implied warranty of title, against the individual or dealer who sold him
Further analysis of the economic considerations must recognize the nature of actual parties in litigation. The *First National* case really involved the insurer of the rightful owner and the lienholder of the bona fide purchaser.\(^{112}\) Perhaps the insurance company is most able to bear the burden of loss.\(^{113}\) If the event which is insured against occurs, then the company is obligated to pay.\(^{114}\) The company assumes the risk in return for the premiums paid by the insured.\(^{115}\) Unless premiums are reduced to reflect the value of repossessions accruing to the insurer, allowance of a repossession constitutes a windfall to the insurer.\(^{116}\)

In *First National* the risk was passed to the subsequent purchaser.\(^{117}\) By limiting an insurer's rights to actions directly against the wrongdoer, the risk would not fall on an innocent purchaser.\(^{118}\) Since stolen automobiles are usually found stripped and abandoned rather than in the car. U.C.C. § 2-312; J. White & R. Summers, Uniform Commercial Code § 9-10, at 299 (1972).

112. *First Nat'l* at 596, 244 N.W.2d at 210.
116. Nebraska, for the year 1975, had 3,558 stolen vehicles. The state recovered 2,902 of these stolen vehicles. Thus there was an 81% recovery rate for 1975. Nebraska Uniform Crime Report, 1975 Annual Report.

Since the recovery rate for the state is high, it would seem that some of these recoveries would accrue to the benefit of the insurance company. The benefit should then be reflected in a lowering of the premium or the company obtains a windfall.

On a national basis the statistics on recovered stolen vehicles are as follows:

<table>
<thead>
<tr>
<th>Division</th>
<th>1976</th>
<th>% Change from 1975</th>
<th>1976 % Located</th>
<th>1975 % Located</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern</td>
<td>94,971</td>
<td>+12.5</td>
<td>39,722</td>
<td>41.83</td>
</tr>
<tr>
<td>Pacific Coast</td>
<td>22,755</td>
<td>+4.4</td>
<td>15,407</td>
<td>67.71</td>
</tr>
<tr>
<td>Southern</td>
<td>18,111</td>
<td>−13.3</td>
<td>9,747</td>
<td>53.82</td>
</tr>
<tr>
<td>Southwestern</td>
<td>12,543</td>
<td>−2.3</td>
<td>6,699</td>
<td>53.41</td>
</tr>
<tr>
<td>Western</td>
<td>51,319</td>
<td>+3.4</td>
<td>25,406</td>
<td>49.51</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td>199,699</td>
<td>+5.7</td>
<td>96,981</td>
<td>48.56</td>
</tr>
</tbody>
</table>


117. The subsequent purchaser, by having the stolen vehicle reclaimed from him without the ability to reduce such risk, takes the full loss.
the hands of a bona fide purchaser, denying recovery as against the bona fide purchaser might not substantially affect premiums.119

While consideration of the relative economic positions of the parties in First National may lead to the conclusion that an innocent purchaser should not bear the risk of loss, the state's interest in preventing the theft and resale of stolen automobiles could be undermined. Yet, a holding that favors the original owner does not clearly further the Act's purpose of deterring thefts. Perhaps the Legislature could devise means more directly aimed at prevention of theft without imposition of a risk on the innocent purchaser. For example, a legislative provision for physical inspection of an automobile prior to issuance of the certificate of title could enhance the protection of the innocent purchaser and deter some methods used by thieves of automobiles.120 Benefits accruing from the adoption of measures protective of the innocent purchaser may outweigh the costs of implementing alternatives for deterring the theft and resale of stolen automobiles.

Robert L. Lepp—'78

119. The trend in stealing automobiles is toward total stripping rather than resale to other individuals, since stripping the car is more profitable than reselling the car as a whole. Information furnished by the National Auto Theft Bureau, 1976 Annual Report.

The amount of recoveries of stolen automobiles from bona fide purchasers must not be very great. This would seem so since it is unknown how many stolen vehicles were located in the hands of bona fide purchasers. In light of the fact that the incidence of such recoveries is not very great, no statistics of such recoveries have been compiled. Letter from Charles Clarke, Executive Vice President, Insurance Information Bureau, New York City, New York (May 6, 1977).