

performance is impossible or illegal.<sup>89</sup> These courts also require more than a showing of benefit or convenience.<sup>90</sup> If the settlor manifests an intention that in the event of changed circumstances the trustee may do acts not authorized to prevent impairment of the trust, the trustee need not apply to the court for permission to deviate. Otherwise, generally, he must seek prior approval unless an emergency has arisen.<sup>91</sup>

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## CALIFORNIA AUTOMOBILE TRANSFERS: OWNERSHIP LIABILITY AND CREDITOR RIGHTS

The past few decades have been marked by an increasing degree of legislative control over ownership and operation of automobiles. The complexity of regulations is explained in large part by the diverse and conflicting policy considerations arising from the dangers to persons and property from motor vehicle operation, the wide use of automobiles as security for loans, the identification requirements of law enforcement agencies and the immense capital involved. Enactment of the Vehicle Code in 1935<sup>1</sup> was an important step in the regulatory process in California, but the balancing of interests and correcting of inequities has never ceased and each legislative session since that date has produced significant changes.

In dealing with automobile transfers important problems arise when the question of "ownership" is in issue. Comprehensive requirements for transfer of ownership have been set out in the code.<sup>2</sup> It is the purpose of this comment to describe the methods which will satisfy these requirements and to demonstrate the consequences of noncompliance.

The system of ownership regulation in California is similar to the Torrens System of land title registration. With the exception of those whose ownership is determined by other states, all vehicles operated in California must be registered with the Department of Motor Vehicles.<sup>3</sup> The Vehicle Code provides a divided ownership concept. The person entitled to use and possession of the vehicle is designated by the code as the "owner"<sup>4</sup> or "registered owner."<sup>5</sup> The person who has a security interest is designated the

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<sup>89</sup> SCOTT, TRUSTS, *supra* note 13, §§ 167, 163, 165.

<sup>90</sup> *Rogers v. English*, 130 Conn. 332, 33 A.2d 540 (1943); BOGERT, *op. cit. supra* note 9, § 561. According to NOSSAMAN, *op. cit. supra* note 24, § 553, obtaining a larger income is not a sufficient showing (citing two cases, one involving the changed gold content of the dollar and one involving the falling value of the German mark). *First National Bank of Jersey City v. Stevens*, 9 N. J. Super. 324, 74 A.2d 368 (1950), would not allow investment in non-legals since seeking a higher income to offset inflation was not a sufficient change of condition. *But cf. St. Louis Union Trust Co. v. Ghio*, *supra* note 82, which permitted deviation from restrictions to invest in mortgages and bonds in order to produce a higher income since the primary intent of the settlor was to produce a reasonable income near 4%.

<sup>91</sup> SCOTT, TRUSTS, *supra* note 13, § 167.1. Los Angeles County appears to require an exercise of discretion by the trustee prior to court approval of an invasion.

<sup>1</sup> CAL. STATS., 1935, p. 93.

<sup>2</sup> CAL. VEH. CODE §§ 175-186.

<sup>3</sup> CAL. VEH. CODE § 141. Section 142 gives the types of vehicles exempted from registration.

<sup>4</sup> CAL. VEH. CODE § 66.

<sup>5</sup> CAL. VEH. CODE § 68.

"legal owner."<sup>6</sup> If the automobile has not been used as security in a credit transaction there is no "legal owner" as distinguished from the "registered owner" and these two interests merge.<sup>7</sup>

Upon application for registration the department issues two documents, both showing the "registered" and "legal" owner. The first document is the "certificate of ownership," commonly known and hereafter referred to as the "pink slip," which is issued to the "legal owner" as a protection for his interest.<sup>8</sup> The second is the "registration card,"<sup>9</sup> commonly known as the "white slip," which is used merely as an identification device and is required to be displayed in the automobile.<sup>10</sup> It does not represent title to the vehicle.

The pink slip is the important document since it is essential to title transfer, and must be properly endorsed by the interested parties if any transfer is to be registered with the department.<sup>11</sup> A creditor's protection arises from this fact, since he may prevent transfer by refusing to endorse and deliver the pink slip until payment of the debt.<sup>12</sup>

In order to transfer title to, or interest in, a registered vehicle Section 175 of the Vehicle Code requires the transferor (both "legal" and "registered" owners if there is divided ownership) to endorse the pink slip,<sup>13</sup> and it is unlawful for the transferor to fail to comply.<sup>14</sup> A duty is placed upon the transferor to notify the department of any transfer, with special provision for notification by automobile dealers.<sup>15</sup> The general requirements

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<sup>6</sup> CAL. VEH. CODE § 67. In California the mortgagee does not get title to property. CAL. CIV. CODE § 2888.

<sup>7</sup> CAL. VEH. CODE § 153.

<sup>8</sup> *Ibid.*

<sup>9</sup> CAL. VEH. CODE § 151.

<sup>10</sup> CAL. VEH. CODE § 155.

<sup>11</sup> CAL. VEH. CODE § 175.

<sup>12</sup> The code does not specifically deal with the problem of transfer by the "registered owner" and the necessity for the "legal owner" to endorse and deliver the pink slip to effectuate a transfer, and there appears to be no case on the point. However, consultation with branch offices of the department show that they require the "legal owner" to endorse and send in the pink slip on each transfer.

<sup>13</sup> "(a) Upon a transfer of the title or any interest of the legal owner or owner in or to a vehicle registered hereunder, the person whose title or interest is to be transferred shall write his signature, and the transferee shall write his signature and address, in the appropriate spaces provided upon the reverse side of the certificate of ownership issued for such vehicle.

"(b) When the required certificate of ownership is lost, stolen, damaged or mutilated, application for transfer may be made upon a form provided by the department for a duplicate certificate of ownership under the provisions of Section 165 hereof. The person whose title and interest is to be transferred shall write his signature and the transferee shall write his signature and address in the appropriate spaces provided upon the reverse side of such application and file same with the department, together with the proper fees for duplicate certificate of ownership and transfer. The department, when satisfied as to the correctness of such an application for duplicate certificate of ownership and transfer, shall issue a new certificate of ownership to the transferee entitled thereto. An application for duplicate certificate of ownership and transfer shall be certified by the applicant."

<sup>14</sup> CAL. VEH. CODE § 176. "It is unlawful for any person to fail or neglect properly to endorse and deliver the certificate of ownership to a transferee who is lawfully entitled to a transfer of registration."

<sup>15</sup> CAL. VEH. CODE § 177 provides: "(a) Whenever the owner of a vehicle registered hereunder sells or transfers his title or interest in, and delivers the possession of, said vehicle to another, said owner shall immediately notify the department of such sale or transfer giving the date thereof, the name and address of such owner and of the transferee and such description

for transfer are set out in Vehicle Code Section 186, which provides as follows:

(a) No transfer of the title or any interest in or to a vehicle registered hereunder shall pass and any attempted transfer shall not be effective unless and until the parties thereto have fulfilled either of the following requirements:

(1) The transferor shall have made proper endorsement and delivery of the certificate of ownership and delivery of the registration card to the transferee as provided in this code and the transferee has delivered to the department or has placed in the United States mail, addressed to the department, such certificate and card when and as required under this code with the proper transfer fee and thereby makes application for a transfer of registration except as otherwise provided in Section 180, or

(2) The transferor shall have delivered to the department or shall have placed in the United States mail addressed to the department the appropriate documents for the registration or transfer of such vehicle pursuant to such sale or transfer *except as provided in Section 178*.

(b) The conditions of subdivision (a) of this section shall not apply to involuntary transfers as upon repossession by a vendor under a conditional contract of sale or to transfers with respect to chattel mortgage liens subject to Chapter 3 of this division.<sup>15a</sup>

Compliance with the transfer requirements has particularly significant effect on two different legal relationships. It affects the liabilities of parties to automobile transfers in case of injury from negligent operation of the vehicle, and may affect the rights of creditors of such parties to reach the vehicle in satisfaction of their claims.

#### OWNER'S LIABILITY FOR NEGLIGENCE

Financial irresponsibility among automobile drivers has long been a serious problem. One attempted solution was enactment of Section 402 of the Vehicle Code, which makes the "owner" liable, within certain limits, for damage from operation of the automobile with his consent.<sup>16</sup> Where

of the vehicle as may be required in the appropriate form provided for such purpose by the department.

"(b) Every dealer upon transferring by sale, lease or otherwise any vehicle, whether new or used, of a type subject to registration hereunder, shall immediately give written notice of such transfer to the department upon the appropriate form provided by it but a dealer need not give such notice when selling or transferring a vehicle to another dealer."

<sup>15a</sup> Emphasis added.

<sup>16</sup> "(a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

"(b) The liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant is limited to the amount of five thousand dollars (\$5,000) for the death of or injury to one person in any one accident and subject to said limit as to one person is limited to the amount of ten thousand dollars (\$10,000) with respect to the death of or injury to more than one person in any one accident and is limited to the sum of one thousand dollars (\$1,000) for damage to property of others in any one accident."

injury results from such operation it is necessary to determine whether there has been compliance with the transfer requirements, and thus whether or not the transferor is the "owner" under Section 402. As will be discussed later, the "legal owner" is ordinarily excluded from ownership liability. It should also be noted that this liability is beyond any considerations of agency, master-servant relationship, family relationship, or competence of the entrusted operator.<sup>17</sup> Although liability under Section 402 requires the "owner's" consent to operation this is seldom a problem to the claimant against a transferor since from transfer of possession courts imply consent for the transferee, or one authorized by the transferee, to use the automobile.<sup>18</sup>

Of course the position of the transferee should not be overlooked. Although the noncomplying transferor is termed the "owner," the transferee may not set up the registration statutes as a bar to liability.<sup>19</sup> The transferee, as operator, or as a bailee if he allows another to drive,<sup>20</sup> is primarily liable, and must be joined as defendant in any action against the owner. In case of recovery, recourse is first had to his or any other operator's property.<sup>21</sup> The difficulty is that the transferee or other operator is often financially irresponsible, or has left the jurisdiction and cannot be personally served.<sup>22</sup>

Court interpretation of the registration statutes establishes three methods whereby a transferring owner can effectively divest himself of owner-

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Legislation was proposed in the 1951 session (Assembly B. No. 2513) to increase the limits to ten thousand for injury to one person and twenty thousand for injury to two or more, but died in Senate Committee. A revision upward of the property damage limit to five thousand was also proposed (Assembly B. No. 3056) and was passed by both the Assembly and the Senate and was awaiting the Governor's signature at the date of this writing.

<sup>17</sup> *Stewart v. Norsigian*, 64 Cal. App.2d 540, 149 P.2d 46, 150 P.2d 554 (1944); see *Bayless v. Mull*, 50 Cal. App. 2d 66, 122 P.2d 608 (1942); Note, 29 CALIF. L. REV. 777 (1941). Cf. *Baugh v. Rogers*, 24 Cal.2d 200, 149 P.2d 633 (1944) (the fact that the negligent operator of the automobile was liable to plaintiff only for workmen's compensation did not preclude recovery from the owner for the negligence imputed by § 402).

With respect to these other forms of recovery it should be noted that they are more desirable from the plaintiff's viewpoint since they are not subject to the monetary limits of § 402.

<sup>18</sup> *Ferroni v. Pacific Finance Corp.*, 21 Cal. 2d 773, 135 P.2d 569 (1943); *Bardin v. Case*, 99 Cal. App. 2d 137, 221 P.2d 292 (1950).

<sup>19</sup> *King v. Unger*, 35 Cal. App.2d 192, 94 P.2d 1040 (1939); *Collard v. Love*, 17 Cal. App. 2d 72, 61 P.2d 458 (1936).

<sup>20</sup> CAL. VEH. CODE § 402 (d). "If the bailee of an owner with the permission, express or implied, of the owner permits another to operate the motor vehicle of the owner, then such bailee and such driver shall both be deemed operators of the vehicle within the meaning of subdivisions (c) and (d) of this section."

<sup>21</sup> CAL. VEH. CODE § 402 (c). "In any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this State. Upon recovery of judgment, recourse shall first be had against the property of said operator so served."

<sup>22</sup> The 1949 legislature added a provision to Vehicle Code Section 402 (subsection (g)) which will aid the noncomplying transferor. The new subsection provides that the cause of action against the operator shall not abate if he died. Previously it had been held that if the operator died the cause of action abated as to him, but the transferor "owner" was still responsible. *National Auto. Ins. Co. v. Cunningham*, 41 Cal. App. 2d 828, 831, 107 P.2d 643, 645 (1941). Of course in reciprocity the new subsection also extends the transferor's liability beyond his death.

ship and place subsequent ownership responsibility on his transferee. First, it is clear from Section 186 (a) (2) that if properly endorsed pink and white slips are mailed or delivered to the department transfer is completed.<sup>23</sup> Second, Section 178 (1), modifying Section 186 (a) (2), provides that sale plus delivery of the vehicle and a properly endorsed pink slip to the transferee will relieve the transferring "owner" from civil liability for operation of the automobile.<sup>24</sup> This is true regardless of whether the transferee performs his duty to forward the papers to the department.<sup>25</sup> Third, Section 178 (2) further modifies Section 186 (a) (2) by providing that the transferor shall not be deemed the "owner" with regard to civil liability when he sells the vehicle, delivers possession of it to the purchaser, and notifies the department as provided in Section 177. Section 177 requires the notice to contain a description of the automobile and also the names and addresses of the transferor and transferee. Transfer may therefore be completed without sending the pink and white slips to the department.<sup>26</sup>

It is imperative to remember that in order for the transferor to avoid liability one of the three alternatives must be exercised *before* the accident, and therefore caution requires compliance before the buyer is allowed to operate the automobile. Although courts hold dealers and the private sellers to the same standards of conduct,<sup>27</sup> dealers appear to have more trouble fitting their transactions into any one of the three.

The first method, requiring mailing or delivery to the department of the pink slip and white slip, properly endorsed by both the transferor and transferee, may protect private sellers, but the procedure is often impractical for a dealer. It would require him to immediately complete the papers and mail or deliver them to a branch office before turning the car over to his buyer. The usual practice is for the dealer to assume the responsibility of registration,<sup>28</sup> although even a slight delay may be disastrous to him. In the case of *Weinberg v. Whitebone*, the sale was made at six o'clock Saturday

<sup>23</sup> When the facts show registration is a sham merely to avoid liability under § 402 for the actual owner, the court will go behind the registration and hold the actual owner. *McCalla v. Grosse* 42 Cal. App. 2d 546, 109 P.2d 358 (1941), 29 CALIF. L. REV. 777 (1941).

<sup>24</sup> "An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another when such owner in addition to the foregoing has fulfilled either of the following requirements:

"(1) When such owner has made a proper indorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in this code.

"(2) When such owner has delivered to the department or has placed in the United States mail, addressed to the department, either a notice as provided in Section 177, or appropriate documents for registration of such vehicle pursuant to such sale or transfer."

<sup>25</sup> *Arnold v. Bernay*, 95 Cal. App.2d 614, 213 P.2d 529 (1950); *Smith v. Western Casualty Co.*, 60 Cal. App.2d 508, 141 P.2d 10 (1943); *Piacun v. Hexein*, 18 Cal. App.2d 145, 63 P.2d 315 (1936).

<sup>26</sup> *E.g.*, *Ferroni v. Pacific Finance Corporation of California*, *supra* note 18; *Bardin v. Case*, *supra* note 18; *Weinberg v. Whitebone*, 87 Cal. App.2d 319, 196 P.2d 963 (1948); *Gulilot v. Hagman*, 30 Cal. App.2d 582, 86 P.2d 865 (1939).

<sup>27</sup> *E.g.* *Woods v. Eastridge*, 99 Cal. App.2d 625, 222 P.2d 296 (1950). (A recent case applying the registration requirements to a private seller.)

<sup>28</sup> *E.g.* *Dennis v. Bank of America*, 34 Cal. App.2d 618, 625, 94 P.2d 51, 55 (1939) (Evidence admitted showing that in 95% of sales by dealers the pink slip is left with the dealer to transfer).

evening and the accident occurred one hour and a half later.<sup>29</sup> The court had little difficulty finding that the dealer was still the "owner" for purposes of liability under Section 402.

The second procedure for transfer of "ownership," requiring merely delivery of the vehicle coupled with delivery of the properly endorsed pink slip, permits somewhat more flexible sales practices, but a recent case demonstrates the strict adherence to statutory requirements which the courts demand. In *Larson v. Barnett* a dealer transferred the automobile and pink slip, but failed to endorse the slip himself, leaving it endorsed by the owners from whom he had purchased the car.<sup>30</sup> The court held that this did not satisfy the endorsement requirement and the dealer was therefore liable for negligent operation by his transferee.

Furthermore, transfer by the second method, unlike the other two procedures, is necessarily limited to cash transactions. Neither conditional vendors nor chattel mortgagees may utilize it since they must retain the pink slip for security.

Both the first and second methods require immediate transfer of the pink slip itself, and therefore the dealer is restricted in their use since the slips are often held by creditors who finance the dealers, and thus not immediately available.

The third alternative suggested above eliminates the necessity of obtaining the pink slip and although the courts have not had this problem directly presented they have indicated frequently that notice to the department after the sale and before any accident would relieve the seller from liability. The time element, however, remains crucial since in a case such as the *Weinberg* case, where the accident happened one hour and a half after the sale, the seller relying on mail notice would have to take immediate action. In addition, even if notice is effective on dispatch, it has been difficult to prove the time of mailing.<sup>31</sup>

The problem of executing a transfer sufficient to shift "ownership" liability is important not only to the transferor but also to his insurer, to whom "ownership" liability has been extended by statute. Despite contract provision for the insurer's liability to cease upon transfer, courts have found that if a contract protects an insured who allows others to operate the vehicle, the insurer is responsible if the insured transfers without complying with the requirements.<sup>32</sup>

The rules for determining "ownership" on transfer are greatly modified when the automobile is marital property and the injured plaintiff attempts to hold the wife as the "owner."<sup>33</sup> The pink slip has been held not to be an

<sup>29</sup> 87 Cal. App.2d 319, 196 P.2d 963 (1948).

<sup>30</sup> 101 A. C. A. 330, 225 P.2d 297 (1950).

<sup>31</sup> See *Johnson v. Barreiro*, 59 Cal. App.2d 213, 138 P.2d 746 (1943) (Dealer had difficulty proving date of mailing and so court only accepted the date of receipt, thereby making the dealer liable).

<sup>32</sup> *Votaw v. Farmers A. Inter-Ins. Exch.*, 15 Cal.2d 24, 97 P.2d 585 (1940). *But cf. Smith v. Western Casualty Co.*, *supra* note 25.

<sup>33</sup> However where an automobile was community property and went to the wife on the husband's death the wife was held responsible for its later negligent operation by her daughter despite the fact that the registration was still in the name of the deceased husband. *Logan v. Serpa*, 91 Cal. App. 2d 818, 206 P.2d 70 (1949).

"instrument in writing" by which persons acquire title, and hence does not raise the presumption that the wife's interest in the automobile is her separate property under Civil Code Section 164.<sup>34</sup> The court looks to the source of the funds used to acquire the automobile in determining ownership.<sup>35</sup> The recent case of *Dorsey v. Barba* indicates how far a court will carry this concept.<sup>36</sup> The wife was the sole "registered owner" and turned the car over to the husband pursuant to a property settlement agreement subsequently incorporated in a divorce decree. The court held that she could not be regarded as the "owner" despite the fact that she had not notified the department of the transfer, nor made any attempt to transfer registration to the husband. Alternative grounds for the decision were given, the court reasoning that since the automobile was community property the wife could not consent to its use,<sup>37</sup> and that she could not be an owner within Section 402 since she did not have the required incidents of ownership set out in Section 172 of the Civil Code.

Unlike other "legal owners," financing agencies which hold title to vehicles usually are excused from responsibility as owners for negligence of operators. Vehicle Code Section 402 (f) excepts the assignee of the conditional vendor, and also the chattel mortgagee, from "ownership" liability.<sup>38</sup> However, in two situations this protection disappears. One is when the security holder repossesses the automobile, in which event Section 402 (f) expressly excludes him from its protection. This was exemplified in *Stewart v. Norsigian* where the vendor assigned the contract to the finance company and guaranteed payment.<sup>39</sup> After repossession a prospective purchaser operated the automobile negligently and the court held the finance company liable as "owner." To avoid such liability a financing agency should provide for refinancing when a vehicle is repossessed so that the dealer will become the "owner."

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<sup>34</sup> *Dorsey v. Barba*, 101 A. C. A. 759, 226 P.2d 677 (1951) (Hearing granted, but no appeal taken from the decision on the point for which cited.); *Pacific Tel. and Tel. Co. v. Wellman*, 98 Cal. App.2d 151, 219 P.2d 506 (1950).

<sup>35</sup> *Dorsey v. Barba*, *supra* note 34; *Pacific Tel. and Tel. Co. v. Wellman*, *supra* note 34; see *Wilcox v. Berry*, 32 Cal.2d 189, 195 P.2d 414 (1948) (Court found pink slip established joint ownership and held the wife liable for husband's negligence, saying that consent was a question of fact if joint ownership were established).

<sup>36</sup> *Supra* note 34.

<sup>37</sup> The problem of consent is troublesome in other co-ownership situations. The court balks at implying consent to a co-owner, refusing to accept the fact of co-ownership as establishing consent. *Krum v. Malloy*, 22 Cal. 2d 132, 136, 137 P.2d 18, 20 (1943). The conclusion appears to be that consent, and thus liability, is a question of fact in each co-ownership case.

<sup>38</sup> "(f) If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of such motor vehicle. A chattel mortgagee of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section."

This section might appear to eliminate conditional vendors from liability under § 402, but the decisions show that they are included. *E.g.*, *Ferroni v. Pacific Finance Corp.*, *supra* note 18; *Guillot v. Hagman*, *supra* note 26; *Bunch v. Kin*, 2 Cal. App. 2d 81, 37 P.2d 744 (1934).

<sup>39</sup> 64 Cal. App.2d 540, 149 P.2d 46, 150 P.2d 554 (1944); accord *Schmidt v. C.I.T.*, 14 Cal. App.2d 92, 57 P. 2d 1016 (1936) (Liability results whether or not the company has complied with the requirement of transferring title to itself.).

The other situation where a financing agency's immunity is impaired is illustrated by *Ferroni v. Pacific Finance Corp.*<sup>40</sup> The finance company, acting for the purchaser rather than for the dealer, had the conditional sale contract signed at its office and paid the dealer in full on receipt of the title papers. The transfer was not registered and when the vendee injured plaintiff through his negligent operation of the automobile the plaintiff charged that the finance company had purchased the car from the dealer and resold to the vendee, thereby becoming a noncomplying conditional vendor. The supreme court held that unless the company could establish that it took the contract as agent for the dealer, plaintiff's contention should be sustained. Since liability turned on the agency relation it is evident that a company should avoid transactions tending to make it appear a purchaser and reseller. If such transactions are carried on the company should protect itself by an express agency contract with the dealer.

#### CREDITOR RIGHTS

The second type of legal relationship which is affected by compliance or noncompliance with the transfer requirements of the Vehicle Code is that of debtor and creditor. Broadly speaking, the rights of three classes of creditors are involved: the general creditor (of both the transferor and the transferee), the conditional vendor, and the chattle mortgagee. The discussion following will demonstrate that courts are reluctant to determine property rights in credit cases by using the strict letter of the Vehicle Code.

##### *Creditors of the Transferor*

As a general rule creditors of the transferor cannot recover against the transferee. Although in an early decision, *Coca Cola Bottling Co. v. Feliciano*,<sup>41</sup> a district court of appeal allowed creditors of the transferor to execute on the vehicles concerned, reasoning that under Section 186 as it was then worded no title passed until the department issued a new pink slip, this result has been changed both by statute and court interpretation. Section 186 was amended in 1941 to make transfer effective on mailing or delivery to the department,<sup>42</sup> thus protecting the transferee's interest if he complied promptly with the registration requirements.

The courts have extended protection to the transferee even where there is no compliance. In a case in which possession of the vehicle was transferred but not registered with the department, a district court of appeal held that the transferor's creditors could not prevail over the transferee. The "legal owner" (debtor) had continued to hold the pink slip when he repossessed the vehicle and then allowed another to assume the "registered owner's" rights without making any attempt to comply with the transfer requirements. The court reasoned that in *Feliciano* the part of Section 186 which then provided that no transfer was effective "except as a transferor may be estopped by law to deny a transfer" had been overlooked, and held

<sup>40</sup> 21 Cal. 2d 773, 135 P.2d 569 (1943); accord, *Gutknecht v. Johnson*, 62 Cal. App. 2d 315, 144 P.2d 854 (1944); *Johnson v. Barreiro*, *supra* note 31.

<sup>41</sup> 32 Cal. App. 2d 351, 89 P.2d 686 (1939).

<sup>42</sup> CAL. STATS. 1941, p. 2095.



that the creditor was estopped to deny the validity of the sale against the transferee since the transferor would have no claim against the transferee and the creditor could take no right greater than his debtor.<sup>43</sup> Although the quoted phrase was omitted in a recasting of the section, the supreme court has indicated that no substantive change was effected and the transferee is still protected.<sup>44</sup>

Where possession of a vehicle is transferred but the transferor is allowed to retain the pink slip (as where a dealer is to effectuate transfer with the department) a district court of appeal has held that the transferor's creditor may not recover against the transferee.<sup>45</sup> However, the court first found that the transferee had not been negligent in leaving the pink slip with the transferor and that the transferor's creditor had been negligent in relying on the transferor's ostensible interest. This indicates that it may be dangerous to leave the pink slip with the transferor, for the implication is that if the transferee is negligent or the creditor reasonably relies on possession of the slip by the transferor, the creditor can defeat the interest of the transferee.<sup>46</sup>

Nevertheless, even culpable participation in noncompliance to an extent declared by the registration statutes to be a misdemeanor will not allow the creditor to recover if possession of the vehicle was transferred and there was an absence of reasonable reliance by the creditor.<sup>47</sup> The supreme court has rejected arguments urging refusal of aid to a guilty party and declared that the Vehicle Code provisions were not adopted to protect creditors, and that noncompliance did not taint a transaction with "illegality."

Where there is no transfer of possession of the vehicle, Section 3440 of the Civil Code becomes important. The section states: "Every transfer . . . is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors . . .," and has been held to apply to transfers under the Vehicle Code.<sup>48</sup> Thus, even if title is transferred the sale is invalid against creditors unless possession also passes.<sup>49</sup>

A recent case has limited application of Section 3440.<sup>50</sup> Both title and possession were transferred, but the transferor took back possession. The district court of appeal held that such a transfer might not be in fraud of creditors and that it was within the province of the jury to determine whether a bona fide sale had been effected. Thus a creditor cannot always

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<sup>43</sup> *Carpenter v. Devitt*, 49 Cal. App.2d 473, 122 P.2d 79 (1942).

<sup>44</sup> *Wargin v. Wargin*, 29 Cal.2d 843, 180 P.2d 349 (1947).

<sup>45</sup> *Dennis v. Bank of America*, *supra* note 28.

<sup>46</sup> *Barnett v. Marsili*, 131 Cal. App. 337, 21 P.2d 650 (1933). The transferee left the pink slip with the transferor and four months later the transferor borrowed money, using the pink slip for security. The lender was held to have a lien prior to the transferee's interest.

<sup>47</sup> *Henry v. General Forming, Ltd.*, 33 Cal. 2d 223, 226, 200 P.2d 785, 786 (1948).

<sup>48</sup> See *Wargin v. Wargin*, *supra* note 44; *Dennis v. Bank of America*, *supra* note 28.

<sup>49</sup> *Dennis v. Bank of America*, *supra* note 28 at 624-625, 94 P.2d at 54-55.

<sup>50</sup> *Credit Bureau of San Diego v. Wolf*, 93 Cal. App. 2d 761, 209 P.2d 828 (1949).

rely on possession of an automobile by his debtor to protect his general interest in the debtor's property.

### *Creditors of the Transferee*

In dealing with creditors of the transferee the courts also refuse to view title registration as conclusive. Registered title in the debtor does not necessarily give his creditor a right to levy on the vehicle. In *Willard H. George, Ltd. v. Barnett* the parties registered the automobile in a mother's name, but evidence was admitted to show that the daughter had in fact made all the payments and was the actual owner.<sup>51</sup> The court found that the mother held only as a resulting trustee with the beneficial interest in the daughter, and that the mother's creditor could gain no right greater than the actual interest of the mother. The improper registration did not estop the daughter from asserting her claim to ownership. In *Getz v. Whisenant* the transferee had given no consideration for the automobile, but the transferor had notified the department of the transfer (admittedly to avoid Section 402 liability) and had also turned over possession to the transferee.<sup>52</sup> The district court held that the transferor was not estopped to assert his ownership and that the prior creditor of the transferee could claim no interest since the failure of consideration prevented the transferee from obtaining any interest in the vehicle.

While there is an older case holding that even when the transferee has given consideration his creditors could not maintain an action until the department transferred the registration (although it was applied for), the decision rested on the code at a time when it provided title did not pass until the department acted.<sup>53</sup> In light of the present emphasis on the actual interest of parties and the change in the statute it appears that a transferee's creditors could levy regardless of compliance.

When the transferor is the complaining creditor of the transferee, the code requirements are accorded greater weight. Failure to deliver the pink slip to the transferee precludes an action by the transferor for the purchase price.<sup>54</sup> Furthermore, the transferee may redeliver the automobile and recover money paid to the transferor.<sup>55</sup> The transferee does not waive his rights by failure to demand the pink slip, for it is the duty of the transferor to deliver it.

Another common factual situation arises when the transferor delivers the car to a third person together with the title papers and the third party sells the vehicle. A sale accomplished by forging the "owner's" signature on the pink slip is held fraudulent and the transferor may recover against

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<sup>51</sup> 65 Cal. App.2d Supp. 828, 150 P.2d 591 (1944).

<sup>52</sup> 93 Cal. App.2d 182, 208 P.2d 708 (1949); *cf.* *True v. Crane*, 119 Cal. App. 653, 7 P.2d 357 (1932) (The ostensible transferee received possession and endorsed pink slip with power to transfer, but the facts showed that he held only for the account of the ostensible transferor and had no interest himself.).

<sup>53</sup> *Redwine v. Trowbridge*, 99 Cal. App. 762, 279 Pac. 266 (1929).

<sup>54</sup> *Sevier v. Roberts*, 52 Cal. App.2d 403, 126 P.2d 380 (1942); *Ludwig v. Steger*, 99 Cal. App. 235, 278 Pac. 494 (1929).

<sup>55</sup> *Wehrle v. D. E. McDaniel, Inc.*, 96 Cal. App. 356, 274 Pac. 421 (1929).

the purchaser.<sup>56</sup> However, if the transferor himself endorsed the papers the transferee could probably retain the automobile.<sup>57</sup> If the third person is a dealer, the transferor is estopped from asserting his rights over those of an innocent transferee, regardless of whether he delivers the title papers.<sup>58</sup> The purchaser is allowed to rely on the dealer's ostensible authority to sell vehicles in his possession.

### *Conditional Vendor*

When the transaction involved is a conditional sale, California appears to follow that theory which leaves title to the goods sold in the vendor and places beneficial interest in the buyer.<sup>59</sup> Since the conditional vendor by definition retains title to the automobile transferred, his rights as a creditor are not affected by the Vehicle Code transfer requirements.

It should be remembered, however, that the general rule protecting the conditional vendor is modified when the conditional vendee is one engaged in the business of selling the type of article transferred. Thus, if a conditional sale of an automobile is made to a dealer, the vendor may not assert his rights against a purchaser from the dealer.<sup>60</sup>

Yet, significantly, in California the reasonably secure position of the conditional vendor may be attained by a financing agency "selling" to a dealer. In *Universal Credit Co. v. M. C. Gale, Inc.* the district court of appeal upheld an arrangement in which the finance company acted as purchaser of new automobiles from the factory and resold to the dealer, preserving a status of conditional vendor rather than creditor.<sup>61</sup> The court rejected the argument that the finance company's interest was a chattel mortgage void for lack of recordation. It is clear, however, that where there is no third party relation (the factory in the *Gale* case) the court will not allow the debtor-creditor relationship to be transformed into an arrangement transferring title, regardless of any agreement of the parties as to what their relationship shall be.<sup>62</sup> Although the device used in the *Gale* case was sustained, it is certainly on the borderline of an invalid attempt to change a debtor-creditor into a seller-purchaser relationship.<sup>63</sup> Since a

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<sup>56</sup> *Freitas v. Marsh*, 70 Cal. App. 2d 711, 161 P.2d 565 (1945); *Mitchell v. Porter*, 123 Cal. App. 329, 11 P.2d 58 (1932).

<sup>57</sup> See *Mitchell v. Porter*, *supra* note 56.

<sup>58</sup> *Kenny v. Christiansen*, 200 Cal. 419, 253 Pac. 715 (1927); *Carter v. Rowley*, 59 Cal. App. 486, 211 Pac. 267 (1922).

<sup>59</sup> See *Hines, Rights and Remedies Under California Conditional Sales*, 23 CALIF. L. REV. 557, 564 (1935).

<sup>60</sup> *California S. F. Corp. v. Riverside F. Co.*, 111 Cal. App. 151, 295 Pac. 555 (1931).

<sup>61</sup> 40 Cal. App.2d 796, 105 P.2d 1003 (1940).

<sup>62</sup> *Teater v. Good Hope Dev. Corp.*, 14 Cal. 2d 196, 93 P. 2d 112 (1939); *Wehrle v. Marks*, 134 Cal. App. 141, 25 P.2d 51 (1933); *Bonestell v. Automotive F. Corp.*, 69 Cal. App. 719, 232 Pac. 734 (1924).

<sup>63</sup> *But cf. Haupt v. Moore*, 77 F.2d 456 (9th Cir. 1935); *In Re Hargrove*, 64 F. Supp. 103 (D.C. S.D. Ala. 1945); *Raymond v. Horan*, 323 Ill. App. 120, 55 N.E.2d 99 (1944); *First State Bank v. Harter*, 301 Ill. App. 234, 22 N.E.2d 393 (1939); *Acme Feeds Inc. v. Berg*, 231 Iowa 1271, 4 N.W.2d 430 (1942); *Hughbanks Incorporated v. Gourley*, 12 Wash.2d 44, 120 P.2d 523 (1941).

financing agency may employ the trust receipt device in California the advisability of using the vendor relationship is questionable.<sup>64</sup>

### *Chattel Mortgagee*

A common security device in automobile transfers is the chattel mortgage. In order to create a chattel mortgage relationship effective against third parties the mortgagee must comply with Vehicle Code Section 195.<sup>65</sup> In essence this section requires the mortgagee to deposit with the department a properly endorsed pink slip showing the mortgagee as the "legal owner." A 1949 change in Section 195 now renders it unnecessary to file a copy of the mortgage itself.<sup>66</sup> Section 198 makes this process exclusive and excepts the motor vehicle chattel from the requirements of the Civil Code, including that of county registration.<sup>67</sup>

Recent decisions dealing with the effect of the noncompliance in chattel mortgage situations have for the most part come from federal courts in bankruptcy proceedings. In *Bank of America v. Sampsell* it was held that the mortgage was not effective until recorded with the department, so that creditors whose interests arose before recordation took priority over the mortgagee.<sup>68</sup> However, in *Citizens Nat. Trust and Savings Bank v. Gardner* an exception to the rule was allowed where the mortgagee could not obtain the pink slip to file (it was then with the department for registration on another transaction).<sup>69</sup> The court held that by filing with the department in a reasonable time after receiving the pink slip, the mortgagee complied with Section 195 and his priority was protected.<sup>70</sup> An attempt for a similar exception was made in *Budget Finance Plan v. England* where the department had the white slip for license plate registration and the mortgagee claimed that this prevented timely filing.<sup>71</sup> The district court of appeal rejected the argument. Since the mortgagee had the pink slip and the chattel he could have complied without the white slip, and his failure to do so gave creditors whose interests arose prior to his deposit with the department priority over his mortgage interest.<sup>72</sup>

<sup>64</sup> CAL. CIV. CODE §§ 3012-3016.16.

<sup>65</sup> "No chattel mortgage on any vehicle registered hereunder, irrespective of whether such registration was effected prior or subsequent to the execution of such mortgage is valid as against creditors or subsequent purchasers or encumbrancers until the mortgagee or his successor or assignee has deposited with the department, at its office in Sacramento, or at any other office as may be designated by the director, a properly endorsed certificate of ownership to the vehicle subject to said mortgage showing the chattel mortgagee as legal owner if said vehicle is then registered hereunder, or if said vehicle is not so registered, an application in usual form for an original registration, together with an application for registration of said chattel mortgagee as legal owner, and upon payment of the fees as provided in this code."

<sup>66</sup> CAL. STATS. 1949, p. 450 (The statute as amended is set out in note 65 *supra.*).

<sup>67</sup> "The method provided in this chapter for giving constructive notice of a chattel mortgage on a vehicle registered hereunder is exclusive and any such chattel mortgage is excepted from the provisions of sections 2957, 2959, 2965, and 2966 of the Civil Code."

<sup>68</sup> 114 F.2d 211 (9th Cir. 1940).

<sup>69</sup> 161 F.2d 530 (9th Cir. 1947).

<sup>70</sup> The department had returned the pink slip once for correction, but the court held that the error did not appear substantial and did not prevent compliance.

<sup>71</sup> 170 F.2d 59 (9th Cir. 1948).

<sup>72</sup> Section 182.1, added in 1947 (CAL. STATS. 1947, p. 645), now provides for registration without the white slip if it is in the possession of the department when application is made for renewal of registration.

In a recent decision, *Bowden v. Bank of America*, the California Supreme Court was faced with the problem of the effect of failure to file a refinancing mortgage with the department.<sup>73</sup> The bank held several chattel mortgages and conditional sale contracts on the vehicles of a bankrupt trucking company. It was registered as "legal owner" under those contracts. The court held a consolidating mortgage did not extinguish the bank's *prior* mortgages. The question of the position of a conditional vendor who takes a subsequent mortgage had been an open one, but the court specifically decided that the security of the conditional vendor would not be extinguished by the acceptance of other security.<sup>74</sup> In 1947 (after the date of the transaction in the *Bowden* case) the legislature added Section 180.7 to the Vehicle Code providing specifically that where the same parties execute a new mortgage covering property which had previously been the subject to a registered mortgage agreement between them no new filing with the department was necessary.<sup>75</sup>

It should be noted, however, that in a consolidating mortgage situation it appears that if there is a new mortgagee failure to file with the department renders the consolidating mortgage invalid as against creditor rights arising before it was filed.<sup>76</sup>

The 1951 legislature has answered a heretofore unsettled problem by passing a measure providing that thirty days shall be allowed for notification of the department of a chattel mortgage on vehicles.<sup>77</sup>

#### RECOMMENDED LEGISLATIVE ACTION

Examination of the cases dealing with the rights of creditors indicates a marked reluctance of courts to allow noncompliance with Vehicle Code requirements to control the outcome of litigation.<sup>78</sup> In effect the supreme court has stated that violations of the Vehicle Code are not controlling factors when it is necessary to determine actual property interests and possessory rights.<sup>79</sup> This policy decision does not appear to have led to inequitable results.

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<sup>73</sup> 36 A. C. 357, 224 P.2d 713 (1950).

<sup>74</sup> *Id.* at 365, 224 P.2d at 718.

<sup>75</sup> "When a chattel mortgage describing a registered vehicle is satisfied, canceled or released by the parties thereto duly registered as owner and legal owner respectively and a new chattel mortgage encumbering such vehicle is immediately executed between the same parties and a copy thereafter is deposited with the department, in accordance with chapter 3 of Division 3 of this code no application or applications for transfer of registration by reason thereof shall be made and no new certificate or certificates of ownership or registration card or cards shall be issued, but respecting such transaction all provisions of this code relating to transfers of title to vehicles or of interest therein and the registration of such transfers shall be deemed to have been fully complied with."

<sup>76</sup> See, *Budget Finance Plan v. England*, *supra* note 71 at 61.

<sup>77</sup> Assembly B. No. 1299, Calif. Legislature, 1951 Reg. Sess.

<sup>78</sup> *Weinberg v. Whitebone*, *supra* note 26 (The accident occurred one hour and a half after a sale made at six o'clock Saturday evening.); *Woods v. Eastridge*, *supra* note 27 (Several months after selling the car the vendor was paid by the vendee, who had subsequently resold the car, and the vendor delivered the endorsed pink slip. Three hours after the pink slip was delivered the vendee's purchaser negligently injured another. The court stated that the original vendor was relieved by this delivery of the pink slip three hours before the accident, but months after her sale.)

<sup>79</sup> See *Henry v. General Forming Ltd.*, *supra* note 47.