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Property—Replevin Action—Assigned Certificate of Title Insufficient to Prove Ownership

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PROPERTY—REPLEVIN ACTION—ASSIGNED CERTIFICATE OF TITLE INSUFFICIENT TO PROVE OWNERSHIP

Plaintiff insurance company paid the owner of a stolen automobile full value for his loss, and received in return the certificate of title with a proper assignment thereon. Later, having found the automobile in the possession of the defendant, a purchaser from a thief,[1] plaintiff sued out a writ of replevin with-

[1] The party who sold the defendant the car was in the penitentiary for car theft. Brief for Appellants, p. 22, State Farm Mut. Ins. Co. v. Drawbaugh, 159 Neb. 149, 65 N.W.2d 542 (1954). The valid Nebraska certificate of title for the stolen car was obtained by altering the motor and serial numbers, obtaining a certificate of registration from Georgia

out first obtaining a new certificate of title in its own name. *Held*: because of his failure to obtain a new certificate of title in his own name, the plaintiff failed to sustain the burden of proving ownership in a replevin action.[2]

It is a well-established rule of law that the plaintiff in a replevin action must bring the action on the strength of his own title, prior possession or right to possession.[3] Here, because the plaintiff had failed to apply for a new certificate of title "within three days after delivery" of the automobile as required by Nebraska statute,[4] the defendant was able to prove that title remained in the original owner.[5]

The Nebraska Automobile Title Act was adopted directly from the Ohio statutes.[6] In that state, the supreme court in a recent case reviewed its previous decisions and announced the rule: "... where endorsement and delivery of a certificate of title for an automobile are made, title passes even though there is a failure on the part of the recipient to secure the issuance of a

which has no title law, and then applying for a Nebraska certificate on the basis of the Georgia registration. The altered serial and motor numbers listed on this new certificate permitted the certificate to be placed on file with the Nebraska Motor Vehicle Division without exposing the fact that it was for a stolen car. Sources Personnel and Records, Nebraska Motor Vehicle Division.

[2] State Farm Mut. Auto. Ins. Co. v. Drawbaugh, 159 Neb. 149, 65 N.W. 2d 542 (1954).

[3] Garbark v. Newman, 155 Neb. 188, 51 N.W.2d 315 (1952); Loyal's Auto Service v. Munch, 153 Neb. 628, 45 N.W.2d 913 (1951).

[4] Neb. Rev. Stat. § 60-106 (Reissue 1952). The court answered the plaintiff's argument that the statute was not applicable in this case because no delivery was ever made by interpreting the words "within three days after delivery" to mean that application for a new certificate of title might be made anytime after assignment of the transferor's certificate and up to three days after actual delivery of the automobile. State Farm Mut. Auto. Ins. Co. v. Drawbaugh, 159 Neb. 149 at 158, 65 N.W.2d 542 at 547 (1954).

[5] The defendant argued that it is a good defense to an action in replevin to prove title and right of possession in a third person. Brief for Appellees. p. 6, State Farm Mut. Auto. Ins. Co. v. Drawbaugh, 159 Neb. 149, 65 N.W.2d 542 (1954). This is a minority rule which the court permitted to stand. The weight of authority permits the defendant to set up the title of a third person only if he can connect himself with such title or has been given this authority by such third person. Fuller v. Brownell, 48 Neb. 145, 67 N.W. 6 (1896).

[6] State Farm Mut. Auto. Ins. Co. v. Drawbaugh, 159 Neb. 149 at 167, 65 N.W.2d 542 at 552 (1954); Ohio Gen. Code Ann. § 6290-94 (1945).

new certificate in his name."[7] While that quotation is dictum espoused in a case which can be distinguished from the instant case,[8] its premise is supported by case law from other jurisdictions.[9] A recent Utah case,[10] for example, held in a similar fact situation almost identical with the case at hand that title and ownership were duly vested in the plaintiff-assignee although he failed to obtain a new certificate of title. Moreover, the Utah statute is more restrictive than the Nebraska statute since it prohibits moving the car on a highway before a certificate of title has been issued or applied for.[11]

The Nebraska statute requires the seller to deliver to the purchaser "... a certificate of title with such assignment thereon as may be necessary *to show title in the purchaser*."[12] It further requires the county clerk to whom the application for a new certificate is made to be satisfied that the "... applicant is *the owner* of such motor vehicle ..." before issuing a new certificate of title in the applicant's name.[13]

The assignment, alone, must place some type of title in the assignee, otherwise he would never be able to convince the county clerk that he is "the owner of such motor vehicle." It is submitted that the title acquired by the bare assignment should be sufficient to prove ownership in a replevin action.

The present decision protects the purchaser from a thief and places the burden of loss on the insurer who has a valid assignment of title to the car from the original owner. It is ultimately

[7] Garlick v. McFarland, 159 Ohio St. 539, 113 N.E.2d 92 (1953). The dissent in the instant case based its argument heavily on that quotation. State Farm Mut. Auto. Ins. Co. v. Drawbaugh, 159 Neb. 149, 168, 65 N.W.2d 542, 552 (1954).

[8] Garlick v. McFarland. 159 Ohio St. 539, 113 N.E.2d 92 (1953). The court in this case found that where there was no assignment of the certificate of title, title did not pass. In the instant case there was a valid assignment of title.

[9] Dahl v. Prince, 230 P.2d 328 (Utah 1952); Crawford v. General Exchange Ins. Corp., 119 S.W.2d 458 (Mo. App. 1953); Wilkison v. Grugeth, 223 Mo. App. 889, 20 S.W.2d 936 (1929).

[10] Dahl v. Prince, 230 P.2d 328 (Utah 1951). This was a replevin action in which the car was seized on an attachment from the original owner who was in temporary possession at the time of the seizure. Title was held to be in plaintiff-assignee even though he had obtained no new certificate of title.

[11] Utah Code Ann. § 41-1-18 (1953).

[12] Neb. Rev. Stat. § 60-104 (Reissue 1952). Emphasis supplied.

[13] Supra note 3. Emphasis supplied.

justifiable only on the ground that the procedure of obtaining a new title is so simple that the plaintiff should be required to comply with it before bringing his action.

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