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The Application of the North Carolina Motor Vehicle Act and the Uniform Commercial Code to the Sale of Motor Vehicles by Consignment: *American Clipper Corp. v. Howerton*

Approximately two-thirds of the automobiles sold in the United States are sold on an installment sale basis,¹ and credit extended for automobile purchases accounts for more than one-third of the total consumer credit extended in the American economy.² Regulating automobile credit is a concern of state legislatures, nearly all of which have enacted statutes to protect automobile buyers, sellers, and financiers.³ Commentators have noted, however, that these statutory schemes (usually embodied in certificate of title statutes)⁴ are more suitable to the turn of the century, horse-and-buggy era than to today's national automobile market.⁵ Indeed, the present system is so unworkable that "[e]uthanasia [may be] the only merciful answer for it."⁶

Much of this unworkability is caused by internal conflicts in the statutory schemes for regulating automobile transfers. The North Carolina Supreme Court in *American Clipper Corp. v. Howerton*⁷ recently addressed a conflict in the North Carolina statutes regarding transfers of automobiles. The conflicting statutes examined by the *Howerton* court were the Motor Vehicle Act (MVA)⁸ and the Uniform Commercial Code (UCC).⁹ Section 52.1 of the MVA provides

1. In a typical installment sale arrangement, the vendor tenders title and delivers the goods to the purchaser, who contracts with the vendor to pay the sales price in the future. The purchaser's debt is to be paid a portion at a time, at given intervals. Such installments generally include a predetermined finance charge. The vendor usually will attempt to reserve some interest in the goods delivered, so that the vendor may repossess the goods should the purchaser fail to pay the agreed installments. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 26-1 to -11 (2d ed. 1980); Note, *Retail Installment Sales—Unruh Act Permits Use of Previous Balance Method in Computing Finance Charges on Revolving Credit Accounts*—Siebert v. Sears, Roebuck & Co., 16 SANTA CLARA L. REV. 416 (1976).

2. Myers, *Multi-State Motor Vehicle Transactions Under the Uniform Commercial Code: An Update*, in 1C SECURED TRANSACTIONS UNDER THE UCC (MB) § 30A.01(2)(a) (1984).

3. See Comment, *The California Used Car Dealer and the Foreign Lien—A Study in the Conflict of Laws*, 47 CALIF. L. REV. 543, 573-89 (1959).

4. A certificate of title statute requires that owners of automobiles register their ownership with the state. The state usually will issue a written certificate of title, evidencing that ownership. See *id.*; *infra* notes 68-72 and accompanying text.

5. See Myers, *supra* note 2, at § 30A.01; see also Leary, *Horse and Buggy Lien Law and Migratory Automobiles*, 96 U. PA. L. REV. 455, 457 (1948); Welsh, *Security Interests in Motor Vehicles Under Section 9-302 of the Uniform Commercial Code*, 37 U. CIN. L. REV. 265 (1968); Note, *Security Interests in Motor Vehicles Under the UCC: A New Chassis for Certificate of Title Legislation*, 70 YALE L.J. 995 (1961).

6. Myers, *supra* note 2, § 30A.01(2)(a).

7. 311 N.C. 151, 316 S.E.2d 186 (1984).

8. The Motor Vehicle Act was enacted piecemeal, beginning in 1937. See Act of March 23, 1937, ch. 407, 1937 N.C. Sess. Laws 787. It reached its present state in 1963 and is codified at N.C. GEN. STAT. §§ 20-1 to 20-372 (1983). See *infra* notes 51-78 and accompanying text for a description of the statute's history.

9. The Uniform Commercial Code was adopted by North Carolina in 1965. See Act of May 26, 1965, ch. 700, 1965 N.C. Sess. Laws 768. The general assembly amended certain provisions dealing with automobile sales in 1975. Act of June 26th, 1975, ch. 862, 1975 N.C. Sess. Laws 1228. The UCC is found in N.C. GEN. STAT. §§ 25-1-101 to 25-11-108 (1965 & Supp. 1983). See *infra*

that unless an automobile dealer transfers a state issued certificate of title¹⁰ to the purchaser, no title to the automobile passes.¹¹ Section 2-401(2) of the UCC provides that when the vendor delivers the car, title passes to the purchaser.¹² The *Howerton* court resolved this conflict in favor of the UCC title-passing provisions.¹³ This Note examines that resolution in light of the historical and practical underpinnings of the MVA and the UCC.

In October 1978 plaintiff American Clipper Corp. (Clipper), a manufacturer of recreational vehicles, delivered a recreational vehicle to Adventure America, Inc. (Adventure).¹⁴ Adventure, a dealer, maintained a lot on which it displayed other parties' vehicles to prospective buyers.¹⁵ Adventure did not pay Clipper for the vehicle when it was delivered. Instead, the arrangement between Clipper and Adventure, based on an informal understanding,¹⁶ called for Adventure to secure a willing purchaser for the vehicle and to notify Clipper when a purchaser had been found. Adventure then would make arrangements to purchase the vehicle from Clipper. The supreme court characterized this informal arrangement as a consignment,¹⁷ although the parties had never expressly termed it as such.¹⁸ Clipper could reclaim possession of the vehicle at any time prior to Adventure's purchase from Clipper.¹⁹ Clipper retained possession of its manufacturer's statement of origin (MSO).²⁰ Clipper neither executed a secur-

notes 82-85, 127 and accompanying text and note 109 for a description of the UCC's history in North Carolina.

10. The precise issue in *Howerton* was more problematic because when the vendor in *Howerton* sold the car, no certificate of title had yet been issued by the state. For a discussion of the North Carolina certificate of title statutes, see *infra* notes 120, 122 and accompanying text.

11. "Upon sale of a new vehicle by a dealer to a consumer-purchaser, the dealer shall execute . . . an assignment of the manufacturer's certificate of origin . . . and no title to a new motor vehicle . . . shall pass or vest until such assignment is executed . . ." N.C. GEN. STAT. § 20-52.1(c) (1983). For a fuller discussion of this and other title passing provisions of the MVA, see *infra* notes 51-74 and accompanying text.

12. "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, . . . even though a document of title is to be delivered at a different time or place . . ." N.C. GEN. STAT. § 25-2-401(2) (1965).

13. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 192-93.

14. "The only written document related to [this] shipment was a writing dated October 10, 1978, on Clipper stationary . . . This document . . . identified the vehicle and revealed a price of \$15,076.00. The document specified at the bottom, 'This is not a [sic] invoice.'" Record at 10.

15. *Id.* at 11.

16. *Id.*

17. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 193. "[T]he hallmark of the consignment . . . is the absence of an absolute obligation on the part of the consignee to pay for the goods." Hawklund, *Consignment Selling Under the Uniform Commercial Code*, 67 COM. L.J. 146, 147 (1962). See Dusenberry, *Consignments Under the UCC: A Comment on Emerging Principles*, 26 BUS. LAW 565 (1970); Annot., 40 A.L.R.3d 1078 (1971).

18. The supreme court found that the arrangement between Adventure and Clipper implied that a sale by Adventure to a consumer would be contemporaneous with a sale by Clipper to Adventure. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 193.

19. Record at 11.

20. A manufacturer's certificate is described as "[a] certification on a form . . . , signed by the manufacturer, indicating the name of the person or dealer to whom the . . . vehicle is transferred, the date of transfer, and that such vehicle is the first transfer of such vehicle in ordinary trade and commerce." N.C. GEN. STAT. § 20-4.01(20) (1983). The certificate also must describe the vehicle in detail. *Id.*

Clipper had purchased parts of the vehicle from Chrysler, which had obtained the original MSO

ity agreement²¹ with Adventure, nor filed a financing statement²² with the state of North Carolina.

In April 1979 defendant Walter S. Howerton agreed to purchase the vehicle from Adventure. Adventure agreed to arrange financing of the purchase price.²³ Adventure had established a regular business practice of arranging financing for its customers with defendant financing company Finance America, Inc. (Finance).²⁴ Upon Finance's approval of Howerton's credit, Adventure and Howerton executed an installment sales contract.²⁵ Adventure then assigned its interest in the installment sales contract to Finance, which paid the purchase price to Adventure.²⁶ After Howerton completed and forwarded to Adventure an application for a North Carolina certificate of title,²⁷ Adventure abandoned its normal financing procedure. Based on past practice, Finance relied on Adventure to submit Howerton's application for title, together with the appropriate MSO, to the Division of Motor Vehicles (DMV). Adventure never submitted Howerton's application; as a result, the vehicle remained untitled.²⁸ In addition,

for the vehicle. Chrysler supplied Clipper with the original MSO, and Clipper obtained a supplemental MSO in accordance with California law. See CAL. VEH. CODE § 5600 (West 1971). Clipper obtained a duplicate MSO from Chrysler after the original was lost, and retained this duplicate and its own supplemental MSO. *Howerton*, 311 N.C. at 154, 316 S.E.2d at 187.

21. "Security agreement" means an agreement which creates or provides for a security interest." N.C. GEN. STAT. § 25-9-105(l) (Supp. 1983). A "[s]ecurity interest" means an interest in personal property or fixtures which secures payment or performance of an obligation." *Id.* § 25-1-201(37). If Clipper had entered into an express security agreement with Adventure, Clipper could have obtained a security interest in the vehicle. (Clipper claimed that a security interest had been created despite the absence of an express agreement. See *infra* notes 107-110 and accompanying text.) Possessing a security interest in the vehicle could have helped Clipper in either of two ways. Possessing the interest would have given Clipper an interest to assert against defendant financing company. (The litigation was framed basically as a contest to see whether Clipper or the financing company could assert superior interest in the vehicle. See *infra* notes 32-34.) In addition, if Clipper had possessed a security interest, it could have taken steps to ensure that if Adventure defaulted, Clipper could take possession of the vehicle. See N.C. GEN. STAT. § 25-9-403 (Supp. 1983). See generally J. WHITE & R. SUMMERS, *supra* note 1, §§ 26-1 to -11 (describing creditor's options in case of default on a secured obligation, including self-help, repossession, foreclosure, and resale).

22. A financing statement is a document signed by both the debtor and the secured party and includes a description of the property in which the security interest has been created. See N.C. GEN. STAT. § 25-9-402(a) (Supp. 1983). In order to render most types of security interests completely enforceable, the party in whose favor the interest has been created must file a financing statement with the office prescribed in N.C. GEN. STAT. § 25-9-401 (Supp. 1983). See J. WHITE & R. SUMMERS, *supra* note 1, § 23-11 to -16; *infra* note 132 and accompanying text.

23. Record at 11-12.

24. *Id.* at 12.

25. For a general description of installment sale arrangements, see *supra* note 1. In this particular instance, Howerton made a cash down payment, was allowed a trade-in credit, and was obligated to pay a remaining balance of \$15,500. This debt was payable to Adventure in monthly installments. The record does not show whether an express security agreement between Adventure and Howerton existed. See Record at 11-12.

26. Record at 12-13.

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

28. Record at 12.

Adventure never notified Clipper that the vehicle had been sold, nor did it make any payment to Clipper.²⁹

Clipper discovered in June 1979 that the vehicle was no longer on Adventure's lot.³⁰ After learning of the sale and of the nature of the financing, Clipper entered into negotiations with Finance, the assignee of Adventure's interest in the installment sales contract, and Howerton. These negotiations resulted in a partial settlement agreement.³¹ The agreement provided that Howerton would retain possession of the vehicle and that Clipper would institute a declaratory judgment proceeding against Finance for the purpose of adjudicating title to the vehicle. In addition, Clipper agreed to forward its MSO to Finance. Upon receipt of the MSO, Finance agreed to forward the MSO and application for a certificate of title to the DMV. The certificate of title was to list Howerton as owner and was to note a lien in favor of Finance for the sole purpose of defending the declaratory judgment action brought by Clipper. Howerton assigned his right, title, and interest in the vehicle to Finance. Finance thereby became obligated to defend both Howerton's interest in the vehicle and its own.³² Most importantly, the parties agreed that if, in the declaratory judgment proceeding, Clipper's right to the vehicle was declared to be superior³³ to that of either Finance or Howerton, Finance would be liable to Clipper.³⁴

At trial Clipper argued that "neither defendant acquired rights in and to the vehicle superior to [Clipper's] own by reason of [Adventure's] attempted conversion of [the vehicle]."³⁵ Clipper claimed that, under section 52.1 of the North Carolina General Statutes, a motor vehicle dealer cannot transfer title to a new vehicle to a purchaser without proper assignment of an MSO.³⁶ Since an MSO was not assigned to Howerton, no title had passed to him. Clipper argued that because the sale by Adventure to Howerton was not valid and because no sale had been made by Clipper to Adventure, Clipper retained title to the vehicle. Clipper argued in the alternative that if title had in fact passed to Howerton, retention of the MSO had reserved a security interest in Clipper. This interest, Clipper asserted, had attached to the installment sales contract and vested in Clipper title superior to the title Finance claimed.³⁷

29. *Id.*

30. *Id.*

31. The basic terms of this agreement are set forth in *Howerton*, 311 N.C. at 155-56, 316 S.E.2d at 188-89.

32. See Record at 4-8. The partial settlement agreement further provided that Howerton's only liability was to stem from the installment sales contract, and that he could incur no liability as a result of a judgment in the action brought by Clipper. *Id.* at 7.

33. The parties never defined in the agreement what constituted "superiority" of title. See *Howerton*, 311 N.C. at 156, 316 S.E.2d at 189.

34. Adventure was not made party to the settlement negotiations or to the litigation. *Id.* at 155, 316 S.E.2d at 188.

35. Plaintiff Appellee's Brief at 6, *Howerton*, 51 N.C. App. 539, 277 S.E.2d 136.

36. See N.C. GEN. STAT. § 20-52.1(c), which provides that "no title to a new motor vehicle . . . shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee." The provision does not state expressly the result of the manufacturer's rather than the dealer's retention of the MSO. See *infra* note 125.

37. See *infra* notes 112-19 and accompanying text.

Finance argued that the UCC, not the MVA, should apply to resolve the question of title. Finance argued that, under the UCC, title to the vehicle had passed to Howerton when he purchased the vehicle. Thus, Clipper had no title to assert against either Howerton or Finance. The UCC explicitly states the time and place in which title passes to a good faith purchaser, such as Howerton.³⁸ The North Carolina version of the UCC provides that unless otherwise agreed, title passes when the goods are delivered, even though a document of title is to be delivered later.³⁹ Since title passed completely to Howerton when the vehicle was delivered to him, Finance argued, Clipper could not prevail against either Finance or Howerton.

Before trial the parties stipulated that no material facts were at issue. Both Finance and Clipper moved for summary judgment. The trial court, in granting Clipper's motion, found that Clipper could assert title superior to Finance's "under applicable law."⁴⁰ The court therefore found Finance liable to Clipper under the parties' partial settlement agreement.

The court of appeals affirmed.⁴¹ Judge Becton, writing for a unanimous court, agreed with Clipper's contention that Clipper's title was superior to Finance's. The court based its opinion on the title passage provisions set forth in the North Carolina MVA. The court reasoned that title could not pass until the MSO was properly assigned,⁴² hence, record title remained in Clipper.⁴³ The court found that Finance assumed the risk of loss when it loaned money on collateral without first determining whether its assignor, Adventure, or its debtor, Howerton, had record title to that collateral.⁴⁴ The court further found that Clipper, by retaining its MSO, did the most it could to protect its interest.⁴⁵

A unanimous supreme court, in an opinion by Justice Exum, reversed the court of appeals, holding that the UCC, not the MVA, controlled.⁴⁶ Analyzing the case as a consignment under the UCC, the court found that Clipper had taken none of the steps by which a consignor can protect his interest in consigned goods.⁴⁷ In addition the court found that Clipper had taken no steps to protect any interest it might have had in the installment sales contract.⁴⁸ Since Clipper had no interest in the vehicle or the contract, it could not assert a title superior to that claimed by Finance or Howerton. The supreme court then

38. The parties stipulated that Howerton was a "buyer in the ordinary course of business" as that term is defined by the UCC. Record at 12.

39. N.C. GEN. STAT. § 25-2-401(2) (1965). See *supra* note 12 for language of the statute.

40. Record at 19. Judge Riddle, the trial judge, did not decide expressly whether the UCC or the MVA was "the applicable law." *Id.*

41. American Clipper Corp. v. Howerton, 51 N.C. App. 539, 545, 277 S.E.2d 136, 139 (1981), *rev'd*, 311 N.C. 151, 316 S.E.2d 186 (1984).

42. See N.C. GEN. STAT. § 20-52.1(c) (1983), set forth *supra* note 11.

43. American Clipper Corp. v. Howerton, 51 N.C. App. 539, 544, 277 S.E.2d 136, 139 (1981), *rev'd*, 311 N.C. 151, 316 S.E.2d 186 (1984).

44. *Id.*

45. *Id.*

46. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 192-93.

47. *Id.* at 164-65, 316 S.E.2d at 194.

48. *Id.* at 166-68, 316 S.E.2d at 194-95.

granted summary judgment for Finance.⁴⁹

The MVA and the UCC have generated voluminous litigation.⁵⁰ The original version of the MVA, enacted in 1937,⁵¹ provided that once the purchaser tendered payment for a motor vehicle, and received delivery of the vehicle, the transfer was valid.⁵² Transfer of ownership without delivery of a certificate of title on which were recorded all existing liens did not invalidate the transfer, but did constitute a misdemeanor.⁵³ Soon after this statute was enacted, litigants attempted to secure a judicial declaration that the statute served as a recordation device for title to, and liens on, automobiles.⁵⁴ North Carolina previously had enacted statutes invalidating titles to, and mortgages on, realty and some forms of personalty, unless the title or mortgage was registered with the state.⁵⁵ The North Carolina Supreme Court, however, had rejected this interpretation of the predecessor to the MVA in 1925.⁵⁶ In *Carolina Discount Corp. v. Landis Motor Co.*⁵⁷ the court characterized the statute as a police regulation, with penal provisions "to protect the general public from fraud, imposition and theft of motor vehicles."⁵⁸ The court also determined that the statute did not change the common-law rule that sales of personal property were not required to be evidenced by a writing and held that certificates of title to automobiles did not determine rights of litigants in disputes arising out of automobile transfers.⁵⁹

Courts accepted this interpretation for several decades, not because this interpretation presented the soundest public policy, but because of the courts' deference to the general assembly. The North Carolina Supreme Court affirmed the rule of *Carolina Discount Corp.* in 1960 in *Southern Auto Finance Co. v. Pittman*.⁶⁰ The *Pittman* court examined sections of the 1937 MVA which provided that the owner of a motor vehicle must be registered with the Department of Motor Vehicles (DMV).⁶¹ When the owner made proper application, the DMV provided a certificate indicating all liens and encumbrances.⁶² The *Pittman* court found that the general assembly, in enacting these sections, did not intend to exempt motor vehicles from the recordation statutes,⁶³ which provided a separate system for establishing ownership of personal property.⁶⁴ The court

49. *Id.* at 170, 316 S.E.2d at 197.

50. *See, e.g.*, cases cited *infra* note 101.

51. Act of March 23, 1937, ch. 407, 1937 N.C. Sess. Laws 787.

52. *Id.* § 38, 804-05.

53. *Id.*

54. *See, e.g.*, *National Bank v. Greensboro Motor Co.*, 264 N.C. 568, 142 S.E.2d 166 (1965).

55. *See* N.C. GEN. STAT. §§ 47-1 to 47-120 (1984).

56. Act of March 5, 1923, ch. 236, 1923 N.C. Sess. Laws 554 was the predecessor to the MVA. This Act required a centralized registration of all motor vehicles with the Department of Revenue. It did not invalidate sales made without transfer of title certificates.

57. 190 N.C. 157, 129 S.E. 414 (1925).

58. *Id.* at 160, 129 S.E. at 416.

59. *Id.*

60. 253 N.C. 550, 117 S.E.2d 423 (1960).

61. Act of March 23, 1937, ch. 407, §§ 37-38, 1937 N.C. Sess. Laws 787, 804-05.

62. *Id.* §§ 12, 36-38, at 793, 804-05.

63. *See* N.C. GEN. STAT. §§ 47-1 to 47-120 (1984).

64. *Pittman*, 253 N.C. at 553-54, 117 S.E.2d at 425.

did state, however, that "if public policy [required] a different system of establishing ownership and encumbrances on motor vehicles, such policy must be declared by the Legislature."⁶⁵

The general assembly soon responded to the needs of public policy. The lien recordation statute in existence at the time of *Pittman* provided that mortgages on personal property were to be recorded, in many cases, in the office of the register of deeds in the county in which the property was located.⁶⁶ Since cars are easily driven from one county to another, chances are great that a car on which there is a mortgage will not be sold in the county in which it was located when mortgaged. A prospective purchaser of an automobile would have had to investigate title records in many, if not all, of the counties in the state to discover the nature of the title to any motor vehicle. By 1960, when *Pittman* was decided, the volume of vehicle sales and the ease of vehicle transportation had become so great that the general assembly decided to lighten this burden on the prospective purchaser.

The general assembly amended the MVA in 1961.⁶⁷ Under the amended act every owner of a motor vehicle still was required to register his vehicle with the DMV, and the DMV continued to issue certificates of title noting all liens and encumbrances.⁶⁸ The 1961 amendments expressly provided that "[t]ransfer of ownership in a vehicle by an owner [was] not effective" until the vendor's certificate of title had been assigned and transferred to the purchaser, and the new vehicle had been delivered.⁶⁹ The purchaser then was required to present the assigned certificate to the DMV, which issued a new certificate to the purchaser.⁷⁰ The general assembly hoped to provide, by means of the title certification procedure, a method whereby all legal interests in motor vehicles could be determined easily.⁷¹ These amendments took several important steps toward achieving that legislative goal. Liens no longer had to be recorded in the county in which the lienor or the vehicle was located.⁷² A purchaser, after the 1961 amendments, merely had to look at the certificate of title to discover liens.

The 1961 amendments, for the first time, also made provision for a manufacturer's certificate of origin. A manufacturer was required to supply a dealer to whom he transferred a newly manufactured vehicle with a DMV form which certified that the vehicle had not previously been transferred.⁷³ When the dealer sold the vehicle to a consumer, the amendment required the dealer to transfer the MSO to the consumer. The consumer then was obligated to submit the

65. *Id.* at 553, 117 S.E.2d at 425.

66. See N.C. GEN. STAT. § 47-20.2 (1984) for the corresponding present provisions regarding mortgages on personalty.

67. Act of June 15, 1961, ch. 835, 1961 N.C. Sess. Laws 1134.

68. *Id.* § 8, at 1139.

69. *Id.*

70. See *id.* § 3, at 1135.

71. *Id.* at 1134.

72. *Id.* § 12. The amendments stated that the mortgage recordation provisions no longer applied to motor vehicles. All vehicle mortgages were required by the amendments to be recorded directly on the title certificate.

73. *Id.* §§ 1-4, at 1134-35.

MSO to the DMV, along with his application for a certification of title.⁷⁴

The first decision interpreting the 1961 amendments was *Community Credit Co., Inc. v. Norwood*.⁷⁵ The *Norwood* court found that the amendments make it the duty of the purchaser to secure from his vendor the old certificate duly endorsed or assigned and to apply for a new certificate. . . . The vesting of title is deferred until the purchaser has the old certificate endorsed to him and makes application for a new certificate [of title].⁷⁶

The general assembly further refined the title-passing provisions of the MVA in 1963. The language of the provisions was changed slightly to mandate that "no title to any motor vehicle shall pass or vest until assignment [of the title certificate] is executed and the motor vehicle delivered to the transferee."⁷⁷ These sections of the MVA were strengthened in 1967. The provisions added in 1967 stated that a dealer, having obtained title to a new vehicle from a manufacturer, could not transfer that title to a consumer without also transferring the MSO to the consumer.⁷⁸ These amendments, however, contained no provision to control consignment situations, like the one in *Howerton*, in which the manufacturer originally made no transfer of the MSO to the dealer.

The supreme court offered its interpretation of the revised wording in *Nationwide Mutual Insurance Co. v. Hayes*.⁷⁹ The *Hayes* court ruled that the amendment imposed three conditions precedent on any transfer of title to a motor vehicle. First, the vendor must execute an assignment of the certificate of title to the purchaser. Second, there must be actual or constructive delivery of the vehicle to the purchaser. Last, the duly assigned title certificate must be delivered to the purchaser.⁸⁰ The *Hayes* court expressly limited its decision,

74. See *id.* § 3, at 1135.

75. 257 N.C. 87, 125 S.E.2d 369 (1962).

76. *Id.* at 90, 125 S.E.2d at 371. The court in *National Bank v. Greensboro Motor Co.*, 264 N.C. 568, 142 S.E.2d 166 (1965), also relied on the language in the 1961 amendments which provided that "transfer of ownership . . . is not effective" until the title certificate is transferred, in determining that a mortgage created on two trucks was invalid. The mortgagor had taken possession of the trucks from a vendor, and prior to receiving the title certificate had created a mortgage on the trucks. See also *Seymour v. W. S. Boyd Sales Co.*, 257 N.C. 603, 127 S.E.2d 265 (1962).

77. Act of May 24, 1963, ch. 552, § 4, 1963 N.C. Sess. Laws 648 (codified at N.C. GEN. STAT. § 20-72 (b) (1983)). The wording of the 1961 amendments had provided that "transfer of ownership in a vehicle was not effective" until assignment and transfer of the title certificate. Act of June 15, 1961, ch. 835, § 8, 1961 N.C. Sess. Laws 1134.

78. Act of June 21, 1967, ch. 863, § 1, 1967 N.C. Sess. Laws 1110 (codified at N.C. GEN. STAT. § 20-52.1(c) (1983)).

79. 276 N.C. 620, 174 S.E.2d 511 (1970).

80. *Id.* at 640, 174 S.E.2d at 524. The *Hayes* court had to determine whether an insurance policy afforded protection for defendant against certain claims resulting from an automobile accident. Plaintiff had issued defendant a non-owner's policy. The non-owner's policy provided that if defendant acquired ownership of an automobile during the period covered by the policy, policy coverage would lapse 30 days after acquisition of the automobile. Defendant thereafter contracted to purchase a car. The car was delivered December 26th. Defendant tendered payment on December 27th. On December 28th, the seller assigned and delivered the title certificate to defendant. On January 27th, defendant was involved in the accident in question. *Id.* at 622-25, 174 S.E.2d at 512-14. If the court had found that defendant acquired ownership when payment was made and the car delivered, the policy would have lapsed before the accident. If the court had found defendant did not acquire ownership until the certificate of title was delivered, however, the policy would have remained in effect through the date of the accident. Although the 1961 amendments spoke in terms

declaring that the three conditions it announced as prerequisite to transfer of title only applied for purposes of determining tort law liability and liability insurance coverage.⁸¹

The UCC was enacted in North Carolina in 1965,⁸² two years after the enactment of the MVA amendments from which the *Hayes* court derived its standard for determining passage of automobile title. The *Hayes* court held that the UCC did not replace the 1963 amendments to the MVA as a means for determining legal interests in automobiles.⁸³ The court relied on the express language of the UCC in declaring that the UCC did not supplant the transfer of title provisions of the MVA. Section 10-102 of the UCC lists the statutes repealed by the passage of the UCC; the MVA is not listed.⁸⁴ Section 10-103 of the UCC, however, repeals all other statutes inconsistent with the UCC.⁸⁵

The *Hayes* court relied on the official commentary to section 2-401 to refute the contention that insofar as the MVA title passage provisions were inconsistent with section 2-401 of the UCC, the MVA provisions were repealed by passage of the UCC. This commentary indicates that section 2-401 is designed to govern private transactions and not to guide the court's interpretation of public regulation.⁸⁶ Courts remain free to decide how title passes in situations in which public regulations call for such determination. Thus, the *Hayes* court found that, because the MVA was a public regulation, passage of title thereunder was not governed by the "private sale" rules of the UCC.⁸⁷ In addition the *Hayes* court declared that section 2-401 of the UCC was general in scope and governed passage of title to "goods." Thus, section 2-401 should not affect statutes governing

of ownership, the 1963 revisions provided that "title will not pass or vest" until the certificate of title is transferred. Act of May 24, 1963, ch. 552, § 4, 1963 N.C. Sess. Laws 648. The *Hayes* court found, after a lengthy restatement of previous definitions, that "title" and "ownership" are synonymous, 276 N.C. at 630, 174 S.E.2d at 517, and thus, because the policy revoked coverage if the defendant acquired *ownership* of a motor vehicle, the court decided that defendant did not acquire title to the car until the certificate of title was delivered to him. *Id.* at 640, 174 S.E.2d at 524.

81. *Hayes*, 276 N.C. at 640, 174 S.E.2d at 524. The MVA has long provided that the certificate of title is "prima facie evidence" of ownership in tort cases arising out of automobile accidents. Act of March 30, 1951, ch. 494, § 1, 1951 N.C. Sess. Laws 405-06 (codified at N.C. GEN. STAT. § 20-71.1 (1983)). The *Howerton* court did not expressly consider this section of the MVA.

82. Act of May 26, 1965, ch. 700, 1965 N.C. Sess. Laws 768, enacted the UCC in North Carolina. The UCC became effective July 1, 1967. *Id.*

83. *Hayes*, 276 N.C. at 638-40, 174 S.E.2d at 522-24 (1970).

84. N.C. GEN. STAT. § 25-10-102(1) (1965).

85. *Id.* § 25-10-103 (1965).

86. The commentary states:

[Section 2-401] in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon "sale" or upon location of "title" without further definition. The basic policy of this Article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. It is therefore necessary to state what a "sale" is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the private law.

N.C. GEN. STAT. § 25-2-401 official comment (1965). The drafters of the UCC did not intend the UCC to supplement the MVA in the operation of the MVA as aid to government regulation of automobile registration. The drafters made it clear that, when necessary, courts should interpret "sale" or "location of title" for purposes of regulatory statutes such as the MVA, to best further the goals of those regulatory statutes.

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

passage of title to more specific categories of goods. Because the MVA dealt specifically and definitely with passage of title to motor vehicles, the *Hayes* court found that the MVA could not be supplanted or repealed by the UCC, even though the UCC was enacted after the MVA.⁸⁸

The *Howerton* court addressed whether the three conditions in *Hayes* applied to a question of title not involving tort liability or insurance coverage and whether passage of the UCC in 1965 rendered the 1963 amendments to the MVA obsolete as a means for settling disputes over transfers of automobile ownership. To decide these two issues, the *Howerton* court initially had to determine whether a party could acquire ownership of a vehicle without assignment and delivery of a title certificate.

If the *Hayes* standard for transfer of ownership applied, no ownership would have been transferred to Adventure; to its assignee, Finance; or to Howerton. Finance contended that under section 2-401(2)⁸⁹ of the North Carolina version of the UCC, title passed to Howerton when the vehicle was delivered to him, even though the certificate of title was never assigned or delivered to Howerton.

The *Howerton* court distinguished *Hayes* on two grounds. First, *Hayes* dealt with the rights of third parties not involved in the sale of the automobile—insurance carriers—while *Howerton* involved a determination of the rights of the vendor and purchaser of the automobile.⁹⁰ In addition, the *Hayes* court limited its decision to a determination of tort liability and insurance coverage, thus leaving “open the question whether the MVA, as opposed to the UCC, would control in all circumstances.”⁹¹

The *Howerton* court did not directly refute the reasoning that led the *Hayes* court to apply the MVA. Instead, it offered an alternative rationale for adopting the UCC standards for passage of title. The court examined the North Carolina commentary to section 2-401 and deduced the legislative intent behind the UCC. The commentary states that the UCC abandons the examination of sales disputes that made “rights, obligations and remedies of sellers, buyers, and third parties dependent on the location of title of goods at a particular time . . . providing [instead] specific provisions with respect to the various rights and duties of the buyer and seller which are not predicated on location of title.”⁹² The *Howerton* court stressed that this commentary evidenced the intent of the general assembly that the courts no longer should employ “the concept of title as a tool for resolving sales problems.”⁹³

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

89. *See supra* note 12.

90. *Howerton*, 311 N.C. at 151, 153, 161, 316 S.E.2d at 186, 187, 192 (1984). *Cf. Hayes*, 276 N.C. at 640, 174 S.E.2d at 524.

91. *Howerton*, 311 N.C. at 162, 316 S.E.2d at 192.

92. N.C. GEN. STAT. § 25-2-401 North Carolina comment (1965).

93. *Howerton*, 311 N.C. at 162, 316 S.E.2d at 192 (quoting *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 153, 229 S.E.2d 278, 283-84 (1976)). *See Clifford, Article Two: Sales*, 44 N.C.L. REV. 539, 551 (1966); *see also Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261, 288 N.Y.S.2d 525 (1968) (theory of the UCC relegates the issue of title to a subordinate position in determining legal interests in automobiles).

Justice Exum noted that the *Howerton* court was not the first to resolve a dispute involving transfer of title to an automobile without relying on the MVA. He cited two pre-UCC cases, *Hawkins v. M & J Finance Corp.*⁹⁴ and *King Homes, Inc. v. Bryson*,⁹⁵ in which the North Carolina Supreme Court relied on the common law of sales, not the MVA, to resolve title disputes.⁹⁶

In *Hawkins* plaintiff delivered two cars to a used car dealer, authorizing the dealer to sell the cars. Plaintiff also delivered the certificates of title, but did not execute an assignment of the certificates. The car dealer used the cars to secure a loan from defendant, without plaintiff's permission. The dealer defaulted on the loan, and the defendant took possession of one car. When plaintiff brought an action for return of the car, the court relied on the common-law principles of agency and entrustment, not on the provisions of the MVA, in reaching its decision. The court concluded that defendant had not acquired any rights to the vehicle.⁹⁷ The *Howerton* court viewed the *Hawkins* decision as authority that the MVA title provisions did not properly resolve all questions pertaining to transfer of title to motor vehicles.⁹⁸

The *Howerton* court derived further support for this view from the decision in *King Homes*. In *King Homes* a mobile home manufacturer delivered a mobile home to a dealer, but did not assign or deliver a title certificate along with the vehicle. The dealer paid for the mobile home by check. After delivering the check to the manufacturer, the dealer sold the mobile home to defendant. When the dealer's check was returned due to insufficient funds, the manufacturer brought an action for return of the mobile home. The court held that title had never passed to the dealer; therefore, the sale by the dealer to defendant was invalid. The *King Homes* court reached this decision, not because a title certificate had not been delivered to the dealer, but because the dealer had never paid the manufacturer.⁹⁹

The *Howerton* court cited *Hawkins* and *King Homes* to demonstrate that the decision to rely on the UCC instead of the MVA did not represent a break with North Carolina precedent.¹⁰⁰ The *Howerton* court then decided not to ap-

94. 238 N.C. 174, 77 S.E.2d 669 (1953).

95. 273 N.C. 84, 159 S.E.2d 329 (1968).

96. The *Howerton* case itself was never framed as a wrongful sale by a bailee. It is possible that application of these common-law concepts would have altered the court's analysis or decision.

97. *Hawkins*, 238 N.C. at 178-85, 77 S.E.2d at 672-77.

98. *Howerton*, 311 N.C. at 160, 316 S.E.2d at 190-91.

99. *King Homes*, 273 N.C. at 90-91, 159 S.E.2d at 333.

100. *Howerton*, 311 N.C. at 162-63, 316 S.E.2d at 191-92. Neither the *Hawkins* nor the *King Homes* court, however, ignored the MVA completely. The *Hawkins* court stated that a bailee could rightfully mortgage entrusted goods if the entruster had clothed the trustee with sufficient indicia of ownership. The *Hawkins* court used the MVA as an aid in applying this common-law principle. The court found that because the certificates of title delivered to the dealer were not assigned in compliance with the MVA, they could not constitute sufficient indicia of ownership. *Hawkins*, 238 N.C. at 179-80, 77 S.E.2d at 674-75. Likewise in *King Homes*, after holding that a mobile home was a motor vehicle within the meaning of the MVA, the court found that the trustee had not been clothed with indicia of ownership sufficient to induce reasonable reliance on the part of the defendant, because the dealer had not delivered a Manufacturer's Certificate of Origin in compliance with the MVA in force at the time. 273 N.C. at 91, 159 S.E.2d at 333. Today, under the UCC, it is possible for an trustee to convey ownership to a bona fide purchaser, regardless of the sufficiency of the indicia of ownership with which the trustee has been clothed. See *infra* note 104.

ply the three-step standard adopted by the *Hayes* court, concluding that "the provisions of the UCC and not the MVA properly resolve the contest" between Clipper and Finance.¹⁰¹

The drafters of the UCC, the court believed, intended the UCC to resolve the type of title question presented in *Howerton*.¹⁰² Therefore, the court must have believed that the provisions of the UCC established a more efficient and more just means of determining legal interest in motor vehicles than the methods that the MVA provides.¹⁰³

The court, however, belied its own beliefs as it applied the provisions of the UCC to the facts presented by *Howerton*. The court first dealt with the question whether Clipper or Howerton had a superior right to the vehicle. The court found the answer in section 2-403 of the UCC.¹⁰⁴ Under this section, title transferred completely to Howerton when he purchased the vehicle. Clipper transferred the vehicle to Adventure, a party in the business of selling such vehicles,¹⁰⁵ clothing Adventure with the authority to transfer absolute ownership of the vehicle. Howerton purchased as a buyer in the ordinary course of business,¹⁰⁶ without notice that Adventure did not have absolute ownership of the vehicle. Adventure, therefore, could transfer to Howerton all of Clipper's right, title, and interest in the vehicle.

Clipper acknowledged that under the UCC it could not assert title superior to Howerton's, but argued that its interest was greater than the interest held by Finance. Clipper claimed its retention of the MSO to the vehicle reserved a security interest in the vehicle, or in the alternative, in the installment sales con-

101. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 192-93. Other jurisdictions also have decided that the UCC prevails over motor vehicle registration schemes and that title passes pursuant to the UCC without completion of the statutory registration formalities. See, e.g., *Indiana Ins. Co. v. Fidelity Gen. Ins. Co.*, 393 F.2d 204 (7th Cir. 1968) (ownership is question for jury); *Semple v. State Farm Mut. Auto Ins. Co.*, 215 F. Supp. 645 (E.D. Pa. 1963); *Metropolitan Auto Sales v. Koneski*, 252 Md. 145, 249 A.2d 141 (1969) (ownership is question for jury); *St. Paul Fire and Marine Ins. Co. v. Boykin*, 251 S.C. 236, 161 S.E.2d 818 (1968) (title to vehicle passes notwithstanding want of compliance with title certificate law); *Park County Implement Co. v. Craig*, 397 P.2d 800 (Wyo. 1964). The South Carolina rule stated in *Boykin* modified the rule established by a federal court sitting in diversity in *Lynch v. United States Gen. Accident, Fire and Life Assurance Corp.*, 327 F.2d 328 (4th Cir. 1964) (under South Carolina law, passage of title effective only between buyer and seller and does not affect rights of third-party insurance carrier). Several jurisdictions in which the UCC has been adopted have decided that ownership does not pass until motor vehicle statute requirements are met. See, e.g., *Merchants Produce Bank v. Mack Trucks*, 411 F.2d 1174 (8th Cir. 1969); *Melton v. Prickett*, 203 Kan. 501, 456 P.2d 34 (1969); *Roe v. Flamegas Indus. Corp.*, 16 Mich. App. 210, 167 N.W.2d 835 (1969); *McIntosh v. White*, 447 S.W.2d 75 (Mo. 1969); *Irion v. Glens Falls Ins. Co.*, 54 Mont. 156, 461 P.2d 199 (1969); *Forman v. Anderson*, 183 Neb. 715, 163 N.W.2d 894 (1969).

102. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 193.

103. The MVA is designed to provide "a ready means by which all legal interests in motor vehicles may be determined." Act of June 15, 1961, 1961 N.C. Sess. Laws 1134. The contest between Finance and Clipper, framed by the parties as a question of who had "superior title," clearly seems to be a contest to decide who has a greater "legal interest."

104. "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." N.C. GEN. STAT. § 25-2-403(2) (1965).

105. Adventure maintained a lot for display of vehicles, and had had prior business dealings with Clipper. Record at 9-11.

106. *Id.* at 12.

tract to which Adventure and Howerton were the original parties. Finance claimed a competing interest. Neither party had filed a financing statement to protect and register its interest.

The court declined to decide whether retention of the MSO by Clipper created a security interest.¹⁰⁷ Clipper's failure to properly perfect its security interest, if any, prevented it from defeating Finance's interest, despite its retention of the MSO.¹⁰⁸

The MVA sets forth some guidelines for determining the order of certain competing security interests.¹⁰⁹ The MVA expressly provides, however, that if a manufacturer claims a security interest in a vehicle held in the inventory of that manufacturer, the interest must be perfected by filing a financing statement in accordance with the provisions of the UCC.¹¹⁰ Clipper admitted that it had retained the vehicle in inventory and had not filed a financing statement.¹¹¹ Therefore, Clipper could not claim a security interest under the MVA.

Under the UCC, because Clipper's entire interest in the car had been trans-

107. *Howerton*, 311 N.C. at 167, 316 S.E.2d at 195. The UCC as adopted by North Carolina states that "any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to reservation of a security interest." N.C. GEN. STAT. § 25-2-401(1) (1965). For other North Carolina decisions stating that retention of documents of title creates only a security interest, see *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722, 728 (4th Cir. 1970) (applying North Carolina law); *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 155, 229 S.E.2d 278, 285 (1976). Some courts have held that automobile certificates of title are not documents of title. See, e.g., *Semple v. State Farm Mut. Ins. Co.*, 215 F. Supp. 645 (E.D. Pa. 1963); *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970). The *Howerton* court did not address that question.

108. *Howerton*, 311 N.C. at 167, 316 S.E.2d at 195.

109. N.C. GEN. STAT. § 20-58 to -58.10 (1983). The UCC expressly provides that these sections of the MVA apply to security interests in automobiles. The original version of the UCC enacted in North Carolina provided that "[t]he filing provisions [of the UCC] do not apply to a security interest in property subject to a statute . . . of this state which provides for central filing of, or which requires indication on a certificate of title of, such security interests in such property." N.C. GEN. STAT. § 25-9-302(3), (3)(b) (1965).

The effect [of this provision] is to preserve the operation of the North Carolina certificate of title law relating to motor vehicles and the perfection of security interests therein. . . .

This North Carolina statute does not apply to security interests created by a dealer or manufacturer who holds the vehicle for resale . . . ; therefore, those security interests are governed by the [UCC] filing provisions.

Id. § 25-9-302 North Carolina comment. This section was revised in 1975, to provide that although filing a UCC statement is still not required to perfect a security interest in a vehicle that may be perfected under the MVA, "during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions [of the UCC] apply to a security interest in that collateral created by him as debtor." N.C. GEN. STAT. § 25-9-302(3)(b) (Supp. 1983). See *Myers*, *supra* note 2, at § 30A.03(1). Adventure was a merchant in the business of selling motor vehicles. See *supra* note 105. Clipper, however, maintained the vehicle in Clipper's own inventory. *Howerton*, 311 N.C. at 166, 316 S.E.2d at 195. The *Howerton* court therefore concluded that, before it could be enforceable, any security interest created by Adventure as debtor would have to be recorded by means of a financing statement. *Id.* at 167, 316 S.E.2d at 195. The court also relied on N.C. GEN. STAT. § 20-58.8(b) (1983): "The provisions of [the MVA] shall not apply to or affect . . . (3) A security interest in a vehicle created by a manufacturer . . . who holds the vehicle in his inventory. Such security interest shall be perfected by filing a financing statement under Article 9 of the Uniform Commercial Code." See J. WHITE & R. SUMMERS, *supra* note 1, at § 22-4.

110. N.C. GEN. STAT. § 20-58.1 (1983). For legislative considerations in the enactment of this provision, see *infra* note 127.

111. Record at 10.

ferred (albeit arguably wrongly transferred)¹¹² to Howerton, Clipper could not assert an interest in the car.¹¹³ Clipper argued instead that it could claim an interest in the installment sales contract. Clipper claimed this interest arose when the vehicle, in which Clipper had an unperfected security interest,¹¹⁴ was sold. Clipper claimed it could assert an interest in the proceeds of this sale,¹¹⁵ the installment sales contract. Finance also claimed an interest in this contract. Finance argued that because Howerton had acquired an unqualified interest in the vehicle, he could freely assign all or part of this title. Finance asserted that Howerton had assigned a security interest to Adventure by means of the installment sales contract. Finance then purchased this interest from Adventure.

The court viewed the installment sales contract as chattel paper under the UCC.¹¹⁶ Under the UCC, if Finance had no knowledge¹¹⁷ that Clipper was asserting an interest in the contract, Clipper could not prevail against Finance. If Finance knew the contract was subject to Clipper's interest, Finance would still prevail if Clipper could claim an interest only because the contract was the result of a sale of property in which Clipper had a security interest.¹¹⁸ Because this was Clipper's only claim to an interest in the contract, Finance would prevail even if Finance could be charged with knowledge of Clipper's interest. The *Howerton* court concluded, therefore, that there were no conceivable circumstances under which Clipper could assert title superior to Finance's.¹¹⁹

It is debatable whether the *Howerton* decision is in accord with the legislative policies that fostered the MVA and the UCC. The decision may conflict with broad policy goals because the facts presented to the court slipped through

112. Finance argued that Adventure's action amounted to conversion. Defendant Appellant's Brief at 5, *American Clipper Corp. v. Howerton*, 51 N.C. App. 539, 277 S.E.2d 136 (1981), *rev'd*, 311 N.C. 151, 316 S.E.2d 186 (1984).

113. See *supra* notes 104-106 and accompanying text.

114. Clipper argued that this unperfected interest arose by means of Clipper's retention of the MSO. See *Howerton*, 311 N.C. at 166-67, 316 S.E.2d at 194-95.

115. Proceeds "includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds." With certain exceptions, the security interest in the collateral "continues in any identifiable proceeds including collections received by the debtor." N.C. GEN. STAT. § 25-9-306(1), (2) (Supp. 1983).

116. *Howerton*, 311 N.C. at 167, 316 S.E.2d at 195. Chattel paper "means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods." N.C. GEN. STAT. § 25-9-105(1)(b) (Supp. 1983). The court of appeals did not determine whether the installment sales contract was chattel paper, or what interests the contract created as between Howerton and Clipper. See *Howerton*, 51 N.C. App. at 545, 277 S.E.2d at 139 (1981). The installment sales contract does not appear in the record, and it is unclear on what evidence the supreme court based its finding that the contract was chattel paper.

117. Under the UCC, knowledge means actual knowledge. N.C. GEN. STAT. § 25-1-201(25) (1965).

118. Clipper might have prevailed if it had filed a financing statement, recording a separate security agreement with the contract as collateral. See Coogan, *Priorities Among Secured Creditors and the "Floating Lien"* in 1A SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (MB) § 7.09(3)(b) (1984); Clark, *Abstract Rights Versus Paper Rights Under Article 9 of the Uniform Commercial Code*, 84 YALE L.J. 445, 450 (1974); Henson, "Proceeds" Under the Uniform Commercial Code, 65 COLUM. L. REV. 282 (1965).

119. *Howerton*, 311 N.C. at 168, 316 S.E.2d at 195. Since Clipper could assert neither title nor security interest superior to Howerton or Finance, Finance prevailed in the declaratory judgment action. *Id.* at 170, 316 S.E.2d at 196-97. The supreme court therefore reversed the court of appeals. *Id.* at 170, 316 S.E.2d at 197.

some cracks in the latticework of the statutes. For example, the 1961 amendments to the MVA declared that "a certificate of title that can be relied upon as a ready means by which all legal interests in motor vehicles may be determined would be to the public interest."¹²⁰ The vehicle in question in *Howerton*, however, was not titled in North Carolina.¹²¹ The provisions in the 1961 amendments for determining interests in untitled vehicles were rather weak; even the strengthening language added to the provisions in 1970 did not encompass all situations.¹²² No provisions yet have been made for cases in which a manufacturer fails to supply an MSO to the dealer to whom he transfers a vehicle. This situation occurs most often when, as in *Howerton*, a manufacturer consigns a car to a dealer. There is no sale or contract to sell between the manufacturer and the dealer at the time the car is transferred to the dealer. The manufacturer retains the car in his inventory. The arrangement is viewed as an offer by the manufacturer to sell the car to the dealer. When the dealer sells the car to a consumer, he may be held to have accepted the offer of the manufacturer, and is bound to pay the manufacturer.¹²³ Cases such as these are expressly removed from the purview of the MVA.¹²⁴ The MVA is silent about the means by which a consumer buying from a consignee-dealer is to learn about the manufacturer's interest in the vehicle. The provisions regarding MSOs do not state whether a transfer to a consumer from a dealer can be valid if the manufacturer has not transferred an MSO to a dealer.¹²⁵ Also, the provisions of the MVA regarding the perfection of security interests by notation on the title certificate do not ap-

120. Act of June 15, 1961, ch. 835, 1961 N.C. Sess. Laws 1134.

121. Record at 13.

122. See *supra* notes 73-74 and accompanying text (discussing provisions of 1961 amendments). The applicable UCC sections provide specifically that a purchaser of chattel paper who gives value for it takes priority over a security interest in that chattel paper if he acts without knowledge of the interest, or "which is claimed merely as proceeds . . . even though [the purchaser of the chattel paper] knows that the specific paper . . . is subject to a security interest." N.C. GEN. STAT. § 25-9-308 (1965). "The obvious intended effect of this provision is to prevent the supplier or financier of a merchant from acquiring an automatic monopoly on the chattel paper of that merchant that results from the sale of the inventory in which the supplier of financier had a security interest." Smith, *Article Nine: Secured Transactions—Perfections and Priorities*, 44 N.C.L. REV. 753, 790-91 (1966); see Coogan, *Priorities Among Secured Creditors and the "Floating Lien"* in 1A SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (MB) (1984).

123. "A principal purpose of consignments is to finance the buyer and maintain a kind of security interest in the seller." Hawkland, *Consignment Selling Under the Uniform Commercial Code*, 67 COM. L.J. 146, 147 (1962). The mere act of consignment does not maintain a true security because the seller may lose the interest in the vehicle when it is sold to a bona fide consumer, and may have no interest in the proceeds. See *supra* notes 104-118 and accompanying text. Note also that a consignment differs from a "sale or return." In a sale or return, the buyer gets complete title to the goods, with an option to return them if unsatisfactory. The seller maintains no interest. See 2 WILLISTON, SALES § 270 (Rev. ed. 1948). The *Howerton* court found the transaction between Clipper and Adventure to be a consignment. *Howerton*, 311 N.C. at 163, 316 S.E.2d at 193.

124. "The provisions of [the MVA] shall not apply to or affect . . . (3) A security interest in a vehicle created by a manufacturer . . . who holds the vehicle in his inventory." N.C. GEN. STAT. § 20-58.1 (1983). See *supra* notes 107-110 and accompanying text.

125. "(a) Any manufacturer . . . shall . . . supply the transferee with a manufacturer's certificate of origin assigned to the transferee . . . (c) no title to a new motor vehicle acquired by a dealer under the provisions of [subsection] (a) . . . shall pass or vest until" the dealer assigns the MSO to the consumer purchaser. N.C. GEN. STAT. § 20-52.1 (1983). It is clear that the dealer cannot transfer the title the manufacturer has transferred to the dealer, unless the dealer assigns the MSO. This section is unclear about the state of title that results from the failure of a manufacturer to deliver an MSO.

ply if a manufacturer has consigned the vehicle to a dealer and maintained the vehicle in the manufacturer's own inventory.¹²⁶ In this situation, the MVA system for utilizing the title certificate (or MSO if no certificate has yet been issued) as a determinative representation of legal interests breaks down.

North Carolina, with the amendments to section 9-302 of the UCC in 1975¹²⁷ and with the *Howerton* decision, has utilized the UCC to prop up the MVA in these situations. A more equitable and efficient system, however, could be constructed by fleshing out the provisions of the MVA.

The provisions of the UCC often are inadequate to resolve disputes arising out of consignment situations such as the one in *Howerton*. In the words of two leading commentators, "the Code's handling of consignments is fraught with uncertainty, and the Code cases on the subject clear up little."¹²⁸ Much of the confusion lies in the interpretation of the UCC sections which provide that consignors may perfect security interests in consigned goods in ways other than by filing financing statements.¹²⁹ Clipper clearly did none of the things which, under the UCC, would have perfected its interest. Even had Clipper attempted perfection as the UCC consignment sections direct, however, Clipper still may not have prevailed; courts often are reluctant to allow such perfection, and cases interpreting these sections have been conflicting.¹³⁰ If the consignor chooses not to file a financing statement, the UCC provides that he can perfect his security interest by posting a sign at the consignee's premises as evidence of his interest.¹³¹ This provision certainly may help to provide notice to bona fide purchasers of consigned vehicles, but it may hinder the DMV in its efforts to centralize recordation of liens. If, on the other hand, the consignor elects to file a financing statement, the bona fide purchaser is put in jeopardy. He may not know that he must search the office of the county register of deeds, where the financing statement may be filed,¹³² to investigate possible liens on consigned vehicles. In ad-

126. *Id.* § 20-58.1.

127. These amendments were basically a compromise. The buying public has come to rely on the MVA "as the primary source of protection and information as to prior liens," while professional lenders and borrowers who deal with inventory as inventory want to retain one-stop financing, and rely solely on the UCC registration system as a recordation device for all liens. *Mack Financial Corp. v. Western Leasing, Inc.*, Bankruptcy No. B74-4082 (C-8) (D. Or. 1975) (unpublished op.), reprinted in SECURED FINANCING FOR THE TRANSPORTATION INDUSTRY 153 (PLI 1980); see also Josephson, *Financing of Trucks* in SECURED FINANCING FOR THE TRANSPORTATION INDUSTRY 41, 45-63 (PLI 1980) (discussion of most common problems arising out of motor vehicles).

128. J. WHITE & R. SUMMERS, *supra* note 1, § 22-4, at 883.

129. The North Carolina UCC provisions allow priority to the consignor's interest if the consignor files a UCC financing statement, places a sign evidencing his interest at the consignee's place of business, or establishes that the consignee is generally known to be in the business of selling the goods of others. N.C. GEN. STAT. § 25-2-326(3) (1965). The *Howerton* court found that Clipper had done none of these things. *Howerton*, 311 N.C. at 164-65, 316 S.E.2d at 193-94.

130. See J. WHITE & R. SUMMERS, *supra* note 1, § 22-4, at 883.

131. See N.C. GEN. STAT. § 25-2-326 (3)(a) (1965).

132. If the collateral which is the subject of the security interest is consumer goods, the financing statement must be filed in the county in which the debtor resides, or if the debtor is not a state resident, then in the county where the collateral is located. N.C. GEN. STAT. § 25-9-401 (1965). Consumer goods are goods bought for personal, family, or household use. *Id.* § 25-9-109. Motor vehicles purchased for personal use are consumer goods. See J. WHITE & R. SUMMERS, *supra* note 1, § 23-7, at 923.

dition, filing financing statements with the county registers of deeds undermines the centralization of lien recordation with the DMV.

Certain other provisions of the UCC may put a consignor such as Clipper at the mercy of a dishonest consignee. The consignee may transfer the consignor's entire title to a consigned vehicle.¹³³ Some courts have suggested that a consignor can curtail these risks "by audits and accounting procedures or he can refuse to knowingly expose himself to the risk with the particular dealer."¹³⁴ Many vehicles are transferred to consignees located at some distance from the consignor, however, so these procedures may be particularly burdensome.

It may be possible to relieve burdens on consignors and consumers by strengthening the provisions of the MVA. Consignors should be required to transfer an MSO to a consignee/dealer. Furthermore, the MSO should indicate the consignment arrangement and any security interest created by the arrangement. The MVA should not allow a dealer to transfer any title to such a vehicle without transfer of this MSO marked "consigned vehicle." When the consumer applies for a title certificate, he would be required to submit this MSO. The DMV thus would have a record of the security interest, and it would be noted on the certificate of title. This security interest would then be treated as other interests recorded under the MVA.

In conclusion, it seems that the *Howerton* court correctly applied the letter of the law existing at the time of the decision. This decision, however, should alert the general assembly to possible flaws in the framework of the MVA. The general assembly should take steps to shore up this framework by lessening the scope of the *Howerton* court's decision to apply the UCC over the MVA. It would be inconsistent with the policy of the state if the UCC were to be substituted for the MVA as the guide for determining all legal interests in motor vehicles. The general assembly has spent fifty years fashioning a reliable certificate of title statute. The *Howerton* decision should not be allowed to eviscerate the statute. An updating of the MVA to regulate consignment sales more strictly will ensure the continuing vitality of the MVA.

PETER JAMES MCGRATH, JR.

133. N.C. GEN. STAT. § 25-2-403(2) (1965). See *supra* notes 104-106 and accompanying text.

134. Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261, 270, 288 N.Y.S.2d 525, 533 (1968).