‘The Nemo Dat Rule: A Balancing Act’

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Abstract

An examination of the current position of the law in relation to the sale of goods and more specifically, the *nemo dat* rule; that no one can give what he or she does not have. Attempting to assess whether our law strikes an adequate balance between the innocent purchaser and the legal owner.

In assessing whether an adequate balance has been achieved, the essay has addressed each exception to the rule individually, the most controversial of these being the market overt exception, which is ultimately recommended for reform.

The essay then compares and contrasts the protection which is provided to the bona fide purchaser of property in most legal systems, except if the property is stolen. This principle stems from the recognition of the intolerable disruptive effect that a contrary rule would have on a free market economy and a system of private property.

In most common law jurisdictions, the original owner retains title to the property even after it has been stolen and even if there have been several subsequent purchases by individuals who were unaware they were buying stolen goods. In contrast the vast majority of civil law systems accord greater protection to the possessor in good faith of stolen property.

The essay then goes on to criticize various aspects of the rule and its exceptions, much of the research on this section produced damning results, that the exceptions to the *nemo dat* rule are over complicated; lack an underlying and unifying rational; overlap in ways that are inconsistent and incoherent and that the rule itself is archaic and outdated.

Finally, to resolve these criticisms the essay suggests various methods of reform to modernize the rule which involves abolitions, repeals and harmonization. The essay concludes, essentially that a system much like that of the United States Uniform Commercial Code should be adopted.
1. Introduction.

In this essay I will attempt to examine the current position of the law in relation to the sale of goods and more specifically, title conflicts over property, together with an explanation on how the law has reached this position. Denning LJ refers to two principles in *Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Ltd* \(^1\), the first relates to the *nemo dat rule*. It has long been axiomatic that the basic rule for sales carried out without authority is that expressed in the maxim *nemo dat quod non habet*: no one may give what he or she does not have.\(^2\)

This rule is fundamental to the law of personal property. Although the essence of the rule is the protection of personal property, its scope has been read down so as to accommodate a competing and equally important principle - the protection of commercial transactions. Although both competing principles can be justified on an economic basis\(^3\), nevertheless certain exceptions have arisen designed to protect the innocent purchaser who takes for value and without notice any defect in the seller's title.\(^4\) These exceptions have been developed to mitigate the perceived unfairness of the rule. The first of these is what Denning referred to as the second principle which has striven for mastery, this is the exception is known as the market overt exception. This exception accrues where the buyer purchases in good faith without notice of any defect in title. In such circumstances the normal solution where the original owner would reclaim his property is void.

It is indeed questionable whether our law strikes an adequate balance between the innocent purchaser and the legal owner, I will attempt to address this issue throughout this essay. I will also make reference to the approach of other jurisdictions in relation to this rule. Finally, I will provide some critical analysis and make some suggestions for the reform of the *nemo dat rule* and its exceptions.

2. The Rule

The idea behind the *nemo dat rule* is the preservation of proprietary interest of the true owner. The common law has a long history of protection of proprietary rights and has

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\(^1\) [1949] 1 KB 322, 336-7

\(^2\) Tortious interference with goods in New Zealand: The law of conversion, detinue and trespass. Cynthia Hawes University of Canterbury 2010 at Pg. 119.


\(^4\) The Nemo Dat rule and estoppel by representation and estoppel by negligence. Moorgate mercantile co ltd v Twitchings by Kanjian, Ken. Sydney Law Review, ISSN 0082-0512, 1976, Volume 8, p. 698
always chosen to cooperate on the side of the proprietary right owner. This strong protection of proprietary rights in the nemo dat rule was induced by the Roman law during the thirteenth century. It was not until the eighteenth century that, because of the recognition of the idea of credit and also the evolution of trade and commerce was there a need to bring in some kind of legally recognized protection to bona fide purchasers of goods.5

The basic rule is set out in section 21 of the Sale of Goods Act 1893:

(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.

(2) Provided also that nothing in this Act shall affect—

(a) the provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Thus a thief who steals goods cannot pass good title to any purchaser however innocent. However, exceptions to the nemo dat rule have developed to take account of cases in which there is a genuine competing interest. 6

Unless one of the exceptions to the nemo date rule applies, the effect of the rule is that an owner is entitled to recover possession of the goods from a person who is wrongfully in possession of them. The owner may take the goods from the other person, or bring an action in detinue to recover the good and/or damages.7 Further, any person who has wrongfully converted the goods either to their own

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use or to the use of another will be liable in damages for wrongful interference (conversion).\textsuperscript{8}

\textbf{3. The exceptions to the nemo dat rule.}

A. Market Overt

It as a long established exception to the nemo dat rule, that “where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller”\textsuperscript{9}

This exception historically encouraged sales to take place in recognized markets by allowing the transfer of good title in goods with defective title. If the purchaser was a bona fide purchaser without notice of the defective title and brought the goods in a market overt, the bona fide purchaser would get the goods free from any prior defect in title.\textsuperscript{10} The effect of a sale in market overt was to give the buyer a “perfect” new title good against the whole world. All the remaining nemo dat exceptions confer only a relatively good title.\textsuperscript{11}

There is no particular registration system or catalogue of market overt, they are determined on a case by case basis, although such case law is relatively limited in Ireland. However, it was held in Gangley v Ludwig (1876) that the old Prussia Street cattle mart in Dublin was in fact a market overt.

Some academics are not in favor of this exception. Davenport and Ross claim that ‘it is an exception which can be politely characterized as an obsolescence. More accurately it can be characterized as an ugly medieval relic, the only benefit of which is to assist in the sale of stolen goods’.\textsuperscript{12} In truth, the rules of medieval markets have no place in the law to-day.\textsuperscript{13} Nonetheless it is still in force today, for better or worse.


\textsuperscript{9} Section 22, Sale of Goods Act 1893.

\textsuperscript{10} Resolution of Rival Claims to Ownership – Or is it? ExpressO (2009)


B. Estoppel

Of all the exceptions to the nemo dat rule none is more difficult to state with accuracy than that embodied in the concluding words of section 21(1) of the Sale of Goods Act, 1893, and generally referred to as estoppel.\(^{14}\) There are several types of estoppel but the two illustrations relevant to this section are estoppel by negligence, and estoppel by representation.\(^{15}\)

Estoppel by representation
Estoppel by representation occurs where the owner by words or conduct misleads a third party into thinking the owner does not own the goods but they are owned by the person in possession. To act as an exception to the nemo dat, estoppel by conduct requires that the owner, and for the third party to act on that impression to his detriment.\(^{16}\)

Estoppel by negligence
Estoppel by negligence could be proven if the true owner by his faulty actions or omissions allowed a third party to represent to another that the third party was the true owner or that the third party had the authority from the true owner to sell the goods. To establish a claim of estoppel by negligence, the claimee not only has to prove that the true owner had in fact been in fault, but also need to show that there was a relationship which gave rise to a duty of care, the breach of that duty and also damages caused by the breach. Because an owner of any property owns no general duty of care that the owner needs to stay in possession of the goods, it is only in exceptional cases where estoppel by negligence could be pleaded. In the case of Mercantile Credit Co Ltd v Hamblin\(^{17}\) the court held that due to the circumstances of the factual situation, a duty of care was establish, which fulfilled the first part of the requirement of estoppel by negligence, but the plaintiff could not establish a breach of that duty – the chain of causation was held to be broken.\(^{18}\)

C. Buyer in Possession

Like other exceptions to the nemo dat rule, the courts have always taken the interpretations of the relevant legislation provisions narrowly; the buyer in possession is


\(^{17}\) [1965] 2 QB 242

\(^{18}\) Sara F L Tsui. 2009. "Resolution of Rival Claims to Ownership – Or is it?" ExpressO. City University of Hong Kong.
no exception to the narrow interpretation. To satisfy and be protected by these sections, the innocent buyer must satisfy certain criteria as specified in the legislation, and there are several which are worth special mentioning.

First, the innocent buyer must have either bought the goods or agreed to buy the goods. Second, the buyer must have obtained consent from the seller to be in possession. The way in which the consent was obtained does not matter, as long as there was real consent. Third, the buyer must deliver or transfer the goods under any sale, pledge or other disposition. Finally, any subsequent buyer must receive the goods in good faith and without notice.

The effect of this position is that the buyer who, before paying the seller, has been given possession of the goods or of documents of title to the goods under his contract of sale with the true owner can pass a good title to a bona fide buyer for value without notice. This is because the buyer in possession is treated as a mercantile agent in possession with the owner’s consent and therefore has the right to sell. The possession of the first buyer must be continuous and there must be a delivery by that buyer of the goods or the documents of title to the goods, to the bona fide second buyer under an agreement to transfer title in the goods. The disposition by the first buyer has the same effect as that by a mercantile agent so that it may be necessary to show that the sale to the second buyer was in the ordinary course of business of the first buyer.

D. Seller in Possession

White suggests that possession can give the impression of ownership. However, when considering this issue one must remember that, possession and property are two separate concepts, and as we have seen property in goods can pass before or after physical possession passes. For this reason, section 25 of the 1893 Act, is designed to protect persons who deal with sellers or buyers in possession of goods but who no longer, or do not yet, own the goods.

19 Sara F L Tsui. 2009. "Resolution of Rival Claims to Ownership – Or is it?" ExpressO
20 Sara F L Tsui. 2009. "Resolution of Rival Claims to Ownership – Or is it?" ExpressO
21 F White, Commercial Law (Roundhall, Dublin 2002) pg.425
22 F White, Commercial Law (Roundhall, Dublin 2002) pg. 425
24 Which mirrors sections 8 and 9 of the Factors Act 1889.
25 F White, Commercial Law (Roundhall, Dublin 2002) pg.419
This section acts to protect a third party provided that they buy the goods in good faith and without notice of the previous sale; and they actually take delivery of the goods or documents of title from the seller or mercantile agent acting for them.  

There are four requirements which must be present for section 25(1) to apply to protect. These are as follows;
1. There must be a sale from the seller to buyer No.1.
2. After the sale, the seller must “continue to be in possession”.
3. The seller must deliver or transfer the goods to Buyer No.2 under any sale, pledge or other disposition.
4. Buyer No.2 must receive the goods in good faith and without notice.

E. Voidable Title

This exception found in Section 23 of the Act depends on the true owner not yet having taken steps to have the voidable title of the seller set aside. In such circumstances the “buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defective title”.

Under section 23 of the SOGO, a bona fide purchaser of goods may be able to obtain good title of goods purchased from a seller with voidable title, if at the time of purchase, the seller’s title had not be avoided. This effectively allows the bona fide purchaser better protection and title over the true owner in situations of fraud. To gain this protection, the purchaser must have purchased the goods before the title of the third party had been avoided. This is all about timing. In the case of Car and Universal Finance Ltd v Caldwell the court held that the notification of fraud to the police was considered to be effective rescission of title by the true owner.

The most common example of a voidable title at common law is one which has arisen because of misrepresentation, innocent or fraudulent, by the buyer. It is voidable at the 

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27 The transaction between the seller and buyer must be a sale within the statutory definition of the 1893 Act. Where the transaction is merely an agreement to sell, section 25 will not apply.


30 [1965] 1 QB 525

31 Resolution of Rival Claims to Ownership – Or is it? ExpressO (2009)
option of the owner/seller. Where the seller of goods (that is, the first buyer) has a voidable title, but their title has not been avoided at the time of the subsequent sale to an innocent third party, the third party acquires a good title. Conversely, no person can pass a good title under section 23 after the contract has been rescinded.  

In Shogun Finance v Hudson, a case pertaining to this matter, the court had the opportunity to reconcile the decisions of the Court of Appeal in Lewis v Avery and Ingram v Little. Their Lordships took the view that the same rules should apply in both situations where contracts were made face-to-face or at a distance or in writing. It seems therefore that the law remains very much as it was before the Shogun decision. Due to the incoherent judgements in this case it would therefore appear that Cundy v Lindsay, Lewis v Avery, and Phillips v Brooks all remain good law.

F. The Factors Act Exception.

This exceptions related to sales or pledges made by a mercantile agent. The exception is embodied in section 2(1) FA 1889. For this exception to operate, the goods must have been entrusted to the mercantile agent in his capacity as mercantile agent. Although the capacity in which the mercantile agent has possession of the goods cannot be apparent to the third party, the exception operates because of the conduct of the owner in entrusting them to the mercantile agent in that capacity.

This principle developed from the 18th century onwards, as it had become common for merchants wishing to sell goods to entrust them to agents. An agent who was entrusted with possession of goods was often referred to as a “factor”. Such agents usually had a general authority to sell goods on behalf of their principal. Clearly where an agent acts within the scope of his actual authority in dealing with his principal’s goods the principal will be bound and the purchaser will acquire title to the goods. It is also the case in the law

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33 [2003] UKHL 62; [2004] 1 All ER Comm 332
34 [1971] 3 WLR 603
36 Bradgate, Commercial Law 3e, Oxford University Press, 2006, at 17.4.1
37 Staff Motors remains good authority on this point.
38 It is also said that the requirement that goods be entrusted to the agent in his capacity as mercantile agent stems from the wording of the original 1825 exception which used the word “intrusted”. See further Sealy & Hooley, Commercial Law, p. 345 and M. Bridge, The Sale of Goods (Oxford 1997), p. 435.
of agency that if the agent is acting within the scope of his “apparent” or “ostensible” authority, the principal will also be bound because he is estopped from denying that the agent was acting with authority. 40

Therefore, where a mercantile agent is in possession of the goods or a document of title, with consent of the owner, and, as a mercantile agent, sells the goods in the ordinary course of business, the buyer will receive good title, provided he buys in good faith without any notice of any defect of title.41

G. Sales under special powers of sale or orders of the court

Section 21 (2)(b) of the 1893 Act provides that nothing in the Act shall affect the validity of any contract of sale under any special common law or statutory power of sale under the order of a court of competent jurisdiction.42

A contract in such circumstances will then be effective to pass title notwithstanding that the owner does not consent. This might validate a sale by a person holding a lien over goods or where the goods have been seized pursuant to a court order to satisfy a judgment debt.43

4. Comparing and Contrasting Irelands approach to addressing this issue with other jurisdictions.

Protection is provided to the bona fide purchaser of property in most legal systems, except if the property is stolen. This principle stems from the recognition of the intolerable disruptive effect that a contrary rule would have on a free market economy and a system of private property. As has been demonstrated thus far the common law nemo dat rule prevents someone conveying that which they do not have. As a result, in common law jurisdictions, the original owner retains title to the property even after it has been stolen and even if there have been several subsequent purchases by individuals who were unaware they were buying stolen goods.44 The vast majority of civil law systems, including


42 F White, Commercial Law (Roundhall, Dublin 2002) pg. 429


44This has however been modified by the legislatures in the form of statute of limitation, imposing limits on plaintiffs.
most of Western Europe, Japan and Mexico, accord greater protection to the possessor in good faith of stolen property. 45

A. England.
England initially developed the Sale of Goods Act 1893, which was adopted by Ireland, Australia, New Zealand and Canada, in various forms. After the Twelfth report in 1966, the legislature drafted a new Sale of Goods Act which was enacted in 1979. Ireland is in much need of an overhaul such as this.

B. America.
United States laws governing bona fide purchasers reflect the traditional common law view regarding international trade in goods46. According to United States law, "where the owner loses or is robbed of his property and the finder or thief attempts to sell or pledge it without consent, the owner may follow and reclaim it no matter in whose possession it may be found."47

The extreme complexity of the law in relation to the Nemo dat rule compares unfavorably with the simplicity of Art. 2-403 of the Uniform Commercial Code, which, while less comprehensive deals effectively with the most common problems.48 The American system provides the strongest instruments protecting ownership rights. Each state in the United States has its own laws regarding stolen property, substantially all of these laws are modeled after the UCC.49 The Universal Commercial Code makes a clear distinction between two types of circumstances: entrustment of property which can lead to a transfer of title, and circumstances involving theft where title cannot pass. A certain chance for a purchaser in good faith to keep the purchased object is provided by the statute of limitations. But, such case does not entail the transfer of title but effective bar of the owner’s claim, which in practice gives the same effect.50

45 Art and cultural heritage: law, policy, and practice By Barbara T. Hoffman Cambridge University Press (December 5, 2005) pg. 90


C. France
Conversely, the French system is an example of an intermediate solution adopted in the majority of laws. The archaic principle of Art 2279 of the Napoleonic Code (French Civil Code), ‘la possession vaut titer’ was extensively supplemented in practice by jurisdiction. This article provides that a buyer in good faith acquires an overriding title provided that he takes possession: ‘possession is equivalent to title’. Article 2280 of the Code further provides that, where the goods are lost by, or stolen from, an original owner, their purchase at a fair or market, a public sale, or from a merchant selling similar goods, allows the purchaser to retain them until he is reimbursed for the price by the original owner.

D. Germany
In Germany, the laws applicable to bona fide purchasers of stolen property are contained in the German Civil Code. The code provisions governing the transfer of movables are Bdnrgerliches Gesetzbuch (BGB) s.926-36. Under these provisions, a purchaser in good faith acquires good title to property, regardless of the seller's ownership rights, unless prohibited under BGB s.935. Section 935 states in pertinent part: "The acquisition of ownership based on s.932-34 does not take place, if the thing has been stolen from the owner, becomes missing or is otherwise lost."

German laws governing the bona fide purchaser generally resemble the provisions in the UCC. However, under German law, the bona fide purchaser benefits from additional protections not found in the UCC. Unlike American law, the German doctrine of Ersitzung allows the bona fide purchaser to perfect his title in stolen property if he obtains the property in good faith and continues to hold it without notice of defect for ten years from the time the owner lost possession of the property. Thus, under certain circumstances, the bona fide purchaser in Germany can acquire property from a thief.

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In the English House of Lords case of Shogun Finance Ltd v Hudson\(^{55}\), Lord Millett in his dissenting judgment made reference to his preference to the approach of German law.

**E. Switzerland**
Swiss law also favors the bona fide purchaser. A purchaser of stolen property in Switzerland acquires title superior to that of the original owner if he purchases the property in good faith. To conclude that a purchaser did not act in good faith, "a court must either find that the purchaser actually knew that the seller lacked title, or find that an honest and careful purchaser in the particular circumstances would have [had] doubts with respect to the capacity of the seller to transfer property rights." Swiss law presumes that the purchaser acted in good faith.\(^{164}\)

**F. Italy**
The Italian Civil Code of 1942 exemplifies a contrary approach to the traditional common law rule favoring the true owner. Italian law favors the bona fide purchaser even in cases of theft where the true owner did not voluntarily give up possession of the property; it therefore discards the traditional approaches to laws governing the transfer of stolen goods.\(^{57}\) This is the most extreme solution adopted for the protection of a purchaser in good faith and Art. 1153 of the Italian Civil Code is very explicit about such protection. The mode of acquisition mentioned in this article makes no concessions for stolen property. It can be acquired only by usucapio, that is, in the case of ad faith, on the lapse of twenty years.\(^{58}\)

**G. Poland**
In the Polish legal system, the issue of purchasing from a non-owner is essentially formulated in a similar way to the French. It is regulated by one relatively simple provision, which stipulates that the purchaser obtains the ownership title when he takes possession of the property in question, unless he has acted in bad faith. But if the property stolen, missing or otherwise lost from its rightful owner is transferred before the term of three years from the date on which it was lost or stone, the purchaser gains the ownership

\(^{55}\) [2003] UKHL 62, [2004] 1 AC 919 at pg. 84-86


title to it only after these three years pass. This reservation, however, does not apply, among other cases, to official public tenders and sales.59

5. Criticisms of the nemo dat rule and its exceptions.

As evidence by the previous sections of this paper, the exceptions to the nemo dat rule are over complicated, lack an underlying and unifying rationale, and overlap in ways that are inconsistent and incoherent.60 Atiyah, for example, describes the statutory provisions in this area as ‘complex and confused’.61 Thus, there have been suggestions that the nemo dat rule and the various exceptions to it should be repealed and replaced by a single, more coherent principle62, for example in the way which the United States have enforced it.

Aside from being archaic, another general criticism put forward by the Sales Law Review Group relates to the ‘all or nothing’ nature of the rule and exceptions. With the rule and it’s exceptions there will always be one ‘winner’ and one ‘loser’ even though theoretically both parties are ‘innocent’.63 Ingram v Little64, Devlin L.J. observed that; the loss “should be divided between them in such circumstances” (where both parties are innocent).

There are many other exceptions put forward by the Review Group. Criticisms which include; the market overt exception, the lack of clarity surrounding ‘good faith and ‘without notice’, the misplacing of section 26, the duplication of an exception in the Factors Act and Sale of Goods Act 1893.

The group also, make reference to some case law criticisms including; the interpretation of section 21(1) being too narrow, the imbalance in the burden of proof under section 23, the difficulty that exists in determining whether a contract is void or voidable, the situation where a voidable title has not been made void and finally, the operation of section 25(2).


In the report the review group go on to make recommendations for reform in light of these criticisms, I will deal with the areas that the group criticize which are further suggested for reform, as they must be the most prudent in the eyes of the Review Group.

A. Market overt exception.
The market overt exception in section 22 has been criticized as being archaic and anomalous in its application and as inappropriate in a modern commercial context.\textsuperscript{65} It has been further suggested that it operates as a ‘thieves’ charter’ in that it is the only exception to the nemo dat rule which allows title in stolen goods to pass to an innocent third party purchaser. Two main approaches to its reform can be distinguished. First, by the extension of the rule to all retail sales as recommended in the 1960s by the UK’s Law Reform Committee.\textsuperscript{66} Secondly, by repeal of the rule, which has has been the dominant approach.

In explaining the abolition of the market overt exception in England, Goode said that “a rule designed to promote honesty among buyers and the integrity of the market came to be seen as providing a charter for thieves”\textsuperscript{67}. This point is also raised by Sealy & Hooley, who said that the rule had “attracted criticism because it facilitated, and perhaps even encouraged, trafficking in stolen goods.”\textsuperscript{68}

B. Burden of proof of good faith and lack of notice.
A second issue relates to the burden of proof of good faith and lack of notice which is placed on the third party buyer. The nemo dat exceptions require that the buyer must act in good faith and without notice of the seller’s defect in title. However, in court it is the original owner (the plaintiff) who has to disprove that the third party buyer acted in good faith without notice of title.\textsuperscript{69} It is highly unfair that this burden be put on the plaintiff. The UK Law Reform Committee recommended the reversal of this burden of proof, though its recommendation has never been implemented.\textsuperscript{70}

C. Section 23 and the difficulty that exists in determining whether a contract is void or voidable

\textsuperscript{66} UK Law Reform Committee 12th Report, op. cit., paras. 30-35.
\textsuperscript{67} Roy Goode, Commercial Law, 3rd edn (Lexis Nexis 2004)
\textsuperscript{68} Appraising the Market Overt Exception, Ji Lian Yap.
\textsuperscript{69} It was held in Whitehorn Bros v Davison [1911] 1 KB 463. that, under section 23, it is for the original owner to prove that the purchaser did not act in good faith and without notice.
\textsuperscript{70} Twelfth Report of the Law Reform Committee, Transfer of Title to Chattels, Cmnd 2958 (1966), para 25.
A third problem arises for the Sales Law Review Group in relation to section 23 and the difficulty that exists in determining whether a contract is void or voidable. The case law on this distinction has been and remains confused and overly technical.\(^{71}\) Abolition of the distinction was first proposed by UK Law Reform Committee in its 12th Report, though its recommendation has not been implemented. The position in the US under the Uniform Commercial Code achieves a similar effect.\(^{72}\)

D. Operation of section 25(2) regarding cases where the buyer is in possession of the goods

A final issue that has caused difficulty and raises concerns for the Sales Law Review Group is the operation of section 25(2) regarding cases where the buyer is in possession of the goods. In this situation the buyer turns into a ‘mercantile agent’ when dealign with a sub-buyer.\(^{73}\) In case law is has been demonstrated that a defendant can acquire good title to the goods if it can be said that the rogue seller had acted in the same way as a mercantile agent. However, the Group noted that this seems to read into the statute a meaning which is not there and it is not clear whether an Irish court would adopt such an interpretation.\(^{74}\) Indeed, the Australian courts have rejected this line of reasoning.\(^{75}\) The UK Law Reform Committee also recommended that the dicta in this case be reversed.\(^{76}\)

E. The duplicate exception.

A final criticism of the statutory framework concerns the fact that similar, though not identical, exceptions to the nemo dat rule at section 25 of the 1893 Act co-exist in a separate statute, namely sections 8 and 9 of the Factors Act 1889. This “virtual duplication”\(^{77}\) has been rightly questioned in the view of the Review Group, and they suggest that there is a strong case for the consolidation of these overlapping rules in sale of goods legislation.\(^{78}\)

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\(^{71}\) Shogun Finance v Hudson [2003] UKHL 62.


\(^{73}\) As was interpreted in Newtons of Wembley Ltd v Williams [1965] 1 QB 560..


\(^{75}\) Gamer’s Motor Centre(Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd (1987) 163 CLR 236.

\(^{76}\) Twelfth Report of the Law Reform Committee


\(^{78}\) Their repeal was proposed in the Diamond Review of Security Interests in Property and has also been recommended by Bridge, ‘Do we need a new Sale of Goods Act?’, op. cit., para. 2.27. See also Thorneley, J. ‘Thieves, Rogues, Innocent Purchasers and Legislative Tangles’, [1988] C.L.J. 15.

A. The market overt exception.
The newly released recommendation of the Sales Law Review Group is to repeal the market overt exception. As mentioned in the previous section this exception is viewed as archaic and anomalous. All major jurisdictions in the common law world have either abolished or rejected at the outset the market overt rule.\textsuperscript{79}

I am in favour of repealing the market overt exception. The remaining question is whether a new rule should be provided to replace it as Professor Howells has said, "abolition of the market overt rule by itself is only a partial solution to the problems which are encountered in this area of the law".\textsuperscript{80} Professor Diamond\textsuperscript{81} has proposed replacing the market overt rule with a new principle that where an owner has entrusted the goods to, or acquiesced in their possession by, another person, a disposition by that person would pass good title to innocent purchasers.

B. Harmonise the burden of proof for all of the exceptions.
As noted in the previous section, the burden of proof under section 23 of the Act forces the original owner to prove that the buyer bought the goods in the absence of good faith and with knowledge of title. The opposite applies to all other exceptions, thus I concur with the Sales Law Review Group that the burden should be harmonized across all of the exceptions.

C. Simplify section 23 by abolishing the distinction between void and voidable.
The abolition of this distinction would ensure that an original owner who has dealt with a rogue would bear this risk, rather than innocent third party purchasers. Lord Devlin criticized this distinction, in his view the only question is which of the two, A or C, will bear the loss caused by B's act.\textsuperscript{82} The Twelfth Report\textsuperscript{83} also recommended that the distinction between void and voidable contracts be abolished for the purposes of C's title. This recommendation, however, was not adopted in the 1979 Sale of Goods Act.

D. Operation of Section 25.

\textsuperscript{79} The Law Reform Commission of Hong Kong, Supply of Goods Sub-Committee, Consultation Paper, Contracts for the Sale of Goods. 2000. At Pg. 221


\textsuperscript{82} Ingram v. Little [1961] 1 Q.B. 31.

\textsuperscript{83} Law Reform Committee, Twelfth Report, \textit{Transfer of Title to Chattels}, April 1966.
The Sales Law Review Group recommend that section 25 is amended to address the ruling in Newtons of Wembley Ltd v Williams\textsuperscript{84}, in which the court developed the principle that the second buyer will only be protected if the first buyer behaved as a mercantile agent would have behaved - that is, according to the normal business practice of such mercantile agents.\textsuperscript{85} The Group suggest that this is done by bringing subsection (2) into line with subsection (1) so as to enable a good title to be acquired by an innocent purchaser regardless of whether or not the person with whom he was dealing appeared to be acting in the course of a business.\textsuperscript{86}

E. Repeal sections 2, 8 and 9 of the Factors Act 1889
The Review Group propose (and I support) that sections 2, 8 and 9 of the Factors Act 1889 be repealed, but that they are consolidated in new sale of goods legislation. These sections are substantially reproduced in section 25 of the Sale of Goods Act and no one has been able to say whether the verbal differences make any legal difference; the explanation offered by Chalmers' Sale of Goods Act in the notes to section 8 of the Factors Act is patently unconvincing.\textsuperscript{87}

F. Notice of recession.
Although the Review Group fail to make any criticisms of section 23 in this context, they nonetheless propose to amend the section to address the ruling in Car & Universal Finance Co Ltd v Caldwell.\textsuperscript{88} In this case the court held that the notification of fraud to the police was considered to be effective rescission of title by the true owner.\textsuperscript{89} The effect of this judgement has been substantially to curtail the protection afforded to third parties under section 23. The Review group recommends that section 23 be amended to provide that, unless the other contracting party is notified of the rescission of the contract, an innocent purchaser from this party should acquire a good title to the goods.\textsuperscript{90} However, this does not cover the entire issue in my view, the Group have failed to deal with the likely situation where the rogue absconds.

\textsuperscript{84} [1965] 1 QB 560
\textsuperscript{88} [1965] 1 QB 525.
\textsuperscript{89} 2009 Resolution of Rival Claims to Ownership – Or is it?
7. Conclusion.

Throughout this paper I have considered Denning LJ’s comments, in doing so I have supported his position. I would be of the opinion that Lord Goff was mislead in his approach to the question when he said that those sections in the Act that followed s.21(1) ‘appear to be minor exceptions to that fundamental principle’\footnote{National Employers’ Mutual General Insurance Assocn Ltd v Jones [1990] 1 AC 24} Although, there is without argument a definite battle for mastery, one should not forget the utter mess that is the statute in relation to this area. I have compared and contrasted many other jurisdictions with our own, in reflection, I would advocate the adoption of legislative reform in line with the Uniform Commercial Code. This in my opinion, would balance the scales in relation to that enunciated by Denning LJ.
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