

THE BUYER IN POSSESSION EXCEPTION TO THE *NEMO DAT* RULE REVISITED

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It is an all too frequent experience for buyers of goods, usually motor vehicles, to find their title now challenged by someone claiming to be the rightful owner. The buyers had purchased in good faith seemingly from the owner or the owner's duly authorised agent. Now they discover otherwise. Their seller had no right to sell the goods.

The purpose of this article is to consider one of the principal exceptions to the general rule that the buyer acquires no better title to the goods than the seller had: *nemo dat quod non habet*.¹ Under section 27(2) of the Sale of Goods Act 1908² a so-called buyer in possession is able, under certain conditions, to pass a good title to an innocent buyer taking delivery of the goods. Two recent and fully reasoned decisions of the highest level in Australia and England have shed significant light on the buyer in possession exception: *Gamer's Motor Centre (Newcastle) Pty Ltd v. Natwest Wholesale Australia Pty Ltd*³ and *National Employers' Mutual General Insurance Association Ltd v. Jones*⁴ respectively.

Before proceeding further, it seems salutary to return to the basic dilemma facing the courts in these unfortunate contests between innocent owners and buyers. The tension engendered by the conflicting principles at work in these unenviable situations is never far below the surface. Given the difficult issues raised by the, at times, complex statutory provisions governing transfer of title by non-owners,⁵ the courts are inevitably forced back to the competing policies underlying the sections.

I. THE DILEMMA

The classic statement of the dilemma posed by sales by non-owners is, of course, that by Lord Denning in *Bishopgate Motor Finance*.⁶

In the development of our law, two principles have striven for mastery. The first is the protection of property: no one can give a better title than he himself possesses. The second is the protection of commercial transactions: the person who takes in good faith and for value without notice should get good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.

Both competing principles can be justified on an economic basis⁷. Buyers

¹ Literally — "He who hath not cannot give" *Black's Law Dictionary* (5th ed.1979) at 935.

² The English equivalent to the New Zealand provision is s.25(1) Sale of Goods Act 1979 (U.K.) (formerly s.9 Factors Act 1889). In Australia see e.g. s.28(2) Sale of Goods Act 1923 (N.S.W.) and s.31 Sale of Goods Act 1958 (Vic.).

³ (1987) 163 C.L.R. 236.

⁴ [1988] 2 W.L.R. 952.

⁵ See ss.23-27 Sale of Goods Act 1908 (N.Z.); s.4 Mercantile Law Act 1908 (N.Z.).

⁶ *Bishopgate Motor Finance Corp.Ltd v. Transport Brakes Ltd* [1949] 1 K.B. 322 at 336-37.

⁷ See B.Kozolchyk, "Transfer of Personal Property by a Nonowner: Its Future in light of its Past" (1987) 61 Tulane L.Rev. 1453 at 1455.

may be wary of purchasing unless there is an assurance they will not be deprived by an unknown owner or creditor. But trade may also be stifled unless entrusting owners' expectations of recovering their goods are protected. Whether protection of the owner in such circumstances is less detrimental to the free flow of trade than protecting the buyer or vice versa, is a difficult empirical question which no one so far has satisfactorily answered.⁸

Whatever the economic ramifications of the choice, the common law has firmly favoured the protection of proprietary rights. As Goode observed:⁹

It is an article of faith in the common law that only in exceptional cases should the owner of goods be deprived of his title to them otherwise than by his own voluntary act. *Nemo dat quod non habet* . . . The fact that the transferee takes possession in good faith and for value is in most cases irrelevant. It is for him to check on his seller's title, if he can, not for the owner to take steps to safeguard his property.

Whilst the Sale of Goods Act 1908 (the Act) enshrined the *nemo dat* rule in section 23(1) it also, as Lord Denning noted,¹⁰ provided certain exceptions. Conceivably the positing of the exceptions immediately alongside the general rule might lead one to surmise that the two competing principles are evenly balanced or even that the protection of commercial transactions supersedes the protection of property. However any suggestion that the general rule has somehow been "swamped" by the exceptions has been firmly rejected. A "gulf"¹² still remains and the "succeeding sections [to section 23(1)] enact what appear to be *minor* exceptions to that fundamental principle"¹³. An illustration of the loyalty to the preservation of proprietary rights (which also exemplifies the dilemma judges face) is provided by the New Zealand decision, *Elwin v. O'Regan & Maxwell*.¹⁴ One of the more interesting arguments raised was whether there came a point in a lengthy chain of transactions at which the original owner's title must be extinguished. Surely the *nemo dat* rule must only stretch so far. Somewhat reluctantly, Beattie J. felt obliged to reject this contention which might otherwise have seriously eroded the fundamental principle:¹⁵

While I can appreciate the hardship that is demonstrated by finding against this argument and the difficulty that later purchasers in the chain are confronted with concerning making of fruitful inquiries, regrettably it seems to me the principle of 'nemo dat quod non habet' is applicable.

In grappling with this invidious choice between the two innocents, it seems only natural that the courts should move towards conceptualising the problem

⁸ This, in many commentators' views, is the achilles heel dogging reform efforts. See e.g. P.S. Atiyah's criticism of the U.K. Law Reform Committee's Twelfth Report and its failure to canvass the empirical evidence concerning sales by non-owners: Atiyah, *The Sale of Goods* (7th ed.1985) at 306.

⁹ R.M. Goode, *Commercial Law* (1982) at 392.

¹⁰ *Bishopgate*, supra n.6. The principal exceptions in New Zealand are: estoppel (s.23(1)); sale by a mercantile agent (s.23(2)(a)); sale under a voidable title (s.25), and sales by sellers (s.27(1)) or buyers in possession (s.27(2)). See generally J.H. Farrar (ed.) *Butterworths Commercial Law in New Zealand* (1985) ch.15.

¹¹ Atiyah, supra n.8 at 268.

¹² Goode, supra n.9 at 393.

¹³ Lord Goff of Chieveley in *National Employers'*, supra n.4 at 961 (emphasis mine).

¹⁴ [1971] N.Z.L.R. 1124.

¹⁵ *Ibid.* at 1132.

in terms of gradations of innocence. Is one party “more innocent” than the other? Certain themes from the caselaw emerge.¹⁶

Sometimes the courts emphasise the innocence of the buyer who would be “inevitably unaware of the legal rights which fetter the apparent power to dispose”.¹⁷ As the Minister of Consumer Affairs recently remarked:¹⁸

The consumer purchases the vehicle in good faith and does nothing wrong. Why should she or he have to suffer through a long song and dance to receive what was paid for?

Related to this is another persistent theme emphasising that since it was the owner who initiated the process and put the transaction in motion it seems fairer he should bear the loss.¹⁹ The well-known dictum of Ashhurst J. in *Lickbarrow v. Mason* best exemplifies this attitude.²⁰

[W]herever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

The owner in entrusting the goods to an intermediary necessarily takes a chance on the latter’s integrity and must appreciate that there is a risk of unauthorised disposition.²¹ Of course this argument is a double-edged sword. For when the owner is parted from the goods in a non-voluntary way and there is no semblance of consent to the intermediary’s possession (not even consent induced by fraud or deception) the sympathy of the court is reversed. There is nothing blameworthy on the owner’s part to point to when his goods are stolen. He should not be held responsible where he did not entrust goods nor trigger the unfortunate chain of events. He is the “more innocent” of the two. Moore J. in *Brandon v. Leckie* articulates this solicitude for the owner in such situations:²²

It simply does not seem logical that the Legislature of this Province, in its wisdom, would enact legislation the effect of which would be to preclude a true owner, *who has done no wrongful act*, from attempting to regain and in fact regaining a chattel stolen from him.

The distinction between consensual entrustment of possession and involuntary dispossession due to theft implies another distinction. Is the intermediary a mere “rogue” or, to use the American term, “rascal” (the entrustment scenario) or is he a “thief”? If the latter, then the original owner would seem more worthy of protection. It may appear odd in ordinary parlance to distinguish between thieves and rogues but the caselaw does, at least implicitly, reveal such a dichotomy. If such a distinction seems artificial one can only reply that it illustrates the lengths judges go to in resolving the dilemma.

As to abandoning the *nemo dat* doctrine altogether in favour of some other

¹⁶ See D.Tiplady, “When is a seller not a seller?” (1988) 51 M.L.R. 240 at 244.

¹⁷ *Pacific Motor Auctions Pty Ltd v. Motor Credits Ltd* [1965] A.C. 867 at 886 per Lord Pearce.

¹⁸ The Hon. Margaret Shields, 1988 N.Z. Parliamentary Debates 3864.

¹⁹ See Goode, *supra*.n.9 at 393; C.L.Kunz, “Motor Vehicle Ownership Disputes Involving Certificate of Title Acts and Article Two of the U.C.C.” (1984) 39 Bus.Law. 1599 at 1604.

²⁰ (1787) 2 T.R. 63 at 70.

²¹ *Gamer’s Motor Centre (Newcastle) Pty Ltd v. Natwest Wholesale Australia Pty Ltd* [1985] 3 N.S.W.L.R. 475 at 491 per McHugh J.A.

²² (1972) 29 D.L.R. (3d) 633 at 637 (emphasis added).

more equitable alternative, the common law has only briefly flirted with other approaches. One might lean entirely in the opposite direction, giving primacy to the second principle, protection of commercial transactions. Many civil jurisdictions have as their general rule (with narrow exceptions) the *possession vaut titre* principle: the buyer in good faith acquires an overriding title provided he takes possession.²³ However one of the few modern committees to even consider this option cautiously rejected it. In their 1979 Report, the Ontario Law Reform Commission commented:²⁴

[W]e have found no significant support in favour of a general adoption of the civil law principle; nor do we know enough about its practical operation in those jurisdictions that have adopted this principle.

A less radical step would be to retain the *nemo dat* rule but further mitigate its harshness by giving innocent buyers greater protection. So the English Law Committee in its Twelfth Report recommended the enactment of a provision under which an innocent buyer at retail trade premises or public auction would acquire a good title.²⁵ This "really far reaching recommendaton"²⁶ however foundered, perhaps as Atiyah stingingly argued,²⁷ because the empirical basis for the change was never clearly established. Along similar lines has been a suggestion that a broad merchant entrustment exception to *nemo dat* be adopted modelled closely upon section 2-403(2) and (3) of the U.S. Uniform Commercial Code.²⁸ So the Ontario Law Reform Commission recommended:²⁹

Any entrusting of possession of goods to a merchant who deals in goods of that kind should give him power to transfer all rights of the entruster to a buyer or lessee in the ordinary course of business.

Arguably however, this proposal is similarly bedevilled by the lack of evidence supporting such a change. Is the greater preference now for innocent buyers merely an altered value judgment grounded in growing disenchantment with *caveat emptor* or is it instead based upon the fact that "modern business conditions [now] demand commercial transactions . . . be concluded without elaborate investigations of proprietary rights and in reliance on the possession of goods"³⁰?

Finally, the solution most obvious to a logician — apportioning the loss

²³ Article 2279 of the French Civil Code provides: "*En fait de meubles, la possession vaut titre*" (in matters of personalty, possession is equivalent to title). See generally Goode, *supra* n.9 at 393.

²⁴ *Report on Sale of Goods* (1979) vol.II at 308.

²⁵ Law Reform Committee, *Twelfth Report on the Transfer of Title to Chattels* (Cmd.1958, 1966) (Lord Donovan dissenting on this point).

²⁶ A.L. Diamond (1966) 29 M.L.R. 413 at 414.

²⁷ (1966) 29 M.L.R. 541 at 545: "The moral of this Report is that we are unlikely ever to have really satisfactory law reform in this country until those responsible for it see that the basic research is undertaken on which sensible proposals can be formulated."

²⁸ Section 2-403(2) reads: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all the rights of the entruster to a buyer in ordinary course of business." See generally A.M. Squillante & J.R. Fonseca (eds.) *Williston on Sales* (4th ed.1974) at 364-385.

²⁹ *Supra* n.24 at 317 (The Hon.J.C.McRuer, one of the six Commissioners, dissenting from this recommendation).

³⁰ K.C.T. Sutton, "The Reform of the Law of Sales" (1968-69) 7 *Atla.L.Rev.* 130 at 187.

between the innocent victims — has also been mooted. This elegant, Solomonic answer to the dilemma certainly appealed to Lord Devlin in *Ingram v. Little*.³¹ The idea of apportionment he noted could hardly be described as novel given judicial power to apportion loss in other fields of law such as frustrated contracts and contributory negligence. Hence his Lordship argued:³²

[T]he loss should be divided between [the two innocent parties] in such proportion as is just in all the circumstances. If it be pure misfortune the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or the greater part.

The English Committee in its Twelfth Report however rejected this solution on two bases.³³ First, it would introduce uncertainty intrinsic to any wide-ranging discretion. Second, it would be impractical or unworkable, given the usual situation of a lengthy chain of transactions. For example, should apportionment be between the original owner and the ultimate buyer only or between the owner and all innocent buyers including the final one?³⁴ Arguably neither of these difficulties is insurmountable. As to uncertainty, one might ask whether this is too high a price to pay for a fairer solution. Besides, this merely resurrects the familiar dilemma between rigid yet certain rules versus flexible yet vague discretions. Admittedly the practical obstacles loom large, yet to abandon the possibility entirely would seem to place undue pessimism in judicial ingenuity.³⁵ Notwithstanding this, the promise of apportionment as a resolution to the dilemma seems for now to be in a moribund state.

II. SECTION 27(2)

The buyer in possession exception contained in section 27(2) of the Act states:³⁶

Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery of transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

1. *History and purpose*

The New Zealand Act is of course a near identical replica of the United Kingdom Sale of Goods Act 1893 which was consolidated with minor amendments in 1979. As the foregoing citation of the subsection indicates,

³¹ [1961] 1 Q.B. 31.

³² *Ibid.*, at 73-74.

³³ *Supra* n.25 at paras.8-13.

³⁴ Atiyah, *supra* n.8 at 307.

³⁵ See Sutton, *supra* n.30 at 185.

³⁶ Proviso omitted. It reads: "Provided that if the lien or other right of the original seller is expressed in an instrument duly registered under the Chattels Transfer Act 1924, and if the person selling, pledging, or disposing of the goods or agreeing to do so is the mortgagor or bailee named in such instrument, then the person receiving the goods shall be deemed to have notice of the contents of such instrument."

the buyer in possession exception is hardly a paragon of conciseness or clarity. It becomes essential then to understand its origins and objectives.

The precise history of the current provision was painstakingly undertaken by Lord Goff in the appeal to the House of Lords in *National Employers' Insurance v. Jones*.³⁷ A series of five Factors Acts beginning in the first quarter of last century, culminated in section 25(2) of the 1893 Sale of Goods Act, which in turn became our section 27(2).

The first Factors Act of 1823 had a very narrow focus. Innocent consignees who dealt with shipping mercantile agents entrusted with goods by the owner, were entitled to a lien in respect of monies advanced to the named shipper. Thereafter, successive Factors legislation saw a two-fold expansion. First, the nature of thing entrusted was extended: beyond goods to documents of title (1825 Act), restricted to documents of title alone (1877) and finally covering both goods and documents of title (1899). Secondly, the nature of the person to whom goods (or documents of title) were entrusted was extended: beyond factors and mercantile agents to vendors and vendees in possession of the goods etc.(1877). One might pause to note that the concept of entrustment by the original owner of the goods was an integral characteristic of all the Factors Acts.

The object of the subsection is straightforward. As Mason C.J. succinctly observed in *Gamer's Motor Centre v. Natwest*:³⁸

The mischief aimed at is a sale by a buyer in possession of goods or documents of title who is not the owner of them, the object being to protect the sub-buyer who is *deceived by the appearance of ownership* arising from possession.

Given entrustment of possession by the owner, the legislature's sympathies lie with the innocent sub-buyer duped by the apparent ownership of the buyer in possession.

2. Interpretation

It may appear somewhat surprising to have a brief excursus on interpretation at this point. However the two important decisions to be examined in depth next, both turned upon differing views on how one should interpret the provisions of the Act.

The dissenters in both *Gamer's Motor Centre*³⁹ and *Jones*⁴⁰ were unified in one respect — they favoured the “ordinary and natural meaning” over a technical or legal meaning for certain words in section 27(2). Coupled with this was a shared dislike for judicial “sleight of hand” in construing the Act's provisions.⁴¹ For example, in warning of the dangers in departing from the clear literal meaning, Sir Denys Buckley in *Jones* referred to the error against which Lord Halsbury counselled in *Leader v. Duffey*:⁴²

³⁷ Supra n.4 at 957-061.

³⁸ Supra n.3 at 249 (emphasis mine).

³⁹ The President of the N.S.W. Court of Appeal, Kirby P. and on appeal to the High Court, Toohey J. Gaudron J. dissented on the application of the facts to the law but not on the legal issue.

⁴⁰ Sir Denys Buckley in the Court of Appeal: [1987] 3 W.L.R. 901. Lord Goff delivered the unanimous judgment of the House of Lords on appeal.

⁴¹ D.G. Powles was particularly critical of “complex display[s] of mental and semantic juggling” in earlier commentary on judicial resolution of the seller/owner problem: “Stolen Goods and the Sale of Goods Act 1893, s.25(2) — A Surrejoinder” (1975) 38 M.L.R. 83 at 86.

⁴² 13 App.Cas.294 at 301, referred to at [1987] 3 W.L.R. 901 at 924.

But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made.

In a similar vein, Kirby P. dissenting in *Gamer's Motor Centre* criticised resort to "subtle" common law concepts which preceded the Code (i.e. the Act).⁴³ Such concepts, unless carefully circumscribed, had a tendency to encrust the Act with meanings which were "unnatural, artificial or exceptional."⁴⁴

However, the plea for a plain, natural meaning gained little favour with the majorities in both cases. The tenor of their rebuttal was that undue adherence to natural or literal construction was misplaced or simplistic. The present writer agrees.

First, any supremacy that the literal approach formerly enjoyed has now passed. As J.F. Burrows recently observed:⁴⁵

Nevertheless, speaking in general terms the trends are clear enough. Just as 50 or even less years ago, one could say the approach to interpretation was more literal than purposive, one can now say the reverse . . . It is quite clear that there is an overwhelming tendency today for courts to attempt to effectuate the parliamentary intent in interpreting statutes.

Secondly, the courts have always been prepared to depart from the natural, ordinary meaning toward a secondary, more technical meaning should the occasion require.⁴⁶ Typical instances are where the ordinary meaning would produce "some injustice, absurdity, anomaly or contradiction"⁴⁷ or where the technical subject matter of the statute dictates certain words being treated as terms of art.⁴⁸ The comments of Priestley J.A. in *Gamer's* are particularly apposite:⁴⁹

No matter how hard a draftsman tries to keep the language of a statute clear and simple, the statute is a legal document. The *Sale of Goods Act* . . . is a legal instrument using words with legal significance in an overall context where all concerned . . . knew . . . that the meaning to be put upon the words in cases of such doubt as would lead to litigation would be decided by lawyers . . . The object of the approach is not to find the legal as opposed to the 'ordinary' meaning, but to find from the range of legal and ordinary meanings, which in any event will seldom be watertight compartments, the meanings best suited to the statutory document as a whole.

Finally, Kirby P. was only relating half the picture when invoking Lord Herschell's well-known words in *Bank of England v. Vagliano Brothers*⁵⁰ to eschew "encrusting" pre-Code decisions and concepts.⁵¹ His Lordship in that case went on to say resort to the previous law was perfectly legitimate if the provision "be of doubtful import,"⁵² which was precisely the case in *Gamer's*.

⁴³ Supra n.21 at 479.

⁴⁴ Idem.

⁴⁵ "Approaches to Statutory Interpretation" Paper presented at the N.Z. Law Commission Seminar, *Legislation and Its Interpretation* (Wellington, 18-19 March 1988) at 11-12.

⁴⁶ See generally Burrows *ibid.*; R.Cross, *Statutory Interpretation* (2nd ed. 1987) ch.4.

⁴⁷ Lord Simon in *Maunsell v. Olin* [1975] A.C. 373 at 391.

⁴⁸ Idem.

⁴⁹ Supra n.21 at 483-84.

⁵⁰ [1891] A.C. 107 at 144-45 (the proper course is, in the first instance, to ascertain the natural meaning uninfluenced by the previous state of the law).

⁵¹ Supra n.21 at 479.

⁵² Supra n.50.

III. THE MEANING OF DELIVERY

Is the delivery of the goods by the buyer in possession (B1) to the innocent buyer (B2) confined to actual delivery, i.e. physical delivery? Or does the word "delivery" in section 27(2) extend to forms of constructive delivery, e.g. where B1 attorns to B2 and continues to hold as bailee for B2? This was the crucial issue in *Gamer's Motor Centre v. Natwest*.⁵³ In the New South Wales Court of Appeal, Priestley J.A. was candid enough to admit that the pros and cons in favour of either construction were "not far from evenly balanced."⁵⁴

In *Gamer's* the appellant, a vehicle wholesaler, agreed to sell eight motor vehicles to a dealer. It was a term of the sale that property in the vehicles was not to pass to the dealer until the appellant was paid in full. The appellant was never paid. Under a so-called "Used Vehicle Bailment Agreement" between the dealer and the respondent finance company, the dealer purported to sell the vehicles to the respondent, who paid the dealer for them. The dealer signed eight documents, each addressed to the respondent, described as "delivery receipts" in which it acknowledged the dealer had taken delivery of the vehicles according to the terms of the bailment agreement. Under the agreement the dealer would retain possession of the vehicles as bailee for the respondent pending sale in the course of the dealer's business. Not having received payment the appellant seized the vehicles and was sued by the respondent in detinue and conversion. The majority of both the Court of Appeal and thereafter the High Court of Australia held that the reference to "delivery" in section 27(2) of the Act included constructive delivery. Consequently the respondent acquired a good title under the buyer in possession exception since there had been a constructive delivery by the dealer (B1) to the respondent (B2), i.e. when B1 acknowledged it held as bailee for B2.

The curious implication of the above holding is that the owner can lose his title even though the goods remain with his buyer (B1) after the sale to the innocent sub-purchaser (B2). I shall return to this later.⁵⁵

The complex arguments raised in *Gamer's* for and against constructive delivery can be reduced to three major points of difference.

1. *Plain ordinary or legal technical meaning?*

Both Kirby P.⁵⁶ (Court of Appeal) and later Toohey J.⁵⁷ (High Court) emphasised the natural, ordinary meaning in their dissenting judgments. The plain meaning of delivery was actual delivery or despatch.

However, as McHugh J.A. pointed out, it is doubtful if an ordinary citizen would necessarily have given delivery its popular meaning.⁵⁸

The ordinary citizen, on examining the Act, would see that 'delivery' is defined by the Act to mean 'the voluntary transfer of possession'. If he was asked the meaning of that expression, he would reply, I suspect, as Lord McNaghten once said a layman would reply to a similar query about charitable trusts: 'That sounds like a legal phrase. You had better ask a lawyer'.

Moreover, as already outlined,⁵⁹ Parliament may well have been using the

⁵³ Supra n.3.

⁵⁴ Supra n.21 at 483.

⁵⁵ See infra n.88 and accompanying text.

⁵⁶ Supra n.21 at 478-79.

⁵⁷ Supra n.3 at 271.

⁵⁸ Supra n.21 at 494.

⁵⁹ See supra nn.46-48 and accompanying text.

word delivery in its technical or legal sense. The technical definition in our section 2(1) of delivery (voluntary transfer of possession) suggests this was the case here. Possession is “an established legal concept”⁶⁰ and both the common law⁶¹ and the Factors Act⁶² clearly established that possession could be constructive as well as actual.⁶³ Likewise delivery could be constructive also. Both McHugh J.A.⁶⁴ and Mason C.J.⁶⁵ invoked Sir MacKenzie Chalmers’ Commentary on the original Act, wherein the draftsman had accepted that the statutory definitions of delivery and possession reflected the antecedent common law. Chalmers wrote:⁶⁶

Delivery may be actual or constructive. Delivery is constructive when it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment or symbolic delivery.

2. *Are the previous authorities decisive?*

Kirby P. relied heavily upon an “unbroken chain of legal authority” holding that delivery meant actual and not constructive delivery.⁶⁷ However, the reasoning in this small handful of cases it, to borrow McHugh J.A.’s phrase, “to say the least, quite perfunctory.”⁶⁸ Quite rightly the majorities in *Gamer’s* felt free to decide the issue unconstrained by earlier authorities.

The first case in the unbroken chain, *Nicholson v. Harper*,⁶⁹ concerned section 27(1), i.e. the seller in possession exception. A merchant owned wine which was stored in the cellars of a warehouseman and the wine remained in the cellars. The merchant sold the wine to the plaintiff but no notice of the sale was given to the warehouseman and the wine remained in the cellars. Later, the merchant pledged the goods to the warehouseman who acted in good faith. It was held that the plaintiff acquired good title as there had been no actual delivery of the goods to the warehouseman after the previous sale by the merchant to the plaintiff. North J. said “there must be some delivery or transfer, whatever that may mean, after the sale without notice that such a sale had taken place.”⁷⁰ However *Nicholson* did not expressly say there could not be a constructive delivery. The better view is that all North J. decided is the uncontroverted proposition that there must be a delivery in addition to the sale, i.e. sale and delivery are two distinct events.⁷¹ Further as K.C.T. Sutton points out,⁷² to hold as North J. did is to take a very narrow

⁶⁰ Mason C.J., supra n.3 at 243.

⁶¹ See e.g. *Mills v. Charlesworth* (1890) 25 Q.B.D. 421 at 425.

⁶² Section 1(2) Factors Act 1889 (U.K.). The New Zealand equivalent is s.2(2) Mercantile Law Act 1908.

⁶³ See s.31(4) Sale of Goods Act 1908 (N.Z.).

⁶⁴ Supra n.21 at 490.

⁶⁵ Supra n.3 at 244-245.

⁶⁶ *Chalmers’s Sale of Goods Act 1979* (18th ed.1981) at 264.

⁶⁷ Supra n.21 at 479. There is a certain irony here as Kirby P. only 2 months earlier had felt quite prepared to abandon a much *greater* chain of unbroken authority requiring a duty relationship in situations of estoppel by negligence. Again McHugh J.A. (for the majority) corrected the President: *Thomas Wholesale Vehicle Trading Pty Ltd v. Marac Finance Australia Ltd* [1985] 3 N.S.W.L.R. 452.

⁶⁸ Supra n.21 at 493.

⁶⁹ [1895] 2 Ch.415.

⁷⁰ *Ibid.* at 418.

⁷¹ See Mason C.J., supra n.3 at 249; Gaudron J., supra n.3 at 275.

⁷² *Sales and Consumer Law in Australia and New Zealand* (1983) at 336. See also McHugh J.A., supra n.21 at 491-92.

view of the section. Arguably there had been a constructive delivery in that the character of the warehouseman's possession changed from that of bailee for the merchant to possession as pledgee of the merchant. To quibble there was no attornment by the warehouseman is "hardly surprising since the warehouseman would be both attornor and attornee."⁷³ Finally, it would seem dangerous to rely upon *Nicholson* as an authority for actual delivery only, when North J. expressly said there must be some delivery "whatever that may mean"⁷⁴ after the sale.

Re Morrison,⁷⁵ the one discordant link in the unbroken chain, was a brief and unsatisfactory decision of the New Zealand Court of Appeal. It was held there that a constructive delivery between the seller and the buyer in possession sufficed to enable the second buyer to obtain good title under section 27(2). This was a different fact situation than that in *Gamer's* where the issue was whether constructive delivery between B1 and B2 would suffice. Moreover the court appears, from the rather obscure report, to have simply assumed there was delivery to the grantee (B2) under the bill of sale.⁷⁶

In *Bank of New South Wales v. Palmer*⁷⁷ a boat builder contracted to build a catamaran for the defendant with property in the boat to pass to the defendant from the commencement of construction. Thereafter the builder gave the plaintiff bank a bill of sale over the boat. The builder remained in possession throughout. The bank relying on section 27(1), sought to take possession of the boat upon the bankruptcy of the builder and sell it. Helsham J. held that the seller in possession exception had no application and the delivery was restricted to a change in physical possession of the goods or documents of title. His Honour placed particular emphasis upon the word "receiving".⁷⁸

'Receiving' is not a word that one would normally use except in relation to the actual physical article, namely the goods or documents of title.

However, as McHugh J.A. noted,⁷⁹ Helsham J. was not referred to cases on the meaning of the term "actual receiving" in the Statute of Frauds. A long series of cases under section 17 of that Act equated actual receipt with delivery which in turn was construed as including a change in possession without any change of actual custody.⁸⁰ Hence, if "actually receiving" can include constructive delivery then a fortiori "receiving" can extend this far also. So far as *Nicholson* was concerned, Helsham J. simply read that as requiring "delivery or transfer" to be read distributively,⁸¹ an obvious point one would have thought. The state of the authorities was such that he felt free to make his own decision as to the correct construction of the section.⁸²

Finally, in the New Zealand decision *N.Z. Securities & Finance v. Wrightcars*,⁸³ O'Regan J. simply agreed with the construction put upon the

⁷³ Dawson J., supra n.3 at 265.

⁷⁴ Supra n.70.

⁷⁵ (1905) 25 N.Z.L.R. 513.

⁷⁶ Sutton, supra n.72; Kirby, P., supra n.21 at 480.

⁷⁷ [1970] 2 N.S.W.L.R. 532.

⁷⁸ Ibid. at 536.

⁷⁹ Supra n.21 at 492. 80. These are reviewed by McHugh, J.A., *ibid.* at 488-490 and Mason, C.J., supra n.3 at 245-247.

⁸¹ Supra n.77 at 535.

⁸² Ibid. at 535-36.

⁸³ [1976] 1 N.Z.L.R. 77 at 80-82.

words by Helsham J. and for the reasons he gave with no further discussion.

This brief perusal of the authorities would strongly suggest that the majorities in *Gamer's* were justified in tackling the issue afresh.

3. *Which construction is more consonant with the object of the subsection?*

The idea that the owner could lose his title to B2 despite B1 retaining physical custody of the goods after the sale was too curious a result for Helsham J.:⁸⁴

... it seems to me quite consistent with the intended operation of the section that it is the acquisition of physical possession that warrants statutory deprivation of the true owner of the property in his goods and not something less.

A related concern of Kirby P.⁸⁵ (and the New South Wales Law Reform Commission⁸⁶) was the deceptive effect a holding of constructive delivery might have upon purchasers *after* B2, i.e. B3 or B4. Conceivably B1's continued physical possession might induce B3, another innocent buyer after B2, to buy the goods.

At first glance these arguments did not appear easy to rebut. However, McHugh J.A. in a carefully reasoned judgment provided a forceful rejoinder.

Firstly, the object of the subsection is, as we have already seen, to protect the innocent sub-buyer deceived by B1's ostensible ownership arising from possession of the goods. Accordingly⁸⁷

Why should any distinction be made between the buyer who takes physical custody and the buyer who does not? Each was or may have been deceived by his seller being left in possession by the original vendor. The problem arises because the original buyer is in possession not because of what the sub-buyer does.

Admittedly it does seem curious that B2 could obtain a good title even though the goods remain in B1's custody yet the alternative construction (actual delivery) can also produce curious results:⁸⁸

If the sub-buyer takes delivery by driving a car onto the street and then hands the car over to his seller to hold as bailee, the sub-buyer obtains title even on the defendant's submission [i.e. actual delivery required]. Why should it be inferred that the legislature intended that the second buyer go through this ritual to obtain title? What of goods which because of their bulk are not easily or immediately moveable? Does the sub-buyer obtain no title until he takes the goods into his custody notwithstanding that he has paid for them and that the seller has acknowledged the change of possession?

And as to purchasers subsequent to B2 being misled? All this meant, McHugh J.A. explained, was that if B2 failed to take delivery he ran the risk that he in turn would lose his title to B3. However "as between himself and the original vendor this [was] an irrelevant consideration."⁸⁹ There would be a certain irony in B2 being deprived of title by his entrustment of possession

⁸⁴ *Palmer*, supra n.77 at 536-67.

⁸⁵ *Supra* n.21 at 482-83.

⁸⁶ *Sale of Goods: Issues Paper* (March 1988) at 31.

⁸⁷ *Supra* n.21 at 493.

⁸⁸ *Ibid.* at 490.

⁸⁹ *Ibid.* at 493.

to B1 but that should be of little moment to the original owner who is now thwarted by B3's acquisition of good title under the subsection.

Overall, the compelling reasoning of McHugh J.A. together with the recognition of the legal technical meaning of delivery in the Act itself (sections 2(1) and 31(4)) satisfy the present writer that the majority result in *Gamer's* was justified — constructive delivery from B1 to B2 will suffice to enable good title to be passed to the latter.

IV. THE SELLER/OWNER CONUNDRUM

1. *The problem*

No doubt the draftsman envisaged that normally the "owner" and "seller" would be the same person. Nonetheless by making express reference separately to owner and seller in section 27(2), the room seems open for a buyer in possession (B1) to be entrusted with possession by a non-owner seller. In other words, instead of the straightforward sequence:

owner(O)/seller(S) —————> buyer in possession(B1) —————> innocent sub-buyer (B2)

we have a more complex chain of transactions:

owner(O) ———> seller(S) ———> buyer in possession(B1) ———> innocent sub-buyer (B2)

If one takes a *literal* reading of the subsection then a curious result may occur.⁹⁰ Although B1 must obtain the goods with the consent of the *seller* the delivery by him under a sale to B2 takes effect as if he (B1) had the consent of the *owner*. So if the seller should be a thief, then under this literal reading B1 would be deemed to deliver the goods not with his (the seller's) defective consent but with the owner's consent. Thus even though the seller (i.e. the thief) did not have good title, the innocent sub-purchaser (B2) from the buyer in possession (B1) could obtain good title since he would be deemed to have taken with the consent of the true owner and not the seller (the thief). As Goode succinctly puts it:⁹¹

[A literal interpretation] would produce the result . . . that whilst a thief could not pass title in the stolen goods to his purchaser, yet that purchaser could pass title on a resale.

One might ask why is this a problem? Why is the proposition that "a buyer from a thief has greater power to pass title than the thief himself"⁹² so curious? Why have commentators and judges alike condemned the literal reading in no uncertain terms as absurd or startling?⁹³

The answer lies in the firmly entrenched Anglo-American belief that (subject to the much-maligned "market overt" exception now subsisting in England

⁹⁰ The original perception of the problem is attributed to W.R.Cornish, "Rescission without notice" (1964) 27 M.L.R. 472 at 477.

⁹¹ *Supra* n.9 at 413.

⁹² Atiyah, *supra* n.8 at 303.

⁹³ E.g. "a startling conclusion which at first sight seems so contrary to everything one knows about the law that it cannot be right" (Atiyah); "absurd in policy terms" (Goode).

only⁹⁴) an owner cannot be deprived of her goods by a thief.⁹⁵ Stolen goods always remain recoverable by the true owner. As we have already seen,⁹⁶ where there is no voluntary assent to the parting of possession, no semblance of consent to the intermediary's possession, then the law's sympathies lie with the owner. Having in no way initiated the process, she should not now suffer. All of the exceptions to the *nemo dat* rule are grounded in the concept of entrustment of possession.

The conundrum, however, is to find an "acceptable" means of avoiding the literal construction. Acceptable in the sense that little or no "violence"⁹⁷ is done to the subsection and one is not forced to adopt any "artificial construction."⁹⁸ Is there a solution sufficiently elegant to appease critics concerned about artificiality of reasoning and disregard for the letter of the law? Certainly one cannot simply cursorily dismiss the literal interpretation as repugnant or absurd by appealing to "commonsense."⁹⁹ Academics and judges have struggled over the years with varying degrees of success to resolve the puzzle.

2. *National Employers' Insurance v. Jones*¹⁰⁰

Several Commonwealth cases have addressed the issue but none might be said to have satisfactorily resolved it.¹⁰¹ In the first English decision to confront it however, *National Employers' Insurance v. Jones*, the problem after exhaustive exploration by the Court of Appeal¹⁰² and House of Lords¹⁰³ might at last be said to be laid to rest.

⁹⁴ The market overt exception to the *nemo dat* rule (s.24) was abolished in New Zealand in 1961: s.2 Sale of Goods Amendment Act 1961. The United Kingdom still preserves it however: s.22 Sale of Goods Act 1979 (U.K.). The exception is universally viewed as an historical anachronism: see e.g. Atiyah, *supra* n.8 at 288 and Goode, *supra* n.9 at 401. The U.K. Law Reform Committee has recommended its abolition: see *supra* n.25.

⁹⁵ Ontario Law Reform Commission, *supra* n.24 at 305; *Cahn v. Pockett's Bristol Channel Steam Packet Co. Ltd* [1899] 1 Q.B. 643 at 658 (per Collins L.J.). *Williston on Sales*, *supra* n.28 at 366, accurately summarises the U.S. position: "[I]t is a fundamental rule of law that one who has no title at all can transfer none, and any buyer who buys from that person, even if in good faith and for value and without notice of defect, gains no title from that person. A thief cannot transfer a good title even to a bona fide purchaser for value."

⁹⁶ See *supra* n.22 and accompanying text.

⁹⁷ Atiyah, *supra* n.8 at 303.

⁹⁸ May L.J. in *Jones*, *supra* n.40 at 914.

⁹⁹ As Beattie J. was prone to do in *Elwin*, *supra* n.14 at 1131. See especially Tiplady, *supra* n.16 at 240 on the need for careful analysis. Having said that, there is a kernel of truth in Croom-Johnson L.J.'s closing words in *Jones*, *supra* n.40 at 920: "... the more self-evident a proposition is, the harder it is to find authority for it."

¹⁰⁰ [1988] 2 W.L.R. 952

¹⁰¹ *Elwin v. O'Regan v. Maxwell*, *supra* n.14; *Brandon v. Leckie*, *supra* n.22; *Murabak Ali v. Wali Mohamed & Co.* (1938) 18 Kenya L.R. 23; *Ford Credit Australia v. Auto Trade Auction* [1982] V.R. 795. Both *Elwin* and *Murabak* were non-theft situations and the reasoning is quite perfunctory. In *Ford* the wording of the Victorian provision made it much easier for Gray J. to equate owner as seller. For further commentary on *Brandon* and *Murabak* respectively see A.A.Zysblat "Sale of Goods [Note upon *Brandon*]" (1974) 9 U.B.C.L. Rev. 186 and A.L.Diamond "Sale of Goods in East Africa" (1967) 16 I.C.L.Q. 1045 at 1054-56.

¹⁰² [1987] 3 W.L.R. 901.

¹⁰³ *Supra* n. 100.

In *Jones*,¹⁰⁴ a Miss Hopkin had her Ford Fiesta motor vehicle stolen. The thieves purported to sell the car to one Lacey who sold it to Thomas. Thereafter it was sold by Thomas to Autochoice Ltd and that company sold it to Mid-Glamorgan Motors Ltd which finally sold it to the defendant. All this occurred within a relatively short space of time. Both companies and the defendant bought in good faith and without notice of the theft. The plaintiff, Hopkin's insurer, bought out her interest and asked the defendant to return the vehicle. The defendant resisted the claim on the basis that he had acquired good title by virtue of the English equivalent of section 27(2). The literal interpretation was pleaded — Mid-Glamorgan Motors (B1) obtained possession of the car with the consent of the seller, Autochoice, hence the delivery by Mid-Glamorgan under the sale to the defendant (B2) would operate as if Mid-Glamorgan were a mercantile agent entrusted with the consent of the owner (Hopkin). The appeal by the defendant against the decision of the County Court Judge, who eschewed the literal reading, was lost. Both the Court of Appeal (Sir Denys Buckley dissenting) and the House of Lords rejected such a construction albeit upon differing grounds.

3. *Alternative solutions to the problem*

The various methods of "escaping" the literal construction can be divided into four. All four were canvassed in the course of *Jones* with the majority of the Court of Appeal favouring the first solution whilst the House of Lords adopted the fourth, and surely now, the decisive solution. I shall now turn briefly to each.

(a) Valid sale is a condition precedent to the subsequent operation of the subsection

Both May and Croom-Johnson L.J.J. preferred this solution.¹⁰⁵ The way out of the problem could be solved by concentrating on the earlier part of section 27(2) which predicates an effective transaction or at least one capable of transferring the true title. May L.J. stated:¹⁰⁶

[I]n my opinion the opening words of section [27(2)], those which lay down the condition precedent for the consequences provided for by the later words of the section, only contemplate a transaction in which the general property in the goods has been acquired or it has been agreed should be acquired. A transaction whereby a thief purports to sell goods to A (B1) in which he purports to but cannot pass the general property in the goods to A because it is not vested in him, is not one which can bring section [27(2)] into operation at all.

However, Sir Denys Buckley (dissenting) could see no reason why the fact that a thief could not transfer a good title should therefore mean that he had not, in law, contracted to sell the goods.¹⁰⁷ In this regard Sir Denys must surely be correct. The majority in their valiant attempt to resolve the

¹⁰⁴ Diagrammatically:

H —> Thief —> L —> T —> A —> M —> Defendant
 "owner" "seller" B1 B2

Sir D.Buckley, *supra* n.102 at 923, observed that in such long chains, section 27(2) only requires consideration of the circumstances relating to the last three members of the chain, the last of whom will be the party invoking the subsection's protection.

¹⁰⁵ Again the origins of this solution lie with Cornish, *supra* n.90 at 478.

¹⁰⁶ *Supra* n.102 at 915.

¹⁰⁷ *Ibid.* at 925.

literal problem by a novel route have merely stumbled into the familiar fallacy that a contract of sale requires the seller to be the owner. This smacks, as Tiplady accurately notes,¹⁰⁸ of the much-misunderstood dictum of Atkin L.J. in *Rowland v. Divall* that “there can be no sale at all of goods which the seller has no right to sell.”¹⁰⁹ Battersby and Preston in their 1972 article clearly showed that definition of contract of sale merely serves to distinguish a sale from other transactions and is silent as to the quality of title to be transmitted. Thus¹¹⁰

Provided that the transaction involves the transfer of *a* title to the absolute interest, it is a sale as defined by the Act: it is not the transfer of a *good* title which is fundamental to the transaction, but the transfer of *a* title. Thus, the mere fact that a possessory title is transferred does not prevent the transaction from being a sale.

If a contract of sale requires perfect title to be transferred then section 14(1) would seem to be otiose; the words “or possessed” in the definition in section 7(1) of existing goods (“goods owned or possessed”) would become meaningless and the statement of the *nemo dat* rule itself (“where goods are sold by a person who is not the owner”) would sit uncomfortably alongside it.¹¹¹ Moreover, the majority’s emphasis upon the general property having passed at some stage¹¹² ignores the part of the definition of a contract of sale (sections 2(1) and 3(1)) embracing agreements to sell.¹¹³ The majority’s cure would seem as unfortunate as the disease itself.

(b) Equation of seller and owner

This equation may take two forms, though both lead to the same result.¹¹⁴ First, by focusing on the earlier part of the subsection the consent of the seller could simply be read as the consent of the owner. Thus section 27(2) would have no application at all to the transaction between S (the thief) and B1 (buyer in possession). Two Commonwealth cases have adopted this approach.¹¹⁵ Alternatively, by focusing on the latter part of the subsection, consent of the owner could be read as consent of the seller. The subsection would still apply as between S and B2 (the innocent sub-buyer) but it would not protect B2 against the true owner.¹¹⁶ In other words, section 27(2) upon this construction, would be effective to pass to B2 such title as S had, namely a possessory title — good against everyone except the owner. Beattie J. in

¹⁰⁸ Supra n.16 at 243; see also J.W.A.Thornley, “Thieves, Rogues, Innocent Purchasers and Legislative Tangles” [1988] C.L.J. 15 at 16.

¹⁰⁹ [1923] 2 K.B. 500 at 506.

¹¹⁰ “The Concepts of ‘Property’ ‘Title’ and ‘Owner’ used in the Sale of Goods Act 1893” (1972) 35 M.L.R. 268 at 273 (emphasis added).

¹¹¹ Ibid. at 274; Thornley, supra n.8 at 16-17. See also Mustill J. in *Karlshamns Oljefabriker v. Eastport Navigation Corp.* [1982] 1 All E.R. 208 at 215 (cited by Atiyah, supra n.8 at 70) where his Honour remarked that “[a] contract of sale can perfectly well be performed by a seller who never has title at any time, by causing a third party to transfer it directly to the buyer.”

¹¹² See May L.J., supra n.102 at 915.

¹¹³ Tiplady, supra n.16 at 243-244.

¹¹⁴ Once more the solution was proffered by Cornish, supra n.90 at 477-78.

¹¹⁵ *Murabak*, supra n.101 (per Thacker J.) and *Ford Credit*, supra n.101 at 797 (per Gray J.).

¹¹⁶ Diamond preferred this approach for this reason: see supra n.101 at 1055.

*Elwin v. O'Regan & Maxwell*¹¹⁷ adopted this solution as did the County Court judge in *Jones*.¹¹⁸ The difficulty with the equation solution is of course its "blatant disregard for the letter of the law."¹¹⁹ This troubled Croom-Johnson L.J. in *Jones* who quite rightly pointed out that as "a matter of construction" it could hardly be that the statute could, within one section, be using two different words to describe the same person.¹²⁰

(c) The "relevant owner" solution

An elegant solution proposed by Battersby and Preston¹²¹ was to treat the word owner as referring to the "relevant owner."¹²² Their submission was that the literal construction argument was based upon the fallacy of assuming "owner" means the true owner "whereas to make sense of the provisions as a whole, it [owner] must be construed as 'the owner of the title which is the subject-matter of the transaction' "¹²³ i.e. the title vested in S. Whilst less violence is done to the language of the subsection, arguably little has changed from simply equating owner with seller. One reads owner to mean relevant owner which again means the seller.¹²⁴ Moreover in giving owner this meaning with the consequence that at most B2 only acquires S's possessory title, section 27(2) becomes otiose, since B2 would anyway acquire a possessory title under the law of torts.¹²⁵

(d) The policy and purpose of section 27(2)

It was left to the House of Lords in *Jones* to fully uncover the underlying policy and purpose behind the subsection.¹²⁶ As we have already seen,¹²⁷ Lord Goff carefully traced the origin and development of the current provision through the various Factors Acts of last century. There was never the "slightest indication" in these Acts that the cardinal principle (*nemo dat*) should be abrogated so as to enable purchasers from a thief to pass good title on a resale.¹²⁸

Where did the root of the problem lie then? The answer was in a small drafting change between the 1877 and 1889 Factors Acts. As Goode had earlier perceived,¹²⁹ the draftsman in an effort at conciseness attempted to spell out

¹¹⁷ Supra n.14 at 1131-32.

¹¹⁸ Supra n.102 at 905 (per May L.J.) cf. supra n.102 at 903 (Editorial comment reports that County Court Judge equated both words as meaning owner).

¹¹⁹ D.G.Powles, "Stolen Goods and the Sale of Goods Act 1893 section 25(2)" (1974) 37 M.L.R. 213 at 214.

¹²⁰ Supra n.102 at 917.

¹²¹ Supra n.110 at 284.

¹²² This is Professor Goode's abbreviation for Battersby & Prestons' solution: see supra n.9 at 414.

¹²³ Supra n.110 at 284.

¹²⁴ Croom-Johnson L.J. in *Jones*, supra n.102 at 917.

¹²⁵ Goode, supra n.9 at 414; Powles, supra n.119 at 216.

¹²⁶ Hence the closing plea of Tiplady (supra n.16 at 245) that "[o]ne can now only hope that the House of Lords will be given the opportunity finally to expose the policy basis of the *nemo dat* exceptions in modern commercial law" was satisfied, at least partially.

¹²⁷ Supra section II, 1.

¹²⁸ Supra n.100 at 958.

¹²⁹ Supra n.9 at 414.

the deeming effect of section 27(2) in an abbreviated manner. Rather than spell out the effect of the subsection *in extenso* he thought he could achieve the same result more elegantly by incorporating by reference the effect of our section 3(1) Mercantile Law Act 1908. By quoting the earlier equivalents of section 27(2) in full, Lord Goff quickly pinpointed the change.¹³⁰ Whereas the provision in the 1877 Act referred to the transaction taking effect as if B1 was a person “entrusted by the vendor with possession” one now witnessed a different wording in the 1889 Act. The provision now referred to the transaction taking effects as if B1 was a person entrusted by “the owner” with possession. So clearly then, the word owner was no more than an elliptical expression or shorthand term meaning the vendor who had entrusted possession. It was upon this “slender foundation”¹³¹ of an altered phraseology between the final two Factors Acts that the appellant had based his case for a purchaser from a thief being able to pass better title than the thief had. Unfortunately for the appellant, there was nothing else either from 1899 Act itself nor the preceding Factors Acts, to suggest that Parliament intended the result now argued for. The legislative history of the subsection was clearly against this.

It does seem somewhat “surprising” as May L.J. observed,¹³² that if one concedes the draftsman in the 1889 Factors Act made an error in referring to “owner” instead of “seller” at the conclusion of the subsection, the lapse was repeated twice — in the original Act of 1893 and again in 1979. However, upon further reflection, repetition of the error was understandable. *Jones* was the first case in virtually a century to uncover the anomaly in England and thereby alert English parliamentary draftsmen.¹³³ This of course does not speak kindly for English awareness of Commonwealth decisions, since well before the 1979 Consolidation there were three non-English cases¹³⁴ which had exposed the anomaly engendered by a literal construction.

So far the discussion has been premised on the assumption that the drafting change was an “error” or a “lapse” since giving effect to the plain meaning would produce a result absurd or repugnant in policy terms. However, not everyone has thought so.

Cornish¹³⁵ considered it arguably better to adopt the literal reading and allow innocent purchasers protection since they are by definition unaware that previous misdealings may have affected their title. If anomalies resulted or the subsection was said to produce illogicality then it was better that these should favour the innocent buyer. However, this merely restates the dilemma with a marked preference for the buyer instead of the owner. Cornish’s sympathy for the buyer was buttressed by the recognition that the true owner would still have his recourse under the English equivalent of section 26 of our Act.¹³⁶

¹³⁰ Supra n.100 at 960-61.

¹³¹ Ibid. at 961.

¹³² Supra n.102 at 914.

¹³³ Lord Goff put this down to the temerity of prudent counsel who feared the “very short shrift indeed” should they have advanced the literal argument: see *Jones*, supra n.100 at 958.

¹³⁴ See supra n.101.

¹³⁵ Supra n.90 at 478.

¹³⁶ Section 26(1) reads: “Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.”

However, the reversion of the stolen goods in the true owner still requires that the thief be apprehended and "prosecuted to conviction." Furthermore, there is English authority¹³⁷ for the view that section 26 must be read subject to the Factors Act's provisions including section 9, the buyer in possession exception. Thus the goods will not revert in the owner when the buyer in possession is convicted. Sutton argues that the same result should follow in jurisdictions such as New Zealand, where the buyer in possession provision has been included in the main body of the Sale of Goods Act, for "[o]therwise it would mean that dispositions of stolen goods by factors would be protected but not dispositions by buyers in possession since the latter are no longer covered by reference to the provisions of the Factors Acts."¹³⁸ If Sutton is correct then his further submission must also follow. The only practical circumstance left for section 26 to operate at all is where the owner has been divested by sale in market overt. As New Zealand discarded this archaic exception to *nemo dat* in 1961,¹³⁹ there would then seem to be little or no room for section 26 to aid the original owner. Hence Cornish's callousness to the plight of the owner becomes less justifiable.

Taking a different tack, Sir Denys Buckley did not consider it irrational in policy terms to let the loss from the theft fall upon the original owner "who would . . . very probably be insured, rather than the innocent purchaser."¹⁴⁰ Yet this is surely an empirical question to which no answer (unfortunately) has yet been given.¹⁴¹ Perhaps Sir Denys was influenced by the fact that in *Jones*, the true owner's interest was bought out by her insurance company in contrast to the (presumably) uninsured defendant purchaser. A stronger argument of Sir Denys was that it would not be irrational for Parliament to enact that stolen goods be recoverable from a thief's immediate purchaser (B1) but not from a subsequent innocent purchaser (B2, or a fortiori B5 as the defendant in *Jones* was¹⁴²). Why? The latter sub-purchaser (B2) had less cause to enquire whether her seller's seller was a thief than the immediate purchaser (B1) who by "diligent inquiry [might] have been able to discover that his vendor was a thief."¹⁴³ Being further down the chain the latter purchaser would be less likely to be aware of suspicious circumstances putting her on inquiry. This argument is more difficult to refute, nevertheless it does tend to come out as no more than greater solicitude for the innocent buyer based on the fact that the sub-buyer is more removed from the misdealing. Moreover it draws upon the doctrine of constructive notice which, as we shall see later,¹⁴⁴ the courts have persistently disfavoured in commercial transactions.

To summarise, in the writer's view, a careful investigation of the legislative history of section 27(2) provides the best solution to the literal reading problem. The thorough examination by Lord Goff in *Jones* revealed that the purpose of the subsection never extended to protecting innocent buyers where the owner had been dispossessed by a thief. The delivery or transfer between the buyer

¹³⁷ *Payne v. Wilson* [1985] 1 Q.B. 653, cited with approval by North J. in *Davey v. Paine Brothers (Motors) Ltd* [1954] N.Z.L.R. 1122 at 1127.

¹³⁸ *Supra* n.72 at 358.

¹³⁹ See *supra* n.94.

¹⁴⁰ *Supra* n.102 at 924.

¹⁴¹ See again Atiyah's comments, *supra* n.27.

¹⁴² Tiplady, *supra* n.16 at 245.

¹⁴³ *Supra* n.102 at 924.

¹⁴⁴ See *infra*, section V, 4.

in possession and innocent buyer was only ever intended to take effect as if the former was a person entrusted with possession with the seller's consent. If this ultimately requires one simply to read "consent of owner" as "consent of seller," so be it.

V. RESIDUAL ISSUES

In this section some of the other issues from section 27(2) will be briefly examined.

1. "Bought or agreed to buy"

Initially it seems odd why the draftsman bothered to include the words "bought or" in the subsection. For if B1 has bought the goods, title has passed and there is no need for B1 to rely on section 27(2) to pass a good title to B2. Atiyah is one commentator who suggests the words ought to be dismissed as "mere surplusage,"¹⁴⁵ a suggestion adopted in one Australian decision.¹⁴⁶

However, Brennan J. in *Gamer's* alluded, in passing, to the rationale for these words. The phrase "bought or" may become meaningful where "the seller has retained a limited interest in the goods."¹⁴⁷ The "answer to the puzzle" was carefully explained by Battersby and Preston.¹⁴⁸ The subsection contemplates two quite different factual situations: (i) where B1 has yet to acquire the seller's title (the situation envisaged by Atiyah) but also (ii) where B1's title is either subject to incumbrances or has been avoided by the original seller. Again the confusion arises because of the draftsman's compression of language.

So far as agreements to buy are concerned, the courts have, for the purposes of section 27(2), restricted these to conditional sales agreements of the *Lee v. Butler* variety. Hence so-called "true" (*Helby v. Matthews* type) hire-purchase agreements involving bailment with an option to purchase, are outside the ambit of the subsection.¹⁴⁹ It seems artificial for the innocent sub-purchaser's protection to depend on the kind of hire-purchase agreement entered into between the seller and B1.¹⁵⁰

2. "Consent"

The law here is plain. Apparent consent will suffice, i.e. even if the buyer in possession obtains the seller's consent by fraudulent means this does not negative consent for the purposes of the subsection.¹⁵¹

3. "Possession"

The interesting issue here is whether B1 must have actual custody of the goods or will constructive possession suffice?¹⁵² Having strongly argued for constructive delivery between B1 and B2 to be enough, can constructive

¹⁴⁵ Supra n.8 at 294.

¹⁴⁶ *Ford Credit*, supra n.101 at 798.

¹⁴⁷ (1987) 163 C.L.R. 236 at 251.

¹⁴⁸ Supra n.110 at 281-82.

¹⁴⁹ See *Elwin* supra n.14 at 1128; *Cunningham v. Richardson* (1924) 32 N.Z.L.R. 433 at 435 (per Sim J.).

¹⁵⁰ See Ontario Law Reform Commission, supra n.24 at 309, 317.

¹⁵¹ *Jeffcott v. Andrew Motors Ltd* [1960] N.Z.L.R. 721 at 728-29.

¹⁵² For those who favour the latter view see e.g. Atiyah, supra n.8 at 282; 41 *Halsbury's Laws of England* (4th ed., 1983) at para.751 n.3.

possession by B1 also be adequate to enable him to pass a good title to B2? Certainly section 2(2) of the Mercantile Law Act 1908 deems a person to be in possession not just where he has actual custody of the goods or documents of title but also they "are held by any other person subject to his control or for him or on his behalf."

The issue was squared raised in *Four Point Garage Ltd v. Carter*.¹⁵³ The defendant agreed to purchase a new Ford Escort from Freeway, a car dealer. He paid by cheque and the dealer agreed to deliver the car two days later. At the time the dealer did not have that particular vehicle in stock so it arranged to buy it from the plaintiff's under an agreement reserving title to the plaintiff until payment in full. At the dealer's request the plaintiff delivered the car directly to the defendant, doing so in the belief that the car was merely being leased for hire to the defendant. The defendant on his part was completely unaware of the existence of the plaintiff and believed that the delivery had been made by the dealer. The dealer subsequently went into liquidation and the plaintiff, being unpaid, sought recovery of the vehicle from the defendant. The plaintiff argued that the defendant could not rely upon section 27(2) as the dealer (B1) had neither taken physical possession nor itself effected delivery. Simon Brown J. disagreed. The plaintiffs having agreed to effect delivery to the defendant, thereupon held the vehicle to the order of Freeway, pending delivery, so that Freeway (the buyer in possession) was in constructive possession within section 27(2) and itself delivered to the defendant through the agency of the plaintiffs. In agreeing with the decision, Goode nonetheless recognised the policy issue involved here:¹⁵⁴

It might be argued that the seller's attornment to the intermediate buyer ought not to be sufficient to attract section [27(2)] on the footing that the purpose of the statutory provisions is to prevent the sub-purchaser from being misled by his own seller's appearance of ownership, which cannot arise where the goods remain in the original seller's physical possession.

The answer upon the unusual facts of *Carter* was that the original seller could hardly complain where he himself had delivered the goods directly to the innocent sub-purchaser.¹⁵⁵ Leaving aside the particular fact situation in *Carter*, it does not seem objectionable for constructive possession to suffice. Where for example, B2 is misled by B1's apparent ownership and a warehouseman holds the goods on B1's behalf, this should not disentitle him (B2). To paraphrase McHugh J.A.,¹⁵⁶ the mischief arises because B1 has been entrusted with possession by the seller not because of the particular *form* (actual or constructive) that buyer's possession takes. Provided B2 is misled, it is an immaterial consequence whether he was deceived by B1's actual or constructive possession.

4. "In good faith and without notice"

The onus is upon the buyer¹⁵⁷ to prove that she took in good faith and without notice of any lien or other right of the original seller. An intriguing issue here is whether "notice" is confined to actual notice or does it extend

¹⁵³ [1985] 3 All E.R. 12.

¹⁵⁴ "Possession and Delivery under Section 25 of the Sale of Goods Act 1979" [1985] J.B.L. 496 at 498.

¹⁵⁵ *Idem*.

¹⁵⁶ See *supra* n.87.

¹⁵⁷ *Heap v. Motorists' Advisory Agency Ltd* [1923] 1 K.B. 577.

to constructive notice i.e. although B2 is not actually aware of the true position, should notice nevertheless be imputed to her because in the (suspicious) circumstances it is reasonable to regard her as having notice? The comment of Lindley L.J. in 1895 that “as regards the extension of the equitable doctrines of constructive notice to commercial transactions, the courts have always set their faces resolutely against it”¹⁵⁸ still appears to hold. A good modern illustration is the Australian case, *Robinson Motors Pty Ltd v. Fowler*.¹⁵⁹ A rogue calling herself O’Malley fraudulently obtained possession of a Holden Torana sedan from the respondent car dealer in Sydney. The vehicle was paid for by a cheque which was later dishonoured. O’Malley was given a receipt upon delivery and the manager of the car dealer sent the change of registration form to the New South Wales Motor Transport Department whereupon O’Malley was registered as the owner as from 15 May 1979. O’Malley two days later sold the car to the appellant at his car yard at Surfers Paradise. When asked for proof of ownership O’Malley produced the respondent’s delivery receipt in which she had falsified the date of purchase to read 15 March 1979. Coupled with telephone confirmation from the N.S.W. Transport Department that O’Malley was the registered owner, the appellant went through with his purchase. Upon dishonour of the cheque and discovery of the vehicle in the appellant’s hands, the respondent sought recovery of it. Delivering the unanimous judgment of the court, Lucas A.C.J. held the appellant acquired good title under section 27(2). His Honour rejected the first instance ruling that the appellant had made no enquiries of the respondent about the earlier sale and hence could not be heard to say that he had taken the car without notice. The traditional reluctance to apply the doctrine of constructive notice to commercial transactions was reaffirmed. The only extension to the word notice beyond actual knowledge would be the “loophole” recognised by Lord Denning¹⁶⁰ — “deliberately turning a blind eye to [the previous sale]”. Here there was nothing obviously suspicious in the circumstances to put the appellant upon enquiry, nothing deliberately to turn a blind eye to. The production of the delivery receipt which on its face showed O’Malley had paid for the vehicle two months earlier; the telephone confirmation of her registered ownership and the absence of significant disparity between what she paid for the car (\$2,990) and what she was now prepared to accept from the appellant (\$1,800) for it, all pointed in the appellant’s favour. His Honour observed:

If the doctrine of constructive notice is to be applied at all to commercial transactions of this nature, the effect of the authorities seems to be that it is *only to be applied in the plainest of cases*. Perhaps it would be better to regard a failure to make inquiries in a case of this nature as relevant more to the question whether the person who acquired the chattel acted in good faith.¹⁶¹

The courts similarly seem slow to infer bad faith from price disparities, requiring the ultimate purchaser to have bought at an “unduly low price”¹⁶²

¹⁵⁸ *Manchester Trust v. Furness* [1895] 2 Q.B. 539 at 545. See generally Sutton, *supra* n.72 at 318-321.

¹⁵⁹ [1982] Qd. R. 374. See also *Feuer Leather Corp. v. Frank Johnstone & Sons* [1981] Com.L.R. 251.

¹⁶⁰ *Worcester Works Finance Ltd v. Cooden Engineering Co.Ltd* [1972] 1 Q.B. 210 at 218.

¹⁶¹ *Supra* n.159 at 379 (emphasis added).

¹⁶² *Davey*, *supra* n.137 at 1130 (per North J.).

before denying him the protection of one of the statutory exceptions. The court's reluctance to view the disparity in *Robinson Motors* with disfavour, where the resale by the rogue was at sixty percent of the original purchase price, illustrates this.

5. "Same effect as if the person making the delivery were a mercantile agent"

The narrow construction of these words by the English Court of Appeal in *Newtons of Wembley Ltd v. Williams*¹⁶³ has been widely condemned.¹⁶⁴ There the court held that these words impliedly incorporated the requirements of (our) section 3 of the Mercantile Law Act 1908. Hence the disposition would only be effective to pass good title if made in the manner it would have been made had the buyer himself (B1) been disposing of the goods as a mercantile agent. Thus B1 would be required to act as a mercantile agent would act in the ordinary course of business — selling within business hours, from a proper place of business etc. This construction, which was arguably obiter anyway,¹⁶⁵ was firmly rejected by the New Zealand Court of Appeal in *Jeffcott v. Andrew Motors* some five years earlier. Gresson P. stated:¹⁶⁶

This is a novel argument which seems to us to be quite unsound. The section operates to validate a sale as if the buyer in possession were a mercantile agent; it does not require that he should act as though he were a mercantile agent. The section is derived from sections of the Factors Act 1877 and 1889 which were enacted only because a buyer in possession was not a mercantile agent entrusted with the goods.

This view was reaffirmed in both *Jones*¹⁶⁷ and *Gamer's*¹⁶⁸ although the expressions of agreement with *Jeffcott* are strictly obiter since B1 in both decisions was a recognised dealer acting in the ordinary course of business.

VI. CONCLUSION

It would be remiss to conclude this article without reference to the potential impact of the Motor Vehicle Securities Bill 1988 upon sales by non-owners. A detailed commentary is beyond the scope of this paper,¹⁶⁹ nevertheless the following points are worthy of mention. Broadly speaking the Bill, at least in its Introductory form, represents a piecemeal reform of non-owner sales. The basic scheme of the Sale of Goods Act 1908 is preserved. However, the harshness of the *nemo dat* rule is further mitigated now by new statutory exceptions. The explanatory note accurately summarises the thrust of the Bill:

¹⁶³ [1965] 1 Q.B. 560 at 579 (per Pearson L.J.) and 574-75 (per Sellers L.J.).

¹⁶⁴ See e.g. Atiyah, *supra* n.8 at 302; Goode, *supra* n.9 at 413; Cornish, *supra* n.90 at 476.

¹⁶⁵ Since on the facts the sale would have been in the ordinary course of business of a mercantile agent (evidence established cash sales at the kerbside in London was an established trading method). See Atiyah, *supra* n.8 at 301.

¹⁶⁶ *Supra* n.151 at 720. See also *Langmead v. Thyer Rubber Co.Ltd* [1947] S.A.S.R. 29 at 39.

¹⁶⁷ *Supra* n.102 at 921 (per Sir Denys Buckley).

¹⁶⁸ *Supra* n.147 at 242-43 (per Mason C.J.); at 252 (per Brennan J.); at 259 (per Dawson J.).

¹⁶⁹ See J.H. Farrar & M.A. O'Regan, *Reform of Personal Property Security Law*, New Zealand Law Commission Preliminary Paper No.6 (May 1988) at 4-5, 88-90 (title system preferable in the authors' opinion).

¹⁷⁰ At i.

The Bill enables intending purchasers of motor vehicles to search a centralised register to discover whether or not the motor vehicle is subject to a security interest. If no security interest is registered, and the intending purchaser has no notice that a security interest exists in respect of the vehicle, then any security interest is, in most cases, extinguished and the purchaser becomes the owner of the vehicle.¹⁷⁰

The greater protection envisaged only extends to the transfer of motor vehicles,¹⁷¹ yet it seems that these are the most common type of chattel subject to the misdealings of rogues and thieves.¹⁷² Certainly in absolute terms, the problem in New Zealand is not a minor one, with innocent purchasers of vehicles losing title to or paying outstanding debts upon vehicles many times every week.¹⁷³ The Bill has staggered commencement dates. The registration and transitional provisions (Parts I and V) are to come into force on 1 October 1989. However, more importantly from a consumer's viewpoint, the provisions enabling purchasers to secure good title (Part II to IV) do not commence until 1 April 1990.¹⁷⁴

The *nemo dat* rule will be further subjugated to the provisions of the Motor Vehicle Securities Act. However, the Bill makes it clear that the new protection for buyers is in addition to the remedies she might otherwise enjoy under the Sale of Goods and Mercantile Law Acts of 1908.¹⁷⁵ Most relevant to the present discussion is the addition of a new proviso to section 27(2).¹⁷⁶ If the security interest is registered under the Act, then the person taking the vehicle (B2) "shall be deemed to have notice of the existence of that security interest". Thus B2 will be imputed with constructive notice of any registered security interest. On the other hand if the security interest is not registered (registration is not mandatory¹⁷⁷) then B2 will, subject to actual notice, secure good title. B2 is in an even stronger position where she buys from a licensed motor vehicle dealer.¹⁷⁸ Then, any security interest in the vehicle is, in most cases, automatically extinguished and she becomes the owner of the vehicle.

The Bill does not protect persons buying from a thief¹⁷⁹ — *nemo dat* will still pertain. However, provision is made for the centralised register to record the fact that a vehicle has been reported to the police as having been stolen.¹⁸⁰ There is no obligation upon owners it seems to report the fact of theft. An interesting question might be whether omission to register this detail would give rise to a successful plea of estoppel by negligence by an innocent buyer against the true owner.¹⁸¹ Where the fact of theft is recorded and the buyer

¹⁷¹ See Clive Turner who suggested the equivalent Queensland legislation might be extended further to cover other expensive chattels, particularly boats: "The Queensland Motor Vehicle Securities Act 1986" (1987) 14 U. Qd.L.J. 101 at 116-17.

¹⁷² See Sutton, *supra* n.72 at 351.

¹⁷³ "Motor Vehicles and Prior Security Interests" An address by the Rt. Hon. G.Palmer, Minister of Justice, to the Motor Vehicle Dealers Institute A.G.M. (7 October 1987, Wanganui) at 5 (Consumer's Institute survey estimated there were between 20 to 25 cases of unauthorised sales per week, about 10 of which probably result in the consumer being deprived of title or paying the debt without compensation). See also the Hon. M.Shields, 1988 N.Z. Parliamentary Debates 3864 (1986 M.V.D.I. survey of members cited).

¹⁷⁴ A "pity" in the view of some: see Editorial, *Otago Daily Times*, 11 May 1988.

¹⁷⁵ See clauses 22(4), 36(3) and 54.

¹⁷⁶ See Second Schedule.

¹⁷⁷ Cl.6; Explanatory Note at ii.

¹⁷⁸ Clauses 26-27.

¹⁷⁹ Explanatory Note at ii; Mr. P.Burdon, N.Z. Parliamentary Debates 3865-66.

¹⁸⁰ Cl.8.

¹⁸¹ For an interesting recent discussion of estoppel by negligence, particularly the troublesome "duty" owed, on occasions, to sub-buyers: see *Leonard v Ielasi* (1987) 46 S.A.S.R. 495.

has not checked then he might be fixed with constructive notice. Even without imputation of notice however, the normal operation of the *nemo dat* rule would disentitle him.

This brief sketch of the Bill suggests that the cumbersome protection afforded by section 27(2) will become largely otiose in motor vehicle dispositions by non-owners. Whether the Bill when enacted¹⁸² will throw up a host of equally troublesome interpretation issues remains to be seen. At this embryonic stage it does appear to be the boon that the Minister of Justice suggests it will become.

The buyer in possession exception after nearly a century has neared the end of its useful life. The judgments of the High Court of Australia in *Gamer's* and the House of Lords in *Jones* may well be the last significant authorities upon section 27(2). They resolved two outstanding issues — the meaning of delivery and the seller/owner problem. The innocent purchaser had his protection extended in *Gamer's* by the finding that constructive delivery by the buyer in possession to him will suffice whereas this protection was denied him in the situation where the original owner was dispossessed of her goods by a thief (*Jones*). Both decisions mark a triumph for purposive interpretation over adherence to the natural, ordinary or literal construction. These decisions will retain their significance in New Zealand for a short while longer. But hopefully with the commencement of the Motor Vehicle Securities Act, both innocent owners and buyers will no longer be faced with the type of lengthy litigation required in *Gamer's* and *Jones* to know exactly where they stand.

¹⁸² *Postscript*: this occurred on 17 April 1989, the Bill becoming the Motor Vehicle Securities Act 1989. The substance of the writer's comments upon the Bill apply equally to the Act.