

The background features abstract, overlapping green geometric shapes, primarily triangles and polygons, in various shades of green, creating a modern and dynamic visual effect.

LAWS4210

Commercial Law

Sale of Goods: Transfer of property and Title

1.1 A Contract of Sale

For a transaction to be within the *Sale of Goods Act* there must be:

- a contract of sale;
- of goods;
- as a result of which property passes;
- for a money consideration.

Sale of Goods Act (NSW) 1923

Contract of sale = sale OR agreement to sell

Section 6(3):

When under a contract of sale the **property in the goods is transferred** from the seller to the buyer the contract is called a **sale**;

but when the **transfer of the property in the goods is to take place at a future time or subject to some condition** thereafter to be fulfilled the contract is called an **agreement to sell**.

Distinguishing between a sale and an agreement to sell:

- where under a contract of sale property in the goods is transferred the contract is called a “sale”
- where the transfer of the property to the goods is to take place at some future time or subject to the fulfilment of a condition the contract is called “an agreement to sell”
- when conditions in an agreement to sell have occurred such that the property in the goods is to pass, the agreement to sell becomes a sale
- different rights arise depending on whether the contract is a “sale” or an “agreement to sell”

- The subject matter of a contract of sale can be a part interest in goods
- The contract can be conditional or absolute
- There is no requirement that the contract be in writing

Goods are defined in s 5:

Goods includes **all chattels personal** other than things in action and money, and also includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Transfer of property

► Classification of goods

- Future goods means goods to be manufactured or acquired by the seller after the making of the contract of sale s 5 (1)
- Specific goods means goods identified and agreed upon at the time a contract of sale is made. s 5 (1) (may be existing or future)

Transfer of property

- ▶ 10 Existing or future goods
- ▶ (1) The goods which form the subject of a contract of sale may be either existing goods owned or possessed by the seller or future goods.
- ▶ (2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.
- ▶ (3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods

Passing of property in goods

- ▶ Unascertained goods - no transfer of property unless and until the goods are ascertained - s 21 SGA
- ▶ Specific goods and ascertained goods - property passes when intended to pass

SGA - s 22: Property passes when intended to pass

(1) When there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intended it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard is to be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Contract for Sale of Goods and Passing of Property

Atiyah & Adams' 5 practical consequences of the passing of property:

1. If property in goods has passed to the buyer, s/he will generally have a good title to them if the seller becomes insolvent while the goods remain in the seller's possession;
2. If the goods are delivered subject to the reservation of title (or property) by the seller, the seller *may* have a good title to the goods should the buyer become insolvent;
3. The right to sue a third party for damage to, or loss of, the goods may depend on who has the property;
4. Risk passes prima facie when property passes;
5. Generally, the seller can only sue for the price if property has passed.

Atiyah & Adams, *The Sale of Goods*, (9th edn) Ptman, 1995 at p.269, extracted in Pearson et al, *Commercial Law: Commentary and Materials* (3rd edn) Lawbook Co, 2010, p. 384.

Passing of Property...

- ▶ Property cannot pass in goods until they are ascertained: s.21 SOGA (NSW)
 - ▶ See, eg., *Jansz v GMB Imports Pty Ltd* [1979] VR 581
- ▶ Property in goods will pass when the parties intend it to pass: s.22 SOGA (NSW)
- ▶ Unless a different intention appears from the contract, property will pass according to the rules set out in s.23 SOGA:

Rule 1 - s.23(2)

If there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial that the time of payment or the time of delivery, or both, are postponed.

- ▶ Passing of property in *specific goods*
 - ▶ *Dennant v Skinner* [1948] 2 KB 164
 - ▶ *McPherson, Thom, Kettle & Co v Dench Bros* [1921] VLR 437
 - ▶ *Bodilingo Pty Ltd v Webb Projects Pty Ltd* (1990) ASC ¶ 56-001
 - ▶ *Kursell v Timber Operators and Contractors Ltd* [1927] 1 KB 298

Transfer of property

- ▶ 21 Goods must be ascertained
- ▶ Subject to section 25A, where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained
- ▶ Unascertained - not yet identified (may be existing or future)
- ▶ Ascertained - have become identified

Transfer of property

- Rules about the passing of property s 23 (these apply unless parties agree otherwise):

Rule 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Transfer of property

- ▶ *Bodilingo Pty Ltd v Webb Projects Pty Ltd* (1990) ASC ¶56-001
- ▶ W sold its business to B as a going concern including office furniture and equipment. Delivery of goods was on or about contract date. Payment was to be made in monthly instalments. Five were paid and then the buyer became insolvent and defaulted on the balance. The contract had no express provision about the passing of property and there as no retention of title clause. W claimed that the true construction of the contract was that property would pass on completion ie when the purchaser had completed paying for the equipment.

Transfer of property

- ▶ Cl 1 provided that the vendor sells and the purchaser purchases the equipment
- ▶ Cl 2 provided that the purchase price would be paid in instalments
- ▶ Cl 3 warranted that the equipment was “in a state of complete severance from any freehold or leasehold”
- ▶ Cl 4 vendor warranted that the equipment is “or will on completion be its own absolute property” (this was relied on by W as indicating an intention that property would not pass until payment made)

Transfer of property

- ▶ Held that rule 1 applied - could not discern any contrary intention of the parties. Cl 1 indicated that property would pass immediately.
- ▶ Per Handley JA
- ▶ *Under r 1 of s 23, and subject to a different intention appearing, where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. The agreement was unconditional.*

Transfer of property

- ▶ 60 Auction sales
- ▶ In the case of a sale by auction:
- ▶ (2) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner: until such announcement is made any bidder may retract his or her bid
- ▶ Listen here for a brief explanation of the history and nature of auctions:
- ▶ <https://www.bbc.co.uk/sounds/play/w3csz2xk>

Transfer of property

- ▶ *Dennant v Skinner* [1948] 2 KB 164 text 443.
- ▶ Auctioneer sold cars at auction then agreed the purchaser could pay by cheque and take the cars but property would not pass until the cheque was cleared which never happened. Auctioneer sought to recover possession from a third party who had bought a car from the rogue.
- ▶ Held property passed on the fall of the hammer - any subsequent agreement about title passing was too late.

Transfer of property

- ▶ *McPherson, Thom, Kettle & Co v Dench Bros* [1921] VLR 437
- ▶ Heifer was sold at auction to the Ds who never obtained possession because the animal disappeared from its pen. Ds were sued for the price. They argued that the provision that the lots were at the purchaser's risk from sale indicated a contrary intention. That provision would not have been needed had property passed at sale.

Transfer of property

- ▶ Per Schutt J
- ▶ “The clause in the conditions of sale as to risk in this case does not, therefore, in my opinion, show that the property in the heifer was not to pass at the time of contract of sale was made, but amounted to an express and emphatic declaration of the intention of the parties that it should then pass, so there should be no room for doubt on the point.”

Transfer of property

Rule 2. Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them in a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof.
(eg registration of a car)

Transfer of property

- ▶ *Underwood Ltd v Burgh Castle Brick and Cement Syndicate* [1922] 1 KB 343
- ▶ Ps agreed to sell to Ds a horizontal tandem condensing engine. The engine weighed 30 tons, was bolted to and embedded in concrete flooring. Seller had to detach and dismantle before delivery by rail. Engine was damaged when being loaded on the railway truck. Ds refused to accept the damaged goods. Ps sued for the price. Ds claimed that property had not passed.
- ▶ Held property had not passed at the time of contract because the sellers were bound to do something to put the goods in a deliverable state.

Transfer of property

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh measure test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done and the buyer has notice thereof.



Transfer of property

- ▶ **Rule 4.** Where goods are delivered to the buyer on approval or on “sale or return” or other similar terms, the property therein passes to the buyer:
- ▶ (a) when the buyer signifies approval or acceptance to the seller, or does any other Act adopting the transaction,
- ▶ (b) if the buyer does not signify approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Transfer of property



*Atari Corporation (UK) Ltd v Electronic Boutique Stores (UK) Ltd [1998]
QB 539*

EB received computer games from Atari on terms providing for sale or return until 31 Jan, On 19 Jan EB wrote to Atari saying it would return unsold goods. Atari had to accept return even though goods not returned by 31 Jan. Notice of rejection prior to 31 Jan sufficient.

Transfer of property

- ▶ *Weiner v Harris* [1910] 1 KB 285 text 454
- ▶ P, a manufacturing jeweller sent articles of jewellery to F, a retail jeweller on terms of a letter which used the term “sale or return”. However the overall terms of the letter made it clear that the retail jeweller was never to be the buyer but would be the selling agent and would either sell the goods and account for the cost price plus half the profit or return the goods.

Transfer of property

- ▶ **Rule 5.** (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.
(2) Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, the seller is deemed to have unconditionally appropriated the goods to the contract.

Transfer of property

- ▶ *Matthew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd* [2001] NSWCA 281 text 461
- ▶ Riviera contracted to manufacture a motor cruiser for Boland, a ship broker in the US.
- ▶ Riviera contracted with Short to arrange shipment of the boat.
- ▶ Riviera took the boat to Port Botany. This was at Riviera's expense under the contract.
- ▶ Short arranged for the Botany Cranes to lift the boat onto Campbell's low loader.
- ▶ Campbell's driver drove under an archway and the boat was damaged.

Transfer of property

- ▶ Riviera sued Campbell who defended the suit on the basis that Riviera was no longer owner of the goods and had no standing to sue. Campbell relied on s 23 r 5 - unconditional appropriation when the motor cruiser was delivered to a carrier or other bailee.
- ▶ At the time the contract was made the motor cruiser was both future goods and unascertained goods so property did not pass at the time of contract.
- ▶ Payment was made before the cruiser was loaded by Riviera - was property to pass then or when it was to be loaded on the freighter or at some interim time?

Transfer of property

- ▶ The only person who was a carrier within s 23 r 5 was the freighter owner
- ▶ Delivery to the relevant “carrier or other bailee” must have “the purpose of transmission to the buyer” - successive transfers of possession were preparatory to transmission of the goods to the buyer.
- ▶ It was significant that it was Short’s practice to inform the buyer of the freighter on which the motor cruiser would be carried but not to inform him of the modes of transport from Queensland to Port Botany.
- ▶ The appropriating act is usually the last act performed by the seller in this case procuring delivery on board the freighter.
- ▶ Property did not pass until after the accident.

Transfer of property



► *Pignataro v Gilroy* [1919] 1 KB 459

D agreed to sell 140 bags of rice to P (unascertained). P paid and was told 125 bags at wharf for collection and 15 bags available for collection at D's business premises. P waited a month and then went to collect the 15 bags only to discover they had been stolen. P sued. Who bore the loss?

Transfer of property



- ▶ Unconditional appropriation
- ▶ *Wardar's (Import & Export) Co Ltd v W Norwood & Sons Ltd* [1968] 2 QB 663

Contract to buy 600 cartons of frozen kidneys Carrier arrived at 8 am to collect and handed over delivery note. Loading not complete until noon by which time the cartons were thawing and the following day at the plaintiff's premises were unfit for human consumption. The plaintiff sued. When did property and risk pass?

Transfer of property

- ▶ **24 Reservation of right of disposal**
- ▶ (1) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

Transfer of property

- ▶ 25A Contracts of sale for goods forming part of bulk quantity (NB that there is no ACT equivalent of this provision)
- ▶ (cf *Sale of Goods Act 1979* of the United Kingdom, sections 20A and 20B)
- ▶ (1) This section applies to a contract of sale for a specified quantity of unascertained goods of which some or all form part of a single bulk quantity of goods of the same kind ("the bulk") if:
 - ▶ (a) the bulk is identified, either in the contract or by subsequent agreement between the parties, and
 - ▶ (b) the buyer has paid for some or all of the goods that form part of the bulk.
- ▶ (2) Unless the parties agree otherwise:
 - ▶ (a) property in an undivided share in the bulk is transferred to the buyer, and
 - ▶ (b) the buyer becomes an owner in common of the bulk, as soon as both of the conditions referred to in subsection (1) have been met.

Transfer of property

- ▶ *Re Goldcorp Exchange Ltd (in Receivership)* [1994] 2 All ER 806 text 470
- ▶ A NZ company dealt in gold coins and ingots for the consumer market, It sold bullion on terms that they were purchasing “non allocated metal” which would be stored and insured free of charge. Customers were told that bullion was not set aside as a customer’s metal. The co became insolvent and did not have sufficient bullion to cover its debts or the purchase contracts. What were the rights of the non-allocated claimants?

Transfer of property

- ▶ Held property in the bullion did not pass at the time of contract as the goods were not ascertained.
- ▶ Another group of claimants (Walker and Hall claims) were in a different position. Originally bullion was stored and recorded separately. After 1983 the bullion was stored en masse but still separate from the vendor's own stock. The quantity in the pooled exactly matched contracts with customers. Documentation with these customers was different - vendor did not claim title and risk was with the customer. Property had passed. The issue was then one of the liability which arose when Walker and Hall was sold and the separated bullion became wrongfully absorbed into its own trading stock.

Transfer of property

- ▶ *Re Stapylton Fletcher; Re Ellis, Son & Vidler* [1995] 1 All ER 192 text 475.
- ▶ B acquired E Ltd and S Ltd (both were wine merchants who held stocks of wine for customers as bailees in return for rentals)
- ▶ Receivers appointed.

Transfer of property

- ▶ Receiver acknowledged customers' claims in the following cases
 - ▶ Where a case of wine had a customer reference on it and it tallied with the company's records
 - ▶ Where a stack of cases had a label showing it belonged to one individual
 - ▶ Where the records show that other cases in a stack have already been removed leaving a number which tallied exactly with the customer's order (appropriation by exhaustion)
 - ▶ Inventory showed one or more cases earmarked for a specific customer and bearing a single rotation number.

Transfer of property

- ▶ In other cases the receiver categorised the claimants as having entitlements rather than an actual allocation of wines.
- ▶ Wine in bond allocated in faxed inventory - in most cases totals matched but nothing to identify particular cases with particular individuals - the claimants held as tenants in common
- ▶ Composite stacks - moved but still identifiable - claimants held as tenants in common

Transfer of property

- ▶ Composite stacks - now largely dispersed and a shortfall existing - tenants in common in original shares - once property has passed mixing will not reverse that.
- ▶ Wine purchased elsewhere - now mixed - interest as tenants in common
- ▶ Wine ordered from France but not despatched at time of receivership - not ascertained and therefore no property had passed at the time of receivership

Nemo dat quod non habet

- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ 26 Sale by person not the owner
- ▶ (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 the owner's conduct precluded from denying the seller's authority to sell.
- ▶ (2) Nothing in this Act shall affect:
 - ▶ (a) the provisions of the *Factors (Mercantile Agents) Act 1923* or of the *Personal Property and Securities Act 2009* of the Commonwealth
 - ▶ (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.

Sale of Goods Act 1954 (ACT)

- ▶ **26 Sale by person not the owner**
- ▶ (1) Subject to this Act, if goods are sold by a person who is not the owner of them and does not sell them under the authority or with the consent of the owner, the buyer does not acquire a better title to the goods than the seller had unless the owner of the goods is, by the owner's conduct, precluded from denying the seller's authority to sell.
- ▶ (2) Nothing in this Act affects—
- ▶ (a) the provisions of the *Mercantile Law Act 1962* or the *Registration of Interests in Goods Act 1990 (ACT)* ^{*}; or
- ▶ (b) the validity of a contract of sale under a special common law or statutory power of sale or under the order of a court of competent jurisdiction.

* The current version of Section 26 of the ACT legislation still refers to this Act although it was repealed by the *Personal Property and Securities Act 2009* (Cth). (Clicking on the hyperlink in the SoGA in the ACT Legislation Register opens a window for the repealed Act).

Exceptions to nemo dat

- ▶ S 26 reflects the general law
 - *nemo dat quod non habet* - you cannot sell what you do not own - you cannot pass a better title than you have yourself but
- ▶ Estoppel s 26 (unless the owner of the goods is by the owner's conduct precluded from denying the seller's authority to sell).
- ▶ - if buyer's belief in seller's ownership has been induced by true owner, the true owner may be estopped from denying the seller's right to sell

Exceptions to nemo dat

Exceptions to the nemo dat rule

Exceptions recognise the need to balance 2 competing principles:

- ▶ The protection of property (nemo dat rule does this); and
- ▶ The protection of commercial transactions (the person who takes in good faith and without notice should get a good title).

Bishopsgate Motor Finance Corp Ltd v Transport Brakes Ltd [1949] 1 KB 332 at 336-7.

Exceptions to nemo dat

What are the exceptions?

1. Estoppel (s 26);
2. Sale under a voidable title (s 27);
3. Sale by a mercantile agent
4. Seller in possession (s 28);
5. Buyer in possession (s 28);
6. Miscellaneous exceptions.

Exceptions to nemo dat

The estoppel exception

- ▶ Closing words of s 24(1) incorporates an exception to the nemo dat rule based on estoppel.
- ▶ Estoppel, where it arises, disentitles the true owner from denying the ownership of a third party who buys the goods from the seller. Consequently, the third party acquires a good title to the goods by 'estoppel'.
- ▶ Focus on what, if anything, has given rise to the belief by the third party that the seller is the owner of the goods, or is authorised to sell them.
- ▶ That belief can be induced by representation by the true owner about the seller; or by negligence on part of true owner which permits seller to create appearance of ownership.

Exceptions to nemo dat

Estoppel by representation

- ▶ The third party must establish that there was a clear and unequivocal representation inconsistent with the right of the owner to assert ownership in the goods and that the third party reasonably relied on it to their detriment: *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600.
- ▶ Entrusting possession of the goods to another is not a representation to a third party that the seller owns the goods or has authority to sell them: *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371; *Haines Bros Earthmoving Pty Ltd v Rosecell Pty Ltd* [2016] NSWCA 112.

Exceptions to nemo dat

Estoppel by omission

- ▶ Occurs when the true owner, by their negligence in not saying something when there was a legal duty to do so permits the seller to create an appearance of ownership.
- ▶ *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd* [2003] VSC 291.
- ▶ In most cases an owner will not owe a third party buyer a duty of care: *Mercantile Bank of India Ltd v Central Bank of India Ltd* [1938] AC 287
- ▶ *Haines Bros Earthmoving Pty Ltd v Rosecell Pty Ltd*

Exceptions to nemo dat

Sale under a voidable title: s 27

► When the seller of goods has a voidable title thereto, but the seller's title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, if the buyer buys them in good faith and without notice of the seller's defect of title.

Under this section, therefore, a person who has voidable title to goods can confer a good title to them on a bona fide purchaser for value, provided that the seller's title has not been avoided at the time of the sale.

- ▶ What is a voidable title?
- ▶ When is a voidable title avoided?
- ▶ *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525

Exceptions to nemo dat

► Sale by mercantile agent s 26(2)(a)

FACTORS (MERCANTILE AGENTS) ACT 1923 (NSW) - SECT 3

"Mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

Sale by a mercantile agent

3(1) *Factors Act* provides:

(1) When a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by the agent when acting in the *ordinary course of business of a mercantile agent*, shall, subject to the provisions of this Act, be as valid as if the agent were expressly authorised by the owner of the goods to make the same: Provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.



Exceptions to nemo dat



► *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600

Murphy owned a Bedford van and wanted to purchase a Chrysler sedan but did not have the deposit. The car dealer suggested that he tell the finance company that the dealer owned both vehicles and Murphy wanted to buy both of them. The car dealer would then sell both to the finance company and M would take them both back on hire purchase. The finance co. only accepted the proposal for the Bedford which M already owned

Exceptions to nemo dat

- ▶ *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600 cont

The car dealer told M the deal was off but proceeded to transfer the Bedford to the finance company which then sought to repossess the van when payments weren't made.

In the meantime M had sold his business including the van to Goldring.

Who had title - the finance company or Goldring?

- ▶ Murphy was precluded from denying the car dealer's right to sell because of the documents (finance application) which represented that the car dealer was the owner of the Bedford van.
- ▶ Did that estoppel affect Goldring?

Exceptions to nemo dat

- ▶ *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600 cont
- ▶ Goldring argued that he was entitled to rely on the reality of the situation.
- ▶ Per Devlin J
- ▶ *“This section expresses the old principle that that apparent authority to sell is an exception to the maxim nemo dat quod non habet; and it is plain from the wording that if the owner of the goods is precluded from denying authority, the buyer will in fact acquire a better title than the seller ... the effect of its application is to transfer a real title and not merely a metaphorical title by estoppel.”*

Exceptions to nemo dat

- ▶ *Mortgage, Loan & Finance Co of Australia Ltd v Richards* (1932) 32 SR (NSW) 50 text 571.
- ▶ MLFA gave Jacobs some jewellery to sell on a sale or return basis. At the end of 6 months Jacobs had to return any unsold goods or pay a list price. Jacobs pledged the goods with Richards.
- ▶ Court at below held that Jacobs was not a mercantile agent relying on the “sale or return terms.”

Exceptions to nemo dat

- ▶ The real issue was whether Jacobs had in the ordinary course of his business authority to sell the goods. The terms of the arrangement gave Jacobs authority to “sell on behalf of the company.”
- ▶ Jacobs did not obtain possession as purchaser because title remained with the company. The terms were not usual agency terms but nevertheless Jacobs was an agent because he had authority to sell.

Exceptions to nemo dat

- ▶ *Cook v Rodgers* (1946) SR (NSW) 229 text 577
- ▶ G, the owner, hired a car to T under a hire purchase arrangement. T undertook not to sell or attempt to sell but took the car to C, an auctioneer and instructed him to sell. C sold the car to M who sold the car to GBC under a finance arrangement and GBC then hired it to the P under a hire purchase arrangement. D as agent for G took possession of the car.

Exceptions to nemo dat

- ▶ Was C, the auctioneer, entrusted with possession of the car within the meaning of the Act when possession was not given by the true owner or with the consent of the true owner?
- ▶ Per Roper J
- ▶ *“ a mercantile agent is not entrusted with the possession of goods within the meaning of the section unless he obtains lawful possession of them, that is, by obtaining possession of them from a person whose right in the goods enabled him in law to give possession of them to the agent”*

Exceptions to nemo dat



- ▶ *Magnussen v Flanagan* [1981] 2 NSWLR 926 text 579
- ▶ F gave her Ford Cobra to Peter Smythe's Classic Car Centre on consignment for a stipulated price.
- ▶ PS sold the car to M who asked for the vehicle to be delivered to a parking station as he was returning to Weipa.
- ▶ M did not receive the registration certificate but PS did notify the Dept of Motor Transport that he had disposed of the vehicle and the vehicle was registered in M's name (without a transfer being supplied)
- ▶ The car was never delivered the parking station and F took back possession and re-registered in her name.

Exceptions to nemo dat

- ▶ Was the sale in the ordinary course of business as a mercantile agent?
- ▶ F relied on the failure of M to get a registration certificate and on some other breaches (failure to display details in window although they were in the vehicle) as showing this was not in the ordinary course of business.
- ▶ Foster J referred to *Oppenheimer v Attenborough and Son* [1908] 1 KB 221

Exceptions to nemo dat

- ▶ Per Buckley LJ re meaning of ‘acting in the ordinary course of business of a mercantile agent’
- ▶ *“acting in such a way as a mercantile agent acting in the ordinary course of business of a mercantile agent would act; that is to say, within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so there is nothing to lead the pledgee to suppose that anything wrong is being done or to give him notice that the disposition is one which the mercantile agent had no authority to make.”*

Exceptions to nemo dat

- ▶ Held there was a sale in the ordinary course of business - English cases relating to log books distinguished - documents are different and regulations applying to them are different.
- ▶ Assistance gained from a Canadian decision *Durham v Asser* where it was held that as the certificate of registration was not a document of title, retention of the certificate did not prevent the sale being in the ordinary course of business and the purchaser got good title.

Exceptions to nemo dat

- ▶ The provision requiring display of relevant details in the vehicle was for the benefit of the buyer and should not be used to the detriment of the buyer. In any event the absence of the statutory notice would not put the buyer on notice that there was something wrong with the dealer's authority to sell the car.

Nemo dat quod non habet

- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ 27 Sale under voidable title
- ▶ Where the seller of goods has a voidable title thereto but the seller's title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided the buyer buys them in good faith and without notice of the seller's defect of title.

Sale of Goods Act 1954 (ACT)

- ▶ **27 Resale under voidable title** If the seller of goods has a voidable title to them but the seller's title has not been avoided at the time of the sale, the buyer acquires a good title to the goods provided the buyer buys them honestly and without the notice of the seller's defect of title.

Exceptions to nemo dat

- ▶ Sale under voidable title s 27
- ▶ *Phillips v Brooks* [1919] 2 KB 243

Purchaser said he was Sir George Bullnough when he was not. Contract could have been avoided for fraud but the contract had not been avoided when the rogue pawned the ring.



Exceptions to nemo dat



- ▶ *Car and Universal Finance v Caldwell* [1965] 1 QB 525 text 592.
- ▶ C sold a Jaguar to N, the rogue, who took the car on payment of a cheque and left a less valuable car as security.
- ▶ C presented the cheque which bounced. He went to the police and to the Automobile Association.
- ▶ N then sold the car to M which had notice of the defect in title.

Exceptions to nemo dat

- ▶ M sold to G&C Finance for hire to K a fictitious person.
- ▶ M then proposed another hirer S (also fictitious) who also appeared to fall into arrears
- ▶ G&C authorised M to repossess the car and sell it.
- ▶ M sold the car to B (a dealer).
- ▶ B sold the car to Car and Universal as part of a hire purchase arrangement.

Exceptions to nemo dat

- ▶ Had C avoided the contract (and recovered title) before the purported sale by M to G&C?
- ▶ Normally to rescind a contract communication of that with the other party would be required but in circumstances like these where the rogue would seek to avoid being contacted, knowing the other party would want to rescind, the defrauded seller can rescind by clear and unequivocal action that he terminates the contract.

Exceptions to nemo dat

- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ 28 Seller or buyer in possession after sale
- ▶ (1) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for that person 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 the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.



Seller in possession exception (cont'd)

- ▶ Seller to continue in continuous possession of the goods: *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867.
- ▶ Delivery of goods by seller in possession to third-party purchaser

Exceptions to nemo dat

- ▶ **SALE OF GOODS ACT 1954 (ACT) - SECT 29**
- ▶ **Seller or buyer in possession after sale**
- ▶ (1) If a person who has sold goods continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for the person, of the goods or documents of title under a sale, pledge or other disposition to a person receiving the goods or documents of title honestly and without notice of the previous sale has the same effect as if the person making delivery or transfer were expressly authorised by the owner of the goods to make the delivery or transfer.

Exceptions to nemo dat

- ▶ Sale by seller in possession s 28(1) - if the buyer leaves the seller in possession after sale and the seller resells them the second buyer (bona fide and for value) will get good title ie the seller bears the risk if the buyer resells them

Exceptions to nemo dat

- ▶ *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867

Car dealer sold its stock to the finance company to finance its operations. The finance co (Motor Credits) allowed the dealer to display the cars and sell them to the public. It withdrew that authority but 16 cars were sold after that time to Pacific Motor Auctions.

- ▶ PMA bought and sold cars with the car dealer and had already received cheques from the car dealer which had been dishonoured. It bought the cars after normal working hours.

Exceptions to nemo dat

- ▶ It was accepted that PMA acted in good faith although Motor Credits argued that PMA must have been aware that the cars were on a floor plan arrangement.
- ▶ It was also argued that the car dealer was not simply a seller in possession but was a bailee. See *Staffs Motor Guarantee Ltd v British Waggon Co Ltd*

Exceptions to nemo dat

- ▶ Per Lord Pearce
- ▶ *“The object of the section is to protect an innocent purchaser who is deceived by the vendor’s physical possession of the goods or documents and who is inevitably unaware of legal rights which fetter the apparent power to dispose. Where a vendor retains uninterrupted physical possession of the goods, why should an unknown arrangement, which substitutes a bailment for ownership, disentitle the innocent purchaser to protection from a danger which is just as great as that from which the section is admittedly intended to protect him?”*
- ▶ The car dealer’s *“continued physical possession was solely attributable to the ... sale.”*

Exceptions to nemo dat

- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ 28 Seller or buyer in possession after sale
- ▶ (2) 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 or transfer by that person or by a mercantile agent acting for that person 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 intrusted by the owner with the goods or documents of title.

Exceptions to nemo dat

- ▶ **SALE OF GOODS ACT 1954 (ACT) - SECT 29**
- ▶ **Seller or buyer in possession after sale**
- ▶ (2) If a person who has bought, or agreed to buy, goods obtains, with the consent of the seller, possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for the person, of the goods or documents of title under a sale, pledge or other disposition of the goods or documents of title to a person receiving the goods or documents honestly and without notice of any lien or other right of the original seller in respect of the goods has 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.

Exceptions to nemo dat

- ▶ Sale by buyer in possession s 28(2) - a seller who gives the buyer possession of the goods before the sale is finalised is in the same position as a buyer who leaves the goods with the seller after sale

Buyer in possession exception (cont'd)

- ▶ Bought or agreed to buy
- ▶ Possession by the buyer
- ▶ Buyer obtains possession with the consent of the seller
- ▶ Delivery of the goods by buyer in possession to the third party

Exceptions to nemo dat

- ▶ *Langmead v Thyer Rubber Co Ltd* [1947] SASR 29 text 614
- ▶ It was clear that property had not passed from Langmead to the car dealer but had Langmead agreed to sell?
- ▶ He said there would be no sale of his Vauxhall unless he got the money (cash).
- ▶ Langmead took a cheque from Gray and allowed him to take the car to the paint shop - intention was that the cheque would be swapped for cash.
- ▶ Gray sold the car, with others, to Thyer Rubber.

Exceptions to nemo dat

- ▶ Langmead went to the police and then banked the cheque which was dishonoured.
- ▶ Held that there was an agreement to sell and that Gray was in possession of the car, for the purpose of getting it painted, with Langmead's consent.

Exceptions to nemo dat

- ▶ *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236 text 624
- ▶ G was a car wholesaler. E and R was a car dealer (retail) which sold 8 cars to E and R on terms that property did not pass unless full cash settlement was made. E and R did not pay anything for the 8 cars.
- ▶ E and R had a floor plan agreement with Natwest under which Natwest would buy used cars acquired by the dealer as stock. The dealer would retain possession as bailee.
- ▶ The 8 cars were sold to Natwest under the floor plan. When E and T failed to pay for the cars Gamer's repossessed them.

Exceptions to nemo dat

- ▶ Did s 28(2) apply?
- ▶ Gamer's argued it applied only if there was physical delivery of the goods to the buyer ie sub-buyer.
- ▶ Held that delivery could be actual or constructive. Was there evidence of change in the dealer's possession of the vehicles which amounted to constructive delivery to Natwest?
- ▶ The delivery receipt evidenced the terms of the agreement for sale to Natwest and acknowledged that the dealer held the vehicles as bailee.

Chelliah v NSW Police [2018] NSWSC 557

- ▶ Mr Hall - Mrs Hall - car stolen - Mr Lind - Mr Cross
- ▶ Who has title to the car?



***Chelliah v NSW Police* [2018] NSWSC 557**

The nemo dat rule:

- ▶ If a person disposes of a chattel, whether for valuable consideration or not, **they can confer no better title than they have themselves.**
- ▶ Only the true owner can transfer property in goods.
- ▶ However, under common law and under statute, a person who is not the true owner can transfer a title sufficient to defeat even that of the true owner.

Chelliah v NSW Police [2018] NSWSC 557

s 27(1) SOG (s 26(1) ACT) provides:

(1) **Subject to the provisions of this Act**, when 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 the owner's conduct precluded from denying the seller's authority to sell.**

***Chelliah v NSW Police* [2018] NSWSC 557**

Personal Property Securities Act 2009 (Cth)

- ▶ Provides for situations where a third party may take personal property free of an existing security interest.
- ▶ Security interest defined in s 12: an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation.
- ▶ Mrs Hall did not have a security interest so PPSA n/a.