the apparently trustworthy Phelan (*secus*, presumably, if she had known or suspected him to be a rogue). Sellers and Pearson L.JJ. thought, further, that in any event the proximate cause of the plaintiffs' loss would not have been any negligence on her part, but Phelan's fraud. The result was that, despite her carelessness in signing and handing over documents which she did not trouble to read, the defendant succeeded, and this decision adds yet another case to the many which tell us what kind of conduct is *not* sufficient to permit the operation of section 21 (1).

No doubt the Court of Appeal in this case correctly applied the principles which decide the technical issue of title; and it is plain that we will always need to have rules of this kind to achieve this end; but the question of title too often has nothing to do with the justice of the case. In many instances, if the problem of loss were fairly resolved, the parties would be ready to agree that one or other of them should keep the disputed chattel. The recommendations of Devlin L.J. in *Ingram* v. *Little* [1961] 1 Q.B. 31, 73–74, that the court should have power to adjust the loss between the victims in such proportion as might be just in the circumstances, may soon be law. A decision on this basis might well have cost Mrs. Hamblin more than her opponents; although of course they would both still be losers, and the fraudulent middleman the only one to gain. The parties may regret that their problems had not arisen in New Zealand, where the motor trade, stung by the damage to its reputation which this kind of incident, unhappily not infrequent, can cause, has put its house in order by securing the enactment of legislation (the Motor-Vehicle Dealers Act, 1958), which requires every dealer to be licensed, and to provide a bond from an insurer guaranteeing his fidelity. The legislation has not only meant the avoidance of much unhappy litigation like the present case; but the need to secure renewal of a licence from a magistrate's court each year has encouraged the less scrupulous dealer to avoid practices which, though not perhaps unlawful, may harm his record.

L. S. Sealy.

SALES BY PERSONS WITH VOIDABLE TITLES AND BUYERS IN POSSESSION

It is startling to learn that the whole development of hire-purchase, approved by the House of Lords in *Helby* v. *Matthews* [1895] A.C. 471 as a means of escaping the provisions of the Factors Act, 1889, s. 9, and the Sale of Goods Act, 1893, s. 25 (2), was largely unnecessary. Yet that is one of the implications of *Newtons of Wembley Ltd.* v. *Williams* [1964] 3 W.L.R. 888. The Law Reform

Committee must also have been given some food for thought in their current study of the *nemo dat quod non habet* rule, for the case concerns the inter-relationship of three exceptions to that rule contained in the Sale of Goods Act, 1893, ss. 23 and 25 (2), and the Factors Act, 1889, ss. 2 and 9.

In *Williams'* case the plaintiff car dealers sold a car to A who paid by a cheque for £735 and drove the car away, although the property in it was only to pass to A when the cheque was cleared. Three days later the cheque was dishonoured, whereupon the plaintiffs informed the Hire-Purchase Information Bureau, unsuccessfully employed two agents to trace A, and told the police. Some weeks later A resold the car to B for £550 in £5 notes in Warren Street, London, where used cars are regularly sold in the street. B bought in good faith, without notice that A had obtained the car by fraud. B resold the car for £505 to Williams. The Hire-Purchase Information Bureau later heard of this and informed the plaintiffs, whose demand for the return of the car was refused by Williams. The plaintiffs therefore sued for detinue or conversion of the car on the ground that A's voidable title had been avoided before the sale to B, whilst Williams relied on the Factors Act, ss. 2 and 9. The Court of Appeal, affirming the decision of Davies L.J. at first instance, gave judgment for Williams.

The Sale of Goods Act, s. 23, enables a person with a voidable title to goods to transfer a good title to a buyer in good faith and without notice of the seller's defect of title provided that he sells before his title is avoided. The potency of this exception to the *nemo dat* rule appeared to be reduced when, in *Car and Universal Finance Co. Ltd.* v. *Caldwell* [1964] 2 W.L.R. 600 (noted [1964] C.L.J. 180–182), the Court of Appeal held that where the rogue, by disappearing, prevents the original owner from directly communicating his decision to avoid the rogue's title, the owner may achieve the same effect by doing all he can in the circumstances to indicate his intention unequivocally, *e.g.*, by asking the police to recover the goods. So in *Williams'* case it was held that A had no title when he purported to sell the car to B, either because the cheque was never in fact cleared or because the plaintiffs had already done all they could to avoid any title A might have had.

But whereas in *Caldwell's* case that was the end of the matter, here it was not, for Williams pleaded the Factors Act, ss. 2 and 9. Section 9 (identical, so far as here relevant, with the Sale of Goods Act, s. 25 (2)) provides that if a person who has bought or agreed to buy goods obtains possession of them with the seller's consent and then sells and delivers them to a third person, who receives

them in good faith and without notice of any right of the original seller, that delivery " shall have the same effect as if the person making the delivery . . . were a mercantile agent in possession of the goods with the consent of the owner." The Factors Act, s. 2 (1), provides that where a mercantile agent is in possession of goods with the consent of the owner, any disposition of the goods made by him " when acting in the ordinary course of business of a mercantile agent " shall be as valid as if it were expressly authorised by the owner.

At the time when he obtained possession of the car, A had indeed " bought or agreed to buy " and in such cases a person obtains possession " with the consent of the owner " despite his own fraud: *Du Jardin* v. *Beadman Brothers Ltd.* [1952] 2 Q.B. 712. So section 9 was held applicable. A's later sale and delivery to B therefore took effect *as if* A were a mercantile agent in possession with the plaintiffs' consent. This was held to mean that A, although not in fact a mercantile agent, could achieve the same results as a mercantile agent in possession could achieve under section 2 (1), namely, a disposition binding on the owner (the plaintiffs), provided that he observed the other requirement of section 2 (1), *i.e.*, that his disposition to B was made " when acting in the ordinary course of business of a mercantile agent." Both Davies L.J. and the Court of Appeal had difficulty in seeing how a person who was not in fact a mercantile agent could satisfy this requirement, especially since in the present case A had no business premises and sold the car in the street for cash. However, they concluded, in effect, that he must act in the way in which he would normally have been expected to act if he had been a mercantile agent and that in the circumstances A had done so, because Warren Street was an established street market for the sale of used cars for cash. It was immaterial that the plaintiffs' consent to A's possession of the car had in fact been withdrawn when they avoided A's title under the *Caldwell* principle, for section 2 (2) of the Factors Act provides that where a mercantile agent has once been in possession with the owner's consent, any disposition which would have been valid had that consent continued shall be valid notwithstanding its withdrawal.

This decision raises a host of problems which cannot be discussed in the space available (for some of them, see W. R. Cornish in (1964) 27 M.L.R. 472–478). It obviously restricts considerably the decision in *Caldwell's* case, for a rogue with a voidable title who has obtained possession of the goods will seek to rely on section 25 (2) rather than on section 23 of the Sale of Goods Act.

On the other hand, the scope of section 25 (2) is considerably reduced, for ever since *Lee* v. *Butler* [1893] 2 Q.B. 318 (C.A.) (which receives no mention in the judgments in *Williams'* case) it had been generally assumed that *whenever* a person in possession, with the owner's consent, of goods which he has bought or agreed to buy disposes of and delivers them to an innocent purchaser, he transfers a good title. It was this assumption that led credit traders to try to preserve their security in goods by developing the bailment of hire with option to purchase, as in *Helby* v. *Matthews*.

But now the innocent purchaser from a person who has " bought or agreed to buy " goods is unlikely to be protected by section 25 (2) unless that person happens to be engaged in trade or business or sells in peculiar circumstances such as those prevalent in Warren Street. It is otherwise with a sale by a seller in possession, under section 25 (1), due to different wording. Section 25 (2) of the Sale of Goods Act and section 9 of the Factors Act no longer apply to conditional sale agreements (Hire-Purchase Act, 1964, s. 21 (4), Sched. 1, para. 8), but it is ironical that this decision, which is likely to render ineffective sales by private buyers in possession, should come just after the legislature had found it necessary to enact in Part III of the Hire-Purchase Act, 1964, that a sale *of a motor-vehicle* by any hire-purchaser or buyer under a conditional sale agreement, whether or not he be engaged in business, shall pass a good title to an innocent purchaser other than a motor dealer or finance company.

J. W. A. Thornely.

CONTRACT AND TORT—CONCURRENCE—PROFESSIONAL NEGLIGENCE

If I employ you to make or supervise the making of something for me and as a result of your negligence it is less good than it ought to have been I have an action against you for breach of contract. I have no claim in tort and no one else has any claim at all. If, on the other hand, as a result of your negligence the thing is less good than it ought to have been *and therefore causes damage to some third person or his property*, then, exceptional cases apart, you will be liable to him in tort. If the thing similarly causes damage to me or my property there seems to be no reason for saying that I have no claim against you in tort but must rely exclusively on my contract. This would be to apply *Winterbottom* v. *Wright* (1842) 10 M. & W. 109 in reverse and have no more merit in the modern context than would that case itself.

Nevertheless some such denial of the concurrence of contract