THIEVES, ROGUES, INNOCENT PURCHASERS AND LEGISLATIVE TANGLES

In *National Employers' Mutual General Insurance Association Ltd.* v. *Jones* [1987] 3 W.L.R. 901 and *Shaw* v. *Commissioner of Police of the Metropolis* [1987] 1 W.L.R. 1332 the Court of Appeal restricted the scope of two exceptions to the maxim *nemo dat quod non habet*.

In *Jones'* case H's car was stolen and sold successively to L, T, A Ltd., M Ltd., and Jones. The last three all bought in good faith, without notice of the theft. A Ltd and M Ltd. sold in the ordinary course of their businesses as motor dealers. The plaintiff insurers bought out H's interest and claimed from Jones the car or its value. The thieves, naturally, got no title against H and could give L none (no sale in market overt being pleaded). The circumstances of L's sale to T were unknown. Jones, however, claimed that the subsequent sales gave him a good title under a literal interpretation of the Factors Act 1889, s.9, and the identical (bar one immaterial omission) Sale of Goods Act 1979, s.25(1). So far as relevant, with critical words italicised and parenthesised letters inserted to identify the participants essential to Jones' claim, those sections provide:

> Where a person [M Ltd.] having bought or agreed to buy goods obtains, with the consent of the *seller* [A Ltd.], possession of the goods . . ., the delivery . . . by that person [M Ltd.], . . . of the goods . . ., under any sale, pledge, or other disposition thereof, to any person [J] receiving the same in good faith and without notice of any lien or other right of *the original seller* [A Ltd.] in respect of the goods, has the same effect as if the person making the delivery [M Ltd.] . . . were a mercantile agent in possession of the goods . . . with the consent of the *owner* [H].

Direct English authority was lacking. But several English writers and, on similar facts, Kenyan, New Zealand and Canadian courts had instinctively rejected as unacceptable a literal interpretation of these and identical Commonwealth enactments which, without enabling a thief to pass a good title direct to an innocent purchaser outside market overt, would enable that or any subsequent purchaser to do so. In *Elwin* v. *O'Regan and Maxwell* [1971] N.Z.L.R. 1286 and *Brandon* v. *Leckie* [1972] 29 D.L.R. (3d) 633 New Zealand and Alberta Supreme Court judges did so by giving the words "seller" and "owner" the same meaning and asserting that no purported seller of previously stolen goods has any title to transfer.

In *Jones'* case the county court followed those decisions. Whilst dismissing Jones' appeal, May and Croom-Johnson L.JJ. acknowledged that giving different words the same meaning within the same section strained established canons of interpretation. They preferred a different basis for rejecting the literal interpretation. They deduced from the definitions of "contract of sale," "sale," "seller," "buyer"

and "property" in the Sale of Goods Act, ss.2(1), 2(4), 61(1), that the essence of a sale was transfer of the general property (ownership) in goods. Thus, unless the "seller," whose consent to possession sections 9 and 25(1) of the relevant Acts required, either had, or had had authority to transmit, the general property in the goods, he would not be a seller within the meaning of the Sale of Goods Act; nor would the person making the delivery be a person who had "bought or agreed to buy" goods. Nobody, however innocent, whose possession derived ultimately from a thief could get title good against the true owner (the person meant by the word "owner") under these sections. *Aliter* where a rogue voidably bought goods from their true owner and sold them on, whether before or (as in *Newtons of Wembley Ltd.* v. *Williams* [1965] 1 Q.B. 560) after the owner avoided their contract, since at least temporarily there would be a "sale" in law enabling the sections to operate on subsequent transactions between innocent parties.

Sir Denys Buckley dissented, rejecting the majority's view that contracts to sell stolen goods were not contracts of sale within the 1979 Act and holding the sections unambiguous and a literal interpretation inevitable. It was not irrational to enact that stolen goods should be recoverable from a thief's immediate purchaser, who by diligent enquiry might discover the theft, but not from a subsequent innocent purchaser, who had less cause to enquire whether his seller's seller was a thief, so leaving the probably insured original owner to bear the loss. The sections, he held, do not operate by depriving the true owner of his title but by giving the purchaser from the notional mercantile agent an impregnable shield against assertion of that title.

Those policy justifications for the literal interpretation may not sway those who believe that even the existing protection of buyers in market overt unduly facilitates transfer of stolen goods. (They might note, perhaps, that although lapse of time no longer bars an owner's action against a thief, his title and right of action against even a first later innocent purchaser may be lost six years after that purchase: Limitation Act 1980, ss.2–4.) Nevertheless, it is respectfully submitted, Sir Denys Buckley rightly rejected the majority's *ratio* that no contract of sale within the meaning of the 1979 Act can exist unless the seller is capable of transferring ownership, even if only revocably. That hardly rides easily with the statement of the maxim itself in section 21(1) that:

> Subject to this Act, where goods are sold by a person who is not their owner, 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 . . .

Seemingly, too, many contracts for the sale of future goods not

already owned or possessed by the seller (s.5(1)) would be excluded; and section 12(1), implying a condition of good right to sell, would seem otiose except where sellers had voidable titles. Equating the meanings of "seller" and "owner," though artificial, seems a less disruptive way of evading a literal interpretation. The decision seems also to discount the relativity of title to chattels and to put sale under section 25(1) alongside sale in market overt (s.22) as giving an indefeasible title rather than, as section 21(1) suggests and as formerly generally believed, only such title as the relevant former owner (here A Ltd.) had: see Battersby and Preston, (1972) 35 M.L.R. 268.

Shaw's case concerned both section 25(1) and estoppel, the exception engrafted onto section 21(1) itself (*supra*) by adding the words "unless the owner is by his conduct precluded from denying the seller's authority to sell." It, too, involved a car, two innocent claimants and a rogue who, unusually, disappeared without the car or payment for it. As the prospective buyer was seeking something for nothing, both Master Grant and a unanimous Court of Appeal (Fox, Lloyd and Stocker L.JJ.) expressed pleasure that the law enabled them to return the car to its gullible owner.

After advertising his Porsche for sale N delivered it to L, a car dealer who said he wanted to buy it for a client. Induced by a (valueless) postdated cheque for £17,250, N signed and handed to L both a letter and the notification-of-transfer slip attached to the car's registration document certifying that he had sold the car to L a month previously. L quickly agreed to sell the car to Shaw for a £10,000 banker's draft and £1,500 cash. L presented the draft, the bank refused to pay cash, and L promptly disappeared without even receiving the £1,500. The police took possession of the car and, when both N and Shaw claimed it, interpleaded. Despite signing the above documents and unambiguously telling the police that he had accepted the cheque in payment for selling the car to L, N in his interpleader affidavit specifically denied any sale, asserting that L acted only as agent. The Master preferred the affidavit evidence, held that property had not passed to Shaw under section 25 or 21, and declared N entitled.

Refusing to upset the Master's acceptance of the affidavit evidence, the Court of Appeal rejected the section 25(1) claim because L had never "bought or agreed to buy" the car. As regards estoppel, the signed letter and notification slip were unambiguous representations sufficient to give Shaw title by estoppel under section 21(1) had L actually sold to Shaw: *Eastern Distributors Ltd.* v. *Goldring* [1957] 2 Q.B. 600. But L had admittedly only agreed to sell; property was not to pass to Shaw until L was paid. The court held that the words "where goods are *sold*" in section 21(1) made it inapplicable to

agreements to sell. Since section 21(1) speaks of "title," this restriction seems correct, especially where the "buyer" claims ownership without payment! In cases of agreements to sell specific and unique goods, where buyers may wish to seek specific performance, they must presumably resort to apparent authority under the normal law of agency.

Perhaps the moral of these cases is that a thorough overhaul of the Factors and Sale of Goods Acts is long overdue. Why are several provisions of the former still duplicated, sometimes with subtle differences, by the latter? Cases like *Newtons of Wembley* v. *Williams* and Sir Denys Buckley's helpful "section 9 hypothesis" in *Jones'* case point up the absurd fictions and difficulties introduced into section 25(1) by the shorthand cross-references to provisions of the Factors Act dealing with a different situation. No doubt in 1889 factors were a recognisable category of agents, but today case law makes it hard to say with confidence who is a mercantile agent. If the United States can modernise their whole commercial law, can we not rethink this fraction of ours?

J. W. A. THORNELY.

A VENDOR'S DUTY OF DISCLOSURE

A PRUDENT purchaser of land will check the register of local land charges before contract lest before completion he should find that through section 198 of the Law of Property Act 1925 he has been deemed to have notice of a previously unknown charge. This result is usually attributed to Eve J.'s interpretation of section 198 in *Re Forsey and Hollebone's Contract* [1927] 2 Ch. 379 (at p. 387). In that case his Lordship said, though some insist this was merely *obiter*, that under section 198 a purchaser was deemed to have contracted with actual notice of a registered charge irrespective of his state of actual knowledge and, hence, was precluded from refusing to complete the contract. A possible result of this heavily criticised view was corrected by section 24 of the Law of Property Act 1969. This section provided that where a purchaser lacked actual notice of a registered land charge at the time of contract, any stipulation in the contract deeming him to have such notice would be void. For the purposes of the section actual notice was to be determined by reference to the purchaser's actual knowledge rather than the provisions of section 198. This statutory amelioration of the problem caused by Eve J.'s position was limited to charges registered under the Land Charges Act. The rationale was that these charges were registered against the name of the estate owner rather than the land