Sale of Goods by a Non-Owner: The Competing Property Rights of a True Owner and a Good Faith Purchaser

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ABSTRACT

Following the sale of goods by a non-owner who has no (or insufficient) authority to sell, the law is faced with apportioning the loss of those goods between one of two innocent parties; the original owner of the goods and the good faith purchaser. The Sale of Goods Act 1979 identifies a number of situations in which a sale by a non-owner might take place and provides the legal framework for determining whose rights to those goods will prevail. This essay questions the fairness of this balancing exercise and makes the case for reform where appropriate. A theme running through these suggested reforms is an attempt to distinguish between an innocent party and an inculpable one. While a party may be innocent of the deception being perpetrated by a non-owner, their conduct may, nevertheless, through ignorance, inadvertence, or inaction, serve to facilitate or permit the deception. Thus, it is argued that they are, albeit to a limited extent, culpable. In reliance upon this notion of relative culpability, a far broader and more contextual approach to identifying the 'indicia of title' in a non-owner is proposed, for the purpose of giving rise to an estoppel.

I. INTRODUCTION

The law relating to the sale of goods by a non-owner must strike a balance between protecting private property rights and facilitating commercial transactions.[1] This conflict is identified by Denning LJ as follows:

> In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a 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.[2]

The first principle is the Latin maxim *nemo dat quod non habet.* Insofar as the maxim applies to the sale of goods, it is expressed in section 21(1) Sale of Goods Act 1979 (hereafter: the SGA): 'Subject to this Act, where goods are sold by a

[1] Michael Bridge, *The Sale of Goods* (3rd edn, OUP 2014) ch 5.42.
[2] *Bishopsgate Motor Finance v Transport Brakes* [1949] 1 KB 322 (CA) 336-337.

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.'

The SGA[3] provide a number of exceptions to the rule largely aiming at catering for the circumstances in which the second principle identified by Denning LJ will prevail. There are further exceptions that apply to the sale of motor vehicles held under a hire purchase or conditional sale agreement.[4] However, this essay focuses primarily on the exceptions set out in the SGA. These various exceptions placed the exceptions previously existing at common law on a statutory footing and extended them so as to rectify their inadequate protection of innocent purchasers.[5] Consequently, much of the existing body of common law has been retained. [6] This codification of the common law has resulted in a finite number of exceptions to the *nemo dat* rule[7] which can be identified and considered in isolation.

It should be borne in mind that the law requires either one or the other of the affected parties to prevail. The question of apportioning loss proportionally was raised by Devlin LJ's dissent in *Ingram v Little*[8] but has been rejected for resulting in unacceptable uncertainty in the transfer of property and for being impractical to implement.[9] Therefore, the *nemo dat* rule and its exceptions aim to balance the competing proprietary interests of an original owner and a good faith purchaser when determining whose claim to title will succeed.[10] This essay considers the extent to which the balance achieved is a fair one.

II. ESTOPPEL

The *nemo dat* rule does not apply where 'the owner of the goods is by his conduct precluded from denying the seller's authority to sell.'[11] This is understood as giving effect to the doctrine of estoppel.[12] However, this is more than a mere personal remedy and gives the purchaser good title to the goods against the world.[13] There are three categories of estoppel: estoppel by representation, estoppel by negligence and estoppel *per rem judicatam.*[14] The first category comprises situations where an owner has represented to a purchaser, either by words or conduct, that a rogue seller has authority to sell

[3] Sale of Goods Act 1979, ss 21, 23-26.
[4] Hire Purchase Act 1964, Part III.
[5] Bridge (n 1) ch 5.45.
[6] Section 62(2) of the Sale of Goods Act 1979 expressly preserves existing common law rules 'except in so far as they are inconsistent with the provisions of legislation including this Act and the Consumer Rights Act 2015.'
[7] Michael Bridge, *Benjamin's Sale of Goods* (1st supp, 9th edn, Sweet & Maxwell 2015) ch 7, para 1.
[8] [1951] 1 QB 31, 73-74.
[9] Law Reform Committee, *Twelfth Report (transfer of title to chattels)* (Cmd 2958, 1966) 9-12.
[10] Bridge (n 1).
[11] Sale of Goods Act 1979, s 21(1).
[12] Patrick Atiyah, *Atiyah's Sale of Goods* (12th edn, Pearson 2010) 364.
[13] *Moorgate Mercantile Co v Twitchings* [1977] AC 890 (HL) 918.
[14] Bridge (n 7) ch 7; *cf.* Atiyah (n 12) 364-373.

their goods.[15] The second relates to circumstances where an owner's negligence results in a rogue seller's apparent ownership of goods.[16] The third applies to matters finally determined by litigation and is of little practical difficulty. The only distinction to highlight in respect of estoppel *per rem judicatam* is that it does not bind the world; it only raises an estoppel against the parties involved in the proceedings in which the judgment is given.[17]

If merely parting with goods does not estop an owner from asserting their right to possession,[18] then in what circumstances can estoppel by representation arise? In *Henderson & Co v Williams*,[19] the owner of 150 bags of sugar, G, was induced by fraud to transfer these goods to the order of a rogue, F, who then sold them to the claimant. Lord Halsbury held that an owner will be estopped when they have 'invested the [rogue] with the indicia of property as that when an innocent person enters into a negotiation with the [rogue] ... the true owner of the goods cannot afterwards complain that there was no authority to make such a bargain.'[20] Prior to the claimant's purchase, the defendant, on behalf of G, had attorned to F's ownership of the goods. G was estopped from denying this representation, which had been sufficient to invest the indicia of property in F, and so the claimant acquired good title to the goods.

The outcome in *Henderson* can be compared with that in *Farquharson Brothers & Co v King & Co.*[21] The claimant (a timber merchant) stored timber at a commercial dock and had written to the dock company granting a clerk in its employ, Capon, unfettered authority to deal with the timber on his behalf. Breaching this authority, Capon committed a number of frauds over the course of four years by selling timber to the defendant for his own benefit. Upon discovering the fraud, the claimant brought an action in detinue. The Court of Appeal[22] held that the claimant must bear the loss caused by Capon's fraud, being the party that enabled Capon to occasion the loss.[23] This approach was viewed as compatible with that taken in *Henderson*;

> [N]o material distinction [exists] between the specific order given in that case to place the goods in the name of [F], and the general order given in the present case to place the goods in such name or names as the clerk should by his order signify...In the case of timber and heavy goods of that sort the only way in which they can be transferred is in the books of the company. It was the transfer made in pursuance of that power which directly made it possible for Capon to carry out the sales to the defendants.[24]

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[15] Bridge (n 7) ch 7, para 9.
[16] ibid ch 7, para 15.
[17] *Powell v Wiltshire* [2005] QB 117 (CA).
[18] *Central Newbury Car Auctions v Unity Finance* [1957] 1 QB 371 (CA).
[19] [1895] 1 QB 521 (CA).
[20] ibid 525.
[21] [1902] AC 325 (HL).
[22] [1901] 2 KB 697.
[23] ibid 710-711.
[24] ibid 714.

To this extent, therefore, the claimant had invested Capon with the 'indicia of property.' The outcome is viewed as fair; the claimant granted the rogue limitless authority to deal with his goods and, despite the depleting timber stocks, failed to detect the fraud for four years. Conversely, the defendant had no means by which to discover the fraud and was, in any event, under no obligation to make enquiries as to the seller's authority to sell.[25] Even Stirling LJ, dissenting, suggested that considerations of natural equity might require the claimant to bear the loss.[26]

Unfortunately, the House of Lords[27] took a different view. Capon was viewed as a mere thief who could pass no title in the goods to the defendant.[28] His conduct was equated with stealing a pocket handkerchief in the street.[29] However, this purported analogy requires an act of theft, separate from the sale of the goods, which results in the true owner's unquestionable right to recover possession. There was no such separate act in the circumstances of *Farquharson*. The House of Lords' approach to the question of estoppel is also suggested to be flawed. As the claimant's existence was unknown to the defendant, and as there had been no express representation to the defendant,[30] the House of Lords rejected any suggestion of the defendant having relied upon the claimant's conduct.[31] However, this analysis fails to give regard to the nature of timber as a good. The timber was never in the actual possession of the claimant or Capon, its nature requiring it to be dealt with from a warehouse location. Equally, individual lengths of timber are not typically identified as being the property of any particular person. Consequently, in the context of ownership and sale of timber, it is submitted that the claimant's conduct invested in Capon the indicia of property, which therefore ought properly to give rise to an estoppel.

The approach adopted by the Court of Appeal in *Farquharson* is suggested as being more closely aligned with fairness and preferred to the current state of the doctrine, which is unduly narrow and has resulted in few cases where an estoppel has been successfully pleaded.[32] Estoppel by representation fails to offer sufficient protection to innocent purchasers and reinforces the primacy of the *nemo dat* rule, even when to do so is contrary to principles of natural justice.

Estoppel by negligence overlaps with the first category insofar as it requires a representation which must be relied upon.[33] However, the distinct approach to identifying negligence merits consideration as a separate category. Pearson LJ set out the applicable test in *Mercantile Credit Co Ltd v Hamblin*:

[25] *Hambro v Burnand* [1904] 2 KB 10 (CA) 20.
[26] *Farquharson Brothers* (n 22) 712.
[27] *Farquharson Brothers* (n 21).
[28] ibid 333, 339, 343.
[29] ibid 329.
[30] ibid 331, 333, 338.
[31] ibid 338.
[32] *Mercantile Bank of India v Central Bank of India* [1938] AC 287 (HL) 302.
[33] Bridge (n 1) ch 5.80.

> In order to establish an estoppel by negligence, the [claimant] has to show (i) that the defendant owed it a duty to be careful, (ii) that in breach of that duty she was negligent, (iii) that her negligence was the proximate or real cause of it being induced to [purchase the goods].[34]

In *Mercantile Credit*, the defendant was fraudulently induced to sign blank documents, which enabled a rogue to represent himself as the owner of her vehicle. The rogue sold the vehicle to the claimant and arranged for it to be let back to the defendant under a hire purchase agreement. By signing the documentation, the Court found sufficient proximity between the defendant and any persons who might contract with her, which included the claimant, to impose a duty of care.[35] However the claim failed as there had been no breach of duty; the defendant, perhaps surprisingly, was not negligent in signing blank documents.[36]

Conversely, in *Moorgate Mercantile Co v Twitchings*,[37] the claimant let a vehicle under a hire purchase agreement but, in doing so, neglected to register the agreement with Hire Purchase Information ('HPI'). Consequently, when the vehicle was sold to the defendant dealer, the Dealer had no notice of the claimant's interest. The Court of Appeal[38] found that an estoppel arose. The claimant owed a duty of care to other HPI members and, in failing to register his interest, had breached that duty.[39] Lord Denning MR opined that it would be 'unfair and unjust'[40] for the claimant to succeed in his claim for conversion and Brown LJ remarked on the 'good business sense'[41] of the outcome; it is suggested that they were right to do so.

Nonetheless, the House of Lords[42] held that the claimant was under no duty to register the agreement with HPI, there being no formal requirement to do so.[43] In any event, the failure to register the agreement with HPI was not accepted as having caused the loss.[44] This outcome is submitted as contrary to notions of fairness. The claimant, as an HPI member, represented to other HPI members that they had no proprietary interest in the goods. Therefore, in the context of HPI membership, it is argued as reasonable to conclude that the claimant invested in the rogue 'indicia of title' sufficient to give rise to an estoppel. As in cases of estoppel by representation, estoppel by negligence is applied far too narrowly and gives deference to the *nemo dat* rule over fair and equitable outcomes. A broader understanding of what constitutes the 'indicia of title' in

[34] [1965] 2 QB 242 (CA) 271.
[35] ibid 275.
[36] ibid.
[37] [1977] AC 890 (HL).
[38] [1976] QB 225.
[39] ibid 239.
[40] ibid 243.
[41] ibid 248.
[42] *Moorgate* (n 37).
[43] ibid 919.
[44] ibid 918.

individual cases, as per the Court of Appeal in both *Farquharson* and *Moorgate*, would rightly recognise an owner's culpability where it exists and thus lend itself to fairer outcomes.

III. MERCANTILE AGENTS

Sales by a mercantile agent are also exempted from the *nemo dat* rule.[45] A mercantile agent is an agent 'having in the customary course of his 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.'[46] In *Lowther v Harris,* this was understood to mean 'an agent doing a business in buying or selling, or both, having in the customary course of his business such authority to sell goods.'[47] In this case, an agent with his own shop who traded under his own name was a mercantile agent, notwithstanding his lack of authority to conclude sales.[48] The court also held that a mercantile agent might work on behalf of a single principal and still fall within the definition.[49] However, this is distinct from merely putting a private individual in the possession of goods in order to sell them, there being no customary authority vested in such an individual.[50] Therefore, although identifying a mercantile agent may not always be an easy task,[51] they can be broadly understood as commercial traders other than the owner of goods.

Section 2(1) of the Factors Act 1889 provides that:

> [W]here 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 him 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 he 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.

A mercantile agent's power to dispose of goods is therefore considerable, section 2(1) indicating a clear preference for commercial certainty over an owner's proprietary rights. However, it also includes a number of safeguards to protect against its abuse. The purchaser's good faith and lack of notice are fundamental to its fair operation. The burden of proving good faith and want of notice lies with the purchaser seeking to rely upon section 2(1) to acquire good title.[52] This is suggested as entirely appropriate; a purchaser can more readily be expected

[45] Sale of Goods Act 1979, s 21(2)(a).
[46] Factors Act 1889, s 1(1).
[47] [1927] 1 KB 393 (HC) 398.
[48] ibid.
[49] ibid.
[50] *Jerome v Bentley* [1952] 2 All ER 114 (HC).
[51] Atiyah (n 12) 376.
[52] *Heap v Motorists' Advisory Agency* [1923] 1 KB 557 (HC) 590.

to demonstrate his good faith than an original owner is able to prove the contrary.[53]

A mercantile agent must also be in actual possession of the goods or documents of title to the goods,[54] at the time of the disposition, in order for section 2(1) of the Factors Act 1889 to apply.[55] However, where an agent is in actual possession, the owner's consent is presumed.[56] To rebut this presumption, it is insufficient to show merely that the owner's consent was induced by the commission of a fraud.[57] However, the owner must have consented to put the agent in possession in his capacity as a mercantile agent.[58] Therefore, even where a person is a mercantile agent in the customary course of their business, the Factors Act 1889 will not apply if they obtained possession in some other capacity.[59]

In *Cole v North Western Bank,*[60] storing wool with a warehouseman who sometimes acted as a mercantile agent was not putting him in possession in his capacity as a mercantile agent. Additionally, the Factors Act 1889 was said generally to apply 'where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed.'[61] Therefore, the decision may be understood on the basis that merely storing the wool with the would-be agent was not sufficient to vest in him the apparent authority to deal with the wool. Conversely, in *Pearson v Rose & Young,*[62] putting goods in the possession of a salesperson, who had no authority to sell the goods, in order to court potential purchasers, put him in the capacity of a mercantile agent. Denning LJ held that:

> [T]he owner must consent to the agent having [the goods] for a purpose which is in some way or other connected with his business as a mercantile agent. It may not actually be for sale...but there must be a consent to something of that kind before the owner can be deprived of his goods.[63]

This approach is suggested as compatible with the general requirement of apparent authority identified in *Cole.* Further, it may be viewed as requiring culpability before an owner may be deprived of his goods, which is the basis upon which it is argued as fair so to do. Such an owner is culpable insofar as he voluntarily vests in the agent the apparent authority to deal with the goods.

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[53] Angela Foster, 'Sale by a Non-owner: Striking a Fair Balance Between the Rights of the True Owner and a Buyer in Good Faith' (2004) 9(2) Cov LJ 1; *Mercantile Bank of India* (n 32) 5.
[54] Factors Act 1889, s 1(2).
[55] *Beverley Acceptances v Oakley* [1982] RTR 417 (CA).
[56] Factors Act 1889, s 2(4).
[57] *Pearson v Rose & Young* [1951] 1 KB 275 (CA) 287.
[58] ibid 289.
[59] *Cole v North Western Bank* (1874) LR 10 CP 354.
[60] ibid.
[61] ibid 376.
[62] *Pearson* (n 57).
[63] ibid 288.

Additionally, the goods must be disposed of in the ordinary course of the agent's business as a mercantile agent, which is distinct from having authority in the customary course of business.[64] Thus, an agent with such customary authority must still dispose of an owner's goods,

> acting in such a way as 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... so that there is nothing to lead [the purchaser] 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.[65]

Whether a mercantile agent is acting in the ordinary course of business is a question of fact.[66] Sales where payments are made directly to the agent's creditor[67] and those where the purchase price is set off against a debt owed by the agent[68] have been held as dealings outside the ordinary course of business. Similarly, in *Pearson,* dealing with a car without its registration book was not in the ordinary course of business of a mercantile agent.[69] The proper basis for avoiding the application of the Factors Act 1889 in *Pearson* is submitted to exist here because the registration book was in the agent's possession without the owner's consent.[70] Nevertheless, these examples demonstrate how determining the 'ordinary course of business' affords a degree of discretion to ensure that outcomes are fair. The law relating to mercantile agents is therefore argued as balancing the interests of the owner and an innocent purchaser commendably. This exception to the *nemo dat* rule is rooted in commercial reality,[71] which is rightly prioritised over the owner's proprietary interests but not without safeguards in place to prevent injustice.

IV. VOIDABLE TITLE

Section 23 of the SGA provides that 'when the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.'

A seller's title may be voidable on a variety of grounds including fraud, misrepresentation, non-disclosure, duress and undue influence.[72] However, the paradigm case is where an owner is induced by fraud to sell goods to a rogue, who subsequently resells those goods to an innocent purchaser.[73] In such cases,

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[64] *Oppenheimer v Attenborough & Son* [1908] 1 KB 221 (CA) 230.
[65] ibid 230-231.
[66] Bridge (n 7) ch 7, para 43.
[67] *Biggs v Evans* [1894] 1 QB 88 (HC).
[68] *Pacific Motor Auctions v Motor Credits (Hire Finance) [1965] AC 867 (PC) 881.*
[69] *Pearson* (n 57) 283, 290, 291.
[70] ibid 290.
[71] Foster (n 53) 11.
[72] Bridge (n 7) ch 7, para 23.
[73] ibid ch 7, para 21.

the distinction between void and voidable title can be finely balanced. In *Shogun Finance Ltd v Hudson,*[74] a rogue entered into a hire purchase agreement with the claimant under an assumed name and subsequently sold the vehicle to the defendant. If, at the time of the sale, the rogue had a voidable title to the vehicle, the defendant would acquire good title under the Hire Purchase Act 1964. However, only contracts concluded face-to-face on a fraudulent misrepresentation as to identity pass voidable title to a rogue.[75] The same misrepresentations made via correspondence render a contract void for mistake.[76] This is distinct from other fraudulent misrepresentations, which render a contract voidable in either case.[77]

The House of Lords in *Shogun Finance* had the opportunity to rectify this 'sorry condition'[78] of the law but, by a simple majority, declined to do so. The contract between the finance company and the rogue had not been concluded face-to-face, and, thus, the parties to the agreement were ascertained by constructing the document.[79] The rogue was not a party to the agreement and could not therefore acquire title under the agreement, so the agreement was void.[80] The contract was concluded through a dealer but Lord Hobhouse rejected the application of the face-to-face principle, holding the dealer to be a 'mere facilitator serving primarily his own interests.'[81] However, it is suggested that this fails to recognise the reality of modern commercial transactions and incentivises the conduct of business through an intermediary.

Lord Nicholls, dissenting, acknowledged that legal principles cannot sensibly differ depending upon whether a transaction is conducted face-to-face or by other means.[82] Furthermore, he viewed as absurd the fact that a subsequent purchaser's rights may depend upon the manner in which a rogue's fraud is concluded.[83] The claimant had intended to contract with the person attending the dealer's showroom, just as in the case of a face-to-face transaction,[84] and a contract had been formed with that person, albeit a voidable one. Lord Millet also viewed this approach as fairer when apportioning loss between two innocent parties.[85] The defendant in *Shogun Finance* was an innocent purchaser who acted in good faith; the claimant, conversely, had been duped by the rogue's fraud, allowed the rogue to take the goods and took no timely steps to avoid the agreement. Fairness must, in such circumstances, compel the claimant to bear the loss. It is arbitrary and undesirable for the manner in which the

[74] [2004] 1 AC 919 (HL).
[75] *Phillips v Brooks* [1919] 2 KB 243 (HC).
[76] *Cundy v Lindsay* (1878) 3 App. Cas. 459 (HL).
[77] *Shogun Finance* (n 74) 931.
[78] *Shogun Finance Ltd v Hudson* [2002] QB 834 (CA) 855.
[79] *Shogun Finance* (n 74) 975.
[80] ibid 943, 975, 978.
[81] ibid 945.
[82] ibid 938.
[83] ibid 939.
[84] ibid 940.
[85] ibid 953.

contract was formed to affect this. It is submitted as entirely appropriate for mistake induced by fraud to render a contract voidable,[86] thus achieving consistency with other forms of fraudulent misrepresentation. As held by Lord Denning MR in *Lewis v Avery*:[87]

> When two parties have come to a contract—or rather what appears, on the face of it, to be a contract—the fact that one party is mistaken as to the identity of the other does not mean that there is no contract... It only means that the contract is voidable, that is, liable to be set aside at the instance of the mistaken person, so long as he does so before third parties have in good faith acquired rights under it.[88]

However, avoiding the rogue's title prior to any further disposition will negate the effects of section 23. Generally, such avoidance must be communicated to the rogue and the right to avoid is lost upon affirmation of the contract.[89] A contract may also be avoided by retaking possession of the goods,[90] or where all possible steps to avoid had been taken, despite not having actually communicated the avoidance to the rogue.[91] Although this latter approach has been subjected to criticism,[92] it is submitted as being grounded on fairness. The act of avoidance has no material effect on the rogue, who will seek to profit from the goods in any event. It is the owner's timely assertion of his property rights that forms the basis upon which it is fair that they are not displaced. To this extent, actually communicating with the rogue may be viewed as immaterial.

Finally, unlike sales by mercantile agents[93] and unlike under section 24 and 25 of the SGA,[94] under section 23 the owner bears the burden of demonstrating notice or a lack of good faith on the part of the purchaser.[95] This was held to be a 'common sense' approach[96] but is viewed as unjust and in need of reconsideration.[97] Requiring an owner to prove a lack of good faith increases the likelihood of unfair outcomes; the buyer is instead in a better position to prove the circumstances in which they acquired the goods.[98] This reverse burden of proving good faith under section 23 is unjustifiable[99] and should be reconciled with the approach taken under the Factors Act 1889.

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[86] Law Reform Committee (n 9) 15.
[87] [1972] 1 QB 198 (CA).
[88] ibid 207.
[89] *Car and Universal Finance v Caldwell* [1965] 1 QB 525 (CA) 554.
[90] ibid 554, 558.
[91] ibid 532.
[92] Law Reform Committee (n 9) 16; Bridge (n 7) ch 7, para 25.
[93] *Heap* (n 52).
[94] Bridge (n 7) ch 7, paras 68 and 86.
[95] *Whitehorn Bros v Davison* [1911] 1 KB 463 (CA) 476.
[96] ibid.
[97] Bridge (n 7) ch 7, para 29.
[98] Foster (n 53).
[99] Law Reform Committee (n 9) 25.

V. SELLER OR BUYER IN POSSESSION

Section 24 of the SGA provides that:

> 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 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 the previous sale, has 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.

The provision is framed in similar terms to section 8 of the Factors Act 1889 and section 25(1) of the Sale of Goods Act 1893. Cases decided in reliance upon these provisions are therefore applicable to section 24.[100] Under section 24, a seller who retains possession of goods following a sale can, in appropriate circumstances, resell those goods and pass good title to a third party, notwithstanding that title to the goods no longer vests in him. It has been suggested that section 24 has no adverse effects[101] but it does not require the buyer's consent and thus will apply irrespective of whether the risk of leaving the goods with the seller was voluntarily assumed.[102]

Cases concerning section 24 include those in which goods remain in a seller's possession under a hire purchase agreement or similar.[103] In practice, therefore, sellers are often in possession of goods with the buyer's consent. However, circumstances where an unscrupulous seller has sold goods and simply retained possession to make a further disposition to a third party may also fall within the scope of section 24.[104] This has resulted in section 24 situations being likened to the sale of goods by a thief.[105] Such a rogue may be better able to demonstrate the appearance of ownership than a mere thief is but it is maintained as unclear why a seller's prior proprietary interest alone should permit him to pass good title to another's property. If the legal owner is inculpable, his proprietary rights ought to prevail.[106] This latter application of section 24 is argued as representing an improper displacement of the *nemo dat* rule.

The general intention of section 24 is to protect innocent purchasers in circumstances where the estoppel doctrine offers insufficient protection.[107] Consequently, the broader approach to estoppel advocated for herein may negate any need for section 24. In *Pacific Motor Auctions v Motor Credit (Hire*

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[100] Bridge (n 7) ch 7, para 55.
[101] *Pacific Motor Auctions v Motor Credits (Hire Finance) [1965] A.C. 867 (PC) 888.*
[102] Foster (n 53) 6.
[103] *Worcester Works Finance v Cooden Engineering* [1972] 1 Q.B. 210 (CA).
[104] *City Fur Manufacturing v Fureenbond* [1937] 1 All ER 799 (HC).
[105] Foster (n 53) 6.
[106] Law Reform Committee (n 9) 10.
[107] *Pacific Motor Auctions (n 101)* 883.

Finance)[108] several vehicles remained on display in a dealer's showroom following a disposition of the vehicles to the claimant. The dealer retained a general authority to sell the vehicles but disposed of several to the defendant in breach of this authority and the claimant brought an action to recover them. The defendant argued, *inter alia*, that the claimant was estopped from asserting their title to the vehicles. The Privy Council did not make a finding on the issue,[109] having found for the defendant under the Australian equivalent of section 24,[110] but it is submitted that an estoppel ought to have arisen. By leaving the vehicles in the dealer's showroom and authorising the dealer to dispose of the vehicle on his own terms, the claimant went beyond leaving the dealer in mere possession and vested in the dealer indicia of title. Consequently, a fair outcome could have been achieved without recourse to section 24.

Insofar as section 24 applies to a seller who remains in possession as a bailee, it must be borne in mind that the Hire Purchase Act 1964 offers some protection to private purchasers of motor vehicles. However, this protection does not extend beyond motor vehicles[111] and applies only to those held under hire purchase or conditional sale agreements.[112] Consequently, there remains a sizeable class of goods held by bailees that fall outside the scope of the 1964 Act.[113] However, in the sub-class of cases to which section 24 might apply, owners typically assume the risk of leaving the seller in possession voluntarily. These owners are also better placed to protect against that risk.[114] Such circumstances, limited as they are, may reasonably justify a presumption that the owner has vested in the seller indicia of title, which would ordinarily give rise to an estoppel. This broader approach to identifying estoppel could fairly protect innocent purchasers without exposing entirely inculpable owners to the risk of their proprietary interests being unfairly displaced.

Conversely, section 25(1) of the SGA provides that:

> 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 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, 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.

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[108] [1965] AC 867 (PC).
[109] ibid 879.
[110] Sale of Goods Act 1923, s 28(1).
[111] Hire Purchase Act 1964, s 27(1).
[112] ibid.
[113] Iwan Davies, 'Wrongful Dispositions of Motor Vehicles A Legal Quagmire' (1995) 1 JBL 36, 49.
[114] ibid 40.

Section 25(1), like section 24, is a restatement of principles previously set out in the Factors Act 1889[115] and the Sale of Goods Act 1893.[116] Typically, the provision is invoked where there has been an agreement to sell, which provides for the transfer of property in the goods to the buyer subject to the fulfillment of some future condition.[117] Consequently, circumstances in which section 25(1) will apply are rare;[118] there is an obvious risk in giving up possession before full consideration for goods has been received and it has been suggested as fair for the seller to bear that risk.[119] Section 25(1) also requires a buyer to be in possession with the seller's consent which, as advocated herein, is essential to the fairness of displacing the *nemo dat* rule. However, consent obtained by fraud is not a bar to the operation of section 25(1)[120] and, unlike section 23, section 25(1) makes no provision for circumstances in which the seller's title has been avoided. Therefore, section 25(1) appears to severely limit an owner's ability to protect his proprietary interests upon discovering a fraud.

Consequently, it had been proposed that section 23 ought to override section 25(1) in circumstances where both apply.[121] However, in *Newtons of Wembley Ltd v Williams*,[122] a rogue whose title had been avoided nevertheless passed good title to an innocent purchaser, thus affirming the primacy of section 25(1).[123] However, section 25(1) grants the rogue authority to deal with the goods only as a mercantile agent of the true owner.[124] Therefore, the owner's avoidance is treated as analogous to the withdrawal of consent under section 2(2) of the Factors Act 1889, which remains valid notwithstanding its determination.[125]

Any disposition of goods under section 25(1) must be done in the ordinary course of business of a mercantile agent.[126] The Court in *Newtons* recognised that section 25(1) 'plainly contemplates... a buyer who is not a mercantile agent'[127] and the difficulty in ascertaining whether such a person could be acting in the ordinary course of business of a mercantile agent.[128] However, a transaction will be validated under section 25(1) 'if [the] buyer is doing something which would constitute acting in the ordinary course of business if he were a mercantile agent.'[129] Therefore, an innocent purchaser will only obtain good title to goods under section 25(1) if the non-owner was acting in the way a mercantile agent

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[115] Factors Act 1889, s 9.
[116] Sale of Goods Act 1893, s 25(2).
[117] Bridge (n 7) ch 7, para 70.
[118] Foster (n 53) 7-8.
[119] ibid.
[120] *Du Jardin v Beadman Brothers Ltd* [1952] 2 Q.B. 712 (HC).
[121] Law Reform Committee (n 9) 24.
[122] [1965] 1 QB 560 (CA).
[123] *Newtons* concerned an equivalent provision: Factors Act 1889, s 9.
[124] cf Factors Act 1889, s 24.
[125] *Newtons* (n 122) 573-574.
[126] Factors Act 1889, s 2(1).
[127] *Newtons* (n 122) 578.
[128] ibid.
[129] ibid 579.

would normally be expected to act when disposing of the goods.[130] This, it is submitted, fairly recognises the risk voluntarily assumed by the true owner as compared with an innocent purchaser of goods from a would-be mercantile agent. As with true mercantile agents, there is a clear preference for commercial certainty in dealings. However, where goods are obtained outside the ordinary course of business of a mercantile agent, it is suggested as fair that the purchaser bears the loss; the extraordinary circumstances being the basis upon which some culpability may reasonably be levelled against them.[131]

VI. CONCLUSION

The various exceptions to the *nemo dat* rule may tentatively be understood as reflecting situations in which an owner's conduct is sufficiently culpable to deprive him of his goods. However, some individual exceptions fail sufficiently to recognise this need for culpability before commercial certainty prevails. A purchaser of goods will only be able to obtain good title in reliance upon any of the *nemo dat* exceptions discussed herein if they have acted in good faith, yet in many instances their claim to title will nevertheless fail. This is an undesirable but unavoidable consequence of bearing loss between the original owner of goods and a bona fide good faith purchaser. Owner culpability is therefore submitted as being the overarching principle upon which this balancing act should be undertaken and forms the basis of the various reforms proposed herein. However, the furtherance of this ideal can be achieved, in large part, by embracing a broader estoppel doctrine. This more flexible and circumstance-specific approach is submitted as being more capable of achieving fairness between the parties than the present state of the law.

[130] ibid 580.
[131] *Oppenheimer* (n 64) 230-231.