apportionment.[43] In *Morris*, the trial judge had rejected the *volenti* plea and reduced the plaintiff's damages by only 20 per cent for contributory negligence. The Court of Appeal considered this was too low, the majority suggesting that 50 per cent was more appropriate.[44]

Conclusion

Had *volenti* not been available in *Morris*, the logic of *Pitts* suggests that the passenger's claim could have been defeated by alleging *ex turpi causa*. Stripped of technicality, in each case the defendant's plea was that the plaintiff had willingly and culpably encouraged him to act in a dangerous manner, and that when the inevitable risk materialised the passenger's claim should fail because he got no more than he deserved. Where parties can be portrayed as being complicit in dangerously drunken driving or, it seems, in other illegal (still to be defined) activities where personal injury is highly likely, it must frequently be possible to argue that the injured party has not just assumed the risk but has foregone the right to compensation by virtue of his participation in the illegality. No doubt where a passenger does no more than passively accept a lift with a driver who is obviously intoxicated, then apportionment will continue to be the appropriate solution. But where the argument is accepted, its effect for the particular plaintiff will be to return tort to the days when fault on his part constituted a complete bar to an action notwithstanding equal or greater fault by the defendant. It is highly questionable whether courts should allow unmeritorious defendants to treat the foolhardy participation of their passengers as a *turpis causa* in this way so as to turn the flank of contributory negligence and side-step the statutory prohibition against *volenti*.

The Sale of Stolen Goods: A Dilemma for the Law

Graham Battersby*

It is a commonplace, but it is worth repeating, that one of the central problems of the law of property concerns the tension between ease of transfer and security of ownership. Ease of transfer requires that a purchaser of property should not run an unfair risk that the title will prove defective, but equally the purchaser should not be compelled, in order to avoid that risk, to make unduly onerous inquiries about the vendor's title. On the other hand, making matters easy for the purchaser is prejudicial to the original owner, whose title may then be weakened or defeated by the transfer to the purchaser. The law tackles this problem in different ways

43 *ibid* at 560, 558 and 560 respectively. In *Ashton* v *Turner* [1981] QB 137, riding in a get-away car and failing to wear a seat belt were similarly considered as constituting driver and passenger equally to blame.

44 *ibid* Stocker LJ at 819 and Sir George Waller at 820. Fox LJ at 809, while agreeing that 20% was too low, said that an increase to 50% would 'substantially penalise' both sides and that he would prefer to leave the loss 'where it falls.' Judge Rice in *Morris* had purported to follow *Owens* v *Brimmell* [1977] QB 859 where a 20% discount was applied to a passenger who had set out on a pub crawl with the driver, 8 or 9 pints apiece having been drunk. Arguably, the result there was too generous to the passenger. For a discussion of the difficulties of evaluating comparative fault in such cases, see Symmons (1977) 40 MLR 350.

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with different categories of property (only tangible property is considered here). In the case of land, the main technique is to use complex systems for the investigation of title, which go a long way to ensuring that a purchaser (1) acquires from the vendor the estate which the vendor has contracted to transfer, and (2) acquires that estate subject only to incumbrances of which the purchaser is aware and which he has contracted to accept. In some kinds of land transactions, principally co-ownership and settlements, the principle of overreaching is employed to ensure that the purchaser takes the land free from beneficial interests, those being shifted into the proceeds of sale.[1] Even so, a conscientious and *bona fide* purchaser of the land will occasionally become a victim of the system; he will then have to be satisfied with seeking compensation for his loss under covenants for title given by the vendor (but those are notoriously limited[2]), or, in the case of registered land, seeking compensation under the statutory indemnity fund.[3] When we turn to the sale of tangible movable property (goods), we find that, in general, matters are arranged very differently. Ships[4] and aircraft[5] are the subject of registration requirements, so that the purchaser can ascertain, to a large extent, the state of the title by searching the register. These are obviously exceptional cases, however,[6] and in the case of the vast majority of goods, and certainly in the case of objects of everyday commerce, the buyer has no real opportunity to investigate the seller's title. To a large extent, the buyer has to take it on trust that the seller has a good title, relying, in the usual case, on the seller's possession as the sole evidence of that title.[7] Where the title proves to be defective, the buyer then has to be satisfied with his contractual remedies against the seller for breach of the terms implied by section 12 of the Sale of Goods Act 1979. The law seeks to help the buyer of goods in three ways: (1) by ensuring that the range of incumbrances which can exist over goods is kept to a minimum,[8] (2) by creating certain exceptions to the *nemo dat* rule which operate in favour of a person who buys in good faith,[9] and (3) by excluding the equitable doctrine of constructive notice from commercial dealings in goods.[10]

This tension between ease of transfer and security of ownership is put to a stern

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1 The compromise of the beneficial interests (money instead of land) brought about by overreaching can on occasion result in the entire loss of those interests: see *City of London Building Society* v *Flegg* [1988] AC 54, where the trustees were adjudicated bankrupt. See the Law Commission Working Paper No 106, 'Trusts of Land: Overreaching,' and the resulting Report, Law Com No 188, 'Overreaching: Beneficiaries in Occupation.'

2 See the critique and the proposals of the Law Commission in Working Paper No 107, 'Transfer of Land: Implied Covenants for Title.'

3 A clear victim was the plaintiff in *Epps* v *Esso Petroleum Ltd* [1973] 1 WLR 1071; Epps lost his land and was too late to claim an indemnity. See the proposals for reform contained in the Law Reform Committee's 21st Report, Cmnd 6923, paras 3.76 *et seq*, followed by the Law Commission in their Third Report on Land Registration, Law Com No 158, paras 3.31 *et seq*.

4 See Part 1 of the Merchant Shipping Act 1894.

5 See the Air Navigation Order 1972, Art 4; Mortgaging of Aircraft Order 1972.

6 Private registers exist in some areas of commerce, eg stud-books of racehorses, and records of ownership of valuable paintings and other works of art. Despite the elaborate system of motor vehicle registration, the registration document is not a document of title: *Central Newbury Car Auctions Ltd* v *Unity Finance Ltd* [1957] 1 QB 371. In the same vein, a finance company involved in hire-purchase business is under no duty to register a hire-purchase agreement in a private register operated on behalf of the industry by Hire Purchase Information Ltd: *Moorgate Mercantile Co Ltd* v *Twitchings* [1977] AC 890. See also *Debs* v *Sibec Developments Ltd* [1990] RTR 91.

7 See, for example, *Moffat* v *Kazana* [1969] 2 QB 152, where ownership of bank notes was established on the balance of probabilities by relatively slight evidence of prior possession.

8 See, for example, *Portline Ltd* v *Ben Line Steamers Ltd* [1958] 2 QB 146 (land law principles of restrictive covenants not applicable to pure personalty).

9 Mainly contained in ss 22–26, Sale of Goods Act 1979, and Part III, Hire Purchase Act 1964.

10 *Manchester Trust* v *Furness* [1895] 2 QB 539.

test in the case of a sale of stolen goods. Take a simple scenario. Goods are stolen from an owner (O) by a thief (T). T sells the goods to a buyer (A) who has no knowledge, or means of knowledge, of the theft. Here we have two innocent people, O and A, who are both the victims of T's dishonesty. One of them must finish up with ownership of the goods,[11] leaving the other with a probably worthless remedy against T. The law at present displays a very strong preference in favour of security of ownership; O will win (the *nemo dat* rule will apply) unless by chance the sale occurs within the very narrowly defined conditions of market overt.[12] A will be left to his contractual remedy against T.

Now extend the simple scenario so that A, having obtained possession of the goods, resells them to B, who has no knowledge, or means of knowledge, of the theft. What should be the law's approach? Is there any reason why B, the second buyer, should be in a better position than A, the first buyer? That is precisely the problem which arose in *National Employers' Mutual General Insurance Association Ltd* v *Jones*.[13] The defendant Jones was actually the fifth buyer of a car which had been stolen some six weeks before from a Miss Hopkin. The plaintiffs were Miss Hopkin's insurers who had bought out her interest in the car. The decision turned on the correct interpretation of section 25 of the Sale of Goods Act 1979 (and its substantially similar counterpart, section 9 of the Factors Act 1889). The argument for the defendant was that, though a first purchaser (A) from a thief (T) could not defeat the original owner, the effect of section 25 was that a second purchaser (B), if innocent, would defeat that owner.

Section 25(1), with the letters T, A and B interpolated, and omitting parts not material, reads as follows:

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

The argument for the defendant Jones depended entirely on the proposition that the word 'owner' at the end of section 25(1) means the true owner, so that the deemed consent is that of the original owner from whom the goods were stolen, ie O in the two scenarios above. A majority of the Court of Appeal (May and Croom-Johnson LJJ) rejected that argument, on the basis that section 25(1) did not apply because the transaction between T and A was not a sale, since it was incapable of transferring the true title to the goods. That proposition is plainly false, however; T does have a title, albeit an imperfect title,[14] and is capable of transferring it by way of sale (or otherwise). Further, the majority's approach, as the dissenting judge, Sir Denys Buckley, pointed out,[15] cannot be correct because it would preclude the operation against T of section 12 of the Sale of Goods Act 1979. Jones appealed to the House of Lords, which unanimously dismissed the appeal. However, the reasons for the decision, given by Lord Goff of Chievely, are wholly different from those given by the majority of the Court of Appeal.

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11 This assumes that the loss cannot be apportioned between O and A, a solution rightly rejected by the Law Reform Committee in their 12th Report, Cmnd 2958, paras 8–12.

12 s 22, Sale of Goods Act 1979, discussed *post*.

13 [1990] AC 24.

14 It is true that, under s 4 of the Limitation Act 1980, time will not run in favour of the thief, but that does not prevent him from having an imperfect title.

15 [1990] AC 24, at p 50D.

Lord Goff's approach was to consider in detail the legislative history of the Factors Act 1889 (section 9 of that Act is plainly the foundation of section 25 of the Sale of Goods Act). In all the previous Acts, from the Factors Act 1823 down to the Factors' Acts Amendment Act 1877, the effect of the second sale to B is equated with the effect which would follow if T had authorised A to sell on behalf of T (T is called 'the vendor' and A is called 'the vendee'). The crucial change in terminology to the word 'owner' occurs in the 1889 Act, but Lord Goff demonstrates that, bearing in mind the overall content and context of the 1889 Act, it is impossible to believe that any radical change of policy was intended. For that reason, the word 'owner' appearing in section 9 of the Factors Act 1889, and its counterpart section 25(1) of the Sale of Goods Act 1979, must be construed as meaning the same as 'vendor' in the older Acts. In sum, the opinion of the House of Lords is that, throughout the Factors Act 1889 (the relevant provisions being sections 2, 8 and 9), the word 'owner' means no more than 'principal of the mercantile agent.'

In reaching that conclusion, Lord Goff also considered section 8 of the Factors Act 1889 (and its counterpart section 24 of the Sale of Goods Act 1979). Section 24, with the same interpolations and omissions used above in relation to section 25(1), reads as follows:

> Where a person [T] having sold goods [to A] continues or is in possession of goods, ... the delivery or transfer by that person [T] ... of the goods ... under any sale, pledge or other disposition thereof, to any person [B] 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 [T] were expressly authorised by the owner of the goods to make the same.

Here we have the same usage of the word 'owner' as in section 25(1). It follows that the argument of the defendant Jones entails that B obtains a good title to the stolen goods, though A does not. There is no conceivable sense in that. Both A and B have dealt with the same seller, and both are deceived by him. Each of them relies on T's possession of the goods to induce an assumption that T has a good title. It is quite irrelevant that T first sold the goods to A, who allowed T to remain in possession; that is sufficient, from a policy point of view, to allow B to defeat A, but offers no justification at all that B should defeat the original owner from whom T stole the goods.

This latter point of Lord Goff's completely destroys one of the arguments put forward by Sir Denys Buckley in his dissenting judgment in the Court of Appeal (though Lord Goff makes no reference to that judgment). Sir Denys had argued that, in relation to section 25, there was a good reason for distinguishing between the first purchaser from a thief and subsequent purchasers; the first purchaser (A) could by diligent inquiry have discovered that his vendor was a thief, whereas a subsequent purchaser (B) could not have discovered that his vendor's vendor was a thief. On that argument, it is sensible that B defeats the original owner whereas A does not. However, that argument collapses completely when applied to section 24. As Lord Goff points out,[16] both A and B have dealt with the same seller, T, and there can be no sensible reason for distinguishing between them.

It is submitted that the House of Lords in *Jones* is plainly correct, and for largely the correct reasons. Lord Goff's historical approach is certainly an unusual method of statutory interpretation, and it involves a degree of dogmatism when it comes to the crucial question whether the introduction of the word 'owner' in the Factors Act 1889 heralded a change of meaning.[17] Nonetheless, the legislative history,

16 [1990] AC 24, at p 62F.

17 See the criticism by Professors Palmer and Merkin in All ER Rev 1988, p 30.

coupled with the need to avoid absurd results, surely justified the conclusion.[18] It is submitted, however, that there is a further reason, not discerned by Lord Goff, for supporting his conclusion. Section 25 requires the innocent purchaser to be a 'person receiving the [goods] in good faith and without notice of any lien or other right of the original seller in respect of the goods.' That language surely suggests strongly that it is the rights of the original seller which can be overridden by the purchaser, not the rights of the original owner from whom that seller stole the goods. In precisely the same way, section 24 refers to 'any person receiving the [goods] in good faith without notice of the previous sale'; the inference is that the innocent purchaser can override the previous sale, but nothing more. By way of contrast, section 22 (sale in market overt) is worded quite differently:

> Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

Here the reference is not to a particular defect or particular rights which are to be overridden, but rather to 'any defect'; obviously a far wider effect is intended, and it is reasonable to conclude that, whereas section 22 facilitates the disposal of stolen goods, sections 24 and 25 do not.

What, then, are we to make of section 23? That section reads as follows:

> 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.

Here we have, as in section 22, the phrase 'a good title,' which might easily be taken to mean a perfect title. However, we also have the phrase 'the seller's defect of title,' *not*, as in section 22, 'any defect of title'; it is therefore obvious that the reference is to the factor which made the seller's title voidable, and that the only protection intended to be conferred on the second purchaser is against that particular defect.

That interpretation would also accord with the decision in *Jones* on section 25, a result which is necessitated by the Court of Appeal's decision in *Newtons of Wembley Ltd* v *Williams*.[19] It was held in that case that section 25 applies where a buyer's voidable title has been avoided (thus ousting section 23) but the buyer remains in possession. Since, as decided in *Jones*, the second purchaser does not acquire a good title to stolen goods, the same result must, in order to avoid absurdity, follow under section 23. The converse would be equally true: since it is obvious that section 23 does not facilitate the disposal of stolen goods, the same must be true of section 25.

We must finally ask, does all this amount to a rational picture? Does the law strike an acceptable balance between ease of transfer and security of ownership? The position relating to stolen goods is very unsatisfactory. We now know, as a result of the decision in *Jones*, that only a sale of stolen goods in market overt will defeat the original owner.[20] Yet the market overt exception has a desperately archaic ring

18 A contrary conclusion would also have undermined the hire-purchase industry, which at present rests on the assumption that goods subject to a hire-purchase (or conditional sale) agreement can be effectively sold only under Part III of the Hire Purchase Act 1964, which is restricted to motor vehicles and protects only a private purchaser. These restrictions would become virtually irrelevant if s 25 were held to protect a second purchaser.

19 [1965] 1 QB 560.

20 For an interesting illustration see the recent criminal law case of *R* v *Wheeler* (1991) *The Guardian*, 4 January. The facts were that a market stallholder, who was himself an innocent purchaser, resold

to it: the sale must take place in an established market, which includes ground-floor shops in the City of London but not in any other part of the country,[21] and must take place during daylight hours.[22] The law is lost in a time warp, having entirely overlooked the development of the High Street shop and the invention of the electric light. It is now some 25 years since the subject was examined by the Law Reform Committee. One of the main recommendations in the Committee's Twelfth Report on the Transfer of Title to Chattels[23] was the replacement of the market overt rule by an exception in favour of an innocent buyer at usual trade premises or public auction. Of course, that proposal would facilitate the wider disposal of stolen goods, and it was for that reason that Lord Donovan expressed his reservation. Professor Atiyah[24] rightly criticised the Committee for its failure to search for any empirical evidence of the workings of the present law; consequently, it would have been impossible for the Committee to make any prediction of the practical effect likely to be achieved by its recommendation. Nevertheless, there is much sound sense and food for thought in the Report,[25] and it is high time that it was rescued from its dusty pigeonhole. No-one, surely, can be satisfied with the market overt rule; it should be either modernised or abolished. Before that decision is made, however, sound empirical research is needed. We need to know, for example, about the extent of the problem of stolen goods. How much property, and what kind of property (excluding cash), is stolen? How much is now recovered? How much finds its way into the hands of innocent purchasers? Do such innocent purchasers buy in market overt, or at usual trade premises, or at public auction? Above all, probably, the impact of insurance needs to be considered. Presumably most motor vehicles are insured against theft. It may well be that most goods worth stealing, and commonly the subject of theft, are insured; examples which come immediately to mind are the valuable contents of cars (especially music reproduction equipment) and the valuable contents of houses (such as jewellery and TV and video equipment). The law now seems to favour recovery under an insurance policy by overcoming technical difficulties under the law of theft.[26] It seems, on the face of it, a reasonable policy for the law to prefer an innocent purchaser to an innocent but fully insured owner. However, before jumping to any conclusions we need to inquire into the extent to which, under the present law, insurers pursue subrogation or assignment claims against an innocent purchaser (as happened in *Jones*). If such claims are successfully pursued at present in a significant number of cases, we need to estimate what effect a change in the law will have on insurance premiums, and then make a judgment as to whether any resulting rise in premiums would be socially and economically acceptable. One conceivable conclusion is that there would be different rules for different categories of goods.[27] The Law Commission, which has research facilities denied to the Law Reform Committee, could usefully take the subject up, using the Committee's Report as its starting point.

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stolen goods to an innocent buyer. The goods were handed over to the buyer in exchange for the price after the stallholder was told by the police that the goods were stolen. The Court of Appeal held that the stallholder had not committed the offences of theft or of obtaining property by deception.

21 *Clayton* v *Le Roy* [1911] 2 KB 1031.

22 *Reid* v *Metropolitan Police Commissioner* [1973] 1 QB 551.

23 1966, Cmnd 2958.

24 (1966) 23 MLR 541.

25 See the more favourable comment by Professor Aubrey Diamond, (1966) 23 MLR 413, at p 419: '... a pretty good report.'

26 See, for example, *Dobson* v *General Accident Fire & Life Assurance Corp plc* [1989] 3 All ER 927.

27 An unattractive but not wholly irrational outcome; cf the provisions relating to motor vehicles only in Part III of the Hire Purchase Act 1964.