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# THE IMPORTANCE OF DELIVERY AND POSSESSION IN THE PASSING OF TITLE

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## I. INTRODUCTION

THE dilemma facing the law when two innocent parties have suffered at the hands of a wrongdoer is well known and arises acutely in the context of the sale of goods. Typically, in the classic simple three party situation: the owner of goods either gives goods to or has goods stolen by a rogue[1] seller who purports to sell them to an innocent third party buyer. Both the owner and buyer of the goods may well have a personal claim against the seller, but if the seller has either disappeared or has no money that personal claim may well be worthless. As a result, the question of who is entitled to the goods themselves is likely to determine which party will suffer as a result of the seller's actions. The crucial issue is who in this situation is entitled to the goods: this is a question of conflict of title or priority.[2] Who has a better title to the goods, the owner or the buyer?

The general rule as to priority in the case of personal property is clear and underpins all forms of transfer, whether by gift, sale, bailment or security, and it is that a person cannot give what is not his or hers to give. This basic rule is often expressed in the Latin maxim *nemo dat quod non habet*. To put it another way, in the language of priorities, the owner's title will prevail over that of the buyer because when there are two competing rights to property the first in time prevails.[3]

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[1] For convenience it is easier to talk of a rogue but the same problem could arise where goods are sold in the mistaken belief that the seller has authority to sell.

[2] See R. Goode, *Commercial Law*, 3rd ed. (London 2004), p. 57. Strictly speaking, title conflicts arise where identical and inconsistent claims are made to the same property as where both parties claim legal ownership in goods. Priority disputes involve different and competing claims to the same property, for example, where both parties claim security interest which must be prioritised: see S. Worthington, *Personal Property Law: Text and Materials* (Oxford 2000), p. 457.

[3] In the context of sale of goods, the basic rule is reflected in section 21 Sale of Goods Act 1979 which provides: "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, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell".

In the case of personal property, there are two exceptions to the general priority rule: the first is that a bona fide purchaser for value of a *legal* interest will take priority over any pre-existing *equitable* interest. The second is the rule in *Dearle* v. *Hall*[4] that priority in the case of assignment is determined by the order in which notice is given rather than the date of assignment.[5] But neither of these exceptions is likely to arise in the case of a sale of goods. Thus, in the situation described above, the owner's title prevails and he will accordingly have priority over the buyer.

In practice, this simple three party situation is relatively uncommon. Very often, more than one person claims to have a better title to the goods than the buyer. For example, the goods may originally have belonged to someone else, who will be referred to as the "true owner", from whom they were stolen, before eventually being sold to the apparent owner. The buyer's rights must then be assessed in the light of both the apparent owner's possessory title and the true owner's proprietary title. This is because in English law title is relative. "The English law of ownership and possession, unlike that in Roman law, is not a system of identifying absolute entitlement, but of priority of entitlement."[6] The rights of the parties again depend on questions of priority: in this case the true owner's title will prevail over both the apparent owner and the buyer, but the apparent owner's possessory title would prevail over the buyer. Although the apparent owner is not in fact the "true owner" of the goods, his possessory title is better than that of the rogue seller and thus he would succeed in a claim against the buyer even though he may himself be susceptible to a claim by the true owner.

Thus far, the rules described are clear, but they are not necessarily fair nor in keeping with the needs of modern commerce and trade. In the case of sales of personal property the position of a buyer may be very difficult. In contrast to land, for example, goods may not last forever and it must be possible to deal with them efficiently and quickly. Furthermore, it is very difficult, if not impossible in many cases, for the buyer to investigate title to the goods. Thus, it became recognised that there may be commercial reasons why in certain situations the rules should be different and that the *nemo dat* rule may need to be subject to exceptions.

[4] (1823) 3 Russ. 1.

[5] It may well be hard to justify either of these exceptions as a matter of legal principle. No compelling justification exists for the position of equity's darling, although it has been described as founded on jurisdictional policies between the common law and chancery courts, or, alternatively, as based on the need to make legal transfers of property secure: Worthington, *Personal Property Law: Text and Materials*, p 464. On the rule in *Dearle* v. *Hall* see L.S. Sealy & R.J.A. Hooley, *Commercial Law: Text, Cases and Materials*, 3rd ed. (London 2003), p. 968.

[6] *Waverly Borough Council* v. *Fletcher* [1996] Q.B. 334, 345, *per* Auld L.J.

Before going on to examine these exceptions to the *nemo dat* rule in detail, it is important to remember that such exceptions can operate in two fundamentally different ways: the extent that the sale to the buyer can override existing legal rights may be relative or absolute. The buyer may acquire an absolute title, good against the apparent and true owner of the goods. Alternatively, the buyer may acquire a relative title, good against the apparent owner but not against the true owner. The only example of the former was the now abolished sale in market overt. The effect of a sale in market overt was to give the buyer a "perfect" new title good against the whole world.[7] All the remaining *nemo dat* exceptions confer only a relatively good title. To put it another way, they affect the rule as to priorities only between the parties to that transaction, they do not affect the priority of the true owner.[8] The remaining exceptions are based on some link between the disponee and the person with better title (here between the buyer and the apparent owner) and they determine priority between those parties only.

The purpose of this article is to consider two of the statutory exceptions, relating to sales respectively by a seller or buyer in possession of goods (embodied in sections 24 and 25 Sale of Goods Act 1979 (SGA) and sections 8 and 9 Factors Act 1889 (FA).[9]) But before turning to consider the requirements of the two sections in detail, it is important to put sections 24 and 25 SGA 1979 in context.

## II. The Factors Act exceptions to the *nemo dat* rule

### *A. Sale or Pledge by a Mercantile Agent*

The first Factors Acts exception related to sales by a mercantile agent. The exception is now embodied in section 2(1) FA 1889[10] which provides:

> Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any

[7] Section 22 Sale of Goods Act 1979 formerly provided that where goods were sold in "market overt", according to the usage of the market, a buyer who took in good faith and without notice acquired good title to the goods. The exception was abolished by Sale of Goods (Amendment) Act 1994.

[8] *National Employer's Mutual General Insurance Association Ltd* v. *Jones* [1990] 1 A.C. 24.

[9] A feature of this area of law which adds to the complexity is the fact that some of the provisions of FA 1889, particularly ss. 8 and 9 which are the subject of this article, are *largely* but not exactly repeated in SGA 1979. The position is unsatisfactory: if the provisions of the FA were too wide they should have been repealed; if not, why not simply repeat them. But this discrepancy is not directly relevant to the issues discussed in this article and the SGA provisions will be referred to for convenience.

[10] The history of the Factors Acts is long and complicated. The 1889 Act, which remains in force, is essentially a consolidation of earlier legislation of 1823, 1825, 1842 and 1877. For an account of the historical development of the law relating to factors see R. Munday, "A Legal History of the Factor" (1977) 6 Anglo–American Law Review 221.

> 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.

The Factors Acts provisions were party a confirmation and partly an alteration of the law.[11] From the 18th century onwards, it had become common for merchants wishing to sell goods to entrust them to agents. An agent who was entrusted with possession of goods was often referred to as a "factor", other agents were referred to as brokers.[12] Such agents usually had a general authority to *sell* goods on behalf of their principal. Clearly where an agent acts within the scope of his actual authority in dealing with his principal's goods the principal will be bound and the purchaser will acquire title to the goods. This is not an "exception" to the *nemo dat* rule, it is simply a consequence of the law of agency which will view the acts of the agent as those of the principal. But it is also the case in the law of agency that if the agent is acting within the scope of his "apparent" or "ostensible" authority, the principal will also be bound because he is estopped from denying that the agent was acting with authority. Thus, if an agent sold goods in disregard of an instruction from his principal, the sale would nonetheless be effective as he usually had apparent or ostensible authority to sell.

It had also become very common for such agents to pledge goods in their own name pending sale.[13] However, agents were not recognised as having apparent or ostensible authority to pledge goods and therefore the principal was not bound. To remedy this situation, a series of Factors Acts were passed the last, in 1899, extending the authority of such agents to the power to make pledges or other dispositions of goods.[14]

But it is crucial to the operation of the mercantile agent exception that the goods were entrusted to the agent in his capacity as a

[11] *Cole* v. *North Western Bank* (1875) L.R. 10 C.P. 354, 360–361.

[12] Although the term factor was also used in a loose sense to describe anyone employed by a merchant to buy or sell on his behalf, in return for which service they received a commission or factorage: see Munday, "A Legal History of the Factor", above note 10, pp. 225–226.

[13] A.P. Bell, *Modern Law of Personal Property in England and Ireland*, (London 1989), p. 496.

[14] Both "factors" and brokers were included in the scope of the Factors Acts because the definition of mercantile agents to whom the Act applies includes: a mercantile 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 (section 1(2), FA 1889). Nowadays, the term factor is usually used in a completely different context to describe someone who discounts future trade debts and offers a debt management service.

mercantile agent.[15] The goods must be entrusted to the mercantile agent in that capacity because the law does not penalise the owner *merely* because of appearances. The purchaser is just as misled whenever a mercantile agent sells in the course of business, but owner of the goods will not be held to have *lent himself to the dispositive act* unless he entrusted the agent with a view to sale.[16] Thus, the exception emanated from and extended the existing position of a mercantile agent acting with apparent authority: once the principal entrusted goods to a mercantile agent the law deemed him to have authority to sell or pledge goods in the ordinary course of business and attributed the dispositive act of the agent to the owner of the goods.[17]

### *B. Sales by a Seller or Buyer in Possession of Goods*

The origins of sections 24 and 25 SGA 1979 stem from the decision in Johnson v. Credit Lyonnais.[18] In that case, the buyer of goods left dock warrants[19] in the hands of the seller pending a decision as to the ultimate destination of the goods. The seller then resold them to an innocent second buyer using the dock warrants. The Court of Appeal held that this second sale was ineffective.[20] It seems that this decision lead to great outcry in commercial circles,[21] and section 3 of the Factors Amendment Act 1877 was introduced to reverse this decision and to protect those who dealt with sellers who continued in possession of documents of title.[22] The section put the seller in possession of documents of title into the same position as an agent who had obtained possession of the documents from the owner and with the consent of the owner. Thus, the purpose of section 3 FA 1877 was twofold: it reversed the result in Johnson v. Credit Lyonnais and, secondly, it extended section 2, by treating a seller in possession of

[15] See, for example, *Cole* v. *North Western Bank* (1875) L.R. 10 C.P. 354; *Staffs Motor Guarantee Ltd* v. *British Wagon Co Ltd* [1934] 2 K.B. 305, *Pearson* v. *Rose & Young* [1951] 1 K.B. 275; *Astley Industrial Trust* v. *Miller* [1968] 2 All E.R. 36.

[16] Goode, *Commercial Law*, p.420.

[17] *Cole* v. *North Western Bank* (1875) L.R. 10 C.P. 354, 372, per Blackburn J.

[18] (1877) L.R. 3 C.P.D. 32.

[19] Although a dock warrant is not a document of title according to the traditional meaning of the phrase at common law, dock warrants were specifically referred to in the earliest Factors Acts and are included in the statutory definition of documents of title in FA 1889 s 1(4). See further A.G. Guest (ed.), *Benjamin's Sale of Goods*, 7th ed. (London 2006), paras. 18-006-18-009.

[20] There was no estoppel because the documents had been left with the seller not to deal with them but pending a decision as to where the goods were going, thus there was no representation made to the third party by the buyer. Furthermore, what is now section 2(1) FA 1889 could not apply as the documents of title were not entrusted to the seller as a mercantile agent.

[21] See Bell, *Modern Law of Personal Property*, p. 504.

[22] Section 3 FA 1877 provided: "Where any goods have been sold, and the vendor or any person on his behalf continues or is in possession of the *documents of title* thereto, any sale, pledge or other disposition of the goods or documents made by such vendor or any person or agent entrusted by the vendor with the goods or documents … shall be as valid and effectual as if such vendor or person were an agent or person entrusted by the vendee with the goods or documents …. Provided the person to whom the sale, pledge or other disposition is made has not notice that the goods have been previously sold." (emphasis added).

documents of title in the same way as a mercantile agent entrusted with goods.

When section 8 FA 1889 was drafted, the protection given to third parties was extended to cases where the seller was left in possession of the *goods* themselves, not just the documents of title. But that protection only arises where the goods have been delivered or the documents of title transferred to the third party. Thus, section 24 SGA 1979 (which for the most part repeats s. 8 FA 1889) provides:

> 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.(emphasis added)

This was a very significant alteration, but the reasons behind and consequences of this extension remain far from clear. The situation of a seller left in possession of goods is in many ways different from that of a seller left with documents of title to the goods. The risk of leaving a seller in possession of documents of title should be obvious. But a third party might be expected to be aware that a person can be in possession of the *goods* themselves for any number of reasons other than as owner or with authority to sell (*e.g.* as bailee or hirer).

The position of a seller left in possession of goods is also very different from that envisaged in section 2(1) FA 1889. It is relatively easy to understand the basis for the priority given by section 2(1) to someone buying from a mercantile agent in the ordinary course of business. But it is much more difficult to see what takes the situation of the seller in possession of goods outside the ordinary *nemo dat* rule. As we have seen, generally an innocent third party buying from a person with possession of goods believing him to be the owner or to have authority to sell, will lose to the title of the owner of the goods. Furthermore, the fact that the owner has allowed the seller to have possession of the goods, or documents of title to the goods does not change the position: there is no representation and therefore no estoppel and no general duty to care for one's own goods on which to found a claim in negligence.[23] But if you allow someone *from whom you have bought goods* to remain in possession of the goods, section 24 SGA 1979 applies.[24] Ultimately, the seller in possession exception now

[23] See: *Johnson* v. *Credit Lyonnais* (1877) L.R. 3 C.P.D. 32; *Jerome* v. *Bentley & Co* [1952] 2 All E.R. 114 and *Central Newbury Car Auctions Ltd* v. *Unity Finance Ltd* [1957] 1 Q.B. 371.

[24] On the difficulty of distinguishing between these two situations see further Bell, *Modern Law of Personal Property*, p. 506.

embodied in section 24 may be difficult to justify in terms of logic or principle; it may simply reflect that the policy of promoting trade and commerce is often inconsistent with a strict application of the *nemo dat* rule.[25]

## III. The seller who "continues or is in possession of goods"

With that framework in place, it is now possible to turn to some of the requirements of section 24 SGA 1979 in more detail. In particular, two very important questions arise:

(1) will the seller "continue in possession" of goods whenever he remains in physical possession of the goods, regardless of a constructive delivery of the goods to the buyer; and
(2) if the seller does not continue in possession, but "is in possession of the goods", must that be in possession *qua seller* or in any other capacity?

These questions raise important issues about the nature of possession and delivery of goods. Therefore, before turning to consider the case law in detail, it may be helpful to start by considering the key features of some of these fundamental concepts and definitions.

### *A. Some key concepts considered*

At common law there are two categories of legal property rights in a chattel: ownership and possession.[26] Within the context of SGA 1979, ownership corresponds with the general property in goods.[27] The starting point, therefore, is that *property* in goods is separate from *possession* of goods. The mere fact that property has passed to the buyer does not confer on him possession or even the right to possession as against the seller;[28] conversely, property in goods can pass before possession.

The passing of *property* in goods is important because risk usually passes with property; the seller can sue for the price once property has passed, and once property has passed the buyer will be the proper

[25] See, for example: M. Bridge, *Personal Property Law*, 3rd ed., (Oxford 2002), p. 116 "Irreconcilable interests and policies often produce law that is difficult to justify in purely logical terms. This is particularly true of [the exceptions to the nemo dat rule]." Goode, *Commercial Law*, p. 424: "As we shall see, the statutory provisions developed piecemeal and interpreted strictly by the courts, do not in policy terms represent either a rational or a cohesive set of rules for balancing the conflicting interests".

[26] See Bridge, *Personal Property Law*, p. 30. *Cf.* Bell, *Modern Law of Personal Property*, p. 33.

[27] Section 61 SGA 1979: "property means the general property in goods, not merely a special property".

[28] Generally the buyer can call for possession only if he has paid the price or has been given credit as s 28 SGA 1979 makes delivery of the goods and payment concurrent conditions.

party to sue in tort if a third party damages the goods.[29] Furthermore, if property in the goods has passed to the buyer he will generally have a good title to them if the seller becomes insolvent.

Once the buyer has paid for the goods, he will acquire an *immediate right to possession*. This is important as anyone with an immediate right to possession of goods will be entitled to sue in conversion.[30]

The buyer may acquire *actual possession* of the goods (*i.e.* exclusive physical control of the goods).[31] But possession may also be *constructive* (*i.e.* control over goods in the hands of someone else).[32] The question of who has possession of the goods is important to the rights of an unpaid seller under section 41 SGA 1979,[33] it is also crucial to the operations of sections 24 and 25 SGA 1979.

*Delivery*, like possession, can be actual or constructive. Delivery is constructive when it is effected without any change in the physical possession of the goods. Constructive delivery may take place in three classes of cases:

(1) the seller is in possession of goods, but after the sale he attorns to the buyer and continues to hold the goods as his bailee;
(2) the buyer is in possession of the goods before sale, but after the sale the buyer holds them on his own account;
(3) the goods are in the possession of a third person as bailee for the buyer, After the sale the third person attorns to the buyer and continues to hold them as his bailee.[34]

It is the first of these forms of constructive delivery which is the most important in this context. *Attornment* is the crucial element in such a constructive delivery. However, what constitutes an attornment is not always clear. In *Michael Gerson (Leasing) Ltd* v. *Wilkinson*[35] the Court of Appeal held that it did not matter that there was no specific

[29] The traditional common law approach is to use the concept of "property" to decide many of these issues, while recognizing that exceptions must be made. But often the exceptions seem to eat up the rule and other jurisdictions adopt a different approach dealing with each specific question, such as the passing of risk, without reference to the passing of property. See further P.S. Atiyah, J.N. Adams, H. MacQueen, *The Sale of Goods*, 11th ed. (Harlow 2005), pp. 317–320.

[30] N.E. Palmer, *Bailment*, 2nd ed., (London 1991), p. 209. For a full discussion of the current state of the remedy of conversion see N. Curwen, "The Remedy in Conversion: Confusing Property and Obligation" (2006) 26 Legal Studies p. 570.

[31] The purely factual question of who has the *actual physical custody of goods*, generally speaking, has much less significance than the concepts of property and possession. Usually the expression custody of goods is used to indicate a person who has physical control over the goods but is not regarded as having possession in law (because there is no intention to control *e.g.* an employee with his employer's goods). See: Bell, *Modern Law of Personal Property*, p. 35; S. Gleeson, *Personal Property Law* (London 1997) p. 30.

[32] Possession can also be symbolic *i.e.* where someone holds something which represents the property, but this form of possession as distinct from actual or constructive possession is of little practical significance. See the "degrees of possession" described in Bell, *Modern Law of Personal Property*, pp. 34–35.

[33] Section 41 SGA 1979 gives a lien to an unpaid seller "who is in possession" of the goods.

[34] Sir Mackenzie Chalmers, *The Sale of Goods Act 1893*, 5th ed. (London 1902), p. 118, as cited in *Michael Gerson (Leasing) Ltd* v. *Wilkinson* [2001] Q.B. 514, at [12] *per* Clarke L.J.

[35] [2001] Q.B. 514.

or identifiable moment at which the attornment took place: a sale and leaseback arrangement was consistent only with the lessor having the right to deliver the goods under the lease, thus the lessor must have intended to take control of the goods and the seller must in turn have acknowledged his right to do so. No specific words or action are required: it is the seller's recognition of the buyer's right to possess as owner which constitutes the attornment. The result of such a constructive delivery is that the seller will continue to hold the goods either as the buyer's servant or his bailee.[36]

Thus, a sale of specific goods (for example, a horse) may have the following consequences:

(1) Property in the horse usually passes to the buyer at the moment of sale.[37] From that moment, risk is presumed to pass to the buyer,[38] he is protected if the seller becomes bankrupt, and he can sue in tort if the horse is damaged by a third party.
(2) Once the buyer has paid for the horse, he will have an immediate right to possession and can sue either the seller or a third party in conversion if they interfere with his right to possession.
(3) But the buyer does not yet have possession of the horse. He will not acquire possession of the horse until it is actually delivered to him or there is a constructive delivery to him (for example, by the seller attorning to him).[39]

### *B. When does a Seller "Continue in Possession of Goods"?*

Section 24 SGA 1979 has two limbs. It applies when the seller or ex seller either (i) continues or (ii) is in possession of the goods. Clearly a seller who has actually delivered the goods to the buyer does not continue in possession of the goods. For example, in the important New Zealand case of *Mitchell* v. *Jones*[40] the owner of a horse sold and delivered it to a first buyer. A few days later he regained possession of the horse on lease and then sold it to a second buyer. The second buyer relied on the equivalent of section 24 SGA 1979 but his claim failed.

[36] See further Pollock & Wright, *An Essay on Possession in the Common Law* (Oxford 1888), p. 71, as cited in *Michael Gerson (Leasing) Ltd* v. *Wilkinson* [2001] Q.B. 514, at [22] *per* Clarke L.J.

[37] There is a presumption that property passes at the moment of sale in the case of specific goods, SGA 1979 section 18 rule 1. However, in modern times, particularly in consumer sales, very little is needed to rebut the inference: see Atiyah, *The Sale of Goods*, pp. 323–324.

[38] Section 20 SGA 1979 provides that unless otherwise agreed risk passes with property. Different rules apply in consumer cases (s 20(4) SGA 1979).

[39] In *Marvin* v. *Wallace* (1865) 25 L.J.Q.B. 369 there had been a constructive delivery of a horse because the buyer loaned the horse to the seller and the seller acknowledged that he was holding the horse not as seller but as bailee (as explained in *Michael Gerson (Leasing) Ltd* v. *Wilkinson* [2001] Q.B. 514, at [26] *per* Clarke L.J.). In *Elmore* v. *Stone* (1809) 1 Taunt 458 there was again a constructive delivery when the owner of a livery stable sold two horses and the buyer, having no stable of his own, asked him to keep them at livery for him. In both cases it was at a moment some time after the sale had taken place that the horses were delivered to the buyer, when the seller agreed to hold for the buyer as bailee.

[40] (1905) 24 N.Z.L.R. 932.

The seller did not continue in possession of the horse; furthermore he was not "in possession" of the horse in the relevant sense (*i.e.* as a seller), because he regained possession in another capacity (*i.e.* as bailee: this aspect of the case will be considered further below).

In *Staffs Motor Guarantee Ltd* v. *British Wagon Co Ltd* (*Staffs Motor*),[41] Mackinnon J. extended this principle to a case where the sale was completed not by physical delivery but by constructive delivery. The seller sold a lorry to the first buyer who then let it back to the seller on hire-purchase. Although the seller remained in physical possession of the lorry he did not "continue in possession" of the lorry because there had been a delivery (albeit constructive here as opposed to actual delivery in *Mitchell* v. *Jones*).[42] But in *Pacific Motor Auctions Pty Ltd* v. *Motor Credits (Hire Finance) Ltd* (*Pacific Motor)*[43] the Privy Council indicated, obiter, that in its view, *Staffs Motor* was wrongly decided on this point. Although their Lordship's accepted that *Mitchell* v. *Jones* was rightly decided, they rejected the extension of the principle to constructive delivery. In this case, the seller had again retained physical possession of the goods, 16 motor cars, under a "floor plan" or "display agreement". The purpose of the arrangement was for the seller, a garage, to get cash to finance its stock by selling cars to the first buyer, and in return to sell cars on the first buyer's behalf to its customers. The Privy Council held that a second buyer had obtained title to the cars by virtue of the equivalent of what is now section 24 SGA 1979. Even if there was an attornment by the seller under the display agreement (although on the facts they found that there was not and that *Staff Motors* was distinguishable on that basis[44]) that was not sufficient to break continuity of possession. All that mattered was that the seller remained in continuous *physical* possession of the goods.[45]

This conclusion was justified on two main grounds. First, their Lordships suggested that otherwise the section would have no real

[41] [1934] 2 K.B. 305.

[42] The decision in *Staffs Motor* was followed, without further discussion, by the Court of Appeal in *Eastern Distributors Ltd* v. *Goldring* [1957] 2 Q.B. 600, 614.

[43] [1965] A.C. 867.

[44] A.G. Guest (ed.), *Benjamin's Sale of Goods*, Para. 7-060. Whether that view is consistent with the wider definition of adornment adopted by Court of Appeal in *Michael Gerson (Leasing) Ltd* v. *Wilkinson* [2001] Q.B.514 is unclear. The Court of Appeal made it clear that it did not matter that no specific moment of attornment could be identified. Nor can the question of whether there is a single agreement or not be determinative. But on the other hand, it was crucial to the Court of Appeal's reasoning that in order to grant the lease under the sale and leaseback agreement, full control and possession had to have passed to the lesser at some point. The same is may not necessarily be true under a display agreement.

[45] When the issue subsequently came before the English Court of Appeal in *Worcester Works Finance Ltd* v. *Cooden Engineering Co Ltd*, [1972] 1 Q.B. 210 the Court of Appeal held that *Staffs Motor* was no longer good law on this point as it was disapproved by the Privy Council in *Pacific Motor*. Again however, this statement was obiter as the seller had never attorned, hence on the facts there was no constructive delivery.

meaning. The fact that a person having sold goods is described as continuing in possession would, they said, seem to indicate that the section is not contemplating as relevant a change in the legal title under which he possesses, for the legal title under which he possesses cannot continue. It is true, of course, that property in the goods, and thus legal title in that sense, will not continue; if property had not passed, there would be no need for an exception to the *nemo dat* rule. But whether the legal character in which the seller holds can continue is a different issue. In particular, the question of whether or not the seller *automatically* becomes a bailee for the first buyer in this situation, even in a case where there has been no attornment and thus no constructive delivery, is a difficult one. Both semantically and historically it could be argued that bailment involves *a delivery* of goods from one person to another.[46] But it is clear that there is no longer any need for a physical delivery, in other words, a bailment can be created by attornment. Furthermore, it also seems that it is not essential that the bailor should ever have had possession independently of the possession of the bailee, so that, for example, a bailment may be created where the bailee receives a thing for the bailor in pursuance of an undertaking to that effect.[47] Indeed, it has been suggested that the supposed delivery requirement adds nothing and in fact is simply a facet of the consensual theory of bailment and is a way of ensuring that possession is assumed under an agreement between bailor and bailee.[48] If that is right, although bailment is not "automatic" it is hard to think of a situation in practice when it would not arise where a seller remains in possession of goods with the consent of the buyer.

But in any event, arguably this focuses on the wrong issue. The character in which possession is held, whether as bailee or not, is, as will be seen in the next section, relevant to the question of whether the seller is "in" possession of the goods in the required sense. But the question here is whether the seller "continues in possession" of the goods. Thus, to ask whether there is inevitably a change in legal title under which the seller holds possession is to focus on the wrong question. If it is right that a seller does not continue in possession where there has been a physical delivery of the goods (as in *Mitchell v Jones*) the crucial question is whether a constructive delivery should have the same effect. As explored further below, there are good reasons, both in theory and in practice, why constructive delivery and actual delivery should be treated as synonymous in this context. If that is right, the section would operate whenever there has been no actual or constructive delivery of the goods (and would therefore have

[46] Palmer, *Bailment*, p. 15.
[47] *Union Transport* v. *Ballardie* [1937] 1 K.B. 510, 516.
[48] Bell, *Modern Law of Personal Property*, p. 88.

operated on the facts of *Pacific Motors* itself) regardless of whether the character of the seller's legal title remains the same or not.

The second justification given in *Pacific Motor* as to why continued *physical* possession should be the only requirement in section 24 SGA 1979 was the fact that the third party relied on the appearance of possession. The object of the section, it was said, 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".[49] But, as we have seen, none of the exceptions to the *nemo dat* rule, including section 24 SGA 1979, protect a third party *simply* because he believed that the seller in possession of goods was the owner or had authority to sell. This is most clearly illustrated by the operation of the other Factors Act exception now contained in section 2 FA 1889. As has been described, that section does not apply whenever a third party buys goods from someone who appears to be a mercantile agent acting in the ordinary course of business. The goods must have been entrusted to the mercantile agent in that capacity, even though this is a requirement of which the third party can have no knowledge. Although section 24 is not based on agency or holding out and thus may not require entrusting of the goods to the seller in the same way, it is clear that the exceptions are based on the conduct of the first buyer rather than simply the expectations of the third party. The fact that the third party thinks he is buying goods from the owner or someone with authority to sell is a precondition to any of the exceptions operating but is not in itself enough.[50] The conduct of the first buyer on which section 24 is based, is his failure to take delivery of the goods. Because he has not completed his sale he is at risk if the seller makes a completed sale to a second buyer.

In any event, in practice it is very unlikely that the second buyer will have any knowledge at all of the previous dealings between the parties. In *Mitchell* v. *Jones*, the second buyer no doubt saw the horse in the seller's stable and assumed that he was the owner of the horse. He could not have known that a few days earlier the horse had been in the possession of the first buyer. Usually the second buyer will not know whether the goods have been in the *continual* physical possession of the seller or not.[51]

[49] [1965] A.C. 867, 886, *per* Lord Pearce.

[50] All of the *nemo dat* exceptions include a requirement that the third party is acting in good faith. The only exception to this is that when an unpaid seller who has exercised a right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title to them as against the original buyer (regardless of whether he acts in good faith or not) (section 48(2) SGA 1979). There is also no requirement of delivery in section 48(2). However, section 48(2) differs from the other exceptions to the *nemo dat* rule in that its purpose is not simply to affect the priorities between two innocent parties: section 48(2) is intended to extend the rights available to an unpaid seller.

[51] As in *Marvin* v. *Wallace* (1865) 25 L.J.Q.B. 369 and *Elmore* v. *Stone* (1809) 1 Taunt 458 discussed in note 39 above; but not in *Mitchell v Jones* (1905) 24 N.Z.L.R. 932.

Accordingly, the two cornerstones of their Lordships' reasoning in *Pacific Motor* are not wholly convincing. Furthermore, there may well be compelling contrary arguments supporting the view that the seller should not continue in possession where there has been a constructive delivery to the first buyer. These arguments will be considered further below, but first it is important to complete the picture by considering the other limb of section 24 SGA 1979, that is, a situation where even if the seller has not continued in possession he is "in possession" of the goods.

### *C. When is a Seller "in Possession" of Goods?*

The crucial question here is the significance, if any, of the character in which the seller is in possession. Again *Mitchell* v. *Jones* is important. Although, as we have seen, the seller in that case had regained possession of the horse and was in physical possession of the horse at the time of the sale, he was not "in possession of the goods" in the sense required:

> The putting-in of the words "or is possession of the goods" was meant to apply to a case of this character: If a vendor had not the goods when he sold them, but they came into his possession afterwards, then he would have possession of the goods, and if he sold them to a *bona fide* purchaser he could make a good title to them…. In this case the person who sold the goods gave up possession of them, and gave delivery of them to the buyer. The relationship, therefore of buyer and seller between them was at an end. *It is true that the seller got possession of the goods again, but not as a seller. He got the goods the second time as the bailee of the buyer*…" (emphasis added).[52]

This passage can be interpreted in a number of different ways:

(1) One interpretation, resulting in the strictest approach, would be that the section only applies if the vendor did not have the goods when he sold them but they subsequently come into his possession.[53]

(2) But, Stout C.J. went on to note that when the seller *regained* possession he did so as bailee rather than seller. This fact would be irrelevant if the strict interpretation in (1) were adopted and thus he seems to envisage that in some cases where the seller has *regained* possession the section will apply. But the seller must have regained possession as seller, not in some other capacity.[54]

[52] (1905) 24 N.Z.L.R. 932, 935.

[53] The passage seems to have been cited in that way by the Court of Appeal in *Worcester Works Finance Ltd* v. *Cooden Engineering City Ltd* [1972] 1 QB 210, 217, but without further discussion.

[54] A.G. Guest (ed.), *Benjamin's Sale of Goods*, para. 7-062.

(3) Again, however, the requirement that possession be regained *as seller* can be interpreted in one of two ways. On a strict view, it could be argued that possession must be regained by virtue of the contract of sale itself. This would be a very narrow interpretation.

(4) But a broader interpretation would be that the section applies provided the seller's possession is *attributable to the sale*.[55] The exception would thus apply, for example, where the seller is obliged under a recourse or similar agreement with a finance company to assist in storage or sale or repossession of goods following an agreement where there has been a default, but would not apply where a buyer happens to take a car for servicing to the garage where he bought it.[56]

It is suggested that the proper interpretation of section 24 SGA 1979 is as follows: the seller "continues in possession" where there has been no delivery of the goods, actual or constructive. If a seller remains in physical possession of the goods he may be "in possession" of the goods but only if his possession is attributable to the sale agreement. There are a number of further considerations which may support this interpretation.

### *D. Consistency with other exceptions to the nemo dat rule*

As we have seen, for the mercantile agent exception in section 2(1) FA 1889 to operate, the goods must have been entrusted to the mercantile agent in his capacity as mercantile agent.[57] Although the capacity in which the mercantile agent has possession of the goods cannot be apparent to the third party, the exception operates because of the conduct of the owner in entrusting them to the mercantile agent in that capacity.[58] By analogy, it can be argued that section 24 SGA 1979 should be based on the conduct of the first buyer in relation to the initial sale of the goods. If he does not complete the sale by taking delivery of the goods he is at risk. The fact that the buyer having

[55] This would accord with the wide view of what is meant by possession *as mercantile agent* in the case of section 2(1). It has been established that it is not necessary that goods are entrusted for sale, provided they are given to the agent for a purpose which is in some way or other connected with his business as mercantile agent *e.g.* for display or to get offers: see *Pearson* v. *Rose & Young Ltd* [1951] 1 K.B. 275, 288, *per* Denning L.J.

[56] Another example of when possession is attributable to the sale might be if the seller lawfully exercised his right of stoppage in transit and thus resumed possession of the goods (SGA 1979 section 44) and resold them (A.G. Guest (ed.), *Benjamin's Sale of Goods*, para. 062). But *cf.* N. Palmer and E. McKendrick, *Interests in Goods,* 2nd ed. (London 1998), p. 334. A more difficult situation is where goods have been returned to the seller for repair as happened in *J & H Ritchie Ltd* v. *Lloyd Ltd* [2007] UKHL 9.

[57] *Staff Motors* remains good authority on this point.

[58] It is also said that the requirement that goods be entrusted to the agent in his capacity as mercantile agent stems from the wording of the original 1825 exception which used the word "intrusted". See further Sealy & Hooley, *Commercial Law*, p. 345 and M. Bridge, *The Sale of Goods* (Oxford 1997), p. 435.

completed the sale, happens to lease the goods back to the original seller should not bring section 24 into operation.[59] In terms of the overall merits of the situation, if anything, the position of the third party is less strong where he is relying on the seller in possession exception. An owner leaving goods with someone whom he knows to be a mercantile agent (albeit in a different capacity) seems more "to blame" when a third party buys those goods from that mercantile agent in the ordinary course of business than an owner leaving goods with his vendor *e.g.* under a sale and leaseback agreement.

### *E. Practical Difficulties*

If section 24 SGA 1979 simply requires continued *physical* possession of the goods, irrespective of any constructive delivery of the goods to the first buyer, at least two significant practical difficulties arise:

(1) what is meant by "continuous physical possession"; and
(2) how does the requirement apply in cases themselves based on constructive possession of the seller?

#### *1. What is meant by "continuous" physical possession?*

The first practical problem is how long a break in physical possession will prevent section 24 SGA 1979 from operating. For example, can a buyer prevent the section from operating by an almost symbolic possession taken by a finance company under a stocking plan of the type in *Pacific Motor* which sends one of its representatives from time to time to drive the cars round the block.[60]

Reformulating the requirements of section 24 in the way suggested would lead to the following position. Once there has been a constructive delivery the seller cannot continue in possession. But that does not mean that the second buyer inevitably loses. Assuming the seller is in fact in possession at the time of the sale, it depends on whether or not that possession is attributable to the original sale contract or not. Thus in *Mitchell* v. *Jones* it clearly was not. But it is possible that this would have been an alternative ground for finding for the second buyer in *Pacific Motor*. If, as the Privy Council clearly felt, the fact that the display agreement was a single agreement meant that the possession remained by virtue of that agreement, he arguably was in possession as seller for these purposes. The point is that it is not

[59] If, in fact it was not chance, and his possession is attributable to the sale, he may nonetheless be "in possession" as seller; but that is a different point. A good example of this is *Olds Discount Co Ltd* v. *Krett and Krett* [1940] 2 K.B. 117. The seller had not continued in possession but was in possession, having repossessed the goods as agent for a hire purchase company. The Privy Council in *Pacific Motor* approved Stable J's decision that as it was a mere accident that the agent to whom the finance house subsequently gave their mandate to hold the goods was the person who had sold them to the finance house in the first place, the section did not apply.

[60] Bridge, *The Sale of Goods*, p. 459.

necessary to treat the seller as having continued in possession; if the possession is attributable to the original sale contract, the section will apply because he is in possession as seller.[61]

*2. Cases based on the constructive possession of a seller*

The second practical problem is how to apply the continual physical possession requirement to cases which are themselves are based on constructive possession (that is where the goods are in the actual possession of a third party but are being held for the seller).[62] In such cases, the phrase "continues in possession" must refer to "continues in constructive possession" of the goods.

### *F. Consistency in the Meaning of "Possession" and "Delivery"*

It is a consistent theme in many of the cases that, where possible, words such as "possession" and "delivery" should be given the same meaning wherever they appear in the SGA. For example, in *City Fur Manufacturing Company Ltd* v. *Fureenbond (Brokers) London Ltd*,[63] the court held that since possession normally encompasses constructive as well as actual possession,[64] constructive possession in a seller was a sufficient basis for section 24 SGA 1979 to apply. By the same reasoning, the starting point should be that "continues in possession" should also refer to constructive as well as actual possession. Similarly, it is now established that delivery in the second part of section 24 SGA 1979 includes constructive delivery.[65] Thus, when the judge in *Mitchell* v. *Jones* said that the exception would not apply where a "*person who sold the goods gave up possession of them, and gave delivery of them to the buyer*" consistency suggests that the section should not apply where a person gives up constructive possession by giving constructive delivery of the goods to the buyer. There would need to be a very good reason why possession and delivery should be given a different meaning in this part of section 24: on the contrary the indications are that they should have the same meaning.

[61] This is the same result advocated by Bridge in these situations but for different reasons: Bridge, *The Sale of Goods*, p. 458.

[62] A good example is *City Fur Manufacturing Company Ltd* v. *Fureenbond (Brokers) London Ltd.* [1937] 1 All E.R. 799. That constructive possession is sufficient for the purposes of section 24 was confirmed recently in *Fairfax Gerrard Holdings Ltd* v. *Capital Bank plc* [2006] All E.R. (D) 380.

[63] [1937] 1 All E.R. 799.

[64] Section 1(2) FA 1889.

[65] Central to the reasoning in *Forsythe International (UK) Ltd* v. *Silver Shipping Co Ltd* [1994] 1 W.L.R. 1334 that constructive delivery must be enough was that the meaning of possession must be the same in both parts of the section.

*G. Application of these Principles to a Double Sale and Leaseback*

Many of these issues were brought into sharp focus in the case of *Michael Gerson (Leasing) Ltd* v. *Wilkinson*.[66] The facts raised the problem of a "double" sale and leaseback. The seller sold equipment to the first buyer under a sale and leaseback agreement and subsequently, without the authority of the first buyer, sold part of the same equipment to the second buyer under another sale and leaseback agreement. The equipment remained in the physical possession of the seller at all material times. The Court of Appeal held that the second buyer had acquired title to the equipment under section 24 SGA 1979. It was conceded, following *Pacific Motor*, that the seller continued in possession of the equipment. Because of that concession, the decision turned on whether there had been a delivery of the goods to the second buyer. It was conceded that a constructive delivery was sufficient.[67] Thus the only question which remained was whether there had in fact been a constructive delivery to the second buyer under the sale and leaseback agreement: the Court of Appeal held that there had. Under the sale and leaseback, the seller was promising to take delivery of the goods, and such delivery could only be taken from the second buyer if the second buyer had the right to deliver them because the seller had (at least notionally, symbolically or constructively) delivered them to it. To put it another way, the lease was consistent only with ownership of the goods by the second buyer and with a right of possession in the second buyer sufficient to transfer possession to the seller under the lease. This amounted to a constructive delivery.

But why was the claim of the second buyer preferred to that of the first buyer when their conduct had been exactly the same? Both purchased machinery but left it in the physical possession of the seller. The general rule of English law, as we have seen, is to protect title over the expectations of innocent third parties. The exceptions to the *nemo dat* rule are all to some extent based on the conduct of the owner of the goods. But in this case, the conduct of both buyers was exactly the same.[68]

There are two ways to avoid the result in *Michael Gerson*. One is to hold, contrary to the second concession which the Court of Appeal

[66] [2001] Q.B. 514.

[67] The High Court of Australia in *Gamer's Motor Centre (Newcastle) Pty Ltd* v. *Natwest Wholesale Australia* Pty (1987) 163 C.L.R 236 said that constructive delivery should be enough and that was followed at first instance in *Forsyth International (UK) Ltd* v. *Silver Shipping Co Ltd* [1994] 1 W.L.R. 1334. Previously in *Nicholson* v. *Harper* [1895] 2 Ch. 415 it had been suggested that only a physical delivery would suffice.

[68] The oddity of this result was predicted by McHugh J.A. in the New South Wales Court of Appeal in *Gamer's Motor Centre (Newcastle) Pty Ltd* v. *Natwest Wholesale Australia Pty Ltd* [1985] 2 N.S.W.L.R. 475, 490. Cf Atiyah, *The Sale of Goods*, p. 397.

thought was rightly made, that constructive delivery to the second buyer is not enough.[69] But the other solution is that the section should not have applied because the seller did not (contrary to the first concession) "continue in possession" of the equipment. The constructive delivery which must also have taken place under the first sale and leaseback should have prevented the section from operating unless the seller was "in possession" in the sense that the possession was attributable to the sale. As in *Staff Motor*, it seems unlikely that under a sale and leaseback agreement of this kind the possession is attributable to the sale, rather possession is attributable to the lease.[70]

## IV. The Buyer in Possession of Goods

Section 25(1) SGA 1979 provides:

> 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.

Whereas section 24 applies when a seller has sold goods twice, section 25 usually applies where a buyer who is in possession of goods sells goods prematurely in that he does not yet have property in the goods.[71]

Again the question arises as to whether the character in which the buyer is in possession is important. This question has received much less attention than the analogous issues which arise under section 24 SGA 1979 which have already been discussed. But many of the same considerations apply.

As before, there are a number of possible ways of interpreting this requirement:

(1) The broadest view would be that all that matters is that the buyer is in possession of the goods for whatever purpose and in any capacity.

[69] See Goode, *Commercial Law*, p. 432. But part of his reasoning seems to have been an assumption that every sale of specific or ascertained goods leads to the seller becoming bailee for the buyer.

[70] As already noted, *Pacific Motor* may be distinguishable on this basis as it may be possible to argue that possession in that case was attributable to the sale which formed part of the single display agreement.

[71] In the vast majority of cases a person who has "bought" goods will have property in the goods and will accordingly be able to pass title in the goods without any exception to the *nemo dat* rule. *Cf. Newtons of Wembley Ltd* v. *Williams* [1965] 1 Q.B. 560 where goods had been "bought" but the seller had subsequently rescinded the contract.

(2) Alternatively, the buyer must have obtained possession *as a buyer* rather than in some other capacity; which in turn could mean:
   (a) that he must have obtained possession under the contract of sale; or
   (b) that his possession is attributable to the sale.

The first interpretation (1) *i.e.* that all that is required is that the buyer has gained possession, seems unlikely. Whatever uncertainties exist about the meaning of "continues in possession" in section 24 SGA 1979, it is clear that a seller "in possession" must be in possession in the capacity of seller. This is also a requirement under section 2(1) FA 1889, the mercantile agent must be in possession in that capacity. The requirement that the person who has agreed to buy goods "obtains with the consent of the seller possession of the goods" is worded in almost exactly the same way as section 2(1) FA 1889 and is analogous to a seller who is "in possession" of goods rather than a seller who "continues in possession of goods".[72]

However, a requirement that possession must have been obtained under the contract of sale itself (*i.e.* interpretation 2(a) above), would be too narrow. Thus, the most likely construction is that the buyer's possession must be attributable to the sale. This was the interpretation of the Supreme Court of South Australia in the only case to discuss this point directly,[73] *Langmead* v. *Thyer Rubber Co. Ltd*.[74] The buyer in that case had possession of a car before sale in order to paint it. The majority of the South Australian Supreme Court held that the buyer was protected by the equivalent of section 25 SGA 1979. Napier C.J. held that

> The sub-section contemplates something resembling a causal connection between the two conditions which bring the enactment into play. The literal sense of the words – "having … agreed … obtains" – is not satisfied unless the agreement to buy is antecedent to the obtaining by consent … and I doubt whether it should be applied to a case in which possession is obtained for a special and temporary purpose which cannot be related to the contractual intention. …".[75]

On the facts there was a causal connection between the agreement and the delivery of possession.

[72] Bridge, *The Sale of Goods*, p. 470. *Cf.* Atiyah, *The Sale of Goods*, p. 403; A.G. Guest (ed.), *Benjamin's Sale of Goods*, para. 7-073.
[73] In *Marten* v. *Whale*[1917] 2 K.B. 480 the section was applied even though the goods were temporarily loaned to the buyer, but it was not disputed in that case that the buyer obtained possession of the car with the consent of the owner so the point was not discussed.
[74] [1947] S.A.S.R. 29.
[75] [1947] S.A.S.R. 29, 33–34.

## V. Conclusions

The exceptions to the *nemo dat* rule contained in sections 24 and 25 SGA 1979 are both based on the possession of goods. But the judgments on the character in which that possession is to be held are to some extent inconsistent and cannot be reconciled with any policy issue. Consistently with the rationale of these and the other Factors Act exception, the *nemo dat* rule should be overridden only when the possession of the seller or ex seller in section 24 and the buyer in section 25 is attributable to the sale itself. The judgments also do not properly examine the question of constructive possession or constructive delivery. In particular, the relevance, if any, of constructive delivery to the question of whether a seller continues in possession for the purposes of section 24 SGA 1979 has never been satisfactorily examined. Again the rationale of section 24, in particular the requirement that there be a delivery to the second buyer, as well as practical considerations, suggest that a seller who has delivered goods to the buyer, albeit that delivery is constructive through attornment to the buyer, does not continue in possession for these purposes.