

## TRANSFER OF CHATTELS BY NON-OWNERS: STILL AN OPEN PROBLEM

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**ABSTRACT.** *The current law relating to the unauthorised dispositions of chattels is an arbitrary and unpredictable mess that has grown up haphazardly and piecemeal. In this connection we need a default rule that is straightforward rational and logical. Such a rule should follow three principles. First there should be a background rule of entrustment, whereby anyone entrusting another with goods takes the risk of subsequent misdealing. Secondly, this rule should apply to all proprietary interests and not simply to ownership. Thirdly, it should be open to exceptions where there is good reason to admit them, for example to accommodate specific schemes covering particular types of security interest.*

**KEYWORDS:** *personal property, sale, nemo dat, good faith, entrusting, good faith, possession.*

### I. THE PROBLEM OF UNAUTHORISED DISPOSITIONS

What should our commercial law do about the problem of unauthorised transfers of chattels? More formally, if someone grants you a proprietary interest in a thing, how far should your interest be affected by the fact that the grantor neither owned the thing nor was authorised by the owner to dispose of it?

The question is a chestnut, but none the worse for a new look. For one thing, a lot of what has been said about it in England is either platitudinous<sup>1</sup> or aimed at a specific problem arising out of unauthorised dispositions rather than the issue as a whole.<sup>2</sup> For another, even though this is an

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<sup>1</sup> Typical is Denning L.J.'s sonorous but ultimately vacuous statement in *Bishopsgate Motor Finance Corp Ltd. v Transport Brakes Ltd.* [1949] 1 K.B. 322, 366 ("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").

<sup>2</sup> A representative sample: A. Diamond, "Law Reform Committee: Twelfth Report on the Transfer of Title to Chattels" (1966) 29 M.L.R. 418; D. Greig, "The Passing of Property and the Misidentified Buyer" (1972) 35 M.L.R. 306; J. Ulph, "Sale and Lease-Back Agreements in a World of Title Relativity: Michael Gerson (Leasing) Ltd. v Wilkinson and State Securities Ltd." (2001) 64 M.L.R. 481; L. van de Vliet, Note (2001) 5 Edin.L.Rev. 361; C. Hare, "Identity Mistakes: A Missed Opportunity?" (2004) 67 M.L.R. 993; D. Miller, "Plausible Rogues: Contract and Property" (2005) 9

area where civilian lawyers think very differently, surprisingly little is said about how far their experience might inform our own.<sup>3</sup> Third, even though the present system can be politely described as an incoherent mess, there has been only one reform in the last 50 years – namely, the unlamented disappearance in 1995 of market overt,<sup>4</sup> a comparatively small change precipitated not by reforming zeal or academic pressure, but by an adventitious scandal in the art world.<sup>5</sup> And lastly, the point matters. Even though an increasing proportion of this field is covered by specific regimes – on the ranking of security interests, on priorities in insolvency or for that matter the background rules on equitable and legal interests – we still need logical and defensible background principles against which these special rules can operate.

Hence the present article. It aims to look at the subject in the round, where necessary drawing from how things are done elsewhere. To keep it within bounds, it has a few limitations. It will not cover specific self-contained systems, for example those applicable to company charges or registered ships (though it will discuss how such schemes should be accommodated in any general regime); nor will it cover complexities over unauthorised dispositions of part of a bulk.<sup>6</sup> Coverage will be angled towards non-consumer cases, that is to cases where owner and ultimate transferee are businesses. This is because, even though the present law rarely in fact treats consumers differently,<sup>7</sup> the need to provide special protection to entirely private parties may well raise separate difficulties. So too, discussion will be limited to *wrongful* dispositions: cases where a possessor is authorised by law to override an owner's title, such as execution sales or disposals of seized goods,<sup>8</sup> do not raise the same issues and will be ignored.

Edin.L.Rev. 150; L. Merrett, "The Importance of Delivery and Possession in the Passing of Title" [2008] C.L.J. 376.

<sup>3</sup> For commendable exceptions see S. Thomas, "Mistaken Identity: A Comparative Analysis" [2008] L.M.C.L.Q. 188; and Miller, "Plausible Rogues" (though both these are essentially limited to the specific problem of goods obtained by fraud). A perceptive earlier example is C. Harding and M. Rowell, "Protection of Property Versus Protection of Commercial Transactions in French and English Law" (1977) 26 I.C.L.Q. 354.

<sup>4</sup> By the Sale of Goods (Amendment) Act 1994, repealing s. 22(1) of the Sale of Goods Act 1979. For a useful description of the old law, with all its curiosities and anomalies (e.g. its inapplicability to ordinary shops except in the City of London), see *Crossley Vaines on Personal Property*, 5th ed. (London, 1973), 174–75.

<sup>5</sup> In summary, in early 1993 a person presented for valuation at Sotheby's a Gainsborough and a Reynolds, both previously stolen from Lincoln's Inn and later bought by him in Bermondsey Market for a princely £145. He was accepted to have impeccable title under the then rule of market overt (see *The Independent*, Saturday 6 March 1993). The art community was outraged; pressure was brought; market overt was duly suppressed.

<sup>6</sup> Some of the issues here were helpfully covered in I. Davies, "Continuing Dilemmas with Passing of Property in Part of a Bulk" [1991] J.B.L. 111.

<sup>7</sup> Section 27 of the Hire Purchase Act 1964, allowing anyone other than a motor dealer to get good title to a hire-purchased vehicle, gets close. But even there the distinction is not exact: any business buyer other than a motor dealer is equally protected.

<sup>8</sup> See e.g. the decision in *Bulbruin Ltd. v Romanyszyn* [1994] R.T.R. 273 (abandoned stolen van recovered and sold off by local authority under statutory powers: original owner's rights held overridden by sale).

These matters aside, however, it will aim at as much generality as possible. To anticipate briefly, it will make the case for enacting a general principle of entrustment – broadly, a rule that anyone voluntarily entrusting possession of goods to another ought to take the risk of subsequent malversation – and then to go on to work out the implications of such a rule (which are less straightforward than one might think). For ease of reference, it will use three stock characters: O, a chattel owner (or sometimes holder of some lesser interest); P, an intermediary possessor of the chattel purporting to convey a proprietary interest in it; and R, the supposed recipient of that interest. Admittedly this is an over-simplification, since the chattel may well pass through the hands of two or more parties between leaving O's hands and arriving in R's (an important point, on which more below). But we will employ this scheme as a general template.

## II. THE PRESENT POSITION: A SUMMARY

To begin with, a short summary<sup>9</sup> of the present English position and attempts to reform it may be helpful.

The starting point is that R gets no better right than P had: *nemo plus iuris transferre ad alium potest quam ipse habet*.<sup>10</sup> This is so at common law,<sup>11</sup> as regards not only ownership but all proprietary interests<sup>12</sup>; in one limited case it is preserved by statute in the form of s. 21 of the Sale of Goods Act 1979.<sup>13</sup> Hence if R wishes to prevail over O it must invoke a specific exception. Of these there are about half-a-dozen, depending on how you count them.

First, O may be estopped from asserting its right against R<sup>14</sup> if it expressly or impliedly represents to R<sup>15</sup> that P owns the goods<sup>16</sup> or that it has authorised P to dispose of them.<sup>17</sup> Common-law in origin,<sup>18</sup> though

<sup>9</sup> For full coverage, see *Benjamin's Sale of Goods*, 9th ed. (London 2016), ch. 7.

<sup>10</sup> Said to come from Ulpian: D. 50.17.54.

<sup>11</sup> E.g. *Whistler v Forster* (1863) 14 CBNS 248, 257, per Willes J.; *Cundy v Lindsay* (1878) 3 App. Cas. 459, 463–64, per Lord Cairns; *Colonial Bank v Whinney* (1886) 11 LR App. Cas. 426, 435–36; *Cole v North Western Bank* (1874–75) L.R. 10 C.P. 354, 362–63, per Lord Blackburn; *Farquharson Bros & Co. v King & Co.* [1902] A.C. 325, 335–36, per Lord MacNaghten.

<sup>12</sup> E.g. pledge (*Paterson v Tash* (1742) 2 Strange 1179; *Hartop v Hoare* (1743) 1 Wils. K.B. 8) or lien (*Buxton v Baughan* (1834) 6 C. & P. 674). It equally applies where O has a proprietary interest less than ownership: e.g. *Reeves v Capper* (1838) 5 Bing. N.C. 136 (competition between pledgees).

<sup>13</sup> Namely, where P purports to sell outright to R. It follows that in so far as provisions in the 1979 Act protect non-buyers such as pledgees (e.g. ss. 24 and 25) they are strictly speaking exceptions not to s. 21 but to the common-law rules.

<sup>14</sup> And any third party taking from R: *Mercantile Credit Co. Ltd. v Hamblin* [1965] 2 Q.B. 242, 270, per Pearson L.J.; and *Big Rock Pty Ltd. v Esanda Finance Ltd.* (1992) 10 W.A.R. 259, 270–71.

<sup>15</sup> There must be a positive misleading of R. A mere transfer to P of possession or the trappings of ownership will not do: *Central Newbury Car Auctions Ltd. v Unity Finance Ltd.* [1957] 1 Q.B. 371, 388, 393, per Hodson and Morris L.J.J., and a fortiori neither will mere fault by O (*Moorgate Mercantile Co. Ltd. v Twitchings* [1977] A.C. 890).

<sup>16</sup> E.g. *Pickard v Sears* (1837) 6 Ad. & El. 469; more recently, *Chaffields-Martin Walter Ltd. v Lombard North Central Plc* [2014] EWHC 1222 (QB).

<sup>17</sup> E.g. *Eastern Distributors Ltd. v Goldring* [1957] 2 Q.B. 600.

<sup>18</sup> E.g. *Pickard v Sears* (1837) 6 Ad. & El. 469.

statutorily acknowledged,<sup>19</sup> this principle can in principle validate any kind of disposition.<sup>20</sup>

Second, the Sale of Goods Act 1979 deals with the repercussions of the rule allowing a buyer to become owner without delivery, or conversely take delivery without yet being owner.<sup>21</sup> Under ss. 24<sup>22</sup> and 25(1)<sup>23</sup> the seller in the first case, and the buyer in the second, can pass title to a second good-faith buyer R, provided the latter takes delivery from P.<sup>24</sup> R must be a buyer, pledgee or someone in an analogous position<sup>25</sup>; in other cases R, however faultless, remains unprotected.<sup>26</sup>

Third, in very limited circumstances R is protected against a subsequent claim by O on the basis of a simple entrustment by O to P. This arises under s. 2 of the Factors Act 1889, extending a narrower common-law protection derived from the agency doctrine of ostensible authority.<sup>27</sup> P must have been in the business of dealing in goods of that sort; O must have entrusted them to P for sale or pledge<sup>28</sup>; and P must have passed (though not necessarily delivered) them to R in the ordinary course of business.

Fourth, good-faith acquisition is partially protected where P defrauds O of goods which it then transfers for value to a good-faith receiver R. Essentially, R's right becomes indefeasible if two requirements are satisfied: namely, that P obtained a voidable title from O,<sup>29</sup> normally under a sale contract voidable for fraud,<sup>30</sup> and that there has been no

<sup>19</sup> By s. 21 above "... unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell".

<sup>20</sup> See e.g. the Singapore decision in *Pan-Electric Industries Ltd. v Oversea-Chinese Banking Corp Ltd.* [1994] 1 S.L.R. 185 (equitable mortgage).

<sup>21</sup> Sale of Goods Act 1979, s. 17.

<sup>22</sup> Dating from the Factors Act (Amendment) Act 1877, s. 3, in the case of sellers in possession of documents of title, and otherwise from 1889 (Factors Act 1889, s. 8) (which is still in force and essentially duplicates it).

<sup>23</sup> Originally s. 4 of the 1877 Act, above, in the case of buyers armed with documents of title; otherwise dating from, and duplicated by, the Factors Act 1889, s. 9.

<sup>24</sup> Including the case where R obtains the goods directly from O with P's acquiescence: see *Four Point Garage Ltd. v Carter* [1985] 3 All E.R. 12; and the earlier *Langmead v Thyer Rubber Co. Ltd.* [1947] S.A.S.R. 29.

<sup>25</sup> Since in both cases the reference is to "any sale, pledge, or other disposition thereof". As to what "other disposition" means, see *Benjamin on Sale*, 9th ed. (London 2016), paras. 7–064, 7–79 to 7–80; for an example of a "disposition" other than a sale or pledge, see *Shenstone & Co. v Hilton* [1894] 2 Q.B. 452 (handing over to an agent for onsale).

<sup>26</sup> E.g. a mortgage or charge, held in *Joblin v Watkins & Roseveare (Motors) Ltd.* [1949] 1 All E.R. 47 (a case under s. 2 of the Factors Act 1889, which uses the same words) not to be an "other disposition".

<sup>27</sup> *Pickering v Busk* (1812) 15 East 38. This however applied only to sales and not to pledges: *Paterson* (1742) 2 Strange 1179. It was extended to them progressively by legislation, starting in 1823 and culminating in the 1889 Act. See S. Thomas, "The Origins of the Factors Acts 1823 and 1825" (2011) 32 J. Legal Hist. 151; also G. Gilmore, "The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman" (1981) 15 Ga L.Rev. 605, 608 *et seq.*

<sup>28</sup> An entrustment for some other purpose such as repair or hiring-out is not enough, even though R has no means of knowing anything about these circumstances: *Astley Industrial Trust Ltd. v Miller* [1968] 2 All E.R. 36.

<sup>29</sup> See *Benjamin on Sale*, 9th ed. (London 2016), para. 7–023 for discussion of the issue of the cases where P's title is voidable and where it is wholly void.

<sup>30</sup> According to *Kingsford v Merry* (1856) 1 H. & N. 503, voidable title can only arise under a sale from O to P. But this seems doubtful. Cf. *Shalson v Russo* [2003] EWHC 1637 (Ch); [2005] Ch. 281, at [126], per Rimer J. (concerning a voidable transfer of money to a fraudster).

effective avoidance of P's title before the disposition to R. This was always the rule at common law<sup>31</sup>; when the transaction between P and R is one of outright sale, it is statutory.<sup>32</sup>

Fifth, there are miscellaneous other cases of protection, one of the best-known being that afforded by statute to buyers, other than motor dealers, of vehicles let on hire purchase.<sup>33</sup>

Lastly, all the above exceptions exist against the background of other regimes, which serve to complicate the picture further. First, the rules of equity always hover in the background, shielding good-faith purchasers against equitable interests<sup>34</sup> – a matter of some significance in the case of non-possessory security interests short of ownership, because such interests are nearly all equitable<sup>35</sup> and there has since 2013 been no requirement for non-UK companies to register them, even when they affect property in England.<sup>36</sup> Second, there are a number of regimes on priorities existing more or less independently of the general law: for instance the rules in Part 25 of the Companies Act 2006 on charges created by UK companies, Sch. 1 to the Merchant Shipping Act 1995 on dealings with registered ships, and the Cape Town Convention regime for interests in aircraft.<sup>37</sup> Further, it should not be forgotten that insolvency law special rules apply to protect good-faith purchasers where property is disposed of by an insolvent whose power of disposition has otherwise been curtailed.<sup>38</sup>

### III. REFORM EFFORTS

Such a ramshackle structure might be expected to spur reform. It has not: the only exception is certain proposals primarily connected with security law which might have had incidental effects on unauthorised dispositions as a whole.<sup>39</sup> In 1966 the now-defunct Law Reform Committee suggested

<sup>31</sup> The earliest example seems to be *Parker v Patrick* (1793) 5 T.R. 175. See too *White v Garden* (1851) 10 CB 919; *Babcock v Lawson* (1880) 5 Q.B.D. 284. This remains important where R's interest is less than ownership, such as a pledge (*Babcock v Lawson*, above), or an equitable security (*Attenborough v London & St. Katharine's Dock Co.* (1878) 3 C.P.D. 450).

<sup>32</sup> See s. 23 of the 1979 Act.

<sup>33</sup> Hire Purchase Act 1964, s. 27.

<sup>34</sup> This is not a mere theoretical possibility: for a thoroughly commercial example see *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All E.R. 675 (pledge of bearer securities held on bare trust).

<sup>35</sup> The only legal security interest, a mortgage of chattels, is hardly used (though this may change if the 2016 report from the Law Commission on bills of sale (Law Com Report No. 369) is put into effect, as presaged in the June 2017 Queen's Speech).

<sup>36</sup> See the Companies Act 2006 (Amendment of Part 25) Regulations 2013, 2013 SI 600, introducing the present Part 25 of the Companies Act 2006.

<sup>37</sup> See the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015, SI 2015/ 912.

<sup>38</sup> E.g. Insolvency Act 1986, s. 284(4)(a). Note also the analogous protection in insolvency law for good-faith transferees for value in cases of transactions impugnable as unfair preferences or transfers at an undervalue (s. 241(2)(a)).

<sup>39</sup> Notably in the shape of the Crowther Report of 1971 on Consumer Credit ((1971) Cmnd 4596); the 1982 Cork Report on Insolvency Law and Practice ((1982) Cmnd 8558); the 1989 Diamond Report

minor changes,<sup>40</sup> inspired mainly by a clutch of cases where fraudsters had sold cars to innocent dupes for cash.<sup>41</sup> These would have tinkered with the rules on buyers in possession, extended the voidable title rule to cover almost all cases of fraud, and extended the then rule of market overt to cover all goods bought in retail premises or at public auction. Nothing happened. In 1989 the Diamond Report,<sup>42</sup> a document largely concerned with security interests, suggested in passing that anyone entrusted with goods under a contract of sale, lease or hire purchase might be empowered to pass title to an innocent buyer. Again nothing happened. Five years later, the Department of Trade and Industry tentatively floated a proposal under which in essence any innocent purchaser from a person in possession of goods with the owner's consent would get good title.<sup>43</sup> Unfortunately this suggestion, which would hardly have raised an eyebrow on the other side of the English Channel,<sup>44</sup> was very superficially supported and inadequately argued. It was intemperately attacked,<sup>45</sup> and quickly forgotten. In 2005 the Law Commission expressed an intention to investigate the whole subject of *nemo dat* in non-theft cases,<sup>46</sup> but by 2011 admitted that it had lost interest.<sup>47</sup> Meanwhile, the only reform that did take place was the one mentioned at the beginning of this article, namely the abolition of market overt.

#### IV. THE PRESENT LAW: AN APPRAISAL

In the light of all this, it is difficult to regard the present English position as anything other than an arbitrary and unpredictable mess. There is no overall plan for deciding when a good-faith receiver ought or ought not to be

(*A Review of Security Interests in Property*); the Law Commission's *Report on Company Security Interests* in 2005 (2005 Cm 6654); and most recently another report from the Law Commission on bills of sale (Law Com Report No. 369). There is also an ongoing Secured Transactions Law Reform Project administered from Oxford University: see <https://securedtransactionslawreformproject.org>.

<sup>40</sup> See its Twelfth Report: *Transfer of Title to Chattels*, 1966 Cmnd 2958: see Diamond, "Law Reform Committee"; and (more sour) P. Atiyah, "Law Reform Committee: Twelfth Report" (1966) 29 M.L.R. 541.

<sup>41</sup> Notably *Ingram v Little* [1961] 1 Q.B. 31; *Newtons of Wembley Ltd. v Williams* [1965] 1 Q.B. 560; and *Car & Universal Finance Co. Ltd. v Caldwell* [1965] 1 Q.B. 525.

<sup>42</sup> *A Review of Security Interests in Property* (HMSO, 1989). The author, Aubrey Diamond, was at various times a solicitor, Law Commissioner and law professor at the University of London. At the time the report appeared he was retired.

<sup>43</sup> Consultation Document, *Transfer of Title: Sections 21 to 26 of the Sale of Goods Act 1979* (20 January 1994).

<sup>44</sup> Provisions in a number of civil law jurisdictions are mentioned below in Section V(A).

<sup>45</sup> E.g. B. Davenport, "Consultation – How Not To Do It" (1994) 110 L.Q.R. 165; and D. Miller, "Transfer of Title: A New Legal Regime in Only Three Paragraphs" [1994] L.M.C.L.Q. 322. Interestingly, almost no stir at all had resulted from a similar proposal by the Scottish Law Commission nearly 20 years earlier, in 1976 (see *Memorandum 27 – Corporeal Moveables – Protection of the Onerous bona fide Acquirer of Another's Property*, para. 28).

<sup>46</sup> As part of its ninth programme of law reform: see Law Com No. 293, paras. 3.51–3.57 (March 2005). This was partly spurred by the decision in *Shogun Finance Ltd. v Hudson* [2003] UKHL 62; [2004] 1 A.C. 919.

<sup>47</sup> Law Com No. 330, paras. 3.4–3.6 (July 2011).

protected. Furthermore, the protections provided to third-party acquirers are spectacularly capricious. For example, a receiver R can frequently sleep easy if it buys goods in P's possession, less so if it lends against them, and hardly at all if it takes those same goods on hire, uses them or asserts a lien over them.<sup>48</sup> Again, a financier providing a van under a finance lease can repossess it if the lessee dishonestly sells it; but if it lets the same vehicle out on hire purchase or conditional sale it loses out unless the buyer is a motor dealer.<sup>49</sup> In fraud cases the distinction between a voidable title in P, which can benefit R provided it takes in good faith, and a void title, which cannot, is at best hard to draw and at worst incomprehensible.<sup>50</sup>

Again, there is no unified concept of a good-faith receiver, with the result that the hurdles to be cleared by R in order to receive protection vary curiously according to the *nemo dat* exception in question. If buying from a seller or buyer in possession R must not only be in good faith but take delivery; if from a mercantile agent or voidable title-holder, a paper transaction is enough<sup>51</sup> (though in the latter case the sale must be in the ordinary course of business<sup>52</sup>). Yet again, the burden of proof is apt to swing like a weathercock. When sued by O, if R relies on a voidable title in P it can sit back and tell O to establish its case<sup>53</sup>; to profit from any other exception to *nemo dat* it must it seems plead and prove it.<sup>54</sup>

Indeed, the strongest indication that the status quo is unsatisfactory is that, while many writers have described it, few if any have seriously tried to support it. Furthermore, such efforts have been fairly consistently unconvincing. For instance, the objection raised against the Department of Trade's 1994 proposal essentially comprised a plea that any substantial downgrading of existing property rights must be bad; that it would be unthinkable if the deposittee of a car or a ring was empowered unilaterally

<sup>48</sup> This is because of the limitation already referred to in ss. 24 and 25 of the 1979 Act, and s. 2 of the Factors Act 1889, restricting protection to sales, pledges and other dispositions.

<sup>49</sup> Hire Purchase Act 1964, s. 27. To make confusion yet worse confounded, the financier can get the vehicle back if it was transferred in payment of a pre-existing debt, since this does not count as a sale: *VFS Financial Services Ltd. v JF Plant Tyres Ltd.* [2013] EWHC 346 (QB); [2013] 1 W.L.R. 2987.

<sup>50</sup> As illustrated by the majority and minority judgments in *Shogun Finance Ltd.* [2003] UKHL 62; [2004] 1 A.C. 919. *Chitty on Contracts*, 32nd ed. (London, 2015), paras. 3–036 to 3–048, takes eight closely printed pages to say that the law is unsatisfactory and uncertain. For further criticism see C. Macmillan, "Rogues, Swindlers and Cheats: The Development of Mistake of Identity in English Contract Law" [2005] C.L.J. 711; also *Shogun Finance Ltd.* [2003] UKHL 62; [2004] 1 A.C. 919, at [5], per Lord Nicholls, [57]–[71], per Lord Millett. A perceptive comparison of the English and US (UCC, Article 2–403(1)) approaches comes in Thomas, "Mistaken Identity".

<sup>51</sup> Indeed, in the case of voidable title it seems that the sale from O to P may equally be a mere paper transaction: *Benjamin on Sale*, para. 7–027.

<sup>52</sup> Expressly so ("sale, pledge, or other disposition . . . made by him when acting in the ordinary course of business . . ."). To complicate matters even further, the same seems to apply by a side-wind to buyers in possession, because under s. 25 of the 1979 Act the sale "has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods". See *Newtons of Wembley Ltd.* [1965] 1 Q.B. 560, 580, per Pearson L.J.; and *Martin v Duffy* [1985] N.I. 417.

<sup>53</sup> See *Whitehorn Bros. v Davison* [1911] 1 K. B. 463 (upheld by the Court of Appeal in the unreported decision in *Thomas v Heelas, CA*, 27 November 1985).

<sup>54</sup> *Heap v Motorists' Advisory Agency Ltd.* [1923] 1 K.B. 577.

to expropriate the owner by selling it; and that the proposal was an open invitation to fraud.<sup>55</sup> Of these, the first begs the question; the second is highly controversial (assuming nothing to choose between O and R in terms of fault, it is perfectly arguable that O, as the person choosing whether and where to entrust goods, should take the risk of subsequent malversation); and the third is simply unsupported (indeed, it presumably entails a belief that most of Europe, where person in possession with the owner's consent can generally pass title, must compared with England be a hotbed of dishonesty).

## V. THE WAY AHEAD

### A. *An Entrusting Rule*

If English commercial law is to reflect live up to its reputation of being as straightforward and uncomplicated as possible, we clearly need to put matters on a rational footing. What will be suggested in this section is the introduction of a general "entrusting rule".

Crudely summarised, this means that in so far as R can prove that it received chattels in good faith from a possessor P, and that O did not lose possession against its will, R should succeed as against O. This should, however, be subject to three conditions. First, R must have believed when it received the goods that P either owned them, or otherwise had authority to deal with them. Second, R must not have had knowledge of matters indicating to a reasonable person in its position that P did not have the power of disposition. Third, R must have given value (subject to one qualification, referred to below).

In addition, it will be suggested that any scheme should have four further features. First, it should not be limited to ownership proper but should cover all proprietary interests, whether it is a question of O losing them or R gaining them. Second, it should be capable of defeating the interests of third parties other than O, provided that those entitled were not themselves dispossessed without their consent. Third, it should (subject to a few exceptions) supplement existing exceptions to *nemo dat*. And fourth, it should acknowledge that it existed against a background of specific schemes and ideally allow the latter to be slotted in as easily as possible. All these matters are covered in detail below.

### B. *Why an Entrusting Rule?*

Why choose an entrusting rule? It is suggested that it can be justified on four bases.

<sup>55</sup> See the arguments in Miller, "Transfer of Title", p. 324; and Davenport, "Consultation".



### 1. The point of principle

The main argument advanced here is as follows. Any discussion of *nemo dat* is at bottom a discussion of how to balance the interests of an original owner O with those of a good-faith acquirer R once P is out of the picture. There are, of course, any number of ways of doing this (some of which will be mentioned below). But the entrusting rule, or something like it, is it is suggested the only one that, in reaching the balance, gives adequate weight to the essential nature of ownership<sup>56</sup> itself.

According to one's point of view, one can regard ownership as an institution resting on a number of possible justifications: for example, autonomy,<sup>57</sup> efficiency<sup>58</sup> or the practical needs of commerce.<sup>59</sup> But whichever view one takes, it is suggested that two features stand out as distinguishing characteristics, without which an institution would not be ownership as we know it. One is the idea that ownership exists as the irremovable residual or background right to dictate how a thing is to be used or exploited, which continues to subsist whatever other lesser rights may come and go.<sup>60</sup> The other is a degree of permanence. Interests in assets can be difficult to characterise convincingly as ownership if they are precarious or readily defeasible without any action on the part of the person entitled.<sup>61</sup>

These two features, suggestive as they are of relatively permanent interests existing in the background whether or not consciously exercised, suggest (it is submitted) that if we are to pay proper respect to the institution of ownership in deciding *nemo dat* conflicts, we need a system that makes ownership rights presumptively indefeasible, unless and until the owner chooses to do something consistent with consent to being divested.<sup>62</sup> And this is precisely the essence of an entrusting rule. A principle of this kind respects these features of ownership by insisting that before O can be expropriated there must be an affirmative act on its part consistent, at

<sup>56</sup> We talk of ownership for brevity: but most of what we say applies to proprietary interests as a whole.

<sup>57</sup> E.g. C. Reich, "The New Property" (1963) 73 Yale L.J. 733, at 773; A. Dorfman, "Private Ownership" (2010) 16 L.Th. 1, 17.

<sup>58</sup> E.g. H. Demsetz, "Toward a Theory of Property Rights" (1967) 57 Am.Ec.Rev. Papers 347; F. Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 Harv.L.Rev. 1165; more recently, J. Huffman, "The Public Interest in Private Property Rights" (1997) 50 Okla.L.Rev. 377.

<sup>59</sup> An obvious point is that one can hardly make sense of trading goods without a background concept of ownership. But there are others: e.g. insolvency law presupposes a distinction between interests in chattels that do, and do not, prevail in insolvency: *Goode on Proprietary Rights in Insolvency*, 3rd ed. (London 2009), 3–5.

<sup>60</sup> An idea that seems to originate with W.W. Buckland: see W. Buckland and A. McNair, *Roman Law and Common Law*, 2nd ed. (Cambridge 1952), 65–66.

<sup>61</sup> Examples: the right to a quantity of goods from a given source whose content is subject to change (*Re Stapylton Fletcher Ltd.* [1994] 1 W.L.R. 1181), or to take percolating water under one's land (*Bradford Corp. v Pickles* [1895] A.C. 587, esp. 593–94, per Lord Halsbury). Both are clearly legal rights in respect of things: both fall short of ownership. See generally on permanence and ownership T. Merrill and H. Smith, "What Happened to Property in Law and Economics?" (2001) 111 Yale L. J. 357; and on precariousness and property K. Gray, "Property in Thin Air" [1991] C.L.J. 252, at 266 *et seq.*

<sup>62</sup> Cf. J. Penner, "The Bundle of Rights Theory of Property", 43 UCLA L.Rev. 711, at 742.

least outwardly,<sup>63</sup> with an intent to alienate it.<sup>64</sup> Conversely, it refuses to deprive O of ownership where the property was taken without such a consent, this being inconsistent with the status that ought to be accorded to property rights.<sup>65</sup>

Of course an entrusting rule is not the only possible approach. A large number of other possible criteria have been suggested for deciding who ought to win a contest of priorities between owner and acquirer: for instance relative fault,<sup>66</sup> some more general form of equitable apportionment,<sup>67</sup> allocative efficiency of scarce goods,<sup>68</sup> relative need<sup>69</sup> or some sophisticated combination of these.<sup>70</sup>

Such approaches nevertheless all face one common difficulty: namely, that unlike the entrustment principle they treat title conflicts similarly to other issues, such as contract or accident law, and as a result fail to give sufficient weight to the special nature of ownership.<sup>71</sup> But they raise other problems too. Notably, the adoption of any approach based on the actual situation of the parties and applied on a case-by-case basis makes the law more unpredictable and the task of settling title disputes quickly and efficiently correspondingly harder. Determining entitlement (or dividing loss) according to fault, for instance, potentially turns every property dispute into a complex evidential dispute about relative blame. Furthermore, it raises formidable problems with repeated dispositions and multiple parties. Imagine O entrusts a thing to P; P sells it to R1, which on-sells to R2. Whose fault would be relevant, and in what proportions,

<sup>63</sup> Admittedly, we are not requiring actual intent here. But this seems also to be the rule for direct transfers of ownership; although there are few cases directly in point, this view seems implicit in decisions such as *Mercantile Credit Ltd.* [1965] 2 Q.B. 242 and, for that matter, in the land case of *Saunders v Anglia Building Society* [1971] A.C. 1039.

<sup>64</sup> Cf. Note, “The Owner’s Intent and the Negotiability of Chattels: A Critique of Section 2–403 of the Uniform Commercial Code” (1964) 72 Yale L.J. 1205, at 1209 (commenting on a semi-entrustment rule in UCC, Article 2–403(2)). Or, to quote a pithy French commentator, “Morality is secured. All the more so because the owner who is caught by [the entrusting rule] has always consented to being dispossessed; where this is not so (the case of theft or loss), the law protects him”. See P. Malaurie and L. Aynès, *Les Biens*, 6th ed. (Paris 2015), s. 576 (author’s translation).

<sup>65</sup> This view, interestingly, is sometimes expressed as a defence of the entrustment principle in France: see Harding and Rowell, “Protection of Property”, pp. 358–63.

<sup>66</sup> A. Schwartz and R. Scott, “Rethinking the Laws of Good Faith Purchase” (2011) 111 Col.L.Rev. 1332; also D. Phillips, “The Commercial Culpability Scale”, 92 Yale L.J. 228. Cf. H. Burgess, “The Market Overt Rule: A Time for Reform?” (2015) 53 Ir.Jur. 154.

<sup>67</sup> See in particular *Ingram* [1961] 1 Q.B. 31, 73–74, per Devlin L.J. (“The plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part”). This is different from fault because of the proposal to split losses equally where no one is to blame.

<sup>68</sup> E.g. H. Weinberg, “Sales Law, Economics, and the Negotiability of Goods”, 9 J.Leg.St. 969; M. Mautner, “‘The Eternal Triangles of the Law’: Toward a Theory of Priorities in Conflicts Involving Remote Parties” (1991) 90 Mich. L.Rev. 95, at 99.

<sup>69</sup> E.g. M. Radin, “Property and Personhood” (1982) 34 Stanford L.Rev. 957.

<sup>70</sup> Mautner, “‘The Eternal Triangles of the Law’”.

<sup>71</sup> See e.g. Merrill and Smith, “What Happened to Property in Law and Economics?”. Some writers cheerfully admit their devaluation of ownership: see e.g. D. Keating, “Examining UCC Title Battles through a Torts Lens” 2011 Utah L.Rev. 255; and the comment in Mautner, “‘The Eternal Triangles of the Law’”, p. 102, that title conflicts have a great deal in common with accidents.

to determine R2's rights against O: R1's, R2's or both?<sup>72</sup> To be fair, it has been suggested that we can overcome such complaints by applying fault criteria on a "typical situations" basis: that is, by grouping cases into typical situations, determining the rule to be applied to each, and then applying it without reference to the facts of the actual dispute.<sup>73</sup> But this raises its own further difficulties. Identifying typical situations is not straightforward (how widely or narrowly should they be drawn?). Furthermore, any move in this direction is effectively regarding the chosen criterion not so much as a test, as merely a guide to be taken into account. It is no doubt for reasons such as this, that criteria such as relative fault have (it is suggested rightly) never attracted much following, either in England<sup>74</sup> or for that matter in any major common or civil law jurisdiction.

## 2. *The relation between entrusting and the present law*

Apart from the argument of principle, it is suggested that an entrusting rule would not only simplify matters, but do so with a welcome lack of drastic change. This is because the existing position under English law is already nearer to an entrusting rule than one might believe.<sup>75</sup> This point may seem surprising, but a moment's thought will confirm it. Of the specific exceptions to *nemo dat* described in Section II above, three explicitly depend on voluntary entrustment. Sections 24 and 25 of the 1979 Act both demand that the seller or buyer, as the case may be, should be or remain in possession *with the consent of the owner*; and the same goes for the factor's possession in s. 2 of the Factors Act 1889. Equally two more exceptions, s. 23 on voidable title and s. 27 of the Hire Purchase Act 1964 dealing with vehicles on hire purchase, largely assume it: one cannot readily have a voidable title or a hire-purchase arrangement without an underlying entrustment of possession. Turning to the more general law, it is also worth remembering that other rules incidentally raising issues of unauthorised disposition, such as those on equitable title, unregistered charges and insolvency, are also concerned overwhelmingly with situations where O, the entity entitled, acquiesces in a middleman P possessing the property later alienated to R.

<sup>72</sup> This, among others, was the reason for the summary rejection of the idea by the Law Reform Committee in its Twelfth Report (note 40 above). See too Keating, "Examining UCC Title Battles", p. 270.

<sup>73</sup> Mautner, "The Eternal Triangles of the Law", p. 107. The same approach is evident in Phillips, "The Commercial Culpability Scale", p. 232. Throughout the latter article the emphasis is on a broad estimation of who typically is likely to be at fault, rather than on anything more precise.

<sup>74</sup> The 1966 *Twelfth Report on the Transfer of Title to Chattels*, 1966 Cmnd 2958, fairly summarily rejected apportionment as unworkable: paras. 8–13. In this connection see too *Benjamin on Sale*, para. 7–008, observing that we can now forget Ashurst J.'s antique apophthegm in *Lickbarrow v Mason* (1787) 2 T.R. 63, 70, that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it".

<sup>75</sup> Cf. Lord Nicholls' comments in his dissenting opinion in *Shogun Finance Ltd.* [2003] UKHL 62; [2004] 1 A.C. 919, at [35] (burdening the "person who takes the risks inherent in parting with his goods" is "the direction in which, under the more recent decisions, the law has now been moving for some time").

The point also works in the converse way. Hardly any of the current exceptions work where O has been deprived of possession against its will: indeed, the one that regularly had this effect, market overt, has been abolished. It is true that estoppel remains capable of protecting the third party in cases of theft<sup>76</sup>: but in practice virtually all estoppel cases also turn on entrustment.

In effect, therefore, it is suggested that the effect of introducing a general entrustment rule should be seen as embodying not so much a change in the present law, as a confirmation of the existing pattern inherent in it by the removal of a number of exceptions. In large part, moreover, these are exceptions that are hard to justify. Few would seriously support, for example, the *Helby v Matthews*<sup>77</sup> rule excluding hire-purchase transactions from the protection given to R in respect of goods sold under reservation of title because they contain a technical option in the hirer not to buy,<sup>78</sup> or the bar on mercantile agents passing title to R if (unknown to R) they were entrusted with goods for some purpose other than sale or pledge.<sup>79</sup>

### 3. *The partial parallel with the UCC*

We have so far not mentioned American developments. Until the coming of the UCC, most American states essentially applied the English system of a number of discrete exceptions to *nemo dat*.<sup>80</sup> Article 2 of the UCC, however, has now greatly widened the third party's protection. Article 2-403 in particular extends the ability of an trustee to transfer goods in two vital ways: by saying that P obtains a voidable title in almost every case of fraudulent purchase,<sup>81</sup> and even more importantly by saying that any entrustment of goods to a dealer in those goods allows the latter validly to transfer them to a good-faith receiver.<sup>82</sup> This solution goes a good deal of the way towards a general entrustment rule, though admittedly not the whole way: thus it does not allow non-dealers to pass title on the basis of entrustment,<sup>83</sup> and affects only the interests of the immediate

<sup>76</sup> *Debs v Sibec Developments Ltd.* [1990] R.T.R. 91 would have been such a case had the representation not been made under duress.

<sup>77</sup> *Helby v Matthews* [1895] A.C. 471.

<sup>78</sup> A point made by the Court of Appeal in *Helby* [1895] A.C. 471: see [1894] 2 Q.B. 262. It is true that today there may be other reasons connected with tax or accounting for choosing lease-purchase over sale as a financing tool; but this is no reason to alter the protection given to third parties.

<sup>79</sup> Even though the point was apparently regarded by Chapman J. in *Astley Industrial Trust Ltd.* [1968] 2 All E.R. 36, 40, as self-proving.

<sup>80</sup> The Uniform Law Commissioners' Uniform Sales Act of 1906, ss. 23–25, e.g. reproduced virtually word-for-word what are now ss. 21, 23 and 24 of the Sale of Goods Act 1979; and most states had some equivalent of the Factors Act 1889 to deal with mercantile agents and buyers in possession. For a brief history see G. Gilmore, "The Commercial Doctrine of Good Faith Purchase" (1954) 63 Yale L.J. 1057, at 1057–63; and Gilmore, "The Good Faith Purchase Idea". Note also K. Jillson, "UCC §2-403: A Reform in Need of a Reform" (1979) 20 Wm & Mary L.Rev. 513.

<sup>81</sup> See Article 2-403(1).

<sup>82</sup> See Article 2-403(2). The whole subject is admirably summarised in J. White and R. Summers, *Uniform Commercial Code*, 6th ed. (St. Paul 2010), 200–07.

<sup>83</sup> In this respect it has been criticised as anomalous: see Note, "The Owner's Intent".

entruster O (thus leaving other entrusters' interests to trip up unwary buyers<sup>84</sup>). Furthermore, it is largely based on the same ideas: namely, that in at least certain circumstances a voluntary entrusting ought to serve to justify expropriating O.<sup>85</sup> It is also worth adding that, although this article is not specifically concerned with the specialist topic of security interests, Article 9 of the UCC also goes some way towards protecting a buyer in the ordinary course of business against pre-existing security interests, even if the latter are otherwise perfected and thus on principle effective against third parties.<sup>86</sup>

#### 4. *The European dimension*

If the UCC in the American context has gone a large way towards adopting a de facto theory of entrustment, European civil lawyers have gone the whole course. By and large the theory of entrustment is now regarded as entirely orthodox,<sup>87</sup> so that when faced with unauthorised dispositions of the kind dealt with in this article civil law regimes subordinate O's rights to R as a matter of course in any case where O was not dispossessed without its consent. These systems are worth a look, not only because they may provide inspiration for reform here but also since (as will appear below) they point up problems that might go unnoticed in an entirely common-law treatment.

The most carefully modulated system in this respect is German law. The civil code explicitly sets the scene, providing that anyone receiving a chattel in good faith from a person he believes to be the owner gets good title, free of all prior interests, save where he is grossly negligent or the original owner was the victim of loss, theft or some other form of involuntary dispossession.<sup>88</sup> Furthermore, where P is a businessperson it suffices that R merely believed P to have authority to dispose of it even if he did not believe P to be the owner.<sup>89</sup> The codal principle, moreover, protects not only buyers but those taking pledges or claiming a number of lesser interests in goods.<sup>90</sup> Switzerland is very similar in approach<sup>91</sup>; indeed, in one

<sup>84</sup> See White and Summers, *Uniform Commercial Code*, p. 205.

<sup>85</sup> Thomas, "Mistaken Identity", pp. 204 *et seq.*

<sup>86</sup> See in particular Article 9–320. This indeed protects such a buyer even if it does know of the general existence of a security interest created by the seller.

<sup>87</sup> A useful summary of the civil law situation appears in J. Basedow, K. Hopt, R. Zimmermann and A. Stier, *Max Planck Encyclopedia of Comparative Law*, vol. 1 (Hamburg 2012), 15. See C. von Bar, E. Clive and H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)* (London 2010), VIII-3:101.

<sup>88</sup> The rule is contained in *BGB*, § 932 (nicely summarised in H. Prütting, G. Wegen and G. Weinreich, *Bürgerliches Gesetzbuch: BGB*, 11th ed. (Munich 2016), § 932); the exception in § 935.

<sup>89</sup> *HGB*, § 366: see the summary in *Münchener Kommentar zum HGB*, 3rd ed. (Munich 2013), § 366, Nr 22–23.

<sup>90</sup> See *BGB*, § 1244 (pledgees) and *HGB*, § 366.3 (assorted lienholders).

<sup>91</sup> See *ZGB*, § 714.2 (good-faith acquisition); § 934 (exclusion of cases of theft or dispossession). As in Germany, protection is extended beyond ownership to other interests: see *ZGB*, §§ 746.2, 884, 895.

respect its civil code is even more generous to third-party acquirers than Germany's.<sup>92</sup>

France is more impressionistic. It admittedly has no provision explicitly applying an entrusting principle. It has nevertheless reached much the same result through inventive interpretation of the famous provision “*en fait de meubles, la possession vaut titre*”,<sup>93</sup> a provision originally aimed at something rather different but increasingly pressed into service as a protection for buyers.<sup>94</sup> The main difference between France and Germany is that protection is less widely extended beyond good-faith buyers, and that a lack of good faith in R is more readily found: but these are details.

The support provided by commentators in civilian jurisdictions is moreover similar to that advanced at the beginning of this section. That is, they argue that if we need to draw a line between protection of property and worry-free trade between honest merchants, consent by O to dispossession is the least unconvincing place to draw it, since then there is at least some conscious consent by O to events that might lead to its dispossession.<sup>95</sup> Although, as already touched on, the details vary,<sup>96</sup> the general principle seems to work fairly well. It is noteworthy that it was adopted without serious question by the drafters of the Draft Common Frame of Reference<sup>97</sup> as a blueprint for a future European law of things, and for much the same reasons.<sup>98</sup>

## VI. WORKING OUT THE ENTRUSTING RULE: WHEN SHOULD R BE PROTECTED?

It is one thing to advocate an entrusting rule; quite another matter, and in practice rather more important, to work out in more detail what form it should take. That is the aim of the remainder of this article.

### A. Possession<sup>99</sup>

The first vital requirement for an entrusting rule, as mentioned above, is that O should have consented to put P in possession. Normally this will be

<sup>92</sup> Because it extends to all cases where R believes in P's power of disposal, even where P is not a businessperson. See *ZGB*, § 933.

<sup>93</sup> *Code Civil*, Article 2276 (Article 2279 before 2008).

<sup>94</sup> For a description of how this happened, see generally F. Terré and P. Simler, *Les Biens*, 8th ed. (Paris 2014), ss. 425–427; P. Malaurie and L. Aynès, *Les Biens*, 6 ed. (Paris 2015) s. 576.

<sup>95</sup> As one contemporary German work puts it, summing up extensive earlier scholarship, it is a matter of the danger of malversation that is obvious to anyone who voluntarily surrenders possession of a thing: F. Baur and R. Stürmer, *Sachenrecht*, 18th ed. (Munich 2009), s. 52, Nr 8–9. See too in the French context Malaurie and Aynès, *Les Biens*, s. 576.

<sup>96</sup> For the variations see generally U. Drobnig, “Transfer of Property” in A. Hartkamp (ed.), *Towards a European Civil Code*, 3rd ed. (Nijmegen 2004), 741.

<sup>97</sup> See von Bar et al., *Principles, Definitions and Model Rules*.

<sup>98</sup> See *ibid.*, at pp. 4153–55, 4162.

<sup>99</sup> See, in connection with English law in this respect, Merrett, “The Importance of Delivery and Possession in the Passing of Title” [2008] C.L.J. 376.

simply a matter of fact: was P placed in de facto control of the goods and did O consent to lose that control?

As for consent, it is suggested that there is no need to define this in detail,<sup>100</sup> and that in practice the concept would be generously interpreted it would be unlikely to cause difficulties. Thus existing statutory provisions in England explicitly requiring P to be in possession with O's consent are already construed widely, as looking to immediate consent only and virtually ignoring complicating factors such as deceit or trickery<sup>101</sup>; this also reflects practice in many civil law jurisdictions,<sup>102</sup> and would no doubt continue. Nevertheless, a number of points could do with clarification.

First, what must be placed in P's possession? Apart from the goods themselves, it is submitted that symbols of them, for example a key or swipe-card<sup>103</sup> giving access to a warehouse or container, should clearly also suffice. This not only fits neatly with the treatment of possession elsewhere in English law,<sup>104</sup> but also reflects the fact that means of access of this kind are regularly used to transfer goods especially where physical transfer would be impracticable. The same also goes for possession where there is evidence of attornment on the part of a third party.<sup>105</sup>

What about documents, whether traditional documents of title such as bills of lading or others which cannot be used to transfer possession? The answer is that if forms of possession such as attornment or symbolic possession through a swipe-card are admitted, a fortiori the same must go for documents: if an owner O entrusts them to P, rather than having them taken out of its hands, R should be in no worse position than it would have been in respect of the goods. This solution has the advantage of maintaining continuity with many of the existing exceptions to *nemo dat* in England, where dealings with documents of title are treated as dealings with the goods themselves<sup>106</sup>; it would also in practice largely

<sup>100</sup> Indeed, there is every reason not to define it: compare the problems that have arisen over the instances given in UCC, Article 2-403(1)(a)-(d), described in Gilmore, "The Good Faith Purchase Idea", pp. 617 *et seq.*

<sup>101</sup> E.g. *Folkes v King* [1923] 1 K.B. 282, esp. 296, 305; *Du Jardin v Beadman Bros.* [1952] 2 Q.B. 712 (on mercantile agents); *Newtons of Wembley Ltd.* [1965] 1 Q.B. 560 (buyer in possession). See too *Ingram* [1961] 1 Q.B. 31, 70, per Devlin L.J.

<sup>102</sup> Germany is typical: here, consent is expressed negatively as an absence of previous theft, loss or similar dispossession ("wenn die Sache dem Eigentümer gestohlen worden, verloren gegangen oder sonst abhanden gekommen war" – BGB, § 935). There has been held to be no such fatal dispossession in cases of fraud or trickery, or even duress other than direct violence: see Prütting et al., *Bürgerliches Gesetzbuch: BGB*, § 935, Rz 5.

<sup>103</sup> Or possibly a copy of a PIN, if obviously extended to be exclusive. The point can matter, since PINs are often used today to give access to valuable cargoes: see e.g. the facts of *Glencore International AG v Mediterranean Shipping Co. SA* [2017] EWCA Civ 365, [2017] 2 Lloyd's Rep. 186.

<sup>104</sup> E.g. in pledge: see the venerable cases of *Hilton v Tucker* (1888) 39 Ch.D. 669; and *Wrightson v Macarthur* [1921] 2 K.B. 807.

<sup>105</sup> Cf. *City Fur Manufacturing Co. Ltd. v Fureenbond (Brokers) London Ltd.* [1937] 1 All E.R. 799.

<sup>106</sup> Expressly so in ss. 24 and 25 of the Sale of Goods Act and s. 2 of the Factors Act, all of which refer to goods or documents of title; but there is no reason why an owner should not equally be estopped from asserting its rights in respect of a documentary transfer. See generally S. Thomas, "Transfers of Documents of Title under English Law and the Uniform Commercial Code" [2012] L.M.C.L.Q. 574.

approximate the situation in England to that under Article 7 of the UCC in the US, which deals specifically with documents of title – though the latter is, to say the least, complex.<sup>107</sup>

### B. The Good Faith of R

The second issue is much more important: to defeat O, R should have to be in good faith and without notice of P's lack of power to deal with the goods. On principle this goes without saying: but on the detail some important issues arise.

One, already touched on in connection with German law, concerns the precise belief to be required of R. Should R have to show that it believed P actually owned the goods? Or ought it to suffice that R thought that P had the *authority* from the owner to make the transfer, even if R knew the goods were, or might be, owned by someone else? The point looks narrow, but it may matter. For example, it is quite plausible that O may sell to P on retention of title terms; that P, not having paid O, sells to R; that R knows this fact, but believes that P is authorised to sell on the goods even before payment (possibly on the basis that it assigns any right to payment to O). If a belief in *ownership* is necessary, R loses: if a belief in *authority* suffices, it wins.<sup>108</sup> This is not something English lawyers readily discuss, and under the present law the answer seems to vary.<sup>109</sup> Civil law jurisdictions also reach different answers; but at least in commercial cases most accept that a belief in P's authority is enough.<sup>110</sup> It is submitted that this latter solution is the better one. If we regard a voluntary surrender of possession as justifying imposing on O the risk of subsequent misdealing by P, there is no reason to complicate the matter by imposing an artificial requirement that R's good faith relate to the ownership of, rather than the empowerment to deal with, the thing concerned.<sup>111</sup>

<sup>107</sup> For an excellent and detailed coverage, see *ibid.*, at pp. 585–603.

<sup>108</sup> A point stressed in Germany: *Münchener Kommentar zum HGB*, § 366, Nr 49.

<sup>109</sup> Under ss. 24 and 25 of the 1979 Act, the buyer is defeated if it has notice of the previous sale (s. 24) or of “any lien or other right of the original seller” (s. 25): from which it seems to follow that R is unprotected if it knows of such rights but believes that P still has authority to sell the goods (which it might well have in cases of sale under retention of title). By contrast, under the Factors Act, s. 2, R is defeated only by notice “that the person making the disposition has not authority to make the same”, suggesting the opposite answer. It also seems clear that estoppel may go to authority as much as ownership.

<sup>110</sup> Germany and Austria limit protection of this kind to goods bought from business sellers, otherwise requiring a belief in ownership: see respectively *HGB*, § 366 and *ABGB*, § 367. Switzerland seems be wider and always to accept as sufficient a belief in the right of P to act on behalf of O: see *ZGB*, § 933 and the *Basler Kommentar zum Zivilgesetzbuch*, 5th ed. (Basel 2015), § 933, Rn 29. The DCFR also adopts this solution, having discussed the matter: see von Bar et al., *Principles, Definitions and Model Rules*, p. 4158.

<sup>111</sup> There is a further point: in German law, where the distinction between belief in ownership and belief in authority has to be drawn in non-commercial cases, the drawing of it has been found to be, to say the least, difficult. See F. Baur and J. Stürmer, *Sachenrecht*, 18 ed. (Munich 2009) s. 52, Nr 29–30.



Another crucial issue concerns what degree of knowledge (or fault) should disable R from relying on the entrusting rule. No one could seriously argue that R should win if it actually knew of P's lack of authority, or suspected it and chose to turn a blind eye to an inconvenient possibility. But what of the more difficult case where R, even if not knowingly dishonest, was to some extent at fault: whether by failing to appreciate facts obvious to a reasonable person, missing a more or less obvious inference from facts known to it, or failing to make proper enquiries (all of which are subtly different)?

Under the present English law of *nemo dat*, this issue remains unsettled, save that there is no doubt that at least some conduct short of positive dishonesty will do. So much is clear because several statutory provisions<sup>112</sup> demand *both* good faith (which by legislative fiat means honesty and no more<sup>113</sup>) and a lack of notice of P's lack of authority to deal, which presumably means something different. But what counts as notice for these purposes remains spectacularly unclear. One can cite suggestions that the doctrine of constructive notice (i.e. liability for anything short of actual knowledge of facts) should be driven out of commercial law<sup>114</sup>; that constructive notice is potentially relevant, at least in some cases<sup>115</sup>; that the existence of an unusual background to a sale itself constitutes notice<sup>116</sup>; that notice is actual knowledge of facts yielding a reasonable inference that a disposition is unauthorised, even if that inference remains undrawn<sup>117</sup>; that there is no positive duty in a buyer to investigate

<sup>112</sup> See s. 23 ("in good faith and without notice of the seller's defect of title"); ss. 24, 25 ("in good faith and without notice . . ."); also Factors Act 1889, s. 2 ("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").

<sup>113</sup> See s. 61(3) of the Sale of Goods Act 1979.

<sup>114</sup> Notably *Worcester Works Finance Ltd. v Cooden Engineering Co. Ltd.* [1972] 1 Q.B. 210, 218, per Lord Denning M.R., dealing with notice under what is now s. 24 of the Sale of Goods Act; and *Feuer Leather Corp. v Frank Johnston & Sons Ltd.* [1981] Lexis Citation 837 (Neill J); see too *Benjamin on Sale*, para. 7-047 ("'notice' of a fact prima facie means actual knowledge of that fact"). More general dicta not in the specific context of ownership of goods include *Manchester Trust Ltd. v Furness Withy & Co. Ltd.* [1895] 2 Q.B. 539, 545, per Lindley L.J.; and *Polly Peck International plc v Nadir (No. 2)* [1992] 4 All E.R. 769, 782, per Vinelott J. See too *Benjamin on Sale*, para. 7-047, n. 313.

<sup>115</sup> See *Macmillan Inc. v Bishopsgate Investment Trust Plc. (No. 3)* [1995] 1 W.L.R. 978, 1000-01, per Millett J.; *Sinclair Investments (UK) Ltd. v Versailles Trade Finance Ltd.* [2010] EWHC 1614 (Ch), at [88], per Lewison J.; [2011] 1 B.C.L.C. 202; [2011] W.T.L.R. 839; *Gray v Smith* [2013] EWHC 4136 (Comm); [2014] 2 All E.R. (Comm) 359, at [132]-[136], per Cooke J. Note that in one case of *nemo dat* constructive notice is statutorily excluded: see the Hire Purchase Act 1964, s. 29(3), dealing with the non-dealer purchaser of a hire-purchased car.

<sup>116</sup> *Heap* [1923] 1 K.B. 577.

<sup>117</sup> "A person may have knowledge of a fact either by direct communication, or by being aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so" – Lord Tenterden in *Evans v Trueman* (1830) 1 Moo. & Rob. 10, 11 (under a predecessor of the Factors Act 1889). See too *The Saetta* [1994] 1 W.L.R. 1334, 1349-50, per Clarke J.; *Gray* [2013] EWHC 4136 (Comm); [2014] 2 All E.R. (Comm) 359, at [132], another Factors Act case ("it is appropriate that the court should apply an objective test to determine whether, in the circumstances of the sale, the buyer as a reasonable man, must have known of the agent's want of authority (or defect in title) or must have had suspicions and wilfully shut his eyes to the means of knowledge available to him. It is a question of fact and degree").

underlying facts<sup>118</sup>; or that it all depends on what sleuth-work is usual in the circumstances.<sup>119</sup>

For once, civil law practice is not much help either. In France the requirement of good faith<sup>120</sup> has been held fairly consistently to bar the buyer's claim to protection where the sale was in circumstances suggestive of skull-duggery.<sup>121</sup> In Germany gross negligence explicitly excludes protection: a point on which there is a great deal of detailed law, not always consistent.<sup>122</sup> The Draft Common Frame of Reference (DCFR) adopts a strict standard under which anything other than slight negligence bars R.<sup>123</sup>

In short, we need a clean slate. It is suggested that the best approach is as follows. First, there should be no general duty in R to enquire as to P's position. Businesspeople do not generally owe a duty of care to safeguard the integrity of others' property rights,<sup>124</sup> and to demand that any purchase of goods be accompanied by due diligence would disproportionately increase delay and cost with no guarantee of comparable gain. Indeed, there is much to be said for resisting any introduction of such a duty even where enquiry is usual practice: although failure to make enquiries might be evidence of knowledge, it would (it is suggested) be going too far to make the protection of innocent third parties strictly dependent on their acting in the ordinary course of business. On the other hand, it is suggested that, in line with developments in the law generally,<sup>125</sup> actual knowledge of facts should defeat protection if those facts would indicate to a reasonable receiver that something was wrong. To this extent, it is suggested that the law ought to continue to demand both honesty in fact and, separately, lack of notice in this sense.

This leaves a third issue: the burden of proof. Under the present English law it is generally on the receiver R<sup>126</sup> (subject to one anomalous exception<sup>127</sup>). This seems right: the vital right of an owner to follow its property

<sup>118</sup> *The Saetta* [1994] 1 W.L.R. 1334, 1349–50, per Clarke J., following the non-sale case of *Feuer Leather Corporation* [1981] Com.L.R. 251, 253, per Neill J.; *Gray* [2013] EWHC 4136 (Comm); [2014] 2 All E.R. (Comm) 359, at [136].

<sup>119</sup> *Gray* [2013] EWHC 4136 (Comm); [2014] 2 All E.R. (Comm) 359, at [135]–[136].

<sup>120</sup> Which does not appear at all in the relevant provision (*Code Civil*, Article 2276), but unsurprisingly is accepted to be implicit in it: Terré and Simler, *Les Biens*, s. 436.

<sup>121</sup> See Malaurie and Aynès, *Les Biens*, s. 579 (“The fact that the acquisition happened in suspicious circumstances is of itself enough to exclude [good faith]”) and the citations to be found there.

<sup>122</sup> In part because fairly venial fault has often been equated to gross negligence. The position is summarised, with copious references, in Baur and Stürmer, *Sachenrecht*, s. 52, Nr 26.

<sup>123</sup> von Bar et al., *Principles, Definitions and Model Rules*, p. 4159.

<sup>124</sup> See cases such as *Moorgate Mercantile Co. Ltd.* [1977] A.C. 890 (car dealer owes no duty to register hire-purchase transaction with HPI so as to save dealer-buyer from being defrauded).

<sup>125</sup> See cases at note 117 above, and also e.g. *Barclays Bank Plc. v O'Brien* [1994] 1 A.C. 180, 195–96, per Lord Browne-Wilkinson (notice of equitable right); and *Bank of Credit & Commerce International (Overseas) Ltd. v Akindele* [2001] Ch. 437, 449–57, per Nourse L.J.

<sup>126</sup> See *Heap* [1923] 1 K.B. 577, 589, per Lush J.; *Stadium Finance Ltd. v Robbins* [1962] 2 Q.B. 664, 673, per Willmer L.J.; *Newtons of Wembley Ltd.* [1965] 1 Q.B. 560, 574–76, per Sellers L.J.; also *The Saetta* [1994] 1 W.L.R. 1334, 1349–50 (following two non-sale cases; *Baker (G.L.) Ltd. v Medway Building & Supplies Ltd.* [1958] 1 W.L.R. 1216, 1220; and *Feuer Leather Corporation* [1981] Com.L.R. 251, 253).

<sup>127</sup> With sale under a voidable title, it seems it is up to the original owner to prove bad faith in the receiver: see *Whitehorn Bros.* [1911] 1 K. B. 463 (upheld by the Court of Appeal in the unreported decision in

into whoever's hands it may come should not be taken away by presumption,<sup>128</sup> from which it is arguable that the initial burden should be on the recipient to prove that it has taken honestly. On the other hand, it is suggested that if honesty is shown by R, it should then be up to O to show that some other bar applies, such as that O was involuntarily dispossessed or that R had knowledge of some fact indicating irregularity: any other result would be in effect an unfair demand on R to prove a wide-ranging negative.

### C. Direct and Indirect Entrusting

A hidden problem in the English treatment of unauthorised dispositions is that discussion generally takes the easy way out and assumes that only three parties are involved: O dealing with P, and P with R. This assumption, which spills over into legislation,<sup>129</sup> can cause problems where, as may well happen, the chain is longer. Imagine, for instance, that P is a buyer in possession from O; P sells to X, who takes in bad faith; R then buys in good faith from X. Any effect of s. 25(1) of the 1979 Act is exhausted by the sale to X: it follows that R loses out, despite being a buyer in good faith in competition with a seller who quite voluntarily delivered the goods before ownership had passed.<sup>130</sup> This limitation also has the converse result that the receiver R's interests trump only those of O and no one else. If a third party Y itself entrusted the goods to O, its interests remain unaffected. This latter point matters commercially. It means, for instance, that if Y sells to O and O to P, both sales being on reservation of title terms with no payment made,<sup>131</sup> an innocent buyer R who pays cash to P takes free of O's interest but not Y's.<sup>132</sup> And so too where shipping

*Thomas*, CA, 27 November 1985, but distinguished in *Heap* [1923] 1 K.B. 577, a case under the Factors Act, s. 2, and regarded with scepticism by *Benjamin on Sale*, para. 7–029.

<sup>128</sup> Even though both France and Germany take a different view: see Malaurie and Aynès, *Les Biens*, s. 579; and Baur and Stürmer, *Sachenrecht*, s. 52, Nr 25.

<sup>129</sup> Notably on buyers and sellers in possession and mercantile agents. See Sale of Goods Act 1979, s. 24: "Where a person having sold goods continues or is in possession of the goods . . . the delivery or transfer by that person . . . of the goods . . . to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if . . ." (Italics supplied). Section 25 and s. 2 of the Factors Act 1889 are similarly worded on the basis that it is the buyer in possession or mercantile agent originally entrusted, and no one else, who makes the wrongful disposition.

<sup>130</sup> This is essentially what happened in *Car & Universal Finance Co. Ltd.* [1965] 1 Q.B. 525, where the fraudster who had obtained the car by deception sold to another rogue, who in turn sold to the innocent buyer. If the sale had been direct to the innocent purchaser the section would have applied: cf. *Newtons of Wembley Ltd.* [1965] 1 Q.B. 560. For a statement that this was the reason why what is now s. 25(1) did not apply in *Caldwell*, see the first instance decision in *Newtons* [1964] 1 W.L.R. 1028, 1033.

<sup>131</sup> So P does not get title under s. 25(1): *Re Highway Foods International Ltd. (In Administrative Receivership)* [1995] B.C.C. 271. This result itself ought to be open to question in a logical scheme of things: see Section V(F) below.

<sup>132</sup> This implicit in the decision in *National Employers' Mutual General Insurance Association v Jones* [1990] 1 A.C. 24, 63, per Lord Goff. In that case Y was the victim of blatant theft and thus deserving of protection anyway: but the House of Lords were explicit that s. 25 of the 1979 Act only affected the rights of the person immediately selling to the buyer in possession, leaving others' rights intact even though they might have voluntarily surrendered possession. This is precisely what happened in the

documents are returned by a bank Y to an importer O under a trust receipt,<sup>133</sup> delivered but not transferred to a buyer P and sold by P to R. In this case too, and for the same reason, R can defeat O's rights but not Y's.

These results are unacceptable. In so far as a credulous owner O deserves to bear the risk of misdealing when pitted against a good-faith buyer R, it should not matter how many possessors intervene or who precisely was guilty of misappropriation: all that should matter is that the owner is not deemed worthy of protection and the buyer is. Put conversely, a person in the position of R should be guaranteed, not simply protection from P's immediate predecessor but clear title, subject only to the exclusion of loss or theft.<sup>134</sup> It is therefore submitted that any entrusting rule should protect the good-faith receiver R in all cases, the only exception being where the original owner O was dispossessed against its will. This, it is worth noting, is the result in France<sup>135</sup> and in Germany.<sup>136</sup>

#### D. A Need for Delivery?

For an entrusting rule to apply, there is no doubt that O must lose possession to P, since otherwise there can be no entrustment at all. But should it be equally necessary that R gain it?<sup>137</sup> The present English approach is ambivalent. To succeed under ss. 24 and 25 of the Sale of Goods Act 1979 (sellers and buyers in possession) R must take delivery: elsewhere, by contrast – estoppel, the Factors Act and voidable title – it need not.

The difference is difficult to justify, and it is suggested that the latter is the better solution. It is difficult to see why the presence or absence of delivery should make any difference to the equities as between O and R,<sup>138</sup>

New Zealand case of *Elwin v O'Regan* [1971] N.Z.L.R. 1124, 1131, per Beattie J.; and R. Ahdar, "The Buyer in Possession Exception Revisited" (1989) 4 Canterbury L.Rev. 149, 150.

<sup>133</sup> Which, curiously, has been held to constitute O a mercantile agent for Y under s. 2 of the Factors Act, thus allowing R to prevail: see *Lloyds Bank Ltd. v Bank of America National Trust & Savings Association* [1938] 2 K.B. 147.

<sup>134</sup> As it is put in German, R is entitled to receive *lastenfrier Erwerb* (unencumbered title), a point emphasised by *BGB*, § 936 ("If the thing is encumbered by a third-party right, that right gives way when ownership is received [by the good-faith recipient]").

<sup>135</sup> Where Article 2276(1) of the *Code Civil*, which in saying "in the matter of moveables, possession is as good as title", is referring simply to the good-faith possession of the *recipient*. The exclusion of goods lost or stolen appears later, at Article 2276(2).

<sup>136</sup> Hence the structure of German law: providing first that "[T]he person receiving a thing becomes the owner of it even where it does not belong to the transferor, unless he was not in good faith . . .", it then goes on to disapply this provision "if the thing was stolen from, or lost by, the owner, or otherwise taken from his possession. . .". See *BGB*, §§ 932, 935. The point that R is entitled to receive *lastenfrier Erwerb* (unencumbered title) is emphasised by *BGB*, § 936, referred to above.

<sup>137</sup> As it must in many civil law systems. In France the whole basis of R's rights is the phrase *en fait de meubles, possession vaut titre* (Code Civil, Article 2276), which obviously pre-empts the issue. In Germany the result is the same, but one suspects by accident and not design: the reason is that under *BGB* § 929 ownership cannot on principle be transferred without delivery, even by someone who is the undisputed owner of a thing.

<sup>138</sup> The DCFR disagrees, saying that "in cases where [P] stays in possession of the goods after their transfer to [R] . . . [R] must normally be suspicious" (see von Bar et al., *Principles, Definitions and Model Rules*, p. 4156). With respect, it is hard to see the basis for this.

assuming the transaction between P and R is capable even without it of creating a proprietary interest in the latter.<sup>139</sup> The whole doctrine of entrusting depends on possession by P, and on the impression of entitlement created by O in letting P have possession. But why should anyone care whether R takes possession? What matters is reliance by R, for example by paying money: delivery is beside the point.<sup>140</sup> Of course, if R fails to take delivery it may itself lose its rights to some other third party: but whether R chooses to take that risk is R's business.

Two further points reinforce this conclusion. One is that in large numbers of contemporary sales buyers do not necessarily take possession at all: R might, for example, have bought the goods in P's possession with a view to resale to a third party which would then take delivery direct from P. There is no reason to penalise R in such circumstances. Another point is that, even where there is a requirement of delivery under the present law, it can be satisfied by a pretty meaningless rigmarole.<sup>141</sup> Furthermore, the legal nature of delivery can give rise to distinctions of striking complexity,<sup>142</sup> which do no credit to anyone; suppressing the requirement of delivery at a stroke removes this sorry complication entirely from this area of the law of property.

#### *E. Must R Take for Value?*

The English law of *nemo dat* regards it as obvious beyond argument that a gratuitous transferee can never be protected as an innocent receiver. Indeed, even though two provisions of the Sale of Goods Act 1979, ss. 24 and 25, and also s. 2 of the Factors Act 1889, make no mention whatever of any need for R to give value, they are said on high authority to require it implicitly.<sup>143</sup>

Strictly speaking, there is no necessity about this. There would be nothing incoherent were we to say that an owner entrusting goods to a possessor took the risk of unauthorised gifts as well as alienations for value<sup>144</sup>: and

<sup>139</sup> Which it is with sales, but not necessarily elsewhere. A pledge, for example, cannot be created without a transfer of possession (*Inglis v Robertson* [1898] A.C. 616). Where this is the case, obviously the issue is pre-empted.

<sup>140</sup> This point is not new. It is forcefully made in van de Vliet, Note (an excellent note by a civil lawyer on the difficult case of *Michael Gerson (Leasing) Ltd. v Wilkinson* [2001] Q.B. 514).

<sup>141</sup> As in *Michael Gerson (Leasing) Ltd.* [2001] Q.B. 514 (a paper attornment).

<sup>142</sup> See e.g. *The Saetta* [1994] 1 W.L.R. 1334; and *Angara Maritime Ltd. v OceanConnect UK Ltd.* [2010] EWHC 619 (QB); [2011] 1 Lloyd's Rep. 61. Nor is this a purely English phenomenon. The law in Germany is if anything even more convoluted, requiring two highly complex provisions of the BGB (§§ 933–934) and a great deal of exegesis. For a summary, see Baur and Stürmer, *Sachenrecht*, s. 52, Nr 16–24.

<sup>143</sup> *Benjamin's Sale of Goods*, paras. 7–042, 7–064, 7–080. One strand in the argument is that in the words “sale, pledge or other disposition” in these sections, “disposition” is to be read *eiusdem generis* with sale or pledge, which both obviously do require value. See J. Peden, “Common Law Liens: An Anglo-Australian Conflict” (1968) 6 Syd.L.Rev. 39, at 49; and *Roache v Australian Mercantile Land & Finance Co. Ltd. (No. 2)* (1966) 67 S.R. (N.S.W.) 54.

<sup>144</sup> Which may be encountered even in a commercial context: e.g. goods given away as part of a marketing exercise.

indeed while in Germany the gratuitous transferee R essentially loses out to the original owner,<sup>145</sup> some civil law systems do protect donees in the same way as other alienees.<sup>146</sup> Nevertheless, on balance it is submitted that the English view is the sounder on principle. With a gratuitous transferee who cannot point to any element of detrimental reliance, the equities seem pretty strongly weighted in favour of the original owner.<sup>147</sup>

On the other hand, the question of gratuitous transfer cannot necessarily be dismissed as simply as this. Although an innocent donee R ought not to become *owner* of the thing at the expense of O, it ought nevertheless to be protected in another way, namely by being insulated from liability beyond an obligation to return the goods. If at the time of any demand it has in good faith disposed of them (or lost them), or the goods have deteriorated, its liability should be limited accordingly. After all, one can hardly blame a possessor for alienating, or failing to take care of, goods it believes with good reason to be its own. The point matters in England, because if the common-law position were left untouched, the law of conversion would in most cases<sup>148</sup> make R liable for the full value of the goods at the time it got them, even if when demanded back they had been devalued or lost; furthermore, if R had disposed of them, however innocently, it would be fixed with a liability for their value at the time of disposal.<sup>149</sup> Any reform would thus have to provide for this (which, incidentally, is the solution of German law<sup>150</sup>).

<sup>145</sup> Admittedly in a roundabout way. On its face *BGB* § 932 protects the ownership of all good-faith receivers, gratuitous or otherwise. However, *BGB* § 816.2 then says that gratuitous transferees are in these circumstances unjustly enriched and must return any benefit received, if necessary by reconveying the goods to the original owner. For a brief explanation of the relation between these provisions, see e.g. F. Peters, *Der Entzug des Eigentums an beweglichen Sachen durch gutgläubigen Erwerb* (Tübingen 1991), 78; and K. Tiedtke, *Gutgläubiger Erwerb im bürgerlichen Recht, im Handels- und Wertpapierrecht sowie in der Zwangsvollstreckung* (Berlin 1985), 49.

<sup>146</sup> In particular France, where the *Code Civil*, Article 2276, refers merely to the recipient's possession, and never mentions value, even inferentially. For a recent example of a case where a gratuitous transferee succeeded, see Cass Civ 1, 17.02.2016, No 15–14121. The same is probably true in Switzerland: see *Basler Kommentar zum Zivilgesetzbuch*, § 933, Rn 33 (stating that this is the prevailing, though controversial, opinion).

<sup>147</sup> “The consequence of good faith acquisition for A – namely expropriation – is so severe that only good faith acquirers who would equally suffer a significant disadvantage by not allowing good faith acquisition deserve protection” – see von Bar et al., *Principles, Definitions and Model Rules*, p. 4156. There is also a practical point: acquisition at an undervalue, and a fortiori acquisition for nothing at all, are very – though admittedly not conclusive – indications of a lack of good faith. See R. Goode, *Commercial Law*, 5th ed. (London 2016), para. 16.44.

<sup>148</sup> Save perhaps estoppel. If O positively misleads P into believing that M is the owner of O's thing and as a result P accepts it as a gift from M, it is suggested that whatever the position as to ownership any claim by O in tort arising out of P's innocent receipt or disposal of the thing would fail on orthodox estoppel grounds.

<sup>149</sup> Under the rule in *Solloway v McLaughlin* [1938] A.C. 247; and *BBMM Finance (Hong Kong) Ltd. v Eda Holdings Ltd.* [1990] 1 W.L.R. 409.

<sup>150</sup> This is because the right of O to claw back the benefit obtained by an innocent donee under *BGB* § 816 is based on R's unjust enrichment, to which R has a defence of good-faith disenrichment. See the articles referred to at note 145 above.

### F. Proprietary Interests Other Than Ownership

Discussions of *nemo dat* and unlawful dispositions regularly assume that the problem is essentially one of deciding about ownership. In fact the issue is much more nuanced. O might be not an owner but a pledgee, lienholder or mortgagee. Conversely P may have purported to grant R something less than ownership; not only a pledge (a possibility at least recognised in the Factors Act 1889 and in ss. 24 and 25 of the 1979 Act), but, for example, a lease, a charge or a possessory lien. It is suggested that in any rational overall scheme, there must be a common rule for all proprietary interests, whether we are talking about the interest which O stands to lose, or that which R stands to gain.

As regards O's interests it is not difficult to see why this must be. If an entrustment by O to P can justifiably cause O to be stripped of full ownership, a fortiori there can be no objection to its defeating some lesser interest in O. This point is accepted as obvious by many civil lawyers<sup>151</sup>; moreover, there is evidence of at least a dim appreciation of it in England, where courts have on occasion strained to interpret some legislative reference to an "owner" in a *nemo dat* context as referring equally to someone in the position of O but with a lesser interest.<sup>152</sup>

Moreover, as a matter of principle a similar a fortiori argument ought to apply to R. If we are happy in an entrustment case to grant R absolute ownership and thus to eclipse O's interest entirely, there is no good reason not to do the same where the transaction between P and R creates some lesser interest like a lease or a pledge, which merely burdens O's right with some lesser interest of R's. This is indeed partly recognised in many European jurisdictions by the extension of protection ad hoc to such interests, generously in Germany<sup>153</sup> though less so in France.<sup>154</sup> It is also grudgingly admitted in England, in that a few of the exceptions to *nemo dat* protect pledgees and analogous receivers.

All this is, of course, subject to a major constraint: we are talking only of *proprietary* interests, as against mere personal claims vested

<sup>151</sup> See e.g. German law as described at note 134 above, making it clear that a good-faith receiver takes free of all interests that would otherwise inhere in entrusters.

<sup>152</sup> See *Lloyds Bank Ltd.* [1938] 2 K.B. 147 (pledgee is "owner" within Factors Act, s. 2, so that when goods returned to dealer-pledgor under trust receipt, latter could sell unencumbered); see too *Beverley Acceptances Ltd. v Oakley* [1982] R.T.R. 417 (same assumption), and cf. *National Employers' Mutual General Insurance Association Ltd.* [1990] 1 A.C. 24 ("owner" under s. 25 of the Sale of Goods Act embraces good-faith possessor of stolen car).

<sup>153</sup> Where protection is extended it to good-faith pledgees (*BGB*, § 1244) and to a few privileged lienholders, such as carriers and commission agents (see *HGB*, § 366.3). Switzerland does much the same: *ZGB*, § 714.2 (ownership) is extended to cover usufruct (§ 746.2), pledge (§ 884) and lien (§ 895).

<sup>154</sup> French jurists regard the wording of *Code Civil*, Article 2276 as limited to ownership, insisting accordingly that only possession *animo domini* in R will do. But case law has grudgingly allowed at least some *créanciers gagistes* (i.e. holders of liens and pledges) to benefit as well. See generally Terré and Simler, *Les Biens*, s. 433; Malaurie and Aynès, *Les Biens*, s. 577.

in R.<sup>155</sup> But what ought to count as a proprietary interest? In the present English context, unless pre-empted by statute<sup>156</sup> R's protection seems to embrace any traditional legal or equitable interest, including that of an equitable chargee or lienholder.<sup>157</sup> But what about possessory interests? Imagine R takes a lease of goods, or buys them subject to reservation of title: does this yield a mere contractual right against P, or a property interest? English lawyers instinctively say the former, on the basis that a lessee is never, and a buyer under a mere conditional agreement to sell not yet, an owner.<sup>158</sup> But, at least where R is in possession, this seems perverse. Possession carries within it its own (proprietary) rights. Thus title to sue for conversion inheres in a lessee,<sup>159</sup> or a purchaser in possession subject to reservation of title<sup>160</sup>; both too, it seems, can also cite their possession to resist claims to surrender of the goods, whether by the contractual counterparty<sup>161</sup> or anyone else.<sup>162</sup> If so, it is suggested that such rights should be regarded as possessing sufficiently proprietary characteristics to be brought within the protection of any legislation so as to be exercisable against O in addition.<sup>163</sup>

### G. Protection for Other Parties

The main thrust of this article concerns the protection of R and the proprietary interest transferred to it. But there is one case where it needs to go further and provide some sort of a shield for third parties. Imagine that P, entrusted by O with goods, dishonestly sells them to an innocent

<sup>155</sup> See, in the context of s. 24 of the 1979 Act (and by extension also s. 25(1) and s. 2 of the Factors Act 1889), *Worcester Works Finance Ltd.* [1972] 1 Q.B. 210, 220, per Megaw L.J.: "'Disposition' must involve some transfer of an interest in property"; also Ramsey J. in *P4 Ltd. v Unite Integrated Solutions PLC* [2006] EWHC 2640 (TCC) at [115] (need for "transfer of an interest, legal or equitable"), and in the parallel context of title by estoppel, *Shaw v Met. Police Commissioner* [1987] 1 W.L.R. 1332.

<sup>156</sup> As with sellers and buyers in possession, and also mercantile agents. Sections 24 and 25 of the Sale of Goods Act and s. 2 of the Factors Act only protect recipients under a "sale, pledge or other disposition".

<sup>157</sup> Cf. *Attenborough* (1878) 3 C.P.D. 450 (holder of voidable title can create equitable pledge good against original owner).

<sup>158</sup> See *Re Highway Foods International Ltd.* [1995] B.C.C. 271 (buyer under reservation of title which has taken delivery but not paid cannot be protected under Sale of Goods Act 1979, s. 25); and *Shaw* [1987] 1 W.L.R. 1332 (estoppel cannot protect interest of would-be buyer in possession to whom property has not yet passed).

<sup>159</sup> *Clerk & Lindsell on Torts*, 21st ed. (London 2014), para. 17–64.

<sup>160</sup> See *Indian Herbs (UK) Ltd. v Hadley & Ottoway Ltd.*, unrep., CA, 21 January 1999.

<sup>161</sup> See *On Demand Information Plc (in Administrative Receivership) v Michael Gerson (Finance) Plc* [2001] 1 W.L.R. 155, 171, per Robert Walker L.J.: "Contractual rights which entitle the hirer to indefinite possession of chattels so long as the hire payments are duly made, and which qualify and limit the owner's general property in the chattels, cannot aptly be described as purely contractual rights"; also *Hendy Lennox (Industrial Engines) Ltd. v Grahame Puttick Ltd.* [1984] 1 W.L.R. 485, 491, 495, per Staughton J.

<sup>162</sup> See generally *On Demand Information Plc (in Administrative Receivership)* [2001] 1 W.L.R. 155, 171; G. Watt, "The Proprietary Effect of a Chattel Lease" [2003] Conv. 61. But not all agree: see e.g. W. Swadling, "The Proprietary Effect of a Hire of Goods" in N. Palmer and E. McKendrick (eds.), *Interests in Goods*, 2nd ed. (London 1998), ch. 20.

<sup>163</sup> A point at least partly recognised in the UCC: see UCC, Article 2A-304, giving a good-faith lessee of goods from a non-owner a valid interest parallel to that of a good-faith buyer.



buyer R using the services of X, a dealing agent or auctioneer; and assume further that X acts without fault. The problem is that even if R is protected, without more the intermediary X, who claims no proprietary interest, is not.<sup>164</sup> Instead X would face strict liability to O in the tort of conversion,<sup>165</sup> at least in so far it exercised any physical control over the goods in the course of arranging the sale.<sup>166</sup> This is perverse: in so far as a receiver R is protected from liability to O, the same must go a fortiori for those whose part in the transaction is merely ancillary. More formally, therefore, it is suggested that in any entrustment scheme it would need to be provided that those acting innocently on the instructions of either P or R in a transaction where R's interest would be protected should themselves receive a statutory shield against liability in conversion.

#### *H. The Effect of an Entrusting Rule on Existing Statutory Exceptions*

We suggest below that a general entrusting rule should supplement, and not replace, the existing protections available to a good-faith purchaser (see "The place of an entrustment regime in the scheme of things"). However, it is suggested that this should be subject to one qualification concerning the current s. 2 of the Factors Act 1889 and ss. 24 and 25 of the Sale of Goods Act 1979.<sup>167</sup> As was pointed out above, these provisions contain more than their fair share of anomaly, narrow distinctions and obscure draftsmanship. Furthermore, virtually all the situations they deal with would in any case be covered – and covered in a more extensive and logical way – by the scheme proposed here. There seems no reason to complicate matters by keeping these antique and partial provisions, and they should go.

One might say the same about s. 23 of the 1979 Act, dealing with voidable title. Theoretically no harm would be done by getting rid of it, since all it does is partially re-enact the common-law position for one particular special case,<sup>168</sup> and most instances will be covered by the new scheme anyway. On the other hand, in one matter it goes further than any entrustment rule: it does not require P to be in possession of the goods at all.<sup>169</sup> Thus if O sells to P under a voidable contract but remains in possession, and P then sells on to R, R's interests are protected. This result seems entirely unobjectionable,

<sup>164</sup> Save in one, admittedly very obscure, case: if a farmer fraudulently sells goods subject to an agricultural charge, the innocent auctioneer is protected under s. 6(3) of the Agricultural Credits Act 1928.

<sup>165</sup> *Consolidated Co. v Curtis & Son* [1892] 1 Q.B. 495; *Willis (RH) & Son v British Car Auctions Ltd.* [1978] 1 W.L.R. 438. The suggestion in the old case of *Shenstone & Co.* [1894] 2 Q.B. 452 that X might be protected if R was a buyer in possession seems highly doubtful (cf. *Roache* (1966) 67 S.R. (N.S.W.) 54; and *Suttons Motors (Temora) Pty Ltd. v Hollywood Motors Pty Ltd.* [1971] V.R. 684).

<sup>166</sup> It seems a mere broker who does nothing but shuffle paper escapes liability: *National Mercantile Bank v Rymill* (1881) 44 L.T. 767; and *Clerk & Lindsell on Torts*, para. 17–17. But the boundary of this protection is alarmingly unclear, and the need for protection remains.

<sup>167</sup> And of course their virtual doppelgangers in ss. 8–9 of the Factors Act 1889.

<sup>168</sup> Partially, because it only applies to sales by P and not to the creation of other interests in R.

<sup>169</sup> A point made in *Benjamin's Sale of Goods*, para. 7–008.

and since there is no reason to throw it into doubt we might as well preserve s. 23 as a harmless confirmation of it.

### *I. Exceptions*

For simplicity's sake, we have argued the case for a general entrusting rule on a largely commercial basis. It must be recognised that with goods not traded or used commercially, there may be a case for requiring different treatment. There is something to be said, for example, for allowing non-commercial purchasers of consumer goods to succeed in the absence of actual knowledge that the disposition to them is unauthorised (as is presently the case with s. 27 of the Hire Purchase Act 1964<sup>170</sup>). There might even be an argument in favour of an analogous protection for owners of such goods, preventing any buyer acting in the course of a business from invoking the entrustment rule as against them.<sup>171</sup> And there may be other examples of goods that exceptionally ought to be protected. An example might be artefacts on loan for display, on the basis that the social interest in preserving their public availability requires some of the normal proprietary rules to be qualified.<sup>172</sup>

### *J. The Place of an Entrustment Regime in the Scheme of Things*

As mentioned above, what is being suggested here is not a universal but a fall-back principle. No rule can accommodate all participants or events; nor for that matter should it try to, especially when it comes to detailed regimes based on statutory registers of security interests, or – even more importantly – systems based on international conventions. Indeed, this residuary feature has been a feature of civil law systems that recognise an entrustment principle, which have never had much difficulty with carving out exceptions to accommodate specific regimes.<sup>173</sup> So too any replacement English system would take effect as a default rule, subject to exceptions.

What actual or possible exceptions are we talking about?

First, there are principles relevant to unauthorised dispositions arising out of the general law (as opposed to legislation): most obviously the rule protecting the good-faith purchaser of goods subject to any equitable interest, and the principles of agency and the rules of estoppel. They are well-established, and it would be a recipe for confusion to try to cut them

<sup>170</sup> See s. 29(3) (though this also protects some non-consumer purchases). The Secured Transactions Law Reform Project's *STR General Policy Paper* (April 2016), para. 3–26, discusses whether consumers may need more generalised protection in.

<sup>171</sup> Cf. Mautner, "The Eternal Triangles of the Law", p. 129.

<sup>172</sup> Compare the limited immunity against seizure by creditors of art lent internationally for display in museums and galleries: see *Tribunals, Courts and Enforcement Act 2007*, Part 6.

<sup>173</sup> A straightforward example: the 2008 French regime for creation and registration of charges (*gages*) over moveable property inserted by *Ordonnance* 2006–346, 23.03.2006 as Articles 2333–2350 of the *Code Civil*. Article 2337 states laconically in that, once a charge is registered, Article 2276 (the general provision giving title to a good-faith purchaser) does not apply.

back; instead it should be accepted that, while they will be partly overlaid by any entrusting rule, they may well continue to have a field of application outside it.

Second, specific statutory schemes providing for the adjustment of existing ownership or security rights. Examples of these are the rules relating to securities over chattels registrable under Part 25 of the Companies Act 2006, those covering interests in aircraft under the Cape Town Convention,<sup>174</sup> and more recondite matters such as the Agricultural Credits Act 1928.<sup>175</sup> These schemes are concerned with security interests of one sort or another, such as the rules on disposals by bankrupts,<sup>176</sup> or the rules of Part II of the Merchant Shipping Act 1995 on transfer of title to registered ships.<sup>177</sup> Moreover, this list may well grow, if (for example) it is thought desirable to add a workable scheme of secured lending to replace the Bills of Sale Acts,<sup>178</sup> to make title retention agreements or finance leases registrable securities,<sup>179</sup> to replace the present privileged status of possessory security in commercial contexts with a requirement of registration,<sup>180</sup> or for that matter to create an all-embracing registration scheme on the lines of Article 9 of the UCC.<sup>181</sup>

## VII. CONCLUSION

The import of this paper can be briefly summarised. It is difficult to deny that the current position as to *nemo dat* in England is an arbitrary and unpredictable mess. No one, given a clean sheet of paper and a brief to design a new system, would come up with the one we have. It follows that we need a substantial recasting, with a view to producing a default rule on unauthorised dispositions of chattels that is easy to understand, rational and logical. Such a rule should follow three principles:

<sup>174</sup> See the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015, SI 2015 No 912. For a neat account of its relation with national law, see R. Goode, "Private Commercial Law Conventions and Public and Private International Law: The Radical Approach of the Cape Town Convention 2001 and Its Protocols" (2016) 65 I.C.L.Q. 523.

<sup>175</sup> Which, having set up a registration scheme, contains a general good-faith purchaser protection in s. 6 (3)).

<sup>176</sup> Insolvency Act 1986, Part IX, chapter II. This again contain a general good-faith purchaser provision: see s. 284(4)(a).

<sup>177</sup> In particular, s. 16 and Sch. 1.

<sup>178</sup> That is, the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882. See the Law Commission's recommendation to that effect: Law Com Report No 369. The June 2017 Queen's Speech indicated that the Government was minded to accept the principle of the Law Commission's recommendations.

<sup>179</sup> As advocated by the Law Commission in the past (*Consultation Paper on Registration of Security Interests: Company Charges and Property other than Land*, Law Com CP No. 164 (2002), para. 7.24), and discussed more recently by the Secured Transactions Law Reform Project: see *STR General Policy Paper* (April 2016), paras. 3.21–3.25.

<sup>180</sup> As tentatively suggested by the Secured Transactions Law Reform Project: see Working Group A, Case for reform paper series, *Methods of Perfection*.

<sup>181</sup> As proposed by the Law Commission in 2005 (see Law Com No. 296 *Company Security Interests*), and discussed on a continuing basis under the aegis of the Secured Transactions Law Reform Project.

- (1) The background rule should be one of entrustment, under which a proprietor putting or leaving another in possession of goods prima facie takes the risk of subsequent misdealing.
- (2) The principle should be universal and not limited to ownership. It should be capable, where it applies, of defeating or protecting any proprietary interest.
- (3) However, a general principle of this kind should emphatically be only a prima facie rule. It should be open to exceptions where there is good reason to admit them, for example where it is necessary to have a specific scheme covering particular types of security interest, or where particular actors are regarded as in need of special protection. What is necessary is a simple and workable underlying scheme that meshes as sweetly as possible with exceptions of this kind.