It is easy to apply this section to the case where the seller simply sells goods to A and then, without ever having delivered them to A, sells the same goods to B.

Difficulties have arisen, however, because the section talks of the seller who continues or is in possession of the goods. Suppose that a car dealer sells a car to A who pays for it and takes it away, and then the following day brings it back for some small defect to be rectified. While the car is at the dealer's premises, the dealer sells it to B. It would be possible to read the section as giving B's rights precedence over those of A but it is quite clear that if A had taken his car to any other dealer who had sold it to B, A's rights would have prevailed over those of B. It would be very odd to make the positions of A and B depend on whether A takes his car for service to the person from whom he has bought it or to someone else. In fact, the courts have not read the section in this way but they have given different explanations for not doing so.

6–30 In *Staffordshire Motor Guarantee v British Wagon* (1934),[33] a dealer sold a lorry to a finance company who then hired it back to him under a hire purchase agreement. The dealer then, in breach of the hire purchase agreement, sold the lorry to another buyer. It was held that the rights of the finance company prevailed over those of the second buyer. The explanation given was that for s 24 to apply the seller must continue in possession 'as a seller'. However, this view was later rejected by the Privy Council on appeal from Australia in *Pacific Motor Auctions v Motor Credits* (1965)[34] and by the Court of Appeal in *Worcester Works Finance v Cooden Engineering* (1972).[35] In these cases, it was said that the crucial question was whether the seller's possession was physically continuous. If it was, as in the *Staffordshire Motor Guarantee* case, then s 24 applied.

If there has been a break in possession so that the buyer has, even for a short time, had the goods in his or her hands although he or she has later re-delivered them to the seller, then s 24 does not apply. This obviously covers the case of the buyer who takes the car back to be serviced the following day, but it means that s 24 also applies to the rather common commercial case where a motor dealer transfers ownership to a finance company or a bank but remains in possession. This is a common means of financing the stock which the dealer has on his or her floor and enables more stock to be carried than if the dealer had to carry the full cash cost of the cars. It is, in effect, a form of security for the lender against the dealer's stock. This form of transaction may well give the lender

33 [1934] 2 KB 304.
34 [1965] AC 867.
35 [1972] 1 QB 210.

adequate security in the case of the insolvency of the dealer, but s 24 will prevent it giving the lender adequate protection against the dishonest dealer who sells the cars and disappears with the proceeds.

Buyer in possession after sale

6–31 Section 25 of the Sale of Goods Act 1979 provides:

> 25(1) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.
>
> (2) For the purposes of sub-s (1) above:
>
> (a) the buyer under a conditional sale agreement is to be taken not to be a person who has bought or agreed to buy goods; and
>
> (b) 'conditional sale agreement' means an agreement for the sale of goods which is a consumer credit agreement within the meaning of the Consumer Credit Act 1974 under which the purchase price or any part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfiled.

It will be seen that this section is in a sense the reverse of s 24 since it deals with the situation where possession of the goods has passed to the buyer before ownership has passed to him or her and permits such a buyer to transfer ownership to a sub-buyer. The wording talks of 'a person having bought or agreed to buy goods'. Normally, if the buyer has bought the goods, there would be a complete contract of sale and property would have passed to him or her. In mat case, of course, he or she would be in a position to transfer ownership to a sub-buyer without any question of s 25 arising. The section is concerned with the situation where the buyer has obtained possession of the goods (or the documents of title to the goods) with the consent of the seller but without becoming owner.

The section does not apply where someone has obtained goods without having agreed to buy them. So, in *Shaw v Commissioner of Police*

(1987),[36] a car had been obtained from the owner on the basis that the person obtaining it might have a client who might be willing to buy it. It was held that he was not a buyer within the meaning of s 25 and was not therefore in a position to transfer ownership to a sub-buyer. In the same way, a customer under a hire purchase agreement is not a buyer for the purpose of s 25 because in such a case the customer has only agreed to hire the goods and is given an option to buy the goods which he or she is not legally obliged to exercise even though commercially it is extremely likely that he or she will (see the discussion in Chapter 2). On the other hand, a customer who has agreed to buy the goods but has been given credit is a buyer within s 25, even though the agreement provides that he or she is not to become the owner until he or she has paid for the goods. Section 25(2) contains a statutory modification of this rule in the case where the buyer has taken under a 'conditional sale agreement' as defined in s 25(2)(b), that is where the price is to be paid by instalments and falls within the scope of the Consumer Credit Act 1974. The reason for this exception is to make the law about conditional sale agreements within the Consumer Credit Act the same as for hire purchase agreements within the Consumer Credit Act.

Section 25 has important effects on the reasoning contained in *Car and Universal Finance v Caldwell* (1965),[37] discussed above. In some cases of this kind, although the buyer's voidable title would have been avoided, he or she would still be a buyer in possession within s 25. This was shown in *Newtons of Wembley Ltd v Williams* (1965),[38] where the plaintiff agreed to sell a car to A on the basis that the property was not to pass until the whole purchase price had been paid or a cheque had been honoured. A issued a cheque and was given possession of the car but in due course his cheque bounced. The plaintiff took immediate steps to avoid the contract as in the *Caldwell* case and, after he had done this, A sold the car to B in a London street market and B then sold the car to the defendant. The Court of Appeal held that, although the plaintiff had avoided A's title, A was still a buyer in possession of the car and that B had therefore obtained a good title from A when he bought from him in good faith and had taken possession of the car. It was an important part of the Court of Appeal's reasoning that the sale by A to B had taken place in the ordinary course of business of a mercantile agent (see 6–32).

36 [1987] 3 All ER 305
37 [1965] 1 QB 525.
38 [1965] 1 QB 560.

Agents and mercantile agents

6–32 In practice, most sales are made by agents since most sellers are companies and employ agents to carry on their business. This presents no problem where, as would usually be the case, agents make contracts which they are authorised to make. Furthermore, under general contract law, agents bind the principal not only when they do things which they are actually authorised to do, but also when they do things which they *appear* to be authorised to do. The common law concerning principal and agent is expressly preserved in the Sale of Goods Act by s 62.

However, it is clear that the law of sale has developed by use of a concept of 'mercantile agents' which is wider than that of agency in the general law of contract. This concept developed because of a limitation which was imposed on the general law of agency. If I put my car into the hands of a motor dealer to sell on my behalf, I will normally be bound by the contract which he or she makes even though he or she goes outside my authority, for instance by accepting a lower price than I have agreed.[39] However, if instead of selling the car, the dealer pledges it as security for a loan, he or she would not under general contract law be treated as having apparent authority to do so. This is so, even though, from the point of view of a third party dealing with the dealer, his or her relationship to the car looks quite the same whether he or she is selling it or pledging it.

The pledging of goods and documents of title is a very important part of financing commercial transactions in some trades. So, people importing large amounts of commodities, such as grain or coffee, may very likely pledge the goods or documents of title to the goods, in order to borrow money against them. It was felt unsatisfactory, therefore, to have this distinction between the agent who sells and the agent who pledges and this was the subject of statutory amendment by a series of Factors Acts starting in 1823 and culminating in the Factors Act 1889, which effectively removes the distinction.

6–33 The Factors Act 1889 continues in force after the passage of the Sale of Goods Act 1893 and 1979. Section 21(2) of the Sale of Goods Act provides that:

> …nothing in this Act affects:
> (a) the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were their true owner.

Sections 8 and 9 of the Factors Act provide:

39 *Lloyds and Scottish Finance Ltd v Williamson* [1965] 1 All ER 641; [1965] 1 WLR 404.

> 8 Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, *or under any agreement for sale, pledge, or other disposition thereof,* to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.
>
> 9 Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, *or under any agreement for sale, pledge, or other disposition thereof,* to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner [emphasis added].

It will be seen that these provisions are very similar to the provisions of ss 24 and 25 of the Sale of Goods Act. The difference is the presence of the words in italics in the text above. A key question is clearly what is meant by a 'mercantile agent'. This is defined by s 1(1) of the Factors Act as meaning 'a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods'. The effect of dealings by mercantile agents is set out in s 2 of the Factors Act:

> 2(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.
>
> (2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

> (3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.
> (4) For the purposes of this Act, the consent of the owner shall be presumed in the absence of evidence to the contrary.

6–34 The most important limitation on the width of the power given by s 2 is that in order for the mercantile agent to be able to pass title he or she must not only be in possession with the owner's consent, but must be in possession *as a mercantile agent* with the owner's consent. So, for instance, a car dealer who has both a sale room and a service facility is clearly a mercantile agent and has the consent of his or her service customers to have possession of their cars for service, but if he or she were to put one of these cars into the sale room and sell it, this would not be a transaction protected by the Factors Acts because he or she would not have had possession of the car as a mercantile agent, but rather as a repairer.

An interesting case in this connection is *Pearson v Rose and Young* (1951).[40] Here, the plaintiff delivered his car to a mercantile agent in order to obtain offers, but had no authority to sell it. The agent succeeded in obtaining the log book by a trick, in circumstances where it was clear that the owner had not consented to the dealer having possession of the log book. Having got both the log book and the car, the dealer then dishonestly sold it. The Court of Appeal held that this was not a transaction protected by the Factors Act. The reason was that although the dealer had possession of the car with the owner's consent, he did not have possession of the log book with the owner's consent. He could, of course, have sold the car without the log book, but the court held that this would not have been a sale in the ordinary course of business of a mercantile agent and therefore the sale without the log book would have been outside the Factors Acts; it followed that the sale with the log book, where the log book had been obtained without the owner's consent, was also outside the Act.

An important decision on s 9 of the Factors Act and s 25(1) of the Sale of Goods Act 1979 is *National Employer's Insurance v Jones* (1988).[41] In that case, a car was stolen and sold to A, who sold it to B, who in turn sold it to a car dealer C. C sold it to another car dealer D, and it was then sold to the defendant who bought it in good faith. It had been assumed in many previous transactions that in such circumstances the defendant was not protected, since the original

40 [1951] 1 KB 275.
41 [1990] AC 24.

invalidity arising from the theft was not cured by any of the subsequent sales. However, in this case, the defendant argued that the transaction fell within the literal scope of s 9 because D had obtained possession of the goods with the consent of the dealer who had sold the goods to him and who was certainly a mercantile agent. It is true that both s 9 and s 25 refer to consent of the *seller* and not consent of the *owner,* and Sir Denys Buckley in the Court of Appeal dissented from the majority view and held that the transaction was covered by ss 9 and 25. However, a unanimous House of Lords took the opposite view. They held that the word 'seller' in ss 9 and 25 must be given a special meaning and could not cover a seller whose possession could be traced back (through however many transactions) to the unlawful possession of a thief. This must be correct, since otherwise the sale by the thief to the first purchaser would not be protected, but the sale by that purchaser to the second purchaser would be.

Part III of the Hire Purchase Act 1964

6–35 It will be seen that in modern times, the vast majority of cases which involve the operation of the *nemo dat* principle involve a dishonest handling of motor cars. This is no doubt because:

(a) a car is by nature easily moved; and
(b) cars command a ready cash price on the second hand market and can, in practice, often be traced by the original owner.

One of the most common forms of dishonesty is for a person to acquire a car on hire purchase terms and then to dispose of it for cash before he or she has completed the hire purchase contract. In practice, he or she will find it difficult to dispose of the car for cash to an honest dealer because the existence of the hire purchase transaction would normally be discovered by reference by the dealer to HPI, as discussed earlier. However, it is in practice very easy for a person who has acquired a car on hire purchase to sell it for cash on the second hand market by advertising, and equally very difficult for someone buying from him or her to know that the seller is not in fact the owner of the goods. Such transactions are not protected by s 25 because someone acquiring goods on hire purchase is not a buyer, nor are they protected by the Factors Act, because the seller is not a mercantile agent.

6–36 In order to deal with this situation, the Hire Purchase Act 1964 created a new exception to the *nemo dat* rule by providing that if a car which was subject to a hire purchase or credit sale agreement was sold to a private purchaser, that purchaser would acquire a good title if he or she bought it in good faith and without notice of the hire purchase or credit sale agreement.

This protection is accorded only to private purchasers and does not apply to dealers.[42] However, the private purchaser does not need to be the person who actually buys and makes the initial purchase of the goods from the person who is dishonestly disposing of goods. So, if X has a car on hire purchase terms and dishonestly sells it to a dealer B, who then sells it to C who buys it in good faith, unconscious of the defects in A's or B's title, C will obtain a good title, even though he has bought from B (the dealer) and not from A (the original hirer) and even though B himself did not obtain a good title.

It is obviously very important, therefore, to know who is a 'private purchaser'. Private purchasers are those who are not 'trade or finance purchasers', and a trade or finance purchaser is one who at the time of the disposition carried on a business which consisted wholly or partly of either:

(a) purchasing motor vehicles for the purpose of offering or exposing them for sale; or
(b) providing finance by purchasing motor vehicles for the purpose of letting them under hire purchase agreements or agreeing to sell them under conditional sale agreements.

It is perfectly possible to carry on either of these activities part time, so that someone who buys and sells cars as a sideline will be a trade purchaser, if he or she is doing so as a business, that is, with a view to making a profit. On the other hand, a company which is not in the motor trade or the financing of motor purchase business will be a private purchaser for the purpose of Pt III of the 1964 Act.

Other statutory provisions

6–37 There is, of course, no limit to the power of Parliament to create further exceptions to the *nemo dat* principle. In *Bulbruin Ltd v Romanyszyn* (1994),[43] a local authority sold an abandoned vehicle to the defendant under powers conferred on it by the Road Traffic Regulation Act 1984 and the Removal and Disposal of Vehicles Regulations 1986. It turned out that, before coming into the hands of the local authority, the vehicle had been stolen from the plaintiff and fitted with false number plates. The Court of Appeal held that the defendant had acquired good title.

42 In *Barber v NWS Bank* [1996] 1 All ER 906, the buyer arguably acquired ownership under the Act, but the Court of Appeal pointed out that s 27(6) said that this did not exonerate the seller from civil or criminal liability.
43 [1994] RTR 273.

CHAPTER 7

NON-EXISTENT GOODS, RISK AND FRUSTRATION

Suppose that the goods which are the subject of the contract never existed, or once existed and have now ceased to exist, or that the goods, although they exist, have been damaged, or that goods of this kind are no longer available on the market. How does this affect the rights of the parties? There are two separate doctrines which are used to answer questions such as this. These are the doctrines of risk and of frustration. Before we examine these doctrines, however, we must consider the special case of goods which never existed at all or which, having once existed, have perished.

NON-EXISTENT GOODS

7–01 Section 6 of the Sale of Goods Act 1979 provides:

> Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void.

This section is commonly assumed to have been an attempt by the draftsman of the 1893 Act to state the effect of the famous pre-Act case of *Couturier v Hastie* (1856).[1] In that case, the contract was for the sale of a specific cargo of corn which was on board a named ship sailing from Salonica to London. In fact, at the time the contract was made, the cargo of corn had been sold by the master of the ship in Tunis because it was fermenting owing to storm damage. (The master of the ship was of course the servant of the ship owners and not of the seller.) One might have expected that if, on these facts, litigation took place at all, it would arise by the buyer suing the seller for non-delivery of the goods. In fact, however, the seller sued the buyer, claiming that he was entitled to the price even though he had no goods to deliver. At first sight, this seems an absurd argument, since normally the buyer's obligation to pay the price is conditional on the seller's being able to deliver the goods. The seller's argument was that, in a contract of this kind, the buyer had agreed to pay against delivery of the shipping documents, which would have given him rights against the carriers and against the insurers of the goods. As

1 (1856) 5 HLC 673.

we shall see, this argument would sometimes succeed because of the rules about the passing of risk where the goods perished after the contract was made. Indeed, in some cases of international sales, it would even succeed where the goods were *damaged* (as opposed to having perished) after shipment, but before the contract was made, because of the possibility that risk might retrospectively go back to the date of shipment. However, the Court of Exchequer Chamber and the House of Lords were agreed that in this case the seller's action failed.

7-02 *Couturier v Hastie* has been extensively discussed, not only in relation to the law of sales, but also in relation to the general law of contract. It has been taken by some as an example of a general principle that, if the parties' agreement is based on some shared fundamental mistake, then the contract is void. Other writers have treated it as an example of an overlapping but rather narrower principle that if, unknown to the parties, the subject matter of the contract does not exist or has ceased to exist, the contract is void. The controversy as to whether either or both of these principles is part of the general law of contract has not been finally resolved and cannot be pursued in detail here. It is important to note, however, that s 6 of the Sale of Goods Act 1979 does not turn on either of these principles.

In order to apply s 6, one needs to know what is meant by the goods having *perished*. It is clear that in *Couturier v Hastie,* the corn may still have existed at the time of the contract. There is no evidence in the report of the case of what happened to the corn after it was sold in Tunis. It seems clear that it was treated as having perished because, as a commercial entity, the cargo had ceased to exist. In *Barrow, Lane and Ballard Ltd v Philip Phillips & Co Ltd* (1929),[2] there was a contract for 700 bags of ground nuts which were believed to be in a warehouse. In fact, unbeknown to the parties, 109 bags had been stolen before the contract was made. It was held that s 6 applied and the contract was void. It will be seen that only some 15% of the contract parcel had been stolen, but this was treated as sufficient to destroy the parcel as a whole. Clearly, whether this will be so in other cases will depend very much on the particular facts of the case and precisely what it is the seller has contracted to deliver. It was probably also relevant in the above case that there was no realistic chance of recovering the stolen bags.

Goods will not be treated as having perished merely because they have been damaged. On the other hand, there may be damage so extensive as effectively to deprive the goods of the commercial character under which they were sold. So, in *Asfar & Co Ltd v Blundell* (1896),[3] the contract was for a sale of a cargo of dates. The dates had

2 [1929] 1 KB 574.
3 [1896] 1 QB 123.

become contaminated with sewage and had begun to ferment. Although all the dates were still available, the cargo was treated as commercially perished.

7–03 It will be seen that s 6 applies only to the sale of specific goods and only where the goods have perished 'without the knowledge of the seller'. A seller who knows that the goods have perished will therefore normally be liable for breach of contract and might, in some cases, alternatively be liable for fraud. A difficult question is what the position would be if the seller ought to have known that the goods had perished. In 1856, communications between Tunis and London were no doubt not such as to make it easy for the seller to have discovered quickly what had happened to the cargo. This would not be the case today. The literal wording of s 6 suggests that, if the seller does not know that the goods have perished, even though he or she could easily have discovered it, the contract is void. It does not follow, however, that the buyer would be without a remedy, since in some such cases the seller would be liable for having represented negligently that the goods did exist. This is one of the possible explanations of the famous Australian decision of *McRae v Commonwealth Disposals Commission* (1951),[4] although this was actually a case where the goods had never existed rather than one where the goods had once existed and had perished. In *McRae,* the Commonwealth Disposals Commission sold to the plaintiff the wreck of a ship which was said to be on a named reef off the coast of New Guinea. The plaintiff mounted an expedition to salvage the ship, only to find that the ship, and indeed the named reef, did not exist. It is easy to see that simply to hold that there was no contract on these facts would have been very unfair on the plaintiff who had wasted much time and money searching for a ship which did not exist. It was not surprising, therefore, that the High Court of Australia held that the plaintiff could recover this lost expenditure although they did not recover the profit they might have made if the ship had been there and had been successfully salvaged.

There has been much discussion over whether an English court would reach the same result. The Australian court took the view that s 6 did not apply to the facts since it dealt only with goods which had once existed and had perished, not with goods that had never existed at all. Some commentators in England, however, have taken the view that s 6 is simply a partial statement of the common law rule and that the common law rule applies not only to goods which are perished but also to goods which have never existed. It would be possible to accept this view but to hold that a seller could be sued for misrepresentation whether the goods perished or had never existed, if it could be shown

4 (1951) 84 CLR 377.