

Chapter 16

1. In *DF Mount Ltd v Jay & Jay (Provisions) Co Ltd* [1960] 1 QB 159 (QB), Salmon J stated:

It seems to me that the language of [s 25(2) of the Sale of Goods Act 1893] is less rigorous than that of the proviso to s 47 and does not compel me to hold that the subsection applies only in those cases where the buyer transfers the same document as that of which he is in possession with the consent of the seller.

Consider whether such a different construction was the intention of the draftsman of the 1893 Act or is indeed correct.

This question examines your understanding of *DF Mount Ltd v Jay & Jay (Provisions) Co Ltd* [1960] 1 QB 159.

A good introduction should outline the principles laid down in this case noting that an unpaid seller will not be deemed to assent to a resale by the buyer (and thereby lose his lien) unless he intends to renounce his rights against the goods and take the risk of the buyer's honesty or that he will pay.

In *Mount*, Jay sold part of a consignment of canned peaches to Merrick for resale to two of his customers, agreeing that the purchase price would be paid by Merrick from the money he would eventually receive from his customers. Jay made out delivery orders in favour of Merrick which he indorsed with the words 'please transfer to our sub-order', and forwarded them to the wharf where the goods were stored. Merrick then sold the goods to Mount and at the same time agreed to repurchase them a week later at a price that would return a profit for Mount. Merrick made out a fresh delivery order in the same form as those made out by Jay in his favour, save that it was in favour of Mount and signed by him, and sent it to Mount, receiving in return their cheque for the purchase price. A week later, Mount sent that delivery order to the wharf and, in pursuance of the agreement with Merrick, sent him a delivery order in respect of the goods made out in his favour, receiving from Merrick a cheque for the higher price of the goods. Merrick's cheque was dishonoured, whereupon Mount cancelled the delivery order in his favour. Meanwhile, Jay, who had not been paid for the goods, cancelled its contract with Merrick and requested the wharf to cancel the delivery orders made out in his favour. Merrick was subsequently convicted of obtaining money by fraud from Mount. Both Jay and Mount claimed they were entitled to the goods.

Salmon J gave a judgment in favour of Mount and held that Jay had assented to Merrick reselling the goods within the meaning s 47 in the sense that they intended to renounce their rights against the goods and to take the risk of Merrick's honesty. He stated that "In the present case [Jay] were anxious to get rid of the goods on a falling market. They knew that Merrick could only pay for them out of the money he obtained from his customers, and that he could only obtain the money from his customers against delivery orders in favour of those customers. In my view, the true inference is that [Jay] assented to Merrick reselling the goods, in the sense that they intended to renounce their rights against the goods and to take

the risk of Merrick's honesty. [Jay] are reputable merchants and I am sure that it was not their intention to get rid of their goods on a falling market through Merrick on the basis that, if he defaulted, they could hold the goods against the customers from whom he obtained the money out of which they were to be paid." Salmon J also held that Mount was additionally entitled to succeed under a different section of the Act, namely s 25(2). He explained that "the object of [s 25(2)] is to protect an innocent person in his dealings with a buyer who appears to have the right to deal with the goods in that he has been allowed by the seller to be in possession of the goods or documents of title relating to them. In such a case the subsection provides that any transfer of the goods or documents of title by the buyer to a person acting in good faith and without notice of any want of authority on the part of the buyer shall be as valid as if expressly authorised by the seller. In the present case [Jay] sent the documents of title to Merrick with the intention that they should enable him to obtain money from his customers. With the help of these documents, which he sent to the wharf so that [they] would give a reassuring reply to any inquiry that [Mount] might make, or at least not query any delivery order they received from [Mount], Merrick managed to obtain a substantial sum of money from [Mount]. In my view, the transfer by Merrick of the delivery order ... was, by virtue of s 25 (2), as valid as if expressly authorised by [Jay]."

2. **Under s 48(2) of the SGA 1979, where the unpaid seller who has exercised his right of lien, retention, or stoppage in transit resells the goods, the buyer acquires a good title to them as against the original buyer. There is no requirement for this new buyer to act in good faith and without notice of the previous sale. This can be contrasted with FA 1889, s 8/SGA 1979, s 24, where the buyer must act in good faith and without knowledge of the previous sale.**

Critically evaluate this statement.

This is a reasonably straightforward question examining the sections referred to in the question.

Where an unpaid seller who has exercised his right of lien, retention, or stoppage in transit resells the goods, the buyer acquires a good title to them as against the original buyer. In order for the unpaid seller to be in a position to resell the goods under s 48(2) he must, of course, be in possession of them. This presents a degree of overlap with the *nemo dat* exception set out in s 8 FA 1889 and s 24 SGA 1979 although the two provisions are by no means identical.

Section 48(2) of the Sale of Goods Act 1979 provides that where the unpaid seller who has exercised his right of lien, retention, or stoppage in transit resells the goods, the buyer acquires a good title to them as against the original buyer. There is no requirement for this new buyer to act in good faith and without notice of the previous sale.

Section 8 of the Factors Act 1889 and 24 of the Sale of Goods Act 1979 deal with the *nemo dat* exception of a sale by a seller in possession after sale. These sections provide as follows: (The text in italics are those words that were omitted from the original SGA in 1893 and remained omitted when s 24 of the 1979 Act was enacted.)

“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.”

This exception to the *nemo dat* rule allows a seller, who after a sale remains in possession of the goods or of the documents of title to them, to pass good title to a second buyer. Provided the requirements are satisfied, the effect shall be ‘as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.’

Given the similar effect of both sets of provisions it is therefore rather curious why there is no requirement for the new buyer to act in good faith and without notice of the previous sale for

s 48(2) to operate whereas the new buyer must act in good faith and without notice of the previous sale before s 8 FA or s 24 SGA will provide similar protection.