

**'PHYSICAL POSSESSION' VERSUS 'CONSTRUCTIVE DELIVERY' IN SECTION 28 OF THE SALE OF GOODS ACT 1923 (NSW) - 'HARMONISATION' OF *PACIFIC MOTOR AUCTIONS*\* AND *GAMER'S CASE*\*\*.**

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## I. INTRODUCTION

'Physical possession' of goods under s 28 of the *Sale of Goods Act 1923* (NSW) (the Act) means 'actual custody' or 'actual possession' of the goods, as opposed to 'constructive possession'<sup>1</sup> of the goods. 'Constructive delivery' under s 28 of the

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\* *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867.

\*\* *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd*. (1987) 163 CLR 236.

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1 The expression 'constructive possession' is adopted in this article for the convenience of discussion. As we will see shortly, the expression is used in an article by C Carracher entitled "Nemo Dat, Section 28 of the *Sale of*

Act means delivery of goods without a change of 'physical possession' of the goods. While the expressions are not inherently inconsistent, the applications of them in the context of s 28 may arguably result in certain legal difficulties. For example, the concept of 'constructive possession' has been arguably deduced into the context of s 28, because of the acceptance of the concept of 'constructive delivery' by the majority of the Australian High Court in *Gamer's* case.<sup>2</sup> Thus it was argued that if, as the result of constructive delivery, "C has received constructive possession of the goods for s 28(2) purposes, but for s 28(1) purposes B has *continued* in (without loss of) possession of the goods, then there is, *prima facie*, an affront to the concept of indivisible juridical possession".<sup>3</sup> What this statement means is that 'constructive delivery' in s 28 results in a simultaneous existence of 'constructive possession' and 'physical possession' of the same goods and thus, the co-existence of two forms of 'possession' over the same goods offends the 'principle of indivisible juridical possession'. Is it true that as the result of 'constructive delivery' two forms of 'possession' co-exist in s 28? This is one of the main issues which will be investigated in the present article.

Section 28 of the Act deals with two of the exceptions to the *nemo dat* rule, where a seller in possession of the goods after sale or a buyer in possession of the goods after sale may under s 28(1) and s 28(2) respectively transfer a good title to a bona fide purchaser, even if they do not have a title to sell. Section 28 provides as follows:

(1) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale 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.

(2) 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 therefore 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 entrusted by the owner with the goods or documents of title.

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*Goods Act and Gamer's Case*" (1992) 9:1 *Australian Bar Review* 55, which will be analysed in detail later in this article. However, this does not mean that the author of this article agrees that 'constructive possession' can be created in s 28 through 'constructive delivery' as argued in Carracher's article.

2 *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd*, (1987) 163 CLR 236.

3 C Carracher *supra* note 1. As we will see soon, the alleged "affront to the concept of indivisible juridical possession" was established on the basis of "constructive possession", whose existence was assumed on the basis of "constructive delivery".

Both s 28(1) and s 28(2) give effect to a transaction where a non-owner (either a seller or a buyer) who is in possession or continued possession of the goods after a previous sale sells the goods to a purchaser, as long as the purchaser bona fide believes that the person in possession has an authority to sell. Physical possession or actual custody of the 'seller' or the 'buyer' in s 28 is the basis of the purchaser's belief. This is why physical possession is crucial for the passing of title under s 28. However, while 'physical possession' is essential, it is not clear in the language of s 28 whether a bona fide purchaser is able to obtain a good title by constructive delivery, namely without actually terminating or interrupting the continued physical possession of the goods by the non-owner. This was debated in *Gamer's* case, where the majority of the High Court was of the opinion that 'delivery' in s 28 could be effected through 'constructive delivery'.

However, it appears that the implications of *Gamer's* case, are far from clear. Two of the important questions are: first, given that the Privy Council in *Pacific Motor Auctions*<sup>4</sup> held 'possession' in s 25 of the *Sale of Goods Act 1893* (UK) (replaced by the *Sale of Goods Act 1979* (UK)), which was equivalent to s 28 of the Act, must be 'physical possession', can 'constructive delivery' harmonise with 'physical possession' in s 28 of the Act; and secondly, given that the High Court held in *Gamer's* case<sup>5</sup> that delivery in s 28 can be effected through 'constructive delivery', how would 'constructive delivery' affect the passing of title in a situation where the same goods have been sold by the same non-owner more than twice without the authority of the previous purchasers? These questions have practical implications, in particular in the cases where the 'seller' or the 'buyer' in s 28, taking advantage of his or her 'physical possession' of the goods, sells and resells the same goods continuously because the previously purchasers only obtain the title by 'constructive delivery'. These questions are raised and discussed in an article by Mr Carracher, published in Volume 9, Issue 1 of the *Australian Bar Review* (1992) under the title of "Nemo Dat, Section 28 of the Sale of Goods Act and *Gamer's* Case" (Carracher's article). That article raises the difficulties in the interpretation and application of s 28 of the Act, in particular, the meaning of 'delivery', although the article was intended rather to deal with a "dilemma" that accepting "the principle of indivisible juridical possession, how can one simultaneously retain actual physical possession, for the purposes of s 28(1), and pass constructive possession, for the purposes of s 28(2)".<sup>6</sup> It discusses s 28 in a hypothetical model for four-parties transactions where both s 28(1) (seller in possession) and s 28(2) (buyer in possession) are presumed to be operative. Carracher's article reflects the difficulties in the construction of s 28 and in the

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4 *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867.

5 Note 2 *supra*.

6 C Carracher note 1 *supra* at 55.

interpretation of the implications of *Gamer's* case.<sup>7</sup> His article will be analysed in detail later in the present article.

The present article is intended to address the relationship between 'physical possession' and 'constructive delivery' in s 28 in four parts. First, it will discuss the practical implications of 'constructive delivery' by reexamining the hypothetical model of four-party transactions proposed in Carracher's article. Secondly, it will deal with the issue of appropriate rules governing the transfer of title in the hypothetical model of four-party transactions. Thirdly, it will probe the meaning of 'constructive delivery' in s 28 by reexamining *Gamer's* case. Lastly, it will attempt to reconcile the implications of 'physical possession' and 'constructive delivery' in the very context of s 28 of the Act. Finally this present article will argue that 'physical possession' does harmonise with 'constructive delivery' in s 28 of the Act.

## II. RETHINKING THE HYPOTHETICAL MODEL OF FOUR-PARTY TRANSACTIONS

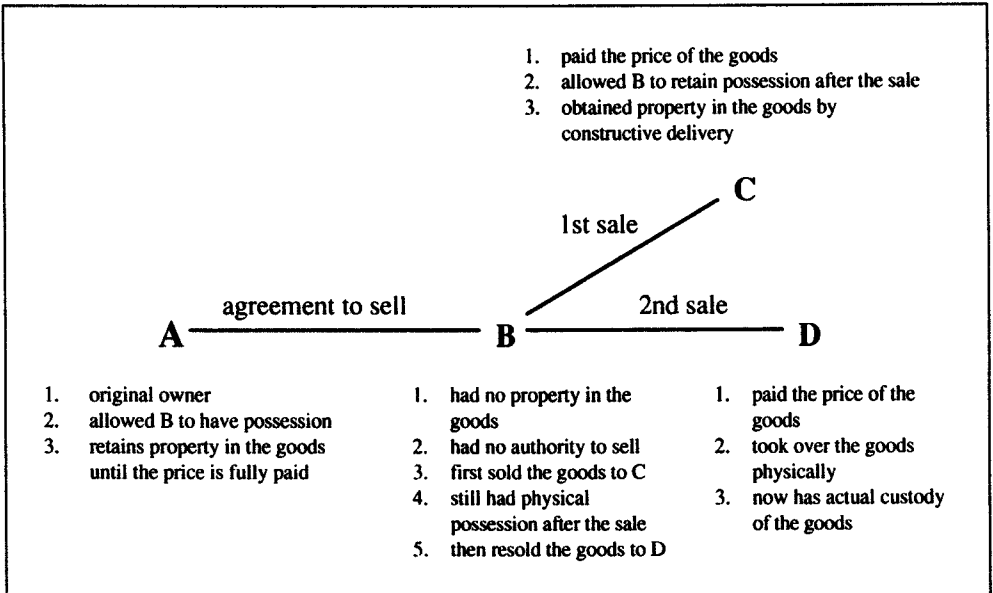
Carracher's article applies constructive delivery to a hypothetical, yet realistic situation where the goods are sold continuously three, or more than three, times, involving at least four parties. The situation can be described as follows:

1. A, the original owner of the goods, sold the goods to B subject to the condition that the property in the goods remain in A until B has fully paid the price of the goods;
2. B thus obtained physical possession (actual custody) of the goods before making the full payment of the price;
3. B then sold the goods to C, without either making the full payment, or obtaining authority to sell from A;
4. C paid the price of the goods without taking physical possession of the goods, allowing B to continue to be in physical possession of the goods without even a symbolic interruption of B's physical possession;
5. B subsequently resold the goods to D without either making the full payment to A, or obtaining authority to sell from A and C;
6. D not only paid the price of the goods, but also actually took over the goods from B;
7. D now has physical possession of the goods.

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7 (1987) 163 CLR 236.

These transactions may be expressed in the following diagram. In this hypothetical model of four-party transactions, A remains the unpaid seller who reserved his or her property in the goods until the full price is paid. This means that A has an interest in the goods now possessed by D. C has paid B for the goods and thus has an interest in the goods. Similarly, D has paid for the goods and accordingly also has an interest in the goods. Leaving aside the legal remedies by each of them against B, the question among A, C and D is who is the legal owner of the goods, or who has a better title to the goods under D's actual custody? Carracher's article was intended to resolve the question of legal ownership in the hypothesis by applying s 28, or alternatively, was intended to illustrate the possible difficulties which may arise from 'constructive delivery' in s 28 in this hypothetical. While appreciating possible complexities in the application of s 28, the present article argues, with respect, that the presumed "dilemma" in Carracher's article is based on an incorrect presumption that s 28(1) "broadly, operates to protect the interest of D in circumstances where B has sold goods to C and B continues or is in possession when B subsequently delivers or transfers to D the goods or documents of title".<sup>8</sup> It is this flawed proposition that led to many questionable arguments and conclusions in that article.



8 Note 1 *supra* at 57.

As we have seen earlier, the proposed model in Carracher's article contemplates three separate transactions which take place in turn between A and B, B and C, and B and D. If A as the owner of the goods agreed to sell the goods to B and let B have possession of the goods under the condition that the property in the goods not pass to B until payment has been fully made, B would be a "buyer in possession after sale" under s 28(2) in the later transactions with C and D respectively. Accordingly, C and D would respectively have a better title against A. However, as we have seen, there is also a property dispute between C and D, because B first sold the goods to C who allowed B to retain the possession of the goods after the sale, then, without C's authority, resold the goods to D, who obtained the physical possession of the goods without knowledge of the previous transactions. Thus, the dispute over the ownership of the goods will arise not only between A and D, or A and C, but also between C and D, because C is deemed to have obtained the property in the goods before D through constructive delivery. The model was intended to raise the difficult questions of applying both ss 28(1) and (2), if they both are in fact applicable, to transactions of this nature. The question could be: which of the two innocent 'buyers', D or C, has a better title under the *Sale of Goods Act* 1923 (NSW) and whether "constructive delivery" can achieve fairness and clarity in such transactions.

Carracher's article argues that both s 28(1) and s 29(2) apply to this model.<sup>9</sup> It assumes that if s 28(2) (buyer in possession of the goods after sale) applies to the transaction involving A, B and C, (in which B as the buyer in the transaction with A sells the goods to C before B fully pays the contract price to A) s 28(1) (seller in possession after sale) would apply to the transaction involving B, C and D, (in which B as the 'seller' in the transaction with C resells the goods to D after B has sold the goods to C). Based on this proposition, the article examines the legal positions of each party under s 28 which have been deduced on the basis of several important judgments, in particular, *Gamer's Case*,<sup>10</sup> *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd*<sup>11</sup> and *National Employer's Insurance Ltd v Jones*.<sup>12</sup> These cases dealt with s 28 or its equivalent in England. While Mr Carracher acknowledges that B is not the owner of the goods in any of the hypothetical transactions, he concludes that "as D gets the interest of C as a result of the delivery by B, B's ownership is not essential so long as B is capable of passing the interest to C".<sup>13</sup> Based on this proposition, the hypothesis that s 28(1) and s 28(2) apply to the model appears to stand.

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9 *Id.*

10 Note 2 *supra*.

11 Note 4 *supra*.

12 [1988] 2 All ER 425.

13 C Carracher note 1 *supra* at 59.

The present article, with respect, argues that the abovementioned proposition is flawed in two respects. First, it confuses the capacity of B in two different transactions, namely the transaction involving A, B and C, and the transaction involving B, C and D. In the former, B is a buyer who "having bought or agreed to buy goods obtains with the consent of" A possession of the goods or documents of title and then sells the goods to C. In the latter case, although B is a person who has the possession of all goods or documents of title with the consent of C, B is neither a 'seller' under s 28(1) because B is not the 'owner' of the goods (or an agent of the owner) before B sold the goods to C, nor a 'buyer' who bought or agreed to buy the goods from C under s 28(2) because B retains possession of the goods or documents with consent of C (who may become the owner of the goods after the transaction involving A, B and C) as a bailee or agent of C. We must point out that B's capacity to pass a good title under s 28(2) in the transaction involving A, B and C does not give rise to a capacity to pass a good title as a 'seller' under s 28(1) in the transaction involving B, C and D and accordingly, the abovementioned proposition fails on this argument. Secondly, the proposition ignores the literal meaning of s 28(1). While s 28(1) gives a good title to a bona fide buyer who purchases goods from a person who has the apparent authority to sell (possession of the goods or the documents of title), it also requires that the person in possession of the goods be either the seller who has sold the goods to a buyer in the capacity of an owner of, or the seller's agent who is authorised by the 'seller' who was the owner of the goods before the sale rather than the 'owner' who became the owner of the goods after the sale, such as C's ownership which was derived from the transaction involving A, B and C. This requirement also defeats the abovementioned proposition, because Carracher's article confuses the capacity of B as a 'buyer' under s 28(2) with the position of B as an agent or bailee of C who "has entrusted possession in B".<sup>14</sup> Section 28(1) applies to a seller in possession after sale and thus does not apply to the transfer of title by a non-owner who is the agent of the true owner after sale or bailee who did not have a right to sell before becoming the bailee.

The defects of the hypothesis are also seen in the context of s 28(1) of the Act, which is set out in the introduction of this article. Although s 28(1) does not define the meanings of "a person having sold goods", it has been established at common law that the person in this context refers to the owner of the goods or his or her agent. For example, *Benjamin's Sale of Goods* observes that s 24 of the *Sale of Goods Act 1979* (UK), equivalent to s 28(1) of the *Sale of Goods Act 1923* (NSW), requires that before the sale the seller "would be in possession as an owner, whereas after the sale he would be in possession as bailee holding the goods

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14 *Id.*

for the new owner".<sup>15</sup> The same view was accepted in *Worcester Finance v Cooden Engineering*,<sup>16</sup> where the case was determined on the proposition that "Griffiths was the owner of the car" when "the Cooden company delivered the car and logbook to Griffiths and received the cheque for £525".<sup>17</sup> Based on this proposition, the English Court of Appeal upheld the finding of the trial judge that Griffiths was the seller in possession after sale and thus had passed a good title to Cooden Engineering.<sup>18</sup> In *National Employers Mutual General Insurance Association Ltd v Jones*<sup>19</sup> where the Court was of the opinion that the 'seller' in s 25 of the *Sale of Goods Act 1979* (UK), which deals with "buyer in possession after sale", does not have to be the owner of the goods, it was held that the 'buyer' for the purpose of passing a good title to the subsequent purchasers under s 25 must at least have obtained the goods from a person who has obtained possession of the goods through legal means. It follows that for the operation of s 28(2) a buyer does not have to buy goods from an owner and the transaction would be effective as long as the 'seller' under s 28(2) obtains possession of the goods through lawful means. However, s 28(2) was not intended to give 'title' to sell to a 'seller' who becomes the 'seller' under s 28(1) only because he or she has been a 'buyer' who just sold goods under s 28(2). In other words, the buyer's act under s 28(2) does not make the buyer a 'seller' under s 28(1).

'Seller', which could be an agent or bailee under s 26(1) or a person having an avoidable title under s 27, means different things under s 28(1) and s 28(2). Under s 28(1) 'seller' is someone who has passed his or her legal title to the first purchaser of the goods, but nevertheless resold the goods to the second buyer. In contrast, under s 28(2), 'seller' is someone who has not passed his or her legal title to the buyer although his or her title may be defeated by the subsequent transaction between the 'buyer' and a third party. Therefore, a 'buyer' under s 28(2) who sells the goods before legally becoming the owner of the goods himself or herself cannot be regarded as a 'seller' under s 28(1) without authority from the original owner,<sup>20</sup>

15 Guest and Others *Benjamin's Sale of Goods* (13th ed. 1987) para 512.

16 [1972] 1 QB 211.

17 *Ibid* per Lord Denning MR at 216.

18 For example, Lord Denning observed that applying "these principles it is plain that Griffiths was a person who, having sold goods to the finance company, 'continued in possession' of them until the time when they were retaken by the Cooden company"; *ibid* at 218.

19 [1988] 2 All ER 425.

20 Of course, a buyer in possession after sale can always become an owner of the goods by "feeding the title". For example, *Patten v Thomas Motors Pty Ltd* (1965) 66 SR (NSW) 458. In that case, Miss Persch was a hirer to a hire-purchase contract in relation to a car under which she would not be an owner until the contract price was paid. She sold the car before paying off the contract price. The car was subsequently sold several times and ultimately to Patten. None of the subsequent purchasers knew that Persch had no title to sell. In terms of time sequence, two months after Patten bought the car, Persch used the car (probably using the hire-purchase agreement as evidence) as a security to obtain a loan from a finance company and paid off the contract price of



because one cannot be both a 'buyer' and a 'seller' at the same time and in the same transaction. The fact that a bona fide purchaser may obtain a good title in a transaction involving a "buyer in possession after sale" does not in turn legalise the right of the 'buyer' to sell. One cannot be a "seller in possession after sale" only because one is a "buyer in possession after sale". It must be pointed out that the 'seller' under s 28(1) does not have a title to sell when the overriding interest of the third party is created by the seller's conduct, but the 'seller' has a right to sell to the buyer under s 28(2) although his or her right may be defeated by the overriding interest of a third party. For these reasons, the author of the present article is compelled to say that the conclusion that "as D gets the interest of C as a result of the delivery by B, B's ownership is not essential as long as B is capable of passing the interest to C" in Carracher's article is incorrect.<sup>21</sup> The implication that B who passed a good title to C as a 'buyer' under s 28(2) could be the 'seller' in possession after the completion of the sale to C appears to be wrong.<sup>22</sup> So is the proposition that s 28(1), "broadly, operates to protect the interest of D in circumstances where B has sold goods to C and B continues or is in possession when B subsequently delivers or transfers to D the goods or documents of title".<sup>23</sup> This follows that, leaving the "principle of indivisible juridical possession" aside, one cannot simultaneously retain actual physical possession for the purposes of s 28(1) and pass "constructive possession"<sup>24</sup> for the purposes of s 28(2) in the proposed four-party transactions.

While appreciating the constructive attempt of Carracher's article to illustrate the possible difficulties of applying s 28(1) and s 28(2) in a multi party transaction, the author of the present article has to question a number of arguments presented and conclusions drawn in Carracher's article involving the application of s 28. For example, Carracher's article argues that given the facts in the hypothetical, if "s 28(1) was applied prior to s 28(2) then ownership would be with A".<sup>25</sup> This argument is wrong regardless of the purpose of the argument. This is because s 28(1) deals with "seller in possession after sale" and in the hypothetical

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the car under the hire-purchase contract. The Court held that Persch became the legal owner of the car by paying off the contract price and this would have the effect of feeding a good title to the purchasers of the car from the date she became the legal owner. The finance company repossessed the car from Patten about 20 months after making the loan to Persch. The dispute appeared to be between Patten and the finance company as to who had a better title to the car. Patten, however, brought an action against the previous seller of the car for breach of s 17(1), a title to sell. The Court held that Persch had fed a good title to Patten since she paid off the price of the car under the hire-purchase contract and thus Patten's action failed.

21 C Carracher note 1 *supra*.

22 This is the conclusion of the discussion under the subtitle "Transactions Between B, C and D, and Section 28(1)". C Carracher note 1 *supra* at 58-9.

23 *Id.*

24 Although the author of the present article does not agree with this term, he nevertheless uses it for convenience.

25 C Carracher note 1 *supra* at 58.

transactions, as we have seen, there is no "seller in possession after sale" at all. In all the transactions described in the proposed model, B has been neither an owner of the goods, nor an agent of the 'seller', who in the hypothetical transactions could only be A. Therefore, there is no ground whatsoever for the application of s 28(1) in the hypothetical transactions. This discovery undermines in particular the discussion on pages 58-59 of Carracher's article.<sup>26</sup> Similarly, for example, the argument that if "C has received constructive possession of the goods for s 28(2) purposes, but for s 28(1) purpose B has *continued* in (without loss of) possession of the goods, then there is, prima facie, an affront to the concept of indivisible juridical possession"<sup>27</sup> appears to be less logical and reasonable than it would be had s 28(1) been really applicable to the hypothetical transactions. Again, while appreciating the effort of stimulating discussions on "the Buyer-Seller Relationship and Section 28",<sup>28</sup> we have to point out that, for s 28(1) purposes, B's continuous possession of the goods does not make B a 'seller' under s 28(1), because, as we have seen, B is not the kind of 'seller' contemplated in s 28(1).

The purpose of s 28(1) is to protect an innocent buyer who obtains the goods under an honest belief that the person in possession of the goods has a title to sell. This is the same for all the exceptions to the *nemo dat* rule. However, the true owner's title is denied under s 28(1) because the true owner after having bought the goods from the seller allows the seller to have the possession of the goods without taking reasonable measures to prevent the seller from selling the same goods fraudulently to an innocent third party. As we have said, B cannot be both the buyer and the seller at the same place and at the same time and therefore the continued possession of the goods by B cannot amount to a continued possession under both ss 28(1) and (2). Therefore, the proposition in the article on which the issue of the "concept of indivisible juridical possession" arises is rather unsound and ambiguous as a result of an incorrect application of s 28(1) to the hypothetical model.

### III. RETHINKING THE APPROPRIATE RULES FOR THE HYPOTHETICAL MODEL

The present article is intended to provide an answer for the hypothetical model, because the proposed four-party transactions do arise in practice. If A is the owner of the goods and B buys the goods from A, B would be a buyer in possession after sale when A allows B to have possession of the goods before paying the price fully. It follows that if B sells the goods respectively to C and D without authority from

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26 This refers to the discussion under "Transactions Between B, C and D, and Section 28(1); *ibid* p 58-9.

27 *Ibid* p 60.

28 This is a subtitle in the article; *id.*

A, C and D would respectively be able to obtain a good title under s 28(2) against A. Now let's look at the possible contest between C and D. Suppose the transaction between B and C takes place before the transaction between B and D, then C would have obtained a good title against A under s 28(2). Thus, in the subsequent transaction involving B, C and D, C would be the owner of the goods, B would be the person in possession of the goods and D would be a bona fide third party buyer. In this case, C's title would be defeated by D, not because B is the "seller in possession after sale" under s 28(1), but because C is by his or her conduct precluded from denying B's authority to sell under s 26(1) of the *Sale of Goods Act 1923 (NSW)*.<sup>29</sup> This is because C, as the true owner of the goods, has contributed to B's apparent authority to sell. Since this apparent authority is the real reason for D's belief that B has an authority to sell, C should be precluded from denying D's title derived from the relevant transaction.<sup>30</sup>

Therefore, we may argue that in order to resolve the questions of ownership arising from the hypothetical transactions, the transaction involving A, B and C should be really separated from the transaction involving B, C and D. In the order of time sequence, the ownership should be determined between A and C first under s 28(2), and then be decided between C and D under s 26(1). Section 28(2) applies, because B has bought or agree, to buy from A the goods concerned and thus becomes the buyer in possession after sale under s 28(2), regardless of whether there is a physical delivery or possession of the goods.<sup>31</sup> Section 26(1) applies because C, becoming the owner of the goods under s 28(2), has entrusted, either physically or constructively, actual possession of the goods to B, who therefore acts in the capacity of C's agent or bailee. The actual possession of the goods, rather than the continued possession of the goods, is the key indicator of an apparent authority to sell in the transaction involving B, C and D. B's continued possession has little consequence for s 26(1) purposes, because s 26(1) does not require the 'continued possession' at all. Thus, the present article argues that s 28(2) and s 26(1) of the Act are the appropriate sections for resolving the questions of ownership arising from the hypothetical transactions.

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29 Section 26(1) states as follows:

Subject to the provision of this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

30 This interpretation of s 26 or its equivalent has been firmly accepted in judicial practice. See, for example, *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371 and *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600.

31 *Gamer's* case note 2 *supra*.

#### IV. RETHINKING GAMER'S CASE

*Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* is the most recent decision of the High Court of Australia in which a three to two majority held that 'delivery' under s 28(2) of the *Sale of Goods Act 1923* (NSW) includes 'constructive delivery'. *Gamer's* case involved the sale of eight vehicles between *Gamer's Motor Centre (Newcastle) Pty Ltd* (original owner), *Evans & Rose Motors Pty Ltd* (buyer in possession after sale) and *Natwest Wholesale Australia Pty Ltd* (third party buyer). *Gamer's Motor* purported to sell eight vehicles to *Evans & Rose* and allowed *Evans & Rose* to have possession of the cars in July 1979 under the condition that the property in the cars remained in *Gamer's Motor* until the agreed price had been fully paid. *Evans & Rose* had a floor plan agreement with *Natwest*, under which *Evans & Rose* could sell vehicles purchased by it to *Natwest* which would pay 90 per cent of the agreed price (the balance would be paid when the vehicles were disposed of) and become the owner of the vehicles, *Evans & Rose* would then have possession of the vehicles as the bailee for *Natwest* to display the vehicles in *Evans and Rose's* premises for attracting potential buyers or hirers of the vehicles. *Evans & Rose* sold the eight cars taken from *Gamer's Motor* to *Natwest* before it paid the agreed price to *Gamer's Motor*. *Evans & Rose* entered into a contract of sale in July 1979 with *Natwest* which became the owner of the cars under the contract without either taking physical possession of the cars or with the knowledge that *Evans & Rose* was not the owner of the cars. *Gamer's Motor* repossessed the cars because *Evans & Rose* did not pay the agreed price pursuant to the contract. *Natwest* took an action against *Gamer's Motor* under s 28(2), claiming either the return of the cars or the value of the cars which amounted to \$26,100. The trial judge gave judgment to *Natwest* on the ground that *Gamer's Motor* had agreed that ownership in the cars be passed to *Evans & Rose* before the price was paid and thus *Natwest* was the legal owner of the cars in dispute. The Court of Appeal of New South Wales upheld the decision of the trial judge by two to one on the ground that *Natwest* became the owner of the cars though a constructive delivery of the cars under s 28(2).<sup>32</sup> This decision was confirmed three to two by the High Court. However, the meanings of 'possession' under the *Sale of Goods Act 1923* (NSW) and the implication of 'constructive delivery' under s 28 remain to be reconciled.<sup>33</sup> The

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32 *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* [1985] 3 NSWLR 475.

33 For example, Davidson, while appearing to be largely in agreement with the rationale of constructive delivery in *Gamer's* case, proposed a 'symbolic physical delivery' as a means of reconciling the meanings of 'delivery' and 'possession' under the Act. A Davidson, "Constructive Delivery and Sale by a Buyer of Seller in Possession: the *Gamer's Motor Centre Case*" (1991) 19 *ABLR* 261 at 271.

Carracher article represents an attempt to reconcile the meanings of 'possession' and 'delivery' as seen in seemingly conflicting authorities.

The meanings of 'delivery' under s 28(2) was the key argument in *Gamer's* case, because Natwest took neither temporary nor symbolic physical possession of the cars.<sup>34</sup> The parties argued that "delivery or transfer" under s 28(2) requires a change of actual possession of the goods. Natwest was given the ownership of the goods, because the constructive delivery was upheld by the High Court. The meaning of constructive delivery is self-evident. However, the implications of the constructive delivery are rather far reaching and less unambiguous, because 'delivery' and 'possession' are interdependent concepts. The question is whether a 'constructive delivery' would effect a 'constructive possession' under s 28.

It appears that 'delivery' and 'possession' are closely related in the *Sale of Goods Act 1923* (NSW). For example, Mason CJ in *Gamer's* case observed that there is a "strong foundation for the conclusion that the statutory definition of 'delivery' referred to 'possession', not in its popular sense or as meaning actual custody, but in its legal or technical sense".<sup>35</sup> Further, in explaining the meanings of constructive delivery, his Honour stated that the "courts equated actual receipt with delivery, holding that there may be a change of possession without any change of actual custody, such a change of possession being described as constructive delivery".<sup>36</sup> Given that constructive delivery means "a change of possession without any change of actual custody", there appear to be difficulties in reconciling the implications of the Privy Council's observation in *Pacific Motor Auctions* that possession under ss 25(1) and (2) of the *Sale of Goods Act 1893* (UK) (replaced by the *Sale of Goods Act 1979* (UK)), which were equivalent to s 28(1) and (2), had the same meaning, referring to "actual custody".<sup>37</sup> The difficulty is, for example, if the 'possession' can be changed 'constructive delivery' without a change of actual custody of the goods, could 'possession' *continue* under s 28(1) when the seller sold the goods to the first buyer, given that the seller could still be

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34 'Symbolical physical delivery' probably refers to some formality of delivery other than a mere change of legal relationship between the parties. For example, Sutton observed that "where the goods are too big or heavy to actually hand over ... symbolical physical delivery in some suitable way must be attempted if advantage is to be taken" of s 28. S Sutton *Sale and Consumer Law in Australian and New Zealand* (1983) at p 337. Symbolic delivery was even recognised by courts of law in the cases where the property in the goods, which were used as security, was to be passed to a party only when the other party failed to perform the contract. This was recognised in *Wrightson v McArthur and Hutchisons* [1921] All ER 261, where the court held that the delivery of the keys to the storage room where the goods were stored and an irrevocable licence to have access to the storage room constituted effective delivery of the goods stored in the room.

35 Note 2 *supra* (HC) at 244.

36 *Ibid* per Mason CJ at 246.

37 Note 4 *supra* at 887.

in 'possession'.<sup>38</sup> It appears that there is a need to distinguish between 'physical possession' and 'constructive possession'. When possession can be changed without an actual delivery, it is the legal title to possess the goods that has been transferred through a constructive delivery.<sup>39</sup> It follows that the expression 'possession' in the abovementioned observation of Mason CJ refers to the legal title to the goods. Will this interpretation of 'possession' be feasible in s 28? This is what Carracher's article attempts to illustrate by applying s 28 to the hypothetical transactions.

On the other hand, a similar difficulty arises when 'delivery' is confined to a change of actual custody of the goods. The purposes of s 28(2) would be defeated, because s 28(2) was intended to provide protection to "an innocent purchaser who is deceived by the vendor's physical possession of the goods or documents".<sup>40</sup> This construction is inconsistent with the spirit of the *Sale of Goods Act 1923* (NSW), because the Act allows the parties to determine when the property in the goods should pass regardless of whether there is a change of actual possession of the goods, (see, for example, ss 22 and 25).<sup>41</sup> Although s 28 mentions 'goods' only,<sup>42</sup> it is about the property in goods and about the contest between titles created under law. Had the non-owner under ss 28(1) and (2) had a title to sell, the third party buyer would have obtained a good title through the transactions. This is probably why s 28 is an exception to the *nemo dat* rule, which is to determine which of the two competing interests should be protected. It follows that if the

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38 Leaving the meanings of "possession" aside, we may perhaps argue that under s 28(1) the first buyer may receive possession of the goods by a constructive delivery, but he or she may also lose the possession by constructive delivery because the fact that he or she allows the seller to continue in actual custody of the goods may be construed as his or her intention to give up through a constructive delivery the 'possession' received through a constructive delivery.

39 The courts of law have accepted long ago that legal possession can be effected by constructive delivery, eg see *Rawlinson v Mort* [1905] KB 555, where a gift of an organ was held to be completed without taking actual custody of the organ at the time of making the gift; *Re Stoneham* [1912-1919] All ER 1051, where constructive delivery was found to give legal possession to the donee who had been in possession of the goods at the time of making the gift; and *Thomas v The Times Book* [1966] 2 All ER 241, where a gift of a lost manuscript was deemed to have been delivered at the time of making the gift even if the lost manuscript was recovered much later.

40 *Pacific Motor Auctions* note 4 *supra* at 886. The same statement was noted in *Gamer's* case, per Mason CJ at 248 and Brennan J at 251.

41 Section 22 provides that the property in specific goods passes to the buyer as the parties intend and s 25 states the property may pass to the buyer "whether delivery has been made or not".

42 Helsham J in *Bank of New South Wales v Palmer* (1970) 91 WN 580 at 584, observed that the wording of s 28 suggests that "the section does not in terms refer to property in goods being the subject of transfer, nor does it expressly refer to any transaction which is ordinarily accompanied only by a transfer of property in goods rather than the goods themselves". With respect, this article has to submit that his Honour should go a step further and examine the purpose of transferring goods under s 28. If property in the goods is not transferred, whether with or without delivery, s 28 does not create a title to the person who does not have the property in goods. Therefore, delivery of goods under s 28 cannot be separated from transfer of property in the goods.

parties under s 28 have agreed that the property passes to the buyer before delivery is made, an innocent buyer who receives the property in goods by constructive delivery would be as innocent as a buyer who receives the property in goods by actual delivery. It is not fair to discriminate between the buyers, except by arguing that s 28 was intended to terminate the confusing state where a non-owner has no more than an apparent authority to sell.<sup>43</sup> However, the existence of this policy consideration is yet to be clarified by the Legislature.

Chief Justice Mason in *Gamer's* case intended to avoid the potential conflicts between the implications of 'constructive delivery' and 'actual custody' by giving the expression 'possession' different meanings in s 28 and s 5 where the definition of 'delivery' is found. His Honour observed as follows:

And it must be accepted, in accordance with what was said in *Pacific Motor Auctions* that 'possession' has the same meaning in s 28(1) and (2). But it does not mean that the meaning which the word has in the context in which it appears at the commencement of the two sub-sections is the meaning which it bears when it appears in the statutory definition of 'delivery'. The point is that the object of s 28, the protection of innocent third parties dealing with a seller or buyer in possession of goods or documents of title thereto and therefore appearing to be the owner of the goods, as well as the legislative history of the provisions, requires that 'possession' be construed in a particular way. These considerations have no application at all to the statutory definition of 'delivery' which is designed to identify or describe the act which passes title to goods as between seller and buyer.<sup>44</sup>

His Honour's observation appears to be a feasible approach, although it may be regarded as less logical,<sup>45</sup> to the resolution of the difficulties arising from the implications of 'constructive delivery' and 'actual custody'. There are two important points in his Honour's observation. First, his Honour implied that the conclusion of the Privy Council in *Pacific Motor Auctions* that possession means 'actual custody' is far too narrow or imprecise when interpreting 'delivery' for the purposes of s 28. Secondly, his Honour appears to say that the object of s 28 requires 'delivery' and 'possession' to be construed in a particular way which may be different from 'delivery' and 'possession' in the other provision of the Act, thus raising a possibility that under s 28 'constructive possession' should be used in certain circumstances to illustrate 'delivery' and 'actual possession' should be used at all times to interpret 'possession'.

In rethinking *Gamer's* case, we may draw the following conclusions. First, the case mainly deals with the meanings of 'delivery' under s 28(2), although Mason

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43 This is implied in the judgment of Kirby J. see *Gamer's* case note 32 *supra* (NSWCA) at 482-3.

44 Note 2 *supra* (HC) at 248-249.

45 Davidson argued that "purely as a matter of logically statutory interpretation it is hard to accept that the word 'possession' at the commencement of the two subsections should bear a different meaning to that which it has when it is used in the definition of 'delivery'"; note 33 *supra* at 279.

CJ accepted that 'possession' has the same meaning in ss 28(1) and (2).<sup>46</sup> Secondly, 'constructive delivery' is a concept closely related to the passing of property in goods. The 'constructive delivery' is recognised because it is the intention of the contracting parties that the property in the goods passes to the buyer regardless of the physical possession of the goods. If the property in the goods has been so passed, the buyer would be an innocent buyer under s 28(2), although this argument is the subject of debate as to whether the Legislature intended to encourage the buyer under s 28(2) to take physical possession of the goods in order to reduce potential disputes.<sup>47</sup> *Gamer's* case suggests that the majority of the High Court preferred a construction which is consistent with the purposes and principles of the Act to the one which is mainly derived from the literal meanings of the words.

#### IV. RETHINKING SECTION 28: MEANINGS OF 'DELIVERY' AND 'POSSESSION'

The meaning of 'delivery' was the focus of discussion in *Gamer's* case in both the Court of Appeal of New South Wales and the High Court of Australia, and 'possession' came into the context only because s 5 of the *Sale of Goods Act 1923* (NSW) defines 'delivery' as a "voluntary transfer of possession from one person to another". The Court of Appeal was divided two to one as to whether the expression 'delivery' under s 28(2) includes also constructive delivery, which means "a change of possession without any change of actual custody",<sup>48</sup> and the High Court was divided three to two (or four to one, because Gaudron J conditionally accepted 'constructive delivery' but excluded its application in that case) as to whether a constructive delivery is within the meaning of s 28(2). The majority of the Court of Appeal and the High Court in *Gamer's* case has established clearly that in Australia a constructive delivery would be effective to pass a good title to a bona fide buyer for the purpose of s 28(2). Although this decision has theoretically qualified or overridden any implications arising from the earlier decision of the Privy Council in *Pacific Motor Auctions* that 'possession'

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46 Note 2 *supra* (HC) at 248.

47 The proposition that the policy behind s 28(2) does not support a wide operation of s 28(2) resulted from the inclusion of 'constructive delivery' was supported by Kirby P in *Gamer's* case (NSWCA) note 32 *supra* at 482. A similar view was seen in *Bank of New South Wales v Palmer* (1970) 91 WN 580, per Helsham J at 585.

48 *Gamer's* case note 2 *supra* (HC) per Mason CJ at 246.



under s 28 of the *Sale of Goods Act 1923* (NSW) means "actual custody",<sup>49</sup> the meanings of 'possession' are not thoroughly probed in *Gamer's* case.

Meanings of 'delivery' and their justifications were thoroughly examined in *Gamer's* case. The implications of the case were also widely discussed by commentators.<sup>50</sup> There is no need to repeat what has been said by their Honours about the rationale behind the construction of 'delivery' under s 28. Instead, a brief summary of the main arguments commented on by their Honours is sufficient for our purposes. There are perhaps three main arguments against the inclusion of constructive delivery in s 28. First, there is an unbroken chain of legal authority which holds that the delivery means the change of actual custody.<sup>51</sup> Secondly, "the plain meanings of the words" in s 28(2) "lead to the conclusion that the 'delivery' it speaks of is actual delivery".<sup>52</sup> Thirdly, the policy of s 28(2) supports a transfer of actual possession of the goods.<sup>53</sup> In contrast, there are also three main arguments in favour of the inclusion of constructive delivery in s 28. First, common law has accepted constructive delivery as well as constructive possession.<sup>54</sup> Secondly, the expression 'delivery' is "defined in terms of its legal meaning" and thus, the "statutory definition of 'delivery' referred to 'possession', not in its popular sense or as meaning actual custody, but in its legal or technical sense".<sup>55</sup> Thirdly, the legislative purpose is in favour of the inclusion of constructive delivery under s 28.<sup>56</sup> As we have seen in *Gamer's* case, the same issues or arguments were often addressed by disagreeing judges, but divergent conclusions were reached. Given that both conflicting arguments appear to be equally powerful, thorough and convincing, indeed, as suggested in Carracher's article, only a legislative clarification of the expression 'delivery' and 'possession' in s 28 seems to be able to reconcile the disagreement.

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49 Note 4 *supra* at 883.

50 For example, A Davidson note 33 *supra* and C Carracher note 1 *supra*.

51 *Gamer's* case note 32 *supra* (NSWCA) per Kirby P at 479-82; and *Pacific Motor Auctions* note 4 *supra* at 887-8.

52 *Gamer's* case note 2 *supra* (HC) per Toohey J at 345, Gaudron J at 273-277, and in the Court of Appeal, note 32 *supra* per Kirby P at 481; and *Bank of NSW v Palmer* (1970) 91 WN 580 per Helsham J at 584-5.

53 *Gamer's* case note 32 *supra* (NSWCA) per Kirby P at 482-3 and *Bank of NSW v Palmer* *ibid* per Helsham J at 585.

54 *Gamer's* case *ibid* (NWSCA) per McHugh JA at 487-8. Similar views were expressed in the High Court per Mason CJ at 243-247, per Brennan J at 255 and per Dawson J at 260-263; however, their Honours did not deal with the concept of "constructive possession". For examples of constructive delivery at common law, see *Rawlinson v Mort* [1905] KB 555, *Re Stoneham* [1912-1919] All ER 1051, *Wrightson v McArthur and Hutchisons* [1921] All ER 261 and *Thomas v The Times Book* [1966] 2 All ER 241.

55 *Gamer's* case note 2 *supra* (HC) per Mason CJ at 244; and in the Court of Appeal, note 32 *supra*, per McHugh JA at 494.

56 *Gamer's* case note 32 *supra* (NSWCA) per McHugh JA at 490-1 and in the High Court, note 2 *supra*, per Mason CJ at 249.

Given what was said about 'possession' in *Pacific Motor Auctions* and what the majority of the High Court said about 'delivery' in *Gamer's case*, it is perhaps worth attempting to reconcile these authorities in the context of s 28. Both ss 28(1) and (2) allow a person who is in apparent possession of goods or documents of title to deliver or transfer the goods or documents of title to a bona fide third party buyer, who would accordingly receive a good title, despite the fact that the person in possession has no title to sell.<sup>57</sup> In the context of s 28, "possession" refers to possession of goods or documents of title by a person who is a seller in possession after sale under s 28(1) or a buyer in possession after sale under s 28(2). Thus, there is no difficulty in applying the conclusion of the Privy Council in *Pacific Motor Auction* that possession in s 28 means "actual custody" to s 26,<sup>58</sup> provided we accept the suggestion of Mason CJ that possession in s 5 and s 28 mean different things. It appears that 'actual possession' would be the only reasonable construction of the expression 'possession' under s 28, because s 28 allows exceptions to the *nemo dat* rule on the ground that a bona fide buyer was deceived by the non-owner who had an apparent authority to sell. It would be virtually impossible to establish that a person who has no actual possession of goods or documents of title would be regarded as having an apparent authority to sell. However, while 'possession' means actual custody, 'delivery' is not restricted to the change of 'actual possession' under s 28. This means that delivery in s 28 has different meanings from delivery in s 5.

'Constructive delivery' appears to be harmonious with 'possession' in s 28 if its implications do not extend to 'possession'. In both ss 28(1) and (2), an innocent buyer may obtain a good title to goods through 'constructive delivery' provided that he or she buys the goods from a person who has or is in possession of the goods. While the goods can be delivered to the innocent buyer constructively, the person who sells the goods must be in physical possession of the goods or documents of title because the physical possession is the only means to create an "apparent" authority to sell. There is no contradiction in the physical possession of the goods and constructive delivery.<sup>59</sup> It is merely a policy matter whether or not

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57 The text of s 29 is set out on page 1 of the present article.

58 Note 4 *supra* at 887.

59 It can also be argued that 'constructive delivery' may be applied to *Pacific Motor Auctions* without affecting the result of the case. In *Pacific Motor Auctions* the car dealer had actual possession of the goods, although its authority to sell the cars in dispute was withdrawn before the sale. It can be argued that 'constructive delivery' does not apply to the withdrawal of authority by Motor Credits because the transaction between the car dealer and Motor Credits was broadly covered in s 28(1) under the expression 'having sold'. This expression does not necessarily have the same meaning as 'delivery' in s 28(1), although normally a contract of sale under the *Sale of Goods Act 1923* (NSW) involves 'delivery' of goods and transfer of property. The transaction between the car dealer and Motor Credits was subject to other sections of the Act dealing with transfer of property and the language of s 28(1) does not warrant the imputation of 'constructive delivery' to affect the "possession" of the

'constructive delivery' is within the meanings of s 28, given that at common law ownership of the goods can be separated from the physical possession of the goods and that delivery can be made through 'constructive delivery'.<sup>60</sup>

However, 'constructive delivery' and 'physical possession' appear to be inconsistent when implications of 'constructive delivery' extend to 'physical possession', or vice versa. For example, Carracher argues that "the possession received pursuant to the constructive delivery was a possession juridically equal to the possession held pursuant to the first transaction referred to in each of the subsections, and as a result, terminated that first held possession".<sup>61</sup> Based on the "principle of indivisible juridical possession", he proceeded to the argument that constructive delivery terminates the 'possession' under s 28(1). Without going into a discussion on the "principle of indivisible juridical possession", the abovementioned argument may be answered by the statement of the Privy Council in *Pacific Motor Auctions* that possession in s 28 refers to "physical possession regardless of any private transaction between the seller and purchaser which alters the legal title under which the possession was held".<sup>62</sup> This statement suggests that in giving the meanings of physical possession to s 28, their Lordships foresaw the implications arising from the change of legal relationship between the vendor and first buyer under s 28(1) and made it clear that regardless of the legal title to the goods, possession in s 28(1) must be physical possession. It follows that constructive delivery (if the concept is applicable) cannot terminate the continuity of physical possession in s 28(1).

We may argue that the implications of constructive delivery to 'possession' and the implication of physical possession to 'delivery' must be examined strictly in the language of s 28.<sup>63</sup> This is what was intended by Mason CJ in *Gamer's* case where his Honour stated that the statement of the Privy Council that possession

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car dealer at the time of sale to the Pacific Motor Auctions. It can also be argued that the Privy Council made it clear in *Pacific Motor Auctions* that 'possession' refers to physical possession "regardless of any private transactions between the seller and purchaser which might alter the legal title under which the possession was held" [1965] AC 867, 888. This implies that even if there is a constructive delivery, the possession is to still be assessed by 'physical possession'. In other words, 'physical possession' prevails over or is irrelevant to 'constructive possession' (if we could use the expression 'constructive possession'). This is why *Gamer's* case and *Pacific Motor Auctions* could be reconciled.

60 *Halsbury's Laws of England* (Vol 35, 4th ed. 1983) paras 1111, 1112, and 1154.

61 C Carracher *supra* note 1 at 62-3.

62 Note 4 *supra* at 888.

63 Kirby P in *Gamer's* case (NSWCA) note 32 *supra* observed that "the safest course is to adhere closely to the language of the subsection, bearing in mind that the mischief which it addresses is the consequence that can flow from innocent parties by the entrustment of actual possession". While agreeing with his Honour's observation, with respect, the author of the present article is tempted to add one more line to his Honour's statement: "bearing also in mind that s 28(2) is designed to protect the third party buyer against the original owner".

“has the same meaning in s 28(1) and (2)” does not mean that ‘possession’ in s 28(1) and (2) bears the same meaning as ‘possession’ in s 5 which defines the meanings of ‘delivery’.<sup>64</sup> Therefore, we may reconcile ‘constructive delivery’ and ‘physical possession’ by arguing that first, s 28 requires, or gives effect to, constructive delivery only when the legal title to goods is in dispute; and secondly ‘physical possession’ under s 28(2) does not mean that the third party buyer must take physical delivery of the goods (although ‘physical delivery’ may terminate the “physical possession” under s 28(1)),<sup>65</sup> because s 28(2) was intended to protect the third party buyer against the original owner and constructive delivery will create disputes only between the first third party buyer and other subsequent buyers who are deceived by non-owner’s (buyer in possession after sale) ‘physical possession’. As we have seen earlier, the dispute between the first third party buyer and subsequent buyers are governed by s 26 or s 27 of the *Sale of Goods Act 1923* (NSW), not s 28. Therefore, inclusion of ‘constructive delivery’ in s 28 does not defeat the purposes of the section.

However, accepting a harmony between ‘constructive delivery’ and ‘actual possession’ in s 28 does not mean constructive delivery does not imply any difficulties in s 28. This can be illustrated by examining some cases. For example, in the *Bank of New South Wales v Palmer*,<sup>66</sup> constructive delivery in s 28(1) gives rise to a possibility that the third party buyer (the Bank) might obtain a good title to the boat in question. In that case, Helsham J rejected the claim of the Bank because there was no physical delivery of the goods or documents of title. It follows that the Bank may have been given a good title had a constructive delivery been accepted in that case. However, it must be pointed out that *Bank of New South Wales v Palmer* may represent a typical example of the dilemma which may be faced by the courts of law in construing s 28. Assume that both the Bank and Palmer could be equally innocent in that case, ‘constructive delivery’ and ‘physical delivery’ may bring out totally different results. This is a dilemma because the exceptions to the *nemo dat* rule are meant to protect innocent parties.<sup>67</sup> Although

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64 *Gamer’s case* note 2 *supra* (HC) at 248-249.

65 The Privy Council in *Pacific Motor Auctions* stated that the requirement of ‘physical possession’ in s 28(1) means “that when a person sells a car to a finance house in order to take it back on hire-purchase the finance house must take physical delivery if it is to avoid the risk of an innocent purchaser acquiring title to it” under s 28(1). [1965] AC 867 at 888. It must be pointed out, however, that ‘physical delivery’ in this context is purported to break the ‘physical possession’ under s 28(1) and make only s 28(1) inapplicable.

66 (1970) 91 WN 580.

67 This has been long accepted by law. See, for example, *Lickbarrow v Mason* (1787) 2 TR 63, *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600, *Pacific Motor Auctions* note 4 *supra*, and *Gamer’s case* (HC) note 2 *supra*.

fault may not be the only criterion for making exceptions to the *nemo dat* rule,<sup>68</sup> the courts of law would take into account the contribution of the original owner in leading the other innocent party into the contract with the non-owner and would protect the innocent buyer if it is not fair in the circumstances to enforce the *nemo data* rule.<sup>69</sup> While there are specified requirements under s 28(1) and both parties appear to be equally innocent, policy considerations would have to be taken into account for determining which of the two innocent parties should have a better title.<sup>70</sup> Lord Denning in *Bishopsgate Motor Finance Corp Ltd v Transport Brakes Ltd* implied that the policy consideration - protection of commercial transaction - would be in favour of a title by the third party buyer "who takes in good faith and for value without notice".<sup>71</sup> Thus, the hypothetical result which may be brought out by 'constructive delivery' in *Bank of New South Wales v Palmer*<sup>72</sup> may be justified on policy grounds. However, the remaining question is whether 'constructive delivery' would always meet the need for protecting commercial transactions in the application of s 28.

Both the purposes of s 28 and policy considerations are important for discussing whether 'constructive delivery' should be allowed under s 28. While the judicial decisions have largely agreed that "the object of the section is to protect an innocent purchaser who is deceived by the vendor's physical possession of goods

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68 Ashhurst J in *Lickbarrow v Mason* stated that "where 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". (1787) 2 TR 63 at 70. This strictly fault or guilt based approach to the interpretation of exceptions to the *nemo dat* rule has been criticised and qualified by many decisions of the courts, eg *Farquharson Bros v King* [1902] AC 325, *Mercantile Bank of India Ltd v Central Bank of India* [1938] AC 287, and *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371. However, the courts of law do look at the acts of the innocent parties which have contributed to the false but yet apparent authority of the non-owner to sell the goods in question.

69 For example, Lord Denning in *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1975] 1 QB 371 at 379-380 observed in considering the principle of estoppel,

"you start with an innocent person who has been led to believe in a state of affair which he takes to be correct (in this case the purchaser has been led to believe that the rogue was the owner of the car) and has acted upon it. Then you ask yourself how has this innocent person been led into this belief. If it has been brought about by the conduct of another (in this case by the conduct of the original owner), who though not solely responsible, nevertheless has contributed so large a part to it that it would be unfair or unjust to allow him to depart from it, then he is not allowed to go back on it so as to prejudice the innocent person who has acted on it".

70 Lord Denning in *Bishop Motor Finance Corp Ltd v Transport Brakes Ltd* [1949] 1 KB 332 at 336-7 states as follows:

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 better title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute to meet the needs of our times.

71 *Ibid* at 337.

72 (1970) 91 WIN 580.

or documents”,<sup>73</sup> they differed as to what is the most important policy consideration in s 28. For example, Kirby P observed in *Gamer’s* case that to “rely upon constructive delivery of the goods unduly extends the operation” of s 28(2).<sup>74</sup> In contrast, McHugh JA asked why “should any distinction be made between the buyer who takes physical custody and the buyer who does not? Each was or may have been deceived by his seller being left in possession by the original vendor. If the sub-buyer does not take physical custody, he may, of course, in turn lose his title to the goods”.<sup>75</sup> Similar disagreement is found in the decision of the High Court in *Gamer’s* case. Chief Justice Mason stated that the object of s 28(2) is “to protect the sub-buyer who is deceived by the appearance of ownership arising from possession” and thus, there is “no point in confining the protection to the sub-buyer who takes under actual delivery”.<sup>76</sup> In reply, Toohey J cited a statement of the Privy Council in *Pacific Motor Auctions* that the Privy Council believed that the construction of possession being ‘physical possession’ is what the Parliament intended and it means “that when a person sells a car to a finance house in order to take it back on hire-purchase the finance house must take physical delivery if it is to avoid the risk of an innocent purchaser acquiring title to it”.<sup>77</sup> It appears that the ‘physical delivery’ is emphasised by the Privy Council in *Pacific Motor Auctions* for the purposes of interrupting the ‘continuity of possession’ by the seller in s 28(1). There is uncertainty whether the statement can be applied to s 28(2) where the ‘continuity of possession’ is not an issue at all. Therefore, the most relevant policy consideration which supports the exclusion of “constructive delivery” is perhaps seen in the statement of Kirby P that s 28(2) is to deal with the mischief flowing from the entrustment of actual possession to a non-owner and thus only actual delivery can end that mischief.<sup>78</sup> If that is what the Parliament really intended, ‘constructive delivery’ certainly assists the continuation of the mischief. However, if the purposes of s 28 are to protect innocent parties, in particular the third party buyer, the denial of constructive delivery is a denial of the intended protection, although this is subject to the interpretation of the meanings of ‘innocent parties’ and the argument of facilitating commercial transactions.<sup>79</sup> Indeed, there is a need to clarify the intention of the Legislature in passing s 28.

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73 *Pacific Motor Auctions* note 4 *supra* at 886; *Gamer’s* case note 2 *supra* (HC) per Mason CJ at 248, per Brennan J at 251, and per Dawson J at 260; and *Gamer’s* case note 32 *supra* (NSWCA) per McHugh JA at 490.

74 *Gamer’s* case (NSWCA) *ibid* at 482.

75 *Ibid* at 493.

76 *Gamer’s* case note 2 *supra* (HC) at 249.

77 *Ibid* at 271.

78 *Gamer’s* case note 32 *supra* (NSWCA) at 483.

79 The argument regarding facilitation of commercial transactions may either approve or disapprove of ‘constructive delivery’. This can only be resolved by the Legislature.

## VI. CONCLUSION

*Pacific Motor Auctions* and *Gamer's* case were determined in their distinctive circumstances. In *Pacific Motor Auctions* the Court had to determine whether the seller continued or was in possession of the goods under s 28(1). For that purpose, the Court observed specifically that the expression 'possession' in ss 28(1) and (2) means "actual custody". However, the Court did not say the expression "possession" in s 5 means actual custody. In *Gamer's* case the Court had to determine whether the goods had been delivered under s 28(2). For that purpose, the Court found that the goods had been delivered by constructive delivery. However, the majority of the Court did not say possession of the goods under s 28 can be affected by constructive delivery. Any proposition that the seller under s 28(1) or the buyer under s 28(2) could have or continue in 'possession' through constructive delivery would be both legally wrong and logically flawed. The exceptions to the *nemo dat* rule are made in the Act for the purposes of not only facilitating commercial transactions but also protecting the innocent party who bought the goods under an honest belief from the non-owner who has an apparent authority to sell. Only actual custody of goods or documents of title can create an apparent authority to sell. By the same token, a constructive delivery can never discontinue actual custody, because it does not change the continuity of the apparent authority.

Policy considerations may affect the operation of constructive delivery. If avoiding and terminating a state where a non-owner could continuously and fraudulently sell and resell the goods to innocent parties was one of the purposes intended by s 28, the requirement for physical delivery would certainly serve that purpose. In the absence of any historical evidence, this can only be clarified by the legislature. Meanwhile, however, we would have to restrict 'constructive delivery' only to the expression of 'delivery' in s 28, where 'physical possession' does harmonise with 'constructive delivery'.