

# Navigating the Nemo Dat Quod Non Habet Rule: A Look at Property Transactions in Malaysia under the Sale of Goods Act 1957

Nasihah Naimat & Nurul Fariah Md Nordin  
Faculty of Law, Universiti Teknologi MARA, Melaka, Malaysia

To Link this Article: <http://dx.doi.org/10.6007/IJARBSS/v13-i9/18891> DOI:10.6007/IJARBSS/v13-i9/18891

**Published Date:** 04 October 2023

## Abstract

The legal principle "*nemo dat quod non habet*" (no one can give what he has not) establishes that a person cannot transfer ownership of a property that they do not have legal title to. However, there are exceptions to this rule. In Malaysia, the application of the exception allowing for the transfer of property by a good faith buyer has been a topic of debate. Through examining the application of the exception under the Sale of Goods Act 1957, it can be argued that it has advantages such as promoting trade and commerce, as well as protecting good faith buyers. However, there are also potential disadvantages, such as increase uncertainty and the possibility of abuse. In conclusion, the legal system must carefully balance the promotion of trade and commerce with the protection of all parties involved in property transactions.

**Keywords:** Nemo Dat Quod Non Habet, Good Faith Buyer, Ownership, Transfer, Malaysia.

## Introduction

The "*nemo dat quod non habet*" rule is a fundamental principle in contract law that governs the transfer of ownership of goods. The rule holds that a person cannot transfer ownership of property they do not legally possess. This principle is recognized and applied in Malaysia, which has a common law system influenced by English law. The rule helps to maintain the integrity of property transactions and deter fraudulent transfers, ensuring that individuals are held accountable for their actions.

Despite this, there are exceptions to the rule, such as those laid down in the Sale of Goods Act 1957 in Malaysia, which permits the transfer of ownership of property even if the transferor does not have legal title. These exceptions are typically based on the principle of good faith and the belief that the transferor did not intend to defraud the buyer. This article aims to examine the advantages and disadvantages of applying the exceptions in Malaysia. By striking a balance between promoting trade and commerce and protecting the interests of all parties involved, the legal system can ensure the stability and predictability of property transactions and contribute to the growth of the market.

### Methodology

This article utilizes a qualitative research methodology, which involves an in-depth examination of the application of the exception to the "*nemo dat quod non habet*" rule in Malaysia. To achieve this, a review of legal literature and case law is conducted to gain insight into the application of the exception and its impact on property transactions in Malaysia. The review of case law involves the examination of judicial decisions in Malaysian courts, which have addressed the application of the exception to the "*nemo dat quod non habet*" rule. The study aims to examine the advantages and disadvantages of the exception and its impact on the stability and predictability of property transactions in Malaysia.

### ***Nemo dat quod non habet* rule and its Exceptions under Sale of Goods Act 1957**

The "*nemo dat quod non habet*" rule is embodied in section 27 of the Sale of Goods Act 1957, which states:

*"Where goods are sold by a person who is not the owner thereof and who does not sell them under 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."*

This rule serves to protect the interests of both the buyer and the original owner of the goods and is widely recognized and applied in jurisdictions following the common law tradition. There are, however, several exceptions to the rule that are outlined in the Sale of Goods Act of 1957, under which the buyer will get the title to the goods even though the seller was not the owner or did not have the authority to sell.

**First:** Estoppel. Estoppel is a well-established principle that has significant implications for the transfer of ownership of goods. Section 27 of the Sale of Goods Act 1957 recognizes the application of estoppel in Malaysia, providing a legal framework for its use in property transactions. Estoppel is invoked when the owner of the goods, through their conduct, makes a representation to the buyer that the person selling the goods has the authority to do so, and the buyer acts in reliance on this representation. The doctrine of estoppel holds that the owner is then prevented from denying the seller's authority to transfer ownership of the goods.

This exception to the "*nemo dat quod non habet*" rule is grounded in the principles of fairness and equity. In certain circumstances, it may be unjust to permit an individual to deny that they have transferred ownership of property, even if they lack the legal right to do so. This is particularly true if the buyer acted in good faith, without knowledge that the person transferring the property did not have the legal right to do so. Estoppel protects the buyer who acted in good faith and relied on the representations of the owner. If the buyer had no knowledge that the person transferring the property did not have the legal right to do so, it would be unjust to allow the owner to deny the transfer of ownership. Estoppel prevents such a situation and ensures that the buyer is protected from any unfair actions of the seller.

**Second:** Sale by Mercantile Agent. The concept of a "mercantile agent" is a crucial element in the law of sales of goods, as it enables a buyer to obtain good title to goods even if the seller has no legal right to sell them. Under section 2 of the Sale of Goods Act 1957, a mercantile agent is defined as an agent who has an authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods. This definition implies that a mercantile agent, despite not having title to the goods, can confer a good title to a buyer who acts in good faith without notice of the agent's lack of authority.

However, this exception to the general rule is subject to certain conditions. First, the mercantile agent must have possession of the goods or document of title at the time of the sale. Section 2 of the Sale of Goods Act 1957 defined document of title to include

*“a bill of lading, dock warrant, warehouse keeper’s certificate, wharfinger’s certificate, railway receipt, warrant or order for delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;”*.

Second, the mercantile agent must have the owner's permission to possess the goods or document of title. The approval of the owner is necessary when the mercantile agent possesses the goods or document of title. Third, the mercantile agent must sell the goods in the ordinary course of business, which requires adherence to the usual business practices of the agent. This includes selling at a fair market price, advertising reasonably, and delivering goods efficiently.

Furthermore, the buyer must act in good faith and have no knowledge of the mercantile agent's lack of authority to sell. If the buyer acquires the goods without notice of the mercantile agent's lack of authority and in good faith, the buyer may obtain good title to the goods. However, if the agent breaches any of these conditions, they may be liable for any loss suffered by the principal.

**Third:** Sale by One of the Joint-Owners. Section 28 of the Sale of Goods Act 1957, allows for the transfer of title of jointly owned goods through the sale by one of the co-owners, even if that co-owner did not have the authority to sell. The exception is subject to two conditions that must be satisfied for it to be valid: firstly, one of the owners must have sole possession of the goods with the permission of the other co-owners, and secondly, the buyer must act in good faith and have no knowledge of the seller's lack of authority.

In practice, the second condition is similar to the last condition of the previous exception discussed in this article, as it concerns the buyer's good faith and lack of knowledge regarding the seller's lack of authority. An example is given of two co-owners, A and B, who jointly purchased a sewing machine, with the understanding that B would keep the machine in her house and A would use it when needed. Without A's knowledge or consent, B sells the sewing machine to C, who is unaware that A did not agree to the sale. Under section 28, C is considered a buyer in good faith and acquires a good title to the sewing machine, despite the fact that B did not have the authority to sell it.

**Fourth:** Sale under a Voidable Contract. The legal principle of voidable contracts has significant implications for the sale of goods. In many circumstances, a formal agreement can be rendered voidable due to factors such as coercion, fraud, misrepresentation, or undue influence, as outlined in section 19 and 20 of the Contracts Act 1950. Section 29 of the Sale of Goods Act 1957 explained that;

*“Where the seller of goods has obtained possession thereof under a contract voidable under Section 19 or section 20 of the Contracts Act 1950, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller’s defect of title”*.

Basically, from this provision, three conditions must be met: the seller obtained possession of the goods under a voidable contract, the voidable contract has not been rescinded and the buyer bought the goods in good faith without knowledge of the fact that the seller has no good title to pass. It has to be noted that if these conditions are fulfilled, the buyer will get a

good title to the goods. For example, if a person purchases a car from someone who has fraudulently obtained it, the buyer will not acquire clear title to the car even if they have paid for it. If the original owner of the car comes forward and proves their ownership, they may be able to reclaim the car from the buyer. Therefore, it is important for buyers to exercise caution and ensure that they have purchase the goods in good faith and without notice of any defects in the seller's title.

**Fifth.** Sale by a Seller in Possession After Sale. This exception has been governed under section 30(1) of the Sale of Goods Act 1957 in which it simply explained that when the seller has transferred the property in the goods to a buyer but remains in possession of the goods. The seller then sells the goods to another buyer, who buys in good faith. The effect of this circumstances is that the original buyer will lose his title, and the 2<sup>nd</sup> buyer will eventually get the title. The original buyer however has the right to seek for remedy against the seller.

In *Syarikat Batu Sinar Sdn Bhd & Ors v UMBC Finance Bhd & Ors [1990] 3 MLJ 468*, the judge cited that

*"the important part of s 30(1) for the purpose of this case is '... having sold goods, continues or is in possession of the goods ...'. The word 'possession' therein, has been interpreted by the Privy Council in the Pacific Motor Auctions case [1965] AC 867 to mean continuous physical possession without a break after the sale of goods and up to the time of another or subsequent sale".*

In the case of *Syarikat Batu Sinar Sdn Bhd*, the second plaintiff had bought a tractor from the third Defendant and then leased it to the first Plaintiff, a finance company. Unknown to the plaintiffs, the third Defendant had earlier sold the tractor to another finance company who after that hired it to the second Defendant pursuant to hire-purchase agreement. The court held that the plaintiffs had failed to prove the continuity of possession for there was a break in such a possession of the tractor, when the tractor dealer delivered the tractor to the hirer. The significance regarding this exception is based on whether there is a break in possession. The interpretation of the term 'possession' plays a crucial role in determining the applicability of this exception, and a break in possession will defeat any claim under this section

**Six.** Sale by a Buyer in Possession After Sale. This exception can be seen in Section 30(2) of the Sale of Goods Act 1957 in which it can be simply explained as the buyer has been consented by the seller to obtain possession after the contract of sale has been done. However, it has to be noted that the property is still subject to some rights and interest of the seller. Such buyer can only pass a good title to another good faith buyer who has no knowledge about the rights or interest of the original seller.

This one case that illustrated this provision is in *Newtons of Wembley Ltd v Williams [1965] 1 QB 560*, whereby the Plaintiff sold the car to A who paid by cheque. Although A was given possession of that car, however the title does not belong to A until the cheque has been cleared. It turns out that the cheque has been dishonoured and A had sold the car to B, without the knowledge of the above fact. B consequently resold the car to the Defendant. The Plaintiff claim the car to be return to them from the Defendant. Subsequently, the court held that as A was given possession of that car by the consent of the Plaintiff, therefore, he could pass a good title to B who in turn transferred the car to D. Hence, D had a good title and entitled to the car.

In addition, it must be noted that the above provision is not applicable in hire purchase cases. This was demonstrated in the case of *Butterworth Used Cars Sdn Bhd v Maybank Finance [1991] MLJU 19*, where the hirer in the hire-purchase agreement was not considered the buyer, and as such, the section above does not apply."

### **The Advantages and Disadvantages of Applying the Exception to the *Nemo Dat Quod Non Habet* Rule in Malaysia**

The exception to the "*nemo dat quod non habet*" rule has been the subject of considerable debate and discussion in Malaysia. While this exception has certain benefits, it also has drawbacks. This paper aims to examine both the advantages and disadvantages of applying the exception of the "*nemo dat quod non habet*" rule in Malaysia.

One of the key advantages of the exception to the "*nemo dat quod non habet*" rule is that it promotes trade and commerce. As noted by Goode (2004); Aigbe (2023), by allowing individuals and organizations to transfer property without worrying about ownership issues, this exception encourages economic growth and drives innovation and progress. If buyers have confidence that they will acquire good title to the property they purchase, they are more likely to invest in property and willing to pay a higher price. Furthermore, it can reduce the risks associated with property transactions. If individuals or organizations were required to conduct extensive research into the ownership history of every property they intended to purchase or transfer, it would significantly slow down the process of trade and commerce (Meusburger, 2020), which would reduce the number of property transactions and the economic growth they generate."

Another significant advantage of the exception is that it protects innocent parties, such as good faith buyers, who have acquired property without any knowledge of ownership issues (*Bishopsgate Motor Finance v Transport Brakes [1949] 1 KB 322 (CA) 336-337*). For instance, if a person purchases a property from a seller who appears to be the rightful owner and has no reason to believe that there are any ownership issues, the rule of good faith buyer protects that person from losing the property if it is later revealed that the seller did not have the legal right to transfer ownership. This protection of the good faith buyer is particularly important in maintaining the stability and predictability of property transactions (Meusburger, 2020). The rule provides certainty and confidence to buyers that they will acquire good title to the property they purchase, provided they do so in good faith and without notice of any ownership issues. This certainty, in turn, promotes the smooth functioning of property transactions and helps to ensure that the legal system is fair and just for all parties involved. Notwithstanding its advantages, the application of the exception to the "*nemo dat quod non habet*" rule in Malaysia is not without its challenges. One of the significant disadvantages of the rule of good faith buyer is that it can increase uncertainty in property transactions (Meusburger, 2020). This is because determining whether an individual or organization is a good faith buyer or not can be challenging, especially in cases where there are conflicting accounts of the transaction. For example, it may be difficult to determine whether a buyer acted in good faith or had notice of any ownership issues. As a result, disputes and legal battles may arise, which can undermine the stability of property transactions and the integrity of the legal system. In addition, the ambiguity surrounding the rule of good faith buyer can discourage potential buyers from investing in property, as they may fear being embroiled in legal battles over ownership issues (Gemmell, 2020; Goode, 2004).

Another challenges of the exception to the "*nemo dat quod non habet*" rule is that it can be abused by individuals or organizations who seek to acquire property without having to worry about ownership issues. The rule creates incentives for sellers to conceal defects in title, as they may be able to transfer the risk of loss to an innocent buyer (Meusburger, 2020). In this case, the good faith buyer would acquire the property with good title, while the rightful owner would be left without legal recourse (Riley, 2017). The implications of such an outcome are manifestly unjust and undermine the fairness and predictability of property transactions. Furthermore, the lack of clarity around ownership issues and the potential for exploitation

can create a climate of uncertainty, which could discourage potential buyers from engaging in property transactions.

### **Conclusion**

The "*nemo dat quod non habet*" rule is crucial in property transactions, particularly in situations where the transferor acquired the property illegally or lacks clear title, as it protects the rights of good faith buyers and maintains the integrity of the property market. To ensure equitable outcomes for all parties, policymakers and legal authorities must balance the benefits and drawbacks of applying the exception to the "*nemo dat quod non habet*" rule. The exceptions outlined in the Sale of Goods Act 1957 are complex and require careful consideration on a case-by-case basis, with the parties need to understand their rights and responsibilities under the law. While the exceptions have advantages such as promoting legitimate trade and preventing the proliferation of stolen goods, they also have disadvantages such as perpetuating criminal activities, creating disputes, and being inconsistent with other legal principles. Overall, a balance must be struck to ensure stability and predictability in the property market.

### **Corresponding Author**

Nasihah Naimat

Faculty of Law, Universiti Teknologi MARA (UiTM), Melaka.

Email: nasihahnaimat@uitm.edu.my

### **References**

- Aigbe, I. A. (2023). Emerging trends in sale of goods in Nigeria: An examination of market overt principle and the exceptions. *International journal of comparative law and legal philosophy (IJOCLLEP)*, 4(2).
- Bishopsgate Motor Finance v Transport Brakes. (1949). 1 KB 322 (CA) 336-337
- Gemmell, O. (2020). Is Good Faith Leaving a Bad Taste? The Role of Good Faith in the Transfer of Corporeal Property in Scots Law. *Edinburgh Student L. Rev.*, 4, 9.
- Goode, R. (2004). *Commercial Law* (3<sup>rd</sup> ed.). Penguin Books. P.89
- Meusbarger, L. U. (2020). The Proof Is in the Numbers: An Economic Analysis of the English Rule of Nemo Dat. *Cambridge L. Rev.*, 5, 1.
- Newtons of Wembley Ltd v Williams. (1965). 1 QB 560
- Riley, O. (2017). Sale of Goods by a Non-Owner: The Competing Property Rights of a True Owner and a Good Faith Purchaser. *QMLJ*, 8, 99.
- Sale of Goods Act 1957
- Syarikat Batu Sinar Sdn Bhd & Ors v UMBC Finance Bhd & Ors. (1990) 3 MLJ 468