

Mistake of Identity: A Comparative Analysis

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*This article notes that English courts deal with voidable title conflicts by attempting to find a contract between the original owner of goods and the rogue whose actions made the contract void or voidable. This position has become entrenched following the decision of the House of Lords in *Shogun Finance v. Hudson*. A comparative analysis with the law of the United States of America indicates a superior alternative: there is no need for a contract between the original owner and the rogue.*

I. INTRODUCTION

In the sale of goods, the general rule is that “no one can transfer a better title than he himself possesses: *nemo dat quod non habet*.”¹ This general ‘*nemo dat* rule’ can lead to ‘*nemo dat* conflicts’ between someone claiming the benefit of the *nemo dat* rule and another claiming protection under one of the exceptions to the *nemo dat* rule.² The following basic situation illustrates a *nemo dat* conflict. First, an original owner of goods sells them to a middleman, who then sells them to an innocent purchaser. If the middleman has misrepresented his identity, the contract between him and the original owner may be void, or voidable. If the contract is void, any title that would ordinarily pass under the contract is itself void, and the *nemo dat* rule means that the innocent purchaser would only have a void title to the goods, which is of minimal value. However, if the contract was voidable, then the middleman can pass a voidable title to the innocent purchaser, who could then gain protection from the general *nemo dat* rule by the ‘sale under voidable title’ exception provided by the Sale of

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¹ *Whistler v Forster* (1863) 14 CB (NS) 248, 257; 143 ER 441, 445, Willes J. This general rule is now embedded in the Sale of Goods Act 1979, section 21.

² For a general overview of the exceptions to the general *nemo dat* rule, see eg A G Guest *et al* (eds), *Benjamin’s Sale of Goods*, 7th edn (Sweet & Maxwell, 2006), ch 7.

Goods Act 1979, section 23.³ The absence of the middleman (either because he is untraceable or is not worth suing) causes the *nemo dat* conflict between the original owner and the innocent purchaser as to who is entitled to the goods. English law, exemplified by the recent House of Lords decision in *Shogun Finance Ltd v. Hudson*,⁴ attempts to solve this conflict by determining whether the contract between the original owner and the middleman was void or voidable. This approach, venerable though it is, suffers from a number of serious problems.⁵

In *Shogun Finance* and some of the subsequent commentary there have been gentle references to the law in the United States of America as provided by the Uniform Commercial Code. This article will show that the US law provides a highly acceptable alternative to the English method of dealing with this particular problem. Part II will detail the English approach (exemplified by *Shogun Finance*) to this particular *nemo dat* conflict, highlighting the problems it can lead to. Part III will provide an exposition of the relevant US law. Part IV provides a conclusion.

II. VOIDABLE TITLE, MISTAKE OF IDENTITY AND ‘CONTRACTUALISM’

Although there are many factors that can render a contract void or voidable,⁶ this article concentrates solely on mistakes resulting from a third party misrepresenting his identity. Different types of mistakes of identity can vitiate a contract, rendering it void or voidable. If there is a mistake of identity, such that the contract is void, “the harsh result is that the

³ “When the seller of goods has a voidable title to them, but his title has not been avoided 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.”

⁴ [2003] UKHL 62; [2004] 1 AC 919; [2004] 1 Lloyd’s Rep 532.

⁵ The Law Commission has decided, following the decision in *Shogun Finance*, to review this whole area of law: Law Commission, *9th Program of Law Reform* (Law Com No 293, 2005), [3.51–3.57].

⁶ See generally H Beale *et al* (eds), *Chitty on Contracts*, 29th edn (Sweet & Maxwell, 2004), vol 1.

[innocent purchaser], through no fault of her own, acquires no rights.”⁷ The distinction between different types of mistake of identity “which can sometimes be a very fine one ... has led to the greatest dissatisfaction with the present state of the law.”⁸ There has been much literature on this area of law, with many commentators offering different interpretations of the case-law on mistake of identity.⁹ This literature seems to focus on the nature of the mistake necessary to show that the contract is voidable,¹⁰ attempting to distinguish those identity mistakes that make a contract void from those that merely make it voidable. Whilst this line of analysis is mirrored in this article, the focus here is quite different.

This article considers voidable title in the context of *nemo dat* conflicts. As noted above, *nemo dat* conflicts involve three parties – they are between an original owner and an innocent purchaser, because of the actions of a rogue middleman.¹¹ This ‘eternal triangle’ is often dealt with by the use of what has been called a “doctrinal-derivational approach”, whereby the rights of the parties are determined according to whether there has been an effective transfer of those rights along the chain of dispositions.¹² It is submitted that in the voidable title context, the term ‘contractualism’ may be more appropriate.¹³ The English courts have developed and accepted a methodology – in accordance with the doctrinal-derivational

⁷ C MacMillan, “Rogues, Swindlers and Cheats: The Development of Mistake of Identity in English Contract Law” [2005] CLJ 711, 712.

⁸ Law Reform Committee, *Twelfth Report (Transfer of Title to Chattels)*, (Cmnd 2958, 1966), [6]. Contrast P S Atiyah, J N Adams and H MacQueen, *The Sale of Goods*, 11th edn (Longman, 2005), 43-44.

⁹ See eg A L Goodhart, “Mistake as to Identity in the Law of Contract” (1941) 57 LQR 228; G L Williams, “Mistake as to Party in the Law of Contract” (1945) 23 Can B Rev 271 and 380; C J Slade, “The Myth of Mistake in the English Law of Contract” (1954) 70 LQR 385; MacMillan [2005] CLJ 711.

¹⁰ MacMillan [2005] CLJ 711, 713.

¹¹ There may be more than three parties: often there may be many middlemen (in addition to the rogue middleman). The basic problem remains the same though.

¹² M Mautner, “‘The Eternal Triangles of the Law’: Toward a Theory of Priorities in Conflicts Involving Remote Parties” (1991) 90 Mich L Rev 95, 97-98.

¹³ The use herein of ‘contractualist’ and variants thereof is as terms of art; the terms bear no relation to any similarly named concepts, such as in R Kar, “Contractualism About Contract Law” (2007) 40 Loy L A L Rev (forthcoming), available at SSRN: <<http://ssrn.com/abstract=993809>>.

approach – for dealing with voidable title conflicts,¹⁴ which is specifically based on assessing the transaction between the original owner and the middleman according to the rules of contract formation. That assessment will either show that there was a valid contract (in which case there is no problem as title will pass along the chain of sales), a void contract, or a voidable contract. Essentially a property problem (the *nemo dat* conflict) is dealt with as a contract problem,¹⁵ hence ‘contractualism’. The problems with contractualism are serious, and are discussed below. However, it is important to recognise that contractualism is not the only methodology available for dealing with *nemo dat* conflicts that take the form of voidable title conflicts; indeed as the exposition of the US law that follows in Part III will show, these types of *nemo dat* conflicts can be satisfactorily dealt with without reference to the *contractual* nature of the transaction between the original owner and the middleman.

Contractualism consists of strict and relaxed contractualism. Strict contractualism is the basic starting point. The axiom of strict contractualism is the “trite law”¹⁶ that for a contract there must be offer and acceptance that correspond. All the court looks for is whether a contract has come about between the original owner and the middleman. This approach is best illustrated by the decision in *Cundy v. Lindsay*,¹⁷ where Lord Cairns LC asked: “Was there any contract which, with regard to the goods in question in this case, had passed the

¹⁴ The reasons for this gradual acceptance are varied. MacMillan [2005] CLJ 711, 732 notes that the main influence on the early cases, including the significant decision in *Cundy v. Lindsay* (1878) LR 3 App Cas 459, was the interaction between the criminal law and the law of contract. Nevertheless, the result is the same in terms of the accepted doctrine.

¹⁵ G McMeel, “Interpretation and mistake in contract law: ‘The fox knows many things ...’” [2006] LMCLQ 49, 70; K Scott, “Mistaken Identity, Contract Formation and Cutting the Gordian Knot” [2004] LMCLQ 292.

¹⁶ *Shogun Finance v. Hudson* [2004] 1 AC 919, [63] (Lord Millett).

¹⁷ (1878) LR 3 App Cas 459. It is not suggested that *Cundy’s* case was a watershed and that contractualism did not exist beforehand (though MacMillan [2005] CLJ 711, 731-733, has show that the early history of mistake of identity is more based on the interaction between criminal and contract law, and that it was not until – or even after – *Cundy’s* case that the problem began to be seen in purely contractual terms). It is just that *Cundy’s* case is the “usual starting point for a discussion of mistaken identity”: MacMillan [2005] CLJ 711, 713. Its importance to the development of voidable title jurisprudence cannot be underestimated, and its impact is still keenly felt today: see eg *Shogun Finance v. Hudson* [2004] 1 AC 919, [108] (Lord Millett): “It has had an unfortunate influence on the development of the law, leading to an unprincipled distinction between face-to-face transactions and others and the indefensible conclusion that an innocent purchaser’s position depends on the nature of the mistake of a third party”.

property in the goods from the [original owner] to the [middleman]?”¹⁸ There was not, because of an absence of *consensus ad idem*.¹⁹ And, as the first edition of Chalmers’ text on sale describes the law following *Cundy’s* case: “If the nature of the fraud be such that there never was a contract between the parties, as for instance, if A obtains goods from B by falsely pretending to be X, then the person who so obtains the goods has no title at all and can give none.”²⁰ And so with strict contractualism a mistake of identity indicates a lack of correspondence between offer and acceptance, and thus there is no contract (ie there is a void contract) between the original owner and the middleman.

The simplicity of strict contractualism is in marked contrast to the problems it can cause, as it is a Procrustean approach to *nemo dat* conflicts. There is a significant conceptual difference between the tripartite nature of *nemo dat* conflicts and ‘normal’ two-party contractual disputes, where the dispute is between an original owner and (what would be in the *nemo dat* conflict) a middleman. In a two-party conflict there is no innocent purchaser, for example because the ‘middleman’ has not disposed of the goods. The strict contractualist approach to mistake of identity problems is merely an application of the rule for two-party conflicts to *nemo dat* conflicts. The failure to see *nemo dat* conflicts as distinct means a problem which is essentially proprietary in nature is actually determined according to the laws of contract formation.²¹

¹⁸ (1878) LR 3 App Cas 459, 464.

¹⁹ *Ibid*, 465 (Lord Cairns LC), 467 (Lord Hatherley), 471 (Lord Penzance).

²⁰ M D Chalmers, *The Sale of Goods: including the Factors Act 1889* (William Clowes and Sons, London, 1890), 41. See also F Pollock, *Principles of Contract at Law and in Equity*, 2nd edn (London, 1878), 409; OW Holmes, *The Common Law* (Little Brown Co., Boston, 1881), Lectures VIII and IX; J W Jones, *The Position and Rights of a Bona Fide Purchaser for Value of Goods Improperly Obtained* (Cambridge University Press, 1921), 66.

²¹ See *supra*, n 15.

In his influential article “Mistake as to Identity in the Law of Contract”,²² Goodhart made a point about contract formation that, whilst valid in the context of simple two-party disputes, causes problems in the conceptually different *nemo dat* cases: it is a “self-evident and platitudinous statement that every contract is always an agreement between two or more specific, identifiable persons. One party, A, makes an offer which the other party, B, accepts. In this sense every contract is and must be personal, the parties being the identified A and B.”²³ Fair enough, but what about *nemo dat* conflicts? Mautner has accurately sets out the “major flaw” with the doctrinal-derivational approach (and thus consequently with contractualism); it attempts to solve the *nemo dat* conflict

“without explicitly and directly taking into account the conduct of the parties involved and the policies relevant to that conduct. Rather, the major determinant under the doctrinal-derivational approach is the amount of legal rights and powers held by [the middleman], as a result of her transaction with [the original owner] ... Moreover, *this determinative factor supposedly arises within the context of the [original owner to middleman] transaction independently of the prospect that the disputed asset will eventually be transferred from [the middleman to the innocent purchaser]*”.²⁴

Thus, the “real conflict” is between the original owner and the innocent purchaser.²⁵ But strict contractualism holds that the *nemo dat* conflict is solvable only by determining the existence of contractual relations between the original owner and the middleman. The italicised text hints at the problem suffered by the innocent purchaser – his rights to the goods will be determined according to the nature of the transaction between the original owner and

²² Goodhart (1941) 57 LQR 228. As to its influence, see eg *Ingram v. Little* [1961] 1 QB 31, 64 (Devlin LJ).

²³ Goodhart (1941) 57 LQR 228, 228-229.

²⁴ Mautner (1991) 90 Mich L Rev 95, 98-99 (emphasis added).

²⁵ *Ibid*, 99.

the middleman, something that is beyond his knowledge or control, a position described as “little short of absurd”.²⁶ The original owner cannot ever intend to contract with the middleman, only with whoever the middleman misrepresents himself as, and the middleman – if he is a rogue – can never be understood as wanting to enter into a binding contract.²⁷

Strict contractualism has been challenged by relaxed contractualism. Relaxed contractualism developed as courts distinguished different types of identity mistake, between contracts done face-to-face and those done at arm’s length. Generally, face-to-face deals are those done between parties in sufficiently close physical proximity to avoid the need for an intervening medium, whereas arm’s length deals are those where the distance between the parties requires some sort of medium for communication, such as mail.²⁸ The courts still require a contract between the original owner and the middleman. However, under relaxed contractualism there is a presumption that the original owner intends to contract with the person he is actually dealing with (ie the middleman), regardless of who the person is claiming to be, who he actually is, and who the original owner thinks that person to be, provided that person is in sufficient physical proximity to the original owner. This presumption appears to be predicated entirely on the actions of the original owner and the middleman. It is only applicable, and seems to apply automatically, to cases where there is a face-to-face deal.²⁹

²⁶ *Shogun Finance v. Hudson* [2004] 1 AC 919, [35] (Lord Nicholls).

²⁷ *Ibid*, [108] (Lord Millett).

²⁸ The terms used here correspond to *inter praesentes* and *inter absentes* respectively: see eg M P Furmston, *Cheshire, Fifoot & Furmston’s Law of Contract*, 15th edn (OUP, 2007), 316-317.

²⁹ The exact nature of the presumption has never been fully considered. Even in *Shogun Finance* the judges seemed to skirt around this issue. It is unclear whether it is a presumption that the original owner is better placed to check the middleman’s identity, or obtain immediate payment, when in a face-to-face deal (compared to one at arm’s length). See eg A Chandler and J P Devenney, “Mistake as to Identity and the Threads of Objectivity” (2004) 3 *Journal of Obligations and Remedies* 7, 16-17. It is beyond the scope of this article to consider this issue in any depth. What is more relevant here is the fact that the presumption has developed within the context of contractualism. It illustrates the distinction in the treatment of deals done at arm’s length and those done face-to-face, which still continues following *Shogun Finance v. Hudson* [2004] 1 AC 919 (see *infra*, n 96 and accompanying text).

This approach is well illustrated by the decision in *Phillips v. Brooks Ltd.*³⁰ In that case Horridge J was faced with the following situation: a rogue entered a jeweller's shop, and selected some jewellery for purchase. He produced a chequebook to pay for the goods, and claimed to be one Sir George Bullough, and gave an address. The jeweller knew of such a man, and the address was checked and found valid, thereupon he allowed the rogue to obtain possession of some of the goods. The cheque was dishonoured, and the goods were pawned to a good faith pawnbroker, causing the *nemo dat* conflict. Horridge J followed a decision of the Supreme Judicial Court of Massachusetts,³¹ and held that because there had been a face-to-face deal, it could be presumed that the "seller intended to contract with the person present".³² By implication there needed to have been a contract, but the face-to-face presumption meant that it was voidable, not void. The formalities of contract formation are adhered to: there must be an agreement between the original owner and the middleman, accompanied by *consensus ad idem*, even if this formality is based on the presumption (essentially a fiction) that such agreement exists.³³

³⁰ [1919] 2 KB 243. *Phillips v. Brooks* should not be misunderstood as the source of relaxed contractualism, much like how *Cundy v. Lindsay* cannot be taken to be the origin of strict contractualism (see *supra*, n 17). Indeed, a good example of relaxed contractualism is the decision at first instance in *Cundy v. Lindsay* (1876) LR 1 QB 348.

³¹ *Edmunds v. Merchants' Dispatch Transportation Co* (1883) 135 Mass 283 (a rogue misrepresented himself as a well-known reputable merchant whilst physically present at the original owner's place of business).

³² [1919] 2 KB 243, 248.

³³ It is accepted that there a number of alternative interpretations of *Phillips v. Brooks*. In *Lake v. Simmons* [1927] AC 487, 501-502, Viscount Haldane claimed the decision had been reached because the contract had been concluded before the middleman made his misrepresentation of identity. MacMillan [2005] CLJ 711, 738-739, explains the decision as resulting from changes in the interaction between criminal and civil law. MacMillan argues that the true reason for the decision in *Cundy v. Lindsay* was that the rogue middleman in that case had been convicted of obtaining goods by false pretences, which at the time meant that the original owner was able to recover his goods even from an innocent purchaser. However, changes to the criminal law prior to *Phillips v. Brooks* meant that whilst it was possible for an original owner who had lost goods because of theft to recover those goods even from an innocent purchaser upon conviction of the thief, it was no longer possible for the original owner to recover goods where he had lost them due to the fraud of a middleman. The author is in agreement with MacMillan that this is the most appropriate reason for the decision in *Phillips v. Brooks*. However, whatever causal factors existed, the outcome is still a presumption in favour of face-to-face deals.

Phillips v. Brooks has been heavily criticised,³⁴ yet the face-to-face presumption has survived ever since. In *Ingram v. Little* a majority of the Court of Appeal held that there was a presumption in face-to-face deals.³⁵ However, a different majority held that as the facts showed that the original owners were so concerned with the financial “stability and standing” of the middleman,³⁶ the presumption was rebutted.³⁷ The basic facts in *Ingram v. Little* were that a rogue middleman offered to buy a car from the original owners, and managed to obtain possession of the car by presenting the owners with a (later dishonoured) cheque, in spite of the owners’ reluctance to part with the car for anything but cash. He got around the owners’ concern for his financial standing by misrepresenting his identity. The owners’ assessed the validity of his identity by checking the name and address he gave against the telephone directory, which convinced them to hand over the car. In *Lewis v. Averay* the Court of Appeal was faced with a very similar scenario to *Ingram v. Little*, but this time the Court held that the presumption was not rebutted on the facts.³⁸ Yet the facts were essentially the same;³⁹ the only distinction of any importance seems to be that the original owners in *Ingram v. Little* secretly checked the rogues supposed identity, whereas the original owner in *Lewis v. Averay* merely asked the rogue for identification (which was provided). There is great

³⁴ Both C K Allen, “Mistaken Identity”, [1928] 44 LQR 72 and Goodhart (1941) 57 LQR 228 argue that *Phillips v. Brooks* is untenable in the face of *Lake v. Simmons* [1927] AC 487. Presumably this is on the grounds that it was suggested *Phillips v. Brooks* be limited to its facts: *Lake v. Simmons* [1927] AC 487, 501-502 (Viscount Haldane); *Ingram v. Little* [1961] 1 QB 31, 51 (Sellers LJ), 60 (Pearce LJ). It should be noted though that the House of Lords in *Lake v. Simmons* was clearly heavily influenced by the criminal conviction of the middleman in that case. Yet as MacMillan [2005] CLJ 711 clearly illustrates (see *supra*, n 33) this approach is highly flawed. In criticising *Phillips v. Brooks* Goodhart (1941) 57 LQR 228, 240-241, submits that there is no contract if an original owner believes he was entering into a contract with X (who the middleman misrepresents himself as), and the middleman knows of this. He gives the following rationale: “If a blind man makes an offer to A, who is present, in the mistaken belief that he is B, can A, who is aware of this mistake, accept the offer? The law must have lost all touch with reality if it holds that under such circumstances there is a contract.” According to Finucane, this view is “somewhat strange”: A Finucane, “Mistaken Identity and its Effect on Contractual Validity: Some Cases from the English Courts” (1990-1991) 24 Arkon L Rev 553, 559. A similar view is expressed by K O Shatwell, “The Supposed Doctrine of Mistake in Contract: A Comedy of Errors” (1955) 33 Can B Rev 164, 189. Ultimately, Goodhart fails to consider the law’s grip on reality if it failed (as it has) to acknowledge the effect of a subsequent transfer by B, the middleman, to an innocent purchaser. He fails to distinguish between two and three-party conflicts (see *supra*, n 22 and accompanying text).

³⁵ [1961] 1 QB 31, 61 (Pearce LJ), 66 (Devlin LJ).

³⁶ *Ibid*, 51 (Sellers LJ).

³⁷ *Ibid*, 50-51 (Sellers LJ), 59 (Pearce LJ).

³⁸ [1972] 1 QB 198, 207 (Lord Denning MR), 208 (Phillimore LJ).

³⁹ Lord Denning MR considered the cases to be “quite indistinguishable” on their facts: [1972] 1 QB 198, 206.

difficulty in drawing a line of distinction between these two cases that can be fully justified. What is evident is that the contractual nature of the face-to-face presumption remained of paramount importance. For Sellers LJ the decision “turns solely on whether [the middleman] entered into a contract which gave him a title to the [goods] which would subsist until it was avoided on the undoubted fraud being discovered.”⁴⁰ Lord Denning MR took a similar contractualist approach, basing his analysis squarely on the need for a contract (subject to the presumption):⁴¹ looking to the “outward appearances” the original owner “made a contract under which he sold the [goods] to the [middleman] ... It was, of course, induced by fraud ... but it was still a contract, though voidable for fraud. It was a contract under which [the goods] passed to the [middleman]”.⁴²

It seems then that the English law on mistake of identity and *nemo dat* conflicts was heavily confused. There are the problems with strict contractualism.⁴³ Furthermore, the deviation from strict contractualism is not trouble-free, as the relaxed contractualist approach is really just another hurdle, in the guise of a protection for innocent purchasers. The decisions in *Ingram v. Little* and *Lewis v. Averay* show the frailty of relaxed contractualism; fine distinctions can lead to the presumption’s rebuttal. The fine distinctions between those identity mistakes excluded from the presumption and those covered do not reflect the multi-faceted communication between commercial actors possible today.⁴⁴ The problems involved with this distinction is one of the reasons why “[t]here are few more vexed areas of contract law” than mistake of identity.⁴⁵ Ultimately it leads to the charge that, as with strict

⁴⁰ [1961] 1 QB 31, 48. His Lordship also noted, at 51, that the issue was to be understood through the application of “the elementary principles of offer and acceptance.” Pearce LJ was in agreement, stating (at 55) that “[t]he question here is whether there was any contract, whether offer and acceptance met.”

⁴¹ [1972] 1 QB 198, 205 (Lord Denning MR).

⁴² *Ibid*, 207 (Lord Denning MR).

⁴³ See *supra*, text following n 20.

⁴⁴ This point was made in *Shogun Finance v. Hudson* [2004] 1 AC 919, [33] (Lord Nicholls), [69] (Lord Millett).

⁴⁵ MacMillan [2005] CLJ 711. See also Goodhart (1941) 57 LQR 228.

contractualism, the innocent purchaser is still dependant on actions beyond his knowledge or control. Furthermore, as the presumption could be rebutted on the facts, lack of certainty can be added to the problems facing an innocent purchaser.

A. *Shogun Finance v. Hudson*

In *Shogun Finance* a rogue middleman went to a car dealership, and offered to buy a car claiming to be one Durlabh Patel. The dealership agreed to sell him a car. The dealer had a 'floor-plan' agreement with a finance company, Shogun Finance, which meant that Shogun Finance were the actual owners of the car. The transaction of the car to the middleman was to be by means of a hire-purchase agreement. The middleman provided identification in the name of Durlabh Patel, and forged his signature in applying for hire-purchase terms with Shogun Finance, who accepted the application. When this happened, the car dealer delivered the car to the middleman, who then sold the car to an innocent purchaser, Hudson.

Unsurprisingly the middleman disappeared, and upon failure to receive the payment Shogun Finance traced the car to Hudson, and sued Hudson in conversion. Hudson claimed a good title under section 27 of the Hire-Purchase Act 1964.⁴⁶ This defence would only succeed if there was a valid hire-purchase agreement between Shogun Finance and the middleman.

Shogun Finance claimed that the agreement was void for mistake of identity⁴⁷ The House of Lords decided by a 3-2 majority in favour of Shogun Finance.⁴⁸

⁴⁶ Hire-Purchase Act 1964, section 27 (as amended): "(1) This section applies where a motor vehicle has been bailed ... under a hire-purchase agreement ... and, before the property in the vehicle has become vested in the debtor, he disposes of the vehicle to another person. (2) Where the disposition referred to in subsection (1) above is to a private purchaser, and he is a purchaser of the motor vehicle in good faith without notice of the hire-purchase ... that disposition shall have effect as if the creditor's title to the vehicle has been vested in the debtor immediately before that disposition."

⁴⁷ Although the case concerned the interpretation of the Hire-Purchase Act 1964, and not the voidable title exception found in the Sale of Goods Act 1979, section 23, the speeches in the House of Lords in *Shogun Finance* were all concerned with voidable title. *Shogun Finance* must now be considered the leading authority in English law on this matter.

⁴⁸ [2004] 1 AC 919.

According to Lord Hobhouse of Woodborough,⁴⁹ the key issue was the construction of the written document containing the contract between the original owners and the middleman.⁵⁰ He thus followed the parole evidence rule, that where a party is specifically identified in a written document, “oral or other extrinsic evidence is not admissible.”⁵¹ His justification was based on the need for certainty of contractual agreements.⁵² In his view there was no face-to-face deal between the original owners and the middleman: they dealt solely by written document. The relationship between the original owners (Shogun Finance) and the car dealer was irrelevant.⁵³ He therefore concluded there was an absence of *consensus ad idem* between Shogun Finance and the rogue: there was either a contract between Shogun Finance and Patel (which there could not be, due to Patel being completely ignorant of his ‘role’ in the fraud), or between Shogun Finance and the rogue (which there could not be, “the rogue having no honest belief or contractual intent whatsoever” and Shogun Finance believed they were contracting with Patel.⁵⁴) His Lordship’s speech is a clear example of strict contractualism. He focused entirely on the written document and attempted to find whether there was a contract between the original owner and the middleman. This was, of course, impossible. It could be argued that his Lordship did acknowledge the existence of a face-to-face presumption, and was merely showing it was rebutted (not on the facts, as in *Ingram v Little*,⁵⁵ but by law, ie the parole evidence rule),⁵⁶ and so there was “no room for the

⁴⁹ McMeel has argued that Lord Phillips’s opinion is the “most compelling analysis”, but that Lord Hobhouse’s “trenchant, though suspect, soundbites” were more attractive to the headnote writer: McMeel [2006] LMCLQ 49, 77. Certainly, the headnote writer took Lord Hobhouse’s speech to be the leading judgment.

⁵⁰ *Shogun Finance v. Hudson* [2004] 1 AC 919, [45]-[46].

⁵¹ *Ibid*, [49]. McMeel has provided a powerful critique of this conclusion by Lord Hobhouse: McMeel [2006] LMCLQ 49, 74-75. He argues (at 74) that Lord Hobhouse makes the “supposed parole evidence rule ... even more stringent than its previous incarnation ... [treating it] as being a conclusive presumption, which it was never said to be”. Furthermore, “Lord Hobhouse’s speech is internally contradictory because he readily has recourse to extrinsic evidence for one purpose but stringently denies its admissibility for another.”

⁵² [2004] 1 AC 919, [49]. Again see McMeel [2006] LMCLQ 49, 74, doubting the validity of this justification.

⁵³ *Shogun Finance v. Hudson* [2004] 1 AC 919, [51].

⁵⁴ *Ibid*, [50].

⁵⁵ [1961] 1 QB 31.

⁵⁶ This approach is subject to cogent criticism: see *supra*, n 51.

application of the ‘face-to-face’ principle between the rogue and the finance company.”⁵⁷

However, it is difficult to conclude what Lord Hobhouse actually felt about the presumption. He failed to consider it in any depth: it was simply inapplicable in his eyes. In the final paragraph of his speech, he called it “the so-called face-to-face ‘principle’, used by judges in those cases to assist them in making factual decisions”.⁵⁸ It cannot be said with any certainty whether Lord Hobhouse actually agreed with the existence of a face-to-face presumption of voidability. Bearing this in mind, as well as the content and general tenor of his speech, it is hard to consider Lord Hobhouse’s approach as anything but strict contractualism.

Lord Walker of Gestingthorpe fully agreed with Lord Hobhouse’s opinion.⁵⁹ Whilst he agreed that the presumption that face-to-face deals make a contract voidable is “the best starting point”,⁶⁰ he would limit its application, so that the distinction between face-to-face deals and those done at arm’s length would remain.⁶¹ If there is “an alleged contract reached by correspondence, offer and acceptance must be found, if they are to be found at all, in the terms of the documents.”⁶² Using this rationale, he held that Shogun Finance’s only intention was to contract with the real Patel, not the rogue middleman.⁶³ Lord Walker’s approach somewhat resembles the approach taken by the majority in *Ingram v. Little*, in that he accepts the presumption in favour of voidability in face-to-face deals, but the facts of the case draw him away from concluding in favour of the innocent purchaser. Deals other than those done face-to-face must be assessed according to the written contract between the original owner and the middleman. Like Lord Hobhouse, he said there was no face-to-face deal, making the

⁵⁷ *Shogun Finance v. Hudson* [2004] 1 AC 919, [51].

⁵⁸ *Ibid*, [55].

⁵⁹ *Ibid*, [180].

⁶⁰ *Ibid*, [185].

⁶¹ *Ibid*, [188].

⁶² *Ibid*.

⁶³ *Ibid*, [191].

problem “easier to resolve”.⁶⁴ The written contract was only between the finance company and Durlabh Patel, therefore the innocent purchaser would not get the goods.

The Master of the Rolls, Lord Phillips of Worth Matravers, neither agreed nor disagreed with Lord Hobhouse. He was “strongly attracted” to the solution proposed by the dissenting judges (discussed below), and he favoured a “strong presumption” that there should be a (voidable) contract when people deal face-to-face.⁶⁵ However, he held that the face-to-face presumption was inapplicable,⁶⁶ because there was a concluded written agreement, the meaning of which (ie the identification of the relevant parties) turned purely on the construction of the document itself.⁶⁷ The inapplicability of the presumption meant the strict contractualist approach would apply – was there a contract between the original owners and the middleman? It was clear to Lord Phillips that the agreement only referred to Patel. As Patel gave no authority for such an agreement, the agreement was “a nullity”,⁶⁸ a conclusion unaffected by the middleman’s fraudulent attempt to induce the original owners to enter into a ‘contract’ with him.⁶⁹

The two dissents go far beyond previous judgments in this area.⁷⁰ Lord Nicholls of Birkenhead’s opinion seems to extend beyond relaxed contractualism. He certainly thought the law should be changed.⁷¹ It is irrational, he said, that there are separate results depending on the nature of the transaction between the original owner and the middleman, since the “essence of the transaction in each case” is that the original owner plans to give his goods to

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, [170].

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, [178].

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, [172].

⁷⁰ McMeel [2006] LMCLQ 49, 77: it may well be “impossible to do [them] justice”.

⁷¹ *Shogun Finance v. Hudson* [2004] 1 AC 919, [34]-[35].

the middleman on the basis of a mistake of identity:⁷² “The purchaser’s rights should not depend upon the precise form the crook’s misrepresentation takes.”⁷³ With this acceptance of the reality of the problem as a *nemo dat* conflict, along with the rejection of a distinction between face-to-face and arm’s length deals, his Lordship took a principled approach: a “person is presumed to intend to contract with the person with whom he is actually dealing, whatever be the mode of communication.”⁷⁴ Yet his opinion was a clear case of relaxed contractualism – even if there was no restriction on the presumption to contract to face-to-face deals only, there still needed to be a contract between the original owner and the middleman, a position Lord Nicholls reiterated a number of times.⁷⁵

Lord Millett noted at the outset of this speech that whether the innocent purchaser succeeds in such cases as this turns on whether there was a contract between the original owner and the middleman,⁷⁶ and the void/voidable distinction is “critical”.⁷⁷ He thought it “indefensible” that fine distinctions in the nature of the middleman’s fraud will affect the void/voidable question,⁷⁸ and stated the law “should if at all possible favour a solution which protects [the innocent purchaser] by treating the contract as voidable rather than void.”⁷⁹ This appears to be a relaxed contractualist approach: the need for a contract between the original owner and the middleman is a necessary element prior to it being declared a voidable contract. Indeed he states it is “trite law” that there must be correspondence between the offer and acceptance between original owner and middleman.⁸⁰

⁷² *Ibid*, [33].

⁷³ *Ibid*, [35].

⁷⁴ *Ibid*.

⁷⁵ *Ibid*, [6], [8]-[11], [36].

⁷⁶ *Ibid*, [57].

⁷⁷ *Ibid*, [60].

⁷⁸ *Ibid*.

⁷⁹ *Ibid*.

⁸⁰ *Ibid*, [63].

He saw the “real objection” as the distinction between face-to-face deals and others.⁸¹ He claimed that although the distinction was always “unsound”,⁸² multi-faceted modern communication makes it “untenable”.⁸³ Accordingly, the time had come to reject the idea that mistake of identity can make a contract void.⁸⁴ However, did Lord Millett go any further than this relaxed contractualism? Whilst he adopted the presumption that all mistakes of identity would make a contract voidable,⁸⁵ he found it still necessary to require the finding of a contract,⁸⁶ through an “objective appraisal of the facts” as to whether there is “sufficient correlation” between offer and acceptance so as to bring a contract into existence.⁸⁷ He held that such correlation did exist, so it could be presumed there was a voidable contract between Shogun Finance and the middleman.⁸⁸ In his opinion, such an approach “gives a measure of protection to innocent third parties.”⁸⁹

The wide range of views expressed by their Lordships in *Shogun Finance* are ultimately points on the same spectrum, because, as Lord Walker put it, all the judges considered the problem before them as one of offer and acceptance,⁹⁰ ie a contractual problem. This ideology of contractualism, without serious challenge in this area of law, is in fact considerably flawed.

⁸¹ *Ibid*, [68].

⁸² *Ibid*, [70].

⁸³ *Ibid*, [69].

⁸⁴ *Ibid*, [61].

⁸⁵ *Ibid*, [81].

⁸⁶ *Ibid*, [62].

⁸⁷ *Ibid*, [76], [81].

⁸⁸ *Ibid*, [104-107]. That “the transaction [under the presumption] should *result* in a [voidable] contract” (*Shogun Finance v. Hudson* [2004] 1 AC 919, [81] (Lord Millett) (emphasis added)) means that there was a contract, not that there was no contract until the presumption was used.

⁸⁹ *Shogun Finance v. Hudson* [2004] 1 AC 919, [82].

⁹⁰ *Ibid*, [183].

B. The failure to move beyond contractualism

Rather unsurprisingly, *Shogun Finance* has been the subject of a significant volume of commentary. The majority of this commentary appears to have focused on the effect of the decision in terms of the rules regarding contract formation.⁹¹ However, the commentary has failed to consider two significant issues. First, that the House of Lords' continuing contractualism forces the *nemo dat* conflict into ill-fitting clothes. As shown above, it is inappropriate to impose rules based on two-party conflicts onto three-party conflicts. Put another way, the problem with contractualism is that "competing interests in property are decided through an application of principles of contract as opposed to property law."⁹² This Procrustean approach is replete with needless flaws. Contractualism, by focusing on the problem as if it did not involve the innocent purchaser, imposes unjust standards on innocent purchasers: they have to bear the burden of things beyond their knowledge or control. Whilst the rights of both the original owner and the innocent purchaser will, essentially, depend on the nature of the middleman's relationship with the original owner, it is only the original owner who can know and/or control that relationship. If the middleman is a rogue, as he inevitably is,⁹³ there are more problems for the innocent purchaser. However hard the innocent purchaser tries to obtain some sort of validation of the rogue middleman's title to and right to dispose of the goods, he will in all likelihood be convinced by the rogue that he is

⁹¹ Eg A Chandler and J P Devenney, "Mistake as to Identity and the Threads of Objectivity" (2004) 3 *Journal of Obligations and Remedies* 7; C Elliot, "No Justice for Innocent Purchasers of Dishonestly Obtained Goods: *Shogun Finance v Hudson*" [2004] *JBL* 381; C Hare, "Identity Mistakes: A Missed Opportunity" (2004) 67 *MLR* 993; C MacMillan, "Mistake as to Identity Clarified" (2004) 120 *LQR* 369; A Phang, P-W Lee, and P Koh, "Mistaken Identity in the House of Lords" [2004] *CLJ* 24; K Scott, "Mistaken Identity, Contract Formation and Cutting the Gordian Knot" [2004] *LMCLQ* 292; D W McLauchlan, "Mistake of Identity and Contract Formation" (2005) *Journal of Contract Law* 1; D W McLauchlan, "Parol Evidence and Contract Formation" (2005) 121 *LQR* 9; McMeel [2006] *LMCLQ* 49. For alternative analyses of *Shogun Finance*, see eg MacMillan [2005] *CLJ* 711 (illustrating the historical factors that have impacted on the development of the English law of mistake of identity and showing the need to reconsider the basic assumptions about the true meaning and value of the early cases on this topic); W Swadling, "Rescission, Property, and the Common Law" (2005) 121 *LQR* 123 (questioning whether there is a necessary link between the failure of a contract of sale and the failure to pass title to goods).

⁹² K Scott, "Mistaken Identity, Contract Formation and Cutting the Gordian Knot" [2004] *LMCLQ* 292.

⁹³ See MacMillan [2005] *CLJ* 711, 715.

getting a good bargain. The innocent purchaser cannot effectively protect himself, other than by not purchasing the goods. This is in stark comparison to the situation the original owner is in, for he can refuse to hand goods over to a purchaser without full confirmation of identity or capability of paying.⁹⁴ This problem is exacerbated when, as in *Shogun Finance*, the original owner is a commercial dealer with significant knowledge of the particular market whilst the innocent purchaser is a mere individual private consumer.⁹⁵

Relaxed contractualism remains the basic rule when a face-to-face deal is considered. A clear majority of the House in *Shogun Finance* were of the opinion that the face-to-face presumption should be retained.⁹⁶ However, the split between Lords Nicholls and Millett and Lords Walker and Phillips over whether the presumption applies to all mistakes of identity is unhelpful. This retention of the distinction between face-to-face deals and those done at arm's length, coupled with the approval by a bare majority of the decision in *Cundy v. Lindsay*, has failed to simplify the law or increase protection for innocent purchasers. As

⁹⁴ See generally, D M Phillips, "The Commercial Culpability Scale" (1982) 92 Yale L J 228.

⁹⁵ An anonymous Note, "The Owner's Intent and the Negotiability of Chattels: A Critique of Section 2-403 of the Uniform Commercial Code" (1963) 72 Yale L J 1205, has questioned this theory on the grounds that where the original owner is a small business, and the innocent purchaser is a large business, the equities in favour of the innocent purchaser cannot easily be discerned. It is noted (at 1223) that "a purchaser can protect himself by dealing with well-established merchants; a small seller, even taking all the care that he can in selecting customers, can only deal with those who choose to come to him." Both points are flawed. The first seems intuitively correct in chiding those that deal with fly-by-night outfits and other non-established commercial actors. However, in doing so it seems to offend against principles of liberty of commerce; certainly how would a newly-established business obtain and retain custom? More than that though, it makes the inaccurate assumption that by becoming "well-established" a business is necessarily 'safe' for any user of that business. However "well-established" it is, it may still be susceptible to insolvency, and this can lead straight to a *nemo dat* conflict. The second point is equally inaccurate. The small merchant, as original owner, may well only be able to deal with those that come to him. (This of course begs the question, whether the same holds for those "well-established" merchants?) Yet this does not mean he is obligated to deal with anyone who comes to him, nor does it mean he has to undertake a deal whereby he gives over goods for anything other than immediate full payment. Should he choose to undertake such a deal, whether he is a small merchant or otherwise, he should bear the risk.

⁹⁶ *Shogun Finance v. Hudson* [2004] 1 AC 919, [35] (Lord Nicholls), [68-70] (Lord Millett), [170] (Lord Phillips), [185] (Lord Walker). There remains a problem with the true meaning of Lord Hobhouse's speech. As noted above it is unclear whether he actually accepted the validity of the presumption: see *supra*, text following n 54. It is possible (just) to conclude from his speech that Lord Hobhouse opposed the presumption totally, but the matter is not clear. Nevertheless, neither interpretation would alter the eventual result of *Shogun Finance*.

both Lords Nicholls and Millett noted,⁹⁷ distinctions between face-to-face and arm's length deals are unsound.⁹⁸ There are some useful results from *Shogun Finance*, such as the overruling of *Ingram v. Little*,⁹⁹ and the recognition that the presumption should be very strong.¹⁰⁰ However, the consequence of the fine distinction between face-to-face deals and arm's length deals was not missed by Lord Walker: "there is sometimes an inclination to regard the eventual buyer from the rogue as the more deserving of sympathy."¹⁰¹ Nevertheless, he considered that the need for "a general rule to cover the generality of cases" meant that "it would not be right to make any general assumption as to one innocent party being more deserving than the other."¹⁰² This is flawed reasoning: the need for a general rule does not necessitate the content of that rule.¹⁰³ The consequence is simple: the innocent purchaser is dependent on actions beyond his knowledge or control. If the dealings were deemed not face-to-face (which as *Shogun Finance* illustrates, is by no means an impossible consequence), then strict contractualism will provide an escape clause for the original owner. If the dealings were face-to-face, the innocent purchaser faces the possibility the presumption will be rebutted.¹⁰⁴

The other significant failure of the commentary on mistake of identity is the absence of a comparative analysis of English and US law. There have been some allusions to the US law

⁹⁷ See *supra*, text following n 70.

⁹⁸ Cf P S Atiyah, J N Adams and H MacQueen, *The Sale of Goods*, 11th edn (Longman, 2005), 44.

⁹⁹ [1961] 1 QB 31. See *Shogun Finance v. Hudson* [2004] 1 AC 919, [185] (Lord Walker).

¹⁰⁰ *Shogun Finance v. Hudson* [2004] 1 AC 919, [33] (Lord Nicholls), [67-70] (Lord Millett), [170] (Lord Phillips), [187] (Lord Walker). A Chandler and J P Devenney, "Mistake as to Identity and the Threads of Objectivity" (2004) 3 *Journal of Obligations and Remedies* 7, 17-18 note that the judges were "struggling" to come up with a case where the presumption would be rebutted. Cf *Ingram v. Little* [1961] 1 QB 31, 57-58 (Pearce LJ) offering some assistance on this point.

¹⁰¹ *Shogun Finance v. Hudson* [2004] 1 AC 919, [181].

¹⁰² *Ibid.*, [182].

¹⁰³ Even if it were, the argument that it should have a "general assumption", as Lord Walker puts it, is as valid as any argument claiming otherwise.

¹⁰⁴ The judges did "struggle" to think of how such a rebuttal may occur (see *supra*, n 100), but it certainly was not held that the presumption has become irrefutable,

in the commentary following the decision in *Shogun Finance*,¹⁰⁵ and the two dissenting judges Lords Nicholls and Millett both claimed consistency with the US law.¹⁰⁶ However, useful though the commentary is, the allusions to the US law are just that: they fail to engage with the complexities of the US law. Furthermore, as will be shown below, the claim by Lords Nicholls and Millett to consistency with the US law does not stand up to full scrutiny.

III. THE LAW IN THE USA

“The time has long since passed when it was possible for any treatise which deals with a broad field of law to pretend that it is exhaustive. A decorative feature of the treatise of a half century ago was the collection of cases from all the jurisdictions from Alabama to Wyoming. No such collections will be found here.”¹⁰⁷

There cannot be any question over the applicability, *mutatis mutandis*, of the caveat just noted, to any study of US law. Though this article cannot (and does not) claim to be an exhaustive survey, an accurate map of the relevant US law can be drawn. The first task here though is to give some background to the US law. Since its widespread promulgation in the 1960s, the Uniform Commercial Code (the ‘UCC’) has become the basic commercial law for all of the States of the Union.¹⁰⁸ It is the UCC which will provide the comparison for the

¹⁰⁵ See eg C Elliot, “No Justice for Innocent Purchasers of Dishonestly Obtained Goods: *Shogun Finance v Hudson*” [2004] JBL 381, 385-386; C Hare, “Identity Mistakes: A Missed Opportunity” (2004) 67 MLR 993, 1002; C MacMillan, “Mistake as to Identity Clarified” (2004) 120 LQR 369, 372-373; K Scott, “Mistaken Identity, Contract Formation and Cutting the Gordian Knot” [2004] LMCLQ 292, 296-297; MacMillan [2005] CLJ 711, 744.

¹⁰⁶ *Shogun Finance v. Hudson* [2004] 1 AC 919, [35] (Lord Nicholls), [84] (Lord Millett).

¹⁰⁷ G. Gilmore, *Security Interests in Personal Property* (Little, Brown and Co., 1965), vol 1, x.

¹⁰⁸ The UCC is a joint project of the American Law Institute (www.ali.org) and the National Conference of Commissioners on Uniform State Laws (www.nccusl.org). The literature on the Code is vast, and a literature review on the topic would go far beyond the scope of this section. For a general introduction, Kamp’s recent series of articles provides a fascinating analysis of the history of the Code: see A R Kamp, “Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context” (1995) 59 Alb L Rev 325; “Uptown Act: A History of the Uniform Commercial Code: 1940-1949” (1998) 51 SMU L Rev 275; “Downtown Code: A History of the Uniform Commercial Code: 1949-1954” (2001) 49 Buff L Rev 359. See

English law. However, the law on voidable title as a *nemo dat* exception that existed prior to the UCC bore much more than a passing similarity to English law. An exposition of the pre-Code law, followed by an analysis of the law under the UCC, will prepare the ground for a useful comparison between English and American law. The changes in the law that show the radical differences between the law prior to and the law following the UCC's promulgation will in turn help map the profound distinctions between the English law and that of the USA.

A. The pre-Code law

The US common law, like the English law, developed a voidable title rule that operated as an exception to the general *nemo dat* rule,¹⁰⁹ which was codified with the Uniform Sales Act 1906, section 24;¹¹⁰ a mirror of the equivalent English provision.¹¹¹ In doing so, "the Uniform Sales Act left the intermediate area of the common law [ie the meaning of 'voidable' title] unchanged."¹¹² The courts would have to interpret the common law to control and sanction "the illogical distinctions embodied in the impersonation cases."¹¹³

also R Braucher, "The Legislative History of the Uniform Commercial Code" (1958) 58 Colum L Rev 798; W A Schnader, "A Short History of the Preparation and Enactment of the Uniform Commercial Code" (1967) 22 U Miami L Rev 1. Louisiana, in accordance with its civilian legal tradition, has not undertaken a full-scale adoption of the UCC. In addition to those States that have adopted the UCC, it now forms the basic commercial law for the District of Columbia, the Commonwealth of Puerto Rico, Guam and the US Virgin Islands. The UCC has been described as "national law": *US v Wegematic Corp* (CA2 NY 1966) 360 F2d 674, 676; *US v First National Bank in Ogallala, Nebraska* (CA8 Neb 1973) 470 F2d 944, 946.

¹⁰⁹ See eg S M Weber, "The Extension of the Voidable Title Principle Under the Code" (1961) 49 Ky L J 437, 437-438.

¹¹⁰ "Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title."

¹¹¹ At the time, Sale of Goods Act 1893, section 23. Cf G Gilmore, "The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman" (1981) 15 Ga L Rev 605, 615, fn 43.

¹¹² K F Jilson, "UCC Section 2-403: A Reform in Need of Reform" (1979) 20 Wm & Mary L Rev 513, 540; Gilmore (1981) 15 Ga L Rev 605, 615 noted that he had "no idea whether this open-endedness was the result of inadvertence or of deliberate design", and that the open-ended nature of the provision enabled courts to devise more and more situations whereby the method the middleman used to get possession of the goods led only to void title, thus protecting the original owner at the expense of the innocent purchaser.

¹¹³ Jilson (1979) 20 Wm & Mary L Rev 513, 539.

The leading pre-Code case on voidable title is the decision of the Court of Appeals of New York in *Phelps v. McQuade*.¹¹⁴ That case involved a misrepresentation by a rogue, who impersonated a man of good financial standing.¹¹⁵ It was held that the relevant issue was “purely” the intent of the original owner – did he intend to sell the goods to the middleman? If his intent was fraudulently induced by the middleman’s misrepresentation of identity, then the title is based on a contract that is voidable because of the mistake of identity title.¹¹⁶ However, *Phelps* involved a face-to-face transaction, and the Court held that this was significant. If there had been an arm’s length transaction, by mail for example, then the title would have been void.¹¹⁷ This distinction was to become a major aspect of pre-Code mistake of identity case-law,¹¹⁸ and in spite of some evidence to the contrary,¹¹⁹ Williston’s conclusion on the matter seems accurate:

“where the buyer in person obtains the assent of the seller to a sale to him of the goods by pretending to be some one else, title passes, although as between the parties the transaction is voidable. In such a case, though it is true the seller intends to

¹¹⁴ (1917) 220 NY 232, 115 NE 441.

¹¹⁵ The facts are not clear as to exactly how this misrepresentation occurred, whether it occurred in a face-to-face deal or otherwise. However, the conclusions of the Court seem to show, without doubt, that there was a face-to-face deal.

¹¹⁶ *Ibid*, 442.

¹¹⁷ *Ibid*; following *Edmunds v. Merchants’ Dispatch Transportation Co* (1883) 135 Mass 283 and *Cundy v. Lindsay* (1877-1878) LR 3 App Cas 459.

¹¹⁸ See eg *Short & Walls Lumber Co v. Blome* (1950) 45 Del 397, 75 A2d 234; *Dresher v. Roy Wilmeth Co* (1948) 118 IndApp 542, 82 NE2d 260; *Martin v. Green* (1918) 117 Me 138, 102 A 977; *Hickey v. McDonald Bros* (1907) 151 Ala 497, 44 So 201.

¹¹⁹ See eg *Loeffel v. Pohlman* (1892) 47 MoApp 574. *Loeffel’s* case can be explained on its facts: there was a sale by the claimant to a rogue, who misrepresented his identity. However, the rogue did not get a chance to sell the goods on; he was arrested and the goods the rogue had were delivered by the police to a sheriff “to hold under color of his office”. The sheriff did not deliver them up to the claimant, who then sued the sheriff. It was held that the claimant was entitled to the goods. Other cases that appear to indicate that a face-to-face presumption in favour of a voidable contract was absent from the law can be explained as being void for other reasons: see eg *Barker v. Dinsmore* (1872) 72 Pa 427 (misrepresentation as an agent); *Windle v. Citizens’ National Bank* (1919) 204 MoApp 606, 216 SW 1020 (bad check); *Amols v. Bernstein* (NY 1925) 214 AppDiv 469, 212 NYSupp 518 (bad check); *Gustafson v. Equitable Loan Association* (1932) 186 Minn 236, 243 NW 106 (bad check). The ‘bad check’ reason, which are discussed *infra*, n 132 and accompanying text, was often used by the courts to justify a finding of void (as opposed to voidable) title: see eg G Gilmore, “The Commercial Doctrine of Good Faith Purchase” (1954) 63 Yale L J 1057, 1060-1062.

transfer title to the person of good credit whom he supposes to be the person standing before him, his primary intent is to transfer title to the person before him.”¹²⁰

At this point it seems clear that the US law distinguished between face-to-face deals and those done at arm’s length, and that those done face-to-face were subject to a presumption of intent to transfer title. A useful point to consider here is the position of transactions undertaken over the telephone. What is clear at the outset is that telephone transactions are a half-way-house between face-to-face and arm’s length transactions: the original owner will only hear the voice of the middleman. The first Restatement of Contracts stated that “Acceptance given by telephone is governed by the principles applicable to oral acceptances where the parties are in the presence of each other.”¹²¹ Furthermore, there is some supporting case-law that title in cases of mistaken identity via a telephone transaction is merely voidable.¹²² “Since the [original owner] has chosen to rely on his sense of hearing in identifying the [middleman], it is more equitable that he bear the loss rather than the innocent purchaser.”¹²³

At this stage, there does not appear to be any serious divergence between English and US law. Certainly there is the same distinction between those deals done face-to-face and those done at arm’s length. Although it would seem that the matter was settled in the US long before it was in England (it is probably correct that the matter was not put entirely beyond question until *Shogun Finance*), to draw anything of substance from this would probably be

¹²⁰ S Williston, *The Law Governing Sales of Goods at Common Law and under the Uniform Sales Act*, 2nd edn (Baker, Voorhis & Co, New York, 1924), vol 2, §635. See also S M Weber (1961) 49 Ky L J 437, 454; H F Fuller, “Mistake and Error in the Law of Contracts” (1984) 33 Emory L J 41, 48.

¹²¹ *Restatement (First) of Contracts*, §65. This is essentially the same as the provision in *Restatement (Second) of Contracts*, §64: “Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other.”

¹²² See eg *Tideman & Co v. McDonald* (TexCivApp 1924) 275 SW 70.

¹²³ C C J, Jr., “Notes – The Impostor and the Law” (1937-38) 86 U Pa L Rev 526, 529.

evidence more of pedantry than anything else. The same caveat should probably also be applied to any attempt to draw anything radical out of the US law's treatment of telephone transactions. It seem odd at first sight, but the absence of judicial (and, indeed, academic) analysis of this problem under the auspices of the English law must surely be put down to the failure of such a case to arise in England.¹²⁴

B. The Uniform Commercial Code §2-403(1)

The Uniform Commercial Code was a radical change to the legal topography of the USA. The revolutionary nature of the UCC in general was matched by the changes to the voidable title exception to the general *nemo dat* rule. The relevant provision of the UCC is §2-403(1). This particular provision has been described as “perhaps, the Code’s most notorious purchaser provision”.¹²⁵ The changes, which set the UCC provision clearly apart from the pre-Code law, and the current English law, will become clear in the following analysis. What is also clear is that the voidable title exception to the *nemo dat* rule is understood as being purely within the context of the *nemo dat* problem; the overlaps with contract law are of much less importance. The UCC simply deems that all mistakes of identity will, at most, lead to a voidable title. Furthermore, the UCC deems that there is no requirement for a contract between the original owner and the middleman – all that is needed is a voluntary transfer of the goods from one to another. It is these two simple acts which mark out UCC §2-403(1) as a radical change, one that goes much further than the current English position; indeed it goes further even than the principled approaches in the dissenting speeches of Lords Nicholls and Millett in *Shogun Finance*. What becomes clear is that the innocent purchaser is

¹²⁴ Goodhart’s analysis of a blind man’s mistake, noted *supra*, n 34, come close to considering the issue of telephone-based transactions. The failure to actually develop an analysis of the issue exacerbates the flawed nature of his analysis.

¹²⁵ D Frisch, “Buyer Status Under the UCC: A Suggested Temporal Definition” (1987) 72 Iowa L Rev 531, 534 fn 20.

nowhere as dependant on the niceties of the relationship between the original owner and the middleman, on factors and information beyond his knowledge and control.

The governing provision, UCC §2-403(1),¹²⁶ reads as follows:

“... A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a ‘cash sale’, or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.”

The US Court of Appeals gives a goods précis of this provision: “Essentially, [UCC §2-403(1)] provides that sale to a good faith purchaser for value cures the defects in the seller’s ‘voidable’ title; it cannot, however, cure ‘void’ title. The distinction between ‘void’ and ‘voidable’ title, therefore, is crucial.”¹²⁷ However, it is clear neither the Code nor the Official Comments discuss the meaning of ‘voidable title’, so recourse to pre-Code law is usually required.¹²⁸ It is at this point that the similarities with English law end.

¹²⁶ This provision was revised, as part of the general Article 2 amendments, in 2003. There were some minor stylistic changes, but not substantive changes. See eg L J Rusch, “Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at what NCCUSL Finally Approved”(2003) 6 Del L Rev 41. As the amended Article has yet to be adopted throughout the US, the old version shall be used for the purpose of this comparison.

¹²⁷ *American Standard Credit v. National Cement* (CA5 1981) 643 F2d 248, 268.

¹²⁸ See eg *Inmi-Etti v. Aluisi* (1985) 63 MdApp 293, 492 A2d 917, 921. See also UCC §1-103: “Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.”

In a major distinction between the English and US law, the Code goes further than just baldly stating a general voidable title rule. The Code expands the protection available to innocent purchasers in voidable title situations: “[UCC §2-403(1)] provides specifically for the protection of the good faith purchaser for value in a number of specific situations which have been troublesome under prior law.”¹²⁹ These “specific situations” are those in UCC §2-403(1)(a)-(d).¹³⁰

This article will only consider one specific aspect of UCC §2-403(1), where “the transferor was deceived as to the identity of the purchaser”.¹³¹ This is the US ‘mistake of identity’ provision. Before this provision is analysed, it is worth noting that the most complex and notorious aspects of pre-Code US voidable title law were the provisions on ‘cash sale’ and ‘bad check’ cases.¹³² These areas attracted considerable volumes of scholarship, both before and after the UCC’s promulgation.¹³³ A cash sale was a transaction where it was agreed that no property would pass to the purchaser until the purchase price was received in full, a bad check case was a development of this theory that was founded on the idea that no title passed until the check was honoured. It is also particularly important to recognise that many mistake of identity cases also involve other aspects such as a bad check, a cash sale, or larcenous actions. *Charles Evans BMW v. Williams* is a good illustration of this, where there was a

Furthermore, see UCC §1-103, Official Comment 3: “The listing given in this section is merely illustrative; no listing could be exhaustive.”

¹²⁹ UCC §2-403, Official Comment 1.

¹³⁰ The “specific situations” are non exhaustive because “UCC §2-403(1) applies in any situation in which the purchaser has, under applicable law, voidable title”: L Lawrence, *Anderson on the Uniform Commercial Code*, 3rd edn (2006), §2-403:50.

¹³¹ UCC §2-403(1)(a).

¹³² Now see UCC §2-403(1)(b), (c). The American spelling of check will be used in this discussion of the US law.

¹³³ See eg E K Markley, “Right to Reclaim Delivered Goods in a Cash Sale” (1932) 36 Dickinson L Rev 277; C B Collins, “Title to Goods Paid For With Worthless Check” (1942) 15 S Cal L Rev 340; L Vold, “Worthless Check Case Sales, ‘Substantially Simultaneous’ and Conflicting Analogies” (1950) 1 Hastings L J 111; C W Corman, “Cash Sales, Worthless Checks and the Bona Fide Purchaser” (1956) 10 Vand L Rev 55; A H Fritschler, “Worthless Checks in Cash Sales: Rights of the Bona Fide Purchaser” (1960) 24 Alb L Rev 195; R A Mann and M J Phillips, “The Cash Seller under the Uniform Commercial Code” (1979) 20 B C L Rev 370.

deceit as to identity, a dishonoured check, and fraudulent conduct punishable under the (relevant State) law.¹³⁴ The Court held that the “undisputed evidence of record shows that the [original owner] delivered his car under a transaction of purchase procured by the perpetration of a criminal fraud whereby he was deceived as to the identity of the purchaser who gave him a check which was later dishonoured.”¹³⁵ So there was voidable title, and the innocent purchaser was able, without much difficulty, to show that he should be protected under UCC §2-403(1)(a), (b) and (d). It is difficult to draw out case-law which has solely considered mistake of identity, and so overlaps must be expected and accepted.

Two issues arise for consideration. First, what is the extent of the provision regarding mistaken identity: are all mistakes of identity covered? Second, and more importantly, does the requirement for a ‘transaction of purchase’ allow for a form of contractualism? The answers to these questions will indicate the breadth of UCC §2-403(1)(a) compared to the English position.

Mistake of identity

It is clear from the outset that a misrepresentation of identity can be achieved (and thus a mistake of identity made) in many different ways. This article will consider those cases where a middleman has represented himself as someone else (either a real or legal person).¹³⁶ Although it seems at first sight that UCC §2-403(1)(a) is sufficiently wide to cover mistakes of identity in general, the question whether the US law is of a sufficiently broad nature to cover all mistakes of identity does arise.

¹³⁴ (1990) 196 GaApp 230, 395 SE2d 650.

¹³⁵ *Ibid*, 231-232.

¹³⁶ Although it seems the case that UCC §2-403(1)(a) covers cases of impersonation as an agent, this article will not cover such cases. See eg Weber (1961) 49 Ky L J 437. Misrepresentation as agent would be covered, in English law, primarily by the law concerning estoppel and apparent authority, or perhaps mercantile agency.

It is clear that there is no special consideration of face-to-face dealings in the relevant part of the UCC, which merely provides that the rogue middleman can pass good title to an innocent purchaser whenever “the transferor [ie original owner] was deceived as to the identity of the purchaser [ie rogue middleman]”.¹³⁷ The lack of ‘displacement’ by the UCC of pre-Code law on this issue seems to also suggest the pre-Code law will govern.¹³⁸ So, with a clear rule in favour of face-to-face transactions carried over from pre-Code law,¹³⁹ and no ‘displacement’ by UCC §2-403(1)(a), it seems clear that such transactions would be covered. It remains to be seen whether other forms of misrepresentation of identity could also be construed as leading only to voidable title, and not void title. The pre-Code law concerning arm’s length transactions usually held that such transactions, where there was a mistake of identity, would be void.¹⁴⁰ Would such transactions be covered by UCC §2-403(1)(a)?

There appear to only be a limited number of cases directly concerning a mistake of identity following the UCC,¹⁴¹ but as such, there is no judicial indication that UCC §2-403(1)(a) is limited in the range of identity mistakes it covers. One explanation for this is the variety of contexts such problems arise under, and the facts may be dealt with by various Code provisions on voidable title. That voidable title conflicts under UCC §2-403(1) can be covered by a number of provisions is recognised by the Courts.¹⁴² There is also a methodological problem here. The US case reports do not provide the facts of the case in the same depth as English case reports. As such, it is often difficult to discern the nature of a

¹³⁷ UCC §2-403(1)(a).

¹³⁸ See UCC §1-103, *supra*, n 128.

¹³⁹ See *supra*, text following n 114.

¹⁴⁰ See *supra*, n 117 and n 118.

¹⁴¹ See eg *Club Pro Golf Products v. Simpson* (1988) 13 VaCir 369, 7 UCCRepServ2d 425; *Charles Evans BMW v. Williams* (1990) 196 GaApp 230, 395 SE2d 650; *Moore Equipment v. Halferty* (MoApp 1998) 980 SW2d 578 (however, no ‘transaction of purchase’ found).

¹⁴² See eg *Charles Evans BMW v. Williams* (1990) 196 GaApp 230, 395 SE2d 650, noted *supra*, n134 and associated text.

rogue middleman's fraudulent activity in relation to mistake of identity.¹⁴³ Consequently, it can be difficult to determine whether reported cases in appellate courts have involved a mistake of identity.

The lack of evidence provided by the reported cases requires a heavy reliance on the commentators in order to assess this issue. It appears that the leading treatise favour a broad interpretation of UCC §2-403(1)(a). For example, *Anderson on the Uniform Commercial Code* states that “the language of this exception is broad enough to include *any deception* of the transferor [original owner] as to the identity of the seller [rogue middleman]”.¹⁴⁴ *Hawkland's Uniform Commercial Code Series* does not go quite so far, but it does support the idea that arm's length transactions would be covered. It notes that UCC §2-403(1)(a) “rejects the distinction that was drawn between face-to-face and remote imposture and provides, instead, that a delivery under either kind of impersonation creates a voidable title.”¹⁴⁵ In a Note in the early years of the UCC the arguments for and against UCC §2-403(1)(a) covering all identity mistakes were set out.¹⁴⁶ It could be argued that the UCC only codified the common law,¹⁴⁷ but this seems to fall down as against the expressed policies of the UCC provision,¹⁴⁸ especially that the purpose of the UCC is to simplify and clarify the law:¹⁴⁹ “[i]t would simplify and clarify the law of commercial transactions if each kind of identity fraud were treated in the same way so that a uniform result could be obtained in all cases of identity fraud.”¹⁵⁰

¹⁴³ *Ibid.*

¹⁴⁴ L Lawrence, *Anderson on the Uniform Commercial Code*, 3rd edn (2006), §2-403:53 (emphasis added).

¹⁴⁵ F H Miller, 2 *Hawkland's Uniform Commercial Code Series*, (2006), §2-403:2. See also H F Fuller, “Mistake and Error in the Law of Contracts” (1984) 33 *Emory L J* 41, 48; *Shogun Finance v. Hudson* [2004] 1 *AC* 919, [84], Lord Millett.

¹⁴⁶ Note, “The Good Faith Purchase of Goods and ‘Entrusting’ to a Merchant under the Uniform Commercial Code: Section 2-403” (1963) 38 *Ind L J* 675, 680-683.

¹⁴⁷ *Ibid.*, 681.

¹⁴⁸ *Ibid.*, 681-683.

¹⁴⁹ See UCC §1-103(a).

¹⁵⁰ Note, (1963) 38 *Ind L J* 675, 683.

Finally, support for a broad interpretation of UCC §2-403(1)(a) arises when the rationale for the distinction between face-to-face and arm's length dealings is considered. The intention in both face-to-face and arm's length deals is, essentially, the same – the intent is to deal with the absent third party who the middleman misrepresents himself as being.¹⁵¹ It is irrational and illogical to consider there to be a distinction: in both situations the original owner would not know he was being deceived.¹⁵² It is also irrational why the innocent purchaser should bear the loss because of the particular nature of a transaction (ie between original owner and middleman) they do not, indeed cannot, have any knowledge of.¹⁵³ It seems to be seriously anomalous that in today's technological society, where multi-faceted communication is commonplace, that deals made at arm's length should be treated differently (with worse results for an innocent purchaser) compared to deals done face-to-face.¹⁵⁴ As was noted earlier, the Official Comments state that the aim of UCC §2-403(1) was to protect the innocent purchaser in a number of specific, "troublesome" situations.¹⁵⁵ It has been suggested that the 'troublesome' aspect of the pre-Code law, in this context, refers (amongst other things) to the fact the innocent purchaser's protection depended on the nature of the identity fraud undertaken by the middleman.¹⁵⁶ It is submitted this is a correct suggestion, as is the supposition that the drafters of the UCC intended to solve this particular problem.¹⁵⁷

¹⁵¹ Lord Nicholls made the same point in *Shogun Finance*: see *supra*, n 72 and associated text.

¹⁵² See eg Jilson (1979) 20 Wm & Mary L Rev 513, 521; W D Warren, "Cutting Off Claims of Ownership under the Uniform Commercial Code" (1963) 30 U Chi L Rev 469, 477; Note, (1963) 72 Yale L J 1205, 1221; Note, (1963) 38 Ind L J 675, 679.

¹⁵³ Cf J Ulph, "Conflicts of Title and the Obligations of the Seller", in McKendrick (ed), *Sale of Goods*, (LLP, London, 2000), 5-041, 5-132; P S Atiyah, *An Introduction to the Law of Contract*, 5th edn (Clarendon Press: Oxford, 1995), 86: "a person who hands goods over to a stranger in return for a cheque is obviously taking a major risk, and it does not seem fair that he should be able to shift the burden of this risk on to the innocent third party", cited with approval by Lord Millett in *Shogun Finance v. Hudson* [2004] 1 AC 919, [84]; Note, (1963) 38 Ind L J 675, 683.

¹⁵⁴ This point is well made in *Shogun Finance v. Hudson* [2004] 1 AC 919, [28], [33], Lord Nicholls, [69-70], Lord Millett. See also, Note, (1963) 38 Ind L J 675, 680.

¹⁵⁵ See *supra*, n 129 and accompanying text.

¹⁵⁶ Note, (1963) 38 Ind L J 675, 682.

¹⁵⁷ Cf Gilmore (1981) 15 Ga L Rev 605, 618: "as a matter of drafting, 'troublesome' was a stroke of genius." The sarcasm of Gilmore's comment cannot go unmarked, for he claimed that in stating that there were situations

Transaction of purchase

It is important to recognise that the four expressly voidable situations found in UCC §2-403(1)(a)-(d) have a special requirement: there must be a “transaction of purchase” between the original owner and the middleman. As shown, English law focuses strongly on the nature of the transaction between the original owner and the middleman. A failure to show a contract between the two parties will mean a void title. The question is thus: does the need for a “transaction of purchase” necessitate a contractualist approach?

Though there is no definition in the UCC or the case law of the precise phrase ‘transaction of purchase’,¹⁵⁸ its meaning is not difficult to discern. The UCC provides that a ‘purchase’ “means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.”¹⁵⁹ The Official Comment to this provision gives some advice, stating that: “In this respect the provisions of the section are applicable to a person taking by any form of ‘purchase’ as defined by this Act. ... On the other hand, the contract of purchase is of course limited by its own terms as in a case of pledge for a limited amount or of sale of a fractional interest in

which had been troublesome, the Official Comments should actually read “situations in which the courts have been protecting the original transferor by refusing to expand the ‘voidable title’ concept”, and that by virtue of the provisions of UCC §2-403(1) “the courts that had failed to appreciate the ‘mercantile approach’ were being put in their places.” The ‘mercantile approach’ seems to be, generally, the protection of the innocent purchaser: G Gilmore, (1981) 15 Ga L Rev 605, 606-616; G Gilmore, “The Commercial Doctrine of Good Faith Purchase” (1954) 63 Yale L J 1057. Gilmore sells the story somewhat short though, as he fails to engage with the question of why the courts who failed to give ‘voidable title’ an expansive interpretation that protected the innocent purchaser needed to be “put in their places”. This is especially frustrating, because, as has been noted, the answer is simple: the innocent purchaser was (essentially) being punished for factors that were beyond his knowledge and control.

¹⁵⁸ *Kotis v. Nowlin Jewelry* (TexApp 14Dist 1992) 844 SW2d 920, 922.

¹⁵⁹ UCC §1-201(b)(29). A ‘true lease’, ie not a sale disguised as a lease, will not suffice as a ‘purchase’: *McDonald’s Chevrolet v. Johnson* (1978) 176 IndApp 399, 376 NE2d 106; *American Standard Credit Inc v. National Cement Co* (CA5 Ala 1981) 643 F2d 248, 268; *Touch of Class Leasing v. Mercedes-Benz Credit of Canada Inc* (1991) 248 NJSuper 426, 591 A2d 661; *Creggin Group v. Crown Diversified Industries* (1996) 113 OhioApp3d 853, 682 NE2d 692. Following the introduction of the Revised Article 9 of the Code on Security Interests, the definition of purchase has been expanded to include taking by security interest.

goods.”¹⁶⁰ The essential element appears to be that the disposition is a voluntary one, and that some sort of interest is created in the property.¹⁶¹

It is clear then that the meaning of ‘purchase’ is hugely significant to the reach of the voidable title provision. A strict interpretation would lead to the strict contractualism that bedevils English law: in order for a ‘purchase’, there must be a contract, which needs agreement, which cannot exist in cases of mistaken identity. The effect of UCC §2-403(1)(a) could be reduced to vanishing point before it even begins. In an analysis that arrived soon after the birth of the UCC, Weber considered this tough issue. He argued that the “creating an interest in property” part of the definition of “transaction of purchase” could be met by the fact that one in possession (ie the middleman) could bring an action of trover even though the possession is wrongful, and that it could be “reasoned” that such a right is an “interest in property”.¹⁶² But he considered this to be too much, covering as it would any bailee of goods, and that such a step would surely have been made explicit in the UCC. He preferred some alternative rationales. First, the definition of ‘purchase’ was the same as that in an earlier draft of the UCC and was not amended (perhaps through oversight) to take into account the fact that UCC §2-403(1) was amended in the meantime.¹⁶³ Secondly, he noted that the definition of ‘purchase’ is qualified by the phrase “[u]nless the context otherwise requires”.¹⁶⁴ This enables the description of the transaction between the original owner and the middleman as a ‘transaction of purchase’ without having to find a contract. This is

¹⁶⁰ UCC §2-403, Official Comment 1.

¹⁶¹ During the influential hearings on the Code before the New York Law Revision Commission, the breadth of the ‘purchase’ definition was questioned, but it was pointed out by Carl Fulda in a commentary for the Commission that such a wide definition was “not novel” (New York Law Revision Commission, *Report of the Law Revision Commission for 1955: Study of the Uniform Commercial Code*, (1955), vol 1, 290), with New York decisions (concerning real property) holding basically the same: see eg *Priest v. Cummings* (1838) 20 Wend 338, 349; *Watson v. Donnelly* (1859) 28 Barb 653, 658; *Strough v. Wilder* (1890) 119 NY 530, 535, 23 NE 1057, 1058.

¹⁶² Weber (1961) 49 Ky L J 437, 461.

¹⁶³ *Ibid.* See also *ibid.*, 447-450, and Jilson (1979) 20 Wm & Mary L Rev 513, 541-42, for a discussion of the drafting changes to UCC §2-403.

¹⁶⁴ See UCC §1-201(a).

allowed by reason of a contradistinction. The first axiom for consideration is that the definition of ‘transaction of purchase’ does not cover a mere voluntary transfer of possession of the goods: if it did then this problem disappears. It is at this point in the analysis that it can be said that “the context otherwise requires” a different definition of ‘transaction of purchase’. The rationale is that the context, the voidable title exception to the *nemo dat* rule provided in UCC §2-403(1), needs an expansive definition of ‘transaction of purchase’, as one squarely founded on a contractual relationship as between the original owner and the middleman could render the exception otiose.¹⁶⁵

Jilson has also considered this problem.¹⁶⁶ For her, the best explanation is that there was some oversight by the drafters of the UCC. In addition, there are other factors which “indicate that the draftsmen desired to expand rather than to merely maintain the protection offered good faith purchasers.”¹⁶⁷ For example, there was the rejection of the draft of UCC §2-403(1) provided by the New York Law Revision Commission,¹⁶⁸ which had provided for the original owner’s intent to be a guiding factor in voidable title cases.¹⁶⁹ In addition, the desire to expand the law is clear from the Official Comment to UCC §2-403(1): “The basic policy of our law allowing transfer of such title as the transferor has is generally continued and expanded under subsection (1).”¹⁷⁰ Also, to allow contractualism to affect UCC §2-403(1)(a) by a strict interpretation of ‘purchase’ would affect the other expressly voidable title situations in UCC §2-403(1)(b)-(d).¹⁷¹

¹⁶⁵ Weber (1961) 49 Ky L J 437, 461-462. See also, Note, (1963) 38 Ind L J 675, 688: “To argue ... that [a voluntary transfer of] possession would be insufficient to meet the ‘transaction of purchase’ [requirement] would seem to make [UCC §2-403(1)(a)-(d)] mere surplusage”.

¹⁶⁶ Jilson (1979) 20 Wm & Mary L Rev 513, 547-548.

¹⁶⁷ *Ibid.*, 547.

¹⁶⁸ *Report of the New York Law Revision Commission Relating to the Uniform Commercial Code*, Appendix IV (Excerpts from the Proceedings of the Commission), (1956), 383 – cited by Jilson (1979) 20 Wm & Mary L Rev 513, 541-542.

¹⁶⁹ Jilson (1979) 20 Wm & Mary L Rev 513, 548.

¹⁷⁰ UCC §2-403, Official Comment 1.

¹⁷¹ Jilson (1979) 20 Wm & Mary L Rev 513, 548. See also, Note, (1963) 38 Ind L J 675, 688.

In addition to the academic commentary, it would seem the courts have adopted a very relaxed interpretation of ‘purchase’, which has the huge benefit of avoiding a contractualist approach. The Court of Appeals of Texas considered this issue in *Kotis v. Nowlin Jewelry*,¹⁷² a case involving a the ‘bad check’ aspect of the voidable title provision.¹⁷³ There the Court considered the limited case-law on the meaning of ‘transaction of purchase’, concluding that “a swindler who fraudulently induces the victim to deliver the goods voluntarily is a purchaser under the code.”¹⁷⁴ By contradistinction, “a thief who wrongfully takes the goods against the will of the owner is not a purchaser.”¹⁷⁵ The basic rule is that “[o]nly voluntary transfers can constitute transactions of purchase”.¹⁷⁶ Furthermore, the Court of Special Appeals of Maryland has said that “voidable title under the Code can only arise from a voluntary transfer or delivery of the goods by the owner. If the goods are stolen or otherwise obtained against the will of the owner, only void title can result.”¹⁷⁷ This approach, that a voluntary transfer of the goods by the original owner to the middleman constitutes a transaction of purchase for the purposes of UCC §2-403(1),¹⁷⁸ has been adopted in various States,¹⁷⁹ and is supported by *Hawkland’s Uniform Commercial Code Series*.¹⁸⁰

¹⁷² (TexApp 1992) 844 SW2d 920; followed with approval in *A. Benjamini v Dickson* (TexApp 1999) 2 SW3d 611, 614.

¹⁷³ UCC §2-403(1)(b). This provisions is as dependant on there being a transaction of purchase as the mistake of identity provision. Therefore, the Court’s conclusions on transaction of purchase are as valid as if the case actually involved a mistake of identity.

¹⁷⁴ *Ibid*, 922.

¹⁷⁵ *Ibid*.

¹⁷⁶ *A. Benjamini v Dickson* (TexApp 1999) 2 SW3d 611, 614.

¹⁷⁷ *Inmi-Etti v. Aluisi* (1985) 63 MdApp 293, 492 A2d 917, 932; followed in *Kenyon v. Abel* (Wyo 2001) 36 P3d 1161, 1166.

¹⁷⁸ Along with a ‘transfer of purchase’, the goods must have been ‘delivered’ under such a transaction for the innocent purchaser to succeed in showing voidable title under UCC §2-403(1)(a)-(d). Delivery is defined by UCC §2-103(1)(e) as a “voluntary transfer of physical possession or control of goods”. So there must be a voluntary transfer of possession from the original owner to the middleman in addition to the transaction of purchase, which itself must be a voluntary transaction. Cf *supra*, text accompanying n 162.

¹⁷⁹ See eg *Jernigan v. Ham* (TennApp 1984) 691 SW2d 553, 556; *Charles Evans BMW v. Williams* (1990) 196 GaApp 230, 295 SE2d 650, 652; *Suburban Motors v. State Farm Mutual Automobile Insurance Co* (1990) 218 CalApp3d 1354, 268 CalRptr 16; *Welch v. Cayton* (1990) 183 WVa 252, 395 SE2d 496; *Heinrich v. Titus-Will Sales Inc* (1994) 73 WashApp 147, 868 P2d 169, 176; *Burris v. Thompson* (KanApp 2005) 119 P3d 1187. Occasionally, the requirement is interpreted such that the original owner must have ‘assented’ to the middleman obtaining the goods, see eg *Marvin v. Connelly* (1979) 272 SC 425, 252 SE2d 562, 563; *Petition of Hennessy*

Consequently, a thief does not take goods under a transaction of purchase,¹⁸¹ and ‘thief’ (as a conceptual label) must be limited to only those recidivists who take goods against the original owner’s will, and not those recidivists who obtain the goods by some means other than physical capture (ie deceivers and fraudsters).

The key issue is really the meaning of a “voluntary transfer of the goods”, and specifically the meaning of “voluntary”. A good starting point is reached by noting that a theft is involuntary – this is clear from the case law cited in the preceding paragraph (as well as from common-sense). What is it then that distinguishes a theft from a voluntarily transfer of the goods; more accurately (in this context), what is it that distinguishes a theft from a different criminal action, such as fraud, which does not affect the voluntariness of the transfer? This issue collapses back to the issue of mistake of identity: can a transfer made because of a fraudulent misrepresentation of identity be described as voluntary? If this question is answered, from the perspective of the UCC, in the negative, then any difference between the English and the US law is only apparent and not real. It is submitted that, as with the approach taken by the US courts (and commentators) to the concept of ‘transaction of purchase’, a broad interpretation, bearing in mind the policy and purposes of this provision, is the most appropriate. Thus, it is important that the interpretation of ‘voluntary’ be

(1985) 343 PaSuper 293, 494 A2d 853, 856. There is no substantive difference between the two formulations, and the facts of both *Marvin v. Connelly* and *Petition of Hennessy* show that the reason the innocent purchaser failed was that the goods had been stolen by means of theft, not some form of fraudulent deception. There is some evidence of an alternative interpretation, see eg *American Standard Credit Inc v. National Cement Co* (CA5 Ala 1981) 643 F2d 248, 268; *Touch of Class Leasing v. Mercedes-Benz Credit of Canada Inc* (1991) 248 NJSuper 426, 591 A2d 661, 667. These cases both suggest that the original owner’s intention is the key determinative aspect. However, a closer examination of these cases indicates that there is no real difference in the interpretation of “purchase”, as immediately after commenting about the seller’s intention, both Courts draw the difference between obtaining goods by fraud (though some sort of con) and obtaining goods by simply taking physical possession. Also, both cases claim accordance with and purport to follow *Marvin v. Connelly*, which is clearly within the boundaries of the interpretation of transaction of purchase that this article suggests is the most appropriate representation of US law under the UCC.

¹⁸⁰ F H Miller, 2 *Hawkland’s Uniform Commercial Code Series*, (2006), §2-403:5.

¹⁸¹ See eg *Olin Corp v. Cargo Carriers* (TexApp 1984) 673 SW2d 211.

undertaken with the purpose of enhancing the protection given to the innocent purchaser.¹⁸²

This is in accordance with the Official Comments to UCC §2-403. Official Comment 1 states:

“The basic policy of our law allowing transfer of such title as the transferor has is generally continued *and expanded* under subsection (1). In this respect the provisions of the section are applicable to a person taking by any form of ‘purchase’ as defined by this Act ... In addition subsection (1) provides *specifically for the protection of the good faith purchaser for value in a number of specific situations which have been troublesome under prior law.*”¹⁸³

There is also Official Comment 2:

“It is also freed from any technicalities depending on the extended law of larceny; such extension of the concept of theft to include trick, particular types of fraud, and the like is for the purpose of helping conviction of the offender; it has no proper application to the long-standing policy of civil protection of buyers from persons guilty of such trick or fraud.”¹⁸⁴

Although this second comment appears, in its context, to be referring to the application of the entrustment provision in UCC §2-403(2), it would also appear applicable to the problems

¹⁸² Cf Note, (1963) 38 Ind L J 675, 681 (noting that as UCC §2-403(1)(b)-(d) forms new law which aims to protect the innocent purchaser, to say that UCC §2-403(1)(a) does not extend the protection available under pre-Code law would make that provision redundant).

¹⁸³ UCC §2-403, Official Comment 1 (emphasis added).

¹⁸⁴ *Ibid*, Official Comment 2.

of voidable title and mistake of identity under UCC §2-403(1)(a),¹⁸⁵ bearing in mind that mistake of identity law has been particularly subject to the “technicalities” of larceny.¹⁸⁶ With this in mind, it seems acceptable to say that the definition of ‘voluntary’ should be a negative one: only those actions which constitute ‘simple’ theft (such that someone who breaks into a warehouse at night and takes goods is a thief) will be involuntary, and everything else (such as a fraud that meets a particular definition of theft) will be considered voluntary.¹⁸⁷ So it is the breadth of the US approach, with everything other than a bare taking of goods from someone’s possession qualifying as a transaction of purchase for the purposes of the voidable title exception in UCC §2-403(1), that distinguishes the US law from the English law.¹⁸⁸

This interpretation of the “transaction of purchase” requirement indicates is that there is no contractualism, strict or relaxed, to hinder the development and application of the voidable title rule. If there are only two parties to the conflict, and there is no transfer of goods to an innocent purchaser (ie a situation not covered by UCC §2-403(1)), then a strict contractualist approach is applied.¹⁸⁹ Of course, in such contexts, it is an acceptable approach. However, when there is a *nemo dat* conflict, the courts do not fixate upon the nature of the transaction *vis à vis* the original owner and the middleman. There is no complex, metaphysical analysis of whether there has been a correspondence of offer and acceptance between the original

¹⁸⁵ Official Comment 2 does specifically refer to the ‘cash sale’ exception under UCC §2-403(1)(c), but there is nothing that *limits* it to such provision.

¹⁸⁶ This is especially clear in the English law, for which see MacMillan [2005] CLJ 711.

¹⁸⁷ See eg Note, (1963) 38 Ind L J 675, 687-688: “Certainly the transfer of possession in larceny by trick is voluntary”. See also C L Knapp, “Protecting the Buyer of Previously Encumbered Goods: Another Plea for Revision of UCC Section 9-307(1)” (1973) 15 Ariz L Rev 861, 882.

¹⁸⁸ It is submitted that this approach deals with the problems concerning stolen goods raised in P S Atiyah, J N Adams and H MacQueen, *The Sale of Goods*, 11th edn (Longman, 2005), 44. There it was argued that the retention of the basic rule that an innocent purchaser cannot obtain good title to stolen goods meant that it would remain necessary to distinguish between thefts and cases where goods are obtained by fraudulent deception. This, it is argued, would still lead to problems distinguishing those frauds which “totally negative the owner’s consent to parting with the goods” and those that do not.

¹⁸⁹ See eg *Silver Dollar City v. Kitsmiller Construction* (MoApp 1996) 931 SW2d 909; *Governing Board of the St Johns v. Continental Aerial Surveys* (FlaApp 2002) 827 So2d 304.

owner and middleman so as to create a contract, which can then be considered as valid, void, or voidable. All that is required in essence is a voluntary transaction that creates an interest in property. The width of meaning the courts have bestowed on this requirement indicates the simplicity of the US provision on voidable title. This is, of course, in complete contrast with the English law.¹⁹⁰

IV. CONCLUSION

It is clear that the US law is broader than the English law in many respects. Mistake of identity, as formulated in UCC §2-403(1), is designed to catch all identity mistakes: it is not just aimed towards face-to-face dealings. Furthermore, the width of the mistake of identity provision and the case-law interpretations of “purchase” mean the innocent purchaser’s chances of success are not dependent on the exact nature of the transaction between the original owner and the middleman. It is generally clear that the UCC’s provision puts the innocent purchaser in a far superior position.

It is also clear that the English law is complex, and *Shogun Finance* has done little to reduce this. Furthermore, the English law is notoriously unhelpful for the innocent purchaser. His position *vis à vis* the goods is dependent on actions undertaken between the original owner and the middleman such as conversations and representations. The innocent purchaser will of course have no knowledge of or control over such things, yet it is he who will bear the risk of loss, rather than the original owner.

¹⁹⁰ Even the relaxed contractualism of Lord Millett seems strict compared to the US law. *Shogun Finance v. Hudson* [2004] 1 AC 919, [62]: “There is clearly a transaction between them, for [the original owner] has let [the middleman] have possession of the goods and take them away, usually with the intention that he should be free to deal with them as owner. But is the transaction contractual?”

However, as valid as these reasons are for English law to either adopt the UCC's provision or develop along such lines,¹⁹¹ they are ultimately less significant than the fact that the US law, unlike the English law, considers voidable title (and by extension mistake of identity) in the context of the *nemo dat* rule. It is clear that the UCC's provision is solely focused on its position as an exception to the *nemo dat* rule. This is a much more realistic approach to the problem. There is an absence in US law of the contractualism that has formed a stranglehold on English analysis of this particular aspect of *nemo dat* law.¹⁹² A strict contractualist approach to the problem, which reduces the issue to a problem of contract formation between the original owner and the middleman, is incoherent and irrational. Even the relaxed contractualist approach, in its most expansive exposition as given by Lord Millett in *Shogun Finance*, is still based on the need to show a contract. The US approach, which clearly delineates the mistaken identity voidable title problem (in a *nemo dat* context) from the problem of what makes *contracts* void or voidable, allows for a clarity in the law that the English jurisprudence cannot compete with.

As Sedley LJ noted in the Court of Appeal's decision in *Shogun Finance*,¹⁹³ the English law on mistake of identity had tied itself into a "Gordian knot".¹⁹⁴ It seems the US law has adhered to the Alexandrian myth, and has slashed the knot apart by a simple process of deeming all mistakes of identity to make title voidable, and by avoiding contractualism by developing a very broad interpretation of the "transaction of purchase" requirement for the transaction between original owner and middleman. The time has probably come to draw a line between *nemo dat* conflicts and two party contractual disputes. So, where goods are

¹⁹¹ This was the recommendation of the Law Reform Committee, *Twelfth Report (Transfer of Title to Chattels)* (Cmnd 2958, 1966), [15]. See also the Ontario Law Reform Commission, *Report on Sale of Goods*, (1979), vol 1, 286.

¹⁹² Cf Note, (1963) 72 Yale L J 1205, 1226 arguing, essentially, that such contractualist ideology remains in US law. It is submitted the overwhelming evidence, analysed above at text following n 157, proves otherwise.

¹⁹³ [2002] QB 834.

¹⁹⁴ *Ibid*, [23].

involved, and there is a dispute between an original owner and an innocent purchaser, due to the actions of a middleman, such cases shall be treated as *nemo dat* cases. Where the dispute is between two parties – the key point is the absence of an innocent purchaser – the legal treatment can be different. The existence of a third party innocent purchaser of goods should mean the situation is so substantially different that a different law should apply. As shown, the US has taken this step.¹⁹⁵ It is submitted that such an approach should be seriously considered for adoption into English law by the Law Commission.¹⁹⁶

¹⁹⁵ However, it is perhaps worth noting that the UCC fails to cover any other types of common law mistake which can affect the validity of the transaction between original owner and middleman: J S Ziegel and P Perrell, *Ontario Law Reform Commission, Sale of Goods Project, Property Effects: The Nemo Dat Doctrine and Sales Transactions*, (March 1975), 6.

¹⁹⁶ As a final point, it is interesting to note briefly that this approach would mirror Roman law somewhat: see K. O Shatwell, “The Supposed Doctrine of Mistake in Contract: A Comedy of Errors” (1955) 33 Can B Rev 164, 171.