

EMERGING TRENDS IN SALE OF GOODS IN NIGERIA: AN EXAMINATION OF MARKET OVERT PRINCIPLE AND THE EXCEPTIONS*

Abstract

Whether or not a buyer of goods acted in good faith, he or she cannot obtain a good title to the goods purchased because of the general rule which provides that a buyer who buys goods from someone other than the owner of the goods will not obtain a good title. This expression is expressed in the Latin maxim 'nemo dat quod non habet,' that is, 'that no one gives what he does not have'. This principle of law was restated under Section 21(1) of the Sale of Goods Act, which states that where goods are sold by a person who is not their owner and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had. This principle seeks to protect the ownership of the goods notwithstanding its contrast with the principle of law which recognizes a buyer who bought in good faith and with value without notice, which also should be protected. There are a lot of complexities that go with the sale of goods and just as there are several exceptions to the general rule governing the sale of goods. However, the focus of this article is the examination of the common law principle of nemo dat rule and the exceptions which the sale of goods has provided to cater for the complexities of sale of goods general principle. This article utilizes the doctrinal method of research.

Keywords: Market Overt, Goods, Buyer, Seller, Sale of Goods, Good title.

1. Introduction

Sale of Goods Act refers to sale of goods as 'a contract whereby the seller transfers or agrees to transfer the property in a good to the buyer for a money consideration called the price'.¹ Looking at the definition above, it means that goods and money consideration must be present in a sale of goods contract. There must also be a seller and a buyer and the general principle of contract also applies. In the contract of sale, there is a valid situation whereby an agreement to sell a property which will take place in the future.² Sale of goods could also be absolute or conditional.³ It is pertinent to note that the main aim of the contract of sale of goods is to transfer the property in the goods to the buyer.⁴ This process of transfer must be from the seller/owner to the buyer. The buyer can only get a good title since the sale was done voluntarily. This situation also is not always possible, for at times unauthorized person can sell goods that do not belong to them. For instance, agents that act beyond their limit of authorization and try to pass off the wrong title to an innocent buyer; others are fraudsters, thieves, etc. What then is the issue, the issue is which of the parties should bear the brunt of the fraudulent fraudster's action? Is it the original owner of the sold goods or the one who bought in good faith for value without notice? This issue in terms of balancing the fate of these two parties was resolved by Lord Denning in the case *Bishop Gate Motor Finance Corporation Ltd v. Transport Brake Ltd*.⁵ Lord Denning saw involuntary passing or transfer of property to connote a situation where persons who are not real owners of goods, not agents of the real owners, sell such goods and still pass a good title to a buyer of such goods. This position is not the original position, for the position has been that no one can give what he or she does not have. This expression is the common law position that is expressed in the Latin Maxim 'Nemo dat quod non habet'. The focus of this paper is to examine this common law principle with the exceptions provided by the Sale of Goods Act to balance the rigorous complexities which go with the sale of goods.

2. Nemo Dat Quod non Habet Rule

As a general rule, there will be no good title to a buyer who buys goods from someone other than the real owner of the goods, notwithstanding that he or she acted in good faith for value without notice.⁶ Simply put no seller of goods, who is not the owner of such goods and also not with the authority of the owner to sell, can transfer a good title in the goods to the buyer. This is the general rule that no one can give what he or she does not have. This principle is provided for under section 21 (1),⁷ it provides thus:

Subject to the provisions of this Act, where goods are sold by a person who is not the owner and who does not sell them under authority or with the consent of the owner and where a joint

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¹ Section 1(1) Sale of Goods Act (SOGA) 1873.

² Section 2(5) Sale of Goods Act.

³ Section 2(3) Sale of Goods Act also see I. N. E. Worujji, *Business Law in Nigeria* (Lagos: Malthouse Press, 2017), 48.

⁴ Section 1(1) Sale of Goods Act.

⁵ (1949)1 .K.B 322.

⁶ *M. I. A. Sons Ltd. v. Afrotec Technical Services Ltd and African Engineering Co. Ltd.* (2000) N.W.L.R Pt. 692 @ 730.

⁷ Sale of Goods Act.

owner sell them without the consent of the other joint owner the buyer acquires no better title to the goods than the seller had, unless the owner or other joint owners of the goods as the case may be, is by his conduct precluded from denying the sellers authority to sell.⁸

The case of *Hollins v. Fowler*⁹ gave a classical illustration when the owner sued for conversion. In the above case, Hollins a Liverpool broker purchased cotton from Bayley another broker who had obtained it from Fowler the owner without title due to fraud. Hollins purchased the cotton in good faith and sold same and delivered to a manufacturer. In this instance Fowler was held liable. This was the decision of the court: ‘When a loss had happened through the roguery of an insolvent, it must always fall on some innocent party and that must be hardship.’¹⁰ From this decision, it is clear that the *Nemo Dat* rule seeks to protect the ownership of goods as provided for under section 21(1) of the Act and this contradicts the principle that a buyer who takes in good faith and for value without notice shall also be protected as provided for under section 61(1) of same Act. This is in order not to make the principle a nullity. It was due to these conflicting principles that made Lord Justice Denning to examine the case of the *Bishops Gate Motors Finance Corporation Ltd v. Transport Brakes Ltd*¹¹ and states thus:

In the development of our law, two principles here striven for mastery. The first is the protection of property. No one can give a better title than he himself possesses. The second is the protection of commercial transaction. The person who takes in good faith and for value without notice should get a good title.¹²

The first principle has had sway for a long time overriding the second condition, but it has been modified by common law itself and also by statute so as to meet the needs of our time. It is true that the *Nemo dat* rule is too restrictive to allow for both freedom and safety and has been modified in a number of important instances by common law rules and also with the Acts of parliament.¹³ Section 21 of the Act indicates the exceptions of the *Nemo Dat* rule and these exceptions are very important because they are developed to strike a balance between the owners’ rights and the buyers’ rights and are listed below.

1. The Exceptions to the Nemo Dat Rule:
 1. Sales under Agency;
 2. Sales by order of Court;
 3. Sales under Voidable title;
 4. Sales under Statutory Power;
 5. Sales by Mercantile Agent;
 6. Sales in the Market Overt;
 7. Sale with the owner’s consent;
 8. Sales by Estoppel;
 - a. By conduct;
 - b. By words; and
 - c. By negligence.
 9. Sales by seller in possession;
 10. Sales by buyer in possession¹⁴

Sales under Agency

According to the Osborn concise Law Dictionary, an agent is a person employed to act on behalf of another person.¹⁵ So, if a sale is within an agent’s apparent or usual authority, it gives the purchaser good title even if the agent is without actual authority. This simply means that a sale by an agent without actual authority will give the purchaser a good title. The agency principle permits a seller, who is not the original owner of a good, to transfer good title to the buyer. The fact is that section 21 (1)¹⁶ provides an exception to the general rule of the sale of goods that a person who is not the owner of goods can sell and give a good title if the sale is under the authority or consent of the owner of the goods. The principle is further reaffirmed by the provision of section 61(2)¹⁷

⁸ Section 20(1) Sale of Goods Law of Cross River State.

⁹ (1875) L.R.7 HL P.757

¹⁰ Ibid.

¹¹ (1949) 1 All E.R 37 @ 46; (1949)1 KB, 322.

¹² Ibid.

¹³ M. C. Okany, *Nigerian Commercial Law* (Onitsha: Africana First Publisher, 2009), 261.

¹⁴ Section 20-24 of the Sale of Goods Act; also see Olawale Ajai, *Consumer Credit Sales and Services Transactions Law in Nigeria* (Lagos: Criterion Publishers, 2011), 178.

¹⁵ 8th ed.

¹⁶ Section 21(1), Sale of Goods Act.

¹⁷ Section 61 (2), Sale of Goods Act.

which reads thus: ‘The rules of common law, including the law merchant save in so far as they are not inconsistent with the express provisions of this Act and in particular the rules relating to the law of principal and agent shall continue to apply to contract for the sale of goods’.¹⁸ Thus, under the common law principle, a sale within the apparent authority of an agent binds the owner of the goods. Also if an agent acted within the course of his employment it also binds his principal even though his action exceeds his actual authority.¹⁹ In any case, when he acts otherwise, it will not be binding on his principal.

Sale by Order of Court

The Courts have the power to order any goods, which is of perishable nature, to be sold.²⁰ Similarly section 26 (1) of the sale of goods Act provides that:

A writ of Fieri Facias or other writ of execution against goods shall bind the party in the goods of the execution debtor as from the time when the writ is delivered to the Sheriff to be executed... provided that no such writ shall prejudice the title to such goods acquired by my person in good faith and for valuable consideration.²¹

Flowing from the above, it simply means that a sheriff by statute is empowered to sell goods that are taken from the premises of a judgement debtor by the Court sheriff.²² It is instructive to note that in the case of *Mbanugo and Ors v. UAC Ltd*,²³ it was held that a sale by a sheriff under a warrant confers good title on the purchaser.

Sales under Voidable Title

Section 23 of the Sale of Goods Act which provides thus:

Where the seller of goods has a voidable title to them, but his title has not been voided at the time of the sale, the buyer acquires a good title on the goods, provided he buys them in good faith and without notice of the seller’s defect of title²⁴

This section is to the effect that a seller of goods who has a voidable title can pass a valid title to a buyer before his title is void.²⁵

Sales under Statutory Power

Many statutes provide for the powers of sale and there are several powers of sale in the statute.²⁶ One of such powers is provided for under section 48 (3)²⁷ that an unpaid seller has power to resell goods especially where they are of perishable nature. The provision makes good business sense and capable of entrenching economic growth in the business sector of the economy. The unpaid seller can resell the goods and pay back to the original buyer his or her ‘deposit’ while also making his profit since the perishable goods are not left to deteriorate and loss value.

Sales by Mercantile Agent

The Factors Act of 1889 defines who a mercantile agent is. That a mercantile agent is an agent who, in the course of his business as an agent, having authority either to sell, consign goods for the purpose of sale, buy or raise money on the security of the goods.²⁸ Some other sales subordinates are exempted from this kind of agent. Some like servants, clerks, warehouse men and shop keepers. People who are mercantile agents must be independent from their principals, able to deal with goods in their own names. The Factors Act under section 2(1) gives the basis for the statutory exemption of the mercantile agent from the *nemo dat doctrine*. This provision reads thus:

Where a mercantile agent with the consent of the owner in possession of goods or of the documents of the title to goods, any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the

¹⁸ Ibid.

¹⁹ P. S. Atiyah, *The Sale of Goods* 6th ed. (London: Pitman Publishing, 1980), 220.

²⁰ M. C. Okany, *Nigerian Commercial Law*, 279.

²¹ Ibid.

²² Sheriff and Civil Process Law, Cap 151 Laws of Bendel State of Nigeria 1976, as Applicable to Edo State.

²³ (1961)1 All NLA 775.

²⁴ Section 23 Sale of Goods Act.

²⁵ The Sale of Goods Act of 1893 merely codified the ideal of voidable title from common law principle.

²⁶ M. C. Okany, *Nigerian Commercial Law*, 279.

²⁷ 48(3) Sale of Goods Act.

²⁸ Section 1(1) Factors Act 1889.

goods to make the same, provided that the person taking under the disposition acts in good faith and has not at the time of the disposition notice that the person making the disposition has no authority to make the same.²⁹

A look at this sub-section reveals that one has to consider the following in order to pass a good title to an innocent purchaser for value without notice. Firstly, the mercantile agent must be in possession of goods or the documents of the title to such goods³⁰ and must be entrusted with such goods as an agent. This was the decision in the case of *Pearson v. Rose and Young Ltd*³¹ where Denning L.J. held that ‘the owner must consent to the agents having them for a purpose which in some way or the other is connected with the business as a mercantile agent’. More so, an individual who undertakes to sell goods as an act of friendship will not be referred to as a mercantile agent. Secondly, the possession of the goods must be with the owner’s consent. Thirdly, the sale must be in the ordinary course of business. Fourthly, the buyer must purchase in good faith without notice of the mercantile agent’s lack of authority. These are some of the import that sub-section (2) has in order to pass a good title to an innocent purchaser without notice.

Sales in the Market Overt

This is another one of the exceptions to the *Nemo dat* rule and it is provided for under section 22 (1) of the Sale of Goods Act. This section of the Act provides that the buyer of goods acquires a good title if the good is purchased in the market overt and according to the usage of the market, acquiring same in good faith for value without notice of any defect or want of title on the part of the seller.³² So, a sale in the market overt must be shown that the sale is within the premises of a market, must be a sale of goods sold in the type of market and must be during the ordinary business of the day. Ordinary business or the usual business hour is between sunrise and sunset, according to Okany.³³ In addition, all transactions made in such market must be open and public. This was the decision reached in the case of *Reid v. Metropolitan Police Commissioner*³⁴ where the Court held that goods should have been sold at day time when all who passed could see the goods. Therefore, it is pertinent to note further that the phrase ‘market overt’ refers to any legally constituted market that is open and public.³⁵ Therefore following this overt market rules or criteria in a recognized legally constituted market, the innocent and honest purchaser with value without notice should be well protected. In any case, if the purchaser is to be protected the following conditions should be met:

That the sale must be in public and must also be open sale; the sales must be according to the custom of the market³⁶ and with the usual market practice; that the goods must be openly displayed for sale and not hidden inside the shop; that the goods must be the kind sold in such market and must be a sale which takes place between sunrise and sunset.³⁷

It is important to note further that sale has to be according to usage of the market.³⁸ It is also important to note that this exception has a great demerit because when a seller sells stolen goods in a market overt, the buyer will acquire a good title. This can be seen under section 22 (1)³⁹ of the Act, but the buyer must purchase such goods in good faith for value without notice of the seller’s lack of title. On the other hand, if the thief is prosecuted and convicted of the crime, the property automatically reverts back to the owner of the stolen goods or to his representatives. Section 22 (1) of the Act which covers the *Nemo Dat* principle has a lot of issues to be clarified. These issues are goods, market overt, and usage of the market, good title, good faith, seller and buyer. An overt market is an open, public and legally constituted market as defined by Jervis, J. in the case of *Lee v. Bayes*.⁴⁰ It therefore means that not all places where members of the public have access to buy and sell goods are market overt within the contemplation of the Sale of Goods Act. Okany confirms that shops; mini markets and supermarkets are not market overt.⁴¹ In fact, an unauthorized market is not a market overt.⁴² However, an overt market has to do with the conflict between the real owner of the goods whose right has been injured by the sale

²⁹ Ibid.

³⁰ Section 1(2) Factors Act.

³¹ (1950) 2 All ER 1022, (1951)1 KB 275.

³² Sec. 22 of the Act.

³³ M. C. Okany, *Nigerian Commercial Law*, 242.

³⁴ (1973) 2 ALL ER 97.

³⁵ Per Jervis J. in *Lee v. Bayes* (1856) 18 C. B. 599 at 601.

³⁶ *Bishopgate Motor Fin. Corp. v. Transport Brakes Ltd.* (1949) 1 K. B. 322 (1949) 1 All E. R. 37.

³⁷ *Reid v. Commissioner of Police* (1973) Q. B.551.

³⁸ S. 22 (1) Sale of Goods Act.

³⁹ Sale of Goods Act.

⁴⁰ (1856) 18 C.B. 599 @ P.200-201.

⁴¹ M. C. Okany, *Nigerian Commercial Law*, 75.

⁴² Ibid, 343.

of his goods and the purchaser who bought in good faith for value without notice.⁴³ On the other hand, a market can be constituted by statute, prescription or custom.⁴⁴ However, in Nigeria there are different markets, like the community market, town markets, daily market, forth nightly market, etc. Most of these markets are authorized and constituted by statute, prescription or custom. What then is the fate of shops set up on residential premises, super markets and mini markets where members of the public can access and carry out their buying and selling? Should they be referred to as market overt? Okany states that they are not market overt.⁴⁵ Put simply, an unauthorized market is not a market overt. Flowing from this fact, the different home stores and shops cannot be referred to as market overt. It is important to note that not every shop that wears the resemblance of market is fully a market overt. For this reason, they may be referred to as quasi market overt. This is because these places have the characteristics of an overt market. Characteristics such as, selling at a shop, on a lawful market day, during the selling period between sunrise and sunset, with the goods exposed and the transaction starts and concludes in the shops or quasi market overt.

Another issue raised by the market overt exception is the issue of the goods sold in overt market. Section 1(1) of the Act defines what the sale of goods means. The definition has some very important points and concepts to note. First, there must be two or more parties to the sale, that is, the seller and the buyer. Also, this section accommodates the different sale contract, that is, agreement to sell, sale simpliciter and transfer of the goods sold from the seller to the buyer. Under the agreement to sell the goods, the goods will be given out in the future after the fulfilment of the consideration agreed upon.⁴⁶ However, goods in this category are ascertained goods, yet to be manufactured goods and goods yet to be harvested. In addition, the consideration refers to in this section is money consideration which is the price to sustain the sale of good contract. This consideration called price is received by the seller and it is the buyer that pays for the goods purchased by him *via* this consideration. Sometimes this consideration is fixed and sometimes negotiable and if so the buyer will have to pay a reasonable price for the goods negotiated. A section of the sale of goods Act provides for what a reasonable price is which depends on fact and the circumstance of each sale.⁴⁷ In *Acebal v. Levy*,⁴⁸ it was held that the market price may not be reasonable because there is no rule that says so, especially when there is no universal rule to that effect. In addition, goods in the sale of goods contract can either be existing goods or futuristic goods.⁴⁹

Another important element in the market overt exceptions is that of good faith. This element affects the buyer and not the seller of the goods. The buyer must be a buyer who has bought at the market overt in good faith without notice of any fraudulent act and with encumbrances on the part of the seller and it is with consideration or value. If the buyer was gifted the goods then it will not come under the market overt exception, because a gift is not a sale and it is without consideration. However, if he had furnished consideration to acquire the goods and without notice of any impediment, then he would invoke the exception. If the buyer had knowledge of the seller's fraudulent act and without consideration, he cannot invoke the *Nemo Dat* exception.⁵⁰ In addition, even consideration alone does not cure the seller's fraudulent act. More so, there must be capacity to contract in order to invoke this exception. So, the sale must be by someone with the contractual capacity to buy and sell.⁵¹ It is pertinent to note that section 2 of the Sale of Goods Act⁵², is the general law that regulates the capacity to contract and also regulates the capacity to transfer and acquire property.

Furthermore, usage of the market is another very important element in market overt exception whereby the sales must take place in accordance to the usage of the market as provided for under section 22.⁵³ The goods must be same traded in the market. In *Bishopsgate Motor Finance Corporation v. Transport Brakes Ltd*,⁵⁴ it was held that as the usage of the market allowed sales to be made privately in the market after the auctioneer had failed to

⁴³ E. Zamir, 'Market Overt in the Sale of Goods: Israeli Law in a Comparative,' *Israel Law Review*, vol. 24, iss. 1 (Winter 1990): 82-127. Available at <https://www.cambridge.org/core/journals/israel-law-review/article/market-overt-in-the-sale-of-goods-israel-law-in-a-comparative-perspective/D596DE/> Accessed 30th September, 2021.

⁴⁴ G. Ezejiofor, C. O. Okonkwo and C. U. Llegbune, *Nigerian Business Law* (London: Sweet and Maxwell, 2009), 171.

⁴⁵ M. C Okany, *Nigerian Commercial Law* p. 342.

⁴⁶ I. N. E. Worugji, *Business Law in Nigeria* (Lagos: Malthouse Press, 2017), 45.

⁴⁷ Section 8 Sale of Goods Act.

⁴⁸ (1834), 10 Bing, 376.

⁴⁹ Section 5 Sale of Goods Act.

⁵⁰ *Bishopsgate Motor Finance Corporation v. Transport Brakes Ltd*. (1949) 1 KB 332.

⁵¹ A. Okachi, 'Sale in Market Overt: A Special Consideration of Stolen Goods,' *The Loyal Nigerian Lawyer*, <https://loyalnigerianlawyer.com/sale-in-market-over-a-special-consideration-of-stolen-goods/> Accessed 03/09/2021.

⁵² Sale of Goods Act.

⁵³ Sale of Goods Act.

⁵⁴ (1949) 1 ALL ER 39.

sell, the sale was in market overt and the buyer had a good title. This decision was reached because the usage in that market allowed a sale by private treaty.

Another exception to the *Nemo Dat* rule is having a good title. This is where the buyer in the market overt buys without notice for value. This title is without any encumbrance and without any overriding title as at the time of the sales. This statement becomes a fact if the original owner of the goods did not stop the fraudulent sales on time and allow the buyer who acquires to have a good title. This was the decision in the case of *Bishopsgate Motor Finance Corporation v. Transport Brakes Ltd.*⁵⁵ It is pertinent to note that the true owner of a good will fail in his claim, if he or she fails to claim the sold good in good time before the final sales and passing of the possession of the good to the new owner.⁵⁶ Section 23⁵⁷ is to the effect that, where the seller of goods has a voidable title⁵⁸ he can pass a good and valid title to a third person before his title can validly be voided. The above section states thus: 'Where 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 on the goods, provided he buys them in good faith and without notice of the seller's defect of title'.⁵⁹

In the light of the above, the case of *Anderson v. Ryan*⁶⁰ is instructive. In this case, a contract of sale was between the owner of goods and a buyer who was a fraudster and he nevertheless acquired a valid title. This is because it was held that section 21 of the Act did not apply to the sale, for the original agreement was not a sale but only an agreement to sell. Also in the case of *Newtons of Wembley Ltd v. Williams*⁶¹ where the buyer in possession transferred a good title to innocent buyer notwithstanding the fact that the owner had voided the swindler's title before the final sale and handing down possession to the innocent buyer without notice for value offered. This swindler is known as buyer in possession of the goods. A seller is one of the parties involved in a contract of sale of goods. The seller always holds out to the buyer that he is the real owner of the goods or has the legal authority to sell the goods. This was the decision reached in the case of *Eicholz v. Bannister*⁶² per Arle, CJ which stated that '... in almost all the transactions of sale in common life, the seller by the very act of selling, holds out to the buyer that he is the owner of the article he offers for sale ...' The seller is one of the parties in the sale of goods that enjoys the freedom to determine the terms of the contract agreement. The seller usually agrees to transfer the property in goods to the buyer and for a price⁶³ known to both parties as the consideration in form of money. The buyer is one of the parties involved in a contract of sale of goods. The buyer pays the only form of consideration known as the price which is also known as the money in the contract of sale for the property in the goods to the seller. The buyer pays a reasonable price for the goods if the price of the goods is not determined. The Act provides for what is reasonable and listed the criteria for knowing it that it is a question of fact and the circumstance of each particular transaction.⁶⁴

Sale with the Owner's Consent

The sale must be with the owner's consent; the owner of the goods must consent to the sale of the goods to a third party. This is because if the seller had no property in the goods sold and was not also authorized or given consent by the owner of the goods to sell, he cannot definitely transfer to the buyer a good title. Not even when the buyer acted in good faith and with valuable consideration. This assertion is backed up by section 21(1) of the Act which provides thus:

Subject to the provisions of this Act, where goods are sold by a person who is not the owner, and who does not sell them under the authority or with the consent of the owner and where a joint owner sells them without the consent of the other joint owner, the buyer acquires no better title to the goods than the seller had, unless the owner or other joint owner of the goods, as the case may be, is by his conduct precluded from denying the seller's authority to sell.

From the above, it shows that the principle protects the owner of the goods and not the buyer especially one who has bought in good faith for value without notice. In fact, the buyer would have to return the good to the original owner which will work hardship on the buyer who did not know or suspect or having a means of knowing the

⁵⁵ (1949) 1 KB 332.

⁵⁶ P. U. Umoh, 'The Market Overt Rule in the Law of Sales,' *Uyo Journal of Management Science*, vol. 1 (October 2000): 26.

⁵⁷ Sale of Goods Act.

⁵⁸ The sale of goods Act of 1893 merely codified this general knowledge that voidable title which is original to common law.

⁵⁹ Section 23 Sale of Goods Act.

⁶⁰ (1967) 1 R 34.

⁶¹ (1965) 1 B.Q.

⁶² (1864) 17 C.N.N.S 708

⁶³ Section 1(1) Sale of Goods Act (SOGA)

⁶⁴ Section 8 of SOGA.

real owner of the goods in the possession of the instant seller. However, the Act under sections 21-25 has put in place some exceptions to the general rule above which is the concluding part of Section 21(1) of the Act thus ‘... unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell ...’

Sales by Estoppel

Section 21(1) of the Sale of Goods Act provides that the owner of the good will be estoppel from denying the existence of an agent’s authority to act on his behalf in relation to the goods, if he so represents the agent as his agent even if such agent does not exist. From the above provision, there are two instances where the owner of the goods can be estopped from denying the seller’s authority to sell. They are:

- (1) When the owner has, by his words or conduct, represented to the buyer that the seller is the true owner or has the owner’s authority to sell. He will be estopped by representation.⁶⁵
- (2) When the owner of the goods, through his negligence, allows the seller to represent himself as the owner of the good or make it look as if he has the owner’s authority to sell. He will be estopped by negligence.

Estoppel by representation is further divided into two: estoppel by words and estoppels by conduct. These are further explained below.

Estoppel by Conduct

For this conduct to avail a buyer who seeks to acquire a good title to the goods purchased, he would have to show that the owner of the sold goods had made some representations that the goods belong to the seller. In the case of *Forquharson Bros v. King and C Ltd*⁶⁶ the House of Lords held that the defence of estoppel will fail because the defendants had not acted on any representation made by the plaintiff concerning the authority of the clerk. Furthermore, the case of *Eastern Distributors Ltd v. Golding*⁶⁷ where X was estopped from setting his title against the plaintiff who had bought the car from C, and further that the estoppel operated to pass title to the purchaser not only against X but also against any buyer in good faith from X.

Estoppel by Words

This is a situation where the owner of the goods represents the seller sufficiently and unequivocally that the seller has the authority from him to sell the goods. This kind of estoppel can well be understood by the decision reached in the case of *Henderson and Co. v. Williams*⁶⁸ where it was held, per Lord Herlsbury, that Y and Z were estopped from denying X’s authority to sell the sugar, because Y had represented that X was the owner by ordering Z to transfer the goods unto his name in their books and Z because he had represented to R that he held the goods to his order.

Estoppel by Negligence

It is true that there is estoppel by negligence when the owner of the goods had by his negligence allowed a third party to represent himself as the owner or as having the owner’s authority to sell. However, there is no negligence unless there is a duty to take care. To establish an estoppel by negligence, a plaintiff must show the following.

1. That the defendant owes him the duty of care;
2. That he was negligent in his breach of the duty owed; and
3. That that negligence of him was the proximate or real cause of the plaintiff’s loss.

These were the decisions reached in the case of *Mercantile Credit Co. v. Hamlin*.⁶⁹

Sales by Seller in Possession

Sales by seller in possession are provided for by two overlapping statutory provisions, that is, the Sale of Goods Act and the Factors Act. They are section 8 of the Factors Act which is *in pari materia* with section 25 (1) of the

Sale of Goods Act thus:

Where a person having sold goods, continues or is in possession of the goods or of the documents of title to the goods the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition

⁶⁵ Okany, 265

⁶⁶ (1902) A.C.325.

⁶⁷ (1957) 2 ALL ER 525.

⁶⁸ (1895) 1 Q.B.521.

⁶⁹ (1964) 2 ALL ER 592-602.

thereof (or under any agreement for sale, pledge or other disposition thereof)⁷⁰ to any person receiving the same in the same effect as if person making the delivering or transfer were expressly authorized by the owner of the goods to make the same.

These sections is just to protect innocent purchaser without notice but with consideration who is deceived into believing that the vendor has the right to sell since he is physically in possession of the goods and documents. It is true that this sales exception enjoys the presumption that possession of goods is evidence of ownership of goods; the capacity in which the seller is in possession is irrelevant. The right question is, is the seller's possession physically continuous, this was the position in the case of *Staffordshire Motor Guarantee v. British Wagon Co. Ltd.*⁷¹

Sales by Buyer in Possession

This sales exception is provided for under section 25 (2) of the sale of goods Act and section 9 of the Factors Act. The wordings in these statutes are identical and they apply to persons who had bought or who had agreed to buy the goods and so relevant where the property in the goods has not passed, the claimer will rely on the above provision. Section 25(2) SOGA) provides thus:

Where a person having bought or agreed to buy goods obtained with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or document of title under any sale, pledge other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other rights of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

There are two important points to note under this statement. Firstly, consent of the seller and one in possession of the goods if a third party is to be afforded the protection of section 25(2) of the Act. Also in the case of *Du Jardin v. Beadman Bros Ltd.*,⁷² it was held that the plaintiff had obtained a good title because the plaintiff had agreed to buy and already in possession of the car with its registration book with the consent of the owner which is in line with section 9 of the Factors Act, even when the consent was fraudulently obtained.

Secondly, possession of the goods is crucial. If the third party is planning to buy or agreed to buy or has bought, he will not be protected. However, he can only be protected if he has actually obtained possession of the goods in question.⁷³

3. Why the Grounds for the Market Overt Exceptions?

The aim of any commercial transaction is to transfer and pass a good title from the seller to the buyer;⁷⁴ this passing off channel must be from the actual owner to the buyer. However, the real owner of the goods can, or acting through his representative or an agent, sell his goods and pass valid title in the goods to a third party.⁷⁵ In any case, an ideal situation is not always the situation. This is because unauthorized persons such as a fraudster, thief and agents who had exceeded their authority, due to their selfish reasons, can pass title unknown to the innocent third party who had bought with consideration without notice. Looking at the rule, its objectives are to allow the real owner of the sold goods to search, especially when the goods is sold by unauthorized seller, around the market place.⁷⁶ If he however neglects to so search he will lose his right but, the innocent purchaser should not be made to suffer for such negligence or carelessness. This rule was set to protect the real or rightful purchaser of the goods because he bought from the market overt unlike when he had purchased same from a private individual from the road side, traffic hold up, freelance marketers, etc and not from the market overt. This market sales exception was to promote and protect the market sales integrities and also a means of meeting the realities of commercial activities.

The market overt sale which is one of the exceptions to the *Nemo Dat quod non habet* is outdated taking the modern facilities and civilization into consideration especially as its use dates back to the fifteenth century⁷⁷ when speed was restricted as a result of the analogue system of commercial activities. There were no modern

⁷⁰ This part inside the bracket is the difference between the Factor Act section 8 and section 25 (1) of the Sale of Goods Act.

⁷¹ (1934) 2 K. B. 305.

⁷² (1952) 2 Q B 712.

⁷³ P. S. Atiyah, *The Sale of Goods* 6th ed. (London: Pitman Publishing, 1980), p.265

⁷⁴ Section 1(1) Sale of Goods Act.

⁷⁵ Section 12 Sale of Goods Act.

⁷⁶ J. G. Pease, 'The Change of the Property in Goods by Sale in Market Overt,' *Columbia Law Review*. vol. 8, no. 5 (May 1908) 375-383. Available at <https://www.jstor.org/stable/1110070>. Accessed 15 October, 2020.

⁷⁷ *Ibid*.

system of transportation both by humans and their goods; no e-commerce, such as internet sales and the house to house shops. All these new developments put together had hindered the rules of its importance and render the market overt exceptions irrelevant as an exception to the once laudable rule. More so the definition of the word market overt has taken a new definition by different authors. For instance, Jervis J, in the case of *Lee v. Bayes*⁷⁸ defined it as ‘an open, public and legally constituted market.’ The Court of Appeal in the case of *Union and Rock Insurance of Nigeria Ltd v. Onuoha*⁷⁹ held that spots set aside in any of the Nigerian towns for the sale of specific or particular goods and which are publicly patronized at regular hours and acknowledged as market qualify to be described as market overt. This very Appeal Court decision had put to rest the view that this exception is moribund and should be laid to rest because unscrupulous sellers will definitely hide under section 22 of the Act to pass a good title to an innocent purchaser for value without notice. This easy way will become realistic because the drafters of the Sale of Goods Act did not avert their minds to the quick future development now being experienced.

4. Conclusion and Recommendations

The *nemo dat* rule was initially made to protect the innocent purchaser not to suffer for what he knows nothing about. Since the cogent reason why it was enacted is no longer cogent it should be abolished. In England where it originated from, it is no longer the law because it is no longer cogent and holds no good to anyone⁸⁰ but in Nigeria, it is still adhered to as a result of lack of modern statutory provisions in favour of the parties to sale of goods. The reality of today’s commercial transactions has surprisingly taken a new and more sophisticated dimension like the e-commerce, super markets, home shops, shopping malls and internet sales to name but a few which has now made the rules under the Sale of Goods Act deficient and outdated. Therefore, drawing from the above discussion in respect to the *nemo dat* rule especially the market overt exception, there is no doubt that the principle itself is no longer relevant due to the fact that it is now moribund coupled with how all the exception have substantially whittled down the cogent reasons for its enactment in the first instance. Hardly one sees a situation in the sale of any goods and in any manner that will not be subsumed in one or more of the exceptions. It is therefore the author’s opinion that the Sale of Goods Act in its raw state, as we have it in Nigeria even after the originators have amended severally, should be amended or repealed to bring it to terms with the present reality in modern commercial transactions like other countries. This is also the opinion of many scholars and jurists.⁸¹ The long aged market overt exceptions should not be allowed to be used further, since it is now a vehicle to perpetuate crime. Many countries have repealed most of these aged long laws. Nigeria should not be an exception, because having removed the market overt exception from model Sale of Goods Law that was prepared by the Nigerian Law Reform Commission as a proposal, all the States should enact it into law especially where the law will cover a range of many activities that has to do with buying and selling, starting with the market, the seller, the buyer and any other third party if need be.

⁷⁸ (1856) 18 C. B 599 at 200-201.

⁷⁹ (1998) 6. N.W.L.R (Pt. 555) 576 per Oguntade J.C.A.

⁸⁰ L. B. C. Gower, ‘Sale of Goods in Market Overt’(1949) 12 MLR 371.

⁸¹ See their different view in R. Idubor, ‘Involuntary Passing of Property under the Law of Commercial Transaction in Nigeria,’ *Ahmadu Bello University Journal of Commercial Law (ABUJCL)*, Vol. 2 (2003-2005): 15-16.