

APPRAISING THE MARKET OVERT EXCEPTION IN THE SALE OF GOODS LAW: THE NIGERIAN PERSPECTIVE*

Abstract

Under that circumstances can the non owner of goods in a Sale of goods transaction transfer good title to the buyer? The law is that no one can give what he does not have. This is encapsulated in the maxim nemo dat quod non habet. This is provided in the Sales of Goods Act, a colonial legacy which is the principal law regulating commercial transactions in Nigeria. The provision seeks to protect the real or true owners of goods against adverse dealing in them by a non owner. However, as with other rules, there are some exceptions one of which concern a sale in a market overt. This article interrogates the meaning of the nemo dat rule and the market overt exception. It highlights the features of the market overt and the rationale behind the rule. It is the position of the paper that this relic of the common law has outlived its usefulness and is no more relevant in the current age. In this light, it is recommended that state legislatures in Nigeria should tinker with the Sales of Goods law in line with the recommendations of the Nigerian Law Reform Commission and in the interest of the consumer buyer.

Keywords: Buyer, market overt, *nemo dat* rule, sale of goods, seller.

1. Introduction

The principal law regulating sale of goods in the common law world including Nigeria is the English Sale of Goods Act, 1893. The statute was received in Nigeria, a former British colony as a Statute of General Application¹. Over time, coupled with the independence of Nigeria and the creation of states in the federation, some of the states² adopted the Act as their Sale of Goods Law with slight amendments to reflect their peculiar situation. In those states where such re-enactment has not yet been done, the provisions of the 1893 Act are still applied. Also, the general principles of contract are applicable to sale of goods. Thus such elements as offer, acceptance, intention to create legal relations, consideration and all other ingredients of a valid contract must be present in a sale of goods transaction. The parties to the contract enjoy the freedom to determine the terms of the agreement.

The Sale of Goods Act covers all the essential aspects of a sale proceeding. However, as with most other statutes of general application, this ordinance has become outdated and out of tune with current realities of the digital business world. To a large extent, its provisions have become either moribund or useless to the extent of constituting an albatross in some sets of circumstance³. It is important to note that even in England from where the Act originated, it was not made as a reforming statute. Rather, it sought to make the law on sale more accessible through the statutory codification of the existing common law⁴. Consequently, in England some provisions of the Act have been abolished or amended while in Nigeria, no comprehensive review of the Act has been undertaken and the law still remains largely as it was handed down. This undertaking interrogates one of the exceptions in the sale of goods law relating to the transfer of title in goods to another by a non owner following the successful conclusion of a sale negotiation. It shall first consider the nature of a sale of goods contract. Next it shall examine the *nemo dat* rule and highlight the exceptions. Thereafter the market overt exception and associated issues shall be analyzed. Flowing from this, some alternatives to the conundrum shall be proffered for consideration by the legislature and other concerned authorities.

2. What is Sale of Goods?

Sale of goods refers to ‘a contract whereby the seller transfers or agree to transfer the property in goods to the buyer for a money consideration called the price’.⁵ From this definition some salient characteristics may be gleaned. First, the parties to this kind of contract are the seller and buyer. Another is that two kinds of transaction are recognized. A sale whereby the property in the goods is transferred from the seller to the buyer; or an agreement to sell, in which the transfer of the property shall take place in future or upon the fulfillment of certain conditions.⁶ For instance, a contract for the sale of goods yet to be manufactured, harvested or processed is an

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¹ A. O. Obilade, *The Nigerian Legal system* (London, Sweet & Maxwell, 1986), 70; A. E. W. Park. *The Sources of Nigerian Law* (Lagos, African Universities Press; London Sweet and Maxwell, 1985) 24-33.

² Some of the states which have re-enacted the Sale of Goods Act as their legislation include Cross River State, Kaduna, Kwara, Lagos State and Rivers State.

³ M Nwocha, ‘Law of Sale of Goods in Nigeria. Interrogating Key Elements of the Sale of Goods Act Relating to the Right of Parties to a Sale of Goods Contract’, *Beijing Law Review* 9, 201-210, doi 104236/blr 2018, 92014. Accessed 21-03-2020.

⁴ F White, ‘Sale of Goods Law Reform: An Irish perspective’. *Common Law World Review*, 42 (2013), 172-199, Doi:10.1350/clwr.2013.42.0253. Accessed 02-04-2020; see also R. Goode, *Commercial Law*, (4th edn., London, Lexis Nexis, 2009) ch.6.

⁵ Section 1(1) Sale of Goods Act (SOGA), see also S. 1(1) Sales of Goods Law (SGL) Cap S1, Laws of Cross River State.

⁶ I N E Worugji, *Business Law in Nigeria* (Lagos, Malthouse Press, 2017), 45-48.

agreement to sell since the property in the goods cannot be transferred until they are manufactured, harvested and ascertained. Another feature is that the nature of the consideration to sustain the contract is stipulated as money consideration called price. Lastly the subject matter of the sale of Goods contract is specified as goods.⁷ The term goods have further been classified into either existing or future goods.⁸ With regard to the consideration, the contract of sale of good recognizes only one form of consideration, which is money. This consideration is paid by the buyer to the seller for the property in the goods purchased by him. The price may be fixed in the contract, or determined by the course of dealings between the parties. Where the price is not determined, the buyer is expected to pay a reasonable price. What is reasonable price is a question of fact, dependent on the circumstance of each particular case.⁹ There is no universal rule that the market price is the reasonable price.¹⁰ In some cases, a reasonable price may be less than the cost of production if there is an ascertainable market price.¹¹

The act of selling any property or chattel is the strongest act of dominion by the seller and is incidental to ownership. It does not merely imply the transfer of possessory right by the seller to the buyer but relates to the change of ownership. In *Eicholz v Bannister*¹² Arle, CJ 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’. A person must first acquire, own and in most instances possess a property before he can legitimately sell, convey or transfer ownership or title of same to another person. However, some cases arise in instance where title in the goods is purportedly passed or transferred to a buyer by a non-owner of the goods. Such circumstance raises the common law principle expressed in the maxim *nemo dat quod non habet* (no one gives what he does not have or no one transfers (a right) that he does not possess).¹³ It is apt to consider the rule in detail.

3. The *nemo dat quod non habet* and its exceptions

The parties to a sale of goods contract are the seller and buyer. However, in some instances, the buyer will later discover that the seller was not the owner of the goods and his possession of the goods may be disturbed by the owner. This inevitably will raise some contest between the original owner who has been deceived into parting with his property or the one from whom the goods were stolen, and the innocent purchaser who has been deceived into buying the goods. The issue here is: which of the two innocent parties is to suffer by the fraud of a third party, the roque?¹⁴ Who should have title to the goods? Certainly, the owner would claim that he deserves the title as the goods were stolen from him. Conversely, the innocent purchaser would argue that he acted in good faith and hence should be allowed to keep the goods. Sometimes the matter may be of a kind that is thorny and perplex.

The *nemo dat* rule was adopted to protect original owners of property. This age-long common law principle which is rooted in property law is embodied in Section 21(1) of the SOGA. It provides:

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 owner sells them without the consent of the 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 sellers authority to sell.¹⁵

The substance of the rule is that the transferee of property/goods cannot get a better title to the property than that of the transferor. This rule gives the original owner an advantage over the innocent purchaser. It asserts that if the seller of goods has no property in the goods and was not authorized by the owner to sell, he cannot transfer a good title to the buyer. It makes no difference that the later acted in good faith. In *M. I. A Sons Ltd v Afrotec Technical Services Ltd & African Engineering Co. Ltd*¹⁶, the court threw some light on the rule. There the 1st respondent had sold some crushing machines to the appellant and installed same on site. The equipment later broke down and were removed and taken to another place by mutual consent of 1st respondent who then purported to sell the

⁷ Goods, the subject of sale of goods contract has been defined to ‘include all chattels other than things in action and money. The term includes emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under a contract of sale. Section 62(1) SOGA; see also Section 68 sale of Goods Law, Cross River State.

⁸ Existing goods can be specific or ascertained and generic or unascertained good, future goods are goods to be manufactured or acquired by the seller after making the contract of sale (section 5 SOGA); See also *Ajayi v Eburu* (1964) M. W. L. R., 41

⁹ Section 8

¹⁰ *Acebal v Levy* (1834), 10 Bing. 376

¹¹ *Sharkey v Wernher* (1959) AC 58; *Waston Brothers v Hornby* (1942) 2 ALL ER 506

(1864) 17 C. N. N. S. 708.

¹³ B. A. Garner, *Black’s Law Dictionary* (8th edn., Thomson West, 2004), 1736

¹⁴ *Central Newbury Car Auditions Ltd v Unity Finance Ltd* (1957) 1QB 371

¹⁵ See also section 20(1) Sale of Goods Law of Cross River State.

¹⁶ (2000) N. W. L. R (Pt. 692) 730

equipment to the 2nd respondent when the postdated cheques issued by the appellant bounced. It was held by the Court of Appeal that as property had already passed to the appellants, the 1st respondent had no proprietary rights over the equipment when they sold them to the 2nd respondent, who was then ordered to return the equipment to the appellants. In an appeal, the Supreme Court held that the fact that the agreement of sale retained a lien for paid instalments was evidence that the deal was a conditioned credit sale and that property had not passed to the purchaser, in effect entitling the sellers to pass a good title to the 2nd respondent.¹⁷

From the above, it is quite clear that the *nemo dat* provision seeks to protect ownership of goods. The rule does not favour bonafide purchasers of goods particularly in emerging economies where it is necessary to promote the easy alienation of goods and their movement with less hindrance.¹⁸ Besides, new technologies have transformed the nature of commercial relations hence, it is also imperative to then protect the buyer who buys in good faith and for value. Accordingly, the revered Lord Justice Denning in *Bishopsgate Motor Finance corporation Ltd v Transport Brakes*¹⁹ stated that:

In the development of our law, two principles have 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 transactions. The person who takes in good faith and for value without notice should get a good title.

In line with the above dictum, the need arose to strike the balance between the right of the original owner and that of the innocent purchaser. Accordingly, exceptions to the *nemo dat* rule were developed²⁰. Some of the exceptions include:

- i. Sale by order of court
- ii. Sale under a statutory power of sale
- iii. Sale with the owner's consent
- iv. Sale where the owner is estopped from denying the seller's right to sell
- v. Sale under a voidable title
- vi. Sale by seller in possession after sale
- vii. Sale by buyer in possession after sale
- viii. Disposition by mercantile agent
- ix. Sale in market overt²¹

An innocent purchaser whose title to the goods has been challenged by the original owner would attempt to bring the transaction under any one of these exceptions in order to retain the goods. Alternatively, he could sue the seller to recover his money on the ground that the seller lacked title to the goods. He could argue that the seller acted in breach of the implied contract term concerning title as stipulated in Section 12 of the Sale of Goods Act. Section 12(1) of the Act provides that in a contract of sale, there is 'an implied condition on the part of the seller that in the case of a sale he has the right to sell the goods, and that in the case of an agreement to sell he will have the right to sell the goods at the time the property is to pass'. However, the reality is that in most instances, the rogue seller would have disappeared or has insufficient funds to meet the refund. This situation creates some hurdles for a contract based claim. In the circumstance, only the original owner and the innocent purchaser are left to contest for title to the goods in issue. It is in this context that the exceptions to the *nemo dat* rule become relevant. This work discusses one of those exceptions namely: sale in market overt.

4. The market overt exception

The term market overt or *marche ouvert* in French originated in the mediaeval times. It governs the subsequent ownership of stolen goods.²² In general, market overt is concerned with the conflict between the bonafide purchaser

¹⁷ See also *Hollins v Fowler* (1875) L. R. 7 H. L. 757

¹⁸ A Okachi, 'Sale in Market Overt: A Special Consideration of Stolen Goods', *The Loyal Nigerian Lawyer*, <http://loyalnigerianlawyer.com/sale-in-market-over-a-special-consideration-of-stolen-goods/> Accessed 21/03/2020.

¹⁹ (1949) 1 KB 322

²⁰ Ji Lian Yap, 'Appraising the market overt exception', *Journal of International Commercial Law and Technology*, vol. 3 issue 4 (2008)

²¹ These exceptions are generally covered by SS 20-24 of the SOGA. See also Olawale Ajai, *Consumer Credit, Sales and Services Transactions Law in Nigeria* (Lagos, Criterion Publishers, 2011) 178-179

²² 'Appendix 60: Memorandum submitted by the Council for the Prevention of Art Theft'. (<https://publications.parliament.uk/pa/cm/199900/cmselect/cmcomeds/371/371ap72.htm>). *Select Committee on Culture, Media and Sport: Appendices to the Minutes of Evidence*. London: British House of Commons. 25 June 2000.pp. section 3.1; see also *Wikipedia*. Accessed 21/03/2020.

of a chattel and the individual whose rights in the property are injured by the sale²³. This exception to the *nemo dat* principle is covered by Section 22(1) of the Act. It provides that ‘Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller’.

The above provisions raise some issues for elucidation. The first is the term ‘goods’ which have already been clarified in the second part of this work. The second issue is ‘market overt’. The act does not provide the definition of this term consequently its meaning has been expounded by the court and scholars. In *Lee v Bayes*²⁴, Jervis J., defined a market overt as ‘an open, public and legally constituted market’. According to the Black’s Law Dictionary²⁵, a market (also called mart) is a place of commercial activity where goods or services are bought and sold. In *Law Union and Rock Insurance of Nig. Ltd. V Onuoha*²⁶, the Court of Appeal 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’.

A market may be constituted by statute, prescription or custom²⁷. In the city of London, every shop within the narrow confines of one square mile area is a market overt for those commodities which are customarily sold there. This is not the case in Nigeria although Orojo has asserted that ‘there are innumerable market overt in this country, some of these have arisen by prescription and, in recent years, several more have been established by local governments and councils all over the country’²⁸. On first impression, one may be tempted to think that every place where things are sold and bought is a market. This is not the case as the scope of the market overt exception has been steadily delineated by the interpretation given by the courts. It is only the market which is regularly or legally constituted that are recognized as a market overt. A place does not become a market merely because members of the public can access it. In this sense, shops, supermarket and mini-marts are not market overt²⁹. In the Hong Kong case *Au Muk-Shun v Choi Chuen-You*³⁰, some 43 tons of pig-iron was stolen from the appellants. The robbers then sold them to a third party who in turn sold them to the respondent. The issue before the court was the determination of the person to be granted title to the pig iron between the appellant or the respondent. In the judgment of the court, the meaning of the term ‘shop’ in Section 24 of the Hong Kong Sale of Goods Ordinance was considered. The court noted that a key aspect of a ‘shop’ is its retail nature and reasoned that the sale of 43 tons of pig-iron was not a retail trade thus effectively confining the phrase ‘shop’ to retail sales. Retail trading usually takes place in a market. The law does not offer any protection to shopkeeper who buys goods in his own shop from the public. Rather, market overt exception only protects a member of the public who buys goods from a stall or in the normal way³¹. In *Hargreave v Spink*³², jewels were sold to a jeweler in London in a showroom of his shop to which customers were only admitted by special invitation. The court held that the sale was not in a market overt.

There are many popular markets overt in Nigeria³³. Every community, town or city in the country has a market. Some are daily markets while a few others have their specified market days. Also, those markets in the rural areas which are constituted by prescription or custom are also market overt. Certainly, an unauthorized market is not a market overt³⁴. The sale in a market overt must be made in the usual place of the market, on the lawful market day and during the ordinary business period (between sunrise and sunset). Also the entire transaction must begin and conclude in the market and the goods must be exposed. It is important that the deal was open and in the public glare. In *Reid v Metropolitan Police Commissioner*³⁵ the sale of stolen goods took place in a market overt in the morning when the sun had not risen and it was only half light. The Court of Appeal in quashing the decision of

²³E Zamir, ‘Market Overt in the Sale of Goods: Israeli Law in a Comparative Perspective’, *Israel Law Review*, volume 24, issue 1, Winter 1990, pp. 82-127. Available at <https://www.cambridge.org/core/journals/israel-law-review/article/market-overt-in-the-sales-of-goods-israel-law-in-a-comparative-perspective/D596DE/> Accessed 21-03-2020.

²⁴ (1856) 18 C.B 599 at p. 200-201

²⁵B A Garner, *op. cit.*, 988

²⁶ (1998) 6 N.W.L.R (pt. 555) 576, per Oquntade J.C.A

²⁷G. Ezejiolor, C.O. Okonkwo & C.U. Ilegbune, *Nigerian Business Law* (London, Sweet and Maxwell, 2009), 171.

²⁸ Orojo, *Nigerian Commercial Law and Practice*, Vol. 1 (1983), 1011

²⁹ M.C. Okany, *Nigerian Commercial Law* (Onitsha, Africana First Publishers, 2009), 342; see also Israel N.E. Worugji, *op.cit.*, 75

³⁰ (1988) 1 HKLR 413

³¹ *R. v Tai Shing Jewellery* (1983) 2 HKC 441 (Hong Kong case).

³² (1892) 1 QB 25

³³ Some market overt in Nigeria are: *Akpan Andem* market, Uyo; *Ariaria* market, Aba, *Dugbe* market, Ibadan; Jos market, Jos; Kano market, Kano; Onitsha market, Onitsha; Alaba International market, Lagos, *Watt* market, Calabar etc.

³⁴ M.C. Okany, *op. cit.*; 343

³⁵ (1973) 2 All ER 97

the lower court which favoured the defendant held that the sale should have taken place in day-time when all persons who passed could see the goods³⁶.

Another important element in the market overt exception is that the deal must have taken place 'according to the usage of the market'³⁷. This implies that the goods traded in the market should be of the kind which is usually traded in that market. In *Bishopsgate Motor Finance Corporation v Transport Brakes Ltd*³⁸, X had a motor car under a hire purchase agreement from Y. In breach of this agreement, X took the car to Maidstone market and handed it to auctioneers to sell at the market. The car was not sold by the auctioneers, but later that day, X sold it to Z. 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 sell, the sale was in market overt and Z had a good title. This decision was grounded on the premise that Maidstone market allows a sale by private treaty. Moreover, Maidstone was a long standing market for the sale of cars. But in *Owoyemi Motors and Finance Co. Ltd v Haruna and Ajibola*³⁹ the sale of a car by a hirer in breach of a hire purchase agreement to the defendant in his business premises which was not a car dealership was declared void as not being made in a market overt. Accordingly, the selling of a car or tricycle at *Watt Market*, Calabar or at *Itam Market* in Uyo, although it appears to be a market overt, may not be sustained, as the usage of these market does not include the sale of automobiles.

Another feature which is embodied in the exception is the phrase 'good title'. A buyer in a market overt acquires good title to the goods. This means title that is not encumbered and cannot be impeached or set aside by a superior or an overriding title. Where the true owner with a better claim appears in good time before the sale is concluded and title passed to the buyer, the latter's expectation will fail⁴⁰. Conversely, if the real owner does not pursue his claim in time to forestall the fraudulent sale by the rogue, the buyer acquires a good title⁴¹.

There is also the element of 'good faith' in a market overt transaction. The good faith is that of the buyer and not the seller. This implies that the buyer has no knowledge (actual or constructive) of any defect or want of title on the seller's part. He is not aware that the goods were stolen or obtained by fraud. If he has any such knowledge he cannot invoke the market overt exception⁴². Besides, the buyer must have obtained the goods at the market for value. This implies that some consideration was furnished to perfect the transaction. A gift is not covered by the market overt exception and will not be protected. Even if done in good faith, a gift is not a sale. Another condition necessary for this exception to subsist is that the sale must be by persons of full contractual capacity⁴³. The capacity to buy and sell is regulated by the general law relating to capacity to contract, and to transfer and acquire property⁴⁴.

When the above stated conditions precedent are fulfilled, the effect is that the innocent buyer will obtain a valid and indefeasible title to the goods, the defect or want of title on the part of the seller notwithstanding. Hence, the law of market overt allows the buyer to take the benefit of two conditions implicit in every contract of sale. The first, is that the seller has the right to sell; and the second being that the buyer shall enjoy quiet possession of the goods he has purchased⁴⁵. There are certain situations when the market overt rule cannot protect the innocent buyer. These are when the goods are horses and when the goods belong to the state. Horses and state property are exempted by the law⁴⁶. Also when the title of the seller is voidable and has been avoided by the true owner by reporting the fraud to the police or any other responsible institution, the market overt principle will not avail the buyer⁴⁷.

Concerning the sale of stolen goods in a market, the buyer will acquire a valid title to them against that of the true owner of the conditions inherent in Section 22(1) of the law have been complied with. Nevertheless, if the thief is prosecuted to conviction by the real owner, the property thereby reverts in him or his personal representative

³⁶ In *Mbanugo and Ors v UAC (Nig) Ltd* (1961) ALL NR 775 the court held that a sale at an auction sale by the order of the court is not a sale in a market overt

³⁷ Section 22 (1) SOGA.

³⁸ (1949) 1 KB 332; (1949) 1 ALL E.R 39

³⁹ (1975) N.N.L.R 180

⁴⁰ P. U. Umoh, 'The Market Overt Rule in the Law of sales', *Uyo Journal of Management Sciences*, Vol. 1. October 2000, 26-31

⁴¹ *Phillips v Brooks* (1919) 2 KB 243

⁴² *Bishopsgate Motor Finance Corporation Ltd. v Transport Brakes Ltd*, *op. cit.*

⁴³ Okachi, *op. cit.*, 3.

⁴⁴ Section 2 SOGA

⁴⁵ Umoh, *op. cit.*, 30.

⁴⁶ *Ibid*

⁴⁷ Section 23 SOGA; *Car and Universal Finance Ltd v Cadwell* (1964) 1 ALL ER 290

notwithstanding any intermediate sale in market overt⁴⁸. In the strict sense, this is a re-vesting of property. A sale in market overt vests the property in the purchaser, and then the conviction of the thief re-vests it in the true owner. Therefore, if while the property is vested in the buyer (i.e. before the conviction of the thief) he parts with the goods or consumes them, the owner will have no cause of action against him, even though he does so with notice of the theft⁴⁹. But an innocent buyer, who deals with the goods as his own after the conviction of the thief/seller will be liable for conversion⁵⁰. However, the property in the goods will not re-vest to the rightful owner or his personal representative where the goods were obtained by false pretences or fraud or other wrongful means and not by stealing⁵¹.

5. The Rationale for the Market Overt Exception

The market overt exception to the *nemo dat* rule dates back to the fifteenth century⁵². It was adopted from the law merchant and was originally not a part of the common law. The reasoning for the exception was the supposed duty of one whose goods have been stolen to search for and claim them in the market place⁵³. If he fails or neglects to search for them, and they are sold in the market, he loses them by his own carelessness and the innocent buyer ought not to suffer. The objective of this rule was to give the purchaser more protection than he would derive from a private sale. According to the jurist Bracton, 'If a person has bought a stolen article publicly in a market or fair in the presence of the bailiffs or other honest men, thinking it to be purchasable, and has paid toll and customs, even though he cannot produce a warrantor, he shall be set free...'⁵⁴. Buying in a market overt relieved the purchaser from the consequences of being in possession of stolen property. The market overt exception was thereby adopted as a means of meeting the dynamics of commercial activities and to provide certainties in commercial transactions. According to Goode⁵⁵, the exception promotes the integrity of the market place.

The rule of market overt was good in the older analogue age when most purchases took place in the market place. During that period, transportation was limited and it was feasible for a person whose goods have been stolen to trace and find them being taken for sale in the nearby market. In today's modern and digital world the conditions of transport and communication has changed remarkably. The modern system of transport expedites the easy movement and disposal of stolen goods by thieves across the country or region. An author has stated that as the logistics system developed, the rule tends to promote the trafficking of stolen goods rather than facilitating fair commerce⁵⁶. Thus a rule designed to promote honesty and integrity in the market place seems to provide a charter for the reign of thieves. It can easily be exploited to facilitate the laundering of stolen goods. The problem is compounded and aggravated by the development of the internet sales (e-commerce). In this digital age the internet enables many buyers to have access to goods and services in distant locations⁵⁷. The drafters of the SOGA did not contemplate these exponential developments in transport and communication particularly the internet. Some unscrupulous sellers may exploit the privacy policy of the internet to dispose of their loot through that medium. It is difficult to determine whether the seller(s) behind an internet site or e-mail address are upright persons since there is no physical meeting of the parties⁵⁸. Such sellers may then rely on the provisions of section 22 to pass good title to innocent buyers. All of these make the rule of market overt in the SOGA deficient and moribund.

6. The Way Forward

Certainly, any domain of law which has been around since the fifteenth century is overdue for extensive review and reform. This is the case with the market overt exception to the *nemo dat* rule. This rule was suitable in the period when trading took place in open markets and people and goods were not very mobile. At that time, the rule represented a compromise between the interest of the owners of goods, the traders and purchasers at the markets⁵⁹. In this modern age, the rule has become obsolete, archaic and quaint⁶⁰. There are now many other retail outlets (including on-line trading) where innocent buyers can obtain goods and the market is no more the only centre of commerce that it used to be. Besides, the exception tends to lump all buyers (trader-buyers and consumer-buyers)

⁴⁸ Section 24(1)

⁴⁹ 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 21/03/2000.

⁵⁰ *Ibid*

⁵¹ Section 24(2) SOGA

⁵² J. G. Pease, *op. cit.*

⁵³ *Ibid*

⁵⁴ Bracton, Lib II, Tract 2, Cap. XXX II, f. 150b, quoted in J. G. Pease, *Ibid*.

⁵⁵ R Goode, *Commercial Law* (3rd edn., London Penguin Books, 2004).

⁵⁶ R Goode, *op. cit*

⁵⁷ I Akomolede, 'Legal Analysis of Formation of consumer contracts in E-commerce', *Ikeja Bar Review*, Vol. 1, Part 1 & 2, Sept. 2006 – March 2007, 225-240.

⁵⁸ Ji Lian Yap, *op. cit*

⁵⁹ Fidelma White, *op. cit.*, 177

⁶⁰ L. S. Sealy & R. J. A. Hooley, *Commercial Law: Text, Cases and Materials* (2003), cited in J. Lian Yap, *op. cit.*

together and did not take into account the interest of the latter group. Most buyers in this class are in a disadvantaged position due to their weak bargaining power and lack of adequate information about the goods they intend to purchase. As highlighted in this paper, this particular exception is riddled with many technical rules and anomalies⁶¹ and is very unsuitable for modern commerce. Contemporary commercial exigencies cannot tolerate a rule which does not adequately protect the seller and innocent buyer. In England from where this rule originated, it later turned out that the reasoning behind it was no more cogent and did not hold any good⁶². Against this backdrop, and following a strong lobbying by fine art dealers and a proposal by the Department of Trade and Industry (DTI) the rules of market overt was abolished by the Sale of Goods (Amendment) Act 1994 which took effect in January 1995⁶³.

Nigeria is still lagging behind in this aspect as the 1893 Act is still in place. However, in the model Sale of Goods Law prepared by the Nigerian Law Reform Commission, the market overt provision has been removed. It is imperative for all the states in Nigeria to enact the new proposals into law. The new law should extend the term 'market' to shops, super market and shopping malls and e-commercial transactions. It should also consider the interest of the owner and the innocent consumer buyer. Thus in the spirit of consumer protection, where the facts tilt in favour of the innocent consumer-buyer to keep the goods, the original owner should be allowed to buy back the goods from the buyer. This will give the owner the opportunity to get back his precious goods that were stolen without causing the consumer-buyer much loss. It behooves on the legislature to adapt the age long rule to balance the interests of original owners of goods and the rights of innocent consumer buyers.

⁶¹ O Ajai, *op. cit.*, 183

⁶² L. B. C. Gower, 'Sale of Goods in Market Overt' (1949) 12 MLR 371; E. R. H. Ivamy, 'Revision of the sales of Goods Act', (1956) 9 CLP 113). P. M. Smith, 'Valediction to Market Overt', 41 (1997) *American Journal of Legal History*. 225

⁶³The rule has also been abolished in many other common wealth countries; some states in Australia, Canadian provinces, New Zealand and Singapore. There are proposals to abolish the rule in Hong Kong and Ireland.