

SALE IN MARKET OVERT: A LEGAL CONSIDERATION OF EMERGING ISSUES ON STOLEN GOODS IN NIGERIA*

Abstract

*Market overt is an open and public market recognized by law. Where a purchaser buys goods from a seller, is he given adequate legal coverage for the transfer of the property in the goods which are the subject matter of the sale? Is the fact that the said goods were purchased in a place other than a legally recognized open market and the seller is lacking in title of any moment? Commerce as we have and know it has moved beyond regular markets. This work utilized the doctrinal method of research and probed the continued relevance of the market overt rule in its extant form as an exception to the *nemo dat quod non habet* principle. In a bid to enhance consumers' and buyers' interests in commercial transactions, this work explored the market overt rule vis-a-vis modern realities. It suggested that the restrictive toga of market overt be shed and the exception be expanded to cover other business premises and entities.*

Keywords: Market overt, *nemo dat quod non habet*, *bona fides* and consumer protection.

1. Introduction

The principal legislation governing sale of goods transactions in Nigeria is the Sale of Goods Act, 1893 - a state of general application.¹ This long standing colonial enactment has been adopted and its contents largely retained by majority of the federating units of Nigeria, except for minor and mainly unappreciable and inconsequential alterations by these States. The Act applies in States in Nigeria that have not domesticated the federal law. This 19th century law can best be described as a piece of legal anachronism with a plethora of provisions that can be said to have outlived their usefulness and are no longer in tune with modern realities. The dictates of contemporary business have rendered most of its provisions obsolete, worn out, lacking in relevance and antiquated. In reality, it is not in all cases that a seller of goods sells goods that he possesses the title to such goods or sells with the express or implied authority of the original owner. The principle of *nemo dat quod non habet* is one that has held sway/forte in jurisprudence all over the world. It is a general principle, and like other legal principles, it admits of exceptions. It is to the effect that a person cannot give a better title than he has. That is to say that one cannot give that which he does not have. The idea principally is to protect the interest of the original owner of such goods from the scheming of unscrupulous sellers. It favours the owner and protects his right of ownership of such goods. The fulcrum of every sale of goods is the passage of property from the seller to the purchaser. Even in the face of *bona fides*, where a person who buys goods from a seller when the property in the goods does not reside in the said seller, the purported purchaser has bought nothing as the ownership of such goods cannot validly pass to the purchaser. The market overt exception was meant to operate as a lifeline to innocent buyers. It therefore follows that any sale wherein there is no valid or actual transfer of property in the goods from the former to the latter is incomplete and cannot be termed sale of goods in the real sense of it. There are circumstances under which a person who neither has property in the goods nor the authority (express or implied) of the owner of such goods can validly pass on property in the goods to a purchaser.

Amongst quite a number of exceptions to the rule is the long standing principle of sale in a market overt. Other exceptions to this general rule: are sale under agency; sale by a person having a voidable title; estoppels; sale by a seller in possession; sale by a buyer in possession; sale by a mercantile agent; sale under common law power; sale under statutory powers; sale by virtue of the Bankruptcy Act and sale under order of court.² An innocent purchaser, faced with a claim for a return of the goods from the original owner, could attempt to argue that one of these exceptions to the *nemo dat* rule applied to his situation, enabling him to keep the goods.³ In other words, an innocent purchaser whose title to the goods has been challenged by the original owner could attempt to bring the transaction under any one of these exceptions in order to retain the

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¹Sale of Goods Act, Cap S1 LFN 2004.

² Ss 61(2), 23, 21(1), 25(1), 25(2), 21(1)(a), 21, 48(3) of the Sale of Goods Act (supra) and s. 57 of the Bankruptcy Act, Cap B1 LFN 2004.

³ J. L. Yap, 'Appraising the Market Overt Exception' [2008] *Journal of International Commercial Law and Technology*, (3)(4), p. 255

goods.⁴ While not underplaying the whole gamut of these exceptions to the rule, the focus of this work is the market overt rule.

2. The Market Overt Exception

The market overt rule is an ancient common law principle. The market overt exception to the *nemo dat* has its origin in the fifteenth century.⁵ Market overt is derived from the French words *marche ouvert* which translates to open market. Market overt has been said to mean an open, legally regulated public market where buyers, with some exceptions, acquire good title to products regardless of any defect in the seller's title.⁶ Indeed a whole lot has been written on the meaning of market overt as an exception to the *nemo dat* rule, and so this work will not dwell much on its meaning in order not to over flog same. Market overt is any public market designated by the relevant authorities. A place does not become a market overt because the public can resort to it.⁷ It describes a legally recognized market that is open to the public. By this, shops, malls, supermarkets, mini-marts, super stores, trade fairs, kiosks, stalls and the like are not market overt. Constitutionally, markets are under the sphere of authority of local government councils. Section 7 and part 3, Fourth Schedule of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It, therefore, presupposes that any market recognized by the local government authorities as an open market is indeed market overt for the purposes of application of this legal rule. Such markets abound within our different localities – rural and urban alike. A key component of the application of this doctrine is that the venue of sale is the market parameters during hours (daytime or night time as the case may be) within which the market operates and the goods sold are such goods as are usually sold in that market. These conditions are conjunctive and not disjunctive as they must exist side by side with each other. In other words, they are conditions *sine qua non* for the application of the market overt exception.

In the case of *Law Union and Rock Insurance of Nig. Ltd. v. Livinus Onuoha*⁸ the Claimant bought a scrap 504 Peugeot saloon car at a mechanic village in Makurdi from a person who claimed to be the owner. The car had been stolen from the true owner and the thief had convinced the Claimant of his title to the car by presenting the original registration papers of the car which he had found in the glove compartment of the car. The Claimant purchased the car, carried out extensive repairs on it and insurance it with the Defendant. The car was later destroyed by fire and the defendant refused to settle the insurance claim when they discovered that the car was a stolen car. The Claimant sued the Defendant claiming the sum of N40, 000 as the estimated value of the car and indemnity, and the trial court awarded him the said sum. The defendant appealed and argued that the Claimant was not entitled to an indemnity because the car was a stolen car thereby rendering the contract of sale between the seller and Claimant illegal and the contract of insurance null and void as the Claimant had no title to the car and therefore no insurable interest in the car. The Claimant on his part argued that he bought the car in the market overt for value and without notice of any defect in the title of the vendor and that he had title and insurable interest in the car as he was protected by section 22(1) of the Sale of Goods Acts, 1893. The Court of Appeal, while upholding the arguments of the Claimant, held that the facts of the case show that the Claimant bought the car from the mechanic village which qualified as a market overt and having in the circumstances of the sale bought it in good faith without notice of any defect or any want of title on the part of the seller, he acquired good title. The Court of Appeal further held in that case 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.' The market overt exception is as provided for in s. 22(1) of the Sale of Goods Act thus: 'Where goods are sold in a 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 long and short of it is that although a seller who is not the owner of goods or does not have the authority of the owner to sell is incapable of giving good title to a purchaser even though the purchaser buys in good faith, where such a sale is conducted in a legally recognized market, within the operating hours of the said market and the nature of the goods are such as are traded in the market, as long as the purchaser buys in good faith and oblivious of the defective title such sale is valid and property in the goods will validly pass from such seller with defective title to the purchaser. Here ignorance of the true

⁴A. Ekpoudo, 'Appraising The Market Overt Exception In The Sale Of Goods Law: The Nigerian Perspective' [2020] (2)(1)*International Journal of Comparative Law and Legal Philosophy*, p. 138 –<www.nigerianjournalsonline.com> accessed 11 March 2021.

⁵ J. G. Pease, 'The Change of the Property in Goods by Sale in Market Overt' [1908] *Columbia Law Review*, (8)(5),p. 375.

⁶ B. A. Garner (ed), 'Black's Law Dictionary,' (8th edn, Thomson West Publishers 2004) p. 989.

⁷ M. C. Okany, 'Nigerian Commercial Law,' (Africana-Fep Publishers 1992), p. 262.

⁸ (1998) 6 *N.W.L.R* (Pt. 555) 576, per Oguntade J.C.A.

ownership is bliss and is a valid excuse. By this market overt exception, the fact that the goods sold are stolen will still ensure the said purchaser with property in the stolen goods if he buys *bona fides* and unaware of the seller's lack of title. This is to enhance commercial activities. As Goode put it, the market overt exception was designed to promote the integrity of the market.⁹ But by virtue of s. 24(1) of the Act if the thief is convicted for the offence of stealing- as opposed to false pretences, fraud or other wrongful means¹⁰ of such goods, the purchaser is divested of the property in the goods and the title reverts back to the original owner.¹¹

3. A Case for Expansion of the Market Overt Exception

Clearly, section 22(1) of the Act excludes shops and such other business outfits. By the rule of construction *expressio unis est exclusio alterius* meaning that the expression of one thing is the exclusion of another, all shops in the city of London were regarded as market overt while outside London, market overt meant only legally recognized markets.¹² As another scholar put it, 'this ancient rule applied to sale from shops in the city of London and, outside the city of London, to sales from any open, public and legally constituted market, including fairs.'¹³ It is common knowledge that with the advance in civilization, science, technology and modern economic activities, there has been a proliferation of businesses around us. Shops, kiosks, roadside and street corner ware display tables, supermarkets, superstores, shopping malls, trade fairs, electronic commerce and numerous forms of businesses are commonplace in our modern society. The restrictive nature of the rule as it applies to Nigeria has effectively placed the consumer in a somewhat disadvantaged position. This narrow application of the market overt exception is anti-consumer and anti-buyer as it works against the protection of consumers. The market overt rule is obviously restrictive. The rule may have served its purpose at times earlier than this, but there is no doubt that it is not in sync with modern realities. Business outfits other than legally recognized open markets are as prevalent today as open markets. And even as the world has grown digital with the internet as a veritable signpost of contemporary civilization it would be out of place to confine the market overt exception to markets. With the advent of the virtual marketplace birthing wide scale electronic commercial transactions (through websites, emails, blogs, text messages, etc) restricting the market overt rule would amount to playing the ostrich. This rule is not in tandem with modern realities. Indeed today anything that can be gotten in a market can be gotten elsewhere. With electronic commerce and a wide range of swift electronic payment platforms, almost any commodity can be bought from anywhere in the world without the need for either party (buyer and seller) to move. The world is now a global village, and at the click of a button what appeared impossible in long distance trade can now be made possible. Interestingly a large chunk of consumers rely on businesses other than those situate in markets for their purchases. The volume of trade in business places other than markets in recent times is unprecedented and huge. As stated by Sealy and Hooley¹⁴ the market overt exception has 'come to be regarded as archaic and quaint.' The market overt rule has been abolished in the United Kingdom.¹⁵ While these writers do not stand for the abolishing of the market overt exception, it is strongly contended here that rather than throw away the baby with the bath water, the rule be tinkered with to enhance consumer protection and purchasers.

It is difficult to argue that the rule that allows a person who buys goods *bona fide* and without knowledge of the seller's defective title to receive good title, is bad law. The operation of the rule is, no doubt, good for commerce as it is inconceivable and manifestly unjust to deprive an innocent purchaser of his purchase when he has been made to go the whole hog of the transaction on the faultless understanding that the property in the goods lies in the seller or that the seller has the imprimatur of the seller to dispose of the goods. Holding a contrary view is tantamount to sending every purchaser on a voyage of discovery. That would be stretching commerce too far and asking for the doing of the impossible. That is simply impracticable. However, in keeping to the dictates of modernity and affording buyers more legal coverage, it is advised that the concept of market overt be enlarged in application to factor in and indeed accommodate other business environments and outfits such as kiosks, roadside and street corner stalls, supermarkets, super stores, shopping malls, cinemas, electronic commerce platforms including new (social) media online shops. Today's society is truly

⁹ R. Goode, 'Commercial Law' (3rd edn, Penguin Books, 2004) p. 89.

¹⁰ S. 24(2) of the Sale of Goods Act.

¹¹ S. 24 of the Act has since been repealed in UK by the Theft Act, 1968 and reverting of title upon conviction for stealing no longer applies.

¹² M. Mark, 'Chalmer's Sale of Goods Act, 1893' (Buttersworth, 1971) p. 359.

¹³ A. G. Guest, (ed), 'Benjamin's Sale of Goods,' (6th edn, Sweet & Maxwell, 2002).

¹⁴ L. S. Sealy & R. J. A. Hooley, 'Commercial Law: Text, Cases and Materials,' 2003. Market overt exception was abolished by the Sale of Goods (Amendment) Act, 1994 which took effect in January,

¹⁵ 1995. It has also been abolished in Australia, New Zealand and Singapore.

a far cry from what was obtainable in times past, and as such this legal regime needs to be fine-tuned. In view of the fact that those business models and entities are regulated by constituted authorities and mostly taxed (e.g. value-added tax - VAT), it would be unjust not to afford buyers and consumers this level of confidence with regard to unencumbrance in title. In view of the foregoing, it is recommended that section 22(1) of the Act be amended to reflect these observations. It is therefore suggested that the words 'where goods are sold in a market overt' be replaced with the words 'where goods are sold by a business entity' or something closely related to those words.

4. Conclusion

This work has considered the rule of *nemo dat quod non habet* rule, a Latin maxim which translates to mean that no one can give a better title to property than he himself possesses. The suitability of the current form of one of the exceptions to this legal principle - the market overt rule – is explored in this work, and it is this writer's contention that there is need to enlarge the scope of the market overt exception to factor in the socio-economic realities that varying forms and venues of business have sprung up and need to be taken into cognizance. There is therefore the growing need to diversify the scope of the market overt exception to include shops, kiosks, stores, road side markets, trade fairs, superstores, supermarkets, shopping malls and electronic commerce platforms.