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CONTENT

NEMO DAT RULE IN NIGERIA: CHARTING THE PATH FOR REFORM IN SALE OF GOODS

BY

OSUNTOGUN ABIODUN JACOB*

ABSTRACT

This paper addresses the problem associated with transfer of goods by a non-owner in order to develop a suitable mechanism to address the problem. It confirms that the attempts made to resolve the problem equitably between the two conflicting parties has not been an easy task because of the jurisprudential and ideological leanings relating to the dispute. After a critical examination of the *nemo dat* rule and its exceptions, it posits that contrary to the argument of some scholars, sale made by a non-owner with the authority and consent of the owner is not an exception to the *nemo dat* rule. It recommends a consumer protection approach as a suitable mechanism that can be adopted in adjudicating and regulating disputes between the owner of goods and the innocent buyer in good faith. The benefit of the approach is that it recognizes the general rule but supports recourse to a suitable exception if the facts of a particular case justify it; thus no interest of any party is deliberately jettisoned.

INTRODUCTION

A disturbing issue in commercial disputes in most countries of the world is the problem associated with transfer of goods by a non-owner. [1] This transfer often triggers a situation in which two innocent parties are claiming the ownership of the same goods. One of the two parties is the original owner of the goods, who perhaps, through carelessness has parted with his goods, but has not instructed any person to sell them. The second party is the innocent buyer who has no knowledge that the seller who is a non-owner has no authority to sell. The problem lies in

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[1] On this problem in other countries, see HO Hock Lai, 'Can a thief pass title to stolen goods? Caterpillar Far East Ltd v CEL Tractors Pte Ltd' 6 Singapore Academy Law Journal 439-450; Gail Pearson, 'Constructive delivery and Constructive possession in delivery of transfer of title to good' (2003)26 (1)University of New South Wales Law Journal,159-178, Boris Kozolchyk, 'Transfer of Personal Property by a non-owner: Its Future in Light of its past' (1987)61 Tulane Law Review, 1453; Menachem Mautner, 'The Eternal Triangles of The Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties'(1991)90 Michigan Law Review, 95.

determining who among the two contending parties should be protected by law. None of the parties seems to want to let it go. On one hand, the original owner of the goods wants the goods back from the innocent buyer. On the other hand, the innocent buyer holds on to the goods because he has furnished consideration. Indeed, both the buyer who had paid for the goods in good faith and the true owner who had not given his consent to the purported sale seem to have strong claims to the goods.

Of course, resolving the ensuing conflict between the two parties equitably has not been an easy task because of the jurisprudential and ideological leanings relating to the dispute. Lord Denning explains the intricate aspect of this conflict when he opined that each of the parties in the dispute can find a particular principle of law supporting his claim. While the original owner can find solace in the principle of law that supports protection of property, the other party, the buyer, is also supported by the principle that protects commercial transactions. Consequently, finding the balance between the two has been a difficult task.[2] Common law attempts to resolve these conflicts relating to ownership of goods by applying the principles of law that are embodied in the latin maxim *nemo dat quod non habet* [3] (herein after refer to as *nemo dat* rule) and its exceptions.

This paper discusses the application of these principles in Nigeria by looking at the statutory provisions dealing with the issue. It examines the suitability of such principles in determining disputes between owners and buyers and makes suggestions that can be used to reform the existing law. It is divided into four sections. Section one introduces the topic, while section two discusses the meaning and application of the *nemo dat* rule. Section three interrogates comprehensively and critically all the statutory exceptions to the general rule. Section four concludes with recommendations. The paper recommends a consumer protection approach as a suitable mechanism that can be adopted in adjudicating and regulating disputes between the owner of goods and the innocent buyer in good faith. The benefit of the approach is that it recognizes the general rule but supports recourse to a suitable exception if the facts of a particular case justify it, thus no interest of any party is deliberately jettisoned.

[2] See, Bishop's gate Motor Finance Corp.Ltd v. Transport Brakes Ltd [1949] 1 K.B. 322 at 336-337. He said: '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 good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times'.

[3] 'Nobody gives what he does not have'

Meaning and application of the *nemo dat* rule

Nemo dat rule simply implies that if you do not have a title to goods, you cannot validly transfer such goods to a third party or parties. In another way, it also means that you can't transfer a better title than what you have.[4] This rule has been codified into the statutory provisions of most of the states in Nigeria[5] and it has been applied by the courts.[6] The *locus classicus* in this respect is *Akoshile v. Ogidan*,[7] where the Supreme Court held that since the defendant in that case was not the owner of the car, he had no right to sell the stolen car to the plaintiff because he could not give what he did not have. In reaching that decision, the court relied on the English case of *Rowland v. Divall*[8] where the House of Lord held that a buyer of a car was entitled to a refund of the price he paid for the car for failure of consideration because the car, unknown even to the seller, was a stolen car. Indeed, Atkin L. J. explained the failure of consideration as the major reason for the judgment when he noted that:

> "It is true that the seller delivered ... the actual possession but the seller had not got the right to possession and consequently could not give it to the buyer".[9]

It means, the nature and essence of the right a seller has over the possession of goods will determine whether he has a right to transfer the goods to the third party. In *Cundy v. Lindsay*,[10] where the goods were obtained under a void contract, the court held that the buyer could not get a good title. Similarly, a finder of goods cannot transfer a better title to the third party.[11] Indeed, with respect to transfer of title in goods, the *nemo dat* rule prevails over its exceptions in resolving dispute relating to titles. Contrary to the

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[4] See Blackburn J. in Cole v. North Western Bank (1875) L.R. 10CP 354, where he said: 'At common law, a person in possession of goods could not confer on another either by sale or pledge any better title to the goods than he himself had'.

[5] For example, S.22 of Sale of Goods, Oyo state law CAP. 149 2000 which is in pari material with S.21 of the 1893 Sale of Goods Act and S.22 of Sale of Goods Law, the Laws of Lagos State of Nigeria 2003, Volume 7 provides that 'Subject to the provisions of this law, where goods are sold by a person who is not their owner thereof, 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, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell'.

[6] See the recent application of the rule in Mohammed v. Mohammed (2012)11 NWLR (pt. 1310) CA 1 where the court quoted the dicta of Denning LJ in supra note 2 for approval; Olametan v. C.F.A.O. [1959] LL.R 42 where the court held that in accordance to the Nemo dat rule, a hirer of a lorry cannot transfer a valid title to the third party without the consent of the owner.

[7] 19NLR 87; Mustapha v. Adenekan [1967]FNLR 77.

[8] [1923]2 K.B. 251.

[9] Ibid at 506 He stated further that 'the buyer during the time that he had the car in his actual possession had no right to it and was at all times, liable to the true owner for its conversion'.

[10] [1878] 3 AC 459 (HL).

[11] See, Lord Mac Naghten in Farquharson Bros v. King & Co. 1902 AC 325 at 336 noting that 'If a person leaves a watch or a ring on a seat in the park or on a table at a café, and it ultimately gets in to the hands of a bona fide purchaser, it is no answer to the true owner to say that it was his carelessness and nothing else, that it enabled the finder to pass it off as his own'.

argument of some scholars, [12] the rule operates even if goods are sold by the agents of the owners. Sale made by a non-owner with the authority and consent of the owner is not an exception to the *nemo dat* rule. It merely restates the rule. There is no ambiguity in the statutory provision to suggest otherwise.[13] A critical look at the relevant statutory provision on this issue shows that before the *nemo dat* rule can be applied, two requirements must be present; one, a sale must be made by the non-owner, and, two, the sale must be without the consent of the owner.[14] That is not an exception to the *nemo dat* rule but a restatement of the rule that a sale without authority of the owner cannot confer a good title on the buyer. Such a sale without authority is void and the owner can recover his goods from the buyer in an action for detinue. [15] In doing that, the owner does not need to proof a refund or re-payment of the price to the third party before he can succeed in such an action. The *nemo dat rule* operates not only as a sword but specifically as a shield to displace the requirement which a plaintiff must prove in order to succeed in an action for detinue. Thus, in *Labode v. Otubu*, [16] the appellant sued the respondents for detinue but since her statement of claim did not contain an averment that she will re-pay the money advanced by the solicitor, the Court of Appeal held that her claim for detinue could not be sustained. On appeal, the Supreme Court set aside the judgment of the Court of Appeal on the ground that 'the principle of '*Nemo dat non quod non habet,*' as canvassed by the plaintiff in the appellant's brief, has considerable force and can avail her even without such an averment. [17] According to the court, there is no need for the appellant to proof an averment that she will re-pay the money advanced by the solicitor because the pledge made by the solicitor was without the authority of the owner of the property.

Furthermore, on the issue of *nemo dat* rule and a sale with authority of the agent, the law does not dichotomize between contracts made by the owners of goods (principals) and those made on their behalf by their agents. The principle of law is *qui facit per alium facit perse (*'he who does a thing through others does it himself'). In *A.C.B Ltd. v. Apugo* the Court of Appeal applied the Latin maxim to hold a bank liable for the action of the 3rd appellant in publishing the libelous words against the respondent, saying:

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[12] See for examples, Kingsley Ikem Igweike (KSM) Nigerian Commercial Law: Sale of Goods Second Edition, Malthouse Ltd Lagos Nigeria P. 126; E.E. Uvieghara Sale of Goods (And Hire Purchase) Law in Nigeria (1996) Malthouse Ltd Lagos Nigeria. P. 76, they stated that sale made by non-owner with the authority and consent of the owner is an exception to the Nemo dat rule and all other authors follow their approach.

[13] Note that although most authors do not comment on the issue whether sale made by non-owner with the authority and consent of the owner is an exception to the Nemo dat rule but they treated it as if it is not an exception. See, for example, John Adams & Hector MacQueen, Atiyah's Sale of Goods (2010) Longman England. PP.363-364 noted that 'the first exception is estoppel' without stating any reasons; Avta Singh, Law of Sale of Goods (2011) Eastern Book Company India. P. 145. He only treated estoppel as exception and ignored that of the authority without any comment.

[14] See the relevant law quoted, ibid. note 4.

[15] They can also sue for conversion, see Greenwood v. Bennet [1972] 3 All ER 586. It was held that the owner was liable to compensate the buyer for any improvements made on the goods.

[16] [2001]7NWLR (Pt712)256 at 277.

[17] Ibid at 287;283.

'he who acts through another, acts for himself'.[18] Thus, if it can be proved that the principal authorizes a non-owner to sell his goods or consents to the sale; the contract operates as if the owner himself sold them.[19] The word authority in the Act symbolizes the mandate of the agent to relate with third parties on behalf of the principal. It covers both actual and ostensible authority and gives power to the agent to alter the legal position of the principal who appointed him.[20] If however the agent has performed the act without the authority of the principal, the principal can still ratify the act by adopting it.[21] But it is crucial to note that an agent may be liable for breach of warranty of authority if he falsely represents that he has authority on the strength of which the third party detrimentally acted.[22] Finally, it is essential to note that the drafters of the Sale of Goods law, having enumerated two requirements for the application of the *Nemo dat* rule,[23] commence the list of exceptions to the general rule with the word 'unless'. Since the word 'unless' begins with the issue of estoppel, it is safe to conclude that sale by the agents is not an exception to the *nemo dat* rule.

EXCEPTIONS TO THE *NEMO DAT* RULE

The Common law and the statutes make room for some exceptions to the *nemo dat* rule.[24] Lord Denning observed that the *nemo dat* rule "has been modified by the common law itself and by statute so as to meet the needs of our own times".[25] This section will discuss the application of these statutory and common law exceptions in Nigeria.

Estoppel

The law provides that the *nemo dat* rule will apply 'unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell'.[26] Since, the word conduct is not explained in the Act, it has been suggested that recourse should be sought to the common law of

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[18] [1995]6N.W.L.R. (Pt.399)65; Bamigboye v. University of Ilorin (1991) 8 N.W.L.R. (Pt. 207)1 at 30.

[19] In such a contract, the owner and not the agent will be liable, see, for example Amadiume & Another v. Ibok & Others [2006]6NWLR (Pt.975)159 at 177 where the Court held that an agent acting on behalf of a known and disclosed principal incurs no liability; Imam v. Ahmadu Bello University [1970] NNLR 39. A Kano High Court held that an agent selling specific goods for a disclosed principal does not warrant the title of those goods but only that he knows of no defect in the principal's title. This is because the act of the agent is the act of the principal. It was the principal who did or omitted to do what the agent did or omitted to do.

[20] See, Opuo v. N.N.P.C. [2001]14(Pt. 734)552 at 569 where the court quoted Bowstead on Agency 15th edition to the extent that 'the agent is said to have authority to act and this authority constitutes a power to affect the principal's legal relations with third parties'.

[21] However, the requirements for ratification must be complied with, see, Ojugbele v. Olasoji (1980) F.N.L.R. 133; Folashade v. Alhaji Duroshola (1961)1 All N.L.R.87.

[22] See, Yonge v. Toynbee [1910]1 KB 215. Yonge was threatening to sue Toynbee for defamation. Toynbee instructed solicitors to defend the case. Unknown to the solicitors, Toynbee became certifiably insane. Proceedings had begun before the solicitors discovered the state of Toynbee. The Court of Appeal held that the solicitors were personally liable for all the costs which had been incurred because they had impliedly represented that they had the authority.

[23] See Sale of Goods Law, supra note 4 at 364.

[24] On the statutory provisions, see supra note 4.

[25] See, Bishopsgate Motor Finance Corp.Ltd v. Transport Brakes Ltd, supra note 2.

[26] See Sale of Goods Law, supra note 4.

[27] See John Adams op cit note 12; Estoppel can be defined as 'a principle of law which prevents a person from asserting the reverse of what he has previously represented, if an innocent representee has materially changed his position in reasonable reliance on the previous representation' see MC Okany Nigerian Commercial law 353 .

estoppel for its explanation. [27] Contrary view that the conduct envisaged here is not the same with that of the common law doctrine of estoppel has been discarded after its initial embrace.[28] However, it has been argued that the owner can be precluded from denying the seller's right to sell in two ways which are estoppel by representation and estopppel by negligence.[29]

Estoppel by Representation

Estoppel by representation, If the owner of goods by his words or conduct has led the buyer to believe that the seller has authority to sell, [30] he will be prevented from claiming that the contract of sale resulting from such reliance is invalid. *Henderson & Co. v. Williams* [31] is a case of estoppel by words. In that case, the owner of goods (Grey & Co.) lying at a warehouse instructed the warehouseman (through a telegram) to transfer the goods to the order of one W. Fletcher. The buyer of the goods from W. Fletcher also obtained a statement from the warehouseman that he held the goods at his order. When it was discovered that the owner was fraudulently induced by W. Fletcher, the owner instructed the warehouseman not to deliver the then proceeded against the warehouseman for the delivery of the goods. It was held that the warehouseman, as a result of his representations to the buyer, was estopped from 'impeaching the title' of the buyer and will be liable for conversion for his failure to deliver. [32]

As for Nigeria, the courts have examined and applied the principle of estoppel by words and conduct in cases dealing with sale of goods. A good example is the case of *Saul Raccah v. Standard Co. of Nigeria Ltd.* [33] In that case, a new employee called Watkins was employed to buy groundnuts from produce dealers by the defendant's company under the supervision and direction of company's representative in its branch office in Kano. The representative had been accepting and paying for the purchase made by Watkins until the company further instructed him (Watkins) to stop the purchase of groundnuts due to fall in the price of groundnuts. In spite of the prohibition, Watkins continued the purchase of groundnuts with the aid of the contract agreement and a certificate signed by the

[28] For endorsement of that view, see, Shaw v. Commissioner of Met Police [1987]1WLR1332; the view was discarded in Thomas Australia Wholesale Vehicle Trading Co Pty Ltd. v. Marac Finance Australia Ltd[1985] 3NSWR452. Note that the Nigerian courts have been following the common law doctrine of estoppel in interpreting this type of conduct.

[29] See John Adams op cit note 12 at 364.

[30] Ibid.

[31] [1895] 1 QB 521.

[32] Note that a similar decision was reached in Eastern Distributors Ltd v. Goldring(1957) 2QB600. The defendant/owner in a plan to deceive a finance company signed an hire purchase form and delivered it to a dealer which enabled the dealer to sell his car to a third party. Court held that the buyer received good title.

[33] (1922)4N.L.R.48.

company's representative to the effect that he had authority to purchase 500 tons of groundnuts. Relying on that representation, the plaintiff was induced to deliver 100 tons of groundnuts to the defendant premises which were accepted and stored by the company's representative. Some of the nuts were taken to the company headquarters in Lagos and some left at the branch office. The company paid for some of the goods and refused to pay for the rest. In an ensuing case, the court held that the company must pay for all the nuts on the ground of estoppel. The court noted:

> It has been proved to my satisfaction that X at the time he entered into the contract had no authority to enter in to the contract as the agent of the company; but that he held himself out as having such authority; and that the plaintiff believed that he was entering into a contract with Watkins as agent for the defendant company. I find further that the plaintiff's belief that Watkins had authority to enter into a contract on behalf of the defendant ...was induced, not only by the statement made by Watkins, but also the conduct of the representative and agent of the defendants at Kano...On the established principle, which applies to corporations, as well as to an individual, that where any person, by word or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such representation, to the same extent as if such other person had the authority which he was so represented to have. I must hold that the defendants are liable to pay the contract price for the groundnuts delivered by the plaintiff.[34]

Estoppel by representation

This occurs 'where the owner, by his negligent failure to act, allows the seller to appear as the owner or as having the owner's authority to sell'.[35] Like the first one, the owner will be precluded from impeaching the disposition made by such a person. The issue of negligence here is not a trivial issue. According to Lush J.:

[34]Ibid at 50-51; see also, Trenco (Nig.) Ltd. v. African Real Estate and Investment Co. Ltd. (1978)1LRN146.

[35]Ibid.

[36]See, Lush J in Heap v. Motorists Advisory Agency Ltd. [1923]1KB577. Heap was careless with his car when he gave his car to North under a pretext to show the car to a potential buyer. North after used the car for a few weeks

> "Negligence in order to give rise to a defence under this section must be more than mere carelessness on the part of a person in the conduct of his own affairs, and must amount to a disregard of his obligations towards the person who is setting up the defence". [36]

Consequently, for the plaintiff to succeed he must proof that the defendant owe him a duty of care, that he has committed a breach of that duty by negligence and that the reason for his loss is the negligence of the defendant. These requirements, starting from duty of care, have been difficult to prove because generally there is no duty on the owner of goods to see to it that they are not lost. [37] In *Mercantile Credit Co. Ltd. v. Hamblin,* [38] the owner of a car wanted to raise money on the security of her car. A car dealer told her to sign documents in order to raise the money but the documents signed allowed the dealer to deal with the car as the owner. The court held that there was a duty of care but there was no estoppel by negligence because there was no breach of that duty since the proximate or real cause was the fraud of the dealer. Similarly, in *Central Newbury Car Auctions Ltd., v. Unity Finance Ltd,* [39] the owner of a car allowed a dealer to take away the car and the registration book before the finance company could accept his proposal form. The dealer sold the car to a garage and the buyer also sold it to the defendant. The court held that 'a mere handling of a car to another could not raise the issue of estoppel" and there could not be estoppel, 'unless the doctrine of ostensible ownership applies". [40] Also, in *Farquharson v. King & Co. Ltd.* [41] *the* plaintiffs were timbre merchants who owned timber housed with a dock company. The plaintiff's clerk had authority to send delivery orders to the dock company, but the clerk had no authority to sell the timber himself. The clerk fraudulently transferred some timber to himself under an assumed name and gave the dock company instructions accordingly. He then sold the timber to the defendants under his assumed name and instructed the dock company to deliver the goods to their order. The plaintiffs having discovered the clerk's fraud brought an action for conversion. The House of Lords held that the defense of estoppel failed because the defendants had not acted on any representation made by the plaintiffs concerning the authority of the clerk.

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sold it to the defendant. Heap sued the defendant. Court held that Heap can take his car park since mere carelessness may not create estoppel.

[37] See. Lord Mac Naghten in Farquharson , supra note 10 at 336 noting that 'If lose a valuable dog and finds it afterwards in the possession of a gentle man who bought it from somebody whom he believed to be the owner, it is no answer to me to say that he would never have been cheated from buying the dog if I had chained it up or put a collar on it, or kept it under proper control'.

[38] [1965] 2 QB 242.

[39] [1957]1QB 371.

[40] The issue of estoppel failed because registration book of a car is not a document of title and it is not a sufficient representation to induce third party, see John Adams supra note 12 at 368.

[41] Op. cit.19.

The approach of the Nigerian courts does not differ from their counterparts in the English courts in proving estoppel by negligence. As usual, the task is always difficult, if not impossible. It follows, therefore, that for a conduct to raise the issue of estoppel, it must be unequivocal and goes beyond mere employment of a person. In *Owoyemi Motor and Finance Co. Ltd. v. Mallam Ahmadu Haruna,*[42] the court held that the buyer of a car under a hire purchase agreement did not receive a good title since a mere parting with goods is not a sufficient conduct that can successfully raise the issue of estoppel and prevent the owner from 'setting up his title against that of the buyer'.

Sale by mercantile agent

A sale by a mercantile agent is another exception to the *nemo dat rule*.[43] However for that sale to be valid, the conditions imposed by law must be met.[44] The first requirement is that the seller must be a 'mercantile agent'. S.1 (1)) of Factors Act [45] defines a mercantile agent as an 'agent who, in the customary course of business, has authority to sell or to consign goods for sale, or to buy goods, or to raise money on the security of goods'. In *Heyman* v. *Flewker,* [46] the court held that the term 'mercantile agent' does not include 'a mere servant' or 'caretaker', or one who has 'possession of goods for carriage, safe custody, or otherwise as an independent contracting party' but only includes 'persons whose employment corresponds to that of some kind of known commercial agent' like an auctioneer or a broker. [47] Consequentially, a legal practitioner who has no business other than that of a lawyer is not a mercantile agent.[48]

The second requirement is that the mercantile agent should be in possession of goods or of the documents of title to goods[49] as a mercantile agent. If he possessed the goods in another capacity, he cannot convey a good title. Thus, if an owner of the goods left them with a person who is a repairer or dealer in order for the goods to be repaired, that is not possession according to this section.[50] A bill of

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[42](1974) UILR 379.

[43]S. 22 of Sale of Goods for Oyo and Lagos States which is in pari material with S.21 of the 1893Act provides further that 'Provided that nothing in this law shall affect- (a) the provisions of the Mercantile Agents Law or any written law enabling the apparent owner of goods to dispose of them as if he were the true owner thereof', see supra note 4. Oyo state substituted Factor's Act with Mercantile Agent law but its effect is the same.

[44]Sect 2 (1) of the Factors Act, 1889 provides the conditions: 'where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of 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 authorized by the owner of the 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 not authority to make the same'.

[45]Ibid.

[46](1863) 32 L.J.C.P 132.

[47]H.S Pathak, Mulla on the Sale of Goods Act & the Indian Partnership Act, (9 th Edition, N.M Tripathi Pvt. Ltd., Mumbai, 1992), P.66.

[48]Budberg v Jerwood & Ward (1934) 51 TLR 99.

[49]S.1.(2) of the Factors Act 1889 provides that 'a person is deemed to be in possession of goods or documents of title to goods , where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf'.

[50]See, Lord Denning in Pearson v. Rose & Young [1951)1 K.B 275.

lading is a document of title [51] but not the registration documents for a motor vehicle. [52] This, according to Slade L. L. J is because the car registration book itself states that it records the name of the registered keeper only and not necessarily the legal owner of the car. The third requirement is that possession should be with the consent of the owner. All documents obtained must be with the consent of the owner. In *Pearson* v. *Rose & Young,* [53] the possession of the car was with the consent of the owner but not the car registration book which was obtained by trick. the court held that the buyer did not obtain a good title. Similarly, in *Stadium Finance Ltd. v. Robbins,*[54] the possession of the car was also with the consent of the owner, who left his car for the purpose of getting offers.[55] The owner retained the registration book and the ignition key. The agent forged the ignition key and sold the car. The court held that the buyer did not obtain good title. The consent of the owner is presumed in the absence of any evidence to the contrary. [56] Also, if the agent obtains the goods with the consent of the owner, withdrawal of the consent will not be effective as against a third party who takes without knowledge of the withdrawal of consent and under a disposition which would have been valid if the consent had continued.[57] Finally, if the agent is in possession of the document of title by virtue of his possession of goods, he shall be deemed to be in possession of the goods with the consent of the owner.[58]

The fourth requirement is that the sale must be in the ordinary course of business as a mercantile agent. According to Buckley L.J in *Oppenheimer v. Attenborough & Son,* [59] this means he must act 'in such a way [that] a mercantile agent acting in the ordinary course of business of a mercantile agent would act; that is to say, within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the buyer to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make'. Thus, in the cases of *Stadium Finance Ltd. v. Robbins* [60] and *Pearson* v. *Rose & Young,* [61] courts held that sales of cars without their ignition keys or registration

[51] S. 62(1) of 1893 Act and S. 1(4) of the Factors Act 1889 state that documents of title to goods include 'any bill of lading, dock warrant, warehouse- keeper's certificate and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as part of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement, or by delivery, the possession of the document to transfer or receive goods thereby presented'.
[52] Beverly v. Acceptance Ltd. v. Oakley &others [1982] RTR417. Note that in that case Lord Denning gave a dissenting judgment that if the agent acquired a car registration book with the car, it can be document of title.
[53] Op. cit.49.
[54] [1962]2 QB 664.
[55] The requirement of consent is satisfied even if 'for a purpose which is in some way connected with his business as a mercantile agent'.
[56] S.2.(4) of the Factors Act.
[57] S.2.2. Ibid.
[58] S.2.(3). Ibid.
[59] (1908) 1 K.B. 221.
[60] (1962) 2Q. B. 664.
[61] (1950) 2All E.R. 102.

books were not a sale in the ordinary course of business. Having said that, it is important to note that there is a very serious concern in the dictum of Buckley LJ dealing comprehensively on the interpretation of this requirement. Atiyah argues that the dictum must be modified in the sense that it combines the requirement that the buyer must act in good faith and without notice with that of the ordinary course of business as a mercantile agent. [62] He concludes that 'A buyer may be in good faith even though the sale is outside the ordinary course of business.' [63]

The fifth requirement is that the person taking under the disposition must act in good faith and without notice of the mercantile agent's lack of authority. Good faith here means an act that is done honestly even if done negligently. [64] The buyer has the onus of discharging these burdens. In *Heap v. Motorists Advisory Agency* Ltd., [65] a car worth £210 was sold for £110, the court held that the buyer did not act in good faith because the low price should have put him on enquiry. In essence, while deliberately turning a blind eye to the knowledge of a fact that calls for caution or enquiry can exclude a buyer from taking the benefit of this provision; 'mere suspicion should not amount to notice'. In *Worcester Works Finance Ltd. v. Cooden Engineering Co. Ltd.*, [66] Lord Denning said the word notice means actual notice, (which means knowledge of the sale or deliberately turning a blind eye to it) and not constructive notice which commercial law frowns at. In that case, there was evidence that the original owner retook the car in good faith because he had no knowledge of sale by the dealer to the finance company; hence the court held that he (the original owner) acquired good title.

Sale under special powers

The Act provides for another exception to the *nemo dat* rule which covers a number of miscellaneous cases. [67] Three categories of sale under special powers are statutorily exempted from the basic rule. They are contract of sale under the common law, statutory power of sale and the order of a court of competent jurisdiction. The most important common law power of sale is the power of pledgee. [68] A person to whom goods has been pledged under the common law can transfer title to the goods to a third party, if the pledge is not redeemed. However, in some circumstances, the pledge can be subject to some regulations. In Nigeria, if the pledgee is a pawn broker, the exercise of his common law right to sell has to be in

[62] At 379.
[63] Ibid.
[64] S. 62 of the 1893 Act.
[65] [1923] 1 KB 577.
[66] [1972] 1 QB 210.
[67] S.22 (b) of the Lagos and Oyo and S.21(b) of 1893 Act, it provides that 'provided that nothing in this law shall affect the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction'.
[68] See John Adam, supra note 12 at 381.

accordance with the pawn brokers' regulations in various states of Nigeria in order to be valid. [69] Similarly, in the United Kingdom, S.120 of the Consumer Credit Act provides that a pawn for under £75 can be forfeited at the expiration of the redemption period while a pawn for more than £75 can only be realized subject to the regulations laid down in S.121 of the Act. [70]

On the statutory power of sale, there are many statutes in Nigeria that give power to a non-owner of goods to transfer title in goods. For example, any proprietor of a hotel has a power of lien to sell by public auction the goods or chattels left in the hotel by any guest if he is indebted for board or lodging. [71] As for the last category, the 1999 Constitution vests judicial powers to the courts to determine disputes in 'all matters between persons, government, authority and to any persons in Nigeria'. [72] In the determination of such disputes, the courts have the judicial power to exercise 'all inherent powers and sanctions of a court of law' [73] and that include the power to make an order to issue a writ of execution. [74] Different states have enacted a specific law in this respect that regulates enforcement of courts' orders and judgments. [75]

The writ is issued to a sheriff who has an authority from the court to enforce its order. Specifically, a writ of *fieri facias* is a writ of execution that authorizes a sheriff 'to lay a claim to and seize the goods and chattels of a debtor to fulfill a judgment against the debtor'. The sheriff seizes the goods and causes them to be sold by public auction. The effect of such a sale by the sheriff, if all the requirements of the law are followed is that the buyer who bought it from him acquired a good title. In addition, the Act also protects the sheriff from any claim from the owner of the goods who is also a judgment debtor. In *Mbanugo & Others v. the U.A.C.*, [76] a bailiff, in reliance to a writ of fieri facias issued by the court, seized a lorry in the possession of one Akinola, a judgment debtor, and sold it to the plaintiffs by public auction which was advertised before its sale. The defendants who are the owners of the lorry had let it out under a hire-purchase agreement. When the plaintiffs brought an action against the defendants who had seized the lorry, the court held that under S.16 of Sheriffs and Civil Processes Act, the plaintiffs had acquired a good title in respect of the lorry and they were therefore, entitled to retain it.

However, it must be noted that for the third party to be protected, the order must emanate from a court of competent jurisdiction. The issues of competence and jurisdiction of a court are

[69] See E.O Akanki (ed)Commercial Law in Nigeria(Nigeria (2005)Lagos, Nigeria 316; S.12 &15 of the Lagos State Pawn Brokers' Law, Cap P 2 (Vol 6) Laws of Lagos State 2003 provides that if the value of the pledge is more than one Naira the pledgee can transfer a good title to the third party provided it is by public auction.

[70] Consumer Credit Act of1974.

[71] See, S.9 &10 of Hotel Proprietors Law of Lagos State Cap H.7 (Vol.3) Laws of Lagos state 2003.

[72] See, S.6 (b) of the 1999 Constitution of the Federal Republic of Nigeria.

[73] Ibid. S. 6 (a).

[74] There are many writs for examples, a writ of fiery facias, a writ of sequestration, a writ of possession, a writ of specific delivery etc.

[75] There are Sheriffs and Civil Process Laws of the States and the Judgments (Enforcement) Rules enacted for this purpose.

[76] [1961] L.L.R. 162.

inter-related. They both affect the capacity to give order and how the order was given. Certain requirements must be met before a court can fulfill the condition dealing with competence and jurisdiction. These conditions are spelt out in the *locus classicus* case of *Madukolu & ors. v. Nkemdilim* [77] where the Supreme Court held that a court without jurisdiction also lack competence and enumerated three requirements for a court to be competent. According to the Supreme Court, one, the court must be 'properly constituted as regards numbers and qualification of the members of the bench, and no member is disqualified for one reason or another'; two, 'the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction'; and three, 'the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.'

It is submitted that if any of those requirements are not met, the third party will not acquire good title and the title of the original owner will not be impugned. The reason is not farfetched. According to the court, where a court is incompetent or lacks jurisdiction, 'its proceedings no matter how well concluded and any judgment arising there from, no matter how well considered or beautifully written will be a nullity and waste of time'. Similarly, no waiver and no acquiescence can confer jurisdiction on a court where none exists.[78]

Market overt exception

The statutory law preserves the common law market overt exception to the *nemo dat* rule which was adopted by the common law from the 'customary law of merchant' in England. [79] 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'.[80] It means, a sale of stolen goods in market overt gives good title to the buyer against the true owner, and even the whole world, if the buyer buys it in good faith without the knowledge of any defect in the title of the seller. The purpose of this exception according to Blackstone, Cooke and Goode is to facilitate market trading and protect its integrity.[81] The word market in the Act refers to a place where trading is conducted. [82] However, not all markets are covered by this exception. Although in the city of London,

[77] (1962) 2 SCNLR 341; Shelim v. Gobang (2009) 12 NWLR. Pt. 1156 403 pp. 455-456.
[78] Ibid.
[79] J.G. Pearse, 'The Change of the property in goods by sale in market overt' (1908) 8Columbia Law Review 375-383 at 376.
[80] S.23 of Oyo and Lagos States and S.22 of 1893 Act, supra note4.
[81] W. Blackstone, Commentaries 449-55 (Bell ed. 1771); E. Coke, The Institutes of the Laws of England 713 (1642); Harold R. Weinberg 'Market Overt Voidable Titles, and Feckless Agents: Judges and Efficiency in the Antebellum Doctrine of Good Faith Purchase' (1981) 56 Tulane Law Review, 1453.
[82] Note that the word market overt is not defined in the Act.

every shop within the city is a market overt.[83] Outside the city, this is not so. A market overt is 'an open, public and legally constituted market'. A legally constituted market means that the market must either be a creation of statute or that of the charter or 'established by long continual user'.[84] The criterion of 'legally constituted' market is not difficult to meet in Nigeria. Although, it is admitted that the market system in Nigeria is not especially well organized and planned,[85] yet, most markets in the cities and outside the cities are legally constituted markets because they are established by the state and local governments who have authority to do the same.[86] As Uvieghara argues, 'all markets in Nigeria established by local government should fall within the category of market overt'.[87] In certain cases, it is submitted that some other markets that are not created by the governments may still qualify to be market overt, if they have been established as a market by continuous usage over a long period of time to the extent that they have been notoriously accepted by the public as a market. However, even if goods are sold in a market overt, there are still other requirements concerning how and in what circumstances the sale should be conducted if it must come within this provision. The requirements according to Halsbury's Law of England[88] are four: one, the sale must take place in the market overt within the time framework and tradition of such a sale in the market, two, the sale must take place in the open: third, the parties to the sale must be of contractual capacity; and four, the goods must be of a kind which is voidable in the market.

On the first one, two conditions must be proved: one, that a sale was made in the market overt and two that the sale was done in accordance with the tradition and custom of the market. In *Owoyemi Motors and Finance Co. Ltd. v. Haruna and Ajibola*,[89] the plaintiff was an owner of a car which was hired by the first defendant. The first defendant without performing is obligation was making effort to sell the car to the second defendant. The sale took place at the premises of the first defendant who was a business man and not a shop keeper. Since the premises were situated along the street on the opposite of a local market, it was contended that the sale was in market overt. The court opined that a meeting of any two people for the purpose of buying one particular thing would not bring the place or the meeting within any of the definitions of a market and that the first defendant's place of business could not be held to be a market place. It therefore held that the sale did not take place in a market overt.

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[83]See, Oguntade JCA in Law Union & Rock Ins. v. Onuoha [1998]6NWLR 576. He noted that 'Generally speaking, the market system in major cities in Nigeria is not very well organized but it seems to me 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 markets qualify to be described as market overt'.

[84]See S.1(e) of the fourth schedule to the 1999 Constitution of the Federal Republic of Nigeria which provides that the local government has power to establish, maintain and regulate 'slaughter houses, slaughter slabs, markets, motor parks and public conveniences'.

[85]E.E. Uvieghara, Sale of Goods (And Hire Purchase) Law in Nigeria Malthouse 1996 Nigeria. P. 84.

[86]Volume 29, 4th edition.

[89](1974) UILR379.

In addition, it must also be proved that the sale took place in accordance with the tradition and custom of the market. This has been explained to mean the sale must take place on the lawful market day, during the hours of business (not at night) and that the goods sold must be of such description that are usually displayed for sale in the market. [90] In *Bishop's Gate Motor Finance Corp.Ltd. v. Transport Brakes Ltd.,*[91] a hirer who obtained possession of a car under a hire purchase transaction took it to Maid Stone Market and gave it to an auctioneer to sell. When every effort made to sell it failed, the auctioneer sold it by a private treaty. The court admitted evidence that cars were usually sold privately in the Maid Stone market if effort made to sell them through an auction had failed and held that the market was a market overt and that the sale was compatible with the usage and practice of the market and therefore valid.

The second requirement is that the sale must take place in the open. To satisfy this requirement, it has been explained that the sale has to take place in the open between the hours of sunrise and sunset and that the goods must be publicly displayed so that stand-by and passer –by could see them'. [92] Thus, in *Red v. Metropolitan Police Commission,* [93] the court opined that since the sale must be in public and open, the goods must be displayed so that a mere sale by sample will not be protected by this provision. The third requirement is contractual capacity. This deals with the law of contract and the general principle is that every person is capable to enter into contract of sale of goods except those who have been rendered incompetent by circumstances recognized by law or whose contractual capacity is limited. [94] The fourth requirement is that the goods must be of a kind which is voidable in the market. [95] like all other exceptions to the nemo dat rule, it must also be proved that the buyer bought the goods in good faith and had no notice that the title of the seller was defective. [96]

Sale under voidable title

The Act provides that;

> 'When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title'. [97]

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[90] Op. cit. 84.
[91] Op. cit 2.
[92] Per Harris Jog in Red v. Metropolitan Police Commission (1973) Q.B. 551.
[93] Ibid.
[94] For example, S.4 of Sale of Goods, Oyo, S.2 of the 1893 and Lagos State, supra note 4. Each of them provides that capacity to buy and sell is regulated by the general law of contract with a proviso that 'where necessaries are sold and delivered to an infant or minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefore'.
[95] The issue of voidable will be discussed in the next sub-section.
[96] See the discussion of this above, sub-section 3.2.
[97] See S.24 of Oyo and Lagos States and S.23 of 1893, supra note 4.

This provision of the Act merely restates or enacts a common law rule.[98] If the exception is to apply, the title must be voidable,[99] because there is no remedy if contract is void.[100] In *Cundy v. Lindsay,*[101] a dealer was induced by a rogue to dispatch his goods to Blekarn thinking that he was dealing with Blenkiron and Co., with whom he was willing to deal. Blekarn sold the goods to the defendants who bought in good faith and for value, but the court held that the contract was void, that the exception did not apply and that the plaintiffs could recover the goods he has parted with from the defendants because there was no contract at all.[102] It is important to note that the House of Lord confirmed this decision in *Shogun Finance v. Hudson.*[103] In that case, a motor dealer agreed to sell car to a fraudster who produced a stolen driving license as proof of identity. On the basis of that false identification and forged signature on Hire Purchase Agreement, he obtained the car. Majority decision applied the case of *Cundy v Lindsay* and held that this was a contract by correspondence and therefore void.[104] If however, the goods are obtained under a voidable contract, the buyer gets a good title. In *Phillips v. Brooks,*[105] a fraudulent person bought some jewelry in a shop, by posing himself to be 'Sir George Bullough,' a real third person known by name, but not personally, to the jeweler. It was held that the contract was voidable and not void and so a good title consequently passes to an honest purchaser through the fraudulent person.[106]

Similarly, in *Lewis v. Averay,*[107] a fraudulent person bought a car in return for a worthless cheque by posing that he was a well-known actor who played Robin Hood on television. The court held that the contract was voidable and not void. Consequently, Mr. Averay had a good title.[108] However, it is possible for the defrauded party to rescind the contract, if he takes prompt action in

[98] Cockburn L.J. in Mayce v. Newington (1878) 48 L.J.Q.B. 125 p. 127. He noted that 'We must know take it to be settled ... that although a seller in induced to sell by fraud of the buyer, and though it is competent to the seller by reason of such fraud to avoid the contract, yet, till he does some act to avoid it, the property remains in the buyer and that if he in the meantime has parted with the things sold to an innocent purchaser, the title of the latter cannot be defeated by the original seller'.

[99] A void title does not exist at all.

[100] A voidable title exists but it is liable to being avoided before a third party acquires it.

[101] Supra note 9.

[102] This was treated as a case of contract void by mistake.

[103] [2003]UKHL 62; [2003] WLR 1371.

[104] Note that in Cundy case, the transaction was by post.

[105] [1919] 2 KB 243. This was treated as a case of contract voidable by fraud.

[106] It is assumed that a dealer who sells face-to-face is presumed to be selling to the person before him, even if the person is a rogue. The decision in Ingram v. Little [1961] 1 QB 31 (CA, Devlin LJ dissenting) where the court held that 'if A's fraud, albeit committed face-to-face, was such that the seller's offer was in truth directed to B, not to A' then, the rogue can consequently not pass on a good title even to an honest purchaser seems to have been overruled in Shogun Finance v Hudson (supra note 85) where the House of Lord considered the Court of Appeal conflicting decisions in Ingram v Little and Lewis v Averay(infra note 87) and expressed the view that the same rules should apply in both situations where contracts were made face-to-face or at a distance or in writing. The court therefore endorses decisions of the court in Cundy v Lindsay, Lewis v Avery, and Phillips v Brooks.

[107] [1972] 1 QB 198

[108] Lord Denning delivering the leading judgment said 'The real question in the case is whether on May 8, 1969, there was a contract of sale under which the property in the car passed from Mr. Lewis to the rogue. If there was such a contract, then, even though it was voidable for fraud, nevertheless Mr. Averay would get a good title to the car. But if there was no contract of sale by Mr. Lewis to the rogue – either because there was, on the face of it, no agreement between the parties, or because any

communicating his intention to the swindler or he evinces an intention to do so, in cases where the swindler cannot be reached. In *Car and Universal Finance Ltd v. Caldwell*,[109] the defendant in this case sold a car to the swindler who paid a worthless cheque in return. The second day when the cheque was dishonoured, the defendant promptly did everything possible to recover the car. The court held that the notification of fraud to the police was considered to be effective rescission of title by the true owner.[110] How the Caldwell decision negatively affects the protection afforded to the innocent third party is not very clear. Initially, it was perceived that the case has fundamentally truncated 'the protection afforded to the innocent third party by the Act'[111] but a critical look at the totality of the Act shows that this is not so. In fact, according to Atiyah, 'it is very clear that the case will be of limited application in practice.'[112] Of course, one cannot but agree to that view, since the rule of rescission by communication, which the court attempts to use to diminish the statutory protection has been whittled down under another exception that a buyer in possession can pass a good title.[113]

Apart from the issue of statutory provision that protects the innocent third party, it is also important to note that some courts have refused to follow the path laid down in the Caldwell case. In *Newtons of Wembley Ltd. v. Williams*,[114] the seller/owner of the car in issue took prompt action to rescind the contract on discovery that the cheque used for the sale was not honoured. However, the rogue, instead of returning the car to the owner as instructed, sold the car to the third party. The court held that the sale was valid and refused to follow the Caldwell principle that the instruction to return the car was an effective rescission. In fact, the Court of Session in the Scottish case of *Mcleod v. Kerr* [115] foreclosed the possibility of the seller rescinding the contract when it held that 'by no stretch of imagination can the seller's conduct amounts to rescission of the contract. Finally, the buyer must also prove that he acquired or bought the goods in good faith and had no notice that the title of the seller was defective.[116]

Seller in possession after sale

If a seller who has sold goods but still has the possession of the goods in his custody sells the goods to another buyer, the second buyer obtains good title if the conditions enumerated in the Act are satisfied.[117] The conditions according to the statutory provisions[118]

[109] [1965]1Q.B. 525.
[110] Court noted that his prompt response was enough because the thief will do everything possible to evade notice.
[111] John Adams, Op. cit. 11.
[112] Ibid.
[113] Ibid. See the discussion of this in the next section; 'the person obtaining goods by fraud can still fall in the category of buyer in possession' see Avtar Singh op. cit.12; Benjamin Sale of Goods (4th edition 1992)306.
[114] [1965] 1 Q.B. 560.
[115] [1965]SC253; Reid, 'The law of Property in Scotland' (1996 Butterworth Law Society of Scotland)606-610.
[116] Note that it has been held that under this exception, the burden or onus is on the original owner to proof that the buyer did not act in good faith, see Whitehorn Bros v. Davison[2011]1KB 463.
[117] S. 26 (1) of Oyo and Lagos States and S.25(1) of 1893 : '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 thereof or under any agreement for sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same'.

are five. First, the person must have sold goods, which means relationship of seller and buyer must exist. It does not cover a situation where there is agreement to sell. Here, there is one seller but two buyers. It implies that the seller must have sold the goods to two buyers as a seller. In some circumstances, there can be two sellers; the first person can be the owner and also a seller, while the second seller may be another person who sold it to another buyer with his authority. In law, the original owner and the second seller who sold with his authority are regarded in law as the same person. In *Shaw v. Commissioner of Police* [119] The court held that only a seller could take advantage of the section.

The second requirement is that property must have passed to the first buyer to trigger the protection afforded by the section. If property has not passed to the first buyer there should be no dispute relating to title if goods are sold to the second buyer who obtains valid title.

The third requirement is that the seller must be in possession of the goods or documents of title to them at the time of the second disposition. In *Staff Motor Guarantee Ltd. v. British Wagon Co. Ltd.* [120] the court held that the provision did not apply because the seller was in possession in the case in his capacity as a bailee of the goods under a hire purchase transaction and not as a seller. [121] However, in *Pacific Motor Auctions Pty .Ltd .v. Motor Credits (Hire Finance) Ltd.,* [122] the court held that what matters is the continuity of physical possession irrespective of private arrangement between them. In that case, M. Co. bought a number of cars from a motor dealer and in a private arrangement between them allowed the cars to remain in the showroom of the dealer for the purposes of display and sale to customers on hire purchase. M. Co. terminated the dealer's authority to sell. The same day the dealer sold them to Motor Credits. The court held that the buyer got a good title. [123] The Court of Appeal followed Pacific case in *Worcester Works Finance Ltd v. Cooden Engineering Co. Ltd.* [124] where the court observed that 'It does not matter what private

[118]The conditions are contained in section 8 of the Factors Act 1889 which are reproduced in slightly different terms in the Sale of Goods Act.

[119][1987] 1 All E R 405

[120](1934) 2 K.B. 305.

[121]Note that same decision was reached in Eastern Distributors Ltd v. Goldring supra note 25 where the court held that possession must be strictly that of a seller and not in any other private arrangement as a 'bailee' or trespasser.

[122][1965] AC 867.

[123]Ibid. Lord Pearce observed 'Where a vendor retains uninterrupted physical possession of the goods, why should an unknown agreement, which substitutes a bailment for ownership, disentitle the innocent purchaser to protection from a danger which is just as great as that from which the section is admittedly intended to protect him'.

[124]op cit. note 60.

arrangement may be made by the seller with the purchaser-such as whether the seller remains bailee or trespasser or whether he is lawfully in possession or not. It is sufficient if he remains continuously in possession of the goods that he has sold to the purchaser'.

The fourth requirement is that there must be delivery of the goods or transfer of documents of title to the second buyer. This means goods must be delivered and documents must be transferred, if the second buyer will obtain good title under this section. In *Nicholson v Harper,* [125] the court held that there was no 'delivery or transfer' where goods are pledged to the warehouseman who stores them because the seller was not in anytime in possession of the wine. [126] It has been argued to the satisfaction of the court that delivery here includes constructive and not only actual delivery. [127] If that reasoning is correct, the accuracy of Nicholson decision may be doubtful, thus the Australian high court in *Gamer's Motor Centre (Newcastle) Pty. Ltd. v. Natwest Wholesale Australia Pty. Ltd.* [128] rejected it as bad law. [129] In that case, the court held that in sale of goods the law recognizes the concept of constructive delivery where the physical possession remained unaltered, but the right to possession was transferred.

Finally, the second buyer must prove that he bought the goods in good faith without the knowledge of the first sale. North J. in Nicholson v. Harper observed correctly that 'there must be some delivery or transfer after the sale without notice that such sale had taken place'. [130] The knowledge of notice vitiates the statutory protection afforded to the second buyer under this section. Lord Denning in Worcester Works Finance Ltd. v. Cooden Engineering Co. Ltd. [131] explained the meaning of notice when he stated that it means actual notice that is knowledge of the sale or 'deliberately turning a blind eye to it'. [132]

Buyer in possession after sale

The last exception is that of a buyer in possession after sale. The relevant provisions of law provide:

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[125] [1895] 2 Ch 415

[126] Note that this case has been rejected as bad law and it was not followed in the Australian case of

[127] See, Michael Gerson (Leasing) Ltd. v.Wilkinson[2000] 2All ER (Comm) 890.

[128] (1987)163 CLR.

[129] Note that Nicholson decision was followed in New Zealand: New Zealand Securities & Finance Ltd. v. Wright Cars Ltd. [1976] 1NZLR 77.

[130] [1895]2 Ch 415.

[131] op. cit. 60.

[132] Schmittoff explained notice as 'notice ... whether conveyed by a communication or by being aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from there to the conclusion that the fact is so. A suspicion which is not supported by circumstances dos not amount to notice'.1111.

'Where a person having bought or agreed to buy goods obtains, 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 documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right 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'.[133]

It is important to discuss three requirements which are very important to this exception. The first is that the person seeking protection of this section must be able to prove that he is a buyer according to the definition of the section. The section defines a buyer as 'a person having bought or agreed to buy goods'. This refers to a person who has entered into a contract of sale of goods and agreement to sell. The implication of that phrase is that unlike the requirement in a sale by a seller in possession, this exception applies whether property has passed to the buyer or not. According to Atiyah, this is a strange and curious provision. He argues that:

'It is not easy to see why there should be any special enactment to protect a person who has bought goods from a buyer in possession when the property has already passed to this buyer'.[134]

However, in spite of the perception of the provision as a 'mere surplusage', it is actually relevant to protect the buyers in three circumstances. First, it protects buyer where he has agreed to buy goods but property in the goods is to be transferred to him at a future date.[135] Second, it protects him where he has bought goods under a voidable title but the seller has avoided the contract.[136] Finally, it also protects a buyer where goods are supplied to him under a reservation of title clause.[137] In *Marten v. Whale*[138] a buyer entered into agreement to buy a motor car and a piece of land from a seller/owner. The purchase of the car was made conditional upon the approval of the

[133] See S. 26 (2) of Oyo and Lagos States and S.25(2) of SOGA. Those provisions are almost the same with S.9 of the Factors Act 1889.

[134] John Adam op. cit. 12 at 388.

[135] See Kingsley at 146.

[136] Ibid; see infra 118, the case of Marten v. Whale.

[137] Note that in that case, a sub-buyer must comply with all the conditions for the property to pass.

[138] 1917] 2 K.B. 480.

seller's solicitor of the sale of land. The buyer was given possession of the car which he resold to the second buyer, a bonafide purchaser who bought it without notice of the situation. Thereafter, the seller's solicitor disapproved the conditions of the sale of the land. The court held that the sub-buyer of the motor car from the first buyer got a good title since he was a person who agreed to buy. Another condition is that a buyer seeking protection of this section must have obtained possession of the goods or the documents of title to the goods with the consent of the seller. Two requirements are important here. The first is possession of the goods or title to the goods and the second is possession with the consent of the seller. It is important to note that constructive possession, even if not physical possession is sufficient here. Thus, where the first buyer requested the seller to deliver the goods directly to the second buyer and goods were delivered according to the instruction, court held that the requirement of possession was met and the second buyer was protected by the section.[139]

On the contrary, if a buyer obtained possession under a Hire Purchase agreement that will not amount to a possession and subsequent sale by him to a sub-buyer will not convey a good title.[140] In addition, a person who has taken goods on approval or sale or return is not a person in possession so that a sale by him will not convey a good title to the buyer.[141]

The second requirement is that the buyer must be in possession with the consent of the seller. It does not matter if he acquired the goods by a criminal offence as long as the owner consented. If the owner has consented, subsequent revocation does not vitiate his consent. In *Newtons of Wembley v. Williams,*[142] the plaintiff sold and delivered a car to the first buyer under a contract saying that no property in the car was to pass to him until his cheque was cleared. The cheque was dishonoured but in the meantime he had sold the car to the second buyer in an open air market. The second buyer also sold it to the defendant. The plaintiff sued the defendant for the return of

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[139]Four Point Garage Ltd. v. Carter [1985]3 All ER 12.

[140]Belsize Motor Supply Co Ltd. v Cox [1911-13] All ER Rep 1084; Shenstone & Co v Hilton [1894] 2QB452; Helby v. Mathews (1895)AC471. Court held that where a person merely has an option to purchase goods, the person neither bought nor agreed to purchase goods.

[141]Edwards v. Vaugham (1910)26 TLR 545 28. Note that option to purchase is not a sale but such a person can adopt the transaction.

[142]1965] 1 QB 560.

the car. The court held that the original buyer was a buyer in possession, not a mercantile agent. It held further that the sale to the second buyer was in the ordinary course of business of a mercantile agent and that the second buyer had acquired a good title which he transferred to the defendant. [143] Similarly, in *Cahn and Mayer v. Pocket's Bristol Channel Steam Packer Co. Ltd.*, a buyer obtained possession of a bill of lading in respect of a consignment of copper with the consent of the sellers and transferred it to the plaintiffs. The court held that the plaintiffs acquired a good title and that the sellers had no right to stop the goods in transit.

The third requirement is that the buyer must have received the goods or documents of title to them in good faith and without notice of any lien or other right of the original seller in respect of the goods. This requirement was considered in *Newtons of Wembley v Williams* [144] where the court held that the original buyer was able to transfer good title to the second buyer because he bought the car in good faith without notice of any defect in the title of the original buyer. However, there are two incongruities in the application of this requirement that must be explained. One, it is difficult to see how the issue of lien can come in where the buyer is in possession of the goods with the consent of the seller. [145] According to the Act, the unpaid seller loses his right of lien when the buyer or his agent lawfully obtains possession of the goods. [146] In that case, how can the buyer be said to have notice of a non-existing right? Of course, the right of lien is not only lost where the buyer has obtained possession lawfully but also unlawfully. [147] However, if the buyer only obtains possession of documents of title to the goods but not of the goods themselves, there is the possibility in some circumstances that the seller could still have a lien on the goods themselves. [148] In such a situation, the section applies and the buyer who has notice of such a lien 'would take subject to the lien whether or not the property had

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[143] Ibid. Court noted the original buyer could not obtain title under the common law but since he had bought the car and obtained possession of it with the consent of the owner he was to be treated as a mercantile agent by virtue of S.9 of the Factors Act 1889 and as a buyer in possession who obtained possession with the consent of the owner. The consent was by virtue of S.2 (2) of the Factors Act deemed to continue notwithstanding that it had been revoked by the original owner.

[144] op. cit. 122.

[145] John Adam op. cit12 at 395.

S.43 (1b) Oyo, S.43(1b) Lagos and s43(1b) of 1893 Act.

[146] See, Jeffcott v Andrews Motors Ltd. [1960]NZLR721 where the court held that it was unnecessary to decide whether the seller's lien could survive where the buyer obtained possession of the goods by criminal fraud on the ground that in any event the third party was protected by S.9 of the Factors Act;

[147] John Adam supra note 12 at 395, he noted that 'in whatever capacity the buyer obtains control of the goods, provided it is with the consent of the owner S.9 of the Factors Act applies and the buyer can pass a good title'.

[148] See John Adamop.cit.12 at 395.

passed to the original owner.'[149] Apart from the issue of lien, the second incongruity in the requirement deals with notice of 'other right of the original seller' in respect of the goods sold. The same problem occurs here as it is with the lien. Of course, it is not easy to decipher what 'other right of the original seller' in respect of the goods sold the third party can have notice of where the buyer has bought the goods so that the property has passed to him. [150] The knowledge by the third party that the price of the goods has not been paid is insufficient to bring this clause into operation or be held to subject buyers in to inquiry. [151]

Therefore, it is clear that this requirement [152] has the minimal chance of being applied only where property has not passed to the buyer and even at that, there is no certainty that the issue of lien can arise.[153] Finally, it is crucial to interrogate the effect of a sale by a buyer in possession. According to the Act, it takes 'the same effect as if the person making the delivery or transfer were a mercantile agent'. [154] This is not the same with the sale by a seller in possession which takes effect 'as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same'.[155] The confusion lies with a sale by a buyer in possession because it *envisages a sale by a person who is not a mercantile agent and it might be difficult* to hold that a sale by such person is *in the ordinary course of business of a mercantile agent*. However, the difficulty had been resolved by jettisoning the proof that a sale by such person is *in the ordinary course of business of a mercantile agent*. Per Gresson P. adopted this approach in *Jeffcott v. Andrews Motors Ltd.* [156] when he opined that:

The section operates to validate a sale as if the buyer in possession were a mercantile agent; it does not require that he should act as though he were a mercantile agent.

[149] Ibid; However, he noted that such an eventuality is difficult to arise since 'possession of document of titles normally carries with it the possession of the goods' for example bills of lading.
[150] Ibid.
[151] Ibid. He further noted that 'even if he is aware that the buyer has not paid the seller and cannot do so because the he has become insolvent, it is clear that the original seller cannot impugn the sub-buyer's title on the ground of bad faith, otherwise, a person could never safely buy goods which he knew he had not been paid for'.
[152] That the third party must receive the goods in good faith and without notice of any lien or other right of the original seller.
[153] John Adam, op. cit. 395.
[154] op. cit 127.
[155] op. cit. 111.
[156] op. cit. 127.

This view had been the position of law since the case of *Lee v Butler* was decided and was assumed to be the law ever since, until the Court of Appeal adopted the notional approach which displaced it in Newtons *of Wembley v. Williams* where the court opined that the buyer must be treated as a notional mercantile agent and that the court must examine whether the sale would have been in the ordinary course of business had he been a mercantile agent.[157]

This view was followed and applied in the Northern Ireland case.[158] where Lord Lowry insisted that it was not the original intention of the drafters of the Act to put a buyer from an ordinary seller in a better position than a buyer from a mercantile agent. While Lord Lowry's view may be correct, it has been argued that the contrary view had held sway for a long time (beginning, indeed, with Lee v Butler in 1893) that it is too late in the day for it to be displaced by another view.[159] In addition, it is difficult to agree with him '... that it would be absurd to protect the bona fide purchaser where the intermediate buyer has not acted as though he were a mercantile agent'.[160]

CONCLUSION AND RECOMMENDATIONS

This paper has discussed the application of the n*emo dat* rule in Nigeria as codified in the statutory provisions and applied by the courts. The paper has shown that the process of reaching equilibrium between protecting the interest of the two contending parties is not only laborious, but also complex, incoherent and susceptible to misconception. Consequently, there is a need for a review of the statutory law in order to ensure precision and avoid miscarriage of justice. In doing that, the philosophy behind the law must be appraised in the light of the modern-day economic and social conditions in Nigeria. For example, why should market overt exception be retained while it has been repealed by some countries?[161] Admittedly, it has been said to be archaic and anomalous and its only benefit is to promote the sale of stolen goods.[162] But in contrast to that view, (as noted earlier), it also protects the interest of commerce and the integrity of the market. Thus, repealing it is not the best solution.[163]

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[157] See Sellers L.J. in Newtons of Wembley v Williams op. cit. 124 at 574 opined that the section places him 'in the position of a mercantile agent when he has in fact in his possession the goods of somebody else, and it does no more than cloth him with the fictitious and notional position'.

[158] Martin v Duffy [1985] 11 NIJB 80.

[159] John Adam, op. cit. at 398.

[160] Ibid. He noted that it is not a sound policy to say otherwise because' a seller who actually delivers the goods to a buyer before being paid chooses to trust to that buyer's credit, and thee seems every reason why he should take the risk if that buyer wrongfully resells the goods to an innocent purchaser in good faith'.

[161] See, for example the Sale of Goods (Amendment) Act 1994 of the United Kingdom which abolishes market overt rule.

[162] See for example Deveport & Ross 'Market Overt' (1993) International Journal of Cultural Property, 25-46 at 25 he noted that 'it is an exception which can be politely characterized as an obsolescence. More accurately, it can be characterized as an ugly medieval relic, the only benefit of which is to assist the sale of stolen goods'.

[163] It has even been said that abolition of the exception does not solve all the problems in that area of law, see G. Howells, 'Consumer Contract Legislation Understanding the new law (1995)32.

In taking a reasonable view on this issue, the interest of the innocent buyer in a developing country such as Nigeria should also be considered. Unlike an owner, who can insure his goods for the purpose of theft, the possibility of a buyer insuring a miniature of goods bought in the market overt is nil. Although the rule of *caveat emptor* applies in Nigeria, [164] to impose duty to take caution on the innocent buyer, but the facilities for proper enquiry are either not there or inadequate to stretch the rule beyond mere surface where there are circumstances that call for suspicion .[165] In addition, time as a great factor for consideration in commercial transaction is not in favour of the innocent buyer when it comes to the issue of enquiry. [166] Thus, a law that protects a buyer for goods sold in the market overt is not absurd or preposterous in a developing country.

Admittedly, market overt exception is like 'charter' that makes stolen goods thrive but legislators have provided a preventive clause that should checkmate its abuse.[167] The Act [168] provides that 'where goods have been stolen [169] and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, [170] or his personal representatives, notwithstanding any intermediate dealing with them whether by sale in market overt or otherwise'. The implication of that provision is that even if stolen goods are bought in the market overt, once, the thief is prosecuted and convicted; the property in the goods reverts back to the owner. [171]

[164] On caveat emptor, see Ageh v. Tortya [2003]6NWLR (Pt.816)385; Owo v. Kasumu (1932) 11 NLR 116.

[165] Most states in Nigeria don't have registries to register goods.

[166] Note that unless, there is a reasonable reason to do so, it is not likely that a buyer will go to the market with an impression that the goods in the market are stolen goods.
E.E. Uvieghara supra note 11 at 85; Igweike, supra note 11at 139 they noted that the section only applies to sale of goods in the market overt.
See S.25 (1) of Oyo and Lagos andS.24 (1) of 1893.

If goods are not stolen but obtained by fraud or wrongful means, the property in the goods does not divest on the owner, see S.25 (2) of Oyo and Lagos or S.24 (2) of 1893 Act. But Uvieghara has argued that it is doubtful if S.24 (2) of 1893 Act 'has effect in Nigeria [due to the fact] that the definition of stealing in the Criminal Code appears broader' to cover cases of fraud or wrongful means.

[170] The owner of the goods here means the owner of the goods from whom they were actually stolen and not necessarily the original owner. See E.E. Uvieghara op. cit. 11 at 86.

[171] Note however, that if the totality of the provisions of the Act is considered, the efficiency of the preventive clause is doubtful. Thus, for example, if a buyer in possession who has sold goods to an innocent buyer in good faith is convicted for stealing, the title of the good will not revert back to the owner and the innocent buyer will acquire a good title. See E.E. Uvieghara supra note 11 at 85; S.21 (1a & b) of 1893 Act, 22 (a &b) of Oyo and Lagos, supra note 4.

This law, however, is not retrospective which means the owner will not be able to sue anyone including an innocent buyer for tort of detinue or conversion.

Another exception that should be interrogated for the purpose of determining its suitability for reform is the voidable title exception. Three issues are important for inquiry. First, the burden of proof under the voidable title exception is different from that applying to the other exceptions. As held in *Whitehorn Bros v. Davison*, [172] it is the duty of the original owner to proof under the voidable title exception that the buyer did not act in good faith. That is inconsistent with the burden of proof in other exceptions. Consequently, there is a need to harmonize the burden of proof for all of the exceptions. [173] This can be done by amending the statutory provision to explicitly provide for that. It is suggested that the phrase 'provided he buys them in good faith and without notice of any seller's defect in title' can be substituted with another phrase 'provided he shows proof that he buys them in good faith and without notice of any seller's defect in title'. If this amendment is effected, there will be no ambiguity on burden of proof and the courts will enforce simple literal meaning of the law. [174]

The second is to examine whether there should be a statutory intervention to resolve the controversy surrounding the issue of rescission of a voidable contract. The general rule provides that rescission of a voidable contract should require communication. Caldwell's case [175] dispenses with the issue of communication. In contrast, other cases refused to follow it. [176] Why then should such a discredited rule deserve legislative intervention in Nigeria? Even if Caldwell's rule is important to defeat the protection afforded by voidable title exception, the fact that an innocent buyer in good faith affected by the rule can find succor in another exception makes it a trifle rule that can be ignored without much ado.

The third issue deals with the abolition of the distinction between void and voidable contracts. This suggestion was first raised by the UK Law Reform Committee, [177]

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[172] [2011] IKB 463.
[173] For the suggestion, see, Sales Law Review Group, Report on the Legislation Governing The Sale of Goods and Supply of Services November 2011 at 462.
[174] For accuracy, the same phrase in market over exception can also be amended same way.
[175] Supra note 103.
[176] See, Newtons of Wembley Ltd. v. Williams, supra note 108 & Mcleod v. Kerr supra note 109.
[177] Specifically, the problem deals with distinction between contracts void for mistake and contracts voidable for fraud. See, Twelfth Report of the Law Reform Committee 'Transfer of title to chattels' Cmnd2958 (1966) para.25.

due to a spate of conflicting cases on the issue [178] but the recommendation was rejected. However, Nigeria cannot avoid reforming its law on this issue in order not to be caught up in the labyrinth of conflicting decisions. Consequently, it is suggested that Nigeria should take a cue from the United States of America's Uniform Commercial Code. Article 2-403 of the Code provides that 'A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though the transferor was deceived as to the identity of the purchaser'. It is submitted that with a provision like this, the innocent buyer will be protected and the problem of distinction between void and voidable contracts shall be a thing of the past. [179]

To sum up the argument for reform, it is suggested that Nigeria should adopt a consumer protection approach to the application of the *nemo dat* rule. What this means is that the general rule should not be jettisoned, but a vigorous attempt should be made to protect the innocent buyer in good faith. Consequently, all the stumbling block imported into the meaning of the Act which inhibits protection of innocent buyers should be expunged. In that regard, considering the importance of the buyer in possession exception in protecting the innocent buyer in good faith, it is suggested that every requirement imported into its interpretation should be expunged by legislative intervention. For example, the dicta in *Newtons of Wembley* case that the court must examine whether a sale by a buyer in possession would have been in the ordinary course of business had he been a mercantile agent is not the law and a statutory intervention should be adopted in Nigeria to prevent some judges from following this erroneous decision, which is persuasive. [180]

Finally, for ease of reference and to avoid overlapping rules, it has been suggested that there should be a consolidation of S.2, 8 and 9 of the Factors Act with S.25 of the Sale of Goods Act. [181] It is suggested that states in Nigeria should reform their laws to reflect this observation. However, in doing this, it should not be forgotten that the requirement that a buyer in possession should act as if he were a mercantile agent should be jettisoned.

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[178] See the cases of Cundy v. Lindsay and Ingram v. Little & Shogun Finance v. Hudson supra note 97.
[179] Sales Law Review Group, Report supra note 167.
[180] Ibid, it has been suggested that this can be done by amending S.9 of the Factors Act.
[181] Ibid.

In conclusion, the purpose of this paper is to chart the path for a reform in sale of goods law in Nigeria. This has been done by a comprehensive discourse of transfer of title by a non-owner and recommendations offered. There is no doubt that a consumer protection approach is a suitable mechanism that can be adopted in adjudicating and regulating disputes between the owner of goods and the innocent buyer in good faith. The benefit of the approach is that it recognizes the general rule but supports recourse to a suitable exception if the facts of a particular case justify it, thus no interest of any party is deliberately jettisoned.