THE TRANSFER OF TITLE BY NON-OWNERS UNDER THE NEW SALE OF GOODS EDICTS IN NIGERIA.

By:

Dr. John N. Samba*

Introduction

Until recently, the law governing contracts of sale of goods in Nigeria has been essentially the English Sale of Goods Act, 1893, a statute of general application which was in Force in England before the first day of January, 1900.[1] The Sale of Goods Act, 1893, until its repeal was applicable in the states of the former Eastern and Northern Regions. The Act was supplemented by the principles of the common law and equity which were not inconsistent with the provisions of the Act.

However, the former Western Region replaced the sale of Goods Act, 1893 in its jurisdiction by the Sale of Goods Law, 1959. That law as well as the common law applied in the states of that former Region. In 1973, Lagos State enacted its own Sale of Goods Law which applied along the same line, that is, with the common law. It should be noted that the fact that the foregoing analysis does not mention customary and Islamic Laws on the subject, does not mean that the writer is oblivious of the wide applicability of them but rather that these are excluded from the scope of the present discourse.

The genesis of the Sale of Goods Edict has come a long way from a draft by the Law Reform Commission through National Workshops and Seminars before its promulgation. The Edict, among others, has, albeit belatedly, come to accomplish the yearnings of many, including the present writer, who saw no wisdom in the continued sustenance for many years after independence of the so called "statutes of general application".

The new Sale of Goods Edict, though federally drafted, could not receive the legislative stamp of the Armed Forces Ruling Council (AFRC), because the subject matter is within the legislative

* LL.B (Hons), Lagos, LL.M; Ph D. (ABU), Senior Lecturer and Head, Department of Commercial Law, Ahmadu Bello University, Zaria.

competence of the states. Its origin makes it uniform in spirit and text. Divergences in the various state edicts are therefore basically in the numerical layout of the provisions. For the present exercise, the specific Edict to be applied is the Kaduna State Sale of Goods Edict, No 15, 1990[2] (herein after to be called the Edict).

The common law rule as to the transfer of title is that no one transfers a better title to goods than he himself has. This position is usually expressed in the Latin maxim "Nemo Dat Quod Non Habet" The maxim is adopted by S.23(1) of the Kaduna State Sale of Goods Edict. By this maxim, any one who attempts to transfer any interest in goods either by sale, pledge or otherwise transfers only the interest he himself has in the particular goods at the time of transfer. While a strict application of this maxim would provide a protection of property rights on the one hand, it would be a great hindrance to commercial transactions on the other hand. It is because of the great disadvantage of the strict application of the maxim that the common law in *Cole V. North Western Bank*,[3] recognised some exceptions to the general rule. These exceptions included sale in market overt and sale under the authority of the owner.

The Sale of Goods Act, 1893 adopted these exceptions among others. The sale of Goods Edicts while so adopting these, in advertently or by design omitted the "market overt" principle. This discourse deals with the exceptions as presented by the Edicts and concludes with the legal position as to whether by its omission, the "market overt" principle has ceased to operate in Nigeria or not.

Disposition under the Authority of the Owner (SS23 & 27)

The accepted instances where a non-owner can transfer ownership in a contract of sale of goods include sales under the actual or apparent authority of the owner, and sales by a seller or buyer in possession of the goods. These are provided for in section 23, 25, 26 and 27 of the Edict.

First, a valid sale under the apparent authority of the owner is provided for in S.23(1). Under the section, a non-owner who sells without the authority or consent of the owner does not pass a better title to the goods than he himself has "unless the owner.... is by his conduct precluded from denying the seller's authority to sell". This is the operation of agency by estoppel. It applies either (a) by reason of a representation made by words or conduct by the true owner that the seller has the authority to sell or (b) by negligence of the true owner which enables the seller to create an apparent ownership or authority to sell.

The implication is that if the true owner stands by and allows an innocent buyer to pay over money to a third party, who professes to have the right to sell an article, in the belief that he is becoming the owner of it, the true owner will be estopped from denying the third party's right to sell.

In Henderson and Co. V. Williams[4], the owner of goods lying at a warehouse was induced by the fraud of F. to instruct the warehouseman to transfer the goods to the order of F. who subsequently sold them to an innocent purchaser. Before paying for them the innocent purchaser obtained a statement from the warehouseman that he held the goods at the purchaser's order. On the discovery of F.'s fraud, the warehouseman refused to deliver the goods to the purchaser. It was held that the warehouseman, having attorned to the purchaser, was estopped from impeaching his title.

Secondly, a valid sale also arises on the one hand where the non-owner has the actual authority of the owner to sell the goods. This is equally derivable from S.23(1) of the Edict. On the other hand, a sale would also be valid where the seller obtained the goods or the documents of title to them with the consent of the owner. This is sale by mercantile agent under S.27(1) of the Edict.

In the first case, the ordinary principles of the law of agency would apply. All the seller as agent needs to show is that he sold the goods under the authority of the owner. He does not by so selling them guarantee the owners' (his principal's) title to the goods. Hence, in *Imam V. Ahmadu Bello University*[5], the defendants offered for sale a car of one Mallam Gwandu, a member of its staff, acting as his agent. The plaintiff who bought the car from the defendants subsequently had his possession disturbed by a third party to whom he handed over the car. He thereupon sued the Defendants as agents claiming damages. The 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.

Where, therefore, the seller sold without authority or consent of the true owner, such owner can recover the goods from the purchaser through an action in detinue or conversion. However, the purchaser will be entitled to compensation for any improvements he might have effected on the goods while they were in his possession.

In Greenwood V. Bennett[6], B. owned a car which he entrusted to S. to do some repairs to it. S. did not do so but instead used it for his own purposes and had a crash in it. Without any authority S. sold the car in its damaged state for £75 to H. an innocent purchaser. H. spent £226 on repairing the car and sold it to a finance company. It was held that B. was entitled to possession of the car but also that B. had to pay £226 to H.

In the second place, the applicable principles are provided for in S.27(1). The subsection provides for the situation where a mercantile agent, is with the consent of the owner, in possession of goods or of the documents of title to goods. In such circumstances, any sale, pledge or other disposition of the goods, made by him acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner to make the same.

The proviso to the subsection is to the effect that the person taking under the disposition must have acted in good faith without notice that the person making the disposition has no authority to do so. The requirements of the provision must be satisfied for the disposition to be valid.

First, the purchaser must prove that the seller is a mercantile agent. Secondly, such mercantile agent must have obtained possession of the goods or the documents of title thereto. The goods or the documents of title to them must be either in his actual custody or held by some other persons subject to his control or held for him or on his behalf. Under S.3(1) of the Edict, "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 proof of the possession or control of goods, or authorising, or purporting to authorise either by endorsement or by delivery to the possessor of the document to transfer or receive goods thereby represented.

Thirdly, the possession of the goods or documents must have been "with the consent of the owner". In *pearson vs. Rose and Young, Ltd,* the possession of a car, the subject of the sale was obtained by the mercantile agent with the consent of the owner but not the registration book which was obtained by trick under such circumstances as showed that the owner never consented to giving it to him. It was held that as the sale could not be validly effected without the registration book and as the mercantile agent did not obtain the registration book with the consent of the owner, the buyer was not protected. Lord Denning observed that,

> 'The consent of the owner' means that the owner must consent to the agent having them for a purpose which is in some way or other connected with his business as a mercantile agent. It may not actually be for sale. It may be for display or to get offers, or merely to put in his showroom: but there must be a consent to something of that kind before the owner can be deprived of his goods.

Fourthly, in selling the goods, the mercantile agent must have acted within the ordinary course of his business as such agent. In *Oppenheimer V. Attenborough & Son*[6], Buckley, L.J. stated that in order to bring a disposition within the exception, the mercantile agent must be, "acting in such a way as 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". In fact there should be 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.

Lastly, the purchaser must prove that he bought the goods in good faith and without notice that the mercantile agent had no authority to sell them. By S.3(2) of the Edict, a thing is deemed to be done "in good faith" when it is in fact done honestly, whether it is done negligently or not. In *Heap V. Motorists Advisory Agency Ltd*[9], it was held that under the proviso to S.2(1) of the Factors Act, 1989 (which is the equivalent of S.27(1) of the Edict), the onus is on the person taking under the disposition of goods made by the mercantile agent of proving that he acted in good faith and without notice of the agents' want of authority, and is not upon the person whose goods have been disposed of by the agent of proving the contrary.

Where the Seller has Unavoided Voidable Title (S.24)

Under the common law, if a seller has a voidable title to goods and his title has not been avoided at the time of sale, the buyer acquires a good title to the goods if he purchased them in good faith and for value. This common law principle has been adopted in S.24 of the Edict as follows:

> "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".

This principle is clearly illustrated by *Phillips V. Brooks,*[10] where it was held that, if A. by fraud obtains goods from B; A. has only a voidable title to the goods, and B. can, on discovering the fraud, rescind the contract. But if A, before he rescinds the contracts, sells the good tó C. who buys in good faith and in ignorance of the fraud, C. will get a good title.

A problem arises where the attempt at rescinding the contract cannot be communicated to a buyer who has either absconded or his address is unknown. In *Car and Universal Finance Co. Ltd. V. Caldwell,*[11] on January 12, C; the owner of a car, was persuaded to sell and deliver the car to a rogue who gave C. a car of much lower value and a cheque in exchange. The next morning, C. ascertained that the cheque was worthless and at once asked the police and Automobile Association to recover his car. The rogue sold the car to a person who did not acquire it in good faith, and only on January 15, the car was acquired by a purchaser in good faith. It passed through several hands and eventually was acquired by the Car and Universal Finance Co. Ltd., which acted in good faith. It was held that while normally the rescission of a voidable contract must be communicated to the other contracting party, that was not necessary if, as in the present case, the other party, by deliberately absconding, put it out of the power of the rescinding party to communicate. Consequently, C. had rescinded the contract on January 13 and the finance company had not acquired a title to it.

The question whether a contract induced by fraud can be regarded as voidable or void is answered by *Lewis vs. Avery.*[12] In that case, the plaintiff owner of a car advertised it for sale in a news paper. A rogue rang him up saying that he was interested in buying the car. The rogue impersonating a famous actor wrote out a cheque for the price. He was allowed to take delivery after satisfying the plaintiff of his alleged identity but a few days later the bank told the plaintiff that the cheque was worthless. Meanwhile, the rogue had sold the car to the Defendant who bought it in good faith and without knowledge of the fraud. In an action by the plaintiff against the Defendant for conversion of the car, it was held that the fraud perpetuated by the rogue rendered the contract between the plaintiff and the rogue voidable and not void. Lord Denning stated.

> "The real question in the case is whether... 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. Avery 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 apparent agreement was a nullity and void ab initio for mistake, then no property would pass from Mr. Lewis to the rogue, Mr. Avery would not get a good title because the rogue had no property to pass to him".[13]

The last point to mention on the application of the provision is to the effect that in order to acquire a good title, the buyer must have bought the goods "in good faith and without notice of the seller's defect of title". In *Whitehorn Bros vs. Davison,*[14] the English Court of Appeal held that the onus lies on the seller who seeks to avoid the sale, and recover the goods, of proving that the buyer took the goods with notice of the fraud or otherwise than in good faith.

Disposition by a Seller in Possession (S.25)

Another instance where a non-owner can transfer a valid title is provided for in S.25 of the Edict. Under the section, where a person having sold goods continues to be or is in 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 of them 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 authorised by the owner of the goods to make the same.

The legal position under the provision is that a seller who has transferred the property in the goods sold, but who retains possession of them or of the documents of title to them, can under certain circumstances pass a good title to a third party. For the section to apply, the relationship of seller and buyer must exist between the party in or continuing in possession and the owner of the goods at the time they were disposed of the second time.

It is very relevant that the property in the goods must have passed from the seller in possession to the buyer and that the buyer must have paid the price of the goods otherwise such seller can easily dispose of them under S.59(2), that is, resale of the goods after exercising the right of lien or stoppage in transit.

It is also essential for the application of the section that the seller is in possession of the goods or documents of title to them at the time of the second disposition. Thus in *Nicholson V. Harper,*[15] a merchant sold wine stored in the cellar of a warehouse and afterwards pledged the wine to the warehouseman for advances made in good faith without notice of the sale. It was held that the pledge conferred no title to the wine as the seller was never at any time in possession of the wine. Also essential is the requirement that the third party must have received the goods in good faith and without notice of the previous sale.

Disposition by a Buyer in Possession (S.26)

A buyer in possession of goods and to whom property in the goods has not passed, can transfer a valid title to an innocent purchaser under S.26 of the Edict. The section provides that where a person have 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 of them, 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 of the goods or documents of title with the consent of the owner.

By this provision, a buyer who has not obtained the property in the goods but nevertheless let into possession of them or documents of title to them can under the following circumstances effectively pass a good title to a third party.

First, in order for such a transfer to be valid, the third party must prove that he received the goods or documents of title to them from a person who has "bought or agreed to buy" them. It is important for the application of the provision that the property in the goods must not have passed to the person or buyer making the sale or other disposition. Hence, in such a case, either the property in the goods was agreed to be transferred in future or the buyer had obtained voidable title which the seller has avoided.

In *Marten V. Whale,*[16] A. agreed to buy a motor car and a piece of land from B. The purchase of the car was conditional upon the approval of A.'s solicitor of the sale of the land. A. was given possession of the car which he sold to a bonafide purchaser without notice of the arrangement. Subsequently, A.'s solicitor disapproved the conditions of the sale of the land. It was held that the purchaser of the motor car from A. got a good title thereto as A. was a person who "agreed to buy" within the meaning of the equivalent provision under the *Sales of Goods Act, 1893.*

Secondly, the third party in order to obtain protection under the provision must show that the buyer who delivered or transferred the goods or documents of title to them to him obtained possession of them "with the consent of the seller". In *Newton of Wembley Ltd. V. Williams,*[17] P. sold a car to A. who paid by cheque. A took the car and re-registered it in his name with the licensing authority the same day. A.'s cheque was subsequently dishonoured and P. took all necessary steps to avoid the contract. In the meantime A. sold the car to B. who resold it to the Defendant. It was held that although A. acquired no title under common law nevertheless since he had bought the car and had obtained possession of it with P.'s consent he was to be treated as if he were a mercantile agent in possession of it with P.'s consent.

Thirdly, the third party 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. In *Newton of Wembley Ltd. V. Williams* (Supra), it was further held that the provision could not be invoked unless it is shown, not only that the person taking under the relevant disposition took in good faith and without notice of the original seller's right, but also that the disposition was made in the ordinary course of business of a mercantile agent.

Disposition under Special Powers (SS.23 & 38)

S.23(2)(b) provides that, "Nothing in this Edict affects (b) the validity of any statutory power of sale or a sale under the order of a court of competent jurisdiction".

Statutory powers of sale include those of an unpaid seller of goods under the Edict and the liquidator of a company under the *Companies and Allied Matters Act,* Cap. 59, Laws of the Federation, 1990.

The courts have power to order the sale of goods belonging to a judgement debtor and whoever sells, acting on the orders of such a court of competent jurisdiction, shall transfer a valid title to the buyer.

The officer who executes sales on the orders of the court is the sheriff. S.38(1) provides,

> A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon receipt of any such writ to endorse on the back of it, the hour, day, month, and year when he received the same.

What is important to note here is that non-owners of goods who sell them acting either under statutory powers or under to orders of a court of competent jurisdiction transfer valid titles to buyers.

However, the Edict omits sale under special "common law powers" which was part of the provision under the corresponding subsection of the repealed Sale of Goods Act, 1893. Common law powers include those of a pledge of goods or documents of title thereto and those of a carrier of perishable goods as an agent of necessity. Despite the omission, it is submitted that sales under any such common law powers shall continue to be valid by virtue of S.70(2) of the Edict which permits the continued application of such principles of the common law as are consistent with the provisions of the Edict.

The Position of the "Market Overt" Principle

S.22(1) of the repealed Sale of Gods Act, 1893 provided that, "where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller".

The Sale of Goods Act, 1893 did not define "market overt". However, under the common law, a "market overt" has been defined as a legally constituted market, open between the hours of sunrise and sunset, and where goods for sale are openly displayed so that standers-by and passers-by could see them.[18]

Market overt means, in the City of London, every shop in which goods are exposed for sale, for such things only as are usually sold in the shop. For example, a sale of jewellery in a men's outfitters' shop is not a sale in market overt. Furthermore, the sale must be by and not to the shopkeeper.[19]

A sale in a showroom to which the general public is not generally admitted is not a sale in market overt.[20] So also is a sale which takes place other than during the daylight hours between sunrise and sunset.[21] Outside the City of London market overt means a market held on days prescribed by charter, custom or statute as market days and is limited to the place where by charter, custom or statute, the market is held.

Given the foregoing analysis, it is submitted that virtually all the township and village markets situated in various parts of Nigeria are necessarily market overts for the purpose of the section. It is however arguable whether the separate or individual private shops or kiosks situated along most of our urban streets can be regarded as market overts since some of them are established without any legal backing.

Where it has been established that the sale took place in market overt, the buyer in order to set up his title against the true owner of the goods, must prove that the sale was in accordance with the usage of that market. He must therefore show that the transaction took place on the ordinary market day, during the usual hours, according to the usual practice, and that the goods were of such description as would normally be found displayed in that market.

In *Bishopgate Motor Finance Corporation Ltd. V. Transport Brakes Ltd.*,[22] a hirer, having obtained possession of a car under a hire-purchase transaction took it to Maidstone market and handed it over to an auctioneer to sell. Having unsuccessfully attempted to sell it, the auctioneer subsequently handed it to the hirer who sold it by private treaty. The court held that Maidstone market was a market overt and that the practice in the market of allowing sales to be made privately after the auctioneer had failed to sell was sufficient to constitute "usage of the market" within the meaning of the provision, and consequently the buyer obtained a good title.

It must also be proved that the buyer bought the goods in good faith and had no notice that the seller had not a perfect title. The requirement of good faith here is the same as in other provisions. Lastly, the buyer's title could be subsequently defeated if the seller is convicted of larceny (theft of the goods). S.24 of the repealed Sale of Goods Act, provided for automatic reverting of property in the goods in the true owner where the goods sold in market overt had been stolen and the offender prosecuted to conviction.

It has been pointed out that the new Sale of Goods Edicts omitted the "market overt" principle from the list of the exceptions to the Nemo dat quo non habet doctrine. It was also noted that the "market overt" among other exceptions had their origin in the common law and not from the Sale of Goods Act, 1893. Hence, it is hereby submitted that the market overt principle being a common law principle will continue to apply to sales transactions in Nigeria in general and Kaduna State in particular notwithstanding its omission from the Edict. Its application then wi'l be by virtue of S.70(2) of the Edict. The section provides that:

> The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Edict and in particular the rules relating to the law of principal and agent

and the effect of fraud, misrepresentation; duress, or coercion, mistake or other invalidating causes shall continue to apply to •contracts for the sale of goods.

The effect of S.24 of the Sale of Goods Act, is that even if a buyer obtains a valid title under the market overt principle, his title will still be defeated when the seller to him is convicted for stealing the goods. Such effect will apply under the Edict, not by virtue of the repealed S.24, but by virtue of the general position of the criminal law that where a person is convicted for stealing goods, the title and other interests of those deriving their title from the convict are consequently defeat.*

NOTES AND REFERENCES

1. Until recently, statutes which applied in England generally before the 1st day of January, 1990 applied in Nigeria.
2. The commencement date of the Sale of Goods Edict, No. 15, 1990 of Kaduna State in the 1st day of October, 1987.
3. (1875) L.R. 10 C.P. 354
4. (1895)1 Q.B. 525
5. (1970) NNLR. 39
6. (1973)1 Q.B. 195
7. (1951)1 K.B. 275
8. (1908)1 K.B. 221 at 230-231
9. (1923)1 K.B. 577
10. (1919)2 K.B. 243
11. (1964)1 All E.R. 290
12. (1971)3 All E.R. 907
13. (1971)3 All E.R. 907
14. (1911)1 All E.R. 907
15. (1895) Ch. 415
16. (1917)2 K.B. 480
17. (1965)1 Q.B. 560
18. "The Case of Market Overt" (1896)5 Com. Rep. 836; and, Lee V. Bayer (1856)18 C.B. 599 at 601, per Jarris J.
19. Hargreave V. Spink (1892)1 Q.B. 25
20. Clayton V. Le Roy (1911)2 K.B. 1031
21. Reid V. Commissioner of Police of the Metropolis (1973)1 Q.B. 551
22. (1949)1 K.B. 322.