

# IS THE MARKET OVERT RULE APPLICABLE UNDER THE OHADA UNIFORM ACT RELATING TO GENERAL COMMERCIAL LAW IN CAMEROON?

By

**Dr. EGUTE Matthew AMANDONG<sup>1</sup>**

<sup>1</sup> SENIOR LECTURER: DEPARTMENT OF ENGLISH LAW, FACULTY OF LAWS AND PLITICAL SCIENCE – UNIVERSITY OF YAOUNDE II, SOA : CAMEROON.

## ABSTRACT:

*The “market overt” has been established in this paper as an open market, legally constituted and runs between the hours of sunrise and sunset within the village and town markets in Cameroon. Generally, the law insists that only a true owner of goods can sell and transfer good title (property in the goods) in the goods sold within the market. This is legally described by the common law maxim of “Nemo dat quod non habet” (No one can give what he does not have or possess). If we were to end here then commerce and commercial transactions may be very difficult and may even come to a halt. In a bid to overcome the difficulties, the English common law developed some exceptions to the general rule, which exceptions include, “sale in market overt” and the rule later became a statutory principle under the English Sale of Goods Act, 1893 (as amended). This implies that, a bona fide purchaser for value that buys in an open market without knowledge of the seller’s defective title could acquire good title in the goods sold or purchased. Cameroon by virtue of her colonial heritage, inherited the common law principles from Great Britain, alongside civil law principles from France respectively. By this venture, the “market overt rule” became a principle of law in English Cameroon, while the English Sale of Goods Act, 1983 served as a Statute of General Application. The Sale of Goods Act was later replaced in Cameroon by the OHADA Uniform Act Relating to General Commercial Law, even though the courts of the two English speaking Regions still apply the provisions of the English Sale of Goods Act, where the OHADA Uniform Act is silent. The burning question which this paper attempted to address was whether the OHADA Uniform Act, which replaced the 1893 Act, has provided for the “market overt rule”, in a bid to secure and guarantee smooth trade and commerce? Expressly, the Uniform Act does not. But when Article 205 was impliedly interpreted, we came to the conclusion that the “market overt rule” is guaranteed and covered considering the fact that Article 205 stipulates for commercial sale of goods, subject to the observation and preservation of common law rules, the market overt itself being a common law principle. This implies that, the OHADA Uniform Act through Article 205 indirectly recognizes common law rules – the “market overt rule” inclusive. We then concluded and suggested that despite the acceptance and the application of the market overt rule in Cameroon, it transactions should not be extended to cover the transfer of title in stolen goods and the Uniform Act should be amended and more provisions should be added to protect a bona fide purchase who buys from a non-owner in an open recognized market, as well as the rightful owner whose goods were stolen.*

## 1. Introduction

Market overt (open market) is an English legal concept originating in medieval times governing subsequent ownership of goods by bona fide purchasers for value.<sup>2</sup> Section 22(1) of the Sale of Goods Act (SGA) 1893 (as amended), merely gave statutory recognition to an old common law rule.<sup>3</sup> Despite the historical justification, in modern times, it appears anachronistic.<sup>4</sup> Its main application is in the cases of sales by non - owners and this indeed appears as an only exception which can assist even a purchaser of “stolen goods in given circumstances”. Section 22(1) of the SGA provides as follows:

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<sup>2</sup> See WIKIPEDIA : Appendix 60 : Memorandum submitted by Council for Prevention of Art Theft.

<sup>3</sup> It should be noted that the provisions of the SGA 1893 are still applicable in Cameroon, particularly in the English speaking regions by virtue of her colonial heritage. This is possible where the local legislation is silent with respect to the matter at hand.

<sup>4</sup> It is probably due to this reason that the market overt rule has been abolished in England and Wales, even though it is still good law in some common law jurisdictions such as Hong Kong and British Columbia. Other common wealth colonies like Nigeria have re-enacted it in the form of Edicts by the various states, with very little alterations, (“the same person but clothed in different attires”). See Sale of Goods Act, www. bclaws. Ca. Retrieved 2019-05-23.)

*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.*

But before settling on the issue of whether or not the market overt rule is currently applicable under the OHADA Uniform Act Relating to General Commercial Law, it must be borne in mind that the Sale of Goods Act 1893 (as amended), which gave recognition to the rule was once and is still applicable in Anglophone Cameroon as a statute of general application in the absence of any local legislation governing the subject matter. The rule is equally an English common law principle adopted by Anglophone Cameroon by virtue of her colonial heritage. Thus, the historical past of Cameroon is quite attached to the common law and civil law applicable in Britain and France respectively. Originally a German Protectorate;<sup>5</sup> she was later divided between Great Britain and France,<sup>6</sup> after the First World War. The territories were thus administered by both powers under the League of Nations Mandate<sup>7</sup> and subsequently, under the United Nations Agreement.<sup>8</sup> The Mandate and Trusteeship Agreement sanctioned the translocation of the laws of the administering authorities into Cameroon.<sup>9</sup> Article 9 of the Mandate provides that:

*The mandate shall have full powers of administration and legislation in the area subject to the mandate. The area shall be administered with the laws of the mandatory as an integral part of his territory...the mandate shall therefore be at liberty to apply his law to the territory under the mandate subject to the modification required by local conditions...*

When British Cameroons passed from a mandate territory of the League of Nations to a Trust territory of the United Nations, the Foreign Jurisdiction Act, 1890, which hitherto was the enabling statute for the introduction and observance of English law in Southern Cameroons, remained in force. The common law accordingly became transplanted into the Cameroonian legal system viz s. 11 of the Southern Cameroons High Court Law of 1955. Section 11 provides that:

Subject to the provisions of any written law and in particular of this section and of sections 10, 15 and 22 of this law:

- (a) The common law;
- (b) The doctrines of equity, and
- (c) Statutes of general application which were in force in England on the 1<sup>st</sup> day of January 1900, shall, in-so-far as they relate to any matter with respect to which the legislature of the Southern Cameroons is for the time being competent to make laws, be in force within the jurisdiction of the court.

In the light of the foregoing historical antecedent, the market overt rule became a rule of common law and statute (the SGA 1893)<sup>10</sup> in British Cameroons/Southern Cameroons. The common law defines a market overt as:

*A legally constituted market, open between the hours of sunrise and sunset and where goods for sale are openly or publicly displaced so that stand-by and passer-by could see them.*<sup>11</sup>

<sup>5</sup> In 1884 Germany annexed Cameroon. Specifically, on 12 July 1884 Gustav Nactigal, Bismarck's envoy, signed a treaty with two Cameroonian kings in Douala on behalf of the German Government. Two days later on 14<sup>th</sup> July 1884 the German protectorate of Cameroon was officially proclaimed. At the Berlin Conference, Britain and France recognized German annexation of Kamerun. For more on this see Cameroon-Handbook prepared under the directive of the historical Section of the foreign office – No. 118, February 1919, pp 15-25.

<sup>6</sup> See Article 119 of the Treaty of Versailles, 28 June 1919.

<sup>7</sup> Article 22 of the Covenant of the League of Nations, 1922.

<sup>8</sup> Article 85 of the Charter of the United Nations of June 26, 1945.

<sup>9</sup> For more on this, see Dashaco John Tambutoh & Ewang Sone Andrew, « Habeas corpus under the Criminal Procedure Code », being an Article published in Readings in the Cameroonian Criminal Procedure Code, (2006) published by Presses Universitaires d'Afrique, at 152. See also Carlson Anyangwe, The Cameroonian Judicial System, (1987) CEPER –Yaounde at p. 3.

<sup>10</sup> See once again s. 22(1) of the SGA 1893 for the definition of market overt.

<sup>11</sup> See the case of *Market Overt* (1896) 5 Com. Rep. 836: *Lee v. Bayes* (1856) C.B. 591 601 as per *Harris Jog Reid v. Commissioner of Police* (1973) Q.B. 551. See also K. I Igweike (2001) Nigerian Commercial Law: Sale of Goods, published by Malthouse Law Books Lagos – Nigeria, 2<sup>nd</sup> ed. at p. 136. Also see M.O. Adesanya & E. O. Oloyede (1972), Business Law in Nigeria, published by Evans Brothers Ltd. – Lagos Nigeria p. 101.

From the above, it is indisputable that the market overt rule has been a recognized legal principle of law in Cameroon, consequent to her colonial heritage. But the crux of the matter is whether the rule is applicable under the new OHADA Uniform Act Relating to General Commercial Sale of Goods Law (shall from time to time be referred to in this write-up as the Uniform Act) that appears to have replaced the 1893 English Sale Goods Act?<sup>12</sup> We shall come to this question later but before this is done, it is necessary to establish what constitutes a contract of sale of goods within the framework of commercial sale of goods in a “market overt”.

## 2. What is a contract of sale of goods?

One thing remains clear, that is, before there is a sale in market overt, there must be a binding contract of sale of goods. The Uniform Act which in principle appears to have replaced the English Sale of Goods Act of 1893, has not defined the term. In this regard, we may resort to the SGA, since the OHADA Uniform Act did not expressly repeal the application of Statutes of General Application in Cameroon, the SGA, itself being a statute of general application. This is justifiable by the fact that courts in the former British Cameroon continue to this day to cite English cases decided long after 1900 as authority for their decisions.<sup>13</sup> The same is true with legal practitioners that have often resorted to the provisions of the Act, where local legislation is silent on the subject matter. In this light, s. 1 (1) of the SGA 1893 defines a contract of sale of goods as:

*... a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.*

In accordance with the definition above, the object of a sale of goods contract is the transfer of property (ownership) in the goods sold and purchased.<sup>14</sup> That is, the object of the contract is the transfer to the buyer, of the best title in goods obtainable and nothing less. To ensure that the object of a sale of goods contract stated above is attained, both the SGA and the Uniform Act imply that the seller undertakes by the sale, to pass a good title (ownership) to the buyer, failure of which is a breach of a condition. Both the SGA and the Uniform Act further imply that the seller warrants that the buyer will enjoy quiet possession of the goods. This, the Uniform Act in its Article 230 provides:

*The seller shall deliver the goods with the assurance that no third party has a right to claim to them unless the buyer accepts to collect the goods under such circumstances.*

The equivalence of Article 230 under the French law is Article 1625 of the French Civil Code, which provides for what is known as “the obligation to guarantee” by the seller to the buyer. This guarantee is for peaceful possession of the thing sold, including the passing of good title as well as for latent defects which may render the sale voidable. This implies that the seller must guarantee that the goods sold are free of any third party charges or encumbrances. Accordingly, in the case *Niblet v. Confectioners Materials Co.*,<sup>15</sup> a firm which dealt in confectioners’ materials agreed in writing to sell condensed milk in tins on terms that the buyer should pay on receipt of the shipping documents. The goods arrived bearing a brand name which was an infringement of the registered trademark of certain manufacturers of condensed milk, at whose instance custom officials detained the goods. The buyers were obliged to remove the offending brand name in order to get possession of the goods and could only sell them at a loss without distinctive mark. The court held that the goods were not free from third party charges and encumbrances.

To erase all possible doubts as to how the best title in goods or property in goods may be acquired through a contract of sale of goods, Article 219 of the Uniform Act provides:

*The vendor shall be bound, under the conditions provided for in the contract and in this Book, to deliver the goods and to hand over, where need be, documents relating to them, to ascertain that they are in conformity with the order and to give a guarantee.*

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<sup>12</sup> The Uniform Act emanates from the OHADA Treaty – Organization for the Harmonization of Business Law in Africa, better known by its French Acronym as OHADA Treaty signed in Port Louis – Benin in 1993 by 14 African Countries, Cameroon inclusive and the Law was intended to regulate commercial sale of goods within member States subject to local legislations. Other member states include: The Republic of Benin; Burkina Faso; Centre Africa Republic; Island of Comores; Republic of Congo; Ivory Coast; Gabon; Equatorial Guinea; Mali; Republic of Niger; Senegal; Tchad and Togo.

<sup>13</sup> See E.N. Ngwafor, “Cameroon: The Law across the bridge: Twenty years (1972 – 1992) of confusion”, *Revue Général de droit*, vol. 2, 1995, pp 70-72.

<sup>14</sup> The transfer of property in the goods or ownership is considered as the crux of the matter in every contract of sale of goods and has been amply affirmed by Article 283 of the Uniform Act. It provides, “unless otherwise agreed between the parties, the transfer of ownership shall take place from the moment the purchaser takes delivery of the goods sold”. See equally Article 284.

<sup>15</sup> (1921) 3 K.B.387.

To give a guarantee as stipulated by Article 219 means that the seller *inter alia*, must guarantee a good title which definitely will be passed onto the buyer and of course that the goods are free from third party charges and encumbrances.

For the protection of property, only an owner of goods can pass property or ownership in the goods to the buyer in a contract of sale of goods. This is the general common law rule expressed in the maxim, “*Nemo dat quod non habet*”, translated as “no one can pass a better title in goods than he himself has or no one can give what he does not have”. In the absence of a local case to buttress the issue, we may illustrate this with the Nigerian case of *Akoshile v. Ogidan*.<sup>16</sup> The defendant in that case sold to the plaintiff a car which he said he bought from a European. Subsequently, the European from whom the defendant bought the car was convicted of stealing the car. The court held that the plaintiff could rescind the contract and claim a refund of the money he had paid as the defendant had no right to sell the stolen car. While in the English case of *Rowland v. Divall*,<sup>17</sup> the buyer had used the car in question for four months before the title was contested. The court disregarded the period of use and held that the buyer should recover all his money upon total failure of consideration and the seller could not give what he did not have.

It should be recalled that car theft in Cameroon today has become very rampant and some of these stolen cars are either sold at very low prices to people who mutilate and use them out-rightly, and sometimes to spare parts dealers who scrap and sell them as second-hand spare parts. In situations where the cars are scrapped, recovery becomes very difficult. But where the stolen cars are recovered through the efforts of the elements of law and enforcement order, such cars are returned to the owners upon proof of ownership, while the thieves or culprits are prosecuted in accordance with s. 318 of the Penal Code. This practice in Cameroon is further reinforced by Article 254 of the Uniform Act that provides:

*The purchaser shall apply to the competent court to cancel the contract: where failure by the vendor to comply with any of his obligations or these provisions constitutes a fundamental breach of the contract...*

Although the law tenaciously seeks to safeguard titular interest, there are elaborate rules which are in the nature of exceptions to the *nemo dat quod non habet* rule. These exceptions seek to allow non-owners, in the interest of commercial convenience, to transfer valid titles in sale of goods contracts. Marrying this with English law, Denning L.J. said:<sup>18</sup>

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

Thus, in a mixed economy such as ours, the essence of commerce is that goods should be freely alienated and should move and circulate within the economy with little hindrance. Although the buyer in sub-sales thereby has his titular interests in the goods assured and protected, the predominant interest of the law in this regard is the protection of commercial transactions. Commerce will grind to a halt if the *nemo dat quod non habet* rule is strictly applied without qualification as for every sale, a law suit may be hanging. Commercial convenience therefore dictates and justifies the relaxation of the rule by recognizing the non-owner’s power to transfer valid title in respect of goods sold in given circumstances. Some of the possible circumstances are market overt, sale under a voidable title, estoppels, sale by seller in possession, sale by buyer in possession, sale by mercantile agents and sale under special powers. But what interest us amongst all of the above is sale in “market overt”, extensively examined hereunder.

### **3. Is the market overt rule applicable under the OHADA Uniform Act?**

It is unfortunate that the OHADA Uniform Act Relating to General Commercial Law does not expressly provide for the market overt rule, despite the availability of “open markets” within the villages and towns of Cameroon that operate between sunrise and sunset as stipulated by the statutory and common law definitions of market overt. The interesting aspect of it all is that, the conditions set out for the recognition of commercial transactions by the definitions are also respected within the “open markets” in Cameroon.

In the light of the foregoing, we may only answer the above question if an implied interpretation is given to the provisions of Uniform Act. Here, Article 205 appears to be very useful where it provides:

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<sup>16</sup> (1948) 19 NLR, 87. See also *Rowland v. Divall* (1923) 2 K.B. 500.

<sup>17</sup> *Ibid*

<sup>18</sup> In the case of *Bishopgate Motor Finance Corporation v. Transport Brakes Ltd.* (1949) 1K.B. 322 at 336-337.

*Apart from the provisions of this Book, the commercial sale shall be subject to the common law rules.*

It is indisputable that the market overt rule is a common law principle. It is equally indisputable that the Received English Law<sup>19</sup> comprised of the principles of common law, equity and statutes of general application that were in force in England before 1<sup>st</sup> January 1900 was inherited by the then West Cameroon, while the French Civil Law was equally inherited by the then East Cameroon<sup>20</sup> and the two judicial systems despite an intensive harmonization,<sup>21</sup> operate concurrently leaving Cameroon with a bi-jural legal system similar to that of Canada. If the market overt rule is a common law rule and which it is indeed, then there could be no other interpretation order than that, the rule has been indirectly recognized by the Uniform Act. Article 205 therefore is intended to preserve the bi-jural nature of Cameroon comprised of the common law and the civil law legal systems respectively. Since all commercial transactions by the force of Article 205 shall be subject to common law rules, including sales in market overt equally considered as commercial sales, we argue without fear nor favour that the market overt rule is applicable under the Uniform Act. Moreover, the rule having been inherited from Great Britain as a common law rule, even before the promulgation of the OHADA Treaty and the Uniform Act in 1993 has not been expressly repealed by the provisions of the Uniform Act. The Act has rather sought to protect the rule through the provisions of Article 205. It shall be considered in this Article as an exception to the "Nemo dat quod non habet" principle.<sup>22</sup>

#### **4. What are the conditions that must be fulfilled in order for a sale to constitute one in a market overt in Cameroon?**

Foreign jurisdictions have facilitated the above question by laying down some conditions that must be fulfilled and all that is required is to see how these conditions apply in Cameroon in conformity with Article 205 of the Uniform Act. Hence, in order to for a sale to constitute one in a market overt, the Halsbury's Laws of England appears to have stated the general position as follows:<sup>23</sup>

- (a) The sale must be made in the usual market place...upon the lawful market day and during the hours... and not at night;
- (b) The goods must be exposed for sale and the whole transaction ... must begin and conclude in the market...;
- (c) The sale must be a real sale by a person of contractual capacity; and
- (d) The goods must be goods of a kind which is voidable in law.

We must acknowledge that the conditions stated by the Halsbury's Laws of England and the common law definition of market overt are in unison. From the analysis, it is submitted that, virtually all the village and township markets situate in various parts of Cameroon are necessarily market overt for the purpose of effecting commercial sale of goods, including the Francophone areas though we heavily traced the development of the market overt rules to the common law. The situation appears to be the same in Nigeria as confirmed by Oguntade, JCA in the following words:

*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.<sup>24</sup>*

It is however arguable whether the various private shops and supermarkets situate along most of the urban cities and high streets in Cameroon can be regarded as market overt, considering the fact that some of the shops and supermarkets even extend beyond sunset? According to the Halsbury's Law, " ... the sale must be made in the usual market place ... upon the lawful market day and during the hours... and not at night". Both the courts

<sup>19</sup> See s. 11 of the Southern Cameroons High Court Law, 1955.

<sup>20</sup> See Articles 1 and 2 of the French Decree of 16<sup>th</sup> April 1924.

<sup>21</sup> See for instance, the Penal Code, the Constitution, the New Criminal Procedure Code, the CIMA Code (regulating insurance matters in Cameroon), the High Way Code, to mention just a few.

<sup>22</sup> The principle once again illustrates the fact that, a non owner of goods can sell them to a bona fide purchaser for value who buys them without knowledge of the fact that the purported seller's title to the goods was defective. This of course will still be subject to the fact that the goods were actually not stolen goods and that the seller has not or is not being prosecuted of theft, punishable under s. 318 of the Cameroonian Penal Code.

<sup>23</sup> Vol. 29, 4th Edition.

<sup>24</sup> See *Law Union & Rock Ins. V. Onuoha* (1998) 6 NWLR 576.

and the administration in Cameroon appear to have taken judicial notice of the fact that private shops and supermarkets dealing in basic consumer goods and other necessities can operate slidely beyond sunset (at night) and the transactions carried out in these shops are recognized as commercial transactions in market overt, contrary to the Hulsbury's Laws that the shops must not operate at night.

In this wise, the sunset time limit appears to be applicable only to village markets while township markets operate slidely beyond the sunset time limit. This is evident by the fact that market tolls within village markets are equally collected by council officials in these markets only between the hours of 6 am – 6 pm. From this observation, it is possible that anyone that buys from the village markets after closing hours will not be considered as a bona fide purchaser for value if the seller's title turns out to be defective.

It is equally arguable that not all sales effected by private and town shops can be regarded as sales in market overt. This position was affirmed by a High Court in Nigeria in the case of *Owoyemi Motors and Fiance Co. Ltd. v. Haruna and Ajibola*.<sup>25</sup>In that case, a sale took place at the business premises of the first defendant who was not a shop-keeper but merely a businessman. The business premises were situated along the street on the opposite side of a local market, and it was argued for the defendants that the sale was in a "market overt". The court held that a meeting of any two people at a place 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 and the sale in the consequence could not be held to be a "market overt". This implies that even though the law has recognized sales in private shops as market overt, their activities must be limited to specific approved goods convenient within the location and for which the relevant approved taxes are paid in the case of Cameroon.

#### **5. What must be proved by the buyer in order to set up his title against the true owner of goods?**

Having established that the place of the sale is a market overt the buyer in order to set up his title against the true owner of the goods, must prove the following:

##### **5.1 That the sale was in accordance with the usage of that market.**

This means that the transaction took place on the ordinary market day, during the usual hours, excluding transactions made in the night and that the goods were of such description as would normally be found displaced in that market. In *Bishopsgate Motors – Finance Corporation Ltd. v. Transport Brakes Ltd.*,<sup>26</sup>a hirer, having obtained possession of a car under a hire purchase transaction took the same to Maidstone market and handed it over to an auctioneer to sell. Having unsuccessfully attempted to sell it, the auctioneer subsequently sold it to A by private treaty. The court held that Maidstone market was a market overt and the practice in the market of allowing sales to be made privately therein after an auctioneer had failed to sell was sufficient to constitute "usage of the market" within the meaning of the provision, and consequently, A obtained a good title.

It should be noted that the "usage of the market" will also include the customs and usages widely known and generally accepted by parties within a particular commercial sector. Article 207 of the Uniform Act seems to recognize such sales, which in the intent of this paper would be considered as market overt sales. According to Article 207:

*The parties shall be bound by any customs and usages they have agreed upon and by the customs and usages established in their commercial relations. Where there is no agreement to the contrary, the parties shall be deemed, in the commercial sales, contract, to have tacitly accepted the customs and usages they are aware of or ought to have been aware of, and which, in trade are widely known and generally accepted by parties to contracts of the same type in the commercial sector concerned.*

We may hereby observe that, from the provisions of Article 207 of the Uniform Act, a buyer who buys in compliance with the customs and usages established within a particular commercial sector within Cameroon obtains a good title. Such a title will be considered as one obtained in market overt, particularly where the purchaser was a bona fide one for value. SO, is the "market overt rule" applicable under the OHADA Uniform Act Relating to General Commercial Law in Cameroon? The answer impliedly is yes.

##### **5.2 It must be proved that the buyer bought the goods in good faith and had no knowledge of the seller's defective title.**

It would appear that the buyer will not be protected if he knew of the seller's defective title. This implies that where he is not a bona fide purchaser for value, the goods automatically revert in the original owner if the

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<sup>25</sup> (1975) NNLR 180.

<sup>26</sup> (1949) 1 K.B. 322.

purchaser was aware of the seller's defective title.<sup>27</sup> Thus, the market overt principle is predicated on commercial convenience and expediency. The rationale for it was explained by Scarman L.J., in *Reid v. Commissioner of Police*<sup>28</sup> as follows:

*The reason why the law permitted a sale in a market overt to confer a good title on a bona fide purchaser was the openness of the transaction... When shops were scarce, the market was the place, and the market day the occasion, for the public to buy and sell ... The policy of the rule is to encourage commerce while affording safeguards to property owners.*

### 5.3. Goods sold must not be stolen goods.

It appears that the buyer does not thereby obtain an absolute title to the goods purchased where the goods are deemed to be stolen goods. The reason is that his title may be defeated if the seller or any other person responsible to the true owner for the loss is convicted of larceny (theft). A good case at hand that illustrates this point is the already discussed Nigerian case of *Akoshile v. Ogidan*. The brief facts once again are that, the plaintiff sued to recover the price he had paid for a car sold to him by the defendant. The defendant had himself bought the car from someone, who had stolen the car. The thief from whom the defendant bought the car was convicted and the car taken away from the plaintiff by the police. It was held that the plaintiff must succeed as the defendant had no right to sell the stolen car. Expatiating on the issue of defective and fraudulent titles over goods, Erle, C.J. in the English case of *Eicholz v. Banester*,<sup>29</sup> stated thus:

*... in almost all the transactions of sale in common life, the seller by the very act of selling holds out to the buyer that he is the owner of the Article he offers for sale. The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion that, by offering an article for sale, the seller affirms that he has a title to sell, and that the buyer may enjoy that for which he parts with his money.*

In line with the above, the correlative interest of the buyer in Cameroon with respect to commercial sale of goods will not be protected and the laws meaningless if there is no assurance that the seller is the true owner of the goods in question. In any case, the absence of a titular nexus between the seller and the goods may well mean that he is not the appropriate defendant for purposes of recovery. It must be noted that the obligation is to possess a valid title which a thief lacks before any valid sale can take place and the condition as to right to sell are inseparable.<sup>30</sup> Thus, in the case of *Niblet v. Confectioners Materials Co.*<sup>31</sup> it was confirmed that the term "right to sell" embraces more than a right to pass the property in the goods (title to the goods). Scrutton, L. J. observed that "if a vendor can be stopped by process of law from selling, he has no right to sell".<sup>32</sup> This of course is very possible where the goods are stolen goods and the title to such goods remains defective even if the transaction was one in a market overt. Atkin L.J. on his part emphasized that the right to sell means not only a right to pass the property in the goods but also a right to confer on the buyer the undisturbed possession of the goods.<sup>33</sup> Stolen goods therefore will never confer ownership in the goods on the buyer irrespective of whether or not the market place was open.

Article 230 of the OHADA Uniform Act impliedly appears to restrict the sale of stolen goods even where bought in market overt. It provides: "*The seller shall deliver the goods with the assurance that no third party has a right to claim to them unless the buyer accepts to collect the goods under such circumstances*". From the foregoing, it will be very dangerous and detrimental to a buyer of goods, to accept such goods knowing fully well that they are stolen goods. It is very clear here that Article 230 of the Uniform Act reinforces the market overt rules one of which is that, only the rightful owner of goods can transfer a good title (property in the goods) to the buyer and where the goods were sold and bought in a market overt, the buyer must prove that he was a bona fide purchaser for value without knowledge of the fact that the goods were stolen. In the interpretation of Article 230, "... no third party has a right to claim to them..." will mean that, the goods must not be stolen goods from a third party and the fact that the transaction was one in a market overt is immaterial.

<sup>27</sup> For more on this, see M.O. Adesanya & E. O. Oloyede (1972), *Business Law in Nigeria*, University of Lagos Evans Brothers Ltd. at p. 101.

<sup>28</sup> (1973) 2 All ER 97 t pp 101-103.

<sup>29</sup> (1864) 17 C. B. N. S. 708.

<sup>30</sup> See M.A. Egute, (2018) *Principles of Product Liability Law in Cameroon*, Published by LEAD PUBLISHERS – Yaounde Cameroon at pp 92-93.

<sup>31</sup> (1921) 3 K.B.387

<sup>32</sup> *Ibid* at p. 398.

<sup>33</sup> *Ibid* at p. 402, approved by Lord Denning in *Microheads A.G. V. Venburst Rd. Marking LTD.* (1975), pp 221 – 222.

The legal effect of the breach of Article 230 is an automatic reverting of the property in the goods in the true owner or his personal representative, where the goods sold in the market overt had been stolen and the offender prosecuted to conviction. This is not withstanding any intermediate dealing with the goods whether in the market overt or otherwise.

The equivalent of Article 230 under the French law is Article 1625 of the French Civil Code, which provides for what is known as “the obligation to guarantee” by the seller to the buyer. This guarantee is for peaceful possession of the thing sold, including the passing of good title since no good title can be passed over stolen goods.

It should be noted that even though sales in market overt by non owners are seen and accepted as exceptions to the general rule, the policy of the law with respect to stolen goods is to tilt the scale in favour of the buyer of the goods. To protect the titular interest of the buyer in a contract of sale of goods therefore, the law in Article 230 of the Uniform Act may imply three undertakings on the part of the seller. The first is the implied condition that in a sale, the seller must have the right to sell the goods, or in an agreement to sell, he will have such a right at the time when property is to pass. The second is the implied warranty that the goods sold are free from any charge or encumbrance not known or disclosed to the buyer before the contract is made.<sup>34</sup> Lastly, there is the implied warranty that they will enjoy quiet possession of the goods.

The tenacity with which the law treats these obligations with respect to stolen goods is explicated on two fronts; and in the first front, the law’s stance raises questions of validity and practical relevance. The first front will relate to the remedies available to the buyer where Article 230 of the Uniform Act is breached. Generally, the remedies may include repudiation of the contract<sup>35</sup> and or a claim for damages since the undertaken in question is an implied condition. In addition, the buyer can recover money paid where the consideration for the payment of it has failed. This is the restitutional remedy of money had and received. For this restitutional remedy to apply, there must be total failure of consideration. The question now is, given the practical realities, can it really be said that for breach of Article 230, there is total failure of consideration when quite often the buyer would have had the use and enjoyment of the goods for sometime before the title is contested? Contractual interpretations of this issue appear strict. In other words, liability under the *nemo dat rule* is strict as the period of time within which the non owner had used the goods before the title was contested is irrelevant. This is actually depicted by the English case of *Rowland v. Divall*,<sup>36</sup> where the buyer used the stolen car in question for four (4) months before the title was contested. The courts have disregarded the period of use by the buyer and have held that there is total failure of consideration and have allowed the buyer to recover his money.<sup>37</sup>

Article 230 of the Uniform Act, may be interpreted as a worthwhile ‘buyer protection device’ since thereby he secures an advantage over and above the other contesting party on the basis of total failure of consideration on the part of the seller. But more objectionable, and possibly inhibitive to the buyer, is the fact that the courts have taken their stance to extremes by strictly interpreting the *nemo dat quod non habet rule*.<sup>38</sup> For instance, even where an item is sold by a non owner in the first instance which item gets resold via a series of sub-sales, the courts have insisted that non of the sub-buyers acquired a good title since the initial seller had no valid title to pass down simply because the goods were stolen goods. The courts have taken this stance even where the initial seller had perfected his title to the goods so that in fact there are no adverse third-party claims against the buyer.<sup>39</sup>

One would have thought in line with Atiyah,<sup>40</sup> that, the essence of a contract of sale is to transfer to the buyer the use and enjoyment of the goods free from any adverse third party claims so that once the buyer has such use and enjoyment and no third party claim is made against him, it should be unrealistic to talk of total failure of consideration.

The practical relevance of this argument in terms of buyer protection is that a buyer who is bent on keeping or retaining the goods in question, that being his preference over recovering his money because the goods are, possibly, of more utility to him than the money, would be advised to insist on specific performance of the contract of sale since no adverse third party claim would impeach it.

## 6. Conclusion

Our final conclusion is that, the market overt is an open and legally constituted market that operates between the hours of sunrise and sunset within the village and town markets of Cameroon. Ordinarily, the law insists that

<sup>34</sup> See also Articles 1602-1625 of the French Civil Code.

<sup>35</sup> See Article 254(1) of the Uniform Act.

<sup>36</sup> (1923) 2 KB 500.

<sup>37</sup> See once again *Akoshile v. Ogidan*, supra.

<sup>38</sup> Illustrated by the Nigerian case of *Akoshile v. Ogidan*, Ibid.

<sup>39</sup> Ibid

<sup>40</sup> Atiyah (1980), supra at 64-66.

only the true owner of goods can pass a good title over same to a bona fide purchaser for value. The Latin description of this is *Nemo dat quod non habet* (no one can give what he does not have). Although the law tenaciously seeks to safeguard titular interest, there are elaborate rules which are in the nature of exceptions to the *nemo dat quod non habet rule*. These exceptions seek to allow non-owners, in the interest of commercial convenience, to transfer valid titles in sale of goods contracts.<sup>41</sup> What this means is that in a mixed economy such as ours the essence of commerce is that goods should be freely alienated and should move and circulate within the economy with little hindrance. Although the buyer in sub-sales thereby has his titular interests in the goods assured and protected,<sup>42</sup> the predominant interest of the law in this regard is the protection of commercial transactions. Commerce will grind to a halt if the *nemo dat quod non habet rule* is strictly applied without qualification as for every sale, a law suit may be hanging. Commercial convenience therefore dictates and justifies the relaxation of the rule by recognizing the non-owner's power to transfer valid title in respect of goods sold in given circumstances.

The paper is centered on whether or not one of the exceptions to the *nemo dat quod non habet rule*, the "market overt" is applicable under the OHADA Uniform Act Relating to General Commercial Law in Cameroon? From our findings, we discovered that the Uniform Act does not expressly provide for the market overt rule. Its application and acceptance in the country could only be deduced from implied interpretations of related Articles of the Uniform Act. Such an interpretation emanates from Article 205, which purports to recognize commercial sales generally and also in keeping with "common law rules".<sup>43</sup> Since the "market overt rule" is an old and long standing common law rule and considering the fact that the English common law had long been inherited by Cameroon alongside the French Civil Law, we concluded that the "market overt rule" is applicable under the OHADA Uniform Act Relating to General Commercial Law when relevant provisions of the Act are given implied interpretations.

The rule however, from our discussion is not an absolute one. For where the buyer was not a bona fide purchaser, that is, he had knowledge of the seller's defective title, then he himself acquires the same defective title that can be set aside upon discovery of the true owner of the goods.

We must also note that, where the buyer is protected by the market overt rule, so that the owner of the goods is not protected, such owner may have other rights against the non owner that sold the goods. A possible action is one for conversion. As noted in words legally defined:<sup>44</sup>

*The rule is for the protection of the buyer and the seller is not thereby protected, an action for conversion lies against one who wrongfully sells and delivers the goods of another in a market overt.*

Finally, where the goods were stolen and the thief is prosecuted to conviction, the goods will automatically revert in the original owner upon proof of ownership rights. In Cameroon, the thief is prosecuted in accordance with the provisions of ss. 318 – 320 of the Penal Code and other related laws in force.

## 7. Recommendations

### 7.1 Amendment of the OHADA Uniform Act Relating to General Commercial Law

We hereby recommend that the Uniform Act should be amended so as to expressly provide for the market overt rule in relation to commercial sale of goods. This will minimize the various diverse interpretations by the courts of the effect of omitting or deleting the rule from the Uniform Act. The transfer of property in goods by non owners to bona fide purchasers for value in the various village and town markets in Cameroon should be expressly and legally recognized.

### 7.2 The market overt rule should be retained with its usual qualifications as obtained under preceding laws.

We equally recommend rather, that the market overt rule be retained with its usual qualifications as obtained under preceding laws ( the English Sale of Goods Act, 1893 (as amended)), so that in the interest of justice, both

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<sup>41</sup> See *Law Union and Rock Insurance of Nigeria Ltd. v. Onuoha* (1998) 6 NWLR ( pt. 555) 576. In that case, the court upheld as valid and so passed good title in respect of a stolen car sold in a "market overt" so that an insurance claim on the car could succeed.

<sup>42</sup> See market overt, sale under a voidable title, estoppels, sale by seller in possession, sale by buyer in possession, sale by mercantile agents and sale under special powers.

<sup>43</sup> The Article once again provides that: "*Apart from the provisions of this Book, the commercial sale shall be subject to common law rules*".

<sup>44</sup> By John .B. Saunders (1969) 2<sup>nd</sup> Ed. vol. 3, p. 214.

the real owner of goods and a subsequent bona fide purchaser from a non owner will be adequately protected. The two contending parties being both innocent of any default deserve equal attention and protection.

### **7.3 The remedy to sue for conversion**

It is equally recommended that where the buyer is protected by the market overt rule, so that the owner of the goods is not protected, such owner should be able to sue for conversion, the non owner that sold his goods.

### **7.4 The non applicability of the market overt rule in cases involving theft or robbery.**

The market overt rule should not be available where the subject matter of the sale was obtained through theft or robbery.

### **7.5 Cameroon Government should put in place an impressive body of legislation on commercial sale of goods in open markets**

Like the position in other countries, Cameroon Government should take the initiative by putting an impressive body of legislation on commercial sale of goods in open markets. This will go a long way to reduce the much dependence on foreign legislation like the English Sale of Goods Act 1893 (as amended) and the provisions of the French Civil Code. The provisions of the OHADA Uniform Act Regulating Commercial Sale of Goods in open markets are not enough. More provisions should be added to Articles 205 and 230 in a bid to protect a bona fide purchaser for value who buys from a non owner in an open market as well as the rightful owner whose goods were stolen.

Finally, to achieve an improved system of commercial sale of goods within the market overt, all operators of the system – the purchaser and the seller must carry out their functions with utmost sense of responsibility. The interest of the purchaser and the true owner of goods should be paramount in whatever action they take. They must be conscious and prudent in their transactions and should also obey directives involved in market overt sales. The judiciary on the final note should be a veritable tool in the protection of the rights of the parties involved and the courts must be willing to advance the course of the bona fide purchaser and the true owner of goods.