THE CONUNDRUM OF BALANCE UNDER GHANA'S LEGAL SYSTEM: THE PROTECTION OF A BUYER IN GOOD FAITH AND THE PRINCIPLE OF CAVEAT EMPTOR

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I. INTRODUCTION

> 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 the protection of commercial transactions: the person who takes the transaction in good faith and for value without notice should get a good title.[1]

The above are the words of Lord Denning in 1949 in elucidating the complexities of protecting an innocent purchaser and the owner of goods with regards to transfer of title in goods. It has been argued that transfer of title is a constituent of the law of sale of goods and its importance lies in the fact that in the rumination of the law, this element cannot be overlooked.[2] The title in goods ought to be transferred from the seller to the buyer as is a reasonable expectation of the latter. It is therefore an obligation on the seller of goods to transfer ownership and possession in the goods to the buyer to effect a completion of the sale transaction. In normal contemplation of the law, the real owner of goods is obligated to transfer title to the buyer. The principle of caveat emptor, meaning buyer beware, also comes to play in commercial transactions. The buyer is required to conduct due diligence regarding the ownership and the state of the goods under the sale

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1 *Bishopsgate Motor Finance Corp Ltd* v. *Transport Brakes Ltd* [1949] 1KB 322.

2 M. N. Mian, 'Transfer of Title', in Mohamad Naqib and Ishan Jan (eds), *Law and Commerce; The Malaysian Perspective* (IIUM, 2011): 1.

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transaction. Caveat emptor is a short form of *quia ignorare non debuit quod jus alienum emit* ('Let a purchaser beware, for he ought not to be ignorant of the nature of the property which he is buying from another party').[3] This means that the buyer should assure himself that the product is good and that the seller had the right to sell it, as opposed to receiving stolen property or a property to which the purported seller does not have legal title. It may also be noted that the legal issue of transfer of title in goods under a sale transaction cannot be analysed without the application of the maxim *nemo dat quod non habet.* This maxim is to the effect that a person cannot purport to transfer title in goods to another if the former is not the legitimate owner or has not been properly authorised to do so.[4] No person can therefore 'transfer a better title in property than he himself has'.[5] Therefore, a person who lacks title in goods cannot purport to transfer title. This rule aims at protecting real owners of goods.

Jurisdictions across the world have enacted laws aimed at easing commercial transactions, more especially the protection of a buyer in good faith (bona fide purchaser) and an owner of goods. Ghana is no exception. In the United States of America for instance, it was a fixed common law policy to protect the real owner of his property.[6] As far back as 1838, the jurisprudence in the United States of America with regard to ownership rights was upheld in *Saltus* v. *Everett* where it was held among others that:

> The universal and fundamental principle of our law of personal property that no man can be divested of his property without his own consent; and consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor.[7]

Consequently, a buyer in good faith who bought goods from a 'thief' cannot have title and possession in the goods against the original owner as was held in *Basset* v. *Spofford*.[8] In 1878, the USA Court of Appeals in confirming the rule of protection of real owners of property held among others that:

> The purchaser buys at his risk of the title and if he would be safe, must make inquiry. He may not with certainty stop at the fact of possession, but must learn how the possession has been acquired.[9]

3 https://consumer.findlaw.com/consumer-transactions/what-does-caveat-emptor-mean-.html (accessed 23 December 2019).

4 L. M. Pheng, *General Principles of Malaysian Law* (Selangor Darul Ehsan, Oxford Fajar Sdn. Bhd., 2005): 579.

5 *Ibid*.

6 F. A. Whitney, 'Value and the Doctrine of Bona Fide Purchase', 7 (2), *St. John's Law Review* (1933).

7 20 Wend. 267 (NY 1838).

8 46 NY 387 (1871).

9 *Farmers Bank* v. *Logan*, 74 NY 568 (1878) per Folger J: 'A purchaser of chattels takes them, as a general rule, subject to whatever may turn out to be infirmities in the title.' See also *Bernard* v. *Campbell*, 55 NY 456 (1874), per Allen J: 'The general rule is that a purchaser of property takes only such title as his seller has, and is authorised to transfer; that he acquires precisely the interest which the seller owns and no other or greater.'

Again, if one bought goods in good faith from a seller who was in possession by fraud, a buyer acquired nothing if the real owner had no intention to divest of his title to another.[10]

However, the application of the principles of caveat emptor and protection of the buyer in good faith has brought to the fore the complexities in balancing competing interests by the judiciary and the legal community as a whole.[11] Sale of goods has been an integral part of commercial transactions and Ghana has not been exempted from the culture of trade. Transfer of title therefore remains the fulcrum of a sale transaction without which there are legal ramifications for both the seller and buyer. The Sale of Goods Act 1962, Act 137, lays down the fundamental principles underlying a sale transaction in Ghana, albeit common law principles and equity. The legal community is faced with this stark reality as to the right person to hold title in goods in a sale transaction. There are numerous hurdles to be overcome in deciding who owns the title in goods. Is there any protection for a buyer who bought goods in good faith from a seller who lacks authority? Does the law protect a seller whose goods have been sold without his authority? Where is the balance between protecting the buyer in good faith and the real owner of goods? Should the real owner of goods be deprived of his title because the buyer bought the goods in good faith? The courts have attempted to protect the property rights of individuals while at the same time ensuring that the rights of buyers in good faith are upheld. Clearly, some difficulties may be faced in deciding who to protect in peculiar instances. This article analyses Act 137 in conjunction with other legislation in selected jurisdictions and case law to ascertain whether there can be a balance between the protection afforded to buyers and sellers to promote good faith and certainty in sale transactions.

II. THE APPLICATION OF THE PRINCIPLE OF CAVEAT EMPTOR IN GHANA

The caveat emptor principle arises primarily from the asymmetry of information between a purchaser and a seller. The information is asymmetric because the seller tends to possess more information regarding the product than the buyer.[12] In the case of *Davies* v. *Randall and Another*, a case involving a dispute over immovable property, Koranteng-Addow JA mentioned that '… it is the principle of caveat emptor that is applicable. The purchaser had to investigate the genuineness of the title he intended to purchase.'[13] This case gives the impression that sellers hold no fault whatsoever when it comes to property or items they have sold. It rather shifts the responsibility of ensuring that one purchases well to the buyer. This gives credence to the phrase caveat emptor which means buyer beware. In the

10 *Soltau* v. *Gerdau*, 119 NY 380, 23 NE 864 (1890).

11 Mian, *supra*, note 2.

12 D. Aboody and B. Lev, 'Information Asymmetry, R&D, and Insider Gains', 55 (6), *Journal of Finance* (2000): 2747–66.

13 (1964) GLR 671–81.

case of *Ansah* v. *Joe*, where it was in dispute whether a defendant was a bona fide purchaser or not, Sarkodee-Addo JSC explained the maxim caveat emptor as follows:

> A purchaser must look out for himself: caveat emptor. He must take precautions for his own protection – if he does not, he 'asks for it' and cannot complain if he 'gets it'.[14]

In the Supreme Court case of *Brown* v. *Quashigah*, it was stated at p. 954 that:

> The burden must rest squarely on the vendor and the prospective purchaser to satisfy themselves that the land intended to be sold is available and vacant or not allocated. The principle of caveat emptor is still a postulate of our law. A prospective vendor or purchaser of land cannot shift onto the shoulders of the existing owner the burden of informing them of the encumbrance, title or interest held in him. In many cases it will not even be enough to conduct a search in the Deeds Registry or the Land Title Registry.[15]

This means that a potential purchaser must take steps to conduct due diligence for his own benefit and that his failure to do so is to his own peril. Another case that is important to look at in understanding how the principle applies in Ghana is the case of *Rockson* v. *Armah*.[16] The appellant owned a car which he sold to the respondent for 3,200 cedis. The respondent made cash payments to the value of 2,200 cedis and settled the balance of the purchase price with two post-dated cheques of 500 cedis each. When the car was delivered to respondent, it showed signs of recent involvement in an accident. There were serious defects in the clutch and starter systems and extensive damage to the mudguard and a head-lamp. After some initial hesitation, the appellant admitted to the accident, accepted responsibility for the defects and agreed to have them repaired. The appellant found a wayside mechanic who took in the car and completed the repairs within a day. The car was subsequently sprayed and delivered to the respondent who accepted it without any complaints. However, after using the car for a period of about two months, the respondent attempted to repudiate the sale by stopping payment of his final post-dated cheque on the ground that he had discovered some latent defects in the car. The issue for determination by the court was whether in the circumstances the respondent had the right to repudiate the contract. In the Circuit court, the learned trial judge held that the respondent was justified in repudiating the contract. On appeal, however, this decision was unanimously reversed by the Court of Appeal. It was held that the appellant had broken no warranty or condition which could entitle the respondent to repudiate the sale. In their lordships' opinion, since the car was second-hand and had been used for two months, there could be no question of the car not being fit 'for the purpose

14 (1961) GLR 395–401.
15 (2003–2004) SCGLR 930.
16 (1975) 2 GLR 116.

for which a car is usually used'. Francois JA reading the judgment of the court observed that:

> A second-hand car must be taken as it is and not elevated into a new car with all the expectation of factory freshness.[17]

Their lordships therefore could not see how any condition relating to the merchantable quality of the car could have been written into the contract (entered into by parties who were not car dealers). Their lordships went on to state that even if the subsequent state of the car constituted a breach of a condition, the respondent must be presumed to have waived his right of repudiation by retaining the car for an unduly long period.

III. AN ANALYSIS OF THE SALE OF GOODS ACT, UK, AND THE SALE OF GOODS ACT, GHANA, ON THE RELATIONSHIP BETWEEN SELLER AND BUYER

The Sale of Goods Act 1979 of the United Kingdom (herein referred to as SGA 1979) and the Sale of Goods Act 1962, Act 137, of Ghana (herein referred to as Act 137) have similar provisions governing the relationship between a seller and a buyer (consumer). An analysis of both provisions reveals that both Act 137 and SGA 1979 have provisions on the formation of a contract. Also, Act 137 has express provisions clearly spelt out in Part 3 of the Act on the duties of the buyer.[18] According to Part three (3) of Act 137, a buyer has fundamental obligations in a contract of sale to pay the price and accept delivery of the goods.[19] SGA 1979 has enacted similar provisions.[20] Additionally, unless otherwise agreed, the buyer shall be ready and willing to pay the price in exchange for delivery,[21] i.e. payment must be concurrent with delivery.[22] Section 28 of the Sales of Goods Act 1979 states that payment must be concurrent with delivery which is similar to the provision found in Act 137. Again, stipulations as to the time of payment or as to the time for accepting delivery are not conditions of a contract of sale, unless otherwise agreed.[23] Thus, if the buyer wants to make the time of payment or time for accepting delivery the conditions of a contract he must agree with the seller. As expected, unless the buyer otherwise agrees with the seller, he is not bound to accept delivery of the goods in installments.[24]

Furthermore, both statutes have provisions ensuring that quality of goods delivered to the buyer are guaranteed. The right of the buyer to receive goods of assured quality is guaranteed by the innovative provision in Act 137,[25] while

17 *Rockson* v. *Armah* (1975) 2 GLR 116.
18 Sections 21–24 of Act 137.
19 Section 21 of Act 137.
20 Section 27 of Act 137.
21 Section 22 of Act 137.
22 Section 28 of Act 137.
23 Section 23 of Act 137.
24 *Ibid*.
25 Section 13 of Act 137.

that of SGA 1979 is found in section 14. A general rule under Act 137 is that a seller of goods is liable for all defects in them and it is an implied condition of the contract of sale.[26] Notwithstanding the aforesaid, there are some exceptions. For instance, a seller will not be liable for those defects which he declares or makes known to the buyer before or at the time of the contract.[27] Thus, a seller cannot be held liable for that which he makes known to the buyer. Again, where the buyer has examined the goods, the seller is not liable for defects which should have been revealed by the examination.[28] This places an onus on the buyer to exercise due diligence when given the opportunity to examine the goods. By implication, latent defects are not inclusive. It would appear then that where the defects complained of were not declared or made known to the buyer before the contract and could not have been revealed by the buyer's examination, if any, the seller is liable.[29]

IV. HAVE THE STATUTES EVOLVED?

In hindsight, the Sale of Goods Act, Act 137 since its inception has not witnessed any major amendment unlike the Sale of Goods Act of the United Kingdom which has witnessed several amendments: from the Sale of Goods Act 1893 to the Sale of Goods Act 1979 (as amended by the Sale of Goods Act 1994). Interestingly, the Sale of Goods Act, Act 137 was enacted 75 years after the Sale of Goods Act 1893 was codified and was to benefit from the 70 years' experience that the English lawyers had acquired in the operation of their great codifying statute of 1893.[30] It is high time that the Sale of Goods Act, Act 137 is amended to reflect the changing times and also to ensure that the buyer's/consumer's interest is secured.

The general principle in section 13 of Act 137, which is based on the caveat emptor principle, is so overshadowed by the exception(s) that the result is something close to a complete negation of the caveat emptor rule where the quality of goods is concerned.[31] In the words of one commentator: 'We started with caveat emptor and have ended with caveat venditor in a novel and extreme form.'[32]

V. THE CONUNDRUM BETWEEN PROTECTION OF THE BUYER IN GOOD FAITH AND THE APPLICATION OF THE CAVEAT EMPTOR PRINCIPLE IN GHANA

In Black's Law Dictionary, good faith is defined as 'a state of mind consisting in honesty in belief or purposes, faithfulness to one's duty or obligation, observance

26 J. E. A. Mills, '*Rockson* v. *Armah*, a Case of Caveat Emptor, Caveat Venditor or Neither?' XV, *University of Ghana Law Journal* [1978–81] 168–75.
27 Section 13(1)(a) of Act 137.
28 *Ibid*.
29 Mills, *supra*, note 26.
30 K. K. Dei-Annang, 'Caveat Venditor Ghaniensis', 90, *University of Ghana Law Journal* (1967): 100–1.
31 Dei-Annang, *supra*, note 30.
32 *Ibid*.

of reasonable commercial standards of fair dealing in a given trade or business or absence of intent to defraud or to seek unconscionable advantage'.[33] A buyer in good faith (innocent purchaser for value/bona fide purchaser) refers to someone who 'buys the property of another without notice that some other person has a right to or interest in it, and who pays a full and fair price at the time of the purchase or before receiving any notice of another person's claim'.[34] It is argued that the doctrine of bona fide purchase/buyer in good faith/innocent purchaser evolved from two sources: 'from the law of merchant and from equity'.[35] It is a maxim in equity that that where the equities are equal, the law will prevail to govern the sale transaction.[36] An essential part of Ghana's jurisprudence is equity and common law.[37] Equity denotes fairness and good faith.[38] This fairness-based principle acts as a sword or a shield depending on the circumstances of each case.[39]

It may, however, be noted that one cannot merely raise the defence of being an innocent purchaser for the court to accept without more. A party who claims to be a buyer in good faith must prove that status.[40] In *Wilson* v. *Osei and Another*, a motion was filed by the plaintiff for the review of an order obtained by the co-defendant for the release of a car impounded by an order of the court for preservation pending the determination of the suit between the plaintiff and the defendant.[41] It was held that the co-defendant satisfied the court in his application that he was a bona fide purchaser for value without notice, and that under the provisions of the Sale of Goods Act 1962 (Act 137), he had a legal interest in the car.

It has been argued that the protection of buyers in good faith is a social commercial interest which is heavily rooted in granting indefeasibility of titles.[42] This position is confirmed under section 10 of Act 137, which states that:

> In a contract of sale, there is an implied warranty on the part of the seller that he will have a right to sell the goods at the time when the property is to pass.

The above section therefore confirms the need for property to pass to a buyer in good faith. In a normal sale transaction, the seller would be in a better position to know his root of title than the buyer.[43] The bona fide purchaser/buyer in good faith/innocent purchaser will then take good title despite adverse claims. An action

33 B. A. Garner and H. C. Black, *Black's Law Dictionary* (West 2009).
34 *Sps. Villamil* v. *Villarosa*, 602 Phil. 932, 941 (2009) (per Tinga J, Second Division), citing *Sps. Domingo* v. *Reed*, 513 Phil. 339, 353 (2005) (Per Panganiban J, Third Division).
35 Whitney, *supra*, note 6.
36 J. W. Eaton, *Equity* (West 1923).
37 Article 11 of the 1992 Constitution.
38 J. McGhee, *Snell's Equity* (Sweet & Maxwell 2014).
39 D. R. K. Sankah (ed.), 'Equity in the Ghanaian Courts', 21, *Review Ghana Law* (2001–2005): 7.
40 *Potenciano* v. *Reynoso*, 449 Phil. 396, 410 (2003) (per J Panganiban, Third Division).
41 [1982–83] GLR 588–94.
42 O. E. Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations', 22, *Journal of Law and Economics* (1979): 233, at 239–42.
43 *Ibid*.

can therefore be brought by persons with competing adverse claims against the seller who fraudulently transferred property to the innocent purchaser.[44] On the other hand, a responsibility has also been placed on the buyer to beware. In *Aryee* v. *Shell Ghana Ltd and Another*, it was held among others that in any sale transaction, there is a duty of vigilance cast on the buyer to beware.[45] It has been argued that the protection of a buyer in good faith and the doctrine of caveat emptor are intrinsically incompatible.[46] Cases involving the bona fide purchaser/buyer in good faith may be classified under three headings: 'cases wherein the vendor has legal title, cases in which the vendor has an equitable title and those cases in which the vendor has no title to pass to the vendee'.[47] According to Howe, each class presents its own difficulties with respect to the type of title which the seller possessed.

It may be argued that one of the underpinnings of buyer beware is the maxim *nemo dat quod non habet* which literally means 'no one can give what he doesn't have'. Section 28(1) of Act 137 re-states the *nemo dat* rule as follows:

> Subject to the provisions of this Act and of any other enactment where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title than the seller has.

The rule is to the effect that a person can only transfer title he/she has to a buyer and therefore the buyer acquires no title in the goods if the seller does not have title himself/herself. A purchaser acquires no title from such a seller lacking authority or title. This common law rule has also been corroborated in various jurisdictions. For instance, in the United Kingdom, Section 21 of the Sale of Goods Act 1979 also explains the rule of *nemo dat quod non habet*. That section states that:

> Subject to this Act, where goods are sold by a person who is not their owner 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.

The *nemo dat* rule from the above provision primarily protects the property rights of original owners. There is a long line of authorities on this position of the law. In *Chandirams* v. *Ghana Commercial Bank* [1960] GLR 178, *Afari* v. *Nyame* [1961] GLR 599, *Kuma* v. *Hima* [1977] 1 GLR 204 and *Hammond* v. *Lamptey* [1987–8] 1 GLR 327 it was observed by the courts among others that 'the principle of *nemo dat* is so well rooted and fundamental in the law that it cannot be disregarded by a court except on well-settled legal grounds. It is the foundation for the protection of property rights by the law and finds expression in

44 < https://uk.practicallaw.thomsonreuters.com/5-383-2167?transitionType = Default&contextData = (sc.Default)&firstPage = true > (accessed 13 December 2020).

45 (J4/3/2015) [2015] GHASC 102 (22 October 2015).

46 J. H. Howe, 'Bona Fide Purchaser – Without Title', 36 (2), *Kentucky Law Journal* (1948): 176.

47 *Ibid*.

section 13(3) of the Conveyancing Act 1973 (NRCD 175), section 4(1) of the Mortgages Act 1972 (NRCD 96) and section 28 the Sale of Goods Act 1963 (Act 137)'.

In Uganda, a similar position has been upheld in the case of *Jade Petroleum* v. *Salim Ramzanli & Anor*.[48] The reliefs claimed by the plaintiff included special and general damages against the defendant for 'fraud and conversion of the plaintiff's petroleum products'. The party who benefitted from the fraudulent sale transaction was not an innocent purchaser of the products per the evidence before the court. The following were the agreed issues for trial: whether the defendant had good title for the products sold to him by the third party, whether the defendant had a claim against the third party and whether there were remedies available to the parties. In dealing with the first issue, the court applied the general rule in the Latin maxim *nemo dat quod non habet* which was reflected in section 22(1) of the Sale of Goods Act Cap 82 laws of Uganda. The court found that the mysterious seller did not have any title to pass to the defendant and thus the defendant never acquired good title to the property. The defendant only proved that it bought from the third party but could not prove that the third party had title to pass. It was opined that someone with void title cannot pass any valid title except under certain exceptions under section 22 of the Act.

VI. THE EXCEPTIONS UNDER THE *NEMO DAT QUOD NON HABET* RULE

Under Ghana's Sale of Goods Act 1962, Act 137, the *nemo dat quod non habet* rule is re-stated with exceptions. Section 28 of Act 137 reiterates the common law principle that a seller cannot transfer title to a buyer if the former lacks authority or title of goods and in logical consequence the buyer acquires nothing. There are, however, exceptions to this *nemo dat* rule to promote commercial transactions and interest.

The first exceptions are found under section 28(2) which are the operation of estoppel or any power of sale which may be conferred by or under any enactment or by a contract of pledge or otherwise. Under these circumstances, the buyer acquires valid title. The doctrine of estoppel arises where a party makes unambiguous representation by words or actions or does not deny the existence of a fact when confronted with it and thereby causes another party (the representee) to rely to his detriment on the representation. In such circumstances, the representator is prevented from acting inconsistently with the representation.'[49] For instance, where there are representations made to the public that the seller has a right to sell the goods and a purchase is made by a buyer, the real owner is estopped by representation, encouragement and/by acquiescence from raising any objection to title. Estoppel 'works as a shield and not as a sword'.[50] In *Eastern*

48 Civil Suit No. 157 of 2012 UGCOMMC 114 (18 August 2017) (Commercial Court of Uganda decisions).

49 N. A. Josiah-Aryeh, *The Property Law of Ghana* (Icon 2015).

50 *Combe* v. *Combe* (1951) 2 KB 215.

Distributors Ltd v. *Goldring*, the owner of a van 'M' transferred the documents of title to his van to 'C' under a plan to deceive a finance company. 'C' was able to represent to the finance company that he was the owner of the car and that he was letting it to 'M' on hire purchase terms. It was held that 'M' was by his conduct estopped from denying 'C's authority to sell and that 'C' had passed good title to the plaintiffs.[51]

In *Greasly* v. *Cooke*, the claimant was encouraged by a family to believe that a house the claimant had moved into was her home for life. The court held that the claimant was entitled to remain in the house as long as she wished.[52] In *Commonwealth Trust Limited* v. *Akotey*, the respondent Akotey was a grower of cocoa in the Gold Coast colony and consigned by railway 1,050 bags of cotton to Laing.[53] Akotey had previously sold cocoa to Liang. However, there was no agreement of sale concluded on this occasion. An offer of $2.50 a ton by Laing was rejected as too low. The difference as to price was not settled between the parties. Laing sold the cocoa to Commonwealth Trust Limited (the appellants), a buyer in good faith. The respondents then sued the appellants for damages for conversion. It was held that the respondents were estopped by their conduct from challenging title against the appellants. An owner of goods in such circumstance cannot challenge the authority of the seller to sell and transfer title in the goods to a buyer in good faith. A similar exception to the rule is found in various jurisdictions. In Kenya, for instance, the principle of *nemo dat quod non habet* and the exception of estoppel are found in section 23(1) of the Sale of Goods Act Cap 31 Laws of Kenya. It states:

> Where goods are sold by a person who is not the 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 that the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.[54]

Again, good title passes to a buyer who purchases goods under any enactment, contract of pledge and power of sale by the court. In such situations, the buyer acquires valid title even though the seller has no authority/consent from the owner of the goods. In the Nigerian case of *Mbanugo* v. *UAC*, a bailiff at a public auction sold a lorry in the possession of a judgement debtor.[55] It was held that the buyer acquired a good title. In *Dadzie* v. *Kojo and Another*, it was held among others that:

> The law is clear that a purchaser of a property under the execution of a fi. fa. steps into the shoes of the judgment debtor, and purchases no more than the estate of the judgment debtor in the property. In

51 (1957) 2 QB 600.
52 (1980) 1 WLR 1306.
53 [1926] AC 72.
54 < https://legalscholarsite.com/exceptions-to-nemo-dat-quod-non-habet-rule-kenya/ > (accessed 4 December 2020).
55 (1961) All NLR 775.

> other words, what is sold and what is bought at a sale in execution is the right, title and interest of the judgment debtor. It therefore follows that, if certain property which is attached under execution by way of fi. fa. turns out to be in any way encumbered, the purchaser buys subject to that charge or encumbrance.[56]

In *Afari v. Nyame*, it was held among others that a purchaser at a sale in execution of a judgment acquires no more than the right, title or interest of the judgment debtor.[57] In July 1951, Kwame Amponsah Darko having sold the farm in December 1950, had no interest which could be sold in execution. Kwadjo Duku therefore bought nothing and he sold nothing to the defendant respondent. The defendant therefore had no claim to the farm. It may also be noted that if a sale was carried out by a void fi. fa, the buyer, though a bona fide purchaser, gets no title as was the case in *Sarpong v. Atta Yaw and Anor*.[58] At p. 421 of the Report Apaloo JSC said as follows:

> True, this may cause great disappointment and possibly hardship to purchasers in some case but people who speculate in the purchase of property put up for sale by the sheriff invariably take a certain amount of risk and must take the consequences of the sale turning out to be invalid.

The next exception to the *nemo dat* rule is found under section 29 of Act 137 which is in relation to a seller with a voidable title. It reads as follows:

> Where a person has a voidable title to goods any sale, pledge or other disposition for value made by that person before his title to the goods has been avoided shall be as effective as if his title were not voidable, if the person taking under the disposition acts in good faith and without notice of the defect in title of the person making the disposition.

The effect of this provision is that so long as a voidable title/contract has not been rescinded by the real owners and the buyer had no notice of the defect in title, such a buyer obtains valid title. A voidable title/contract is valid until steps have been taken to set the same aside. The Kenyan Sale of Goods Act Cap 31 Laws of Kenya also provides that when the seller has voidable title to goods but the title is not rescinded at the time of the sale, the buyer obtains valid title. The only condition for the buyer to acquire valid title under such voidable titles is when the buyer is a bona fide purchaser without notice of the seller's defect in title. The real owner cannot avoid title once a bona fide purchaser buys the good. In the English case of *Lewis* v. *Avery* per Lord Denning MR, it was held among others that a mistake as to identity does not make the contract a nullity but voidable. Consequently, since the voidable contract was not avoided in time, title in the car had passed to the fraudster then to Avery.[59] In Ghana, in the case of *Alhassan* v. *Social Security Bank*

56 6 WACA 139.
57 [1961] GLR 599.
58 [1964] GLR 419.
59 (1971) 3 All ER 907.

Limited, it was held among others that the defendants could be caught by laches and acquiescence or both if they became aware of the voidable sale and failed to act within a reasonable time.[60] Laches being an equitable principle operates within the general context of fairness.[61] The principle *vigilantibus non dormientibus jura subveniunt*, means the law serves the vigilant and not those who sleep on their rights. A court of equity therefore aids the vigilant and not the indolent. This principle underlies the statute of limitation and in Ghana, the defence of laches can only be raised in matters that are not affected by the Limitation Decree 1973. Acquiescence on the other hand can arise from inaction or silence encouraging the erroneous belief and consequent actions of another.[62] In *Lindsay Petroleum Co.* v. *Hurd*, acquiescence was explained to involve the following:

> Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.[63]

The next exception is a disposition by a mercantile agent. A mercantile agent under section 81 of Act 137 'means an agent having in the ordinary course of his business as an agent authority to sell goods, or to consign goods for sale, or to buy goods, or to raise money on the security of goods'. These mercantile agents under section 30 of Act 137 generally have the consent of the owner of goods to be in possession of their goods or of the documents of title to goods and these agents can sell and transfer title in the goods to the buyer in the ordinary course of his business. The buyer obtains valid title from the mercantile agent since the consent of the owner shall be presumed unless the contrary is proved. In *Weiner* v. *Harris*, Weiner, a manufacturing jeweller, entrusted goods to Fisher as his agent.[64] Fisher had a shop where he sold jewellery but he also travelled the country selling jewellery on behalf of other people. Harris bought some goods from Fisher and it was held by the court that he had good title on the goods although Weiner claimed that Fisher was not a mercantile agent. The court held that Fisher was a mercantile agent and therefore Weiner could not recover the goods from Harris.

The next exception relates to a sale by a seller in possession under section 31 of Act 137. Where a person has sold goods to a buyer but is still in possession of the goods after property has passed to the buyer, the delivery or transfer by the seller of the goods or documents of title under any contract of sale, pledge or other disposition for value to a third party in good faith and without notice of previous sale is valid. Such a third party has valid title of the goods if he acquired the same in good faith and without notice of the previous sale. For example, if 'K' sells a car to be 'B' but 'K' still has in his possession the car, he can sell the goods to 'Z'

60 (1989–90) 1 GLR 549–560.
61 Josiah-Aryeh, *supra*, note 49.
62 *Ibid*.
63 (1874) LR 5 PC 221, at 240.
64 (1910) 1 KB 285.

and 'Z' will have valid title if 'Z' had no knowledge of the previous sale. It will be presumed that 'B' had authorised 'K' to resell the good.

The Last exception relates to a buyer in possession under section 32 of Act 137. This arises where the buyer of goods obtains possession or documents of title to the goods before he obtains title in the goods and the buyer sells, pledges or makes a disposition for value to a third party in good faith and without the notice of the buyer's lack of the title. The third party then acquires valid title as if the buyer were expressly authorised by the seller to make the same.

A. Will the Plea of *nemo dat quod non habet* Succeed?

The courts in Ghana have sufficiently laid down the yardstick for the plea to succeed. In *Mensah* v. *Kwanko II*, the Supreme Court held among others that the plea of bona fide purchaser for valuable consideration even if applicable is a defence which calls for supporting evidence to prove it.[65] In this case, the appellant as plaintiff raised this defence to assert title which was void by the nature of the grant. This defence must be proved to the satisfaction of the court. Again, in *Hydrofoam Estates (GH) Ltd* v. *Owusu* in discussing this plea held as follows:

> Where a party had put up the plea of bona fide purchaser for value without notice of any adverse title, the onus would squarely be on that party who had pleaded the same. Since the plea was to be considered as an absolute, unqualified and unanswerable defence if upheld by a court of law, the law would require that evidence in support of the plea must satisfy the court.[66]

The Supreme Court after careful perusal of the evidence on record indicated that there was no evidence to support the plea and accordingly dismissed the appeal.

VII. CONCLUSION

It may be argued that the principle of caveat emptor is gradually fading, perhaps by reason of the introduction of modern-day commerce and trade. The principle has undergone changes over time. The balance is in the necessity of disclosure of information by the seller on the one hand and the implications of reasonable inspections done by the buyer on the other. Under the principle of caveat emptor, the buyer, before entering into a sale transaction with any seller, is required to make the necessary checks to assure himself of whether in fact and in deed the person selling the goods has the requisite title to the goods or the right to make a sale of the goods. No action will lie in favour of a buyer who fails to conduct the necessary checks on the title of the seller. However, in reality, the innocent purchaser is favoured by equity (coined by the courts as 'equity's darling') to

65 (J4/17/2016) [2017] GHASC 22 (14 June 2017) Civil Appeal No. J4/17/2016.
66 [2013–14] 2 GLR 1117.

the neglect of the 'original owners with pre-existing interests'.[67] The innocent purchaser's defence is the exceptions to the common law rule of *nemo dat quod non habet* which is also confirmed by Ghana's Act 137 and other jurisdictions. Nonetheless, the buyer cannot be callous but must remain vigilant to the seller's title. The balance of the principle of caveat emptor and the protection of the buyer in good faith therefore lies in the peculiarities of each case. Certainty and balance between these two concepts in normal commercial transactions as required is succinctly opined by Mansfield LJ in *Vallego and another* v. *Wheeler*:

> In all mercantile transactions, the great object should be certainty; and therefore, it is more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.[68]

67 < https://www.mondaq.com/canada/real-estate/948788/equity39s-darling-the-bona-fide-purchaser-for-value-in-real-estate-priority-conflicts > (accessed 5 December 2020).

68 (1774) 98 ER 1012 at 1017, 1 Cowp 143 (KB).