

April 1928

## Real Property--Vendor and Purchaser

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### Recommended Citation

Anne Slifkin, *Real Property--Vendor and Purchaser*, 34 W. Va. L. Rev. (1928).

Available at: <https://researchrepository.wvu.edu/wvlr/vol34/iss3/15>

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soning, the case as a whole seems to approach the position advocated in the earlier article. And as "great civic good can be done by giving effect to the statute," it is to be desired that the court will continue its approach to that position, ultimately to apply the statute literally construed. Obviously, the only alternative is the repeal of the provision.

—LESTER C. HESS.

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REAL PROPERTY—VENDOR AND PURCHASER.—Plaintiff is the assignee, first in date of assignment, of five out of a total of twelve notes secured by a vendor's lien. By virtue of such priority of time he claims a lien against the security prior to holders of the remaining notes subsequently assigned. Plaintiff's claim was based on the rule of West Virginia and Virginia, that where notes secured by a mortgage or vendor's lien are assigned to different persons, the first note assigned will be the first satisfied out of the security. The court acknowledged the rule, but made an exception to it in the case under consideration because the notes were made payable to several grantors jointly, and before assignment of any of the notes they had divided them among themselves by indorsing them "without recourse." In such a case the court held that the payees or their assignees will be entitled to participate in the distribution of the security in the proportion represented by the amount of their notes irrespective of priority of assignment. *Home National Bank of Sutton v. Boyd*, 140 S. E. 482 (W. Va. 1927).

The rights of different assignees of a series of notes secured by a vendor's lien have by the courts of this country been adjudicated in three different ways. First, some courts, and West Virginia among them, have held that the notes should be paid in the order of their assignment. *White v. King*, 53 Ala. 162 (1875); *McClintic v. Wise*, 25 Gratt. 448, 18 Am. Rep. 694; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 532; *Tingle v. Fisher*, 20 W. Va. 497 (1882); *Jenkins v. Hawkins*, 35 W. Va. 799, 12 S. E. 1090. The decision in the

case in our discussion refers us to TUCKER'S COMMENTARIES, Vol. I, 353, for the basis of the rule of West Virginia where it is reasoned that the first assignee shall have preference, for by the assignment he at once acquired a preference over his assignor, and it is concluded that this preference would not be taken away by subsequent assignees. This view is justly criticized in the case of *Salmon v. Downs*, 55 Tex. 243 (1884). That case asks why there should be a presumption arising from the transfer of one or more of a series of notes secured by a vendor's lien that the vendor or assignor intends to waive his right to share pro rata in the common fund on the remainder of the notes. Further, as the several notes are entitled to satisfaction out of the same fund, why, by force of the transfer of some of them, is the lien of the others not transferred postponed. Why should the transfer carry with it a new right of priority of payment which the notes did not possess before? We do not see, why, in the absence of an express guaranty, the assignor must step aside, and let his assignee satisfy his claim, he taking only what may be left in payment of the notes retained by him. The ordinary assignment of a note does not carry with it the guaranty of full payment. Even admitting that as between the assignor and the assignee, the former should stand in the position of a warrantor, why does it follow that as between two or more successive assignees of notes secured by a vendor's lien, the first, although first only by an insignificant period of time, should take preference over the ones succeeding him. It may be a workable rule, but it is not an equitable one. Some few courts hold that priority between notes secured by the same mortgage or vendor's lien is determined according to the order of their maturity. *Koester v. Burke*, 81 Ill. 476 (1876); *Nashville Trust Company v. Smythe*, 94 Tenn. 513, 29 S. W. 903. This also may be termed a workable rule. The greatest number of courts have held that the proceeds of the security should be applied pro rata in part payment of the several notes, irrespective of their dates of maturity or assignment. *Salmon v. Downs*, 55 Tex. 243 (1881); *Penxel v. Brookmire*, 51 Ark. 105, 10 S. W. 5; *Lovell v. Cragin*, 136 U. S. 130; *Armstrong v. Parr*, 162 S. W. 1003 (Tex. Civ. App. 1914). This last rule is given in POMEROY, EQUITY JURISPRU-

DENCE, § 1203, although Pomeroy states that as between the assignor and assignee, the latter stands in a superior position in respect to the security. It appears therefore that the rule between assignor and assignee should not necessarily govern the rights between successive assignees.

The principal case is to be commended because it adds a needed qualification to the West Virginia rule above stated. The court reasons that as the notes were executed to the three grantors jointly, it would be inequitable for one of them to diminish or jeopardize the security of the rest by assignment. The court therefore follows the implied intention of the parties regardless of priority of assignment. We wonder why intention is not equally potent in cases of successive assignments where the notes are not executed to several grantors jointly.

—ANNE SLIFKIN.