Volume 29 | Issue 2 Article 6

January 1923

Purchaser for Value

J. W. M.
West Virgina University College of Law

West Virginia Law Quarterly
And THE BAR

Published by the Faculty of the College of Law of West Virginia University, and issued in November, January, April and June of each academic year. Official publication of The West Virginia Bar Association.

Subscription price to individuals, not members of The West Virginia Bar Association, $2.00 per year. To those who are members of the Association the price is $1.50 per year and is included in their annual dues. Single copies, 50 cents.

PURCHASER FOR VALUE.—A purchase for value without notice has important legal consequences. Under the rules of equity one who purchases for value a legal title or interest without notice of outstanding equitable interests is not bound to recognize those interests.[1] Another way of stating the same conclusion is frequently employed by the courts, viz., that a purchaser for value without notice cuts off all equities. In the law merchant, adopted by Lord Mansfield into the common law, perhaps the most important doctrine was that in the transfer of bills of exchange and promissory notes a purchase for value without notice had the effect of cutting off defenses which might have been used by the maker of the obligation against the original obligee or any party other than the purchaser for value without notice. This doctrine has been codified into the Uniform Negotiable Instruments Law.[2] Under our Recording Statutes providing for the recordation of writings affecting the title of land or chattels, it is commonly provided

[1] Hoult *v.* Donaline, 21 W. Va. 294 (1883); Bassett *v.* Mosworthy, 2 Lead. Cas. Eq. 1; Warner *v.* Winslow, 1 Sandf. Ch. 430 (N. Y. 1844).
[2] See W. VA. CODE, 1916, c. 98A, § 52 defining a holder in due course; § 57 defining the rights of a holder in due course; § 58 defining the rights of one not a holder in due course

that an unrecorded instrument shall be void as against subsequent purchasers for valuable consideration without notice.[3] It will be observed that under the provisions of the Recording Statutes not only equitable interests and personal defenses but complete legal titles are extinguished by a purchase for value without notice. The scope of the doctrine is constantly expanding. By the Uniform Sales Act[4] and the Uniform Stock Transfer Act[5] the effect of the purchase for value without notice is to extinguish some rights which could have been asserted against the vendor.

In analyzing the phrase "purchaser for value without notice," three questions present themselves. (1) What is a purchase? For example, does the acquisition of an equitable interest in the property in question constitute a purchase or is the meaning of the word limited to the acquisitoin of a legal title or interest? (2) What is meant by "value" when that word is used in this connection? (3) What is notice? This discussion will be limited to the second of the above matters, that is, to determine what meaning the decisions have given to the word "value" in applying the doctrine of purchase for value without notice.

An heir of a trustee is not a purchaser for value and is bound by the trust.[6] An executor is bound by the trust.[7] A donee of the trust *res* takes subject to the trust.[8] The widow will be prevented by a court of equity from asserting dower,[9] or homestead interest[10] in land held in trust by her husband. Likewise a husband is not entitled in equity to curtesy in land of which his wife is a trustee.[11] At common law when the trustee of personal property died intestate and without next of kin the Crown took the title to such chattels as *bona vacantia,* and upon the attainder of the trustee of personalty for felony or treason, the Crown took legal title to the personal property by forfeiture, but in both cases the Crown not being a purchaser for value would upon petition of right give relief to the beneficiary of the trust.[12] In the case of the death of the trustee of land without heirs, the lord taking by escheat was not, at common law, bound by the trust for the reason that

---

[3] See W. VA. CODE, 1916, c. 74, §§ 4, 5.
[4] See § 76 of UNIFORM SALES ACT; see also WILLISTON, SALES, § 619.
[5] See § 22 of the UNIFORM TRANSFER ACT.
[6] Anonymous ———— 1474, Fitzh. Abr. Subpoena pl. 14; Y. B. 22 ED. IV. fol. 6, pl. 18 (1482).
[7] Mortimer *v.* Ireland, Chancery 1847, 11 Jur. 721; see W. VA. CODE, 1916, c. 132, § 6.
[8] Anonymous ———— 1522, Y. B. 14 Hen. VIII fol. 4, pl. 5; Otis *v.* Otis, 167 Mass. 245, 45 N. E. 737 (1897); AMES, LECT. ON LEG. HIST. 285; 17 CALIF. L. REV. 283; *ibid* 479.
[9] Noel *v.* Jevon, Freem. C. C. 43 (1678).
[10] Osborn *v.* Strachan, 32 Kans. 52, 3 Pac. 767 (1886).
[11] Bennett *v.* Davis, 2 P. Wms. 316 (1725); PERRY, TRUSTS, § 322.
[12] Hix *v.* A. G., Hard. 176 (1673); see 144 L. T. 170.

the lord did not take in privity with the trustee, but by paramount title.[13] In most of the above cases the legal title or interest is one which the laws casts upon a person without his giving in return any thing which has even the semblance of value. In the following cases, however, it becomes necessary to determine whether the word "value" as used in the phrase "purchase for value" is approximately synonomous with the word "consideration" as used in the law of contracts.

One who takes a conveyance from the trustee of the legal title to a trust *res* but gives in return only his promise to pay is not a purchaser for value.[14] He must surrender the *res* to the *cestui que trust,* and is, of course, relieved of his promise to pay the trustee. If, however, he, after his purchase but still before notice of the defense or equity, pays for the property he then holds it free and clear.[15] If he pays after notice, he is bound by the trust.[16] If the promise given in exchange for legal title is a promise to marry, the purchaser takes free of trust, upon the theory that there is an actual giving of value by entering into the status of an engaged person.[17] If the purchaser's promise to pay is given in the form of a negotiable instrument, which is subsequently negotiated to a holder in due course the purchaser has, of course, paid value and is protected,[18] but if the negotiable instrument has not been negotiated when the purchaser receives notice he is not protected.[19] His course should be to immediately restrain the negotiation of the instrument by the holder.

If a purchaser has secured the legal title to trust property but has paid only a part of the consideration, he should, of course, be protected to the extent of his payment. This protection is accom-

---

[13] Burgess *v.* Wheat, 1 Ed. 177, 201, 246, (1759); Hardman, Law of Escheat, 4 L. QUAR. REV. 318, 329.

[14] McNight *v.* Parsons, 136 Iowa 390, 113 N. W. 858, (1907); City Dep. Bk. Co. *v.* Green (Iowa) 103 N. W. 96 (1905), 106 N. W. 942 (1906); Citizens State Bk. *v.* Cowles, 180 N. Y. 346, 73 N. E. 33, (1905); Manufacturers' Nat. Bk. *v.* Newell, 71 Wis. 309; 37 N. W. 420, (1888); Hodge *v.* Smith, 130 Wis. 326, 110 N. W. 192 (1907), *accord.* Royal Bank *v.* Tottenham, 2 Q. B. 715, 717, (1894); Capital & Counties Bk. *v.* Gordon, (1903) A. C. 240, *contra.* Mann *v.* Sec. Nat. Bank of Springfield, Ohio, 30 Kans. 412, 1 Pac. 579, (1883).

[15] Fox *v.* Bank, 30 Kans. 441, 1 Pac. 789, (1883); First Nat. Bk. *v.* McNairy, 122 Minn. 215, 142 N. W. 139, (1913); Cunningham *v.* Holmes, 66 Neb. 723, 92 N. W. 1023, (1902); U. S. Nat. Bk. *v.* McNair, 114 N. C. 335, 19 S. E. 361, (1894); Merchants Nat. Bk. *v.* Santa Maria Sugar Co., 162 N. Y. App. Div. 248, 147 N. Y. Supp. 498, (1914).

[16] Tourville *v.* Naish, 3 P. Wms. 307 (1734).

[17] Smith *v.* Allen, 5 Allen (Mass. 1862) 454; Huntress *v.* Hanley, 195 Mass. 236, 80 N. E. 946 (1907) *semble;* De Hierapolis *v.* Reilly, 44 N. Y. App. Div. 22, 60 N. Y. Supp. 417, (1899); Lionberger *v.* Baker, 88 Mo. 447, (1885) *contra.* See Boggess *v.* Richards, Admr., 39 W. Va. 567, 20 S. E. 599, (1894); Vance *v.* Richards, Admr., 39 W. Va. 578, 20 S. E. 603, (1894).

[18] Davis *v.* Ward, 109 Cal. 186, 41 Pac. 1010, (1895), *semble*; Partridge, Wells & Co. *v.* Chapman, 81 Ill. 137, (1876); Freeman *v.* Deming, 3 Sandf. Ch. (N. Y. 1846) 327.

[19] Davis *v.* Ward, 109 Cal. 186, 41 Pac. 1010, (1895); Rush *v.* Mitchell, 71 Iowa 333, 32 N. W. 367, (1887); Jones *v.* Glathart, 190 Ill. App. 630, 641, (1901). See *contra,* Citizen's Bank *v.* Shaw, 14 S. D. 197, 84 N. W. 779, (1900).

plished in one or the other of two ways in different jurisdictions. In most cases the purchaser may retain the title only as security for the repayment to him of the amount advanced by him in the purchase of the *res*.[20] In some jurisdictions under these circumstances the purchaser retains a beneficial interest in the *res* subject to a lien in favor of the *cestui que trust* for the unpaid portion of the purchase price.[21] By the latter view the purchaser gets the benefit of his bargain, including, of course, any increase in the value of the *res*, and the *cestui que trust* accordingly loses his beneficial ownership in the *res* and gets merely a claim for money. The West Virginia court adopted this latter view in the case of *Mitchell* v. *Dawson*.[22] In that case a purchaser had paid all of the purchase money, being about $2,000.00, with the exception of $25.00, when he received notice of an equitable lien held by a prior vendor against the property. The court held that the purchaser's title was clear except that he must pay the remaining $25.00 to the equitable incumbrancer.

The question of whether the law should regard the taking of property in payment of, or as security for, *a pre-existing debt* is the most troublesome question which arises in the attempt of the law to define "value." It has been held that the taking of real or personal property other than negotiable paper or money as security for a pre-existing debt is not a purchase for value.[23] The taking such property in *payment* of an atecedent debt has been variously treated. In Virginia and West Virginia one who takes land or chattels either as security for, or in payment of, an antecedent debt is a purchaser for value.[24] Perhaps the numerical weight of authority is that such taking in payment is a purchase for value, but many courts take a contrary view.[25] The law should probably make no distinction between the cases of the purchase of property in payment of and as security for a pre-existing debt. It is true that in the case of payment of an antecedent debt, the purchaser if he is deprived of the *res* will be under the necessity of re-establishing the debt in law. He will, however, have no difficulty in doing this. He is hardly more likely to find himself in a less favorable position for the collection of the debt than is

[20] Henry *v.* Phillips, 163 Cal. 135, 124 Pac. 837, (1912); Youst *v.* Martin, 3 S. & R. 423, (Pa. 1817.); POMEROY, EQ. JURIS., § 750.
[21] Citizen's Bank *v.* Shaw, 14 S. D. 197, 84 N. W. 779, (1900); Mitchell *v.* Dawson, 23 W. Va. 86, (1883); POMEROY, EQ. JURIS., §750.
[22] 23 W. Va. 86, (1883).
[23] See POMEROY, EQ. JURIS., § 749.
[24] See POMEROY, EQ. JURIS., § 749 and cases cited; WILLISTON, SALES, § 620.
[25] Wickham *v.* Martin, 13 Gratt. 427, (Va. 1856); Gilbert *v.* Lawrence, 56 W. Va. 281, 49 S. E. 155, (1904).

the person who takes the *res* as security for the payment of an antecedent debt. In both cases the purchaser has generally delayed collection of the debt because of the payment or security and hence is, in fact, in a somewhat less favorable position than he would have been had it not been for the purchase.[26] If the creditor has surrendered or cancelled other securities for his debt upon the faith of his purchase of the *res,* he is a purchaser for value.[27] In that case it is practically impossible for the purchaser to restore himself to his *status quo ante* if he is deprived of the *res.* At common law one who took either money or negotiable paper either as security for or in payment of an antecedent debt was in most states held to be a purchaser for value.[28] Whatever difference of opinion existed among the state courts was remedied by the Uniform Negotiable Instruments Law, which provides that[29] "An antecedent or pre-existing debt constitutes value." It will be seen that many state courts have defined the term "value" differently in the case of a purchase of negotiable paper on the one hand and the purchase of land or chattels on the other hand. The explanation for this lies in the desirability of a free transfer of negotiable instruments in the interests of commerce.[30] These reasons do not apply with equal strength to the transfer of land and chattels.

It is the general view that an assignee for the benefit of creditors is not a purchaser for value. The courts have said that the assignee should take no better title, no higher rights, than the assignor himself had; that if the assigned estate is subject to a trust, the assignee should take subject to the rights of the equitable owner.[31] The West Virginia cases, following the Virginia cases, take the opposite view, and hold that the assignee for the benefit of creditors is a purchaser for value, just as if he were an individual or a trustee for a single creditor who had taken a conveyance as security for an antecedent debt.[32] The results are so striking that the doctrine deserves examination. In a Virginia case

---

[26] See POMEROY, EQ. JURIS., § 749 for a discussion of this point.
[27] Franklin Sav. Bank *v.* Taylor, 53 Fed. 854, (1893); Richardson *v.* Wren, 11 Ariz. 395, 16 L. R. A. (N. S.) 190, 95 Pac. 124, (1908); Grand Rapids Nat. Bank *v.* Ford, 143 Mich. 402, 107 N. W. 76, (1906).
[28] Holly *v.* Missionary Society, 180 U. S. 284, (1901); Spaulding *v.* Kendrick, 172 Mass. 71, 51 N. E. 453, (1908); Stephens *v.* Board of Ed., 79 N. Y. 183, (1879).
[29] See NEGOTIABLE INSTRUMENT LAW, § 25; W. VA. CODE, 1916, c. 98A, § 25.
[30] See POMEROY, EQ., JURIS., § 748 (1).
[31] In re Howe, 1 Paige 125, (N. Y. 1828); Van Heusen *v.* Radcliff, 17 N. Y. 580, (1858); Griffin *v.* Marquart, 17 W. Va. 28, (1880); Stainbach *v.* Junk Bros. Co., 98 Tenn. 306, 39 S. W. 530, (1897); see POMEROY, EQ. JURIS., § 749.
[32] Wickham *v.* Lewis Martin & Co., 13 Gratt. 427, (Va. 1856); Chapman *v.* Chapman, 91 Va. 397, 21 S. E. 813, (1895) *semble*; Gilbert Bros. *v.* Lawrence Bros. 56 W. Va. 281, 49 S. E. 155, (1904); Marshall *v.* McDermitt, 79 W. Va. 245, 90 S. E. 830, (1916).

before the separation,[33] a merchant, B, had by his fraud, secured a purchase of goods from A. Shortly thereafter he made an assignment for the benefit of his creditors. The court held that his assignee was a purchaser for value, and the rights of the creditors were superior to the equity of the defrauded vendor to recover his goods. Thus property, which in equity belonged to A, was subjected to the debts of B, although the creditors of B were not shown to have relied and probably did not rely upon the title in the debtor, or forego any rights because of the conveyance to their trustee. If an individual creditor of B had taken a mortgage or deed of trust covering these goods, he might claim some equity in being allowed to retain them, in consideration of forbearance to sue or demand other security but in the case of a general assignment it is submitted that there is, ordinarily, no value given, and, unless there are circumstances of laches or estoppel, the creditors should not be allowed to have the benefit of the property. The doctrine then had its origin in this and other Virginia cases[34] which gave no promise that it would be a useful or equitable rule. The first West Virginia case[35] to apply to the doctrine, doubted its soundness on principle. It has since, however, been several times applied in reported West Virginia cases both to cut off interests acquired under prior unrecorded conveyance[36] and interests arising under general doctrines of equity.[37] Perhaps the most effective way to strike at the root of this inequitable doctrine would be to adopt the view that the taking of title to property other than money and negotiable paper, as security for an antecedent debt is not, *prima facie,* a purchase for value, but that special circumstances of damage, by forbearance to sue or loss of other means of recovery, might be shown, to give the creditor a prior right, in whole or in part.

A trustee in bankruptcy is not a purchaser for value.[38] In spite of the provision of the National Bankruptcy Act, Amendment of 1910 to Sect. 47a (2), that "such trustee shall be deemed vested with all the rights, remedies and powers of a creditor holding a

---

[33] Wickham *v.* Lewis Martin & Co. *supra,* note 32.
[34] Wickham *v.* Martin, supra note 32; Evans *v.* Greenhow, 15 Gratt. 157 (Va. 1859); Exchange Bank *v.* Knox, 19 Gratt. 747, (Va. 1870); Antoni *v.* Wright, 22 Gratt. 837, (Va. 1872).
[35] Western Mining Co. *v.* Petoyna Cannel Coal Co., 8 W. Va. 406, (1875).
[36] Weinberg *v.* Rempe, 15 W. Va. 829, (1879); Hardin *v.* Wagner, 22 W. Va. 356, (1883); Duncan *v.* Custard, 24 W. Va. 730 (1884); Cox *v.* Wayt, 26 W. Va. 807, (1885); Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611, (1893); Marshall *v.* McDermitt, 79 W. Va. 245, 90 S. E. 830, (1916).
[37] Wickham *v.* Martin, *supra,* note 32; Gilbert *v.* Lawrence, 56 W. Va. 281, 49 S. E. 155, (1904); Throckmorton *v.* Throckmorton, 91 Va. 42, 22 S. E. 162, (1895).
[38] Carpenter *v.* Marnell, 3 B. & P. 40, (1802); *Ex parte* Dumas, 2 Ves. Sen. 582, (1754); Kip *v.* Bank of N. Y., 10 Johns. 63, (N. Y. 1813); Blin *v.* Pierce, 20 Vt. 25, (1847).

lien by legal or equitable proceedings," the West Virginia Supreme Court of Appeals in a recent case has held that the trustee in bankruptcy "takes the property of the bankrupt, not as a *bona fide* purchaser, but in the same capacity and condition that the bankrupt himself held it, and subject to all equities impressed upon it in the hands of the bankrupt. . ."[39] If the trustee were really given the rights of lien creditor, as the Bankruptcy Statute provides, he would be preferred to the holder under a prior unrecorded conveyance, under the West Virginia Statute.[40] But the case of *Custard* v. *McNary*[41] is undoubtedly right as applied to unrecordable equities.

In most jurisdictions a judgment creditor is not a purchaser for value,[42] nor is an attaching creditor.[43] Even such lien creditors then are postponed to the equities already attached to the property. But under the West Virginia recording act[44] creditors are given precedence over interests acquired under prior unrecorded instruments. They are not made purchasers for value by the statute, but are given a status in some respects superior to that of purchasers for value, since, as to them, notice is immaterial.[45] The word creditor as used in the statute has been construed to include only *lien* creditors, such as have statutory liens[46] or have secured an attachment,[47] or a judgment duly docketed. The failure to record does not prejudice outstanding non-recordable interests, such as those acquired by an oral contract of purchase[48] or the *assignment* of an obligation secured by a mortgage or deed of trust,[49] nor, presumably, to equities arising out of resulting or constructive trusts, or fraud, mistake, etc.[50] It should be repeated, however, that even the attaching or judgment creditor has no priority by virtue of the general doctrine of purchase for value, but only by the operation of the recording statute and its express provision for creditors. —*J. W. M.*

[39] Custard *v.* McNairy, 85 W. Va. 516, 102 S. E. 116, (1920).
[40] See W. VA. CODE, 1916, c. 74, § 5.
[41] Custard *v.* McNairy, *supra*, note 39.
[42] Whitworth *v.* Gougain, 3 Hare, 416, 1 Phil. 728, (1844); Dyson *v.* Simmons, 48 Md. 207, (1877); Harney *v.* First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221, (1894); see POMEROY, EQ. JURIS. § 721.
[43] Waterman *v.* Buckingham, 79 Conn. 286, 64 Atl. 212, (1906); see BOGERT, TRUSTS, p. 520.
[44] See W. VA. CODE, 1916, c. 74, § 5.
[45] Guerrant *v.* Anderson, 4 Rand. 208, (Va. 1826); Anderson *v.* Nagle, 12 W. Va. 98, (1877); Delaplain *v.* Wilkinson, 17 W. Va. 242, (1880); Snyder *v.* Martin, 17 W. Va. 276, (1880); Pack *v.* Hansbarger, 17 W. Va. 313, (1880); Abney *v.* Ohio Lumber Co., 45 W. Va. 446, 32 S. E. 256, (1898); Marshall *v.* McDermitt, 79 W. Va., 245, 90 S. E. 830, (1916); see 2 MINOR'S INST. 866, 872.
[46] Clarksburg Casket Co. *v.* Valley Undertaking Co., 81 W. Va. 212, 94 S. E. 549, (1917).
[47] Smith *v.* Rush, 79 W. Va. 228, 92 S. E. 247, (1916).
[48] See cases cited *supra*, note 45.
[49] Citizens Bank *v.* Harrison Doddridge Coal Co., 89 W. Va. 659, 109 S. E. 892 (1921); but see W. VA. CODE, c 74, § 11 (ACTS OF 1921, p. 173).
[50] See W. VA. CODE, 1916, c. 74 § 5 which makes no provision for recordation of such miscellaneous equities.