

## PURCHASE FOR VALUE WITHOUT NOTICE

Although conscious of repeating what has been said better elsewhere, I would like to say a few words upon an article in the *YALE LAW JOURNAL* for January by Professor Kenneson.<sup>1</sup> In this the learned writer, in the form of a criticism of the well known views of Dean Ames, presents an exposition of the rights of the assignee of a chose in action and the transferee from a *cestui que trust* where there has been a prior equity created by the assignor. The case stated is this: T, the owner of a chose in action, makes himself trustee of it for the benefit of C, then assigns it to A, who learns of the rights of C before collection is made. Professor Kenneson holds that C should be preferred to A, basing his contention upon two main points.

First, he says that the assignee of a chose in action, because his right may be defeated by the debtor's making payment either to the original creditor or another assignee, has only an equitable right.<sup>2</sup> As to this, it may be suggested that a legal right is one which will be enforced in a court of law and certainly the assignee has this sort of a right. But further, the fact that it may be cut off or destroyed by the action of another does not indicate that there is only an equitable right here. The same is true of many legal rights. Thus the owner of property may have his legal title destroyed by its sale in market overt, if that now anywhere exists, or by an agent who has been authorized by him to do so. If one buys personal property and suffers it to remain in the hands of the seller, it is possible for the latter to defeat his title in many cases by sale to a third person, and the same is true of course where the buyer of real estate fails to record the conveyance. In all of these cases the title is in one person while a power to affect that title resides in another, though the exercise of that power may be wrongful. The legal owner in these cases may have redress in equity to prevent the destruction of his right, but that would not justify us in saying that his rights are only equitable. So in the case of an assignment of a chose in action, the power which the assignor or a subsequent assignee has to defeat the rights of the assignee whose rights are in question does not indicate in any way that his rights are only equit-

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<sup>1</sup> 23 *Yale Law Journal*, p. 193.

<sup>2</sup> Page 212.

able. Is it true that only equitable rights can be wrongfully destroyed? There is some room in a court of law for a *bona fide* purchaser.

Professor Kenneson's co-ordinate point is that upon collection of the debt by the assignee, the title to the chose in possession which is received in payment of the debt passes through the assignor; that the assignee being only an agent, would have no more right to transfer the title to himself with knowledge of the rights of the *cestui*, than the assignor would have the right to transfer the title to any subsequent equitable encumbrancer.<sup>3</sup> The fallacy here lies in considering the assignee an agent, though it is true that the courts have invoked the fiction of agency to make a chose in action assignable. But an agent is a fiduciary; he is bound by the will and is under the control of the principal; he acts for the benefit of the latter. An assignee is not a fiduciary, his power is irrevocable and he acts for his own benefit.<sup>4</sup> Even in states where he is not allowed to sue in his own name, he is in complete control of any action he may have to bring for collection.<sup>5</sup> There is never any occasion for him to go into equity save where his legal right is threatened with destruction, and then his right is equitable only to the same extent as is the right of any legal owner of property. He is in law the *dominus* of the chose, having the legal power of control. Though acting in the name of the assignor, he is not at any step the latter's agent. If, now, he collects the money, assuming that the title to it must first pass through the assignor, something which is at least doubtful,<sup>6</sup> is there anything wrongful in his exercise of the power to transfer title to himself? He owes no obligation to the assignor; the latter is not even vicariously committing a breach of trust, for he surrendered control over the chose when he made the assignment. In fact the only method by which the *cestui* could prevent the collection of the debt would be by an appeal to a court of equity, since the *cestui* has no standing in a court of law. The question is, therefore, whether equity should interfere with the

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<sup>3</sup> Page 196.

<sup>4</sup> *Knaapp v. Alvord*, 10 Paige, 205; *Dazey v. Mills*, 10 Ill., 67.

<sup>5</sup> *King v. Miller*, 53 Or., 542; *Anderson v. Miller*, 15 Miss., 586; *Welch v. Mandeville*, 11 U. S., 152; 1 Wheat., 233.

<sup>6</sup> In the *mandatum in rem suam* of the Roman law, even before its development by the praetor, the assignee came to be considered a true successor.

exercise of a legal right which has been paid for in ignorance of the existence of an equitable claim. Admitting that equity will not help one to perfect a title where there is a prior existing equitable right, should it interfere to take from a *bona fide* purchaser of a legal right that which he has?<sup>7</sup> Using the language of the courts, there is not here that equality without which the maxim that the prior equity prevails has no application.

In regard to *Dodds v. Hills*,<sup>8</sup> which Professor Kenneson thinks to have been misinterpreted by Dean Ames, it is suggested that the latter may have been guilty of using colloquial language but that his result is sound. In that case, a trustee, in breach of trust, delivered to one Smith, a "*bona fide purchaser*", certificates of stock, Smith to have the usual right to be substituted as a shareholder upon surrender of the certificates to the company. Upon June 14, Smith learned of the existing equity; upon June 19, he surrendered the certificates to the company, and the court held that he was entitled to retain his rights as shareholder. Of course, as Professor Kenneson points out, the signing of the transfer book is a needless formality, but it is not true, as he suggests, that upon the delivery of the stock certificates by the trustee to the transferee, the latter became a shareholder. Until he was registered and recognized by the company, he had merely a right to become a shareholder,<sup>9</sup> *i. e.*, a power to compel a novation, a power, by the way, which could have been enforced specifically only in a court of equity. Is it not fair to argue, then, that if the assignee of a share of stock would cut out prior equities, though he acquires knowledge of them before he becomes a shareholder, *a fortiori*, the assignee of an ordinary debt claim should have the right to appropriate the proceeds of its payment. Although in a novation there is no chance for the title to vest in the assignor, if the contention previously made is sound, that the holder of the power to collect is not an agent, the result would be the same.

Finally, as Professor Kenneson points out, the rule should be the same in all cases of choses in action, whether legal or equit-

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<sup>7</sup> For instance in a bill for discovery, it was a good defence that the defendant was a *bona fide* purchaser. See Pomeroy's *Equity Jurisprudence*, §200 and cases cited.

<sup>8</sup> 2 H. & M., 424.

<sup>9</sup> This would seem to be correct on principle and is the rule in England where *Dodds v. Hills* was decided. Lindley, *Corporations*, 6th ed., §656; Machen, *Law of Corporations*, §852.

able, and, if we adopt the *in personam* theory, this leads inevitably to the conclusion that a purchaser from a *cestui que trust* should hold free from the equities of a sub-trustee. The opposite result which is reached in the English cases (and it must be admitted that the language in *Phillips v. Phillips*<sup>10</sup> supports this view) can be upheld only upon the ground that the rights of a *cestui* are not wholly defined by the mere procedure adopted by the courts of equity, but that he has in fact a right *in rem*.

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<sup>10</sup> 4 De G. F. & J., 208.