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Sales - Bona Fide Purchaser for Value - Credit on Pre-Existing Debt

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general. If courts continue to assume that the advertisement is an offer without closely analyzing the individual case, advertisers will be forced to publish the complete terms of any possible contract which might result from the advertisement. It is submitted that such a result would be an unreasonable burden. The public understands that advertisements are deliberately terse to give the reader a general idea of what is available without having to state the details of a possible contract. The presumption against advertisements as offers[27] must be maintained in order to promote the most efficient communication between the advertiser and the public.

A. J. Gray, III

SALES—BONA FIDE PURCHASER FOR VALUE—CREDIT ON PRE-EXISTING DEBT

Plaintiff-consignor shipped gear equipment to consignee for sale on plaintiff's account. Consignee transferred part of the equipment to defendant in what appeared to be a C.O.D. sale for $1800. Actually, consignee had an unpaid account with defendant, who credited this account with the value of the equipment, thus cancelling the account. After defendant had sold the equipment in a subsequent transaction, plaintiff brought suit to recover the equipment or its value. The trial court held that the pre-existing debt constituted valuable consideration and that defendant was a bona fide purchaser for value. The Fourth Circuit Court of Appeal reversed. On certiorari, the Louisiana Supreme Court affirmed. *Held*, a person who takes property in satisfaction of a pre-existing debt has not given valuable consideration and therefore cannot be a bona fide purchaser for value. *Diesel Equipment Corp. v. Epstein*, 246 La. 953, 169 So. 2d 61 (1964).

It has generally been held in Louisiana and at common law that a bona fide purchaser for value is one who parts with new consideration at the time of his purchase and does not have prior notice of any adverse interest sought to be enforced against the property acquired.[1] Although there is no uniform pronounce-

27. See text accompanying note 2 *supra*.

1. Port Fin. Co. v. Ber, 45 So.2d 404, 406 (La. App. Orl. Cir. 1950), wherein the court stated: "Louisiana has received the common law concept of bona fide purchaser into its jurisprudence." Quoting from Note, 23 TUL. L. REV. 420,

ment as to what constitutes value, several attempts have been made to define this term.[2] As to whether credit on a pre-existing debt constitutes value sufficient to make a third party a bona fide purchaser for value, not only are the common law jurisdictions in conflict, but the question appears to be *res nova* in Louisiana.

The most pertinent provision of the Louisiana Civil Code is article 2138, which provides that if a debtor undertakes to discharge his obligation by giving in payment a thing he has no right to deliver, the true owner may reclaim it from the creditor, unless the thing given has been consumed in use.[3] The only relevant Louisiana case is *Frantz v. Fink*, where a consignee attempted indirectly to give in payment certain earrings belonging to the plaintiff.[4] In allowing recovery of the earrings from

421 (1949), the court explained this concept as follows: " 'The common law rule that a bona fide purchaser for value and without notice prevails over the original seller has its origin in equity and is based on the theory that the legal right of the third party cuts off the equity of the original seller. . . . It is essential that the third party have no notice of the defective title.' " It should be noted that the court omitted a portion of the quotation from the Note and that this omission contains a necessary element of the entire bona fide purchaser rule, which is: "A third party who acquires property without payment of value is not entitled to protection as a bona fide purchaser." For a precise enumeration of the elements of a bona fide purchaser in relation to sales, see Barthelmess v. Cavalier, 2 Cal. App. 2d 477, 488, 38 P.2d 484, 490 (1934): "The elements of bona fides in the law of sales are: (1) a valuable consideration; (2) the absence of notice; and (3) the presence of good faith."

2. UNIFORM SALES ACT § 76: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor."

See also BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 25 (7th ed. 1948): "Value is any consideration to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." Compare the above with UNIFORM COMMERCIAL CODE § 1-201(44): "Except as otherwise provided with respect to negotiable instruments and bank collections . . . a person gives 'value' for rights if he acquires them . . . (b) as security for or in total or partial satisfaction of a pre-existing claim." *But see id.* § 1-201(9) where it is stated that a "buyer in the ordinary course of business" does not include one who takes goods in bulk or as security for or in total or partial satisfaction of a money debt.

3. LA. CIVIL CODE art. 2138 (1870): "If the debtor give a thing in payment of his obligation, which he has no right to deliver, it does not discharge his obligation, and the owner of the thing given may reclaim it in the hands of the creditor, unless the obligation has been discharged by the payment of money, or the delivery of some of those things which are consumed in the use, and the creditor has used them; in which case neither the money nor the things consumed can be reclaimed, and the payment will be good."

4. William Frantz & Co. v. Fink, 125 La. 1013, 52 So. 131 (1910). Consignee attempted to give in payment earrings belonging to plaintiff in exchange for defendant cancelling his claim against the consignee for a certain diamond brooch he had made for defendant but which consignee had pledged to a pawnbroker. Consignee pledged the earrings to another pawnbroker and defendant was to acquire his brooch and earrings by redeeming consignee's pledges with the pawnbrokers. Plaintiff was allowed to recover these earrings from the defendant.

the defendant-creditor the court apparently based its decision on the fact that the defendant had prior knowledge of the consignee's misdealings rather than on the ground that the defendant had not parted with value.[5] In the same case, the defendant had purchased another set of earrings from the consignee and was held to be a bona fide purchaser against the plaintiff, the court reasoning the defendant had parted with value and the consignee had the necessary indicia of ownership[6] to transfer a valid title.

A majority of common law jurisdictions hold that the giving of credit on a pre-existing debt in exchange for chattels does not constitute value sufficient to place the creditor in the position of a bona fide purchaser against the true owner seeking to reclaim his goods.[7] On the other hand, some jurisdictions have held the creditor to be a bona fide purchaser for value even though the only consideration given was credit on a pre-existing indebtedness.[8] However, it should be noted that if payment was

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It may be noted that this was not a true *dation en paiement*, but an indirect one, as the defendant used the pawnbroker's ticket to acquire the earrings.

5. *Id.* at 1034, 52 So. at 139: "We put our decision distinctly on the fact that the earrings were not acquired from a merchant having them for sale to the public generally, but were redeemed from a pawnbroker's shop at the request of an embezzler as a means of settlement for the embezzlement."

6. *Id.* at 1031, 52 So. at 138: "It is a plain proposition that the mere possession of movable property is not such indicium of ownership as will enable the possessor to convey a good title as against the true owner. He [the owner] must have to some extent accredited the title of the possessor—clothed him with more pronounced indicium of ownership than mere possession.

"This may be done in various ways, and one way would be . . . consent that a vendor of jewelry exhibit the jewels as part of his stock of goods, or as belonging to him." In *Frantz* the court found the "more than mere possession" to be the fact that both plaintiff and defendant dealt with Moss knowing him to be a trader in the same business, which seems to be the reasoning of the trial court in the instant case. However, in both cases the only visible indicium of ownership was mere possession. For a stricter requirement concerning indicia of ownership see Flatte v. Nichols, 233 La. 171, 96 So. 2d 477 (1957), where the plaintiff was attempting to regain possession of a car because the check given him by his vendee was worthless. Recovery was denied as plaintiff had parted not only with possession of the car, but application for title, license papers, and an invoice bill of sale.

7. See Western Land & Cattle Co. v. Plumb, 27 Fed. 598 (N.D. Ill. 1886); Hamilton v. Rankin, 108 Ark. 552, 158 S.W. 496 (1913); Truxton v. Fait & Slagle Co., 17 Del. 483, 42 Atl. 431 (1889); P. Cox Shoe Mfg. Co. v. Adams, 105 Iowa 402, 75 N.W. 316 (1898); Henderson v. Gibbs, 39 Kan. 679, 18 Pac. 926 (1888); Hard v. Bickford, 85 Me. 217, 27 Atl. 107 (1892); Buffington v. Gerrish, 15 Mass. 156 (1818); Automobile Equipment Co. v. Motors Bankers' Corp., 251 Mich. 220, 231 N.W. 559 (1930); Sleeper v. Davis, 64 N.H. 59, 6 Atl. 201 (1886); Wheeling & L.E. R.R. v. Koontz, 61 Ohio St. 551, 56 N.E. 471 (1900); Phelps, Dodge & Palmer v. Halsell, 11 Okla. 1, 65 Pac. 340 (1901); Hamilton-Brown Shoe Co. v. Lyons, 6 Tex. Civ. App. 633, 25 S.W. 805 (1894); Downs v. Belden, 46 Vt. 674 (1874).

8. See Wight v. Chandler, 264 F.2d 249 (10th Cir. 1959); Virginia Timber & Lumber Co. v. Glenwood Lumber Co., 5 Cal. App. 256, 90 Pac. 48 (1907);

made partly by the crediting of an antecedent debt and partly by the payment of cash, this generally has been held to be a purchase for value for the full amount.[9] Although the Uniform Commercial Code provides that any entrusting of goods to a merchant dealing in goods of that kind gives him power to transfer all rights to a buyer in the ordinary course of business,[10] another provision of the Uniform Commercial Code states that one receiving goods in total or partial satisfaction of a money debt is not a buyer in the ordinary course of business.[11] Therefore, the majority view at common law has apparently been adopted in the Uniform Commercial Code.

The French deal with the bona fide purchaser for value under the doctrine *en fait de meubles, la possession vaut titre*—in the matter of movables, possession is equivalent to title.[12] This doctrine does not apply if the goods are lost or stolen[13] or if the third party acquiring them has knowledge[14] that his transferor is not the true owner or is not capable of alienating them. French Civil Code article 1238[15] provides that a *dation en paiement* is not valid unless the person giving the thing in payment is the owner and is capable of alienating it. According to the French commentators,[16] the doctrine of *la possession vaut titre*

Hallet v. Alexander, 50 Colo. 37, 114 Pac. 490 (1911); Sutton v. Ford, 114 Ga. 587, 87 S.E. 799 (1916); Butters v. Haughwout, 42 Ill. 18 (1866); Strauss, Pritz & Co. v. S. Hirsh & Co., 63 Mo. App. 95 (1895); Rasmussen v. O. E. Lee & Co., 104 Mont. 278, 66 P.2d 119 (1937).

9. See Wilk v. Key, Simmons & Co., 117 Ala. 285, 23 So. 6 (1897); Titcomb v. Wood, 38 Me. 561 (1854); Kingsbury v. Smith, 13 N.H. 109 (1842); Wears & Googher Dry-Good Co. v. Crews, 23 Tex. Civ. App. 667, 57 S.W. 73 (1900).

10. UNIFORM COMMERCIAL CODE § 2-403(2): "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business."

11. See *id.* § 1-201(9).

12. FRENCH CIVIL CODE art. 2279 (Cachard's transl. 1930): "Possession is equivalent to a title with respect to personal property. Nevertheless a person who has lost a thing, or from whom it has been stolen, can claim it from the person in whose hands he finds it, during three years from the day of the loss or of the theft; but the latter has his remedy against the individual from whom he has received it."

13. *Ibid.*

14. See 2 COLIN, CAPITANT, ET DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL n° 1545 (10th ed. 1953).

15. FRENCH CIVIL CODE art. 1238 (Cachard's transl. 1930): "In order that a payment should be valid one must be the owner of the thing given in payment and be capable of conveying it.

"Nevertheless, the payment of a sum of money or of some other thing which is consumed by use, cannot be recovered from the creditor who has consumed it in good faith, although the payment has been made by a person who was not the owner or who was not capable of conveying it."

16. See 2 COLIN, CAPITANT, ET DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL n° 1545 (10th ed. 1953); BAUDRY-LACANTINERE ET BARDE, TRAITÉ DES OBLIGATIONS n° 1424 (1905).

and not article 1238 controls where a good faith creditor accepts goods by way of a *dation en paiement*; thus the true owner is generally denied recovery of his goods.

The instant case demands a determination of whether credit on a pre-existing debt constitutes value sufficient to make a third party a bona fide purchaser for value. However, there is the underlying policy determination of which of two innocent parties, plaintiff-owner or defendant-creditor, should be protected against the loss resulting from the unauthorized act of the consignee. In holding the defendant to be a bona fide purchaser for value the trial court took note of four factors: the plaintiff entrusted the equipment to a consignee engaged in the business of selling this type of equipment; the defendant acquired in good faith without knowledge of any infirmity in the title; the antecedent debt of the consignee served as valuable consideration; and the plaintiff apparently clothed the consignee with the necessary indicia of ownership to allow the consignee to pass a valid title to defendant.[17] In reversing, the Court of Appeal for the Fourth Circuit met the issue precisely and held that since defendant did not pay cash for the merchandise, but only gave credit, valuable consideration was lacking, and the defendant could not be considered a bona fide purchaser against the true owner of the property.[18] In affirming the decision, the Supreme Court stated the court of appeal properly held that satisfaction of an antecedent debt was not value within the meaning of the bona fide purchaser rule. However, in stating the rule, the Supreme Court added the requirement that in order to be a bona fide purchaser for value the party giving value must be in circumstances such that he cannot be restored to his original position.[19] The court further stated that under the provisions of the Louisiana Civil Code[20] the consignee would have discharged his obligation if the goods delivered had been of the kind con-

17. See note 6 *supra*.

18. Diesel Equipment Corp. v. Epstein, 159 So. 2d 1, 2 (La. App. 4th Cir. 1963): "Since Al Epstein, Inc. did not pay cash for Plaintiff's merchandise entrusted for sale to Zapetis [consignee], but received it as a *dation en paiement* to satisfy a pre-existing debt, Al Epstein, Inc. cannot be considered as a bona fide purchaser as against the true owner, Plaintiff."

19. 246 La. 953, 959, 169 So. 2d 61, 63 (1964), quoting from 24 AM. & ENG. ENCYC. 1171, 1173, the Supreme Court stated: " 'To constitute a *bona fide* purchaser he must have been a purchaser for value; that is he must have parted with value at the time of his purchase or before notice of the adverse interest sought to be enforced against him, so that in case he is deprived of the property he cannot be placed in the position he was in prior to the purchase.' "

20. See LA. CIVIL CODE art. 2138 (1870).

sumed in use and the creditor had in fact used them. The court disposed of the defendant's argument that the equipment having been sold in a subsequent transaction, had been consumed in use within the meaning of article 2138, by stating that selling a thing is not synomymous with consuming it.[21]

The majority view at common law is that credit on a pre-existing debt is not value; after the true owner has been allowed to recover his property, the parties can be placed in their original positions without prejudice by a reinstatement of the debt.[22] This view was adopted in the instant case.[23] It is submitted, however, that reinstatement of the debt may not always re-establish the status quo. If, for example, the debtor has become insolvent, restoring the debt would leave the creditor in a worse position. Furthermore, the creditor may, in reliance on delivery of the goods and crediting of the debt, enter into transactions he might not otherwise have undertaken, thus further worsening his position.

The minority of common law jurisdictions take the position that there seems little basis for distinguishing between money and credit on debt in defining value. This view may be supported by several reasons. First, if the defendant had actually paid cash and the consignee had converted the money to his own use, defendant would have been a bona fide purchaser for value under the existing rule. Going a step further, if the consignee used this cash to discharge his debt to the defendant and the latter accepted the funds in good faith,[24] there seems little reason for saying that the defendant would not be a bona fide purchaser for value, and the plaintiff-owner would have to look to his consignee for payment. Second, the Negotiable Instruments Law recognizes credit on a pre-existing debt as sufficient to make one a holder in due course,[25] and this rule has

21. 246 La. 953, 962, 169 So. 2d 61, 64 (1964): "On its face the article does not admit of the interpretation that selling is included in the meaning of the word 'consumed', for it is treating of 'those things consumed *in the use*, and the creditor has *used them*.' There is no basis whatever for saying that using a thing, and by such use consuming it, includes or is synonymous with selling it."

22. See VOLD, SALES 403 (2d ed. 1959).

23. 246 La. 953, 962, 169 So. 2d 61, 64 (1964): "Thus when the plaintiff recovers from Epstein [defendant], Epstein will be in the same position it was in before receiving the gears from Zapetis [consignee]."

24. Good faith as used here is intended to mean that the defendant does not have notice or knowledge that the money being paid to him is the same used by him to purchase the gears.

25. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 25 (7th ed. 1948).

been followed in Louisiana.[26] Third, if the principle "that where one of two innocent parties must suffer a loss, he who is the cause or occasion of that loss ought to bear it"[27] is applied to the instant case, the loss should fall on the plaintiff since he had chosen the consignee whose wrongful act caused the harm. Fourth, treating credit on a pre-existing debt as value would not only provide greater protection for transactions,[28] but would also recognize that credit has become a universal method of conducting business.[29]

While the decision brings Louisiana in line with the majority of common law jurisdictions, there is a more desirable basis for allowing the plaintiff to recover his goods. It is submitted that article 2138 of the Louisiana Civil Code provides adequate authority for allowing recovery by the consignor because this article expressly provides that a debtor may not discharge his obligation by giving a thing which he has no right to deliver. However, application of article 2138 raises several problems.

A similar provision in the French Civil Code states that in order to have a valid *dation en paiement* it is necessary that the debtor be the owner of the thing and be capable of alienating it. The test in French law, therefore, is "ownership" rather than the "right to deliver it." The question arises whether the redactors of the Louisiana Civil Code intended to permit a debtor

26. See Priest v. Wenzel, 168 La. 679, 123 So. 121 (1929); Exchange Nat'l Bank v. Longino, 168 La. 824, 123 So. 587 (1929); see also East Birmingham Land Co. v. Dennis, 85 Ala. 565, 567, 5 So. 317, 318 (1889), wherein the court stated: "The rule is well settled that a *bona fide* purchaser of a negotiable bill, bond, or note, although he buys from a thief, acquires a good title, if he pays value for it, without notice of the infirmity of his vendor's title."

27. Flatte v. Nichols, 233 La. 171, 179, 96 So. 2d 477, 480 (1957). In William Conner v. Hill, 6 La. Ann. 7 (1851), plaintiff entrusted certain goods to his son and the latter left Allen in charge of the goods. Allen sold them to defendant and plaintiff sought recovery. In holding plaintiff estopped to recover from defendant the court said: "It imposes upon shippers of produce for sale, the necessity of selecting with great care, honest and capable men to intrust with their property." *Id.* at 8.

28. See Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchaser*, 6 TUL. L. REV. 589 (1931). In comparing the French doctrine of *la possession vaut titre* and the Anglo-American concept of bona fide purchaser also adopted in Louisiana, the author concludes that the "Anglo-American system gives insufficient protection to transactions in movables, excessive protection to transactions in immovables; and that the French system quite adequately protects transactions in movables, and controls dealings in immovables by other devices." *Id.* at 595.

29. Long v. McAvoy, 133 Wash. 472, 480, 233 Pac. 930, 933 (1925): "To hold here that a transfer of property in payment of a pre-existing debt does not make the purchaser one for value would bring great confusion to our cases . . . . [T]he most logical rule which will more nearly lend itself to business interests [is] that one who purchases personal property of any character, paying therefor by discharging a pre-existing debt, is a purchaser for value."

to discharge his obligation by delivering a thing which he did not own simply because he had the right to deliver it. In French law, a consignee may validly discharge his debt by delivering the thing held on consignment under the doctrine that possession of movables is equivalent to title. This is not true in Louisiana. It might be argued that the redactors did not adopt the "ownership" test because it might operate too harshly but preferred to extend the debtor's right to discharge his obligation by allowing him to give in payment property over which he had the right of delivery. Assuming the redactors intended to adopt this view, the question arises: what constitutes a "right to deliver." A literal interpretation of a "right to deliver" in the instant case might cause the following results: Since a *dation en paiement* is treated as a type of sale by the Louisiana Civil Code,[30] and since a consignee for purposes of sale would have a right to deliver the thing for a *dation*, it could be contended that as the consignee in the instant case had a right to deliver the thing by way of sale, he had a right to deliver by way of *dation en paiement*. It is doubtful that the redactors of the Louisiana Civil Code intended such an interpretation. It would be logical to limit the "right to deliver" to transactions by way of sale or possibly by way of *dation en paiement* for the owner's debt. This view may be supported by interpreting the words "no right to deliver" as meaning "no right to deliver by way of giving in payment." The Supreme Court apparently adopted this approach when it stated that a debtor cannot extinguish his obligation by giving in payment a thing which he does not own.[31]

In conclusion, it is submitted that the final result reached by the Supreme Court seems desirable in light of the Code provisions and that subsequent cases of this nature should be disposed of similarly, if possible. However, to say that credit on pre-existing debt is not value within the bona fide purchaser rule appears to be desirable only where the third party who accepts the goods by way of a *dation en paiement* has not, in fact, injuriously relied on the delivery. To so limit the decision would provide a flexible

30. LA. CIVIL CODE art. 2656 (1870): "That giving in payment differs from the ordinary contract of sale is this, that the latter is perfect by the mere consent of the parties, even before delivery, while the giving in payment is made only by delivery."

31. 246 La. 953, 962, 169 So. 2d 61, 63 (1964): "The article [2138] was evidently quoted for the legal principle that a debtor cannot extinguish his obligation by giving in payment to his creditor property which he does not own, and that the true owner has the right to pursue the creditor who has wrongfully been paid with his property."

rule, protecting the owner if the parties could actually be placed in their original positions, or the creditor, if, through no fault of his own, he could not be restored to his original position. This approach would also give effect to the additional requirement of the bona fide purchaser rule stated by the Supreme Court[32] which, it is submitted, should be limited to cases involving a giving in payment.[33]

Robert A. Seale, Jr.

TORTS — THE EMERGENCE OF STRICT LIABILITY IN PRODUCTS CASES

Today a consumer is apt to select an item because of the glowing descriptions of a television commercial, or because of enticing packages and displays.[1] Courts are aware that, with the advent of mass advertising through radio, television, magazines, and billboards, consumers purchase specialized products manufactured miles away from the retail outlet by processes only experts understand[2] and that, consequently, only manufacturers, and not the ultimate consumers, are able to evaluate the worth, quality, and fitness of the products.[3] As a result, manufacturers are being held to a greater degree of care to the end that their products fulfill their representations and are free from harmful defects.[4]

Traditionally, the two theories, warranty-contract and negligence-tort, that were available to a person injured by a defective product, equally required the person to be in privity with the manufacturer. The origin of the privity requirement is uncertain;[5] it is clear, however, that growth in the area of products liability has been marked by the gradual elimination of the

32. See note 19 *supra*.

33. The following example will illustrate the need for this limitation. If a third party in good faith and without notice of any infirmity in the title of goods pays cash for them, he is undoubtedly a bona fide purchaser for value. If the rule required that this party be placed in a worse position before being protected as a bona fide purchaser for value, this would clearly be contra the established rule. See note 1 *supra*.

1. See Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1961).

2. See Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960).

3. See Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

4. Witherspoon, *Do You Have A Products Liability Case?*, 36 MISS. L.J. 30, 33 (1964).

5. See Comment, 27 Mo. L. REV. 193 (1962).