BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE; AN EUPHEMISM FOR COMMERCIAL THEFT?

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DEDICATION.

A ladder is a wonderful device, and climbing up the **same** is even more wonderful and exciting,

But saintly are the hands that patiently hold and steady the ladder.

This thesis is dedicated to my dear mother Ann Wothaya Macharia; for all the sleepless nights. You have never tired in your love for me. Your effort is not in vain.

To Mr. & Mrs. Jarvinen of Viitaila, Finland; for your material and moral support. Your altruistic acts towards me have proved quite invaluable to say the least. To you also I dedicate this work and may God bless you.

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8. Transfer of Property Act. Group 8. Received Statutes.

ABBREVIATIONS.

1. A.C. - Appeal cases.
2. All. E.R. - All England Law Reports.
3. Anset - Anstruther Reports.
4. AtK - AtKyns Reports.
5. C.B.N.S. - Common Bench, New Series.
6. Ch. App. - Chancery Appeal Cases
7. Ch. D. - Chancery Division
8. C.L.R. - Commonwealth Law Reports
9. Co. Rep. - Coke Reports
10. Croc Jac - Croke Reports
11. De, G.& J - De Gex, Jones, Temp; cranworth. chelmsford and campbell.
12. De, G.J. & S. - De Gex, Jones and Smith Reports
13. De, G.M. & G - De Gex, Macnaghten and Gordon Reports.
14. Doug - Douglas Reports
15. E.R. - English Reports
16. Hare - Hare Reports
17. K.B. - King's Bench
18. L.R. - Law Reports
19. Mag. Cas. - Magistrates Cases
20. Moo. p.c. - Moore Law Reports
21. N.S.W.L.R.- New South Wales Law Reports
22. N.Z.L.R. - New Zealand Law Reports
23. Prec. Ch. - Precedents in Chancery Reports
24. Q.B. - Queen's Bench

25. Rep.t.Finch - Reports, temp. Finch
26. Russ - Russel Law Reports
27. Sim & St. - Simmons and Stuart Reports
28. Ves. - Vesey Law Reports
29. W.L.R. - Weekly Law Reports

INTRODUCTION.

> "We must, I think remind ourselves that one of the purposes of all rules, legal or otherwise, is to protect such expectations as society approves and which one generally calls 'legitimate expectations'. The fundamental principle ***pacta servanda sunt***, that contractual promises must be kept, is a very clear illustration. So is the legal protection of property ... The critical situations are those in which legitimate expectations clash. This is apt to happen where social powers support conflicting expectations and it is at these neuralgic points that the rules of conduct become most acutely necessary".
>
> *Professor Otto Kahn Freund.*

If the words of Professor Freund[1] are anything to go by, one of the main objectives of any legal system is the protection of private property. This is essential especially in a capitalist society as it is only human that one should want to say with certainty that 'this is my own'. By this we have in mind the right to hold absolutely, real or personal property and to have the right and privileges that go together with the same. One of these rights is the right to dispose of property freely.

But the mode of disposing of this property in the market is fraught with many complexities especially where title to the same has not been registered. This is especially so in the area of personalty. More often than not, it becomes very difficult, if not impossible altogether, to register title to goods that will change hands as frequently as legal tender and a purchaser cannot definitely ascertain whether the seller has a good title.

It therefore usually happens that one buys property innocently and it later turns out that it was fraudulently

obtained property. The original owner of that property will seek legal redress via the remedy of recovery, among others. Now the law wants to come in and arbitrate between the two people; the legitimate , innocent original owner and the equally legitimate, innocent subsequent purchaser. The latter is popularly known as the bona fide purchaser for value without notice. His protection comes under the doctrine of bona fide purchaser for value without notice.

This thesis is an analysis of the doctrine of bona fide purchaser for value without notice. Being an area that has not been written on in any great detail, we intend first and foremost to trace the history of the doctrine. The doctrine has its origin in equity jurisprudence and we therefore intend to first deal with the history of equity, albeit briefly, to give the reader good understanding of the backdground against which the doctrine arose. It is also in order to keep in mind, and this we will in a later chapter raise again, the fact the doctrine is quite an old one and was developed in a very different socio-economic context.

One of our major aims is to answer the following questions; Is the doctrine applicable to our context? Should the doctrine still be supported in view of the prevailing social and economic circumstances ? Has it outlived its importance and should we establish an altogether new system of values to adjudicate upon property matters? If the doctrine is to continue to be applicable today, should it subsist in its classical form or

should it be rationalised to reflect prevailing circumstances?

Going back a bit, the doctrine is somewhat technical in that it involves some concepts or terminologies that are not easily comprehensible. For purposes of clarity, we intend to define first these terms that are fundamental to a study of the doctrine. Further, it is an analysis of the terminology and the predicates of the same that will give us an insight into the rationale of the doctrine under review.

By looking at the nature and history of equity, we will have traversed the area of its aims and purposes. Here, we propose to be very brief as it is not the history of equity, by itself, that is of crucial importance in this thesis, but more so, we intend to

trace the origin of the doctrine and the philosophical basis of the protection of the bona fide purchaser for value without notice.

A very controversial area in equity, that also calls upon our attention, is the fusion of law and equity. The question this begs primarily is; what was merged, law and equity or the adminstration of law and equity? Though the ***Judicature Act 1873-1875***[2] postulated that in a case of conflict between law and equity, equity prevailed, one wonders what was the rationale or rather the letter and spirit of the ***Judicature Act***[3]. Bearing in mind the conflicts and hostilities between common lawyers and equity lawyers, which of the two groups can be said to have triumphed by the merger? It has been stated that equity was an

appendage of the law and did not come to qualify the law.

We would therefore suggest that upon merger, there was an indication that 'the grease had outrun its importance and the wheel was again at a halt! Had equity died or had its 'lease' been withdrawn by the parent common law? This would eventually lead to the question; now that equity had been merged with common law albeit most writers have tended to shy away from the implication of the merger and therefore left the issue a very moot point, what was the fate of equitable rights, that were only recognised and indeed enforced by court of equity? Could we fairly continue with the pedantic categorization of interests as equitable and legal?

This is crux of our analytical expose and will form the jurisprudential predicate for this thesis. We submit and intend to prove that the classification of rights as legal and equitable after 1875 has been the bane of the plaintiff's rights when he attempts to enforce his rights in a court of law. It would defeat the purpose of the *Judicature Act*[4] were we to keep referring to rights as legal or equitable as a justification for refusing to enforce a plaintiff's rights. This is especially clearly grasped when one understands equitable interests as those interests that were recognised and enforced solely by equity courts.

Further to this, equity attempts to show that a legal estate will be superior and therefore defeat an equitable right or interest.

This begs the question; Is the interest of a victim of theft or fraud or other unwholesome conduct to be made equitable by the mere fact of that theft or fraud? This especially becomes manifest in commercial practice where the defence of bonafide purchaser is very ubiquitous. We intend to show that though the doctrine may have been based on equitable principles in its classical form, it gave and still gives a lot of concessions to mercantile practices and customs leading to legal interests being obliterated by future legal interests. This, we contend, defeats the fundamental principles of priority and natural justice.

It is worth noting that the doctrine comes as one of the qualifications to the rules of priority. To us, the courts of equity did not strive to really explain who the bona fide purchaser was or what were his rights and privileges. They were more concerned with creating a monster which has invaded the commercial world and terrorised property owners. Though originating in equity, we propose to show that the doctrine is no longer living within its confines (what with the merger of law and equity) but has invaded legal rights; no longer living by the rules of the game but hitting below the belt.

When dealing with matters concerning property, one is dealing with intricate scales; a conflict of interests. We wish to prove that equity was not based on morality, ethics, natural justice or fairness. For one, equity lawyers were ecclesiastics but gradually, lawyers took over. This is not to

mean that they were impartial; if anything, most jurists will tend to espouse the existing or contemporary socio economic and political status. Consequently, the then economic set up would have won the sympathy of the equity lawyers as to uphold the defence of bonafide purchaser for value without notice. We see that as a reflection of capitalistic tendencies at keeping at bay all impediments and bottlenecks to economic progress.

And because everything has to have a reason, one way or the other the courts did not want to state, straightforwardly, what their reasons were for non-interference.

As such they brought about the question of one's conscience as the peg upon which to tie property relations. To us, it is the same as if they had said to the plaintiff, "yes, we acknowledge that you are entitled to this property in law, but practically, commerce must go on, trade must not be fettered, the interests of the propertied class are thereby prejudiced and as such, we are very sorry but we cannot enforce your rights. You have no redress in this court."

Of relevence also is the doctrine of constructive notice. The severity of the strict application of the doctrine of constructive notice tends to whittle down the vitality of the doctrine of bonafide purchaser for value without notice. Here we intend to canvass the fine details of constructive notice and show to what extent, after exposure to the rigours of notice, a defendant can still cling to the doctrine or rather to the defence of bona fide purchaser for value without notice.

The issue of bona fide also invites a jurisprudential consideration. What is the yardstick of good faith? Is it personal testimony or the testimony of others? How can we tell that one did a particular thing or omitted another in good faith? This is a very grey area as even the devil knows not of man's intentions. We wish to show that the characteristics of the bona fide purchaser for value are so vague that he remains in the minds of many as a ghost whose analysis is left to the wisdom of our judges; the discretion or opinion of our arbitrators. Is it then a question of law or one of personal predilection? Can we leave property relations which are very germane to peaceful co-existence to the chance of discretion?

When the judge says, "I am of the opinion...", there is a likelihood of a great credibility gap that could mean the difference between inheritance and disinheritance for the plaintiff. This begs the interesting question; is it possible to do without the doctrine of bona fide purchaser? Can we, without undue prejudice to the defendant, adhere to the general code of priority, that is the order of creation? This to us, would help enhance commercial morality as purchasers would ever be put on their guard before purchasing property. One may be rightly tempted to argue that this would cause hypersensitivity in the market and hamper the progress of commerce. To this, we wish to respond that this is no injury to commerce when put against the loss that befalls many a people when the courts refuse to enforce their rights against bona fide purchasers for

value without notice. Commerce without morality is sheer theft.

Are courts impartial in their decisions or rather in their noble task of settling disputes? We intend to show that this could be a dogmatic application of archaic doctrines that were devoid of morality and all fairness. Equity courts were not courts of honour and this much has been conceded by equity lawyers.

We suggest that there is nothing necessarily just or moral in a doctrine of equity. Tentatively, we state that "equity and law were primarily one, were temporarily divorced and later re-united" for equity followed the law. Grease is no better than the wheel or joints it is intended to lubricate.

On the practical application of the doctrine, we intend to follow it first to the area of land law and show how its prominence has been whittled by the increased legislation on the registration of title to property. But further to that, and of crucial significance to developing countries where title to real property has not wholly been registered, we intend to show that the doctrine has relevance when looked at from the perspective of the doctrine of notice.

We at this juncture take a closer look at the Kenyan situation and examine local legislation dealing with property relations to see to what extent the doctrine is justified. This is because in previous chapters, we would be theoretically, analytically and generally examining the classical English

position as regards the history and the nature of the doctrine under review.

Going on to the commercial sector, we wish to look at the code of commercial practice applicable to personal property with an aim of exposing the inroads that have been made on the basic principles of commercial decency, if there be any decency in commerce at all. Instead of going by the old maxim of *caveat emptor*, it seems that increasingly, we are advocating for and actually espousing a new commercial maxim, '*owners beware*'. This will automatically beg the question, does the owner of property owe a third party a duty to take care of his own property? If no, then we wish to suggest that regardless of the manner in which a purchaser acquires stolen or fraudulently acquired property, the owner's rights should prevail.

With regard to banking and negotiable instruments, we wish to look critically at the concept of the holder in due course and attempt to answer the question; why are the rights of a holder in due course an exception to the general rule that choses in action should not be subject to the doctrine of bona fide purchaser?

The main sources of raw materials will be textbooks in equity particularly for the first and second chapters plus the books in various disciplines which we intend to traverse in tracing the practical application of the doctrine; land law, commercial law and the law of negotiable instruments. Because these sources tend to be few and far between, we intend to bring

them together in a frontier approach for a better appreciation of the doctrine by the reader.

As such, our research will be library - oriented. The work will also be based on case law and some other materials touching on property interests and the harmonization thereof from various legal sources.

A caveat is however hereby given that there is no claim to exhaustiveness in this work as laying such a claim would be preposterous to say the least. Suffice it to say that, along a dark path, it is a humble step to shine a light ahead for endeavouring future explorers.

INTRODUCTION

FOOTNOTES.

1. Otto Kahn Freund, '*Labour and the law*' (Stevens & Sons. London. 1977) 2nd ed. p48.
2. *Judicature Act 1873-1875*: passed with the sole aim of merging the administration of law and equity as a result of the practical problems arising from the separate jurisdictions.
3. Ibid.
4. Ibid.

CHAPTER ONE

HISTORICAL BACKGROUND OF THE DOCTRINE

1.1 Meaning of Equity.

> "Although in origin the jurisdiction of the court of chancery was undoubtedly based on principles designed to remove injustices incapable of being dealt with in the common law courts, equity was always ... essentially a supplementary jurisdiction, an appendix or gloss on the common law,and it is acccordingly not ...possible to (really) define it'

However, it is generally agreed that equity has two general meanings; the broad popular meaning and the narrow technical sense. To us, though it is generally stated that equity is more about the latter than the former sense, these two senses cannot be divorced from each other or rather be exclusive of each other.

As Hanbury put it,

> "In a wide sense, it means that which is fair and just, moral and ethical"[2].

We contend that this definition is very broad and abstract but considering the fact that the aim of equity was to ameliorate the harshness of the common law, then there was an element of fair play in the decisions that were arrived at by the court of chancery. This, at least, was the initial position of the courts of chancery.

In a statement that was apparently justifying the evolution of equity, Snell had the following to say,

> "Equity is thus a body of rules or principles which form an appendage to the general rules of law, or a gloss upon them. In origin, at least, it represents the attempt of the English legal system to meet a problem that confronts all legal systems reaching a certain stage of development. In order to ensure the smooth running of the society it is necessary to formulate general rules which work well enough in the majority of cases. Sooner or later, however, the general rules produce substantial unfairness. When this occurs, justice requires either an amendment of the rules or, if (as in England some five or six centuries ago), the rule is not freely changeable, a further rule or body of rules to mitigate the severity of the rules of law. This new body of rules (or 'equity') is therefore distinguishable from the general body of law, not because is seeks to achieve a different end, (for both aim at justice), nor because it relates necessarily to a different subject matter, but merely because it appears at a later stage of legal development"[3]

This to us, appears a very simplistic way of justifying the separateness of equity, for as it were, the development of equity was not only historical but also accidental. This is because, apart from developing a new body of rules, the Englishmen could have amended their laws. As such, saying that what was developed could merit a new name and nature by the mere fact that it developed at a later date is very wanting.

In any case, that was the attitude of a society of several centuries back. One wonders what would become of our legal system if we decided to form a separate body of laws that would be distinct from the common law of the land. We assert that this custom of borrowing nomenclature without proper understanding as to their basis or origin is very unfortunate.

We state this because upon that nebulous distinction, a whole set of consquences arise and have continued to plague the property world even todate. Or should we also be calling every amendment an equity just because it comes at a later stage in legal development? It is our humble opinion that this is an unfortunate path that British legal history took, and, being the recipients of this very history, we find ourselves being haunted by the relics of a system long gone obsolete.

A classic 19th century statement put it that,

> "Equity is no part of the law but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness and edge of the law and is a universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it but assist it"[4]

That equity is not a part of the law seems a contradiction of the general feeling that there is no equity apart from the law. This was a very separatist position on the part of Sir Nathan Wright especially when one considers the fact that it was a maxim of equity that it followed the law. Going by that, to state that it was not part of the law seems a regrettable statement. What would Sir Nathan have said after 1875 when law and equity had become fused? We feel

that his statement has long been overtaken by events.

Secondly, to state that it was also the province of equity to protect those who might be denied a remedy though they had an undoubted right is not specifically true. We feel that equity, having followed the law and aimed at assisting it, failed to remedy the injury of a beneficiary who had an undoubted right, as against the strong and to this extent, equity could be seen as having failed in its prime duty. Perhaps there is truth in saying that

> "It is not possible to define equity solely in terms of natural justice any definition must have regard to form and history rather than substance or principles"[5].

There is a general consensus among writers that equity courts were not necessarily guided by natural justice in arriving at their decisions as was manifest in the words of Fry L.J. when he said,

> "If we were sitting in a court of honour, our decision might have been different"[6].

So much for the broad sense. We will return to it at a later stage for it has much bearing on what we wish to say about the doctrine.

> "In the narrow sense, it is not synonymous with justice and a plaintiff asserting an equitable right or remedy had to show that his claim had an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction. It is not sufficient that because we may think that the justice of the present case requires it, we should invent such a jurisdiction for the first time"[7].

This is a manifestation that though equity had the aim of

doing justice in circumstances where common law could not, it very soon became rigid and unfair and as such, the principles that it had developed, would also, as of necessity become rigid and unfair with time. This is also true of the doctrine under study which, in our view, needs thorough re-examination today in view of the changed socio-economic circumstances.

Hanbury is of the view that principles of justice and conscience are the basis of equity jurisdiction but hastens to warn that it must not be thought that the contrast between law and equity is one between a system of strict rules and one of broad discretion.

Therefore, it can simply be stated that equity was a set of rules or principles that were applied by the chancery courts before 1875[8].

1.2 *Historical outline of Equity*

Historically the chancellor was a very powerful official in the monarchy and this is evidenced by the names he acquired such as "the King's secretary of state for all departments,"[9] and later 'the keeper of the queen's conscience'. He could influence the development of the law by issuing royal writs, varying or inventing new ones.

There developed a custom whereby citizens could petition the king if they felt that their grievances had not been redressed. It appears therefore that the king had extra-ordinary powers and was seen by his subjects as a fountain of all justice. As these petitions increased in number, it

became necessary to delegate his power to intervene to the chancellor. With the development of this custom, it led to the growth of a fully fledged court called the chancery as early as 1747.

The chancellors, who were originally acclesiastics had a great deal of discretion having been well-read in civil and canon law. This discretion was very wide and vague such that,

> "the chancellor would give or withhold relief, not according to any precedent, but according to the effect produced upon his own individual sense of right and wrong by the merits of the particular case before him"[10]

We are however, of the opinion that such wide discretion could easily be abused or fettered so much as to engender injustice on parties who apparently had a rightful claim. We say this because we see nothing so moral about a mortal clerical who is given the jurisdiction to decide matters in a court. Having been contemporaries with common lawyers, we would assert that they in most cases shared the same ideologies such that when saying that equity follows the law, it could have been a veil for their determined policy of non-interference with the *status quo*; the non-interference with legal rights to property. No wonder that this prompted a jurist to comment that,

> "Equity is a roguish thing. For law we have a measure .... Equity is according to the conscience of him that is chancellor and as that is longer or narrower, so is equity"[11]

To ensure the attendance of the defendent, the chancellor used subpoenas. The failure of the defendant to appear before the court would mean the forfeiture of a certain amount of money. On enforcement, the chancellor's jurisdiction was always *in personam*, that is, directed at the conscience of the defendant and he used to back his orders with threats of imprisonment for any contempt on the defendant's part.

A controversial area in the development of equity concerned the common injunction. This injunction had the effect of preventing a party from proceeding with an action in a common law court or, having obtained a judgement, from enforcing it. This was construed as meddling by equity in to the province of common law. There was a general feeling among the common lawyers that,

> "If any court of equity doth intermeddle with any matters properly triable at the common law or which concern freehold, they are to be prohibited."[12]

As such, there was a great struggle for legal supremacy between the courts of equity and the courts of common law. The chancellor was accused of leaving,

> "the common law of the realm and you presume much upon (yourself) and think, that your own conceit is far better than the common law".[13]

The hallmark of this controversy was the conflict between Lord Ellesmere and Chief Justice Coke, the latter feeling strongly that equity was an impediment to the administration

of justice. But such allegations were countered by such historical statements as that of Maitland to the effect that,

"Equity had not come to detroy the law but to fulfil it".[14]

This controversy having coincided with the reign of James I, he decided to temper it by directing Bacon, the then Attorney General, to decide the matter with the help of other counsel. Upon their advice, and perhaps with peer pressure, he decided in favour of the chancery meaning that the common injunction remained. Though there was a lull after the determination, the conflict never ended and soon it resurfaced strongly.

With increased petitions, the work of the chancellor increased in volume and there was appointed a Master of Rolls and later a Vice-Chancellor and more of these thereafter matured into an independant court as the following statement testifies,

"What had begun as an irregular process of petitioning the crown in extra-ordinary circumstances had become a regular system of courts with a recognised jurisdiction".[15]

1.3 Fusion of Law and Equity.

Before the *Judicature Acts*, there had been attempts to absorb the doctrines of equity into the common law as was shown by the *High court of Justice Bill* in 1870 which provided in its 13th amendment clause that,

"Any jurisdiction hitherto exercised by the court of chancery or by the court pf Admiralty otherwise than under the authority of an Act of Parliament is declared to be part of the common law of England and to modify such common law to the extent in which it differs therefrom"[16].

This move was opposed by many equity lawyers with Lord Romilly calling it "a foolish confusion."[17] As such, what eventually matured in 1875 as the *Judicature Act* was a compromise between the two frequently hostile systems as shown by the *Judicature Act*,

"Generally, in all matters not hereinbefore particularly mentioned, in which there is a conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail".[18]

This section was applied in the case of *Berry v Berry*[19] to prevent a wife succeeding in an action on a separation deed. The deed had been varied by an agreement not under seal, which was no defence to an action at law but the equitable rule was that a deed may be varied by a simple contract and the equitable rule now prevails.

Talk of the fusion of law and equity and you will be talking of a dispute that has flared over the years about whether it was the administration of the two systems or the systems themselves that were merged. It is generally agreed that there was need to harmonize the two systems and this was ultimately done by the *Jidicature Act*[20]. But about its effects. there seem not to be any concensus todate. There are

two schools of thought on the issue; the orthodox school stating that it is only the administrations of the systems that were merged while the second states that the Act had the effect of merging law and equity themselves.

The most notorious of the orthodox statements perhaps was the one by Ashburner to the effect that,

> "the two streams of jurisdiction, though they run in the same channel, run side by side, and do not mingle their waters"[21].

Most writers in equity feel that to declare the classification of legal and equitable interests (which is the direct upshot of the consequence and meaning of the merger) as meaningless would be confusing since it would appear that the Judicature Act intended to do away with the rules of equity[22].

Perhaps these sentiments are corroborated by the words of the then Attorney General when he was introducing the second reading of the *Judicature Bill* when he explained the purpose of the bill thus,

> "The defect of our legal system was, not that law and equity existed, but that if a man went for relief to a court of law, and an equitable ... defence arose, he must go to some other court and begin afresh. Law and equity therefore, would remain if the bill passed, but they would be administered concurrently and no one would be sent to get in one court the relief which another court had refused to give ... Great authorities had no doubt declared that law and equity might be fused by enactment; but in his opinion, to do so would be to decline to grapple with the real difficulty of the case. If an Act were passed doing no more than fuse law and equity, it would take 20 years of decisions and hecatombs of suitors to make out what parliament meant and had not taken the trouble to

> define. It was more philosophical to admit the innate distinction between law and equity which you could not get rid of by an Act of parliament, and to say, not that the distinction should not exist, but that the courts should administer relief according to equitable principles. That was what the bill proposed with the addition that, whenever the principles of law and equity conflicted, equitable principles should prevail"[23].

We have quoted the Attorney General at length in order to bring out the purpose of the Act but at the same time, we intended to bring out his orthodox position concerning the eventual effect of the ***Judicature Act***. This is because it tends to bear out statements by writers such as Hanbury, Snell and Ashburner in respect of the same, but looking at the dates when such sentiments were expressed, it calls for great care before being swept by their general statements. A lot of water has gone under the bridge since 1875 and considering that the two systems are now operating in harmony, it would be very salutary to reflect on what possible effect they have had on each other.

It would not do us a lot of good to stop at Hanbury's or other writer's opinion that the two systems are coming together but are not yet fused.

In contradistinction to the foregoing school of thought, there are those who contend that the Act had the effect of fusing both law and equity themselves. Lord Diplock had this to say of Ashburner's metaphor of two streams that flew in the same channel without mingling their waters.

> "By 1977, this metaphor has in my view become most mischievous and deceptive. The innate conservatism of English lawyers may have made them slow to recognise that by the Supreme Court of Judicature Act 1873, the two systems of substantive and adjectival law formerly administered by courts of law and courts of chancery ... were fused"[24].

We would agree with this second school of thought since the emergence of equity was necessitated by rigidity, among other things. Likewise, the fusion of law and equity was necessitated by conflict and irregularity. It would seem to us that equity had become unruly, mishievous and had outgrown its vitality, as such by the merger, it was being ferried back to where it belonged; the common fold of the common law. We would as such state that equity was nought without the law. This much has been indicated by an authority[25].

Consequently, those principles and maxims that it developed were not unique to itself and after the fusion, it would be very pedantic to continue talking of 'equitable' or 'legal' as such. To us, all the rights should have become legal because, by nature they became recognised by the courts of common law. In consequence thereof, there would not be the practice of relegating some interests to others on the mere ground of unjustified nomenclature that has no direct, if any, relevance to contemporary conditions and property relations.

Still others, less extreme, have expressed the view that we ought to be addressing our minds to the combined efffect of the systems of law and equity, and that to keep the systems

always distinct is pedantic and an impediment to the natural development of the law.

The case of ***Seager v Copydex***[26] is relevant here as an illustration that today, the court will give legal remedies for equitable claims and equitable remedies for legal claims. Though this was a frontier case, it was an indication that a plaintiff should be free to sue for damages for instance, instead of instituting an action for recovery and being met with the equitable defence of bona fide purchaser for value without notice.

We feel it would be very appropriate if we could have a uniform code for dealing with all civil matters that may come before the court. We further assert that the development of equity was influenced greatly by monarchical and religious factors. Had the development of the law been addressed squarely by the legislature, we are of the opinion that there would not have been this system of administering justice by the name of equity. There would have been either a common law court of appeal or alternatively, an amendment of the rigid laws.

Logically then, there would not have been such concepts as equitable right, equitable remedies or equities as distinguished from their legal counterparts. As will be seen subsequently from the difinition of these concepts, it is today somewhat parochial to at least say that a right or interest is only equitable and cannot be enforced against a

legal right. This, to us, is a situation of history creating a condition, unfortunate though, that 'avalanches' down to the contemporary world and, behind the shield of conservatism, continues to haunt us and preserve the ***status quo*** in the commercial world.

All in all, depsite the fact that the currency of opinion tends to be that it was only the administration of the two systems that was fused, we strongly assert that, while these opinions could be true largely from their contextual perspective, we believe that the passage of time has dealt this distinction a sure blow and if we are now aware that remedies are now interchangeable now that they are administered by one court, it can safely be stated that time has had the effect of fusing law and equity themselves.

It is on that basic premise that we progress to ask the question; if the passage of time has had the effect of fusing law and equity, how logical would it be to retain the nomenclature of decades and centuries gone if the retention only works to the detriment of the parties that equity initially aimed at protecting? For a court to deny or give relief today on the mere basis that the claim was legal or equitable is very unfair and devoid of good reason. Perhaps it is at this point that one might be tempted to ask the question; What are equitable rights? This will be our concern in the next sub-topic that deals with the nature of equitable interests.

1.4 Nature of Equitable Interests.

Some rules of equity have with time since the fusion disappeared especially those coming under the general rubric of auxilliary jurisdiction. Some however, like the division between equitable and legal interests have been reinforced and developed by property legislation and the retention has been solely justified on the fact that equity acted *in personam*.

We contend that the maxim that equity acts *in personam* is very presumptous and disregards the potentiality and indeed, the reality of the growth of equitable interests from mere rights *in personam* to rights *in rem*..

We should at this point hasten to make it clear that rights are ordinarily called equitable in contradistinction to legal interests. There is a general presumption that equitable interests are rights in personam while legal interests are rights *in rem*. We will however endeavour to show that this is not necessarily the case. For now, suffice it to look at the lexicon definitions of the two terms.

Legal estates in land means its legal proprietorship at common law, as distinct from those estates and interests which have their sanction in the jurisprudence of equity[27].

Stroud's definition of the term legal estate is more or less in harmony with those in other legal dictionaries.[28] On the other hand, walker in his dictionary[29] defines, equitable interests as interests in property created and enforced by courts of equity, such as the interest of the beneficiary

under trust property, the legal title to which is vested in the trustee alone.

These definitions are, to us, only descriptive but not analytical. They are obsolete and archaic to the extent that they state only the historical basis for the distinction of legal estates from equitable estates. We contend that the definitions in the lexicons have long been overtaken by events and cannot be taken as the gospel truth in the 20th century. A jurisprudential approach to these definitions will reveal that they are not reliable in giving the reader an understanding of the distinction between legal and equitable interests (if there is any).

Having previously stated that there could have been nothing moral or just, or fair for that matter, about the chancery court as one jurist conceded at one time [29(a)], then the definition of a right or interest as equitable just because it has its origin and recognition in equity begs several questions. It is too historical and conservative as to lack any merit. Should an equitable claim go unremedied just because it had its origin in equity and should therefore be defeated by a legal right which is enforceable by a common law court?

Underhill in his treatise on trusts[30] emphasizes the importance of the distinction between legal and equitable estates. He states that the difference is not merely of theoretical interest. A legal title, according to him,

prevails over against the whole world unless statute-barred *Wyld v Silver*[31] Whilst an equitable title does not prevail against a bonafide purchase of a legal estate for value without notice of the equitable interest affecting the legal estate as happened in Pilcher v Rawlings[32].

Again, if the second claimant was a purchaser of his equitable interest without notice, he could take priority over the equitable prior interest if he subsequently acquired the legal estate without being a party to a breach of trust. This was true in the case of *Bailey v Burns*[33].

It can therefore safely be stated that the interest of a beneficiary in trust property is called an equitable estate or interest because it was originally only recognized in courts of equity. The question that begs an answer now is; now that there are no courts of equity and courts of common law, what are equitable rights and what are legal rights? Does the retention of this archaic system of naming have any moral basis in contemporary jurisprudence? We are of the opinion that it has not.

Lord Selbourne is of the opinion that the distinction is still very vital as is manifest from the following words;

> "If trusts are to continue, there must be a distinction between what we call a legal and an equitable estate. The legal estate is in the person who holds the property for another; the equitable estate is in the person beneficially interested. The distinction between law and equity is, within certain limits, real and natural and it would be a mistake to suppose that what is real and natural ought to be disregarded, although our present system is often pushed beyond these limits"[34].

The old legal estate, therefore still subsists and though equitable interests are now recognised by all branches of the supreme court, and may therefore, in a sense be called 'legal', it has been found more convenient to retain the old nomenclature, 'legal' and 'equitable' signifying, as it does, a real and substantial difference, which would still exist, even though the terms had themselves been abolished.

We at this point differ with Lord Selbourne when he says that the distinction is real and natural and goes on to base his next argument on this premise. His sentiments seemed very much like those of his contemporaries which to us are very positivistic. He justifies the subsistence of the nomenclature without giving us at least a moral basis for its retention. As such, by our foregoing argument, we assert that there is nothing about the distinction between legal and equitable rights that is natural leave alone real. Or perhaps natural means historical in this context? We do not however intend to read a meaning into the Lord's words.

As intimated earlier, the controversy has raged on and todate, there has not been a consensus as to what exactly is the nature of equitable interests. It seems the case that most writers in equity are not willing to give their positions as regards this very important issue and they therefore leave it a moot point[35].

But we submit that this is an issue that should not be left to conjecture as it has a great impact upon real life

situations. It is from a determination of the nature of these rights or interests that the viability and the basis of the doctrine of the bona fide purchaser for value without notice can be appreciated. We therefore contend that the evasive tendencies of most jurists on this matter has led to the unjustified retention of the doctrine.

At first, the rights of a beneficiary were rights *in personam* in that he had an action only against the trustee but this situation engendered hardship to the beneficiary where the trust property passed from the trustee to a third party. To respond to this problem ofthe exact nature of a beneficiary's interest;

> "The answer was that the beneficiary's interest was effective against everyone with the exception of a bonafide purchaser for value without notice; actual or constructive of the equitable interest."[36]

According to such an argument, it would appear that a beneficiary's interest was more than personal as against the trustee but less than a right *in rem* for it could be defeated by bona fide purchaser for value without notice. As such,

> "What begun as a mere personal equity has ended as a right of property"[37].

Hanbury[38] took a middle course by saying that equitable rights were less than ownership because of their susceptibility to the bona fide purchaser for value without notice and more proprietary at common law because of the availability to equitable owners alone, of the tracing remedy.

It has often been said that legal interests are rights *in*

rem whilst equitable interests are rights *in personam*. Since rights are given only against persons and not things, what this means is that legal rights prevail against persons generally while equitable rights prevail against a limited group of persons.

This limited group comprised persons who were not bona fide purchasers of legal estates for value without notice and now includes persons who are not able to take advantage of special protective provisions in the 1925 property legislation[39]. This view has been expressed by Underhill in his treatise on trusts and trustees[40]. Many writers, though acknowledging the development of equitable interests are still reserved on the issue of the distinction.

> "To argue that a beneficiary's rights are proprietary is not to say that legal rights are the same as equitable or that equitable ownership is the same as legal"[41].

It is our view that since the fusion of law and equity[42], equitable rights have developed appreciably from what they were, that is, mere rights *in personam* to rights *in rem*. Going by their definition, legal rights are rights *in rem* and good against all the world. It therefore follows that if equitable interests had obtained a proprietary nature, they were "almost legal" save for the fact that they could be subjected to a bonafide purchaser for value without notice. We contend therefore that the retention of this doctrine in the contemporary legal spheres has been the greatest

impediment to the full growth of the equitable interests in the postfusion period.

The removal of this exception would mean that equitable interests would be good against all the world and as such be recognised as legal interests. Therefore, as against the third parties, the right of the beneficiary would be given preference.

To us, this would be a great step towards tempering conflicts in the property world. As we intimated before, the classification of rights as legal and equitable even after 1875 (a thing many writers and jurists tend to readily justify without rationality), has been the essence of the injustice done to the plaintiff when he wishes to enforce his property rights in an action for restitution or recovery. All rights under the new system should have been recognised as legal and as such, not qualifiable by equity's darling.[43]

What is equitable (by this we mean fair or just) about denying a beneficiary his rights and pegging our decision upon the conscience of the purchaser? We are of the view that a thorough consideration of the circumstances of the case would be far much fairer in deciding whose interests should prevail rather than pedantically applying archaic concepts to the detriment of one of the parties. While still at it, we know that legal rights of ownership are not necessarily good against all the world.

There are many ways in which the legal ownership of a

chattel or chose in action may be defeated. A legal owner of stolen property may not assert his title against a bonafide purchaser who buys them in market Overt.[44]

If a thief takes the property of a legal owner and sells it to another person who in good faith buys without notice of the previous ownership, then the law recognises the second or subsequent legal interest.

That, by itself, is proof of the fact that legal interests are not good against all the world and are also qualifiable by bona fide purchaser for value without notice. If that be the case then, what is the difference between legal interests and equitable interests? In contemporary commercial practice, both have become the same for they have at least one common denominator, they are prey to this 'monster' by the name of the bona fide purchaser.

If, therefore, this doctrine has its genesis in equity jurisprudence and is only available as an equitable defence against equitable claims initially, it baffles one how it stealthily crept
into the common law and became a threat even to legal interests. We contend therefore, that the system of classifying rights as legal and equitable and using that as a basis for interference or non interference was very unrealistic and has lost its viability in the contemporary socio-economic circumstances.

We submit that, stating that the doctrine has its origin

in equity is an oversimplification and classifying rights as legal or equitable as to sole basis for the retention of the doctrine is unfortunate in our present times.

> "It is a moot (point) whether the whole discussion raised by the arbitrary classification borrowed from Roman law and distorted to fit in with new facts is not a merely academical tourney with no real bearing upon the protection of the law, and, being faulty in hypothesis and unsatisfactory in result, would be better abandoned altogether"[45].

CHAPTER ONE

FOOTNOTES

1. **PETTIT. P.H.** *'Equity and the law of trusts'* (Butterworths ..London. 1979) 4th ed. p.1
2. **Hanbury;** *'Modern Equity'* (Stevens and sons. London. 1985) 13th ed. p.1.
3. **Snell. E.H.T.;** *'Principles of Equity'* (Sweet and Maxwell. London. 1973) 27th ed. p.1
4. Per Sir Narthan Wright L.K. in *Lord Dudley & Ward v Lady Dudley (1905) Prec. Ch. 241, 244.*
5. *Supra* footnote 3 p. 7.
6. *Re Cawley & Co. (1889) 42 ch. D. 209, 236.*
7. *Re Diplock (1948) ch. 465, 481, 482.*
8. The date is significant as the date when the Judicature Act was passed fusing law and Equity, though, as we endeavour to show later, the meaning of this fusion has remained a moot point todate.
9. Maitland's "Lectures on Equity". Lecture I-IV.
10. *Supra* footnote 2 p.6.
11. *Table Talk of John Selden* (ed. pellock 1927) p 43 Quoted in *'History of English Law'* (1) pp 467-468.
12. *Heath v Rydley (1614) Croc. Joc. 335.*
13. *'Reply of a Sergent to the doctor and student.* Harg. Law Tracts 323 at p. 328; quoted Holdworth *Ibid* (1) p 460.
14. This statement has been attributed to Maitland in his defence of the role of equity during the early days when

chancery was under attack from common lawyers who saw it as an unnecessary interference with canon law.

15. *Supra* footnote 3 p. 10

16. Cited (1840) 14. S.J. 548.

17. *Ibid.*

18. *Judicature Act* cap 8 Laws of Kenya. 525 (11).

19. (1929) 2 K.B. 316.

20. 1873-75. This need is manifested in the preliminary moves to absorb equitable doctrines to common law and the reasons therefor among them that there was a lot of conflict between law and Equity on matters that could be dealt with by the same court.

21. Ashburners *'Principles of Equity'* (Butterworths London) 2nd ed. p. 18. quoted in Hanbury *supra* 13th ed.

22. Hanbury states that to argue that a beneficiary's rights are proprietary is not to say that legal rights are the same as equitable or that equitable ownership is the same as legal.

23. *Hansard 3rd Series.* Vol. 216; 644, 645. quoted in Pettit *Supra* footnote 1.

24. Lord Diplock discussing Ashburners' Metaphor in *United Scientific Holdings Ltd v Burnley Borough Council (1978) A.C. 904, 925.*

25. *Supra* footnote 14.

26. (1967) 1.W.L.R. 923.

27. *'Stroud's Judicial Dictionary'* 4th ed.

28. Walker's *Oxford Companion to Law* (Oxford University Press 1980.

29. *Ibid*

29(a) Jessel M.R. in *Re National Funds Assurance Co. (1878) 10 Ch. D. 118, 128* wherein he said that the chancery was not a court of conscience but a court of law.

30. Underhill's *"Law of Trusts and Trustees'* (Butterworths. London. 1979) 13th ed. p 8.

31. (1963) ch. 245.

32. (1872) 7. Ch. App. 259.

33. (1894) 1 ch. 25, 36.

34. *Hansard (N.S.)* Vol. 214 at p. 333;
Quoted in Underhill *Supra* footnote 30.

35. For instance, Snell says at page 33 that;
"Happily, this controversial subject has not been pursued here".

36. Hanbury *Supra* footnote 2.

37. *Sinclair v Brougham (1914) A.C., 398, 441.*

38. Hanbury *Supra* footnote 36 p. 18.

39. Law of property Act. 1925.

40. *Supra* footnote 30.

41. *Supra* footnote 36.

42. As per the *Judicature Act 1875.*

43. The term equity's darling has been given to the doctrine of bona fide purchaser for value without notice. This could well be an indication of the unreasonable

preference by equity to the defendant in an action for recovery by the plaintiff.

44. *Sale of Goods' Act* chapter 31 Laws of Kenya at *s27* protects the bona fide purchaser for value without notice.

45. Turner; *'Equity of Redemption'* (1931. ed) p 152 quoted in Hanbury *Supra* footnote 2.

2.0 CHAPTER TWO

THE DOCTRINE OF BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE.

2.1 Introduction:

In this chapter, we intend to carry out a critical analysis of the doctrine under review for purposes of a clear understanding of its nature. It is interesting to note how readily writers and jurists pronounce the doctrine as a protection of the defendant without as much as giving its rationale. It would seem like it has become the norm that in determining issues relating to property relations, the doctrine becomes an automatic qualification. It is our intention to analyse the doctrine of bonafide purchaser with, one, a view to making it less mythical, and, two, to put it in its proper perspective in contemporary times.

The doctrine, as it is exposed in equity books, is in its classical form and one writer acknowledges that the principles discussed in his book in respect of the doctrine are those that prevailed during the time when title to property had not been registered[1]. We are interested in exposing the present status of the doctrine as a defence in this era of increasing registration of title to property. It is our hypothesis then, that, with increasing registration of title to property, the doctrine is on the wane and with an ideal situation of registration of all title to property, one wonders what will

be the future of the doctrine of *bona fide* purchaser for value without notice. But before we move on to the doctrine itself, we will dwell, albeit briefly, on the question of prorities from which, as we will soon show, stems the doctrine of purchaser for value without notice.

2.2 **Priorities**

Mention property and you will be talking of conflicting property rights. It usually happens that in dealing with property, one is tampering with an intricate balance whereby the vesting of one person with property means divesting another of these rights. The law, as a regulatory device, has therefore come up with principles or rules for the harmonization of these conflicts in an amicable and acceptable manner. This is the ranking of conflicting property rights and is the province of the rules relating to priority.

We do not intend to dwell at length on the rules relating to priority save to the extent that they are the rules to which the doctrine of *bona fide* purchaser for value without notice comes as a great exception.

The rules of priority are summarized by snell in his treatise[2] as follows;

In determining questions of priority, it is best to consider first whether the rule in *Dearle v Hall*[3] applies, that is, whether or not the conflict is between successive dealings in an equitable interest in real or personal

property. This rule deals with the order of notice where priority primarily depends upon the order in which notice of the dealings in the relevant property has been received. Indeed, as was said in ***Stocks v Dobson***[4],

> "Equitable titles have priority according to the priority of notice".

If the rule in ***Dearle v Hall***[5] does not apply, the question will have to be settled according to the basic rule of the order of creation.

When it comes to the order of creation, the rule is that estates and interests primarily rank in the order in which they were created. This is in keeping with the latin maxim; ***Qui prior est tempore potior est jure***[6]. Snell states that where the equities are equal and neither claimant has the legal estate, the first in time prevails, since "every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more"[7].

But it should be noted here that under the doctrine of purchaser, the maxim applied is that when the equities are equal, the law prevails, that is, it would seem, regardless of any question of priority. The one with a legal title is given priority. But this rule of creation is modified by rules relating to;

(i) the purchaser without notice

(ii) fraud, estoppel and gross negligence

(iii) registration

(iv) overreaching

From the above, it can be seen that generally, there are rules of priority in dealing with conflicting property interests and, secondly, the doctrine under review comes as one of the exceptions to the general rule of ranking of interests according to the order of creation, which rule is only too logical. The order of creation is therefore the general rule while the purchaser without notice is an exception to the general rule.

But it is interesting to note how this exception has been emphasized and supported by statute that one wonders whether it has become the general rule. It is for this reason that we propose to examine the doctrine in the face of changed circumstances and show that it would perhaps be better if we could do away with it and abide by the rules of priority save as they may be otherwise qualified by other exceptions which exceptions, we do not intend to deal with in the present work. It should be stressed that we are at this point dealing with the English position.

2.3 **The Doctrine.**

Nature

Basically, the doctrine is a comprehensive one in that, as it appears even in statutes, it is not capable of being compressed to one word and as such, it remains a phrase that

must be taken as a whole. It is however our opinion that the very lengthy nature of the phrase is a manifestation of its indeterminacy. It would seem that the doctrine lacked a shorter description and had to be expressed in lengthy, and in our opinion, technical terminology.

It therefore becomes interesting and of significance to go through the motions of analysing the various elements or ingredients of the doctrine and examine its rationale. It is not uncommon for one reading a property statute to be met by the qualification, "except if he is a bonafide purchaser for value without notice", or "save where the property has vested in a purchaser for valuable consideration without notice" or other related phrases. The ubiquitous nature of this exception makes one wonder what or who is the bona fide purchaser for value without notice. Is he a reality or a mere fiction of the law? Does such a person exist given the conditions that he, theoretically at least, must fulfil before he can be afforded the protection?

The doctrine of *bona fide* purchaser has its origin in equity jurisprudence for as we will show later, it is more concerned with conscience and the concepts of fairness and justice. It comes as a defence in an action related to property for instance, recovery of possession. As was said in the case of ***Phillips v Phillips***,

> ".... the defence of a purchaser for valuable consideration is the creature of a court of equity and it can never be used in a manner at variance with the

elementary rules ....[8]

It has been said that the defence of *bona fide* purchaser should be used as a shield but not as a sword. That means it can meet a claim but cannot be a cause of action in itself. Again, the defence must be pleaded by the defendant, otherwise, the defendant who wants to rely on it must actively have recourse to the defence. The court cannot infer *bona fide* purchase in his favour and this much was said in ***A.G.V. Biphosphated Co.***[9]. There is, as such, no presumption of good faith, consideration, legal estate or lack of notice. It has however been stated that,

> "The doctrine is not a rule of property for it does not determine questions of title between parties. It is only available by way of defence .... a shield in the hands of the defendant .... it means equity will refuse to interfere to aid the plaintiff because it would be unconscionable that the plaintiff should have what he seeks to obtain. It enforces no right but simply refuses to interfere on plaintiff's behalf[10].

In our opinion however, the statement seems an evasive way of explaining away the doctrine. One cannot see much difference in a rule, per se, and any other device that may be used to emphasize or alternatively qualify the rule. If it should emphasize a rule, then, in our view, the result is the same, regardless of its being a defence.

Perhaps for a better appreciation of the extent to which the purchaser for value is protected, the words of James L.J., in ***Pilcher v Rawlings*** might throw a light;

"Such a purchaser's plea of purchase for valuable

> consideration without notice is an absolute, unqualified, unanswerable plea to the jurisdiction of this court. Such a purchaser ... may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the ***bona fides*** or ***mala fides*** of his purchase and also the absence or presence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea... then, according to my judgement, this court has no jurisdiction whatever to do anything more than let him depart in possession of that legal estate, that legal right , that legal advantage which he has obtained, whatever it may be. In such a case, a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him"[11].

It is therefore the case that a ***bona fide*** purchaser for value without notice can destroy the beneficiary's interest under a trust so that a trustee can pass good title to such a bona fide purchaser. In our opinion, equity gave the plaintiff a raw deal in cases of trusts by inventing the concept of trusts and leaving the beneficiary at the mercy of a fraudulent trustee.

Of significance is the fact that the doctrine does not apply to trusts for sale. A trust for sale is one where the settlor leaves the property to a trustee with specific directions that the property be sold and the preceeds to be settled to the beneficiary or beneficiaries, as the case may be. The interest of the beneficiary attaches on the trust money upon the coversion by the trustee. As such, a beneficiary under a trust for sale cannot follow property into the hands of a third party who is not even bound to make inquiries. The remedy available for the beneficiary is strictly against the trustee for the recovery of the proceeds.

The doctrine of purchaser however applies differently to personalty. This is in contradistinction to its application to realty. As such, a purchaser of personalty is not bound to inquire into title before making a purchase. This is because personalty is not usually registered and, if registered, the interests outstanding therein are not indicated, and it would not augur well to expect that, for instance, a purchaser, of stock-in-trade or a consumer for that matter, should inquire the title of a retailer. This in our view has been one reason why the doctrine has continued and will in future continue to thrive in the personal property arena.

There are three instances of the defence of purchaser;
(i) Where an application is made to an auxilliary jurisdiction of the court by the possessor of a legal title, as by an heir at law, which was the case in ***Basset v Nosworthy***[12] or by a tenant for life for the delivery of the title deeds; ***Wallwynn v Lee***[13] and the defendant pleads that he is a ***bona fide*** purchaser for valuable consideration without notice, the court gives no assistance to the legal title.
(ii) The second class of cases is the ordinary one of several purchasers or incumbrancers each claiming in equity and one who is later and last in time succeeds in obtaining an outstanding legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a court of equity. To a bill filed against him ...by a prior ...

encumbrancer, the defendant may maintain the plea of purchaser for valuable consideration without notice; the principle is that a court of equity will not disarm a purchaser, that is, will not take from him the shield of any legal advantage. This is the common doctrine of ***tabula in naufragio***[14].

(iii) Where there are circumstances that give rise to an equity as distinguished from an equitable estate - as for example an equity to set aside a deed for fraud or to correct it for mistake - and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice; the court will not interfere.

These instances were outlined by Lord Westbury L.C., in ***Phillips v Phillips***[15]. From the above, it can therefore be said that the doctrine can qualify not only legal estates, but also equitable estates and equities. But this would be a contradiction of the general principle that it operates in favour of a person who has acquired a legal title as against a person who has an equitable interest in the property. Perhaps instance (i) is an acknowledgement on the part of the court that the doctrine has to day evolved as to qualify even legal estates. But at this point, one wonders why the doctrine of constructive notice should not operate to defeat the estate of the purchaser.

At this particular point, it may be appropriate to re-examine what exactly the estates are that the doctrine is concerned with. Ordinarily the doctrine is concerned with the

purchaser of a legal estate as against an incumbrancer who has an equitable estate and not vice versa. This we will return to later when looking at the various constituents of the doctrine. In ***Phillips v Phillips***[16], it was said that the doctrine does not apply to equitable interests since an equitable interest is prima facie evidence of third party interests.

Though it is not very clear to what property the doctrine applies, it seems that some writers in equity[17] tend to concentrate more on its application to realty than to personalty. Tiley J. in his book[18] is not very definite and says that the rule applies to realty and perhaps to personalty, but not to choses in action, assignees of which take subject to all prior equities.

The above statement cannot be said, in our view, to be authoritative for two reasons; first, the word 'perhaps' in the statement suggests that the matter was not settled in the writers mind but it does not mean that the rule cannot apply to personalty and secondly, not all choses in action are taken subject to equities and this is evidenced by the exemption of negotiable instruments from this impediment. Perhaps the better view is that taken by the court in ***Taylor v Blakelock***[19] that the doctrine applies as much to personalty as to realty. This is because the doctrine will be encountered in real[20] as well as personal property statutes[21].

The above view is further emphasized by the case of

through the net?

A. Bona fide.

Bona fide is defined[25] as; in good faith, honestly, without fraud, collusion or participation in wrong doing. To us, good faith seems to be a very abstract terminology for there is no scale on which to measure good faith. It is left only to the defendant to have his word against that of the plaintiff concerning whether he acted in good faith or not. Placed in juxtaposition with the conditions of notice, especially constructive notice, this requirement seems to lack significance especially where one negligently fails to inquire into the title to the property he is purchasing. We are therefore of the opinion that good faith is not a good measure for the upholding of a purchaser's legal interest. It is very hard to know what is going on in a man's mind and even if he had qualms when purchasing an item but went ahead against his conscience and purchased the same, then it would be very hard for the court to know whether or not he acted in good faith. What we call good faith could as well be bad faith or ***male fides*** especially where the purchaser satisfies all the other conditions.

This especially ties up with the requirement of notice, which is a major requirement such that if a purchaser can prove good faith and no notice, then the court will refuse to interfere on behalf of the plaintiff. We say this because good faith is an abstract notion and need not be physically

manifested. If it remains at the thought level, then no one will ever come to prove or even disprove that the defendant acted in good or bad faith. As such, it is a requirement that can as well be done away with.

B. Purchaser

But at this point, one might stop and ask, who is a purchaser? In ordinary parlance, a purchaser is simply a buyer or one who buys goods. But in the context of this doctrine, which as we have intimated therebefore is one of general application, it means that and much more, and it is very clear that purchaser includes a lessee or mortgagee[26]. As such, it can be deduced that over and above ordinary sale and purchase transactions, the doctrine applies to leases and mortgages.

C. Legal Estate.

The general rule is that the purchaser must have obtained a legal estate. This was said in the case of ***Wigg v Wigg***[27] that a purchaser of a mere equitable interest cannot have a claim that is superior to that of the beneficiary for both are equal and the fact that the beneficiary's equity is prior in time, then it will prevail. In the case of ***cave v cave,***[28]

> The sole trustee of a marriage settlement used the trust funds to purchase lands in breach of the trust, and took conveyance in the name of his brother. The brother then created a legal mortage in favour of A and an equitable mortagage in favour of B, neither A nor B having notice of the trust. It was held that A's legal mortgage had priority ever the equitable interests of the beneficiary but that those interests had priority over the equitable mortgage.

But it has also been said that a legal estate is not always required for one to rely on the defence of bona fide purchaser[29]. In fact, in the case of ***Malden v Menill***[30], Lord Hardwicke had refused the rectification of an instrument for mistake, as against a purchaser of an equitable interest without notice on the ground that the mistake should not turn to the prejudice of the purchaser. There are three instances where the requirement of legal title is not mandatory for the defence of purchaser without notice to avail itself to the defendant.

The first of these is where a purchaser gets a legal title and has it transfered to a trustee for his benefit. That means that he has a better right to the legal estate. He becomes a beneficiary but as between him and the original owner of the estate, he has a better title to the legal estate though his is also an equitable estate and the courts of equity will not disarm him or rather remove the shield of bona fide purchaser without notice. This was well illustrated by the case of *Taylor v London and Country Banking Co.*[31].

> In the case of *Thorndike v Hunt*[32]T, held certain money on trust for A, he was ordered to transfer the money into court. The transfer was made and the money was treated as belonging to A's estate. It then appeared that the trustee had obtained the money by fraudulently misappropriating funds which he held in trust for B, and the question was whether B had a right to follow the money into court. It was held that he had not, because A had in effect obtained the legal title.

The second situation is where the purchaser subsequently

acquires an outstanding legal estate. Snell puts it that ,

> "A purchaser without notice who, at the time of the purchase fails to obtain either a legal estate or a better right to one will nevertheless prevail over a prior equity if without being party to a breach of trust, he subsequently gets in a legal estate, even if he then has notice of the equity. Between himself and the owner of the prior equity, the equities are equal, and there is no reason why the purchaser should be deprived of the advantage he may obtain at law by superior activity or diligence"[33]

Thirdly and lastly, is where a purchaser of an equitable estate is placed against a possessor of mere equities. A bona fide purchaser in the face of a holder of a mere equity, for instance, a right to rectification or a right to set aside a conveyance. This was stated by Lord Wilberforce in *Shiloh Spinners Ltd v Harding*.[34]

These three instances come, in our view, as openings for the purchaser to defeat the interests of the equitable owner. Considering that the doctrine is an exception to a general rule, these instances are exceptions and this, in our view, is a clear lack of determinancy on the issue. The exceptions to the requirement of legal estate are coming as a further prejudice to the equitable owner of property. To this extent, therefore, the rule can be seen as lax and favourable to the purchaser but doubly detrimental to the equitable owner of property.

This brings out the whole issue of why estates have to be classified as legal or equitable. It is, as we stated in the previous chapter[35], the case that had we abandoned the

classification of rights after the fusion of law and equity, we could not protect the purchasers on the mere ground that he had acquired the legal title.

As it were, the Judicature Acts[36] had merged the jurisdictions of courts of equity with those of common law courts, and what used to be the exclusive and auxilliary jurisdiction of equity courts became part of the jurisdiction of the courts of common law. It cannot therefore be rightly argued that equity was merged into common law and still retained its peculiarities as they were.

As a result, the court of Judicature could not rightly retain the distinction while it was supposed to administer both these jurisdictions. It is our view that it could henceforth vary or even interchange the remedies that it could give as was illustrated in *Seager v Copydex*[37]. The recognition of rights by a common law court which had full jurisdiction would, in our view, make all rights recognised there as legal rights and therefore enforceable as such.

Without having to overemphasize what we have intimated herebefore, it would be very simplistic to assert that the *Judicature Acts*[38] simply intended that equity and law remain distinct but administered by one court. This, in our view, would be in total ignorance or disregard of the events preceeding the enactment of the *Judicature Acts*[39].

D. Value.

This is yet another of the constituents of the doctrine

of bona fide purchaser. It is conceded that the word may have different meanings[40] but it can be said to be the price which a commodity will fetch when exposed to competition. In the context, it is usually refered to as valuable consideration.

The requirement here is that the purchaser must have provided value or that price which he must pay for the legal estate before he can rely on the defence in a case of a claim by a plainfiff.

As was stated in *Thorndike v Hunt*[41], this value could be money or money's worth. By money's worth , it could be anything that has the worth equivalent of or could be converted into money. It could therefore be in kind or what is referred to as consideration in contractual situations.

It has been stated that consideration must be valuable and not nominal.

This is however a question of fact rather than one of law. In fact, the consideration need not be adequate as was stated in *Park v Dunn*[42]. Again, the consideration must move from the purchaser *Redman v Permanent Trustee Co.*[43]. This was again well stated in the case of *Dillwyn v Llwelyn*[44] that;

> "A voluntary agreement will not be completed or assisted by a court of equity in cases of a mere gift. If anything be wanting to complete the title of the donee, the court of equity will not assist him in obtaining it; for a mere donee can have no right to claim more than he has received. In order to enable a defendant to set up the plea of purchaser for value, it is unnecessary for him for to assert and prove that the transaction in regard to which he desires to set up the plea was a contract of sale and purchase in the strict sense. It is, in our (view), sufficient if he can show that the

> transaction consisted in the transfer or handing over to him of property by the plainfiff, or some other persons through whom the plaintiff claims, and that there should move from the defendant, some consideration valuable in the eye of the law, for example, the suffering by the defendant of some detriment"

It is therefore clear that the law will not assist a volunteer or donee for what he receives is subject to all burdens it was subject to when in the hands of the donor. But it has been suggested that marriage consideration is sufficient in the case of *Jackson v Rowe*[45].

E. Notice.

Notice can be said to be the awareness or knowledge of the existence of a certain fact or set of facts. The doctrine of bona fide purchaser seems to be very much hinged upon this element and it has been written on broadly in comparison with the other elements which are apparently just glossed over and are not stringent. The importance of notice emanates from the fact that equity operated or rather acted upon the conscience of the person and so long as one acted with a clear conscience, he could not be affected with liability of that which he was not aware of. Therefore, equity did not operate along the lines of strict liability such that ignorance was a good defence for a person who came into property through a fraudulent seller.

It would therefore seem that, on the ground of this element of notice, equity protected a purchaser who, upon being faced with a claim by an equitable owner of property

cold say, "I did not know that your interest existed or that it was outstanding". Such a claim was enough to kill or smother the interests of the equitable owner.

It is however our contention that, it is very inequitable to hinge peoples' rights or interests on the mere knowledge or ignorance of those rights by strangers.

Notice can be divided into three heads; actual notice, imputed notice, and constructive notice. The last two are not essentially different as they are implied by law and sometimes imputed notice has been regarded as a type of constructive notice, being not actual but only implied by law. We will now examine the different heads of notice.

(1) **Actual notice.**

Walker[46] defines notice, that is, actual or express, as that conveyed by one person to another orally or in writing. It would seem that actual notice must be direct notice, that is, from the giver of such notice to the recipient and not through third persons.

Snell[47] states that such notice must be by an interested person and in the course of negotiations. But what is meant by an interested person? An interested person could mean several things as property maybe the subject of several interests. But this restriction of notice only from interested persons seems, in our opinion, to be very technical as it may happen that an uninterested person may have knowledge, and superior knowledge for that matter, of facts

that affect property which facts an interested person may not have.

It would therefore adversely effect the beneficiary, if a purchaser is informed of equitable interests outstanding by a stranger and yet continued unfettered with the sale. 'In the course of negotiations' is yet another limitation that does not augur well to the claim of the plaintiff in that the implication here is that if the purchaser acquired notice without the relevant negotiations for the sale, he would go scot free. It is our contention that knowledge should not be restricted to the time of negotiations as this is a very technical requirement. It should not be allowed to operate to the favour of a purchaser whose mind has been affected with notice.

It has been said that actual notice means knowledge by the party concerned as was the case in ***Williamson v Bars***[48], that mere rumours or vague reports of a fact do not constitute notice of that fact. This however, should be looked at in the light of ***Lloyd v Banks***[49], which laid down that reasonably explicit information, even from an uninterested party, cannot be safely disregarded. It was in this latter case where it was said that one can regard information if it is of a kind that a reasonable businessman can act upon though from an uninterested person.

We are in agreement with this second position that information need not come from an interested party. If the

purchaser should acquire knowledge that operates as a warning to him, then he cannot plead ignorance just because the knowledge was communicated by a stranger. If it is enough to cause an apprehension then it should bind the purchaser regardless of the source.

However, it was stated in ***Reeve v Pope***[50] that the notice must be clear and distinct. This is supported by the view of Lord Kingsdown in ***Barnhart v Greenshields***[51] wherein he said;

> "We now come to the parole evidence of notice. Upon this subject, the rule is settled that a purchaser is not bound to attend to vague rumours; to statements by mere strangers but that a notice, in order to be binding, must proceed from some person interested in the property".

It seems from the currency of opinion that actual knowledge must strictly be direct and clear and from interested persons. The law here is very much in favour of the purchaser but it is our contention that the latter holding that information from strangers should not be disregarded is a concession that the classical position as to notice works unfairly for the plaintiff.

Under the statutory system of registering charges[52], registration of a charge is deemed to be actual notice to all persons so long as the registration remains in force. Land charges are therefore ineffective against a purchaser unless registered. The making of charges registrable under the ***Land charges Act 1925***, has had the effect of whittling down the doctrine of bona fide purchaser even in the area of

unregistered land; this is because ordinarily, unregistered land in respect of the doctrine under review is just like personalty. With respect to registered land, registration of title is notice to all the world but with unregistered land, a purchaser would have no way of ascertaining the validity of the title of his vendor.

This is in fact the environment within which the doctrine of purchaser without notice sprung. As such, the law can on this point be seen to be protective of the beneficiary by making land charges registrable. This is a point at which we wish to stress the fact that with the gradual registration of title to property, the doctrine will continue to wane, if only in the real property area, and in theory, it will eventually be supplanted by the system of registration which is distinct from the doctrine of bona fide purchaser for value without notice[53].

(ii) *Imputed notice*

As the name suggests, the notice is imputed on the purchaser by law if he employs an agent to conduct such matters as sale on his behalf. This is in accordance with the maxim, ***Qui facit per alium facit per se***[54]. A purchaser, as such, is presumed to know that which his agent knows or ought to know on the rationale that when he employs the agent, he does so at his own peril.

It was thus laid down in ***Wyllie v Pollen***[55] that a peson who employs an agent in a transaction is presumed by law to

have brought to his notice all information which his agent has acquired or ought to have acquired in the course of the transaction and relevant to it; a presumption that is not normally rebutted unless the agent was involved in fraudulent activity that resulted in the creation of the other equity.

This is, in our view, as it should be, because, if a purchaser employs an agent, then he takes chances by trusting the agent to know that which he ought to know and communicate it to his principal. If he should fail to do that, then the purchaser cannot be heard to say that he had no notice because his agent did not communicate the information to him. It was in this respect stated by Lord Heatherly that,

> "The purchaser of an estate has in ordinary cases, no personal knowledge of the title, but employs a solicitor and cannot be allowed to say that he knew nothing of some prior incumbrances, because he was not told of it by his solicitor. It cannot be left to the possiblity or the impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain."[56]

However, for this notice to be effective, it must be communicated to the agent and in the same transaction[57]. The implication here is that if the agent receives notice of an interest or incumbrance in the ordinary course of his business but in a separate transaction from the one in question, then that notice cannot be imputed to the purchaser.

One important qualification of the imputation of notice to a purchaser is where he can show that, the notice is

tainted with fraud, that is, on the part of the agent. This was the case in *Cave v Cave*[58] where;

> A, a trustee had improperly invested trust money in the purchaser of land; the legal estate was conveyed to his brother B, for whom A acted as solicitor and who made legal mortgages to C and equitable mortgages to D. Fry. J. held that the mortgagees took without notice and that the first mortgagee, as a purchaser for value without notice, and having the legal estate had priority over all.

It therefore came as a contradiction in the case of *Bradley v Riches*[59] where it was held, inter alia that,

> "the presumption that a solicitor has communicated to his client facts which he ought to have known cannot be rebutted by proof that it was in the solicitor's interest to conceal the facts."

This is an instance of constructive fraud which the agent perpetrates on the part of the client and, by stating that proof of this is not enough to rubut a presumption is very harsh on the purchaser. It can therefore be seen that the concept of presumed notice can do irreparable harm to the purchaser who is deceived by his agent as to the true facts of a particular case and proceeds with the sale without notice. No wonder that the doctrine of presumed notice has been referred by a certain jurist as one;

> "which has been found to work very grievous injustice to honest men" [59(a)].

(iii) *Constructive notice.*

> "Whatever is sufficient to put a person upon inquiry is notice of all the facts to which that inquiry will lead when prosecuted with reasonable diligence.[60]"

Balentine[61] goes on to define constructive notice as such circumstances as the law deems the equivalent of actual notice since they are such as, under the law, put a party upon inquiry.

It is based upon a presumption of notice which is so strong that the law does not allow it to be controverted. It is as such clear that constructive notice is not actual notice. One need not have any notice at all but the law presumes notice on the part of the purchaser. But it seems that this can prove to be very harsh on the purchaser.

Perhaps it would be more instructive to look into the circumstances under which constructive notice will arise. Various writers have different categorizations of the instances where constructive notice will be implied by the law but however indicated, they have a central theme and hence some similarities.

Where a purchaser is aware of an incumbrance but fails to inquire. This will mean that he had knowledge of a fact which upon proper inquiry, should have led him to full knowledge and prevent him from purchasing.

Failure to inquire altogether. Where a purchaser fails to make any kind or sort of inquiry, then he cannot protect himself by saying he did not have notice.

The law will fix him with constructive notice of that which he would have discovered, if he had as he was rightly supposed to.[62] Failure to investigate the known defeats the

equity of the purchaser. If a purchaser has knowledge that would have put a reasonable man upon inquiry but he fails to make such inquiry, then he will be fixed with constructive notice and he cannot as such fall upon the doctrine of purchaser without notice. The law will not allow a careless defendant to defeat the claim of a plaintiff if by reasonable diligence, he would have acquired the required knowledge.

In *Wilson v Hart*[63], Turner L.J., said that,

> "Generally speaking, a purchaser or mortgagee is bound to inquire into the title of his vendor or martgagor and will be affected with notice of what appears upon the title if he does not so inquire".

Failure to investigate title of freeholder by lessee means that he has constructive notice of the details he would have discovered upon inquiry.

In the case of *Patman v Harland,*[64] it was held that;

> "a purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor has constructive notice of the contents of such deed and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title".

Supportive of the above position is the statement by North. J. in *Gainsborough v Watcombe Terra Cotte Co*[65] where it was said that a purchaser cannot avoid constructive notice by omitting to investigate the title to the property or set up the legal estate as against the title of a third person when he himself;

> "did not take the usual ordinary precaution to make inquiry about it but was content to accept the title, to

take a conveyance and to advance his money without inquiry of any kind or sort".

This takes us back to the legal fiction of the reasonable man, which is what the doctrine of constructive notice is hinged on. What exactly do we mean by saying "that which a reasonable man would have done?" We contend that anybody could be a reasonable or unreasonable man. Action or reaction is not measured against a fixed yardstick but will vary according to the circumstances and as such what will be reasonable in one set of circumstances will be quite unreasonable in another.

After all has been said and done, it will remain a question of fact as to who is a reasonable man. It is possible, depending on the discretion of the person hearing the matter, to protect conduct of a purchaser who pleads no notice on facts which another judge would consider unreasonable and hence untenable in law. The divide may therefore be so flimsy as to lack any certainty. A defendant who appear before a conservative court may have the day where the bench decides in his favour that he acted reasonably in his inquiries and could as such be protected by the defence of bona fide purchaser for value without notice. Failure to ask for title deeds without reasonable excuse means the purchaser takes subject to the mortgage. Anyone purchasing land is therefore supposed to check whether there are other incumbrances upon such land before going on with the purchase.

In *Oliver v Hinton,*[66] it was held that in order that a purchaser for value who has acquired a legal estate without notice of a prior equitable mortgage of the property may be postponed to that mortgage, it is not necessary to show that he has been guilty of fraud or negligence amounting to fraud; it is sufficient that he has been guilty of negligence so gross as to render it unjust to deprive the prior mortgagee of his priority.

Therefore, negligence on the part of the purchaser is very material in that he fails to do that which he ought to do in the ordinary circumstances. It has been stated that a purchaser who, in the course of his inquiries, received notice of a relevant fact is affected with notice of all ... relevant facts which he would have discovered by further proper investigation; ***Lyons v Imperial land & Building Co. Ltd.***[67] unless he received a reasonable excuse[68].

Apart from investigating the title, a purchaser of land, is expected to investigate or inspect the land itself and failure to do that imputes constructive notice on the purchaser, for he thereby neglects to check whether there is any current occupier. This was said in ***Daniels v Davidson***[69]

Though this requirement is a search for certainty, it works unfairly and has some practical bottlenecks. It is not practically possible to go checking or ascertaining the rights of every occupier you find on the property that you wish to purchase. On land that is supposed or intended to be

mortgaged, there may be relatives or even other family members like the wife and it may be very embarrasing to go inquiring as to what their rights to the property are. It therefore may be very harsh on the purchaser to expect him to leave no stone unturned while inspecting the land to ascertain the beneficial interests. Such a situation arose in the case of ***National Provincial Bank v Hastings Car Mart***[70] where a mortgagee was held not bound by the equity of a wife whose husband had transfered his house to a company; the bank was held to be a bonafide purchaser for value without notice.

Hanbury states that in the case of purchase of freehold, the purchaser should examine the title deeds reaching back fifteen years and for so long, he is deemed to have constructive notice of all equitable interests that have attached to the land. In this respect, it was held in ***Robson v Flight***[71] that a purchaser who enters into a contract to accept a shorter title than he would have insisted on under an open contract, has constructive notice of all facts he would have discovered on an investigation of the title for the full period.

However, one cannot help wondering why the period is fixed at fifteen and only fifteen years. Why can't it be fourteen, sixteen or twenty years for that matter? It would mean, according to such provision, that if the defect in title had occurred sixteen or even fifteen and a half years before, then, the purchaser will not be affected whereas, if it

occurred fourteen and a half years before, it would be caught in the time limit and will affect the purchaser if he fails to investigate. It is our argument that this is a very rigid way of determining the issue and it could work unfairly for either party depending on the circumstances. It cannot however, be dispensed with as totally unnecessary or undesirable especially where there is a long history of title.

If a purchaser obtains the interest but gets notice of the trust before conveyance, then he cannot save himself by having the conveyance completed for he becomes a trustee of the trust property because of his participation in breach of trust[72]. In the case of ***Jared v Clements***[73], it was stated that a purchaser who, before compeletion of his purchase, received notice of an outstanding equitable interest must, in order to get a good title from his vendor, take care to see that that interest is got in or destroyed. If he chooses to complete in reliance upon the assurance of the vendor or the vendor's solicitor, that the interest has been got in or destroyed, he does so at his own risk if it turns out that the interest is still outstanding and the conveyance to him of the legal estate, accompanied by the delivery ... of the title deeds, affords him no protection against the prior equitable interest.

Where, however, an intending lessee or assignee is not entitled to call for the freehold or leasehold reversion, he is not to be deemed to be affected with notice of any matter

or thing of which, if he had contracted that such title should be furnished, he might have had notice.

All in all, it can be said that constructive notice arises where the purchaser has part knowledge but refuses to get full knowledge or has no knowledge at all due to his carelessness or negligence in which case, the law will not allow him to rely on the 'no notice' part of the doctrine of purchaser for value. It seems, in our view, that left that way, the doctrine of constructive notice is the most important element of the doctrine of purchaser for value, and, unqualified, it can prove to be a real test of the doctrine of purchaser.

But one gets the feeling that the requirement of notice is very strict in this field and if the words of Eyre C.B., are anything to go by, the presumption of constructive notice is so violent that,

"the court will not allow even of it's being controverted[74]."

But being based on the fiction of the reasonable man or man of business, one wonders whether the doctrine of cnstructive notice has any practical merits to it. It may as well turn out that what could be a very good check on the overeliance on the doctrine of purchaser is no more than a theoretical limitation which has no practical benefit.

This is more so when one considers the criticism that has been directed on the application of constructive notice. It

has been said that the doctrine has limits and should not be pushed too far. As such, a purchaser should not be expected to have notice of that which he cannot have in practical reality. Matters which are not easy to ascertain even upon investigation, for instance the equity of a wife or relative, should not bind the purchaser.

Illustrative of this attitude was the statement of Esher, M.R., in *English & Scottish Mercantile Investment Co v Brunton*[75] when he said;

> "I pointed out that the doctrine was a dangerous one. It is contrary to the truth. It is founded on the assumption that a man does not know the facts, and yet it is said that constructively he does know them".

It was not only Esher, M.R. who held such views concerning the doctrine of constructive notice[76]. If the opinion of such jurists are anything to go by, and we believe they are, then we see that constructive notice will not be overloaded. If it has been seen to engender unfair results on the purchaser, it would mean that it is not a very reliable test. What then is the best test for the authenticity of a plea of bona fide purchaser?

To us, it seems the case that once the defence is pleaded, it is a matter of chance whether, after a canvassing of all the elements, the defence will be upheld or rejected.

It should be pointed out further that under the system of registration,[77] the entering of an item on the register is actual notice to the world and failure to investigate the

known, as we have intimated herebefore, constitutes constructive notice on the part of the purchaser. As such, under this system, the doctrine of notice has been profoundly changed; indeed it has been abandoned. If the right in issue is registerable, the question is whether it is registered rather than whether the purchaser knows or should have known of it.

This is a sharp departure from equity in the sense of fairness, but a gain in practical convenience. This in our view, is as it should be for property rights should go hand in hand with certainty rather than be pegged on the abstract notions of fairness, justice and fair play.

The doctrine of notice is therefore a nominal doctrine only for it has been mechanized by statute; the test is now the state of the register, not the state of the purchaser's mind. At this point, we can hypothesize that as the registration of title to property becomes the norm, rather than the exception, especially in the real property area, the doctrine will suffer a sharp decline and go into obscurity.

2.4 *Purchaser with notice from Purchaser without notice.*

Now about the position of a person who purchases property with notice from a purchaser for value without notice. What is the legal position? The position is that such a person is protected by the law. It was said in *Barrow's case*[78] that to avoid fettering the purchasers ability to alienate his property, then a purchaser from him, though with notice, will

be protected; save that a trustee cannot use this technicality to defraud a beneficiary by transfering property to a bona fide purchaser and repurchasing it. This very sentiment was expressed by Ashburner in his treatise on equity[79].

Jessel M.R. rationalised this stance of the law on the ground that a purchaser with notice takes free of the trust not from the merits of the second purchaser but of the first for if an innocent purchaser were prevented from disposing of the beneficial interest, the result would be a stagnation of property.[80]

This is perhaps in keeping with the view expressed by David Crystal Kirk that,

> "the theme appears to be that at some stage, the law must recognise the factual expediency of rubbing out the old title and allowing a new one to arise, either for the sake of enforcement of accrued rights at common law, by statute or by court order; or because the trail of title has been so obscured that it is time to erase it altogether and start with a clean sheet."[81]

As we intimated earlier, it is one of the fundamental objectives of any law to protect rights to property. But the suggestion that an interest can be defeated on the ground that a legal interest has vested in another person, at a later date, seems a contradiction of this. This equitable owner of property is as much entitled to protection as the legal owner. The law should be seen to protect even the equitable interests to property.

The rationale given for the recognition of the title of

the second purchaser is the certainty that should go with transactions in real or personal property. But it would be salutary to ponder on the price of this certainty. It is said that property would be clogged but should the certainty be achieved at the cost of alienating from the rightful owners their interests in property? We feel, with all due respect, that this is a wanting justification.

To illustrate this, if for instance, a third party knows and is very much aware that certain property is encumbered but keeps aloof as another purchases the same, unaware of the outstanding interest only to purchases the property from the innocent purchaser; what should be the position as among the parties? As per the above, the second purchaser will be protected, and as we have gathered, the justification is that property should not be clogged but should be allowed to flow freely.

Now as between this second purchaser and the still innocent equitable owner, who should the law protect? It is our view that, the law finds itself in a quandary and has to resort to technicalities such as these in order to avoid a multiplicity of claims. But we feel that this is no proper way to take short cuts, especially where we need certainty.

It may happen that the first purchaser himself slipped through the net and ended up with the property using the shield of bona fide purchaser for value without notice. Therefore, when he passes on the property to a purchaser with

notice, the law is protecting an unjust transaction on the basis of a primarily unjust transaction and the whole process therefore smacks of unfairness to the equitable owner of the property.

A case very much illustrative of this position of the law is *Wilkes v Spooner*[82]. In this case;

> x the lessee, of two Highstreet shops, Nos. 137 and 172, assigned the lease of no. 170 to the plaintiff, and covenanted in effect, not to compete with the plaintiff's business as a general butcher. This restriction upon the user of no. 137 was such as to be binding in equity on the land under the doctrine of ***Tulk v Moxhay*** X surrendered the lease of No. 137 for value tothe landlord, who, not knowing of the restrictive covenant, accepted the surrender and later gave a new lease to X's son, who did know of it. The court of Appeal held that the covenant was not binding. The landlord was a purchaser for value without notice. The covenant was destroyed, and did not revive on the passing of the land to the son.

Instead of justifying the first purchaser on the grounds of conscience and the second on the grounds of practical convenience, it would as well have been stated that the doctrine of purchaser was intended as a facade for the qualification of rights to property and not at all a matter of conscience. It was an evasive solution to practical difficulties.

2.5 *Burden of Proof*

Once the defence of purchaser for value without notice has been pleaded, the question arises, who has the burden of proving or rather who would lose if the fact to be proved were dispensed with? It would appear that in that particular case,

the plaintiff would lose. If however we go by the rule that he who asserts must prove, then by asserting that he is a bona fide purchaser, the purchaser has the onus of proving each and every fact that he relies on.

Scotts has stated in his treatise on trusts that;

> "There is a conflict of authority on the question whether the burden of proving is on the holder of the legal title to show that he is a purchaser for value and without notice or whether it is on the equitable claimant to show that the transfer was gratuitous or that the holder had notice."[83]

But it would seem that the current of authority has it that the burden of proof is on the one who relies on the doctrine of purchaser for value.

In *Attorney General v Bishopsgate Guano Co.*[84], it was held that the assignee of certain land was affected with notice of a specifically enforceable agreement for the creation of a public right of way entered into by his assignor, in the absence of any evidence as to knowledge, solely because it had failed to plead and prove that it was a bonafide purchaser of the legal estate for value without notice.

It was also held in ***Mills v Renwicke***[85] that if a purchaser of a legal estate wished to claim immunity from a prior equity, the burden fell on him to prove both that he gave value and had no notice.

The law reform committee, in its report on the transfer of title to chattels recommended that it should be for the purchaser to prove that he bought in good faith.

The foregoing is indeed, as it should be, as it would be very unconscionable to expect the plaintiff to prove that which the defendant has asserted. This however has not been the view of others and it has been held not by a lesser than the highest court of the land[86] that where a plaintiff impeaches the title of a purchaser, the burden is upon him to prove lack of good faith[87].

Further in ***G.L. Baker Ltd v Medway Building & Supplies Ltd***[88]

where a ***cestui que trust*** sought to trace trust property which had been fraudulently converted by his trustee into the hands of third party, the onus of proving both the giving of value and the absence of notice lay on the third party.

Going by the above, it is true that there is a conflict of authority but it would seem that there is more support for the view that the onus is on the person who pleads bona fide purchaser for value without notice. We would agree with this view because it appeals more to reason that the one who asserts a particular fact must prove it if he is to succeed in his claim.

Once the plaintiff has instituted a suit against the defendant and shown that he has a cause of action, then, if the defendant should plead such a defence as purchaser for value, then it is upon him, to justify his claim.

It is our view that the burden should therefore lie where it rightly belongs and where the defendant fails to prove that

he is not only a purchaser but in fact, a bona fide purchaser for value without notice, then he should be unshielded and faced with all the consequences and liabilities of taking encumbered property.

2.6 *Conclusion*

In a nutshell, an examination of the doctrine shows that there is nothing stringent about the checks that have been placed on it to prevent fraudulent purchasers from disinheriting equitable owners of property. We are of the view that the doctrine, being based on an obsolete system and being itself lax on the purchasers, is a doctrine that should be abolished and replaced, perhaps, with a more certain system like registeration, which though fixing people with strict liability, has an overall effect of certainty and security. The opinions of judges in the past concerning especially the unfairness of the doctrine of constructive notice and the burden of proof serve to show that the doctrine of bona fide purchaser is not a reliable doctrine in property relations.

CHAPTER TWO

FOOTNOTES.

1. Hanbury; *'Modern Equity'* (Stevens & Sons London 1985) 13th edition. p. 25.
2. Snell E.H.T. *'Principles of Equity'*. (Sweet & Maxwell London 1973) 27th edition p 68.
3. (1828) 3 Russ. 1.
4. (1853) 4 De G.M. & G. 11 at p 17 per Turner L.J.
5. *Supra* footnote 3.
6. Latin maxim meaning that he who is first in time is stronger in law.
7. *Supra* footnote 2 at p 46 quoting Lord Westbury L.C., in Phillips v Phillips *infra* footnote 8) at p 215.
8. (1862) 4 De. G.F. & J 208.
9. 11. ch. D. 327.
10. *German Sav. Society v De Lashmutt* 67-Fed. 399,400.
11. (1872) L.R. 7. ch. 259, 268-269 per James L.J.
12. (1673) Rep. t. Finch 102.
13. (1803) 9 ves. 24
14. Latin maxim meaning literally a plank in a shipwreck. It is used to denote the power of a third mortgagee who, having obtained his mortgage without any knowledge of a second mortgagee, could acquire the first incumbrance and squeeze out and have satisfaction before the second mortgagee.
15. *Supra* footnote 8.

16. *Ibid* at p 215.

17. Hanbury and Snell (***Supra*** footnotes 1 & 2 respectively) tend to discuss the doctrine with particular reference to land as contrasted to personal property.

18. Tiley. J.; ***'A casebook on Equity and Succession"***. (Sweet and Maxwell. London. 1968).

19. (1886) 32. ch. 560.

20. *Law of property Act* 1925.
Land changes Act 1925.

21. *Sale of Goods Acts*

22. (1970) ch. 101.

23. Meagher; ***'Doctrines and Remedies'*** (Butterworths London. 1975).

24. ***Supra*** footnote 11 per James L.J.,

25. Walker; ***The Oxford Companion to Law.***

26. ***L.P.A. 1925*** s205 (i) (xxi).

27. (1793) 1 Atk 382.

28. (1880) 15 ch. D. 639.

29. ***Supra*** footnote 2 at p 48.

30. (1787) 2 Atk 8.

31. (1901) 2 ch 231.

32. (1859) 3 De. G. & J 563.

33. Snell. ***Supra*** footnote 2 at p 48-49.

34. (1973) A.C. at p. 721.

35. ***Supra*** chapter one: on legal estates and equitable estates.

36. 1873-1875.

37. (1967) 1 W.L.R. 923.

38. *Supra* footnote 36

39. *Ibid.*

40. *Infra* footnote 60.

41. *Supra* footnote 32.

42. (1916) NZLR 761.

43. (1916-17) 22 CLR 84.

44. Quoted in *Re Diplock (1947) ch 716.*

45. (1826) 2 Sim & St. 472.

46. *Supra* footnote 25.

47. Snell; *Supra* footnote 2.

48. (1900) 2 N.S.W.L.R. (eq) 302.

49. (1868) 3 ch. App. 488.

50. (1914) 2 K.B. 284.

51. 9 Moo. p.c. 36.

52. *Land Charges Act 1925.*

53. *Supra* footnote 2 p 47.

54. Latin maxim meaning that he who acts through another person is deemed to have acted in person. As such, a principal is liable for the acts of his agent which are within the scope of his authority.

55. (1862) 3 De G.J. & S 596.

56. *Rolland v Hart L.R. 6 ch. 678, 682.*

57. *Re Cousins (1886) 31 ch. 671.*

58. *Supra* footnote 28

59. (1878) 9 ch. 189, 196.

59.(a) *Supra* footnote 57 at p 676.

60. J.A. Balentine; 'Balentine's Law Dictionary 3rd edition.

61. *Ibid.*

62. *Smith v Jones (1954) I W.L.R. 1089.*

63. (1866) 1 ch. App. 463, 467.

64. (1881) 17 ch. D 353.

65. (1885) 54 L.J. ch. 991 at p. 994.

66. (1899) 2 ch. 264.

67. (1894) 15 N.S.W.L.R. (Eq) 64.

68. *Hewitt v Loosemore 65 E.R. 586, 590.*

69. (1809) 16 Ves. 249.

70. (1964) Ch. 9.

71. 46 E.R. 1054.

72. *Harpham v Shacklock (1880) 19 ch. D. 207.*

73. (1903) 1 ch. 428.

74. *Plumb v Fluit 2 Anst. 438.*

75. (1892) 2 QB at 708.

76. *Ibid.* Lord Esher M.R. referred to the statements of Lords Cottenharm, Lyndhurst and Cranworth, Turner L.J., and Jessel M.R., expressing the same sentiments.

77. *Land Charges Act 1925.*

78. (1880) 14 ch. 432.

79. Ashburner's *'Principles of Equity'* (Butterworths London. 1933)

2nd edition.

80. *Supra* footnote 78.

81. David Crystal Kirk, '*Innocent Purchaser Protection' 1980. 14 Law Teacher* at p 105.

82. (1911) 2 KB 473.

83. *Scotts on Trusts*. (Little, Brown & Company Boston Toronto 1956) 2nd Edition at p 284.

84. (1878) L.R. 11 ch 327.

85. (1901) I.S.R. (NSW) (Eq) 173.

86. House of Lords

87. *Burkinshaw v Nicholls (1878) 3 A.C. 1004.*

88. (1958) 1 WLR 1216.

3.0 CHAPTER THREE.

STATUTORY PROTECTION OF THE BONA FIDE PURCHASER: A SHIFT TO THE PRACTICAL

"They say that even thieves have a code of laws to observe and obey"

(Cicero 106-43 B.C.)

De Officiis bk. 11 ch XI.

3.1 *Introduction.*

In the foregoing chapters, we have looked at the history of the doctrine of bona fide purchaser, its origins and followed up with its analysis. Arising as it may well have, in equity jurisprudence and much as may be said of the fact that equity and law themselves were not merged but rather only their administration was merged, the merger of the two had the effect of bringing to the common law, or rather confirming in common law, that which over years had been considered as just and fair in day to day human dealings. It is because of this that some doctrines of equity have found expression in common law more vividly and especially so in property statutes.

There has always been a struggle by the mercantile community to have the judiciary espouse and indeed protect their business interests. With time, this struggle was

extended to the legislative organ of the state such that not only are statutes dealing with property atuned towards the protection of the property rights of the business world but the very interpretation of those laws by the judiciary has shown a like tendency.

It is for this reason that we intend to follow up the doctrine into the statutory realm and see how the legislature has endeavoured to protect the bona fide purchaser and at the same time look at instances where the courts have decided in favour of the bona fide purchaser.

It should be noted here that we are looking at the Kenyan statute law on the premise that the law applied in Kenya as per the *Judicature Act*[1] is in essence English law. Having replicated English law, as it were, Kenyan law is reflective of the common law position as of the reception date. Coming to case law, where and if necessary and possible, we will rely on English decision owing to the dearth of local reported cases relevant to the doctrine.

But Kenyan courts cannot be said to be so activist as to have altered the common law position in any substantial way. But as we intimated earlier in this work, this is not an exhaustive illustration but just a glimpse at some of the instances of the application of the doctrine. We will specifically deal with sale of goods and negotiable instruments, some mention being made, though brief, of the doctrine under real property transactions.

3.2 *Real Property.*

Dealing with real property, we propose not to delve deep into this area as most real property rights are being registered with the passage of time and as such, the principles of registration, which we do not intend to deal with in the present work, are taking over and supplanting the doctrine of bona fide purchaser for value without notice.

But before we plunge deep into this chapter, we wish to give the basis for the introduction of the doctrine into the Kenyan legal system. The ***Judicature Act***[2], after stating that the jurisdiction of the Kenyan courts shall be exercised in conformity with the constitution and all written laws, proceeds to state that;

> "Subject thereto, and so far as the same do not extend or apply, the substance of the common law, ***the doctrines of equity and the statutes of general application in force in England*** on the 12th August 1897, and the procedure and practice observed in courts of justice in England at that date"[3] (Emphasis ours).

It is therefore clear that the ***Judicature Act***[4] introduces not only the doctrines of equity to the Kenyan legal system but also the statutes of the United Kingdom as of the reception date. No wonder, as will be manifest in most statutes, they are a true replica of English statutes, an example being the ***Sale of Goods Act***[5] and the ***Bills of Exchange act***[6] with which we will later deal.

But the ***Judicature Act***[7] proceeds to warn us under the

proviso to this paragraph;

> "provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary".[8]

As such, a blind adherence to the *Corpus* of received law would be prejudicial to the Kenyan subjects and the questions to ask are; is this doctrine, or this statute for that matter, suitable to the Kenyan context? What mischief, if any was it aimed at preventing?

Does it, for instance, need any modifications to suit local circumstances in conformity with the provisions of the Act?

As stated earlier, most real property rights have become registrable and the rules and regulations governing the same have moved from the doctrine of bona fide purchaser to the principles of registration. As we intimated hereinabove, the doctrine of bona fide purchaser deals, albeit not exclusively so, with unregistered property rights. This being the case, we know that not all land in Kenya comes under the *Registered Land Act*[9] and as such, some land is under the *Transfer of Property Act*[10]. Dealings under such land must of necessity be dealt with carefully as it will necessarily touch upon matters of notice.

Further, the doctrine would seem more pertinent in the Kenyan context as most people, being either illiterate or semi-literate, do not understand matters of land registration

or whether they are supposed to have title deeds.[11] Therefore, it is our view that whether under the*Registered Land Act*[12] or the *Transfer of property Act*[13], land dealings in Kenya should be looked at specially; especially with regard to the doctrine of constructive notice. When a person deals with unregistered land without notice and provides consideration in good faith, then, if the doctrine has any practical significance, it is here that it should avail the Kenyan purchaser.

With regard to the *Registered Land Act*, the effect of registration is to give actual notice to anyone who may deal with such property and as such, we will only deal with these sections that attempt to protect the bonafide purchaser, most of the other dealings being left to the regime of the principles of land registration which are, in essence, opposed to the doctrine of bona fide purchaser for value without notice.

The general spirit of the Act in this respect is stated at *s31* as follows;

> "Every proprietor acquiring land lease or charge shall be deemed to have had notice of every entry in the register, relating to the land ... and subsisting at the time of acquisition".[14]

But we note the protections given to the purchaser of land under the Act as follows;

> "No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned -
> a) to inquire or ascertain the circumstances in or the consideration for which that proprietor was registered;

or
b) to search any register kept under the land registration (Special Areas) Act, the Government Lands Act, the Land Titles Act or the Registration of Titles Act."[15]

Further, purchasers of land from trustees are further protected under the Act as follows;

> "Where the propriator of land ... is a trustee, he shall, in dealing therewith be deemed to be absolute proprietor thereof, and no disposition by the trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that the disposition amounted to a breach of trust".[16]

One can here envisage a situation where M, holding land in trust for and for the benefit of his brothers, N., O., and P. He sells it to R., who buys it upon the representation by M. that he is the sole owner, doing so in good faith and without knowledge as to the defect in the title of M., then R . is a bona fide purchaser for value and will be protected against the claims of any or all of N., O., or P. regardless of the breach of trust by their brother M.

It can therefore be stated that the ***Registered Land Act***[17] is not totally opposed to the doctrine though land under the same must be registered which registration constitutes actual notice.

Under the ***Transfer of Property Act***[18], the protection of the bona fide purchaser comes out in ***s41*** which provides as follows;

> "Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and tranfers the same

> for valuable consideration, the transfer shall not be made voidable on the ground that the transferor was not authorised to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer he acted in good faith."[19]

The Act goes on to state, after declaring certain transfers voidable under sections *43* and *53*, that the rights of a bona fide purchaser shall not be prejudiced. This comes under the provisos to these sections which go like this;

"Nothing in this section shall impair the rights of transferees in good faith for consideration without notice ..."[20]

As such, in real property, though the principle applicable is the one dealing with registration in harmonizing conflicting interests in property, the doctrine under review still has some room though it can be said with fair certainty that due to increased registration, especially considering that in Kenya there is a policy aimed at bringing all unregistered land under the ***Registered Land Act*** eventually, the doctrine of bonafide purchaser is, in this respect, a doctrine on the wane. It is our view however that the special circumstances of Kenya require special treatment. There is no rationale in imposing the strict rules of registration under the *Registered Land Act* to a people who have title, if any, appreciation for the same. This is manifested by the fact that even after the registration of land, most Kenyans continue to relate to land in the customary manner.

3.3. Personal Property

> "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 (has). The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title"[21]

This statement of Denning L.J.; is a landmark statement in the exemplification of the conflict that has for long existed between the need to protect property, which, as we intimated therebefore, is a fundamental role of the law, and secondly, the need to protect commerce, which, with time, seems to be getting the upper hand.

As regards the area of personal property, we will concentrate on the regime of the *Sale of Goods Act*[22]. Concerning the transfer of property, the Act States initially the general rule that no one can pass a better title than he himself has and this is in keeping with the Latin maxim *Nemo dat quod non habet*. This was also stated clearly in the case of *Whistler v Forster*[23] and is also in the letter and spirit of *s23* of the *sale of Goods Act*.[24]

However, the qualifications that follow this general rule water it down to a preamble followed by a catalogue of exceptions. These include sale under voidable title, sale by seller or buyer in possesssion, sale in market overt among others. We will highlight the above exceptions to bring out the protection accorded to the bona fide purchaser for value without notice.

As we stated hereinabove, the Kenya ***Sale of Goods Act***[25] is a replica of the English ***Sale of Goods Act***. Perhaps a case that brought out the general rule best is that of ***Farquhason Brothers v King and Company***[26] where it was stated, inter alia, that,

> "If a man, leaves a watch or a ring on a seat in a park or on a table at a cafe', and it ultimately gets into the hands of a bona fide purchaser, it is no answer to the true owner that it was his carelessness and nothing else, that enabled the finder to pass it off as his own".

The first exception to the rule is sale under voidable title which is provided for by ***s24*** of the ***Sale of Goods Act***[27] as follows;

> "When the seller of goods has voidable title thereto but his title has not been avoided at the time of sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect of title".

This was illustrated by the case of ***Cunday v Lindsay***[28]. The Law Reform Committee in its report[29] recommended that it should be for the purchaser to prove that he bought in good faith. Two illustrations in this respect will suffice;

> B induces A to send him jewellery on approval by falsely representing that he has a good customer for it. He then pledges the goods with C. B then induces A to sell to him the goods on credit, saying that he cannot ask the customer for cash before delivery. A cannot avoid the sale to B and recover the goods from C unless he can affect C with the notice of the fraud.

This was the situation in ***Whitehorn Brothers v Davidson***[30].

> A rogue obtains a motorcar by fraud and deliberately absconds. On discovering the fraud, the seller

> absconds. On discovering the fraud, the seller immediately does everything possible to discover the rogue and informs the police and the Automobile Association. Subsequently the rogue sells the car to another rogue who sells it to a bonafide purchaser. The first sale has been avoided and the bona fide purchaser acquires no title to the car under the section.

This was so stated in ***Car and Universal Co. Ltd. v Caldwell***[31]. It should be noted that the position is not well settled as was shown by the case of ***Newtons of Wembley v Williams***[32] where the rogue conveyed a good title by virtue of the same section of the law. In fact, the Law Reform Committee in its report[33] recommended that a seller should not avoid a sale until he has informed the buyer of the decision.

The recommendation of the committee seems to further entrench the position of the bona fide purchaser. But it is our contention that the requirement that the seller should inform the buyer that the has avoided the sale is very prejudicial tothe sellers property rights since it is very unrealistic to suppose that a rogue will at any time want to keep in touch with a defrauded seller. This to us does not seem a very logical ground for protecting the purchaser for value.

Another protection of the purchaser comes under ***s26(i)***[34] which states that;

> "Where a person, having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving them in good faith and

without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make it."

Further, the Act provides that by *s27* a writ of *fieri facias* shall not prejudice the title to goods acquired by any person in good faith and for valuable consideration, unless that person had, at the time when he acquired his title, notice that the writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to, and remained unexecuted in the hands of the sheriff.

By way of digression, we wish to make mention of the protection provided by the rules of market overt which is not operative in Kenya. It applies in England but it is our view that practice in day to day dealings in Kenyan markets calls for the consideration of this concept in Kenya. This is because when one buys property, say a shirt or a pair of shoes in Ngara River Market or Gikomba Open Air Market in Nairobi, what actually takes place is a sale in market overt and it is not far fetched to envisage or even encounter litigation arising out of such sale for the property could have been stolen for all practical purposes.

Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

This was said in *Re market Overt*[35] which proves that the doctrine of bona fide purchaser was operative in the commercial world as early as the sixteenth century.

The following illustrations will help put the case even more clearly.

1. A motorcar is put up for auction in a statutory market by its bailee under a hire purchase agreement. It remains unsold, but the bailee later sells it by private treaty in the same market, as is customary there. The buyer gets a good title, as the rules of market overt can apply in a market established by statutory powers and the sale need not be by a trader. It was so held in the Landmark case of *Bishopsgate Motor Finance Co. v Transport Brakes Ltd*[36].

2. Two stolen antique chandeliers are offered for sale in market overt on 21st October. One is sold at 4.30 p.m. on the same afternoon to a bona fide purchaser, having been exposed on the stall for only a few minutes. The other is sold to another bona fide purchaser after sunset after being exposed daily until 21st December. The first buyer gets a good title; the second buyer does not. This was said in the case of *Reid v Metropolitan Police Commissioner*[37].

It should be noted that the Law Reform Committee, in its activist self, recommended that the law of market overt should be extended to all shops. This is an illustration of how commercial people have pressed against the *nemo dat* principle for the sake of commercial certainty and security. It is in

this spirit that such open air markets like Ngara and Gikomba among other local markets should be recognised as statutory markets and property transfers therein be protected more formally. What with all the wares being peddled in the streets of Nairobi and other urban centres of Kenya!

Kenyan law on the sale of goods would therefore seem to protect a bona fide purchaser for value without notice and this brings out the contrast between real and personal property. It is clearly the position that commercial and financial dictates require that chattels should not be fraught with all the trappings found in the area of real property. It is very cumbersome for a chattel that changes hands so often to be registered, or even if registered, to require a purchaser to investigate title every time he buys. A stolen article may change hands in Gikomba market twenty times before it is traced, if ever. This fetter would cause commercial sterility and no wonder that the concept of market overt in particular and the doctrine of bona fide purchaser in general have been enduring for so long in the personalty realm.

3.4 CHOSES IN ACTION.

This is the other area we propose to look at by way of tracing the statutory protection given to the purchaser for value without notice. Here we are primarily concerned with the realm of negotiability with particular reference to the holder in due course as provided for by the ***Bills of Exchange***

Act[38]. This being a rather technical area, we start by defining some terms to be dealt with. These include choses in action, negotiable instruments and a holder in due course, which is a banking terminology analogous to our bona fide purchaser for value without notice. This is evidence of the fact that the doctrine has permeated even the financial world and the bona fide purchaser is given considerable protection as we will show.

A chose in action is a right in action as distinguished from a right in possession in that it can only be enforced through an action in a court of law and not by taking possession. Choses in action include negotiable instruments which we intend to deal with herebelow.

Walker in his dictionary[39] defines negotiable instruments as a class of undertakings to pay, evidenced by writing which by long - settled mercantile custom have the characteristics that valuable consideration is presumed and need not be stated or proved, that they may be transfered from one person to the other by delivery or endorsement and delivery, without more formal assignment, enabling the transferee to sue thereon in his own name, and that a transferee taking such an instrument in good faith, for value and without notice of any defect in the title of the transferor, will have a good title. Negotiable instruments include bills of exchange, cheques and promissory notes, debentures or share warrants payable to bearer among others.

Finally, Walker[40] defines a holder in due course as a holder who has a bill of Exchange, cheque or promissory note, complete and regular on the face of it, who became the holder of it before it was overdue, and without notice that, if such is the case, it had been dishonoured, and took it in good faith and for value having, at the time it was negotiated to him no notice of any defect in the title of the person who negotiated it to him.

The protection of the holder in due course is provided for by the *Bills of Exchange Act*[41] where it states;

> "A holder in due course is a holder who has taken a bill, complete and regular onthe face of it under the following conditions -
> a) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if that was the case;
> b) that he took the bill in good faith and for value and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it".[42]

Further protection is given to the purchaser and all those who may take under him by the same section in the following words,

> "A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder".[43]

It can be seen here that the purchaser from a holder in due course need not provide value and, as has been indicated earlier in this work, the protection of the second holder is not on the basis of the good faith or the consideration he has or has provided but purely on grounds of commercial

convenience.

This, in our view, does not seem to augur very well for property owners because it is a double-edged sword in that while the commercial world benefits; it deprives the true owner, indeed the rightful owner, of his legitimate interests in property. It is as such the reason, and rightly so, that Lord Coleridge C.J. stated in *Coyner v Kent*[44] that;

> "In trade, in commerce, even in profession, what is one man's gain is another's loss"

It was stated in the English case of *Banca Popolare di novara v John Livanos & Sons Ltd*[45] that a person cannot be a holder in due course if he is affected with bad faith or notice, actual or constructive for if he is affected withthe same by receiving a bill as a fraudulent preference, then he will not be protected by *s29* which is the equivalent of *s29* of the Kenyan sister Act.

Again it was stated in *R.E. Jones Ltd. v Waring and Gillow Ltd.*[46] that if the original delivery of a bill was not a negotiation, then the payee cannot be a holder in due course.

The rights of a holder in due course as provided by *s38* of the *Bills of Exchange Act*[47] are that he may sue on the bill in his own name, he holds the bill free from any defect of title of prior parties and may enforce payment against all parties liable on the bill. For example;

If A draws a bill on B payable to C and after B has

accepted it and C has indorsed it, C loses it in the street, whereupon D finds it and transfers it to E for value, then as there is no forgery and provided E can establish himself as a holder in due course, E has a perfect title to the bill and can sue any or all of A, B, C and D. The instrument being negotiable, the defect in title as regards D is overcome when E takes it in good faith and for value and thereby gets a better title than his tranferor had. If the instrument in question had been 'not negotiable' for instance a crossed cheque, then, once the defect in title arose, the chain of title would thereafter be permanently defective. Suppose E gives the bill to F as a present, then F , as he did not give value, is not a holder in due course, but he is a holder for value, as value has already been given for the bill, so he can sue all or any of the parties except E.

The strong position of the holder in due course is illustrated by the case of *Jade International Steel Stahl und Eisen G.m.b.l. & Co. K.G. v Robert Nicholas*[48] where;

> The plaintiff had sold to the defendant a quantity of steel to be delivered in two equal instalments, and had drawn a bill of exchange on the defendant for the price. On delivery, the defendant claimed that the first consignment was substandard and refused to accept the second. When the bill (which had been discounted by the plaintiff with a bank) was presented for payment, it was dishonoured; the bank duly debited the plaintiff's account and handed the bill back to the plaintiff. It was held that the plaintiff was entitled to immediate judgement for the amount of the bill.

Where a bill is discounted through a bank by the drawer, he

ceases to be an immediate party to the bill and does not regain that capacity when the bill is subsequently returned to him after dishonour, but can still sue on the the bill with all the rights of a holder in due course by virtue of *s29 (3)* of the Bills of exchange Act since he derives his title through a holder in due course (the discounting bank) and is entitled to immediate judgement for the full amount of the bill, notwithstanding that if he had sued as a drawer there would have been a discretion to grant leave to defend because of a counter claim by the acceptor.

The position of the holder is further strengthened by the Act under *s30* where it states that;

> "(1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.
> (2) Every holder of a bill is prima facie deemed to be a holder in due course, but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill".

As such, there seem to be a strong presumption of good faith and value in this section in favour of the holder in due course. We will cite three further cases to illustrate the protected position of the holder in due course.

In the case of *London Joint Stock Bank v Simmons*[49], it was stated that a person taking a negotiable instrument in good faith and for value obtains a valid title though he takes from

one who had none.

> A broker in fraud of the owner pledged negotiable instruments belonging to other persons with a bank as a security *en bloc* for an advance. The bank did not know whether the instruments belonged to the broker or other persons or whether the broker had any authority to deal with them, and made no inquiries. The broker having absconded, the bank realised the securities. It was held that there being, as a matter of fact, no circumstances to create suspicion, the bank was entitled to retain and realise the securities, having taken negotiable instruments for value and in good faith.

Perhaps the words of Lord Hoschell are expressive of the protective attitude of the courts towards the holder in due course when he said that;

> "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments".[50]

Supportive of this prevailing sentiment are the words of Lindley L.J. in ***Manchester Trust v Furness***[51] wherein he said;

> "And as regards the extension of the equitable doctrines of constructive notice to commercial transactions, the courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates with which the court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of these doctrines, and the protest is founded on perfect good sense. In dealing with estates in land, title is everything, and it can be leisurely investigated; in commercial transactions; possession is everything and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions, we would be doing infinite mischief and paralysing the trade of the country"

The uncompromising stance of the mercantile world is perhaps best emphasized by Elbert Hubbarb when he stated that;

> "Laws for the regulation of trade should be most carefully scanned. That which hampers, limits, cripples and retards must be done away with".[52]

It is therefore our view that the law is very much prepared to do away with the original title and start on a neat sheet for the sake of convenience. But what is the rationale, we humbly ask, of sacrificing property rights at the alter of convenience?

It should however be noted that if the holder does not fulfil the conditions of *s29* of the ***Bills of Exchange Act***[53], he will not be deemed a holder in due course and cannot enjoy the protection therefore. This was stated in the case of ***Earl of Sheffield v London Joint Stock Bank***[54] a House of Lords decision,

> "S gave to E certificates of railway stock with transfers thereof executed by him in blank and bond of foreign companies (alleged to be negotiable securities) for the purpose of raising 26,000 pounds E gave these securities to M., a money lender in London to secure 26,000 pounds advanced by M. to E. M. deposited the transfers and securities together with other securities of his customers with various banks, as security for large loan accounts running between him and them, the blanks in the transfers of stocks being filled up with the names of nominees of the banks. The banks in so dealing either actually knew, or had reason to believe that the securities did or might belong not to M. but to his customers. M. having become bankrupt, the banks sold some of S's securities and claimed to hold the proceeds and the unsold remainder as security for all the debt due from M to them. It was held that though the banks had the legal title to the securities, they were not purchasers for value without notice but ought to have inquired into the extent of M's authority and thus whether the securities were negotiable or not; and that upon payment to the banks of the money advanced by M to E., S. was entitled to the value of such of the securities as had been sold by the banks, and to redeem

the remainder."

As such, a person dealing with property, be it real, personal or even a chose in action will not be protected as a purchaser for value without notice, if he had notice or could have had notice upon inquiry. Emphasis was given to this position of the court by the words of Lord Halsbury L.C.; when he thus stated;

> "My Lords, if this is the true view of the facts, it is impossible to contend that the bank is entitled to the position of purchasers for value without notice. I think they had actual knowledge, but if they had reason to think that the securities might be Mozley's own, or might belong to somebody else, I think they were bound to inquire".[55]

As such, it is our view that the conditions of the defence still remain as they were but the doctrine of constructive notice, as we have shown hereinabove, continues to be eroded for the sake of protecting business interests by giving efficacy to commercial transactions. So much for the positivist assertion that the judicial process is value neutral and apolitical!

It is worth noting that these rights of the holder in due course are the essence of negotiability. But a defective title must be distinguished from no title at all. Whilst a good title can be passed by a thief to a holder in due course, if there is forgery in the chain of title, the person claiming under the forgery has no title and cannot pass on any title to anyone else.

3.5 Conclusion.

By way of conclusion, it can be said that the doctrine has entrenched itself more in personal property laws than in real property laws. This, we have stated, is because personal property is, more often than not, unregistered. However, rights in land are being increasingly registered and the doctrine will be of little, if any, significance in that respect. Much as we might be disatisfied with the doctrine and much as it might be a defeat of the laws aim of protecting property, business convenience dictates that we have to overlook the original title and create a new page of reference if transactions have to continue smoothly.

Indeed as Ralph Waldo said once;

> "All stealing is comparative. If you come to absolutes, pray who does not steal?"[56]

It is therefore necessary in our view to reconcile property rights with business convenience though the balance is a delicate one. It is in the same spirit that Lord Mansfield said in *Medcalfe v Hall*[57] that;

"Convenience is the basis of mercantile law".

This kind of reconcilliation will therefore as of necessity call for the retention of the doctrine of bonafide purchaser for value for while Lord Denning talked of the conflict between property and commerce, he never offered a solution to the problem that will for long continue to haunt the minds of many a people; scholars and lay alike.

CHAPTER THREE

FOOTNOTES

1. ***Judicature Act*** Chapter 8 Laws of Kenya.
2. ***Ibid.***
3. ***Ibid*** s(1) (c).
4. ***Ibid.***
5. Chapter 31 Laws of Kenya.
6. Chapter 27 Laws of Kenya.
7. ***Supra*** footnote 4.
8. ***Ibid.*** s3(1) (c)
9. Chapter 300 Laws of Kenya.
10. ***Group 8 Received Laws.*** (Government Printers. Nairobi.)
11. These have been cases of the relevant government officials anouncing in the media that landowners should pick their title deeds from their respective registries after some have remained lying there for many years.
12. ***Supra*** footnote 9.
13. ***Supra*** footnote 10
14. ***Supra*** footnote 12
15. s39(1) (a) and (c)
16. ***Ibid s39 (2)***
17. ***Supra*** footnote 12
18. ***Supra*** footnote 13
19. ***Ibid*** s41
20. ***Ibid*** s43 (proviso thereto).
21. Denning L.J. in ***Bishpsgate Motor Finance Co. ltd. v***

23. (1863) 4 C.B.N.S. 248, 257.

24. *Supra* footnote 22

25. *Ibid.*

26. (1902) A.C. 325, 336.

27. *Supra* footnote 25.

28. (1878) 2 A.C. 459, 464.

29. *'Transfer of Title to Chattels'* (cmd 2958).

30. (1911) I.K.B. 463.

31. (1964) 1 All E.R. 2990.

32. (1964) 3 All E.R. 352.

33. *Supra* footnote 29.

34. *Supra* footnote 5 s26(1).

35. (1596) 5 co. Rep. 83. b.

36. (1949) 1 All E.R. 37 (C.A.)

37. (1973) 2 All E.R. 97.

38. *Supra* footnote 6.

39. *'Oxford Companion to Law'*.(Oxford Unversity Press 1980).

40. *Ibid.*

41. *Supra* footnote 38.

42. *Ibid* s29(1)(a) and (b)

43. *Ibid* s29(3)

44. (1891) 61 L.J. Mag. Cas. N.S.9, 18.

45. (1965) 2 Lloyd's Reports 149.

46. (1926) A.C. 670.

47. *Supra* footnote 41.

48. (1978) 3 All E.R. 104 (C.A.).

49. (1891-94) All E.R. 201.
50. *Ibid* p 221.
51. (1895) 2 Q.B. 539.
52. (1856-1915) ***Notebook*** p 16 Quoted in ***'Dictionary of legal Quatations'***. Simon Jarnes and Chantal Stebbings.
53. ***Supra*** footnote 41.
54. (1888) 3 A.C. 333.
55. ***Ibid*** p. 34.
56. (1803-82) ***'Essays, Second Series', 1884, 'Experience"*** Quoted in *Dictionary of legal Quotations'* ***Supra*** footnote 52.
57. (1782) 3 Dough 113, 115.

4.0 CHAPTER FOUR

4.1 CONCLUSION AND RECOMMENDATIONS

Having come to the end of our thesis, it is quite in order to recapitulate on what we have been able to establish by the research and at the same time make recommendations. As we said initially, it becomes very difficult when a society recognises two legitimate but conflicting interests and this will only mean that though debate and contraversy may rage over the issue, still the problem persists but it would do us a lot of good to try and ameliorate the harshness of such conflict for the welbeing of our society.

We have seen that the development of equity was an histotrical accident because as an alternative to developing equity the law could have been amended with the result that all the consequences engendered by its emergence would have been avoided.

As such, a careful consideration of the context within which the doctrine arose is very vital for an understanding of its operation in Kenya. One question that one is tempted to ask is whether the courts are today doing the job that equity courts aimed at performing; protecting the weak from the crafty. We have seen that equity, even during its heyday, seems to have abdicated its duty and it is not a wonder that

a merger was found necessary in 1875. The emergence of the doctrine of bonafide purchaser is an example of the unfortunate path of the law in a monolithic state.

The struggle for supremacy between courts of law and courts of equity was a regretable interference with the development of the law. Further, the feeling that law and equity remained separate can only be accepted to a limited extent because the passage of time has had the effect of really merging the two. Accepting the school of thought that law and equity were merged would have the effect of putting at par equitable and legal ownership or fusing them into a new comprehensive legal ownership.

Therefore, the merger had the effect of making baseless the distinction between legal and equitable rights, consequent upon which the doctrine is watered down, though not completely, and depicted as an unjust relic of an obsolete system.

It can therefore be stated that the resolution of the conflict or rather controversy as to the nature of equitable rights today is perhaps the way towards the rationalization of the doctrine as the consequence thereof would determine whether we really need the doctrine in our property laws. Indeed it is the case that the equitable right has matured but is only fettered from becoming a right *in rem* by the doctrine of bona fide purchaser for value without notice. But we concede that the removal of the defence totally might course

harm in some respects.

We are of the view that a thorough consideration of the circumstances of the case would be far much fairer in deciding whose interests should prevail rather than pedantically applying archaic concepts to the detriment of one of the parties. In fact, we suggest that may be we should use the maxim of equity *'equality is equity'* and divide the property equally between the two innocent parties!

We have also seen that the doctrine applies even against legal interests and the classical equitable position is not necessarily true today.

That is why we suggested that the classical classification of interests as legal and equitable is faulty and should be abandoned altogether. But then we realised that this would not necessarily solve property problems and the fact that these will persist calls for a reconcilliation as between the two opposing interests.

In chapter two, we saw that our hypothesis that registration of title to property will whittle down the doctrine is only true to the extent that it relates to or affects real property, but in respect of personal property which is more often then not, never registered, than the doctrine will remain. Even in the area of real property, the special circumstnces of developing countries like Kenya will still call for a special consideration of the doctrine.

Our hypothesis that the doctrine should be obolished may

not be wholly realistic in the face of the fact that we would be fixing very strict civil liability on some purchasers and therefore, especially in the special circumtances of a country like ours, to the extent that it may help ameliorate the disadvantaged position of ignorant masses who must of necessity engage in trade.

The doctrine is therefore a reality especially in view of its significance in real commercial life where people have to deal with real life problems of property interests that clash. But this, we must caution, is not the same thing as saying that it is a good doctrine or that it is based on justice.

Justice is one thing, logic the other.

Our recommendation would be that though we have to do with the doctrine as a necessary evil, the rules or conditions of the doctrine should be made stricter and not relaxed as some jurists suggest by their dislike of the doctrine of constructive notice. A measure of justice would be achieved by ensuring that only the very honest purchasers are availed the protection of the doctrine.

We have also seen that the protection of a purchaser from a purchaser for value without notice is a true manifestation of the rationale behind the doctrine of bonafide purchaser; convenience in property transfer which to us is a matter of mere expediency. We recommend that the burden of proof should be on the purchaser and it should of a high degree.

Looking at the '*Judicature Act*[1]' a question arises as to

what is the effect of the statement of the reception date. Controversy has raged over the years but thank God that Kenyan courts do not feel bound by the date as such. This would mean that if there should be a change in English law, then there should be no restriction to our benefiting from it just because it developed after the reception date.

We further recommend that not only should the powers of the trustee be checked properly in regard to the disposal of trust property but also that the purchasers from purchasers without notice should be more scrutinised to avoid instances of patent fraud.

On the suggestion by the Law Review Committee that, in a case of sale under voidable title, the owner should communicate the fact of avoidance to the person fraudulently acquiring the property or the purchaser himself, we wish to recommend that this is not necessary, if possible at all, and what the owner should do is to inform the police so as to set the criminal process in motion and at the same time continue looking for the property.

Moving from the conclusion that the doctrine is a necessity in personal property transactions, we recommend that the legistlature whould enact law incorporating the doctrine of market overt in Kenya's *sale of Goods Act*[2] so that thereby, such notorious markets as Gikomba and Ngara markets among other open-air markets in Kenya could be recognised as market overts and thereby we could have legitimate transactions in

those markets.

We have also seen that commercial interests have over time waged a war against individual property rights and seen to have the judiciary and the legislature on their side. This is proved by the fact that judges have justified the protection of the bonafide purchaser without compuction;

> "Thus the practices of the commercial world are often found to be gradually ambodied in commercial law, especially in the formative stage"[3]

We wish at this point to recommend that owners should be even more careful, though they don't owe rogues a duty of care, so that before parting with property, they should verify the authenticity of the person they are dealing with especially in cases of fraud.

It is at this point that we wish to emphasize the point that the Judicial process is not value neutral and to what extent or whether they offer justice in the harmonization of conflicting interests or the attempt thereat remains to be seen. This might open the floodgates of the controversy of what is justice in essence. It is not our wish to let open these gates in our present work but just by way of passing, and so long as it is germane to our present thesis, we wish to call attention to the observation of one jurist that;

"Justice is a power wielded over the minds of men by society"[4] yet, as Lord Lloyd[5] rightly commented on the above that, a society may be so organised that justice according to

law favours unduly the dominant section, and the judiciary, being drawn from that section, consciously or unconsciously, will tend to favour the needs of that section to the detriment of the rest of society.

Conflicts in property interests will continue and so long as a truly just solution is not possible, expediency in the form of the doctrine will continue. The doctrine is therefore an evil the society has to tolerate.

CHAPTER FOUR

FOOTNOTES

1. *Judicature Act* Chapter 8 Laws of Kenya.
2. *Sale of Goods Act* chapter 31 Laws of Kenya.
3. Lord Lloyd, '*Introduction to Jurisprudence*' (sweet & MAXWELL. London. 1965) 2nd ed. p 228.
4. *Ibid* p 238.
5. *Supra* footnote 3 p 238.

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