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# NOTICE OF ASSIGNMENTS IN EQUITY

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Where there is direct conflict of opinion between the courts of different States on a question of practical importance in the business world, it may well be worth while to state the question and to give the reasons assigned on both sides and endeavor to come to a conclusion as to which side should prevail. There is such a difference of opinion on a question which arises very frequently in dealing with the equitable title acquired by an assignment of funds in the hands of executors and trustees or of moneys due from a debtor to a creditor.

The question is whether an assignee for value without notice who gives notice to the debtor or trustee obtains priority over a prior assignee who has not given notice, or whether the assignment prior in time is prior in right even though the earlier assignee has given no notice to the debtor or trustee.

In the United States there are decisions on both sides of the question. In England, the rule is that which was adopted in *Dearle v. Hall,* 3 Russ., 1 (1827), that if one takes an assignment of a fund in the hands of a trustee and neglects to give notice to the holder of the fund, a second assignee for value who has no intimation of the prior assignment and has himself given notice to the holder of the fund, will have priority. This rule has been adopted by the Federal courts in the United States and by the courts of some of the States, but it has been ignored or rejected by the courts of other States, and they have applied the maxim *qui prior in tempore potior in jure,* and have held that the prior assignment must prevail even though no notice was given to the trustee and the second assignee take his assignment for value and without notice.

In the *American and English Encyclopaedia of Law* the situation of the law in England and America is stated as follows:

"It is a well established rule in England that as between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided that at the time of taking it, he had no notice of the prior assignments. In this country the authorities are greatly at variance on the question. In the Federal courts and many of the State courts the English rule has been adopted; but in other States the doctrine is denied and it is held that the assignment of a chose in action is complete upon the mutual

assent of the assignor and the assignee and does not gain additional validity as against subsequent assignees by notice to the debtor." [1]

In the *Cyclopaedia of Law and Procedure* it is said:

"The general rule is that as between successive assignees of the same chose in action from the same assignor, the assignee prior in point of time is prior in point of right, even though he has failed to give notice of the assignment to the debtor, and a subsequent assignee, who took without notice of the prior assignment, has given notice to the debtor of the assignment to him, although the courts of the United States and some of the States hold to the contrary view." [2]

In both of these compilations of the law, the rule is stated as a rule of property governing the assignment of choses in action generally, as if it applied to notes and bonds and other papers which are themselves obligations. The question is treated as a question of the title to a chose in action rather than as a question as to how a court of equity shall deal with persons acquiring the title in certain circumstances to equitable property of a certain kind, and it is perhaps because the distinction has not been observed in some cases that there is a contrariety of opinion in the American cases.

The rule of property, both at law and in equity, undoubtedly is that the holder who is prior in time is also prior in right, and, whether the assignment of a chose in action gives a legal title or merely a title in equity, this is the rule that must ordinarily govern the title to the property thus acquired. Since choses in action have been made assignable at law it is not always easy to determine whether the title acquired by an assignment of a

[1] 2 *A. & E. Ency. of Law,* 1077. 2nd ed. 1896. The cases cited are the following: Federal courts: *Spain v. Hamilton's extrs,* 1 Wall., 623; *Judson v. Corcoran,* 17 How., 612; *Laclede Bank v. Schuler,* 120 U. S., 511. States adopting the English rule: *Bank v. Hewitt,* 3 Iowa, 93, 66 Am. Dec., 49; *Murdoch v. Finney,* 21 Mo., 136; *Smith v. Sterritt,* 24 Mo., 260; *Ward v. Morrison,* 25 Vt., 593; *Switzer v. Noffsinger,* 83 Va., 518. States rejecting the English rule: *Kennedy v. Parke,* 17 N. J. Eq., 415; *Muir v. Schenck,* 3 Hill (N. Y.), 228, 38 Am. Dec., 633; *Hopkins v. Bank,* 7 Cow., 650; *Fairbanks v. Sargent,* 104 N. Y., 108, 56 Am. Rep., 490; *Brander v. Young,* 12 Tex., 332.

[2] 4 Cyc., 77. Note 82. The authorities cited for the doctrine stated in the text are cases in Alabama, California, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, New York, Ohio, Pennsylvania, South Carolina, Texas, Vermont and West Virginia. The American authorities cited as following the English rule are cases in the United States courts and in Iowa and Missouri.

chose in action is legal or equitable, and in some of the States in which the question we are considering was first decided, it was not necessary in the procedure of the court to distinguish very sharply between legal and equitable titles.

In some of these decisions the courts have regarded the question as a question of the title to the thing assigned as between assignor and assignee, rather than as a question of the principle to be applied by courts of equity to dealings in equitable interests between successive assignees.

In Massachusetts, the question arose with respect to the rights of a judgment creditor under an attachment of a debt that had been assigned without notice to the debtor. In *Wood v. Partridge,* 11 Mass., 488, it was held that want of notice to the debtor would not defeat the interest of the assignee as against an attaching creditor of the assignor, and afterwards in *Thayer v. Daniels,* 113 Mass., 129, it was held upon a creditors' bill that an assignment of a chose in action was good against the attaching creditor of the assignor, although the assignee had not given notice to the debtor. In this case Devens, J., referred to *Dearle v. Hall* and said:

"The rule in England seems to be that as between successive purchasers of a chose in action, he will have preference who first gives notice to the debtor, even if he be a subsequent purchaser. * * * Such, however, has not been the rule adopted in this State where it is well settled that the assignment of a chose in action is complete upon the mutual assent of the assignor and the assignee and does not gain additional validity by notice to the debtor. The principle which must govern in the trustee process, must determine the case upon this point." [3]

In a later case in Massachusetts,[4] the question arose between successive assignees of a fund in the hands of a trustee under a will. The first assignee had given no notice to the trustee and the assignment had not been recorded and the second assignee had given notice and recorded his assignment. The case was very similar to *Dearle v. Hall,* but the Supreme Judicial Court did not consider the question of equity discussed in that case, but applied the rule declared in *Thayer v. Daniels* with respect to the title to choses in action and said:

"Their respective interests were mere choses in action and it is settled in this Commonwealth that in the absence of fraud, an

[3] Citing *Wakefield v. Martin,* 3 Mass., 558; *Dix v. Cobb,* 4 Mass., 508; *Wood v. Partridge,* 11 Mass., 448.

[4] *Putnam v. Story,* 132 Mass., 205.

assignment of a chose in action is good against a subsequent purchaser though not recorded and though no notice is given to the debtor."

And it was held that an assignment by the beneficiary of a trust of his interest in the trust fund, although it was unrecorded and no notice was given to the persons in charge of the fund, took precedence over a subsequent assignment for value without notice which was recorded and of which notice was given.

In New York the rule established is in accordance with that of Massachusetts, and it is interesting to observe that it had its origin in like manner as a rule of property rather than in the application of principles of equity.

The leading case in New York was an action of debt on a bond,[5] and the decision was that the first assignee of a bond was entitled to recover the last installment, even though a later assignee had given the first notice, but the recovery was only sought of an installment which came due after notice given by the first assignee. Judge Cowen said that as between the two assignees of the bond, the first was entitled to the money. In a conflict of equitable claims, the rule is the same as at law, *qui prior est tempore, potior est jure,* and the first assignee was allowed to recover against the obligee of the bond the money he had paid over to the second assignee after receiving notice of the first one. Judge Cowen referred to the question suggested by Chancellor Kent in *Murray v. Lylburn,* 12 Johns Chy., 441-443, whether the case of *Redfearn v. Ferrier,* 1 Dow Parl. Cases 50, might not be regarded as a qualification of Lord Thurlow's remarks in *Davis v. Austin,* 1 Ves. Jr., 249, where he said: "A purchaser of a chose in action must always abide by the case of the person from whom he buys." On the question whether notice should be required to complete the title of an assignee. Judge Cowen said:

"Ordinarily any notice to conventional assignees must be out of the question, for the first assignee cannot know who they will be. Notice to the debtor might, I admit, afford them a better chance, for then there would be someone of whom they might inquire and they would naturally inquire. This might prevent fraud and to require it would perhaps be very proper. It is required by the law of Scotland, as appears by *Redfearn v. Ferrier,* which was decided by Scotch law. By that law, there must be what is called an intimation to the debtor before the assignment

[5] *Muir v. Schenck,* 3 Hill, 228 (1842).

is perfect and secures a complete preference even as against a subsequent assignee."

Judge Cowen, however, distinguished *Murray v. Lylburn* as a case in which there was a mere equity and not an express assignment. He said he considered the notice as intended for the protection of the debtor alone. He referred to the Massachusetts cases[6] in which it was held that as between assignor and assignee an assignment is complete without notice to the debtor and that such an assignment was good as against attaching creditors. And he cited cases in Kentucky[7] and quoted Hall, J., in *Jordan v. Black*,[8] as saying in substance that upon an examination of the authorities it would be found that the ground taken by the assignee of being a *bona fide* purchaser is tenable by those persons only who have the legal title in them and plead that they are purchasers for a valuable consideration without notice. The suit was an action on a bond and it was found that the debtor had no defense with respect to so much as had been paid to the second assignee after notice of the claim of the first. No demand was made for the money which had been paid over before such notice. The case of *Dearle v. Hall* was not considered and the question was treated as a question of the equitable title to a chose in action to which the doctrine of the defense of a *bona fide* purchaser of the legal title for value without notice was not applicable.

The doctrine of *Muir v. Schenck* was applied in *Fairbanks v. Sargent*[9] to the case of an assignment made to an attorney of a certain share of what should be collected on an account in litigation. The assignor afterwards assigned the account to another who, having had no notice of the assignment to the attorney, settled the case by taking bonds. It was held that the attorney was entitled to his share of the bonds. Ryan, C. J., said: "One assignee of such a claim from the owner (*i. e.*, a claim witnessed by no writing) must necessarily acquire the same interest as any other assignee does, and that is, in the absence of controlling equities, an interest subject to the rule that he who is prior in point of time is prior in right." The decision was placed upon

[6] *Wood v. Partridge*, 11 Mass., 488; *Foster v. Sinkler*, 4 Mass., 450; *Bholen v. Cleveland*, 5 Mason, 174-176; *Dix v. Cobb*, 4 Mass., 508.

[7] *White's Heirs v. Prentiss' Heirs*, 3 Monroe, 510; *Madeira v. Cattlett*, 7 Id., 477.

[8] *Jordan v. Black*, 2 Murphy, 30.

[9] 104 N. Y., 108.

the ground of priority of title, the title of both parties, whether it was legal or equitable, having been derived from the same source and it was considered that if there were equities they should not control so as to disturb the natural order of priority.

In a later case the same rule was stated in a contest over the priority of two assignments of the moneys due under a contract with a city.[10] The assignment was made a security for a smaller sum and was considered as an assignment of a part of the fund and was therefore an equitable assignment. The Court said:

"Patten, as a matter of fact, makes no claim against the city. * * * * He comes within the rule laid down by this Court to the effect that as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected although he has given no notice of such assignment to either the subsequent assignee or the debtor.[11] A different rule exists in England, in some of the States and in the United States courts. The respondents counsel has cited many of these foreign cases that are contrary to the law as long established in this State."[12]

The courts of many other States have reached the same conclusion as those of New York and Massachusetts, and have followed the same line of reasoning, and in doing so they have stated that a different rule has been adopted in England and in our Federal and some of our State courts. The cases are collected in a note in the fourth volume of the *Cyclopaedia of Law and Procedure,* 4 Cyc., p. 77, Note 82, and there are abstracts of them in 4 Century Digest, *Assignments,* Pars. 149 and 150, and still later cases may be found by reference to the *Annotations for* 1909.

One of these later cases is *Columbia Finance & Trust Co. v. First National Bank,* 25 Ky. Law Rep., 561, 76 S. W. Rep., 156 (1903). The Court said:

"The rights of the trust company are not affected by reason of the fact that the bank first gave notice to the debtor of its assignments. The rule in England is that as between successive assignees of the same chose, each being a *bona fide* purchaser for value, the one who first gave notice to the debtor will be entitled to a preference, although his assignment is later in date. Some

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[10] *Fortunato v. Patten,* 147 N. Y., 277, 41 N. E. Rep., 572.

[11] *Fairbanks v. Sargent,* 104 N. Y., 108; *Williams v. Ingersoll,* 117 N. Y., 508; *Muir v. Schenck,* 3 Hill, 228.

[12] There are later cases in New York in which the same rule is laid down, *e. g., Niles v. Mathusa,* 162 N. Y., 546, 57 N. E. Rep., 184; *Central Trust Co. v. West India Impr. Co.,* 169 N. Y., 314, 62 N. E. Rep., 387.

courts of this country have adopted the same rule, but the weight of authority is to the effect among successive assignments, the order of time prevails." [13]

It is to be observed, however, that Mr. Pomeroy, while stating the two rules does not say which is sustained by the weight of authority, and in paragraph 693, after stating the reasons given for the English rule, he says: "Courts of the highest ability have, therefore, regarded such assignments as occupying a very special position, and have applied to them a special rule in determining their order of priority."

There is an early case in New Jersey which is often cited in support of the rule adopted in New York and Massachusetts. This is *Kennedy v. Parke,* 17 N. J. Eq., 415 (1864). It was a suit for a legacy in a probate court. The executor had paid the legacy to an assignee and the ordinary, Chancellor Green, held him liable to pay it again to a prior assignee who had given no notice of the assignment. He said the right to a legacy was an equitable right and that after the assignment, no interest, whether legal or equitable, remained that could have passed to a second assignee, and that it was difficult to see how a payment to him could constitute a defense to the action. "It would seem," said he, "that if the executors have any defense upon this ground, it is purely an equitable defense and available only in a court of equity." Here again the question was purely a question of title and equitable principles were neither invoked nor applied. It is now completely established in New Jersey and everywhere else that if, without notice, the depositary or trustee pay the assignor, such payment is a complete defense against an action by the assignee.[14]

In a recent case in New Jersey, Vice-Chancellor Garrison said: "The English doctrine has been discarded in certain jurisdictions in this country, including New York and New Jersey." [15]

The New Jersey cases cited were: *Kennedy v. Parke,* 17 N. J. Eq., 415; *Kamena v. Huelbig,* 23 N. J. Eq., 78; *Terney v. Wilson,* 45 N. J. Law, 282; *Board of Education v. Duparquet,* 50 N. J. Eq., 234. *Kennedy v. Parke* has already been examined. The next case involved the assignment of a bond and mortgage which

[13] Citing 2 *Pom. Eq.,* Par. 695; 4 Cyc., 32, 77.

[14] *Board of Ed. v. Duparquet,* 50 N. J. Eq., 234-242; *Miller v. Stockton,* 64 N. J. Law, 614-622; 2 Spence, *Eq. Jur.,* 858; 4 Cyc., 89.

[15] *Cogan v. Conover Mfg. Co.,* 69 N. J. Eq., 358-372.

were delivered to the assignee. In such a case there was no negligence in not giving notice to the obligor, and the rule in *Dearle v. Hall* is never applied to assignments of mortgages nor to any liens on land. The third case was not a case of the equities of successive assignees of the same debt, but of the right of a debtor to set off against an assignee who had given no notice a counter claim which the debtor had acquired against the original creditor. In the last of these cases, Vice-Chancellor Pitney examined the English rule as declared in *Dearle v. Hall* and stated in Spence's *Equitable Jurisdiction,* Vol. II, par. 850, and said it arose out of the peculiar provision of the English Bankrupt Act by which personal property and choses in action in the possession of the bankrupt by the permission of the true owner passed to his assignees, by reason of which it was held that assignees must do all in their power to reduce the thing assigned into their possession in order to prevent it passing to the assignee in bankruptcy. This, he says, led to the practice of giving notice and to the habit of making inquiry of the debtor before taking an assignment of choses in action. "The effect of this practice," he said, "was that the courts held that the party who bought without notice of a previous assignment and after inquiring of the debtor or depositary, got a better title than a prior assignor who had not taken the precaution to give notice. Thus giving notice to the debtor or depositary came to take the place of a public registry of the assignment. This is illustrated by the cases of *Dearle v. Hall* and *Loveridge v. Cooper,* 3 Russ., 1."

The vice-chancellor discussed these cases in detail and said: "The result is that the whole value of notice to the debtor or depositary of the assignment of the fund or chose in action is, *first,* under the English bankrupt law, to prevent the subject of the assignment being considered as in the possession of or under the order of disposition of the assignor; and, *second,* to prevent the debtor, depositary or trustee or innocent third parties, from dealing with the original assignor or beneficiary." The vice-chancellor thus stated clearly the origin and purpose and effect of the English rule. The case did not involve the rights of innocent third parties, and his decision was that our attachment act was not like the English bankrupt law and that an attaching creditor was not a *bona fide* purchaser for value without notice and had no better title than the debtor himself had.

It has not been decided or even suggested, except in the dictum of Vice-Chancellor Garrison, above referred to, that the English rule with regard to the effect of failure to give notice or the rights of successive assignees, has been discarded in New Jersey. On the contrary, all the cases in New Jersey on equitable assignments recognize the necessity of giving notice to the debtor or trustee in order to make the assignment effective in certain cases, and it is only when the question has been between the assignee and the assignor and those who stand in his shoes that the assignment has been held to be effective without it.[16] The Court of Errors and Appeals in reversing the judgment in *Cogan v. Conover Mfg. Co.*, said: "As between the assignor and assignee and those standing in the shoes of the assignor, notice to the debtor or holder of the fund is not necessary. (Citing English authorities.) Cases in which notice to the debtor or holder of the fund becomes important are cases where the question is one of priority between different assignees, as in *Loveridge v. Cooper* and *Dearle v. Hall*, 3 Russ., 1, and cases arising under the English *Bankruptcy Acts, Ryall v. Rowles*, 2 L. C. Eq., 1533."

In *Miller v. Stockton*, 64 N. J. Law, 614, 622, the Court of Errors of New Jersey said:

"Whilst the notice is not an essential part of the assignment, yet its office and value is to prevent the debtor, depositary or trustee and innocent third parties from dealing with the original assignor as still the creditor, owner or beneficiary. If, without such notice, he pays the amount to the assignor, he must in law be relieved from its payment to the assignee, and payment to the assignor would be a complete defense to an action by the assignee. *Board of Education v. Duparquet*, 50 N. J. Eq., 234; 2 Spence, *Eq. Jur.*, 856, *et. seq.*"

There is no doubt that it is the established rule, applicable to equitable interests as well as to legal titles, that in the absence of controlling equities the title that is prior in time must prevail. It is also well settled that an equitable assignment as well as a legal assignment of a debt is complete as between the assignee and the assignor, although no notice of the assignment be given to the debtor or trustee. It is generally agreed that if no notice of an

[16] *Heath v. Supt. of Public Schools*, 15 N. J. Eq., 22; *Burnett v. Jersey City*, 31 N. J. Eq., 341; *Kirtland v. Moore*, 40 N. J. Eq., 106; *Bank of Harlem v. Bayonne*, 48 N. J. Eq., 246, S. C., on appeal, 318; *Bd. of Education v. Duparquet*, 50 N. J. Eq., 234; *Fisher v. Bull*, 52 N. J. Eq., 298; *Miller v. Stockton*, 64 N. J. Law, 614, 622.

assignment be given to the debtor, the assignment is not complete as against him, and he may safely pay a second assignee.[17] The only question is whether the rule shall be applied also to the protection of a second assignee who is an innocent purchaser without notice from the debtor or depositary, especially if he has made inquiry of the debtor with regard to his knowledge of a prior assignment.

It is this question that has been answered in the affirmative in *Dearle v. Hall,* and the English and American cases in which the rule adopted in England in 1827 has been followed. The decision was not put upon the doctrine of the rights of a *bona fide* purchaser for value without notice. This, as Prof. Pomeroy says,[18] is not a rule of property but a rule of inaction, and applies only when a defendant having a not inferior equity has acquired also a legal title or an equitable title which is regarded in equity as equivalent to a legal title. The rule in *Dearle v. Hall* rests upon the ground that in view of the nature of the property acquired by an equitable assignment of a chose in action, it is incumbent upon the holder of it to do what he can to reduce it to possession and to make good his title, so that the assignor may not deal with it as if he owned it to the injury of subsequent purchasers.

*Dearle v. Hall* and *Loveridge v. Copper,* 3 Russ., 1, were decided by Sir Thomas Plumer, Master of the Rolls, in 1827, and the decision was affirmed by Lord Lyndhurst. A person having a beneficial interest in a fund in the hands of trustees made an assignment for value to one who gave no notice to the trustees, and afterwards another, having made inquiry of the trustees, took an assignment of the same fund for value and gave the trustees notice. It was held that the second assignee had the better title. Lord Lyndhurst after remarking that there was no precise authority in point except the unreported case of *Wright v. Dorchester,*[18a] said: "But the case is not new in principle. Where personal property is assigned, delivery is necessary to complete the transaction not as between vendor and vendee, but as to third persons in order that they may not be deceived by the apparent possession and ownership remaining in a person who is not in fact the owner," and he referred to *Ryall v. Rowles,* 1 Ves.,

[17] 4 Cyc., 89.

[18] 3 Pom., *Eq. Jur.,* Sect. 743.

[18a] This case has now been reported in the notes to *Dearle v. Hall,* 38 English Reports, Full Reprint, 496.

348, 1 Atk., 165, which he conceded was a case in bankruptcy; but he said the Lord Chancellor called to his assistance Lord Chief Justice Lee and Lord Chief Baron Parker, "so that the principle the court then acted upon must be considered to have received the most authoritative sanction." And after quoting from the judgment of Lord Chief Baron Parker, he said: "I cite these authorities to show that in assignments of choses in action, notice to the legal holder has been deemed necessary."

It is true that the decision was based upon the prior decisions under the bankrupt law and, as Vice-Chancellor Pitney has suggested, upon the fact that it came to be regarded under that act as negligent not to give notice to the debtor, but nevertheless the rule was deliberately adopted by the court of equity for safety in dealing with a species of property which the court itself had created and which was peculiarly subject to misuse unless precautions were taken to require something to be done to reduce it to possession in order to retain the title as against innocent purchasers.

The doctrine of *Dearle v. Hall* was reviewed by the House of Lords and approved and applied in *Foster v. Cockerell,* 3 Clark & Finnelly, 456 (1835). This was a case of a second incumbrancer of an equitable interest who had given notice to the trustees and it was held that he had obtained priority over a prior encumbrancer who had not given notice. Lord Lyndhurst, in moving the judgment of the House of Lords, stated the principles upon which Sir Thomas Plumer had based his conclusions and said he entirely agreed with them and that the principles were directly applicable to the case in hand. Lord Brougham concurred in this opinion and the House of Lords gave judgment accordingly.

The rule of *Dearle v. Hall* was followed and explained by Sir James Wigram, V.C., in *Meux v. Ball,* 1 Hare, 73 (1841), and the principle was applied to a case in which the second encumbrancer had made no inquiry of the trustee. The vice-chancellor said the reasoning of Sir Thomas Plumer had been affirmed by the House of Lords in a case where no inquiry had been made by the second encumbrancer, and he had been preferred to the first who had failed to give notice to the trustee, and the decision was put on the ground that the first encumbrancer had not perfected his security. He said: "I think these decisions are founded on principle. The omission of the *puisne* encum-

brancer to make inquiry cannot be material where inquiry into the circumstances of the case would not have led to a knowledge of the prior encumbrance."

*Dearle v. Hall* was distinguished from *McCreight v. Foster,* 5 Ch. App., 604 (1870), where there was merely a contract to assign and not a complete assignment and also in *Ex parte Robbidge,* 8 Ch. D., 367. It was followed and applied by Sir George Jessel, M.R., in *In re Freshfield's Trusts,* 11 Ch. D., 198 (1879), and the judgment was affirmed by Lord Selborne, and Baggallay and Lush, L., JJ.

In a recent case in the King's Bench Division, in bankruptcy, it was held that the doctrine was not limited to a case where there was *laches* in not giving notice. Wright, J., after quoting Lord Lyndhurst in *Foster v. Cockerell,* said:

"According to that authority the rule that prefers an assignee who has given the prior notice does not depend solely on the imputation of *laches* and even in the absence of *laches* the other grounds for the rule exist. Nor, I think, has the question ever been treated as one merely of *laches.* The courts seem to me to have in modern times asked only which assignee was the first to perfect his security by notice." [19]

In *Montefiore v. Guedalla* [1903] 2 Ch., 37, Cozzens-Hardy, J., said:

"The rule laid down in *Dearle v. Hall* is now part of the law of the land. It does not rest merely upon the decision of Sir Thomas Plumer and Lord Lyndhurst in that case. It was affirmed and possibly extended by the House of Lords in *Foster v. Cockerell.* The reasoning of Jessel, M.R., in *In re Freshfield Trusts* has satisfied me that the principle applies equally when the second assignment is made not by the original owner who made the first assignment, but by his legal representative. That decision is nearly a quarter of a century old. It has never been questioned."

The rule of *Dearle v. Hall* is stated by Mr. Spence in his treatise on *The Equitable Jurisdiction of the Court of Chancery,* as an established rule of the court of equity in dealing with successive assignees or encumbrancers of debts or funds in the hands of trustees,[20] and by Judge Story in his work on *Equity Jurisprudence,* in 1857.[21]

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[19] *In re Lake; Ex parte Cavendish* [1903] 1 K. B., 151.

[20] The case is stated and the rule explained and defined in *White v. Tudor's* note to *Ryall v. Rowles,* 2 Leading Cases in Equity, p. 849.

[21] 2 Story, *Eq.,* Par. 1035. See also Par. 1057 and 1 Story, *Eq.,* Par. 421. A later edition gives a reference to the American cases holding a contrary doctrine. *Ibid,* Par. 421 (c).

The English rule is stated in Pomeroy's *Equity* with the reasons on which it is based, and he says: "Courts of the highest ability have, therefore, regarded such assignments as occupying a very special position and have applied to them a special rule in determining their order of priority." These reasons, he says, do not apply as between the assignor and the assignee, or even his judgment creditors.[22] Prof. Pomeroy states also the contrary rule adopted by many of the American courts. *Dearle v. Hall* is included in the collection of *English Ruling Cases,* Vol. X, p. 478, and the rule is there stated briefly as follows: "Where A, having a beneficial interest, present or future, by a right available against B assigns his interest to C, and subsequently assigns the same interest to D, if before B has received any intimation of the assignment to C, D gives notice to B of the assignment to him, D has a better equity than C." In the American note it is said: "There is some dispute about the doctrine of the rule in this country and reference is made to some cases on both sides of the question." [23]

The English rule was approved and followed by the Supreme Court of the United States in *Judson v. Corcoran,* 17 How., 612 (1854), where Catron, J., said: "The rule was distinctly asserted by Chancellor Kent in 1817, in *Murray v. Lylburn,* 2 Johns. Ch., 442, before the question was settled in England and before this court discussed it which was in 1822 (*Bayley v. Greenleaf,* 7 Wheat., 46), and the same principle was applied by the Court of Appeals of Virginia in the case of *Moore v. Holcombe,* 3 Leigh's R., 597, in 1832."

This decision was followed by the Supreme Court in *Spain v. Hamilton's Administrator,* 1 Wall., 604 (1863). Mr. Justice Wayne said:

"This case has been examined by us very fully and with every regard for the arguments of the able counsel representing the complainant (Messrs. Brent and Bradley). We think it to be clearly within the principles decided by this court in *Judson v. Corcoran.* It is clearly within the cases which have been so fully and ably reported, of *Dearle v. Hall* and *Loveridge v. Cooper,* in 3 Russ., 1. * * * As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor. But in order to perfect his

[22] 2 Pom., *Eq.,* Pars. 893, 894.

[23] There is a note upon *Dearle v. Hall* in 1 Ames, *Cases on Trusts,* 386.

title against his debtor, it is indispensable that the assignee should give immediate notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee or the debt may be discharged by a payment to the assignee before such notice. (2 Story, *Eq. Jur.*, 376, Par. 1047, and the cases cited.) No cases can be cited or were in conflict with those upon which we rely for the judgment we are about to give in this case."

The judgment was in favor of the second assignee who made inquiries and gave notice against the first assignee who had had no notice.

This decision was quoted in *Laclede Bank v. Schuler,* 120 U. S., 511 (1886), but the question in that case related to a draft upon a bank, and such also was the question in *Christmas v. Russell.* 14 Wall., 69.[24]

The English rule has been adopted by the courts of California,[25], Connecticut,[26] Iowa,[27] Mississippi,[28] Missouri,[29] Pennsylvania,[30] Tennessee,[31] Virginia,[32] and Vermont,[33] and the principle of the rule is fully recognized in New Jersey as shown in the New Jersey cases above cited.

There is no need to refer to the cases in detail, but it may be useful to quote a few of the recent cases. It is interesting to note that in a case in Connecticut in 1841,[34] the rule was applied even as against attaching creditors and that the court refused to

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[24] The rule in *Dearle v. Hall* was applied in *Methven v. Staten Island L. H. & P. Co.,* 66 Fed., 113 (C. C. A., S D. N. Y. 1895), in the *Elmbank* 72 Fed., 610 (N. D. Cal. 1896); in *Third National Bank of Philadelphia v. Atlantic City,* 126 Fed., 413 (C. C. N. J., 1903), and in *Jack v. National Bank,* 17 Okla., 430, 89 Pac., 219, overruling *Gillette v. Murphy,* 7 Okla., 91, 54 Pac., 413.

[25] *Graham Paper Co. v. Pembroke,* 124 Cal., 117, 56 Pac., 627, 44 L. R .A., 632.

[26] *Woodbridge v. Perkins,* 3 Day, 364; *Judah v. Judd,* 5 Day, 534; *Bishop v. Holcomb,* 10 Conn., 444; *Van Buskirk v. Hartford Ins. Co.,* 14 Conn., 141, where the rule was applied even against attaching creditors; *Foster v. Mix,* 20 Conn., 395.

[27] *Merchants' Bank v. Hewitt,* 3 Iowa, 96; *Manning v. Matthews,* 70 Iowa, 503, 66 Am. Dec., 49.

[28] *Enoch-Havis Lumber Co. v. Newcomb,* 79 Miss., 462, So. R., 608.

[29] *Murdoch v. Finney,* 21 Mo., 138; *Houser v. Richardson,* 90 Mo., App., 134.

[30] *Re Phillips Estate, Appeal of Moses,* 205 Pa. St., 515, 55 Atl., 213.

[31] *Nelson v. Trigg,* 79 Tenn. (7 Lea.), 69.

[32] *Coffman v. Liggett,* 107 Va., 418, 59 S. E. R., 392.

[33] *Ward v. Morrison,* 25 Vt., 593.

[34] *Bishop v. Holcombe,* 10 Conn., 141.

credit the evidence offered to show that the law of New York differed from that of England and Connecticut upon a principle so "correct and salutary as that requiring notice to be given of the assignment of a chose in action to protect it against the subsequently acquired rights of other persons."

A recent case in California[35] applies the English rule to an assignment of book accounts, noting the distinction mentioned by Prof. Pomeroy between a subsequent purchaser for value and an attaching or judgment creditor of the first assignee. The court referred to the New York decisions and said they thought the English rule followed by our Federal courts and some State courts was "based upon the better reasons and sustained by the weight of authority." Notice to the debtor not only protects the assignee against payment to the assignor but against any payment to the subsequent assignee.

In Pennsylvania after some uncertainty in the earlier decisions, there was a case in 1903 in which choice was made between the two lines of conflicting American decisions, and preference was given to the English rule as affording the greater safety in dealing with an important species of equitable property.[35a] Judge Brown, speaking for the Supreme Court, said that funds in the hands of trustees were dealt in commercially by means of assignments and that it was important that the dealings should be protected as far as possible. Inquiry of the assignor would be of little avail, because if a man would sell to one man what he had already sold to another, his word was not to be relied upon. The trustee had no interest and would answer truly if inquired of. If notice were required by law, notice would ordinarily be given, and assignments could be taken with safety after inquiry of the trustee. He quoted the words of Chief Justice Gibson in *Fisher v. Knox,* 13 Pa. St., 622, 53 Am. Dec., 503, as indicating how he would have decided the question if it had come before him and said: "With the question now fairly before us, we adopt and announce as the only safe rule, that if an assignee fails to give notice to the person holding the fund assigned to him, a subsequent assignee without

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[35] *Graham Paper Co. v. Pembroke,* 124 Cal., 117, 56 Pac., 627, 44 L. R. A., 629 (1891).

[35a] *In Re Phillips Estate, Appeal of Moses,* 205 Pa. St., 515, 55 Atl., 213.

notice of the former assignment, will, upon giving notice of his assignment, acquire priority."

There can be no question of the policy of adopting such a rule. It is a rule that works for justice and gives the value of commercial availability to credit assets of enormous extent and variety. A review of the cases shows that it has the authority of English equity judges of the highest ability during three-quarters of a century, and also of the Supreme Court of the United States and other Federal courts and of the courts of many of the States. The principles of equity upon which it rests are familiar. It is conceded in most of the cases that as between the assignor and the assignee, the title to a claim assigned is complete without notice to the debtor or trustee, and that this is also true with respect to those who stand in the shoes of the assignor as attaching creditors or assignees in bankruptcy or insolvency, apart from the special provisions of the English statute; but as against subsequent assignees for value without notice, it is required of an assignee that he assert his control over the property by giving notice to the person who holds it in trust or possession. In the earlier decisions this was required by way of analogy to the statutes against fraud in the transfer of personal property without change of possession, and it was in fact the declaration of a rule for enforcing honest dealing in equitable property. If no notice were given, the property was not safe against assignees under the English Bankruptcy Act, nor was it secure against a payment by the trustee to the assignor or a subsequent assignee. There was negligence, therefore, in not giving the notice and by reason of this negligence the assignee who failed to give notice was deferred to one who did. The doctrine of notice, as was said by Garrison, J., in a case in the Court of Appeals of New Jersey,[86] is at bottom a part of the law of negligence. So far as title is concerned the equities of the two assignees may be equal, but by reason of the negligence of the first assignee in leaving the assignor with apparent ownership, the second assignee who himself gives notice has the better equity. His equity is like that of a subsequent encumbrancer without notice who takes protection against a subsequent encumbrancer which a prior

[86] *Fisher v. Bull*, 52 N. J. Eq., 298-309. The Judge adds: "It is undoubtedly true, as a general rule, that the assignee of a fund is negligent if he fails to give notice to the depositary who may otherwise pay it out to a subsequent assignee."

encumbrancer has neglected to take.[37] Even though the second assignee, being a *bona fide* holder for value, has not a legal title, he has a title which the court of equity has created and is desirous of protecting, and on this ground he is regarded by analogy at least, as having the rights of a *bona fide* purchaser for value without notice.[38] The doctrine of estoppel also is invoked against the first assignee who has not given notice, and for want of giving the notice he is not permitted to assert his claim against one who parted with value relying upon the apparent title of the assignor. He must himself have given notice, but according to the English authorities,[39] it is not necessary that he should have inquired of the trustee before purchasing if the inquiry would not have revealed the prior purchase.

There are choses in action that do not come within the reasons for the rule or the mischief that it is intended to guard against. Such are negotiable and quasi-negotiable instruments, mortgages on land, shares of stocks and debts which are transferable only by possession of the document by which they are evidenced, but apart from these it may be said that the rule of reason and sound policy supported by the weight of authority is the rule declared by Sir Thomas Plumer and approved by Lord Lyndhurst in *Dearle v. Hall.*

*Edward Q. Keasbey.*

*Newark, N. J.*

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[37] *Foster v. Blackstone,* 1 My. & K., 297; *Etty v. Bridges,* 2 Y. & C. C. C., 486, 492.

[38] An equitable mortgagee who advances his money on taking his mortgage is regarded as a *bona fide* purchaser for value. *Wheeler v. Kirtland,* 24 N. J. Eq., 553, 555.

[39] *Meux v. Bell,* 1 Hare, 73; *Etty v. Bridges,* 2 Y. & C. C. C., 486-494; *Warburton v. Hill,* 1 Kay, 470; *Foster v. Blackstone,* I My. & K., 297; *Foster v. Cockerell,* 3 Cl. & Fin., 456, 9 Bligh., N. S., 332.