Dearle v Hall 3 Russell 1, 38 ER 475

Loveridge v Cooper 3 Russell 1, 38 ER 475

Report Date: 1823, 1828

[3-Russell-1] DEARLE v HALL. LOVERIDGE v COOPER. June, July, December, 1823; May 8, November 8, 9, 1827; December 24, 1828.
[S. C. 2 L. J. Ch (O. S.) 6 2, 75. See M'Creight v Foster, 18 70, L. R. 5 Ch 612; Ex parte Allen, 1870, L. R. "Eq. 211; Ex parte Rabbidge, 1878, 8 Ch D. 370; In re Freshfield's Trust, 1879, "Ch D. 198; Palmer v Locke, 1881, 18 Ch D. 386; West of England Bank v Batchelor, 1882, 51 L. J. Ch 200. Held not to apply to shares in Companies, Societe Generale de Paris v Tramways Union Co. 1884-5, 14 Q. B. D. 425; "App. Cas. 20. See Arden v Arden, 1885, 29 Ch D. 708; In re Richards, 1890, e 5 Ch D. 589; Ward v Duncombe, [1893] AC 376 Stephens v. Green, [1895] 2 Ch 148; In re Wasdale, [1899] 1 Ch 163. Lloyds Bank v Pearson, [1901] 1 Ch 865; In re Lake, [1903] 1 KB 153 Montefiore v Geudalla, [1903] 2 Ch 33.]

A person having a beneficial interest in a sum of money, invested in the names of trustees, assigns it for valuable consideration to A. but no notice of the assignment is given to the trustees; afterwards, the same person proposes to sell his interest to B. and B. having made inquiry of the trustees as to the nature of the vendor's title, and the amount of his interest, and receiving no intimation of the existence of any prior incumbrance, completes the purchase, and gives the trustees notice: B. has a better equity than A. to the possession of the fund, and the assignment to B. though posterior in date, is to be preferred to the assignment to A. It is of no importance in the question as to the priority of title acquired under the assignments, whether the interest of the vendor be vested or contingent, present or reversionary.

The cases of Dearle v Hall and Loveridge v Cooper involved the same principle; and the decision in the latter, both on the original hearing and on appeal, was pronounced immediately after judgment had been given in the former, and with reference to the reasons and authorities on which that judgment proceeded. These circumstances render it convenient to combine, to some extent, the report of the one case with that of the other.

[3-Russell-2] The case of Dearle v Hall arose out of the following transactions
Peter Brown, by his will, dated the 11th of September 1794, after bequeathing some legacies, and giving an annuity of £40 to a granddaughter, made the following disposition of a part of the residue of his personal estate and of the money to arise by the sale of his real estates: "I do hereby direct my said executrix and executors, and the survivors and survivor of them, and the executors and administrators of such survivor, to place one moiety of the said residue of my personal estate, and of the money to arise from the sale of my real estates, out at interest upon government or real security, during the life of my son Zachariah Brown, and to pay the interest and produce thereof unto him my said son Zachariah Brown during his life."

3 Russell 3, 38 ER p476
Ann Bircham, William Foster the elder, William Foster the younger, and William Unthank, the executrix and executors of Peter Brown, had invested the clear residue of the testator's estate, amounting to £4600, on real securities: and the share of the interest yielded by these securities, which was payable to Zachariah Brown, came to about £93 a-year. Mr. Unthank was a solicitor, and took the principal share in the management of the testator's estate.

By an indenture, bearing date on the 19th of -December 1808, and made and executed by and between Zachariah Brown of the first part, Charles Martin Demages of the second part, William Bircham of the third part, and William Dearle of the fourth part-(reciting, that Zachariah Brown was, under the last will of his father Peter Brown, entitled for life to the yearly annuity of £93,

issuing out of a moiety of Peter Brown's residuary estate, and which was then paid to him by [3-Russell-3] Ann Bircham, William Foster the elder, William Foster the younger, and William Unthank, the executors and executrix of Peter Brown; that Zachariah Brown had agreed, in consideration of the sum of £201, to sell to Dearle an annuity of £37 a-year during the natural life of him Zachariah Brown, the payment of which was to be secured by the covenant and warrant of attorney of Zachariah Brown, and also of Charles Martin Demages, and William Bircham, who had agreed to become jointly and severally sureties for him), it was witnessed, that, in pursuance of the said agreement, and of the sum of £204: paid to Zachariah Brown, they, Zachariah Brown, and Charles Martin Demages, and William Bircham, did, for themselves', their executors and administrators, jointly and severally covenant with William Dearle, his executors, administrators, and assigns, that they their heirs, executors, or administrators, or some or one of them, should pay or cause to be paid unto William Dearle, his executors administrators, and assigns, during the natural life of Zachariah Brown, one annuity of £37, free of and clear from all taxes, charges, and deductions, by equal quarterly payments, on the 19th of March, the 19th of June, the 19th of September, and the 19th of December, in every year.

The indenture further witnessed, that, "for the better and more effectually securing the payment of the aforesaid annuity, he, Zachariah Brown, granted, bargained, sold, and assigned unto William Dearle, his executors, administrators, and assigns, all and singular the yearly sum or annuity of 193, and all arrears thereof, yearly arising or growing, and to which he, Zachariah Brown, was entitled for life, under the will of Peter Brown, and all the estate, right, title, interest, trust, property, benefit, claim, and demand of him Zachariah Brown in, to, or out of the same," to have and take all the interest, dividends, and proceeds of the aforesaid stocks [3-Russell-4] or sums, and all other the premises thereby assigned, in as ample and beneficial a manner as he, Zachariah Brown, was then entitled to the same; but, nevertheless, upon trust to permit and suffer Zachariah Brown and his assigns to receive and take the same, until default should be made for the space of twenty-one days in payment of some, quarterly instalment of the annuity, or some part thereof; and upon further trust, in case any quarterly instalment of the annuity, or any part thereof, should happen to be in arrear or unpaid for the space of twenty-one days next after any of the days or times aforesaid then that William Dearle, his executors, administrators, or assigns, should receive and take the thereby assigned interest, dividends, and proceeds, and should thereout, in the first place. retain and satisfy to himself and themselves the costs of receiving the same, or otherwise attending the performance of the trusts thereby declared; and, in the next place, should thereout retain, reimburse, and satisfy to himself or themselves the said annuity, or so much thereof as should be then in arrear, and should pay, or otherwise permit and suffer him Zachariah Brown, or his assigns, to receive and take the residue or surplus thereof, if any, to and for his and their own use and benefit. This declaration of trust was followed by a proviso making the annuity redeemable. A memorial of this indenture, and of the warrant of attorney mentioned in it, was enrolled.

By another indenture, bearing date on the 26th of September 1809, and made and executed by and between Zachariah Brown of the first part, William Bircham of the second part, and Caleb Sherring of the third part - (reciting Zachariah Brown's title under his father's will; that he had contracted to sell an annuity of £27 for his own natural life to Caleb Sherring, which, it had been agreed, should

be secured by the covenant and warrant [3-Russell-5] of attorney of Zachariah Brown and William Bircham as his surety; and that Zachariah Brown and William Bircham had, for that purpose, jointly and severally executed a warrant of attorney to confess judgment in the sum of £300);-it was witnessed, that, in pursuance of the said agreement, and in consideration of the sum of £1 50, they, Zachariah Brown and William Bircham, did for themselves, their heirs, executors, and administrators, jointly and severally covenant to pay or cause to be paid to Caleb Sherring, his executors, administrators, and assigns, from thenceforth during the natural life of Zachariah Brown,

one annuity of £27, free and clear of and from all taxes, charges, and deductions, by equal quarterly payments, on the 26th of December, the 26th of March, the 26th of June, and the 26th of September: and it was thereby further witnessed, that, for the "better and more effectually securing the payment of the aforesaid annuity," Zachariah Brown granted, bargained, sold, and assigned unto Caleb Sherring, his executors, administrators, and assigns, the above-mentioned yearly sum or annuity of £93, and all arrears thereof. This assignment took no notice of the indenture of the 19th of December 1808, but was expressed in similar language, and was upon similar trusts. A memorial of this second indenture, and of the warrant of attorney mentioned in it, was enrolled.

The annuity of £37 was paid up to the 19th of June 1811, and that of £27, up to the 26th of June 1811. From those dates both annuities had been unpaid; save only that, in May 1813, Dearle, having arrested the surety, Demages, in an action upon the covenant, compelled him to pay the arrears of his annuity for one year and three-quarters, up to the 19th of March 1813.

Notwithstanding these assignments, Brown, early in 1812, advertised his life-interest in the £93 for sale as [3-Russell-6] an unincumbered fund; and this advertisement led to a negotiation with Joseph Hall, who proposed to become the purchaser. Hall's solicitor, Mr. Patten, used all due diligence in scrutinising Brown's title; and, in a correspondence which took place between him and Mr. Unthank, the acting executor, he inquired of Mr. Unthank the exact amount payable to Brown, and called for every information respecting the fund and the title.

No notice of the assignments to Dearle and Sherring had been given to the executors; and as Mr. Unthank was in complete ignorance of the existence of such instruments, none of his letters made any mention of or allusion to any incumbrance as affecting the property. Under these circumstances, the contract between Brown and Hall was carried into effect, by an indenture dated the 20th of March 1812, made between Joseph Hall of the one part, and Zachariah Brown of the other part; which, after reciting Brown's title and contract with Hall, witnessed, that, for the sum of £711, 3s. 6d. Zachariah Brown thereby assigned unto Joseph Hall, his executors, administrators, and assigns, all the annual income, interest, and dividends of the moiety of the residuary estate of Peter Brown, consisting (among other things) of the several sums of money due upon certain mortgages and securities specified in an annexed schedule, to receive and take the interest and dividends from the 25th of December then last past, during Zachariah Brown's life. Brown also covenanted for quiet enjoyment, and that he had done no act to encumber the fund; and he constituted Hall, his executors, administrators, and assigns, the attorney and attornies of him, Brown, for the purpose of receiving the dividends. The executors of Peter Brown had been requested to become parties to the deed, but had refused.

[3-Russell-7] On the 25th of April, Hall served a written notice on the executors, requiring them to pay to him, as assignee-of Zachariah Brown, the moiety of the dividends of the residuary fund during Brown's life; and, in July 1812, Unthank remitted to Hall £31, 12s. 10d. on account of the yearly dividends so assigned. On the 17th of October following, the executors, for the first time, received notice of the assignments to Dearle and Sherring; and they thenceforward declined to pay the interest to any of the claimants, until their rights should be ascertained.

The material parts of the correspondence between Hall's solicitor and the executors are stated by the Master of the Rolls in his judgment.

On the 17th of June 1819, Dearle and, Sherring filed their bill against Hall, Zachariah Brown, the sureties for the payment of their respective annuities, and the personal representatives of Peter' Brown. The bill charged, that, even if Hall had given the executor notice of his assignment before Dearle and Sherring gave

notice of their incumbrances, the preferable title, which they acquired by reason of the prior date and execution of the instruments under which they claimed, could not be prejudiced by that circumstance; that Hall did not, before he completed his purchase, make or cause to be made, any inquiries of the executors of Peter Brown, for the purpose of ascertaining whether they had received

notice of any incumbrances affecting the funds out of which the annuity was to be paid; that it was incumbent on Hall and his agents, before the completion of his purchase, to have searched, or caused search to be made, at the proper offices, for t e pur-pose of ascertaining whether there were any prior incumbrances affecting the funds; that he and they were [3-Russell-8] guilty of laches in omitting to make such search; and that, if such search had been made, Hall would have ascertained that the Plaintiffs were entitled respectively to their annuities of £37 and £27. The prayer in substance was, that the arrears and growing payments of the annuity of £93 a-year might be applied in satisfying to the Plaintiffs, according to their priorities, what should be found due to them on their several annuities, and their costs in recovering the same; and that the executors of the testator might be restrained from paying any part of the arrears or growing payments of the £93 a-year to Hall, or to any other person than the Plaintiffs, until all the arrears due to them in respect of their annuities should have been satisfied.

Hall, by his answer, relied on the indenture of the 20th of March 1812, and the priority of his notice; submitting to the judgment of the Court, whether the

Plaintiffs were not bound to have given to the executors of Peter Brown, within a reasonable time, and before March 1812, notice of the assignments made to them respectively whether, by having omitted to give such notice, till after the execution of the Defendant's indenture of assignment, they were not precluded in a court of equity from having any benefit of their assignments as against him-and whether they ought not to resort, for the payment of their annuities, to their personal, remedies against Zachariah Brown and his sureties?

Hall further stated, that, before the execution of the assignment to him, and the completion of his purchase, he, by his solicitors, made inquiries of the executors respecting the title of Zachariah Brown to the dividends in question, and respecting the securities on which the fund was invested; and that, though a correspondence [3-Russell-9] on the subject took place between' his solicitor and Unthank, the acting executor, no notice or intimation of the existence of any incumbrance on Brown's fife interest was given to him, Hall, or to any person on his behalf, either by the executors or by any other individual. But he admitted, that he did not, before he completed his purchase, make, or cause to be made, an inquiries of the executors of Peter Brown expressly for the purpose of ascertaining, whether they had received notice of any incumbrance or incumbrances affecting Zachariah Brown's life-interest in the moiety of the dividends of the residuary estate; and that he did not make, or cause to be made, any search at any of the offices, in order to ascertain whether any such incumbrances existed. He insisted, also, on some alleged defects in the memorials of the annuities granted to the Plaintiffs.

Zachariah Brown stated by his answer, that, at the date of the assignment to Hall, he 'believed the former annuities to have been redeemed.

A former bill, filed for the same purpose as the present, had been suffered to be dismissed for want of prosecution.

The executors had-paid into court the arrears of the dividends of Zachariah Brown's moiety of the residuary fund.

Mr. Sugden and Mr. Phillimore, for the Plaintiffs.

Mr. Horne and Mr. Barber, for Hall.

Mr. Roupell for the trustees. [3-Russell-10] The point contended for by the Plaintiffs was, that, prima facie, the priority of their assignments gave them a preferable title, to the possession of the fund, and that nothing had been done which afforded a sufficient reason for postponing them.

The Defendant, Hall, on the other hand, argued, that, by giving the first notice to the trustees, he had first done all that could be done to make the title to an equitable interest in a personal chattel complete; that the Plaintiffs, on the other hand, by omitting to give notice of their incumbrances, had chosen to remain satisfied with an imperfect title, and had enabled Brown to commit a fraud; and that, under such circumstances, the equity of him, Hall, though arising under an instrument of later date, was a better equity than theirs.

it was admitted in the argument, that there was, no direct authority upon the point; but a case of Wright v Lord Dorchester (see 3 Russ. 49) was referred to, in which it appeared from an interlocutory order made by Lord Eldon, that the inclination of his opinion was in favour of the purchaser who gave the first notice, as against a prior purchaser who gave no notice.

July 1, 1823. The Master of the Rolls, Sir Thomas Plumer, went through the facts of the case, and stated his opinion, that Hall's claim was to be preferred to that of the Plaintiffs. The principle, on which he, chiefly relied, was, that the Plaintiffs had been negligent; and, in consequence of their negligence, third parties had been involved in transactions which could not have taken place, if the first purchasers, by omitting to communicate their claims to the legal holders of the fund, had not put it out of the power of those legal holders, though acting with [3-Russell-11] perfect fairness and honesty, to represent to the subsequent purchaser the true state of circumstances; that, where a first purchaser, by his negligence, placed a subsequent purchaser, who had acted with all due caution, in such a situation, that loss must fall either upon the one or the other, he, who had been in default, and had caused the mischief, ought not to be saved harmless at the expence of an innocent party that, under such circumstances, the general rule of priority ought to be qualified, and that he, who stood first in point of time, ought to be postponed to a competitor claiming under an instrument of later date, who had been informed by the legal holder of the fund, that there were no incumbrances affecting it, and who gave that legal holder notice of his purchase, before notice had been given of any other incumbrance.

But as the point did not appear to have been expressly determined in any preceding case, and was of great importance. his Honour declined coming to any final judgment in the cause, till the question was again argued.

December 3, 1823. The case was again argued, by Mr. Sugden for the Plaintiffs, and by Mr. Barber for the Defendant Hall.

December 26. The Master of the Rolls, Sir Thomas Plumer. It is observable, in the first place, that the right, which Zachariah Brown had under the will of his father, was simply a right to a chose, in action. The legal interest in the residue was vested in the executrix and executors; and they were to hold this moiety of the residue so long as Zachariah Brown lived. They were to Pay him the dividends during his life; but it is clear, from the terms of the will, that they were not to part with the legal interest. [3-Russell-12] Dearle, when he entered into this contract, seems to have been anxious to secure the payment of the annuity in many different modes. He took the precaution to have, not only Brown's covenant, but the joint and several security if Demages and Wm. Bircham: he took also a warrant of attorney to confess judgment. In fact, the fund in question was the last security resorted to, and is specified as a further and collateral security.

One of the terms of the contract was, that Brown and his assigns were to be permitted to receive the £93 a-year, until default should be made, for the space of twenty-one days in payment of the annuity. Not only, therefore, was the contract not followed by possession of the fund, but there was an express stipulation to the contrary: so that the transaction with Dearle, at the time when it happened, was nothing more than an equitable contract for a collateral security, to be issuing out of a chose in action, not followed by equitable possession, nor by any thing tantamount thereto. It was not possible for Brown to transfer the legal interest that could not but remain with the executors; but wherever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it which a court of equity considers tantamount to possession, namely, notice given to the legal depositary of the fund. Where a contract, respecting property in the hands of other persons, who have a legal right to the possession, is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of - that is, by giving notice of the contract to those in whom the legal interest is. By such notice, the legal holder's are converted into trustees for the new purchaser, and are charged with responsibility towards [3-Russell-13] him; and the cestui que trust is deprived of the power of carrying the same security repeatedly into the

market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrance, and that the trustees are still trustees for him, and for no one else. That precaution is always taken by diligent purchasers and

3 Russell 14, 38 ER p480
incumbrancers if it is not taken, there is neglect; and it is fit that it should be understood, that the solicitor, who conducts the business for the party advancing the money, is responsible for that neglect. The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having taken place in the equitable rights affecting it: he considers himself to be a trustee for the same, individual as before, and no other person is known to him as his cestui que trust. The original cestui que trust, though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property as absolutely as ever; so that he has it in his power to obtain, by means of it, a false and delusive credit. He may come into the market to dispose of that which he has previously sold; and how can those, who may chance to deal with him, protect themselves from his fraud Whatever diligence may be used by a puisne incumbrancer or purchaser - whatever inquiries he may make in order to investigate the title, and to ascertain the exact state of the original right of the vendor, and his continuing right, - the trustees, who are this persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them, that the fund remains the sole absolute property of the proposed vendor. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees; and they must be considered as foreseen by [3-Russell-14] those who, in transactions of that kind, omit to give notice; for they are the consequences which, in the experience of mankind, usually follow such omissions. To give notice is a matter of no difficulty: and whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons; and they become responsible, in some respects, for the easily foreseen consequences of their negligence.

It was as easy for Dearle, or his solicitor, to have given notice in 1808 of the equitable contract with Brown, as in 1812. In not doing so, he was guilty of negligence, - of gross negligence, which exposed the property to all that has since happened; - which enabled Brown to practice on another innocent individual so as to induce him to lend his money, without any suspicion of the existence of a preceding conveyance; - which, leaving the trustees in ignorance of the fact, led them into the erroneous belief, that Brown was the owner of the whole equitable right, and induced the 'in to represent him as the owner to the individual who, at a period long subsequent, became the purchaser of the fund. In June 1811, Dearle's annuity fell into arrear, and, from that time, was in arrear for much more than twenty-one days. Dearle had then a right to take immediate possession of the fund; yet he allowed Brown to continue in undisturbed enjoyment of it, and, for more than a year afterwards, he took no step towards obtaining possession of the £93 a-year, which was a collateral security for the payment of what was due to him. Not even then did he give notice of the existence of his incumbrance to the executors; and they continued to hand over the income to Brown, as the only person having any claim to it.

[3-Russell-15] The deed, under which the other Plaintiff, Caleb Sherring, claims, is, with little variation, similar to the deed to Dearle, and was probably drawn by the same professional gentleman; yet no notice is taken in it of the prior conveyance to Dearle, nor is any thing done by Sherring to obtain immediate possession of the fund. On the contrary, in this as in the other indenture, it is expressly stipulated, that Brown and his assigns should be permitted to receive the £93 a-year, till default was made for twenty-one days in the payment of the annuity. Sherring's annuity of £27 was paid up to June 1811, and then fell into arrear, but no step was taken to reach the fund. It was not till the 17th of October 1812, that notice of these two annuities was, for the first time, given to the executors. The act of then giving notice shews, that the annuitants were aware

that notice was necessary, in order to complete their security; but their tardiness in giving notice constitutes the negligence which has produced all the mischief. For Brown, having, by the conduct of Dearle and Sherring, been thus left at liberty to deal with the property as he pleased, availed himself of this power, and was even so confident as to advertise his life-interest for sale, publicly inviting purchasers to treat with him as, for an unincumbered fund. In March 1812, more than half a year before Dearle, and

3 Russell 16, 38 ER p481

Sherring gave the executors notice of their annuities, the contract was made between Brown and the Defendant Hall: and, in the same month, an indenture of assignment was executed, reciting Brown's right under his father's will to the £93 a-year, by which, in consideration of £700 and upwards, Brown transferred that £93 a-year to Hall.

In concluding this contract, Hall conducted himself in a way very different from that in which the Plaintiffs had acted; for, before he paid his money, he took the [3-Russell-16] precaution of making, by his solicitor, all due inquiries of the trustees and executors; not trusting to his personal contract with Brown, but going immediately to the legal holders of the fund, strictly investigating the title and employing a very exact and scrutinising industry to ascertain whether the fund was as represented by Brown, and whether Brown could completely transfer the interest which he stated himself to have.

The correspondence between Mr. Patten, the solicitor of Hall, and Mr. William Unthank 5 the acting executor, commenced early in February 1812. On the 4th of that month, Mr. Patten wrote to Mr. Unthank, stating that he had drawn a contract between Brown and Hall, for the purchase of Brown's life-interest under his father's will, and requesting to be, furnished with an abstract of Brown's title, and of the titles on which the money was invested, as well as with any other information on the subject, "and with the exact clear amount you pay to Brown annually." Mr. Unthank, in his answer, dated the 6th of February, sent an extract of the will of Peter Brown, and stated, that Zachariah Brown "is entitled during his life to a moiety of the income arising from the residue of his father's estate, after payment of an annuity of £40 bequeathed by the will, and that the residue amounted to £4000, which was invested in real securities, bearing 5 per cent. interest."

On the 8th of February, Mr. Patten wrote again, requesting an abstract of the titles of the estates on which the money was secured. "Be, so good," he adds, "as to say on what days in the year the interest is payable, and to what time Mr. Brown has received it, and if there be any other deduction from the interest-,money than the property tax."

[3-Russell-17] Mr. Unthank, in his answer, dated the 10th of February refuses to disclose the titles of the mortgagors without their permission; and then adds, "The interest of the principal mortgage is paid half-yearly, in June and December; and at those times I have usually divided the surplus of the interest of the residue of the late Mr. Brown's property between Mr. Z. Brown and his sister, which was done in December last. There is no other deduction made from the interest than the property tax, except that I have deducted from Mr. Z. Brown's moiety the postage of fetters I have, received from him. The will of Mr. Brown furnishes all the information that can be necessary for preparing an assignment of the interest and annual produce of one moiety of his residuary property from his son the date of the assignment from whom will of course determine the period from which I shall have to account for the interest to the assignee. I see no reason why the executors should become parties to the proposed assignment, which, Mr. Z. Brown having an undoubted right to make, requires no confirmation from them; but, for myself, I do not choose in any way to express my approbation of it, though I shall as readily pay the interest to his assignee as I should do to him, if he were, not to part with it."

Further communications took place between Mr. Patten and Mr. Unthank, with respect to the securities on which the money was invested; and this part of the correspondence is terminated by a letter from Mr. Unthank, dated the 1st of March, in which he states, that he has not the least reason to suppose that there were any outstanding demands on the estate of the late Mr. Brown.

[3-Russell-18] This correspondence affords a complete answer to a topic which was strenuously urged in favour of the Plaintiffs. It was said that Hall had not exercised due diligence; for that the question-whether there, was any prior incumbrance on the fund-was not put directly either to Brown or to the executor. And it is true that the question was not put in express words; but was it not put in substance The inquiries were such as drew from Unthank what is tantamount to an assurance that there was an absolute title in Brown; and if Unthank had received any intelligence of a prior incumbrance, and yet had acted and written in

3 Russell 19, 38 ER p482

the manner in which he has, he would have involved himself in all the responsibilities which would affect an individual, who should stand by and see, another person, upon the faith of the representations made by him, entering into a contract and parting with his money on the supposition that a certain fund, known by him, who stood by, to have been already pledged, was free from incumbrances. When Mr. Unthank was asked whether there was any deduction from the interest-money except the property tax, would be, if the assignments to Dearle and Sherring had been notified to him, have answered, "There is no other deduction from the interest, except the property tax? "When Mr. Unthank said in one of his letters, that the date of the assignment would determine the period from which he would have to account to Hall for the interest, that was in fact a statement that he was thenceforth to account to no person else; and he could not have spoken of himself as liable to account for the whole of the interest to Hall, if he had known that he was to account for part of it to Dearle and Sherring. The, very first letter addressed 'to the executor, calling for an abstract of Brown's title, the amount of the residue, and the sum which was then paid yearly to Brown, was in fact a request to the [3-Russell-19] executor to communicate every information, of every circumstance relating to the fund, which it could be of importance to a purchaser to know.

With respect to the circumstance that the question was not put directly to Brown, he covenants in the deed of assignment that the fund was free from incumbrances; and, consequently, the nesessity of making inquiries of him was superseded.

These proceedings are antecedent to the execution of the contract. After so' much precaution, the assignment of Brown's interest is executed; and Hall pays the purchase-money. Does he content himself with remaining in this situation? After having given notice to the legal holder of the fund, and having obtained from him an engagement to pay the interest to him, Hall, as readily as it had been before paid to Zachariah Brown, Hall is let into possession. Mr. Unthank fulfils his promise; having become a trustee for a new cestui que trust, he accounts to him, and, in July 1812, pays over to him his share of the income of the residuary fund thus, Hall is actually admitted into the enjoyment of the thing which had been assigned to him. On the 6th of July, Unthank writes a letter to Patten, in which he says, "As I have not been instructed as to the means by which Mr. Hall wishes to have, his moiety of the interest of Mr. Brown's residuary estate conveyed to him, I have enclosed you a draft for £31, 19s. 10d. belonging to him, and now in my hands." He then goes on to render an account, to shew, that, as a trustee, he has accounted to his cestui que trust for all that was in his hands; and he begs Mr. Patten to communicate to him Mr. Halls orders, "if you" would have me in future make any remittances directly to him." Thus. Mr. Unthank becomes virtually a party to the transaction, giving Hall all the assurance [3-Russell-20] a purchaser could have. Such is the contrast between the conduct of the subsequent incumbrancer and of the incumbrancer who stands first in point of time.

Some months afterwards, on the 17th of October 1812. Dearle and Sherring caused notice of their annuities, to be given to the executors; accompanied with an intimation that the £93 a-year must not be paid any longer to Hall, inasmuch as they were entitled to have, their demands first satisfied out of it. Upon receiving that notice, the executors, acting like cautious men, who thought that it was not for them to enter into any contest, stayed their hands, and did not make an further payment; but, had the notice not been given, they would have continued to have paid the interest of the moiety of the residue to Hall.

The present suit was instituted on the 17th of June 1819, six years and a half after the date of the notice, when ten years had elapsed from the date of Sherring's assignment, and eleven, from the date of the assignment to Dearle, and long after a former bill had been dismissed for want of prosecution: and what the Plaintiffs seek by this new suit is,-that a court of equity shall, at this remote period, interpose to stop the £93 a-year from being paid to Hall, to throw upon him the loss which must be sustained by some one or other, and to direct the fund to be applied in satisfaction of the arrears and growing payment of their annuities.

The ground of this claim is priority of time. They rely upon the known maxim, borrowed from the civil law, which in many cases regulates equities - "qui prior est in tempore, potior est in jure." If, by the first contract, all the thing is given,

3 Russell 21, 38 ER p483

there remains nothing to be the subject of the second contract, and priority must [3-Russell-21] decide. But it cannot be contended that priority in time must decide, where' the legal estate is outstanding. For the maxim, as an equitable rule, admits of exception, and gives way, when the question does not lie between bare and equal equities. If there appears to be, in respect of any circumstance independent of priority of time, a better title in the puisne purchaser to call for the legal estate, than in the purchaser who precedes him in date, the case ceases to be a balance of equal equities, and the preference, which priority of date might otherwise have given, is done away with and counteracted. The question here is,-not which assignment is first in date,-but whether there is not, on the part of Hall, a better title to call for the legal estate, than Dearle or Sherring can set up q or rather, the question is, Shall these Plaintiffs now have equitable relief to the injury of Hall? What title have they shown to call on a court of justice to interpose on their behalf, in order to obviate the consequences of their own misconduct All that has happened is owing to their negligence (a negligence not accounted for) in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually prevented all the mischief which has followed. Is a Plaintiff to be heard in a court of equity, who asks its interposition in his behoof, to indemnify him against the effects of his own negligence at the expense, of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the very person who prays relief against him q The question here is not, as in Evans v Bicknell, whether a court of equity is to deprive the Plaintiffs of any right-whether it is to take from them, for instance, a legal estate, or to impose any charge upon them. It is simply, whether they are entitled to [3-Russell-22] relief against their own negligence. They did not perfect their securities; a third Party has innocently advanced his money, and has perfected his security as far as the nature of the subject permitted him: is this Court to interfere to postpone him to them q They say, that they were not bound to give notice to the trustees; for that notice does not form part of the necessary conveyance of an equitable interest. I admit, that, if you mean to rely on contract with the individual, you do not need to give notice; from the moment of the contract, he, with whom you are dealing, is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice; and, unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery if possession; and it is possession which determines the apparent ownership. If, therefore, an individual, who in the way of purchase or mortgage contracts with another for the transfer of his interest, does not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner as before, he must take the consequences which may ensue from such a mode of dealing. That doctrine was explained in Ryall v Rowles (1 Ves. Sen. 348; 1 Atk. 165), before Lord Hardwicke and three of the Judges. If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you. The principle has been long recognised, even in courts of law. [3-Russell-23] In

Twyne's case (3 Rep. 80), one of the badges of fraud was, that the possession had remained in the vendor. Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences.
" When a man," says Lord Bacon (Maxims of the Law, max. 16),is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued."
It is true that a chose in action does not admit of tangible actual possession, and that neither Zachariah Brown nor any person claiming under him were entitled to possess themselves of the fund which yielded the £93 a-year. But in Ryall v Rowles the Judges held, that, in the case of a chose in action, you must do every thing towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person, who has an equitable or legal interest in the matter, under an obligation to treat it as your property. For

3 Russell 24, 38 ER p484
this purpose, you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession, and under the absolute control, of another person. Is there the least doubt, that, if Zachariah Brown had been a trader, all that was done by Dearle and Sherring would not have been in the least effectual against his [3-Russell-24] assignees; but that, according to the doctrine of Ryall v Bowles, his assignees would have taken the fund, because there was no notice to those in whom the legal interest was vested? In that case it was the opinion of all the Judges, that he who contracts for a chose in action, and does not follow up his title by notice gives personal credit to the individual with whom he deals. Notice, then, is necessary to perfect the title, - to give a complete right in rem, and not merely a right as against him who conveys his interest. If you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not necessary; for against him the title is perfect Without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket-conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated: you had priority, but that priority has not been followed up; and you have permitted another to acquire a better title to the legal possession. What, was done by Dearle and Sherring did not exhaust the thing (to borrow the principle of the civil law) but left it still open to traffic. These are the principles on which I think it to be very old law, that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he, who does not obtain such possession, must take his chance.

I do- not go through the cases which constitute exceptions to the rule, that priority in time shall prevail. A - man may lose that priority by actual fraud or constructive fraud; by being silent, for instance, when he ought to speak; by standing by, and keeping his own [3-Russell-25] security concealed. By such conduct, even the advantage of possessing the legal estate may be lost.

The principle, which I have stated, is recognized in many authorities. In Evans v Bicknell Lord Eldon says (6 Vesey, 192), "If in this case I could be perfectly satisfied that the intention was, according to the allegations in this bill, taken altogether, that he might represent himself as entitled to credit as owner of the premises, and obtain credit in his trade by representing himself as owner of the premises, and that Bicknell acceded to that purpose, so understood, I should be strongly disposed to hold Bicknell liable to the extent in which Stansell's holding himself out as owner had involved a third party."
The case of Wright v Lord Dorchester (3 Russ. 49), though a qualified and conditional determination, and made without prejudice to a final decision, yet, considering the known habits and caution of the great Judge by whom that interlocutory order was pronounced, and the weight due even to the first impressions of his Lordship, is entitled to considerable authority. The preference given in that case to the puisne incumbrancer, who had made inquiry of the trustees, over

the prior incumbrancer, who had not, must have proceeded on the principal which, I have applied to the present case. The puisne incumbrancer was not put into permanent possession in that case by a power of attorney to receive the dividends, more than by actual payment of the current interest in the present case, and a promise of regular payment in future.

In Ryall v Bowles (1 Vesey Sen. 371; I Atkins, 182), Lord Hardwicke puts his opinion principally on the ground, that, when a vendor [3-Russell-26] is left in possession of that which he has disposed of, he "gains a delusive credit by a false appearance of substance." (1 Atkins, 185.) "I will not say," he observed, "but some inconveniences may arise on each part. But this I will say, that very great inconvenience may arise by giving an opportunity to people to make such securities, and yet appear to the world as if they had the ownership of all those goods of which they are in possession, when, perhaps, they have not one shilling of the property in them." Mr. Justice Burnet said (1 Ves. Sen. 360, 361), "Where the neglect naturally tended to deceive creditors, it has been held a badge of fraud, where left in his

3 Russell 27, 38 ER p485

hands. It is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods should leave them with the vendor, unless to procure a collusive credit: and it is the same, whether in absolute or conditional sales. If the conditional vendee, on paying his money for the goods, will not insist upon delivery to him, he confides in the vendor, not in the goods; and, therefore, should come in the same case with other creditors, especially as he has been the bait to draw other creditors in." Then he, argues, with respect to the assignment of a bond-debt or other chose in action (1 Ves. Sen. 362 363) "Why is not delivery as requisite on such an assignment as a deliver in the conveyance of a thing in possession? Why will not the means of reducing into possession be considered in the same light as a conveyance of the thing itself, at law? The debt, by the assignor's continuing it in his hand, is in his order and disposition, as he may receive the money due, and cancel the bond, and assign it over to another creditor; and cannot have this bond, but by consent of the true owner in equity; and, therefore, as he is not obliged to [3-Russell-27] accept a defective security, it is his own fault. As to bulky go, means of reducing into possession has been held sufficient: why not, then, in case of a chose in action

Lord Chief Baron Parker expresses himself thus: (1) It is said, there can be only an equitable assignment chose in action: which is true; and yet, in case of bonds assigned (for bills exchange, or promissory notes, are assignable at law), they must be delivered; and such delivery of the bond, on notice of assignment, will be equivalent to the delivery of the goods; for the debtor cannot afterwards justify payment to the assignor, Domat. lib. I. This clause extends to things in action; and all has not been done to divest the right from the bankrupt, and to vest a right in the mortgagee, for no notice appears to be given." So Lord Chief Justice Lee spoke "of an honest creditor or mortgagee" who has had a conveyance made to him for valuable consideration, but "is not to have any preference to, another creditor, because he does not give notice to other creditors, by having that delivery to him to which he was entitled." (1 Vesey Sen. 369.)

[3-Russell-28] I cite these authorities to shew, that, in assignments of choses in action, notice to the legal holder has always been deemed necessary; and it would be very dangerous for the solicitor of the purchaser to neglect it. A solicitor, who should neglect it, would find it difficult to make out, that he had not become responsible to his client.

It was said that Hall had himself been negligent; for he had not searched in the enrolment-office, where he would have found memorials which would have given him notice of these incumbrances. I answer, that Hall, in contracting for the purchase of Brown's life-interest, was not in any respect called upon by the nature of the transaction to search for memorials of annuities. If the fund could not have been transferred or incumbered, without a memorial, he would have been bound to search in the enrolment-office, but there was nothing to lead him to search in that quarter; and the transfer of an interest in the £93 did not, taken by itself, call for a memorial. How, then, could he be expected to look for documents which had no natural connection with the transference

of the fund It was the mere accident that the prior charges had been created by way of security for the payment of annuities, which caused memorials to be made; and memorials would have been equally necessary, if the annuities had not been secured on the fund in question. It would be too much to impose on a purchaser the obligation of making a search, to which there is nothing to lead him. In affairs of great importance, a careful individual would probably search every where. But it is impossible to say, that Mr. Hall was bound to conjecture, that Brown had raised money by granting an annuity, and had secured that annuity by pledging his life-interest under his father's will. [3-Russell-29],On these grounds, I think that the Plaintiffs have not shewn a title to call on a court of equity to interpose in their behalf, and to take the fund from an individual who has used due diligence, in order to give it to those whose negligence has occasioned all the mischief. There is no equality of equities between the Defendant Hall, and the Plaintiffs.

What opportunities of fraud would be afforded, if a party, who, having obtained an equitable conveyance, conceals it from every body, and lies by for years, while intermediate transactions are taking place, could at any time come forward with

3 Russell 30, 38 ER p486

his secret deed, and say to a subsequent purchaser, who had advanced his money in ignorance of the existence of such a claim, "My deed is in date prior to yours; and, therefore, whatever may have been my negligence, or your diligence, the property belongs to me." Good sense, reason, authority, and equity are all on the other side.

The bill, therefore, must be dismissed, but, as against Hall, without costs. I do not make the Plaintiffs pay costs to Hall, because they may have been losers without any intention to commit a fraud, and I am unwilling to add to their loss. Constructive fraud is the utmost that can be imputed to them.

I may mention, further, that the language of text writers (though, of course, I do not refer to them as authorities) shews, that the rule, as I have stated it, is in accordance with what has been the current practice and the understanding of the profession on the subject of priorities. "On the mortgage of a chose in action," says one of the text writers (Powell's Law of Mortgages, by Coventry, p. 451, note T.), "it should never be [3-Russell-30] omitted to give notice of the transfer to the trustee; for, upon the authority of the cases quoted in the text, Tourville v Nash, 3 P. Wms. 308, and Stanhope v Verney, Butl. Co. Lit. 290 b, n. (1), s. 15, it has been thought (and indeed, as it should seem, with a great degree of reason), that, if a mortgagee of this equitable right neglect to give notice of his incumbrance to the trustee, and such equitable right be afterwards assigned to a second mortgagee, who takes the precaution of giving the trustee proper notice, the first mortgagee will be postponed."

February 5, 1824. There was some discussion concerning the minutes of the decree. The result was, that His Honour ordered the costs of Unthank and his co-trustees to be paid by the Plaintiffs; and the fund in court to be paid to Hall.

" His Honour doth order and decree, that the £919, 2s. 5d. 3 per cent. bank annuities, standing in the name of the accountant-general, in trust in this cause, be transferred to the Defendant Joseph Hall: and it is ordered, that thereupon the Plaintiff's bill do stand dismissed out of this Court as against the Defendants, William Unthank and Ann Bircham, with costs, to be paid by the Plaintiffs, &c. and without costs as against the several other Defendants."

Reg. Lib. 1823, A. 1102.

From this decree the Plaintiffs appealed.