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RISKS OF AN ASSIGNEE UNDER RESTATEMENT OF THE LAW OF CONTRACTS

The prevailing custom of extending credit upon the security of choses in action and claims for monies due and to become due results in a definite business need for some basis of safety for the assignee; some method by which he may become reasonably safe in taking such assignments as security for the credit extended. For example, in a recent case\(^1\) decided by the Supreme Court of the United States, a finance company took an assignment from a contractor of monies to become due by virtue of performance of a certain contract in order to secure it for advancements for the cost of equipment, and the finance company lost the benefit of its security because the contractor had previously assigned the claim to a bonding company. A large amount of money was involved. Once the same claim has been assigned to two or more assignees who have in good faith given a valuable consideration for it, a decision between them will necessarily work a hardship on someone. Much litigation as well as academic interest has in the past centered around the problem of working out a proper basis for decisions in such cases. Modern business methods have rendered the problem more practical in its aspect.

Similar problems arise when *bona fide* purchasers take assignments of choses in action which are subject to latent equities of such third parties as defrauded prior assignees in the same chain of title, or of defrauded *cestui sque trustent*.

Sections 173 and 174 of the Restatement of the Law of Contracts deal with these problems. One of the sections purports to make an important change in the law, one of the few instances in which the reporter and his advisers assumed to depart from the majority rule upon a point as found in the cases; the other section amounts to the exercise of a choice between two competing rules of law which were about evenly divided. This choice was made upon the basis of a Supreme Court decision rendered in 1924.\(^2\) The rules of Sections 173 and 174 are both in a sense new law upon an important business problem. It is

\(^1\) *Salem Trust Co. v. Manufacturers Finance Co.*, 264 U. S. 182.

\(^2\) Ibid.
the purpose of this discussion to point out the significance of Sections 173 and 174, to test them upon the basis of their application to business needs, and to attempt to analyze and estimate the decision of the United States Supreme Court which was responsible for the adoption of the rule of Section 173.\(^3\)

The party who purchases a chose in action or who extends credit upon the faith of an assignment of monies due or to become due to his assignor has always been subject to several types of risk, which may for convenience be placed in three classes:

1. The risk that his assignor's debtor may have a valid defense against the claim assigned and that the claim may therefore be valueless.
2. The risk that the assignor may have previously assigned the claim to someone else.
3. That some person may assert an equitable claim of ownership to the chose, i.e., the claim may be subject to the latent equity, for example, of a defrauded *cestui que trust* or a defrauded prior assignor.

The first of these three risks has been the least dangerous not only because possible defenses of the obligor would be less surprising but because of the possibility of making inquiry of the debtor and of ascertaining whether or not he has a defense. The problem of the defenses available to the debtor will not be taken up, but the discussion will be concerned with the second and third types of risk mentioned. These two problems are covered by Sections 173 and 174 of the Restatement. Section 173, which presents the central problem, will be taken up last. Section 174 reads as follows:\(^4\)

> "If an assignor's right against the obligor is voidable by some one other than the obligor or is held in trust for such a person, an assignee who purchases the assignment for value in good faith neither knowing nor having reason to know of the right of such person cannot be deprived of the assigned right or its proceeds."

According to Section 174, if an original obligee is fraudulently induced to make an assignment and the fraudulent assignee makes a subsequent assignment to an innocent purchaser for value, the secondary assignee gets good title to the claim and

\(^3\) Ibid.

the original obligee's latent equity is cut off. It has long been true that the rights of a defrauded vendor of a chattel were cut off by a sale by the fraudulent vendee to an innocent purchaser, but until the time of the publication of the Restatement of the Law of Contracts, it had been the majority rule in the United States that the assignee of a chose in action who acquired his claim from a fraudulent assignee of a defrauded prior owner, took subject to the equitable rights of the defrauded prior owner. If C. had a claim against D, and F by fraud obtained an assignment of the claim from C and reassigned to G, C was preferred over G. The theory was that C and G both had equitable interests and the equity prior in time prevailed. A generation or two of American law students have in the past been perplexed with wondering, "Why is it that I can get a good title to a horse from a fraudulent vendee and cut off the equities of a defrauded vendor, and can't get a good title to a chose in action against a defrauded assignor from a fraudulent assignee?" When he has asked his teacher or consulted the text books he has received rather a dusty answer. He has been told that it is because the fraudulent vendee of the horse had legal title and therefore could pass legal title, and that the fraudulent assignee had only an equitable title and could pass only an equitable title to him, and that the legal title in case of the purchase of the horse cut off the defrauded party's equity and that his equitable title to the chose would not cut off the prior equity of the defrauded assignor. The bewildered student, reacting to the explanation as academic and rather unrelated to the kind of practical business problems that he had innocently supposed rules of law were intended to serve, has been wont to flee to the big books as a scared young rabbit to a briar patch, in quest of the important distinction between equitable and legal title. He has emerged, confused and disgusted, after a long wandering through the wilderness of argument as to whether an assignment of a chose in action passes legal or equitable title. Finally he has put the whole matter aside as one of those things to be remembered rather than understood.

² Ibid.
³ Williston, Vol. I, sec. 447; also 30 Harvard L. Rev. 91; Idem. 822; articles by Professor Cook, 29 Harvard L. Rev. 816; and 30 Id. 449.
Section 174 has done much to alleviate the student's burden and to simplify the law and, if it is followed by the courts, the time may not be far off when one may say to the earnest young student of the law: "The innocent purchaser of a chattel or a chose in action from a fraudulent vendee or fraudulent assignee gets title free from the latent equities of the defrauded vendor of the chattel or defrauded assignor of the chose."

Surely those who believe that safety in the purchase of choses in action, or safety in taking them as security is an end to be desired in the present day business world, and those who believe that there is intrinsic merit in simplicity, will react to Section 174 as progress. It is interesting to observe, however, that the committee in a note expressly admit that the weight of authority on the point is contrary to their statement in Section 174.\(^8\) While the purpose of the Restatement, as the name implies, is to restate and not to reform the law, the draftsmen frankly reserve to themselves the privilege of choosing in certain instances a minority rule where they regard it as clearly the better suited to business needs. It is believed that the committee was quite justified in so doing in this instance and that the reliability of the work as a restatement will not be diminished thereby; especially since attention is called to the departure from the majority rule by the draftsmen themselves.

If it is agreed that the reporter and his advisers have done a valuable service to business in rendering the taking of assignments of choses in action more safe and have rendered a service

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\(^8\) Restatement of the Law of Contracts, page 279.

Cases collected by the Reporter of the Restatement which support the rule of Sec. 174 are as follows: Winter v. Montgomery Gas Light Co., 89 Ala. 544, 7 So. 773; First Nat. Bank v. Perris Irrigation Dist., 107 Cal. 55, 40 Pac. 45; Duke v. Clark, 58 Miss. 465; Williams v. Donnelly, 54 Nebraska 193, 74 N. W. 601; Dewitt v. Vansickle, 29 N. J. Eq. 209; Mifflin County Bank’s Appeal, 98 Pa. 150; Huber’s Assigned Estate, 21 Pa. Sup. Ct., 612, 615.

to the lawyer and law student by simplifying the law, let us examine the companion section, No. 173⁸, which reads as follows:

"Where the obligee or an assignee makes two or more successive assignments of the same right, each of which would have been effective if it were the only assignment, the respective rights of the several assignees are determined by the following rules:

(a) A subsequent assignee acquires a right against the obligor to the exclusion of a prior assignee if the prior assignment is revocable or voidable by the assignor;

(b) Any assignee who purchases his assignment for value in good faith neither knowing nor having reason to know of a prior assignment, and who obtains:

(i) payment or satisfaction of the obligation, or
(ii) judgment against the obligor, or
(iii) a new obligation of the obligor by a novation, or
(iv) delivery of a tangible token or writing, surrender of which is required by the obligor's contract for its enforcement,⁹ can retain any performance so received and can enforce any judgment or novation so acquired, and, if he has obtained a token or writing as stated in paragraph (iv), can enforce against the obligor the assigned right;

(c) Except as stated in Clauses (a) and (b), a prior assignee is entitled to the exclusion of a subsequent assignee to the assigned right and its proceeds.

Stated briefly, and with sufficient accuracy for the purposes of this discussion, Section 173 simply tells us that of two successive assignees, the one whose assignment was first in order of time prevails unless the case falls within one of the exceptions listed in subsections (a) or (b), regardless of whether or not any notice of the earlier assignment was given to the debtor. In order to avoid the possibility of the general rule being confused and obscured by the exceptions and the side show swallowing up the circus, it will probably be well to postpone any examination of Subsections (a) and (b) and the exceptions therein contained, and focus attention upon the rule of Subsection (c), to the effect that as between two successive assignees of the same chose in action, the first in order of time prevails, regardless of any question of notice to the obligor.

In enunciating this doctrine, the Restatement exercised a choice between two well known rules often referred to as the American and English rules. The American doctrine was chosen and the so-called English rule rejected. The rejected rule,

⁹Note in connection with the four exceptions set forth in subsection (b) of Sec. 173, that in each instance the second assignee would have obtained a legal right which would prevail over the prior equitable right. Subsection (a) is self-explanatory.
which is usually referred to as the rule of Dearle v. Hall,11 was as much American as the so-called American rule in that as many American cases had adopted it as were committed to the so-called American rule.12

An examination of Mr. Williston's own collection of cases contained in his footnotes numbers 6 and 8 of Sec. 435 of Williston on Contracts shows about twice as many jurisdictions following the rule of Dearle v. Hall as follow the rule approved by Section 173 of the Restatement.13 Fairness, however, requires


12 In Sec. 435 of Williston on Contracts a comprehensive list of cases bearing upon the rights of successive assignees, to which the note on Sec. 173 in the Restatement refers. Cases contra to Dearle v. Hall and in accord with Sec. 173 are:


This list, it will be observed, contains decisions of nine jurisdictions with decisions contra to Dearle v. Hall which had not been overruled at the time compiled, 1921.

Cases following the rule of Dearle v. Hall are as follows:


13 This list contains decisions of sixteen jurisdictions, almost twice the number contained in the list given by Mr. Williston contra to Dearle v. Hall. The Federal Courts, prior to the Salem Trust Co. case, were in accord with the actual decision of Dearle v. Hall; See Williston, Vol. I, Sec. 435, footnote No. 8.
one to admit that American authority contra to *Dearle v. Hall* was as strong as authority in favor of it; New York, the most important commercial state, having repeatedly rejected it\(^\text{14}\) and Illinois\(^\text{15}\) and Massachusetts\(^\text{16}\) also being opposed.

In order to make an intelligent comparison of the American rule stated in Section 174 and the so-called English rule, the latter should perhaps be set out and its scope and history briefly discussed. The English rule is to the effect that in cases of two or more successive assignments, the assignee who first gives notice to the debtor will prevail. In the case of *Dearle v. Hall*,\(^\text{17}\) decided in England in 1828, one Brown assigned his rights to an annuity to one Dearle as collateral security. The trustee was given no notice of the assignment. Later Brown assigned the same claim to Hall, who made inquiry of the trustee in order to ascertain whether he had received notice of any assignment. The Court held that Hall, who knew nothing of the prior assignment, and who had made inquiry of the trustee, should prevail over the prior assignee, Dearle, who had omitted to give notice of his assignment. The basis of the decision of *Dearle v. Hall* had been in dispute, but in the case of *Ward v. Duncombe*,\(^\text{18}\) decided by the House of Lords in 1893, the Court said that the reason for the decision of *Dearle v. Hall* was the possibility of fraud upon the second assignee resulting from failure of the prior assignee to give notice to the trustee.

It will be noted that in the case of *Dearle v. Hall* the second assignee in order of time who was preferred over the prior assignee had actually made inquiry of the trustee in a diligent effort to ascertain whether or not there had been a prior assignment and that the case of *Dearle v. Hall* is therefore no authority for saying that an assignee second in order of time who had made no inquiry of the obligor would be preferred over the first assignee in order of time simply because the second assignee


\(^{15}\) *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 139.


\(^{17}\) 3 *Russell* 1. The facts of *Dearle v. Hall* are analyzed and discussed in *U. of Pa. L. Rev.*, Vol. 60, p. 668.

\(^{(1893)}\) *App. Cases* 369.
gave notice and the first assignee had omitted to do so. But in the case of Foster v. Cockerell, in 1835, the rule of Dearle v. Hall was extended. That case held that it makes no difference whether the second assignee makes inquiry of the obligor or not; the first assignee giving notice to the obligor prevails. The English rule then is the result of three cases; it is the decision of Dearle v. Hall as interpreted by Ward v. Duncombe and as extended by Foster v. Cockerell. The doctrine of Dearle v. Hall, then, is wider than the actual decision of the case itself and "the English rule" and "the rule of Dearle v. Hall" are generally used as synonymous expressions.

The rule of Dearle v. Hall has been preferred to the American rule by a majority of text writers, including notably Pomeroy and Williston, the reporter of the Restatement. The reason for their preference for the English rule was that the requisite of notice to the debtor, when required, operated somewhat like a recording system. The notice to the debtor provides a source of information to which an intending assignee can go to ascertain whether his intended assignor still owns the claim. Mr. Williston, in his treatise on contracts, in Volume 1, Section 435, has the following to say upon the point:

"In England by a rule which though not depending upon statute may be compared to a recording act, whichever of two several assignees first gives notice is preferred over the other assignees though they have prior assignments. . . . it seems best to adopt the test of notice in contests between successive assignees, even though prior assignees are likely to suffer thereby until business men learn what is necessary."

In view of the apparent practical advantage of requiring the first assignee to give notice in order to cut off a subsequent bona fide purchase of the claim, the attitude of writers generally and the preference of the reporter himself, it is very surprising to find the Restatement enunciating in Section 173 the rule which gives preference to the assignee first in time, regardless of whether he has given notice or not; especially since the

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19 13 Cl. & F. 456.
20 60 U. of Pa. L. Rev. 668, supra.
21 Idem. Also see: Keasby, Notice of Assignments in Equity, 1910, 19 Yale L. J. 258, and (1912) 25 Harv. L. Rev. 728, and Williston on Contracts, Sec. 435, and Pomeroy, Equity Jurisprudence (1907) Sec. 695, Note 1.
22 Pomeroy, Equity Jurisprudence (1907) Sec. 695, Note 1.
23 Williston on Contracts, Sec. 435.
choice of the rejected rule would not have required the committee to change existing majority law, as they frankly did in case of Section 174 discussed above. There was an even division of authority as far as the American states were concerned and yet the rule which the draftsmen personally preferred was rejected. The reason for this surprising action is explained for us in a note to the Restatement.\textsuperscript{24} It reads as follows:

"The latter rule (rule of Dearle v. Hall) has been consistently followed in England and nearly or quite half of the decisions on the question in the United States have also favored the same rule. The other half give priority to the first in time. The cases are collected in Williston, Contracts, Sec. 435. In the case of Salem Trust Company v. Manufacturers Finance Company, 264 U. S. 182, 68 Law. Ed. 628, 44 Supreme Ct. Reporter, 266, it was held that the assignee prior in time should be protected. In view of this decision it is not likely that many American Courts which have not already adopted the rule of Dearle v. Hall will do so. The Restatement therefore rejects the rule."

The Restatement committee, then, according to their own account, rejected the rule of Dearle v. Hall solely out of deference to the Supreme Court’s decision in the Salem Trust Company case.\textsuperscript{25} A decision by the United States Supreme Court which breaks a deadlock in the authorities and points the way to forty-eight jurisdictions in the solution of an important commercial problem is destined to be famous, perhaps as famous as Payne v. Cove or Adams v. Lindsell. Any reader of Section 173 of the Restatement who has not read the case will hasten to get the report.

He will find that the facts of the Salem Trust Co. v. Manufacturing Finance Company are briefly these:

On May 16, 1919, the Nelson Blower and Furnace Company assigned (to the extent of $45,000) to the Salem Trust Co., the amounts due and to become due upon a certain contract for the construction of certain engines, and on July 15th, 1919, the Nelson Blower and Furnace Company assigned the same claim to the Manufacturers Finance Co. (to the extent of $40,000) and on September 20, 1919, the Nelson Blower and Furnace Co. assigned to the Manufacturers Finance Company the same claim (to the extent of $10,000) and on or about this date the Manufacturers Finance Company gave notice of its assignments to the debtor. The prior assignee had given the debtor no notice and

\textsuperscript{24} Restatement, page 276.
\textsuperscript{25} Ibid.
neither the debtor nor the second assignee, Manufacturers Finance Company, knew of the prior assignment. The Manufacturers Finance Company, however, made no inquiry of the debtor at the time of taking its assignments. The Court held that the Salem Trust Company, the first assignee, who had given no notice to the debtor, should prevail. While the case involves other legal questions of importance, it is, as far as this problem is concerned, the simplest form of case where there are two successive assignees of the same claim and the first in point of time was preferred although he had given no notice to the debtor. It should be noted, however, that the second assignee made no inquiry of the debtor, whereas in the case of Dearle v. Hall the party in the position of this second assignee had made diligent inquiry.

The opinion in the Salem Trust Company case is by Mr. Justice Butler. Justices Holmes and Brandeis concurred in the result upon the ground that the case was governed by Massachusetts law, Massachusetts being committed to the so-called American rule, but did not concur in the reasons for the decision as given by Mr. Butler.

Since the Restatement committee have told us that they rejected the rule of Dearle v. Hall because of the Salem Trust Company case and their belief that no states not already committed to the rule would adopt it, their reason for rejecting it is just as strong and no stronger, than the opinion in that case, and their choice is to be justified only if it is likely that states will adopt the other rule. If, on the other hand, the case was so badly considered as to be destined to be discredited, then it is not so likely to be followed by all jurisdictions not already committed. It is the conviction of the writer that the case will be thrown into the limelight, thoroughly analyzed and completely discredited. Mr. Butler's opinion amounts briefly to this:

I. By the first assignment all the rights pass to the first assignee; the subsequent assignee gets nothing because the assignor has nothing left to give.

II. Notice of the assignment given to the debtor adds nothing to the title transferred and failure to give notice does not divest the first assignee of any title. If the second assignee elects to reply upon representations made by the assignor he
cannot shift his loss unless there is some act or omission of the first assignee which is the cause of his deception.

Mr. Butler’s argument completely ignores the possibility of the first assignee getting title subject to the liability of being divested by the later assignment. To say that the assignor cannot pass title to the second assignee because the assignor did not have title is to ignore a well recognized principle that a party who has not title may nevertheless have a legal power to vest title in an innocent third party. A vendor of a chattel who has no title may, if left in possession, be held to have legal power to vest title in an innocent purchaser. Parties without valid title continually vest title in third parties where the parties without title have so-called indicia of title and indorsers of negotiable paper continually create rights in third parties which they do not have themselves. Legal power to vest rights in third persons is not limited by or to the measure of rights which the transferor has or may assert, and it is surprising to find a statement made by a Justice of the United States Supreme Court to the effect that a second assignee cannot receive title because the assignor had nothing to pass to him. The argument is almost as naive as if the Court had said: “If there is but one glass of milk in a pitcher and two extended glasses, there will be no milk left to pour into the second glass if the first glass has been poured full, and it follows that if all the rights are poured out into the first assignee’s glass, then it is a foolish gesture to go through the motions of pouring rights into the second assignee’s glass.”

The modern mind fortunately does not work that way, but recognizes that the term “title” is a figurative term connoting an intricate group of legal relations presumably existing between human beings with relation to various types of property and composed of rights, privileges, powers, immunities, etc. Whether these rights and privileges may be asserted depends upon nothing more than the probable decision of courts deciding cases upon the basis of specific sets of facts. If upon the basis of a certain set of facts growing out of what is called an assignment from A to B, we may fairly assume that the courts would protect B in the exercise of certain rights, privileges and immunities with relation to the chose in action, we may conveniently refer to B as having title; if B does have what we call title it is because the courts would back him up in the assertion
of his rights. He does not have title because A had title. A might have had title without the power to vest title in B, or conversely, A might have had a legal power to vest title in B or C without having title himself. It is true that the power to vest title in a third party usually follows the title, but it so frequently is not true that we get very impractical and unfortunate results by assuming that legal powers to create rights in third persons can be accurately determined by looking to the transferor's title. Mr. Justice Butler was confronted with a choice between two competing assignees, both of whom had taken assignments from the same assignor; it was a three-party situation and he should have kept his mind away from the problem of what the rights of the first of the two assignees would have been if there had been a simple two-party situation such as would have been presented had he been deciding a case involving the rights of one single assignee with relation to the assignor. The second assignment introduced a new party and a new factual situation. The new party and the new operative fact, the second assignment, coming into the situation changed the whole nature of the problem. This new and different problem should have been squarely met and decided upon the frank basis of his own power to make a choice between the first and second assignee, the decisions by reason of being evenly divided, giving him a free hand in making his choice. His choice was one that was of vast importance to the business world and he should have been concerned primarily with the business aspect of the problem. He had an opportunity to make a decision which would have provided a basis for safety and security in taking assignments of choses in action by choosing the rule of Dearle v. Hall, but he did not do it. If he thought the other rule the more practicable working rule and that there were good practical reasons for believing it would work better in business he had an opportunity to point out what those reasons were, but he did not do that. Instead he avoided admitting that he was doing any choosing one way or another, in deciding the case. His decision is treated as having flowed from principle as automatically as if he were a mere inanimate conductor. Blithely ignoring the business aspect of the problem and for the most part the entire literature on the subject, he explained that in the nature of things the second assignee in point of time got nothing because all of the rights of the assignee had
already passed to the first assignee. Whether Mr. Justice Butler knew it or not, the reader is apt to see at a glance that the very thing that he had to decide was whether or not the rights of the assignor had passed to the first assignee as against the second assignee. The reason given for the decision is then upon analysis the decision itself lefthandedly stated, and consequently is no reason at all. If Mr. Justice Butler's mode of mental operation compels him to look to the transferor's title or status as a measure of the transferee's status he would have done better to inquire whether or not the assignor after the first assignment had been made still had a power to vest a right in the second assignee, even though he had already parted with the title, or to state it conversely, he might have asked himself whether the first assignee, who admittedly had title as between himself and the assignor in the first instance, was under a liability that his assignor terminate the rights that composed his title by exercising his power to vest title in an innocent third party, the second assignee. His inquiry, then, should have led him very shortly to the point of recognizing that such a power could be said to exist if he should say so and only because he said so. It was his choice and he could not escape it. It is the belief of the writer that his choice was bad and that it stands unsupported by any reason other than his own arbitrary pre-arrived-at decision stated in the form of a reason, and that consequently the decision is not deserving of the deference accorded to it by the draftsmen of the Restatement of the law. Nor is it believed that the state courts will desert the admonition of the great legal writers of the past who have preferred the rule of Dearle v. Hall, ignore better considered opinions of courts of lesser dignity, and flock to the rule of this case, even though the restatement committee felt obliged in the face of their better judgment to follow it.

The Salem Trust Company case was decided in 1924, and nearly five years have elapsed, but the writer's examination of the digests discloses no case showing that any state which was committed to the rule of Dearle v. Hall has deserted it during the period and gone over to the rule of the Salem Trust Company case.²⁶ So long as business men find it useful in their business

²⁶In a case decided by the Supreme Court of Iowa in April, 1928, the prior assignee who had given no notice was preferred over the subsequent assignee giving notice, and Iowa was committed to Dearle v.
to purchase choses in action or to take assignments of claims unevidenced by instruments as security for credit extended, there will be a demand for some basis of safety in taking such assignments, and so long as that is true there is likely to be a feeling that this basis of safety can only be achieved by providing some source of information to whom the intending assignee may go and find out whether or not his purported assignor is still the owner of the claim, or whether by reason of mistake or fraud he has assigned the same claim to someone else. A recording system, such as is carried on in connection with real estate transactions, is not practicable in this field, and the normal source of information is the debtor. This information is likely to be given the debtor if the penalty attached to failure to inform the debtor is the application of the rule of Dearle v. Hall.

Aside from the question of safety in taking such assignments it is believed that the rejection of the rule of Dearle v. Hall and the adoption of the rule of the Salem Trust Company case makes for less simplicity than would have been achieved had the former rule been chosen by the Restatement committee.

The student who has come to law school with his mind unconfused by erudite controversies as to whether or not the assignment of a chose in action passes legal or equitable title, unbiased by fictional modes of thought, and primarily interested in practical results, when confronted with Sections 173 and 174 of the restatement is likely to ask this sensible question:

"Why is it that I would get clear title to a chose in action which I obtained from a fraudulent assignee, when I could easily have ascertained who his assignor was and by going to the defrauded assignor could have learned in most instances about the facts of the fraud, but on the other hand must lose my claim if I purchase a chose in action from a direct obligee who apparently has every right to make the assignment, and it turns out that this obligee has already assigned the claim to someone else? Hall before the decision of the Salem Trust case. But here the prior assignee was preferred because it was a bonding company, given a prior lien by statute, of which fact the second assignee was chargeable with knowledge. Ottuma Boiler Works, et al. v. Omera & Son, 218 N. W. 920. Also, in the case of Board of Education of City of Elizabeth v. Zink, 137 Atl. 713, June, 1927, the Court of Chancery of New Jersey preferred the first assignee who had given no notice to a second assignee giving notice and New Jersey was committed to Dearle v. Hall but in this case the second assignee had taken the assignment to secure a preexisting debt and was not a purchaser for value.
To whom could I have gone to learn of the prior assignment? If I had gone to the obligor, since no notice is required and none was given, the obligor would have answered: 'So far as I know the original obligee still owns the claim.'"

The only way to be safe in taking an ordinary assignment of a chose in action against the possible claims of prior assignees, the student is likely to conclude, is to make inquiry of all the people in the world who might possibly have purchased the claim. If the rule of Dearle v. Hall had been adopted by the draftsmen in Section 173, this confusion would not arise and the teacher could tell the student that by making inquiry of the debtor before taking his assignment that he could be reasonably safe against any adverse claim of ownership of the chose whether adverse claim was that of defrauded prior assignee in his chain of title, defrauded cestui, or prior assignee of his assignor failing to give notice. Such a rule would have the merit of simplicity, if simplicity in the law is to be desired.

There are many who believe that the second assignee in point of time who has made inquiry of the debtor should be protected against the prior assignee, who has omitted to give notice to the debtor, but who nevertheless refuse to go as far as the English rule goes. They would go no farther in protecting the second assignee than it was necessary to go in the factual situation of Dearle v. Hall, where the second assignee had actually made inquiry of the debtor. Why, they may ask, should the second assignee who has not even taken the trouble to make inquiry of the debtor, be preferred over a prior assignee, when the omission of the first assignee to give notice has not deceived the second assignee in any way? The attitude of parties who take this position is entirely reasonable. It is actuated perhaps by a deep-seated sense of justice combined with a feeling that too much emphasis is arbitrarily placed upon priority of notice to the debtor. Whether the English rule or the modified form of it last discussed is preferable is perhaps a question of policy. The recording statutes do not limit the protection of innocent purchasers against adverse parties who have failed to record to cases in which the innocent purchaser has actually gone to the records. The rule of the recording acts is arbitrary; if the incumbrance is shown upon the records, the subsequent purchaser is assumed to have known of it; if it is not on...
the record and the subsequent purchaser had no actual knowledge of the incumbrance, he takes free of it regardless of whether he made a search or took his chance. Whether the analogy to the recording acts should be made complete in determining the competitive rights of successive assignees of choses in action or be limited by protecting only the second assignee, who has made inquiry of the debtor, is too large a problem to be adequately gone into in this discussion. Either would provide a businesslike basis for safety in purchasing choses in action or taking them as security; either would be vastly better than the rule of Section 173. It is true that the Restatement could have adopted the rule of the actual case of Dearle v. Hall without going directly in the face of the decision of the United States Supreme Court in the Salem Trust Company case, because in the latter case, as has been pointed out, the second assignee had made no inquiry, but it must be admitted that it could not have been done withoutflaunting the opinion in the case.

The idea back of the case of Dearle v. Hall is sound because it is practical and adapted to business needs; the idea of Section 173, while perhaps sound historically and upon theory divorced from business, is impracticable. The ultimate law upon the question, it is believed, will be in line with the decision of Dearle v. Hall, the United States Supreme Court and the Restatement to the contrary notwithstanding. Real progress was made in Section 174; an opportunity for greater progress was overlooked in the drafting of Section 173.

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