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LATENT EQUITIES IN MARYLAND

By Charles G. Page*

PRELIMINARY DISCUSSION

It has been stated as a general rule that the \textit{bona fide} purchase of an equitable interest will not cut off prior claims or equities. This article is directed to a discussion of certain exceptions to the rule, at least with regard to choses in action, and to a discussion of the reasons for such exceptions.

A typical example of the problem is: Can an assignor of a chose in action upset his assignment on the ground of fraud after a subsequent assignment to a \textit{bona fide} purchaser without notice?\textsuperscript{1} The discussion will also include the doctrine of \textit{Dearle v. Hall}\textsuperscript{2} which is not generally regarded as within the scope of the latent equity doctrine. This involves the question: Can a subsequent assignee of a chose in action overcome the claim of a prior assignee who has failed to notify the obligor of his assignment?

\textbf{The Rights of a Bona Fide Purchaser}

To bring out the problem more clearly, certain of the rules applicable to the purchase of a chattel will be summarized. It is fundamental that except in extraordinary cases a thief cannot give a better title than he possesses. If a chattel is stolen and pawned, the owner can retake the

\textsuperscript{1}There are, of course, many possible situations. So, what are the assignee's rights if creditors of the obligor assert the obligation was incurred in fraud of creditors? If the obligee obtained the obligation fraudulently? If the assignor assigns in breach of trust, etc.?

\textsuperscript{2}3 Russ. 1 (1823).
chattel without reimbursing the pawnee because the thief cannot convey a good legal lien or title.\textsuperscript{3}

Despite the fact that the thief who has no title cannot cut off the legal title of the owner, a different rule prevails where the holder of a legal title subject to an equity conveys the title to a \textit{bona fide} purchaser. Here the \textit{bona fide} purchaser of the legal title will postpone the holder of the equity. The rule is one of inaction: An equity court will not disturb the legal title.\textsuperscript{4} So, a trustee can, in breach of his trust, convey a good title to a \textit{bona fide} purchaser;\textsuperscript{5} a fraudulent vendee of property can convey a good title (as against his vendor who has an equity of rescission) to a \textit{bona fide} purchaser.\textsuperscript{6} The rule has even been extended to the case where legal title is acquired after notice to support a prior purchase of an equitable interest.\textsuperscript{7} This is known as the doctrine of \textit{"tabula in naufragio"}. When we go one step down the ladder and arrive at a conflict of equitable interests, a still different rule prevails. As between two equities acquired by two \textit{bona fide} purchasers, the first in time will prevail and the rule \textit{"qui prior est tempore, potior est jure"} is applied.\textsuperscript{8} Another way of expressing the same thing was attempted by Lord Westbury in \textit{Phillips v. Phillips}\textsuperscript{9} and is that \textit{"every conveyance of an equitable interest is an innocent conveyance"}.	extsuperscript{10} Or it has been stated that a \textit{bona fide} purchase of an equitable interest will not cut off prior equities.\textsuperscript{11}

\textsuperscript{3} Md. Code, Art. 83, Sec. 44 (Uniform Sales Act), Lemp Brewing Co. v. Mantz, 120 Md. 176, 181 (1913).
\textsuperscript{4} Duncan Townsite Co. v. Lane, 245 U. S. 308, 311, 62 L. Ed. 309, 38 S. Ct. 99 (1917); Huston, The Enforcement of Equitable Decrees, 131; Maitland, Lectures on Equity, 123, 143. It is interesting to note that at one time even a purchaser with notice of the legal title prevailed; contra since \textit{Phillips v. Phillips}, 4 De G. F. & J. 208 (1861); Huston, op. cit. supra, 129.
\textsuperscript{5} Maitland, op. cit. supra note 4, 122, 123, 130.
\textsuperscript{6} Md. Code, Art. 83, Sec. 45 (Uniform Sales Act).
\textsuperscript{7} Huston, op. cit. supra note 4, 129; Ames, Purchase for Value without Notice (1887) 1 Har. L. R. 1, 14; Maitland, op. cit. supra note 4, 135. Cf. Restatement, Trusts, Sec. 303, 311 (merely gives lien); 4 Bogert, Trusts and Trustees, Sec. 886.
\textsuperscript{8} Maitland, op. cit. supra note 4, 130, 131; Pomeroy, Equity Jurisprudence, 4th Ed., Sec. 414.
\textsuperscript{9} 4 De G. F. & J. 208 (1861).
\textsuperscript{10} Glenn, \textit{Assignment of Choses in Action; Rights of Bona Fide Purchaser} (1934) 20 Va. L. R. 621, 625.
\textsuperscript{11} Merchants Bank v. People's Assn., 70 F. (2d) 169 (1934); 4 Bogert, op. cit. supra note 7, sec. 886; Huston, op. cit. supra note 4, 116, 180.
Unless the holder of the first equity is guilty of some unwarranted misrepresentation which would create an estoppel, the ordinary rule is that he will prevail. So, if C, a cestui que trust, assigns his interest to A, A takes the interest subject to all equities then existing; if T, trustee of an equity of redemption for C, assigns it to a bona fide purchaser in fraud of C, C will prevail;\(^\text{12}\) if a fraudulent vendee makes an equitable mortgage of his interest to A, a bona fide purchaser, the defrauded vendor can rescind the sale and re-acquire the property.\(^\text{13}\)

Despite these recognized rules there has been a constant pressure to facilitate commerce in such interests. In 1887 Professor James Barr Ames advanced the theory that:

"A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value without notice of the plaintiff's equity, nor of any other common law right acquired as an incident of his purchase."\(^\text{14}\)

The theory was designed to put the bona fide purchaser of an equitable "ownership" in the same position occupied by the bona fide purchaser of a legal title with respect to prior equities. Ames' theory has not been accepted—at least with regard to chattels; though as we shall see, he is not very far from present authority with regard to choses in action.\(^\text{15}\)

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\(^\text{12}\) Huston, op. cit. supra note 4, 118; Maitland, op. cit. supra note 4, 131.
\(^\text{13}\) See Bogert, op. cit. supra note 7, Sec. 885, pp. 2564, 2565. Cf. the doctrine of equitable restrictions on land under Tulk v. Moxhay, 2 Ph. 774 (1848).
\(^\text{14}\) Huston, op. cit. supra note 4, 109.
\(^\text{15}\) Ames, op. cit. supra note 7, 1, 3.

The question of the rights of a purchaser of an equity involves the interesting discussion whether the rights of the owner of an equitable interest are merely against the trustee and his privies (in personam) or in the thing itself and so good until cut off by purchase of legal title; or, is the right a mere claim or an "equitable ownership"? For development of the law on this subject see Huston, op. cit. supra note 4, 87; W. W. Cook, The Power of Courts of Equity (1915) 15 Col. L. R. 37, 106; H. F. Stone, The Nature of the Rights of the Cestui Que Trust (1917) 17 Col. L. R. 467; Scott, The Nature of the Rights of the Cestui Que Trust (1917) 17 Col. L. Rev. 467. The Supreme Court has repudiated Mr. Justice Stone's view, at least with respect to taxation, in Senior v. Braden, 295 U. S. 422, 79 L. Ed. 1520, 55 S. Ct. 800 (1935).
Negotiable Choses

Turning now to choses in action, it is a commonly stated rule that the assignor cannot assign legal title to a chose; and that the assignee merely obtains an equitable interest with a power to sue in the name of the assignor. Proverbially, the assignee "stands in the shoes" of the assignor.\(^6\)

Of course, this rule has also felt the pressure of modern day customs and the demand to facilitate commerce. The most common examples of the change in the common law is the rule concerning negotiability of certain instruments containing obligations to pay money or deliver goods, as for instance, negotiable bills and notes, stock certificates, warehouse receipts, bills of lading, etc. These, by the law merchant and by statute have been treated as things, so that the right to enforce the chose passes with the title to the certificate. Unlike ordinary choses, the promise is to the payee or order, to the world at large, and a direct legal right to enforce the chose is obtained by the purchaser. Defenses of the obligor of failure of consideration, fraud, etc. cannot be set up. Also the pressure has been sufficiently great to change the common law rule even with regard to passage of legal title by a thief so that a chose represented by a negotiable instrument is transferable by a thief where an ordinary chattel cannot be so transferred.

The law concerning these is still in a state of change and we see the most recent attempt to give this characteristic of negotiability to corporate bonds which do not come within the Negotiable Instruments Law. Some courts have succeeded in giving such bonds the characteristic of negotiability without the aid of statute, some have required a statute.\(^7\)

With these special choses in action we are not concerned and we return to the ordinary chose in action which on the one side is not so personal that the obligation cannot

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\(^6\) Williston, Contracts (Rev. Ed.) Sec. 422.

be assigned; on the other side, is not within the exception concerning negotiable instruments.\textsuperscript{18}

**The Nature of the Assignment of an Ordinary Chose**

At common law "legal title" to a chose cannot be assigned. Blackstone says:\textsuperscript{19}

"Which property (a chose in action) is however not in possession but in action merely and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the ancient common law, for no chose in action could be granted over because it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded; though in compliance with the ancient principle the form of assigning a chose in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore when in common acceptation a debt or bond is said to be assigned over, it must be sued in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee."

And it has often been arbitrarily stated that the law does not recognize an assignment of a chose. This of course is an absurdity if what is meant is that the law does not recognize some rights in the assignee.\textsuperscript{20}

\textsuperscript{18} Though no attempt is made to discuss these special choses, the development of the law with regard to assignment of ordinary choses is somewhat analogous to the law relating to the assignment of an overdue negotiable instrument. An excellent article thoroughly reviews these rights: Z. Chafee, Jr., *Rights in Overdue Paper* (1918) 31 Har. L. R. 1104. See also Eversole v. Maull, 50 Md. 95 (1878).

\textsuperscript{19} Blackstone's Commentaries. (Cooleys 4th ed.) 442. See also Story, Equity Jurisprudence (3rd ed.) Sec. 1040; Ames, op. cit. supra note 7, 6; Ames, Lectures on Legal History, 253, 258. Cf. Restatement, Trusts, sec. 10.

\textsuperscript{20} "... blind revolt at the assertion that choses are not transferrable when in fact they are transferred." Williston, *Is The Right of An Assignee of a Chose In Action Legal or Equitable?* (1916) 30 Har. L. R. 97, 107. "The creation of an obligation is no part of the law of property; but the transfer of such obligation when created is as much part of the law of property as the transfer of a house or table." J. C. Gray, Rule against Perpetuities (3rd ed.) 307 n, as quoted in Glenn, op. cit. supra note 10, 623 n.
The question today is not whether a money debt can be assigned (as used in the above sense) but rather, what rights are acquired by the assignment.

At common law the obligee remained the obligee; at law he could destroy the debt by granting a release or accepting payment. In equity the assignee's rights were recognized and the obligor was restrained from relying upon a release received after notice of the assignment, or a payment made after notice. The right of the assignee to collect was a power coupled with an interest and irrevocable; and soon the assignee could bring action in the name of the assignor at law. Under these circumstances the rights of the assignee have been called "equitable".\textsuperscript{21}

In modern times considerable pressure has developed for additional protection of the assignee. The real-party-in-interest statutes are cited to show that the assignee has more than a "mere equity";\textsuperscript{22} and articles have been written to show that there was no rule of the common law which forbade assignment of legal title to a chose in action.\textsuperscript{23} As a result statutes have been passed in some states which are more than mere real-party-in-interest statutes and are recognized as changing the nature of the assignee's rights in substance.\textsuperscript{24}

Professor Williston disagrees with the tendency to define the rights of the assignee as legal. His views are set

\begin{footnotes}
\footnotetext[21]{Shriner v. Lamborn use of Smith, 12 Md. 170 (1858) ; Glenn, op. cit. supra note 10, 625. See Owings & Plet v. Low, 5 G. & J. 134, 145 (1833).}
\footnotetext[23]{A rather amusing discussion in the article by Bailey shows that in the very early English history those who were maintained as the King's bankers, were given certain special advantages in collection; and that the use of the power of attorney in assignments was not because such obligations were unassignable, but to render to the assignee the same advantages possessed by the assignor. The King's assent was necessary to the assignment. S. J. Bailey, Assignment of Debts in England From the Twelfth To The Twentieth Century (1931) 47 Law Quart. Rev. 516. "The old doctrine 'caveat emptor' is being modified by the change in social conditions to 'caveat dominus'." Huston, op. cit. supra note 4, 128. And see Holdsworth, History of the Treatment of Choses in Action by the Common Law (1920) 33 Har. L. R. 997; S. J. Bailey, Assignment of Debts in England From the Twelfth to the Twentieth Century (1931) 47 Law Quart. Rev. 516; (1932) 48 Law Quart. Rev. 248, 547 (Parts II and III of the same article).}
\footnotetext[24]{See supra note 22.}
\end{footnotes}
out in answer to the arguments of Professor Cook. He explains his recognition of the right of the assignee in law courts but states that if we fail to remember that they are derived in equity, substantial error may result. He therefore urges that the word "equitable" correctly describes the assignee's rights.

He explains that he uses the word "equitable" in describing the nature of an assignee's rights to indicate that the right was "originally enforcible in courts of chancery, though no longer so, but retaining characteristics which distinguished the right in question when enforced in chancery." He explains:

"It is in this sense that courts have used the word in the scores of cases where the right of an assignee of a chose in action has been called 'equitable' though his action was necessarily brought in a law court. An assignee has for centuries recovered in an action at law; and for more than a century has rarely had occasion to ask the aid of a court of equity. He was not allowed to proceed in equity in any ordinary case, and without the aid of any statutes allowing equitable pleas, and long before such statutes were passed, a court of law afforded the assignee protection against defenses of the debtor acquired after notice of the assignment."

He explains that the distinction is more than a mere question of terminology. A legal title is distinguishable from an equitable ownership in the method of approach even though on occasion the same result is reached in the case of an equitable ownership through the help of recording acts and other statutory devices.

"The law achieves the result by imposing limitations on a title which would otherwise be absolute. Equity achieves the result by extending to others so far as is conscientious an obligation which is primarily personal to one."
He then sums up his argument by distinguishing between the alienation of property where ownership of the legal title can be established according to rule; and the assignment of a contract obligation where "the boundaries of contract obligation are fixed by the expressed mutual assent of the parties".

"The law may give defenses to contracts or limit their operation for any reason of policy without regard to expressions of assent by the parties, but if it imposes liability upon them different from that which they have assumed in terms express, or fairly to be implied, it is violating an established principle. And this it certainly seems to do when it holds A liable to C (an assignee) without his assent on a contractual obligation to pay B (an assignor)."

It will therefore be seen that though law courts have consistently recognized rights of the assignee since about the end of the 18th century, the equitable ownership so involved did not include a legal right to the claim itself.

Professor Williston objects to the designation of the assignee's rights as legal more because he fears the result of an over-statement than because he wishes to avoid the results at present sought by his opponents. When an obligor enters into a contract essentially personal in nature, it cannot be assigned at all. When a person enters into an obligation to pay money he has inherent in his obligation the idea that under certain circumstances he will be entitled to a defense. To deprive the obligor of the right to assert that his obligation is personal, or to his defenses, will impair his contract. Furthermore where right of set-off is acquired prior to an assignment, it is only fair that the assignor should be refused the right to deprive the obligor of the set-off. Hence it is essential that in any assignment

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30 Crane Ice Cream Co. v. Terminal Freezing & Heating Co., 147 Md. 588, 128 Atl. 280 (1925). Circumstances have, of course, changed our conception of what obligations are so personal. In the days when an obligee could imprison his debtor for a default, it was highly important for the debtor to select carefully his obligee. See Bailey, op. cit. supra note 23, 47 Law Quart. Rev. 516.
the obligor’s defenses should be preserved. The obligation cannot, therefore, be treated like a chattel except under certain circumstances when it is made negotiable, where the obligor intends that he shall sacrifice defenses in the hands of a *bona fide* purchaser for value.³¹

Mr. Williston further suggests that there would be another important result of recognizing a legal title in the assignee to which he objects. It is universally recognized that the assignee of a part of a claim cannot bring action in his own name.³² It is therefore undisputed that the partial assignee gets at most an equitable claim. If the subsequent total assignee of a claim were regarded as receiving a legal right his right would cut off that of the partial assignee. Mr. Williston says that such a holding in the case of a partial assignment with a contrary holding in the case of two complete assignments would be a “monstrous result”.³³

*The Doctrine of Dearle v. Hall*

The tendency to protect and facilitate exchanges and sales of choses has been reflected by the development of two doctrines; one, by the extension of the rule of *Dearle v. Hall*³⁴ to choses in action; two, by the rule regarding latent equities. There is very much the same element and background in both rules.

*Dearle v. Hall* was decided in 1828. It did not involve the assignment of a chose in action but concerned the assignment by a *cestui que trust*, first, to one *bona fide* purchaser and then to a second *bona fide* purchaser. The second purchaser notified the trustee of the assignment first and it was held that he would prevail. The case has often been discussed.³⁵ The doctrine was based upon the idea that though there can be no delivery of possession of a cestui’s

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³¹ See also Maitland, op. cit. supra note 4, 147.
³² Note the statutory exception in the case of mortgages, Md. Code, Art. 66, Sec. 6.
³³ Williston, op. cit. supra note 25, 30 Har. L. R. 97, 104.
³⁴ Supra note 2.
rights which are merely a claim against the trustee, the least that the assignee can do to evidence to the world that he is assignee is to report the transaction to the trustee. If he does report, he protects himself from payment by trustee to the cestui; which is more than the quiescent first assignee is entitled to. So why not give him a preference?36

Many of the States in America adopted the rule but a majority refused to follow it.37 The American Law Institute refuses to follow the rule.38 To those who did follow the rule the opportunity soon arrived to apply it to the analogous case of the assignment of a chose in action. The obligee took the place of the cestui; the obligor took the place of the trustee. The analogy was carried out, and the first assignee in point of time to give notice to the obligor was protected.

A minority of the States applied the modified rule to assignment of choses;39 a majority refused to apply it, including the Federal Courts.40 The American Law Institute follows the majority.41

The Latent Equity Doctrine

In 1817 Chancellor Kent invented the latent equity doctrine in his decision in Murray v. Lylburn.42 In that case certain cestuis of a trust of land filed a bill against the trustee to enjoin him from disposing of property. While the suit was pending, the trustee sold the land to M and took a purchase money mortgage from M which he assigned to A, a bona fide purchaser for value. The cestuis came against A to upset the mortgage. The case was decided on the doctrine of lis pendens, but Kent stated that had the doctrine not applied, he would have protected the bona fide purchasers as the equities asserted by the cestuis were latent.

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36 Maitland, op. cit. supra note 4, 145.
37 J. Bogert, op. cit. supra note 7, sec. 195; (note that Corpus Juris states to the contrary in 65 C. J., sec. 303, p. 551.
38 1 Restatement, Trusts, Sec. 163.
39 Glenn, op. cit. supra note 10, 621, 626.
41 Restatement, Contracts, Sec. 173.
42 2 Johns Ch. (N. Y.) 441 (1817).
and, therefore, did not bind the purchaser. Chancellor Kent reasons:

"The assignee can always go to the debtor and ascertain what claims he may have against the bond, or other chose in action, which he is about purchasing from the obligee; but he may not be able with the utmost diligence, to ascertain the latent equity of some third person against the obligee." 

Latent equities have been defined by a writer in New York as follows:

"‘Latent equities’ embrace equities which are secret and undisclosed at the time of the assignment of the chose, residing in some prior assignor, or in some third party, a stranger to the assignment.”

However, the so-called “patent equities”, not cut-off, are sometimes far from obvious. An undiscovered equity of defense of the obligor for fraud of the obligee is an example. Latent equities are sometimes spoken of as the "equities of ownership" as distinguished from "equities of defense". They arise out of claims to ownership of the obligation rather than claims of defense against the enforcement of the obligation. This latter definition is better than that of Lee.

When he made the above dictum, Chancellor Kent apparently was thinking along the lines that were considered in Dearle v. Hall. Dearle v. Hall was decided, it will be recalled, with regard to the assignment of a so-called equitable interest of a cestui in a trust, and the prior assignee was cut off. While nominally based on a doctrine of estoppel there was in truth no real estoppel and the real reason for the rule was to protect bona fide purchasers as much as possible from a prior assignment. The latent equity doctrine is almost an identical idea for cutting off equities of third persons not prior purchasers, i. e. of subordinating a prior equity (latent) to a subsequent stronger

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43 Ibid, 442; Jones, Mortgages (8th ed.) sec. 1069.
45 Vanneman, Latent Equities in Ohio (1931) 5 Univ. of Cin. L. R. 135.
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equity not with the idea of true estoppel but rather as an attempt to give the effect of a "legal title" to this sort of assignment very much like what Dean Ames suggested.

It is noticeable that the latent equity doctrine does not affect the obligation of the obligor of the chose and, therefore, Mr. Williston's main objection regarding the impairment of contracts is avoided. The application of the doctrine does not require the recognition of a "legal title" in the assignee but depends upon the establishment of an hierarchy of equities to reach a result analogous to the legal title result through equitable means. It is further noticeable that though the device is intended to reach a result in the case of choses in action, the idea of establishing an hierarchy of equities could very well be applied in the case of things other than choses in action; as for instance, equitable ownership in chattels. So it might be urged that the trustee of an equity of redemption could convey a good equitable title to a *bona fide* purchaser as against his *cestui*. This comment is made to show that the device, intended to avoid one difficulty, creates a method for reaching the general result Ames suggested in his article on *bona fide* purchases mentioned above.

The doctrine of latent equities has been criticized as unnecessary deprivation of the prior claimants' rights. It has been adopted in a number of States but not by the weight of authority. It is interesting to note that the doctrine (devised by Chancellor Kent of New York) was thereafter repudiated in New York. The doctrine is, however, accepted by the American Law Institute, which protects the assignee for value even in the case where the obligation is held in trust for a *cestui*.

With this preliminary, a warning should be sounded against the use of the expression "latent equities" with too much reliance on the word "latent". As has been

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46 Walsh, Mortgages, 265.
47 Bogert, op. cit. supra note 7, sec. 883; Walsh, Mortgages, sec. 62; note (1918) 32 Har. L. R. 431; Glenn, op. cit. supra note 10, 621, 626; (contra) Jones, Mortgages (8th ed.) sec. 1069.
48 Bush v. Lathrop, 22 N. Y. 535 (1860) ; Walsh, Mortgages, sec. 62.
49 Restatement, Contracts, sec. 174; Note (1918) 32 Har. L. R. 431.
seen, the doctrine is a qualification of the equity doctrine which, unless some good reason is shown, protects a prior equity. Where a chose or an equitable interest is conveyed first to one and then to another purchaser, the second purchaser is just as much handicapped in determining the existence of the first purchaser's rights as he would be in determining whether some prior assignor has been defrauded; yet in the former case he will some times not be protected even where the latent equity doctrine is in force.\(^5\)

So, if A defrauds an obligee, E, into assigning a debt to himself and then A assigns to B, a *bona fide* purchaser, E cannot rescind under the latent equities doctrine; but if E, instead of being defrauded, assigns the obligation to A, and then assigns it to B, A is protected. Such a result is not explainable if the reasoning advanced to justify the rule of latent equities is that which was given by Chancellor Kent. Both equities are latent so far as B is concerned.

But if we approach the matter in a different light the distinction is easier. Professor Ames' argument for protection of a *bona fide* purchaser of an equity was to put it on a parity with conveyance of a legal title. If E, owner of a chattel, is defrauded into conveying legal title to A who conveys to B, a *bona fide* purchaser, B is protected from E's equity of rescission; but if E conveys legal title to A, and then conveys to B, A is protected.\(^5\) So that if we approach the situation in the same way that Ames did, we would not protect the second assignee from a prior assignment.

Perhaps the explanation of the difficulty is that courts, feeling the pressure about them to recognize that a chose is assignable, were confronted with the usual difficulty in the case of judicial legislation. They wished to find a way to reach Ames' conclusion, yet could not do so without excuse. The latent equity doctrine, while a convenient excuse for doing so in the cases originally coming before the court, accomplished too much; and so has been qualified in cases where the result went too far.

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\(^5\) Note (1911) 24 Har. L. Rev. 490.

\(^5\) Ames, op. cit. supra note 7, 9.
If we take the American Law Institute as a guide to what may result from the general scramble, we see

(1) It reaches the results of the latent equity doctrine in case of assignments of choses.\(^5^2\)

(2) It discards the rule of *Dearle v. Hall.*\(^5^3\)

(3) Where an obligee or a cestui assigns his interest to first one and then another *bona fide* purchaser, it protects the former.\(^5^4\)

**The Situation In Maryland**

In Maryland an equitable interest in a chattel, though assignable, is subject to prior equities.\(^5^5\) In the case of choses in action non-personal obligations can, of course, be assigned. It is perfectly clear, however, that at our common law a non-negotiable chose in action could not be assigned "at law".\(^5^6\) Suit had to be brought in the name of the assignor, and the assignee's relief was addressed to the law court to exercise its power to give equitable relief at law. So, where the assignee of a penalty brought suit in the name of the obligee (assignor) and after the Statute of Limitations had run the obligee dismissed the action, the assignee's petition for reinstatement was denied, because *equity* does not enforce a penalty.\(^5^7\)

The Maryland Statute, applicable to assignment of a limited class of unsecured choses only, changed the procedure.

"The assignee of any judgment bond, specialty, or other chose in action for the payment of money, or any legacy or distributive share of the estate of a deceased person *bona fide* entitled thereto by assignment in writing signed by the person authorized to make the same, may, by virtue of such assignment, maintain an action or issue an execution in his own name against the

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\(^{52}\) Restatement, Contracts, sec. 174.

\(^{53}\) Restatement, Contracts, sec. 173.

\(^{54}\) Ibid; Restatement, Trusts, sec. 103.


\(^{56}\) Shriner v. Lamborn, use of Smith, 12 Md. 170 (1858).

\(^{57}\) Andrews & Green v. Central Bank, 77 Md. 21, 25 Atl. 915 (1893).
debtor therein named, in the same manner as the assignor might have done before the assignment.”

This provision is almost identical with the original statute passed in 1829 the preamble of which gave as the reason for the statute:

“Whereas equitable assignees have frequently sustained injuries and loss, by the death of the assignor or legal plaintiff. . . .”

The Court of Appeals in passing on this section has said:

“The preamble to the Act as well as the enacting clause shews that the design of the Legislature was no further to extend the powers, or enlarge the rights of the assignee, than to enable him to sue in his own name. . . . We think, therefore, that this Act of Assembly does not impair or change the rights, either legal or equitable, of the obligor or debtor, whether the suit be instituted in the name of the assignor or assignee.”

“Before the Act of 1829, Ch. 51, the *bona fide* assignee of a chose in action, was considered as having peculiarly an equitable remedy, and certainly that statute enlarges his powers.”

“That Act only enables the assignee to sue in his own name. It does not alter the nature of the assignment.”

The statute should be regarded therefore as changing procedural rights but not as changing rights of substance of the assignee. It does not go so far as some statutes and still comes within the definition by Mr. Williston of an equitable right enforceable at law.

It is also clear that despite this statute, equities of defense (or so-called “patent equities”) can be asserted against any assignee whether a *bona fide* purchaser or not:

“Any defendant may make the same legal or equitable defenses as might or could have been had and maintained against the assignor at the time of such

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58 Md. Code, Art. 8, sec. 1. (Italics supplied.)
59 Md. Acts 1829, Ch. 51.
60 Harwood et al. v. Jones, 10 G. & J. 404, 420 (1839).
62 Cox v. Sprigg, 6 Md. 274, 286 (1854).
63 Williston, Contracts (Rev. Ed.) Secs. 446A, 447.
These include rights of recoupment undiscovered at the time of assignment. The only apparent way that a debtor can be deprived of these defenses is by an estoppel which the courts do not seem anxious to extend.

Latent Equities in Maryland

In *Economy Savings Bank v. Gordon*, a bill was brought by creditors of M to cancel a mortgage given by M to E and thereafter assigned by E to a *bona fide* purchaser for value. It was admitted that the conveyance to E could have been upset, but the court stated that the equity of creditors of M was latent and that, therefore, the *bona fide* purchaser was protected. Had the equity which had been assigned been an equitable interest in a chattel, the *bona fide* purchaser would have probably failed. The application of the latent equities doctrine saved the *bona fide* purchaser just as it would have saved the *bona fide* purchaser of the legal title of a chattel.

*Wicklein v. Kidd*, was a case where a prior grantor filed a bill against a mortgagee alleging that her grant to the mortgagor had been obtained by fraud. The mortgagee was declared a *bona fide* purchaser and was protected. The court distinguishes this case from where a mortgagor claims that a mortgage is invalid because of fraud of the mortgagee and is protected against a *bona fide* purchaser.

The court in the *Gordon Case* makes a comment which might indicate that a distinction could be drawn between

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64 Md. Code, Art. 8, Sec. 3; National Bank v. Anderson, 152 Md. 641, 137 Atl. 367 (1927); Carney v. Maas, 166 Md. 249, 170 Atl. 781 (1934).
65 Schenuit v. Finance Corp., 148 Md. 403, 415, 130 Atl. 331 (1925); Hagerstown Bank & Trust Co. v. College of St. James, 167 Md. 646, 176 Atl. 276 (1935).
66 Blum v. Apitz, 149 Md. 91, 131 Atl. 35 (1925). Cf. Hunter v. Chase, 144 Md. 13, 123 Atl. 393 (1923). While the so-called estoppel certificate obtained by a transferee from a mortgagor debtor is a common-place in New York, it is not believed to be in general use here.
67 90 Md. 486, 45 Atl. 176 (1900).
68 See also Farmers’ Bank of Va., etc., v. Brooke, Trustee, etc., 40 Md. 249 (1874); but cf. Byles v. Tome, 39 Md. 461 (1874).
69 149 Md. 412, 131 Atl. 780 (1926).
70 Ibid, 421.
71 Supra note 67.
assignment of a debt together with legal title to a mortgage which is security and assignment of the debt alone. It could very well be argued that the legal title to the security gave the purchaser a better right than the equitable ownership of the debt.

Such distinction has not generally been recognized in Maryland. In *People's Banking Co. v. Fidelity and Deposit Co.* an attempt was made by the People's Banking Co. to regain possession of certain mortgages transferred by it to the Central Trust Company and by that company to the defendant surety company. It was alleged that the Trust Co. had obtained a transfer of these mortgages with the other assets of the Bank in a purchase induced by fraud. The Surety Company defended on the ground that it had accepted the transfer of the mortgages to it in good faith in exchange for its continuance on certain depository bonds of the Trust Company and that it was therefore not subject to the equity of rescission which might have been asserted against the Trust Company. The defense was allowed and the Surety Company kept the mortgages.

It is noticeable that here again the legal title of the mortgage was transferred along with the debt. The case is, however, treated as one involving the transfer of a non-negotiable chose and the dissenting opinion written by Parke, J., expressly states that the writer joins with the majority in deciding that the *bona fide* purchase of a non-negotiable chose will cut off latent equities. Here then there is an apparent direct approval of the latent equity doctrine.

The majority opinion is not, however, clear on this subject. The court seemed to base its reasoning on a sort of estoppel saying:

"... while the general rule is that a vendee acquires no better title than his vendor, it is subject to an exception, quite as well established as the rule itself, that, where the true owner puts it in the power of another to deal with property as though it were his own, and

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72 Ibid, 502.
73 165 Md. 657, 170 Atl. 544 (1933).
74 Ibid, 684, 685.
that person transfers it to one who purchases it in good faith, for value, and without notice or knowledge of any infirmity in the title of his vendor, the true owner will be estopped from asserting his title against such purchaser.\textsuperscript{75}

Certainly no such broad rule can be applied to assignments of choses in action; and the mere placing of apparent ownership of a mortgage in another is usually not ground for an estoppel.\textsuperscript{76} In view of the confusion which reference to “estoppels” of this sort create it is fortunate that the majority opinion was clarified by that of the minority. It seems safe to conclude that the latent equity doctrine is law in Maryland whether or not the purchaser obtains legal title to security for the debt with the assignment.

Despite the \textit{People's Banking Company Case}, it is interesting to note that the court restricted the application of the doctrine in another recent case. In \textit{Hagerstown Bank & Trust Co. et al. v. College of St. James}\textsuperscript{77} M mortgaged certain property to the Bank which in turn made a recorded assignment to X. An examination of the record shows that the mortgage was overdue when assigned to X, though this fact is not mentioned in the opinion. Subsequently X reconveyed the mortgage to the Bank. None of the conveyances indicated that the mortgage was held in trust. The mortgagor which had in the meanwhile maintained a large deposit in the mortgagee Bank did not withdraw its funds because it relied upon a set-off, in the event of trouble, against the mortgage debt. The Bank became insolvent and it was admitted that ordinarily a set-off would have been permitted.\textsuperscript{78} The Bank set up that the reconveyance from X to itself was to it as trustee and that the purchase was made with funds of a trust estate. None of this was shown in the record title. The court held that the cestui’s interest in the mortgage debt would prevent the mortgagor from obtaining a set-off.

\textsuperscript{75} Ibid, 664.
\textsuperscript{76} Whistler v. Hanna, 152 Md. 597, 137 Atl. 276 (1927); Carney v. Maas, 166 Md. 249, 170 Atl. 781 (1934); National Bank v. Anderson, 152 Md. 641, 137 Atl. 367 (1927).
\textsuperscript{77} 167 Md. 646, 176 Atl. 276 (1934).
\textsuperscript{78} Md. Code, Art. 75, Sec. 16.
Assuming that the right of set-off was a substantial right in the nature of an equitable right, it would seem that M’s continuation of his deposit in reliance of his right of set-off was a change of position sufficient to defeat the cestui and should have cut off the cestui’s interest so that the set-off should have been permitted under the latent equity doctrine. The court, however, refused to apply the doctrine. It is noticeable that the American Law Institute, which has adopted the latent equity doctrine would probably have recognized the right of set-off even had the mortgage not been due at the time of the assignment to X.

The Effect of Dearle v. Hall in Maryland

The leading case regarding the adoption of the doctrine of Dearle v. Hall in Maryland is Lambert v. Morgan. There a testator left real estate to be sold by T, trustee, and the income paid to C for life. Before the sale of the property by T, C mortgaged his interest to six groups of persons one after the other and each of them gave value. The question of priority of the various assignments came up. The court quoted Dearle v. Hall as follows:

“In cases like the present the act of giving the trustee notice is, in a certain degree, taking possession of the fund; it is going as far toward equitable possession as it is possible to go, for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice.”

The court then cites Story on Equity and quotes from a passage of Story having to do with the assignment of choses in action. (Story regarded the assignor as a trustee):

“In order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of an 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 assignor before such notice.”

Footnotes:

7 Restatement, Contracts, Sec. 174.
8 Restatement, Contracts, Sec. 167, and Restatement, Trusts, Sec. 323.
9 110 Md. 1, 72 Atl. 407 (1909).
10 Ibid. 26.
11 Ibid, 26, 27.
The court thereupon decided that the first mortgagee to give notice took precedence over prior mortgagees of the cestui's interest.

Aside from the adoption of the rule of *Dearle v. Hall* the case is interesting for two reasons; first, the court cites a passage from Story relating to assignments of choses in action which paved the way for application of the rule of *Dearle v. Hall* in the case of such assignments; second, the passage of Story cited speaks of the perfection of a "title" to a chose against the debtor. With regard to this second statement it is obvious that Story could not have meant that the assignee acquired a legal obligation running to himself unless not only notice was given to the debtor, but also the debtor consented to substitute the assignee as his obligee, i. e. a novation. Story must have been using the word "title" in the sense of equitable ownership; although we see in later Maryland cases where the court in commenting upon the assignment of a chose in action not yet due and therefore, in its mind, not as complete as an irrevocable assignment of a chose in action which has become due, as an assignment "equitable in nature". This indicates a tendency of the Court of Appeals of Maryland to speak of complete assignments in the sense of the passage of a legal title to the assignment, and of those incomplete or defective in the sense of passage of an equitable ownership, equivalent to an equitable interest in an imperfect conveyance of a chattel. The confusion so caused will be discussed later.

The citation from *Dearle v. Hall* regarding possession would have indicated that the reasoning underlying the postponement of the assignee's interest was analogous to a failure to deliver a chattel, i. e. based not on estoppel so much as a defect in title of the transferee. This idea of incomplete transfer, however, was not to prove the true basis of the rule. In *McDowell, Pyle & Company v. Hop-*

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84 Cf. the statement of the Supreme Court of the United States in the famous case of Benedict v. Ratner, 268 U. S. 353, 363, 69 L. Ed. 991, 45 S. Ct. 566 (1925), holding an assignment defective "not upon seeming ownership (in the assignor) because of possession retained, but upon a lack of ownership (in the assignee) because of dominion reserved".
field,85 a contractor assigned existing accounts to E to secure an advance of money by E. A subsequent creditor then issued a non-resident attachment against one of the accounts and recovered judgment of condemnation before notice was given by E to the debtor of his assignment. It was stated by the court that E had refrained from giving notice "in deference to the assignor".86

Under these circumstances it was naturally argued by the attaching creditor that E's assignment was incomplete; that though the attaching creditor admittedly got no better title to the property than M possessed, and was not entitled to rely on an estoppel, nevertheless as E never got any interest in the chose, M retained an attachable interest and, therefore, his attachment should be good.87 The court refused to recognize the attaching creditor's contention and held that sufficient interest passed to E to give him precedence over the attaching creditor despite the fact that notice had not been given to the debtor.

In reaching this conclusion the court brought the case into close line with the authority relating to the equitable mortgage of chattels to E, who has for some reason or other failed to perfect his legal title. In these cases the putative mortgagee has been protected against a subsequent attaching creditor.

The case of Lambert v. Morgan establishes the doctrine of Dearle v. Hall in Maryland with respect to assignment of a cestui's interest in a trust; it impliedly also extends the doctrine to assignments of choses in action. No case, however, has been discovered in Maryland which has expressly passed on the point where assignment of a chose in action is involved and it should be noted that in an earlier case88 the first of two assignees of a chose was protected without mention of who was first to give notice to the obligor or the effect of such a notice. If the doctrine is in force with

85 148 Md. 84, 128 Atl. 742 (1925).
86 Ibid, 89.
88 Byles v. Tome, supra note 68.
respect to assignments of choses in action, which is assumed, the apparent effect of the Hopfield case is to limit the doctrine to one of estoppel against the assertion of a defective title by an assignee which will be available only to certain classes of persons; and to discard the theory that it is a rule of conveyancing which would leave sufficient interest in the assignor to be reached on attachment by the assignor's creditor.

The conclusion that Dearle v. Hall will be applied to assignments of choses in action in Maryland is however again complicated by an apparent distinction made by the court between a partial assignment and the total assignment of a chose in action.

"Even if the garnishee had been a debtor instead of a trustee bound by the duties of an active trust, and had not, in fact, accepted the partial assignments, prior notice to the garnishee would have made the assignments operate as equitable assignments between the owner and the assignees and, so, good as against subsequent attaching creditors of the assignor. The reason for this is that the attaching creditor can subject to his attachment only the interest of the attachment debtor at the time of the attachment and arising before the trial. It follows that a bona fide partial assignment or other transfer by the debtor before the laying of the attachment has priority, although the assignment or other transfer be equitable instead of good at law."90

The statement is dictum but in view of the scarcity of cases it is possible that it might lead to adoption, at least in the case of a partial assignment, of a contrary result from the Hopfield Case (where no notice prior to the attachment was given). 

In the Pen Mar Case a trustee was appointed to hold certain funds, advanced by a mortgagee, to be paid to the mortgagor as a building covered by the mortgage progressed. The mortgagor made assignments of certain funds which had not yet come due under the trust to secure an advance by A. A gave notice to the trustee. A creditor

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9 Supra note 85.
0 Pen Mar Co. v. Ashman, supra note 55.
then laid an attachment in the trustee's hands. The court first discussed the difference between the assignment of an equitable interest in a chattel and the assignment of a portion of an interest of an obligee in a chose in action. It treated the case as though it were the case of a cestui assigning an equitable property interest (in a chattel) and based its decision in favor of the assignee on that ground. It then went on to suppose that the assignment was the assignment of a chose. Under this assumption it said that the assignment was not a good "legal assignment" because it was for only part of the debt, but that it at least should be regarded as an "equitable assignment," good against attaching creditors.

Here again we see the confusion evident in the court's mind with respect to the effect of an assignment and the use of the adjective "legal" to define an assignment of the whole chose, which is not defective; and "equitable" to define a defective or partial assignment. Can it be that the court would distinguish the Hopfield case on this ground, calling the total assignment in that case a legal assignment though the assignee had not given notice to the debtor? And if so could a garnishing creditor postpone a prior equitable assignee who has failed to give notice?

In Seymour v. Finance & Guaranty Co.91 we have another case where the Court speaks of an equitable title which is apparently regarded to some extent as subordinate to the ordinary interest acquired in an assignment. In that case H, a contractor, borrowed money from the F. & G. Co. under an agreement by which he was to sell them accounts which he represented to be "existing, undisputed, liquidated claims which were due or to become due on the dates set forth". After the assignment of a number of these claims, H was on the point of defaulting when a creditors' committee was appointed which obtained an assignment from H of his rights under the contract and the creditors' committee completed the work at a loss. It turned out that the assignments from H were not of liquidated

91 155 Md. 514, 531, 142 Atl. 710 (1928).
sends of money then due but rather of anticipated payments of money to be earned. The committee knew of the terms of this assignment. It was held that "the debt had no actual existence" because it was not then earned, but it "did have a potential existence" so that it could have been assigned; that though the rights of the assignee were not equivalent to those of a completed assignment nevertheless "equity will treat the assignment as an assignment pro tanto of the fund, and by force thereof vests the equitable title to the money in the assignee". The court thereupon held that H having assigned his contract to E, gave E a legal claim against the committee for moneys earned in the performance of the work by H under the supervision of the creditors' committee though earned by reason of their advance of additional moneys.22

From what has been said, it is evident that though Dearle v. Hall is probably law in Maryland both with respect to assignments of the interest of a cestui que trust and of an ordinary chose in action, the effect of the rule is still in some doubt. Lambert v. Morgan has not often been cited on this point and considerable remains to be said by the Court of Appeals. The ever present confusion resulting from the casual use of the word "equitable" can be expected to increase the difficulty both to the court in deciding the cases and to practitioners in interpreting its opinions.23

22 The case is also interesting as a warning to persons dealing with creditors' committees to be careful to arrange a technical default on the part of the assigning debtor before completing performance of a contract in order to protect themselves from prior assignees of the debtor. See also Hohman v. Orem, — Md. —, 182 Atl. 587 (1936).

23 One additional question should be mentioned which remains undecided in Maryland. Is the doctrine tabula in naufragio going to be extended to the doctrine of Dearle v. Hall? Will a bona fide purchaser for value be in a worse position if he receives notice of the prior assignment before he notifies the trustee? The doctrine of tabula in naufragio has been criticized and is not generally recognized in this country; Huston, op. cit. supra note 4, 129; Bogert, op. cit. supra note 7, sec. 886; Maitland, op. cit. supra note 4, 135; but we have another case of a similar right where the bona fide purchaser of legal title to land who first records his instrument is protected. Md. Code, Art. 21, Sec. 16. On principle there seems little reason to qualify the rule of Dearle v. Hall by refusing to protect a bona fide subsequent assignee who has given value whether or not he receives notice of a prior assignment before he himself notifies the obligor.
Comparison of the Two Doctrines

Before closing the discussion of the latent equity doctrine in Maryland it is relevant to compare it with the rule of *Dearle v. Hall*. While historically the two doctrines are separate, so that at the present time *Dearle v. Hall* is not accepted but the latent equity doctrine is accepted by the American Law Institute, it would seem that fundamentally the two doctrines are based on much the same reasoning—the recognition of a demand for greater marketability. The prior unannounced assignment of a chose to a person who does not trouble to notify the trustee or debtor seems to be merely a variety of latent equity. While it is not necessary to express any opinion as to the advisability of extending the doctrine of *Dearle v. Hall*, the comparison of the two doctrines and the recognition of their similarity should help in the development of the law.

Conclusive Presumption of Title Under Article 66, Section 25

The law relating to assignments is sufficiently confused in Maryland without considering the effect of the statute relating to mortgage debts, which reads in part:

"The title to all . . . debts hereafter contracted, secured by mortgage or deeds in the nature of a mortgage, shall . . . be conclusively presumed to be vested in the person . . . holding the record title to such mortgage or deed in the nature of a mortgage."\(^{94}\)

The purpose of the statute has been explained as follows:

"The object of the Act was to avoid the complications that often arose by reason of the fact that the release of a mortgage by the mortgagee was not valid, unless he also owned the evidences of debt secured by it, and hence it often left the titles to mortgaged property involved, as the ownership of the evidences of debt was not necessarily, or usually, a matter of record."\(^{95}\)

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\(^{94}\) Md. Code, Art. 66, Sec. 25

\(^{95}\) Dickey v. Pocomoke City Bank, 89 Md. 280, 296, 43 Atl. 33 (1899).
Despite the wording of the statute, it has been recognized that an equitable interest does pass to an assignee though the assignment is not recorded.

"The legal title to the mortgage debt, no matter how evidenced, is conclusively presumed to be in the party holding the record title to the mortgage deed. . . . The equitable title to the mortgage indebtedness may, however, be in an assignee under an assignment not of record." 95

The statute has been stated to have the effect of protecting the subsequent *bona fide* assignee for value of a mortgage (who records) against prior unrecorded assignments.97 A combination of Art. 21 sec. 16 (giving priority to the first *bona fide* purchaser for value who records) and Art. 66 sec. 25 would seem to protect the first person to record as between two assignees. But sec. 16 applies only to the conveyances of "lands or chattels real". Perhaps sec. 25, alone, will accomplish the result for other cases, particularly if the second assignment is recorded without notice of prior assignments.

Sec. 25 seems to apply to second and equitable mortgages as well as first mortgages; and to partial assignments as well as full assignments of the debt.98 It will probably not be construed to give persons not assignees of the mortgage any rights.99 While a considerable group of choses in action are removed by this section from the discussion in this paper, a large class are also apparently added. The statute probably renders all mortgage notes non-negotiable.100 It perhaps renders all bonds secured by mortgage deeds of trust non-negotiable so that a purchase from a thief would not be protected;101 and it is hard to see how the assignee of such a bond can get more than the so-called "equitable interest" to the chose if the statute is interpreted literally.

99 Supra note 77.
The object of this paper has been to show that there is a strong modern tendency to qualify the accepted general rule of equity that a *bona fide* purchaser of equitable rights is not protected from prior equities. It has been shown that though the assignment of a chose in action is regarded as creating nothing but an equitable interest in the assignee nevertheless he will in two important instances be protected: One, in cases where the assignor has already assigned to another assignee for value, where the second assignee first gives notice to the obligor (the rule of *Dearle v. Hall*); and two, in cases where the *bona fide* purchaser of a chose in action is protected from pre-existing latent equities set up against his claim of ownership.

The application of the doctrine extending (in a limited manner) the *bona fide* purchaser rule to the purchase of equitable interests in the case of choses in action seems to blaze the trail for a similar treatment with respect to the *bona fide* purchase of other equitable interests (already to some extent opened by the adoption of the doctrine of *Dearle v. Hall*). For instance, if latent equities attaching to a chose can be cut off on the ground that the equity is not as strong an equity of ownership as the claim of a subsequent *bona fide* purchaser, why cannot the same reasoning apply to the situation where a trustee of an equitable interest conveys the interest to a *bona fide* purchaser in fraud of his cestui? It would seem that every substantial reason for applying the *bona fide* purchaser rule in one case would apply in the other, yet courts have been reluctant to respond to the pressure for extension of the rule and only a small minority recognize it.\(^{102}\) It is interesting to note, however, that the American Law Institute recognizes the right of a *bona fide* purchaser of an equitable interest in such a case, where the transaction has been consumated.\(^{103}\)

No attempt has been made in this discussion to consider

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\(^{102}\) Bogert, op. cit. supra note 7, Sec. 885, pp. 2561-2568.

\(^{103}\) Restatement, Trusts, Secs. 284, 285, 286.
the assignment of future accounts.\textsuperscript{104} At common law it was impossible to give to another an assignment, even in the form of a power to collect, of a chose in action which did not exist, as it was regarded as against the public interest to permit a man to so encumber his future assets.\textsuperscript{105} Persons engaged in commercial enterprises, as for instance the retail sale of goods, often find it necessary to borrow money and to assign accounts not in existence to the lender. Pressure for recognition for such assignments has been great and without much discussion they have been recognized as valid in many States. Courts have reached this conclusion by comparing an assignment of an after acquired chose in action to the assignment of an after acquired chattel and have built up a so-called "equitable title" analogous to the equitable interest recognized in many States in the case of assignments of after acquired chattels. Such assignments of after acquired choses are recognized by the Federal Courts as valid under Maryland law. The restrictions concerning such assignments and the rules which must be followed to make a valid assignment are sufficiently complicated to make the basis for another paper. Suffice to say that the Court of Appeals of Maryland seems in the humor to recognize two sorts of interests in the case of assignments of choses in action; one a so-called "legal" interest, the other a so-called "equitable" interest; and the assignment of an after acquired chose perhaps may take the same position as the equitable ownership recognized in the case of the mortgage of an after acquired chattel and so be subject to claims of pre-existing equities even though they be latent.

The following summarizes what seems to be the present state of the Maryland law:

1. The Maryland assignment statute, Article 8 section 1, does not change the nature of an assignment from one "equitable" in nature.

\textsuperscript{104} Lauchheimer, \textit{Problems in Modern Collateral Banking} (1926) 26 Col. L. R. 129. Note (1935) 44 Yale L. J. 639.

\textsuperscript{105} Seymour v. Finance & Guaranty Co., 155 Md. 514, 531, 142 Atl. 710 (1928); Cf. Restatement, Contracts, Secs. 154, 166. See Hamilton, In Re The Small Debtor (1933) 42 Yale L. J. 473.
2. Defenses of the obligor may be asserted against subsequent assignees at least if they arise out of the contract itself.

3. A right of set-off against the obligee can be cut off by a hidden equity, and apparently even a right of set-off on a matured claim can be cut off by assignment.

4. Latent equities are cut off by a bona fide purchase of the chose, at least where the chose is an obligation within the meaning of Code Art. 8 sec. 1.

5. In the case of two successive assignments by an obligee the first gets at least an equitable interest which can be cut off by a bona fide purchaser (under Dearle v. Hall) if the second assignee gives notice first.

6. The doctrine tabula in naufragio has apparently not yet been applied in Maryland to the assignment of a chose.

7. The court is fast coming to the position in its dicta regarding assignments of the "legal title" to a chose where the dicta will become law and assignment of choses will then be treated like assignments of chattels; and there will be a distinction between "legal title" and "equitable title" under assignments.

8. This will probably result in giving precedence to "legal title" under an assignment over a prior "equitable assignment"; the result which Williston calls "monstrous".

9. This will probably have its effect on assignments of after acquired choses because of the analogy to assignments of after acquired chattels.

10. The law is radically changed with regard to debts secured by mortgages.

The tendency in Maryland has been to draw a stronger and stronger analogy to the assignment of a chose and the conveyance of legal title of a chattel. As we have seen, the
analogy between the assignment of a chose and the conveyance of an *equitable* interest in a chattel is somewhat close. On the other hand, if the court making this analogy later goes further to hold that a completed assignment within the terms of Code Art. 8 sec. 1 passes "legal title" analogous to that of the legal title passed in the case of a perfect conveyance of a chattel, we can anticipate confusion. The *dicta* in the cases cited above indicate that the court is not clear as to the effect of such an assignment of a chose; and that when a case involving the question comes before it, it may very well fall into the errors suggested as possible by Mr. Williston (see articles quoted above). It will, for instance, be interesting to see whether the *bona fide* purchaser of an assignment within the terms of Md. Code, Article 8, sec. 1 will be given preference over a prior partial assignee of the same debt, on analogy to the superiority of the *bona fide* purchaser of the legal title of a chattel over a prior equitable title.

The actual results accomplished so far in the Maryland law of assignment seem desirable. They recognize a qualification of the rule of equity to the extent of adopting both the latent equity doctrine and the doctrine of *Dearle v. Hall*. These two doctrines have been adopted in the manner customarily used by a court which is given old legal ideas to adapt to new situations. The changes have been gradual and made to fit the particular case. The real difficulty is that we have attempted to fit the law of assignment of choses in action into the law constructed for assignments of chattels. We have recognized only a legal title or an equitable right with certain characteristics surrounding each. To attempt to fit the assignment of a non-negotiable chose in either category is to put a square peg into a round hole.

Here we see the true good accomplished by the American Law Institute in its Restatement which presents a compact picture available to judges who are moulding the law in individual cases. The Restatement shows a very radical departure from the older ideas of assignment yet does so according to a set plan with a wary eye for pos-
sible confusion. Instead of being dependent upon working out the assignee's right on theories of equitable procedure adopted for chattels, with modifications of that procedure, like the latent equity doctrine, the Restatement has set forth rules to show the right of the assignee which are stated in a way to indicate that it is independent of the rules concerning either legal title or equitable ownership of chattels. The obligation of the obligor is kept intact, yet assignees of even a part of the obligation are given rights which comply with modern demands for easy disposal of this valuable property.

We must remember that there is more to the problem than a recognition that the obligor's duty under a contract cannot be put into set rules of property in the same manner in which we can define ownership of a chattel. We must go further and recall that the ownership of a chattel as a practical matter is different from the ownership of the chose. The chattel is a thing which people can see and touch and deliver; on possession of which creditors, at least to some extent, can rely; and which before it becomes the property of another must be conveyed either by delivery or by some other event which can be verified. Set rules have grown up concerning conveyance of title and recording acts have been devised to protect creditors. Such things do not usually exist in the assignment of a chose except in the case where it is represented by an instrument which can be delivered and which can represent title (insurance policies, notes, etc.). The legal results of a conveyance should, therefore, be treated as distinct.

We could perhaps find that the rules surrounding ordinary equitable ownership are better applied than the harsher rules concerning legal title. So we might conclude that a prior equity in a chose should not be cut off though we would cut off a somewhat similar equity, upon conveyance of the legal title of a chattel.

This is a matter of policy. It will be unfortunate if we wander into an inadvertent determination of the policy involved by a confusion of terms or by misleading analogies.