even in maintaining this desire, will at an early date develop the principles a little further, and perhaps by indicating the construction which is to be placed upon "real and substantial connection" with Australia, enable the area of effective operation of awards to be more accurately defined.

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THE RULE IN *DEARLE* v. *HALL*
B. S. LYLE LTD. v. *ROSHER*

At first sight the recent decision of the House of Lords in *B. S. Lyle Ltd.* v. *Rosher*[1] gives the impression that their Lordships have confined the operation of the equitable doctrine of priority known as the rule in *Dearle* v. *Hall*[2] to the simple situation where there exists a fundholder, a person who has, or has had, a beneficial interest in the fund and two or more successive assignees. But closer examination of the speeches of Lord Reid and Lord Keith reveals that this impression is perhaps too superficial, since both speeches contain reasoning which could be seized upon by a judge desiring to extend the application of the doctrine to new situations.

The doctrine known as the rule in *Dearle* v. *Hall*[3] is said to have originated in the cases of *Dearle* v. *Hall*[4] and *Loveridge* v. *Cooper*.[5] In the former case it was laid down by Sir Thomas Plumer, M.R., that if an assignor, who has a beneficial interest in a fund invested in the name of trustees, assigns it for valuable consideration to a first assignee, who neglects to give notice of the assignment to the trustees, and subsequently the assignor purports to assign the same interest to a second assignee, who has no notice of the prior encumbrance but who gives notice to the trustees of the assignment, the second assignee's interest will be given priority over that of the first. The principle upon which the Master of the Rolls chiefly relied in formulating the rule appeared to be that the plaintiffs, who were the prior encumbrancers in point of time, had been negligent, and that in consequence of their negligence third parties had suffered injury. In addition, because of this negligence a cestui que trust would be put into a position where he could more easily perpetrate a fraud on subsequent encumbrancers. It was the opinion of the Master of the Rolls that "under such circumstances the general rule of priority ought to be qualified."[6]

The doctrine was recognised as binding by the House of Lords in *Foster* v. *Cockerell*[7] in 1835, where Lord Lyndhurst, L.C. approved the decision in *Dearle* v. *Hall*[8] in these terms: "In the case of an equitable assignment the party who was the earlier encumbrancer in point of date was not entitled to priority if he did not give notice; but such priority was justly to be conceded to a party giving notice to the trustees although such party was, according to the date of the assignment only a second incumbrancer."[9] *Foster* v. *Cockerell*[10] clearly decided that priority in the *Dearle* v. *Hall*[11] situation depends solely on priority of notice and is independent of any other consideration of the conduct of the competing assignees.

In *Ward* v. *Duncombe*[12] the House of Lords was asked to extend the doctrine to a situation not already covered by authority. Their Lordships, after inquiring into the principles upon which the rule was based, held that these principles were not so clear nor so convincing that the rule ought to be extended

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[1] (1959) 1 W.L.R. 8.
[2] (1823) 3 Russ. 1.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *Id.* at 11.
[7] (1835) 3 Cl. & F. 456.
[8] (1823) 3 Russ. 1.
[9] *Foster* v. *Cockerell* (1835) 3 Cl. & F. 456, 476.
[10] *Id.* 456.
[11] (1823) 3 Russ. 1.
[12] (1893) A.C. 369.

to such a new case. Lord Macnaghten observed that "the rule in *Dearle* v. *Hall*[13] has on the whole produced at least as much injustice as it has prevented",[14] and indicated that it should be confined to its present limits.

The application of the rule was shown in all its severity in the case of *Re Dallas*[15] when the Court of Appeal, following *Foster* v. *Cockerell*[16] and *Ward* v. *Duncombe*,[17] held the doctrine clearly settled. In *Re Dallas*[18] a testator gave a legacy to X and appointed him executor. The testator having become incurably insane, X borrowed money from A and then from B on the security of the legacy. On the death of the testator, X renounced probate and Y was appointed administrator. B was the first to give notice to Y and was held to be entitled to be paid first, although A had given notice as soon as he could and although his failure to give notice earlier had not led to the creation of B's charge. This decision works hardship to the unfortunate first assignee in such a situation and surely presents a strong argument for curtailing the strict application of the doctrine rather than extending it as the House of Lords was asked to do by counsel for B. S. Lyle Ltd.

In *Lyle's Case*[19] their Lordships were asked to apply the rule to the situation where the assignor had no beneficial interest to assign. The facts of the case were briefly these. A son who desired to qualify as an underwriting member of Lloyd's caused certain investments to be transferred to that organisation to be held upon trust for the due discharge of his underwriting obligations. The investments so transferred formed part of a settled fund of which he and his father were beneficiaries. The transfer was effected by father and son executing a deed of appointment, which they had power to do under the settlement, and to which the settlement trustees were also parties. This appointment, made in 1933, recited that, in order to comply with the entrance conditions, the appointors were desirous of exercising the joint power of appointment conferred by the settlement "to the extent and in the manner hereunder appearing". Then followed provisions that the investments should thereafter be held on trust, that the trustees of the settlement should transfer the investments into the name of Lloyd's to be held upon the trusts and for the purposes of, and subject to, the trust deeds, to be executed between the son and Lloyd's which, after securing the payment of claims on policies underwritten by the son, contained ultimate trusts in favour of the son. In 1951 the son borrowed a total amount of £3,000 from B. S. Lyle Ltd., who were registered money-lenders, at a high rate of interest. He soon defaulted and in consideration of the appellants agreeing to delay further proceedings he charged, or at least purported to charge, the stock deposited with Lloyd's. In 1953 he borrowed a further £2,500 from Lyle's. Immediately before taking the charges the appellant's solicitors inquired of Lloyd's as to whether they had notice of any other charge, and were advised that they had not. After the charges had been executed notice of their execution was given to Lloyd's. In 1954 the son was adjudicated bankrupt and the question of priority arose in relation to the funds. Were the trustees of the settlement to have priority by their equitable right based on the deed of appointment, or the moneylender by virtue of his charges, notice of which had been given to Lloyd's?

The plaintiff (appellant) before Wynn-Parry, J., at first instance, claimed a declaration that the two charges given by the son in its favour ranked in priority to any interests of the first and second defendants (i.e. the original settlement trustees). The first and second defendants counterclaimed for a declaration that certain of the funds and the income from them were subject to the trusts of the original settlement in priority to any claim of the plaintiff

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[13] (1823) 3 Russ. 1.
[14] *Ward* v. *Duncombe* (1893) A.C. 369, 393.
[15] (1904) 2 Ch. 385.
[16] (1835) 3 Cl. & F. 456.
[17] (1893) A.C. 369.
[18] (1904) 2 Ch. 385.
[19] (1959) 1 W.L.R. 8.

or of the son's trustee in bankruptcy. Wynn-Parry, J. made the declaration claimed by the first and second defendants. The Court of Appeal (Jenkins and Sellers, L.JJ., and Upjohn, J.) affirmed this decision and the appellant thereupon appealed to the House of Lords. Before their Lordships the appellant moneylenders contended that the case was one of competing equitable interests in which priority was to be decided by an application of the rule in *Dearle* v. *Hall*.[20] They claimed that the 1933 appointment gave an equitable interest in the investments to the son and that there was an assignment by him of the interest to the trustees of the settlement. It was alternatively submitted by the appellant that even if the son did not have the beneficial interest, the documents conferred a right on him as between himself and Lloyd's (subject to underwriting claims) to receive the investments, and that this was a chose in action against Lloyd's which Lloyd's held upon trust for the trustees of the settlement; that the son carried out successive dealings with the chose in action, that is to say he had been constituted trustee for the settlement trustees and had charged the chose, and that these successive dealings created competing equities in the settlement trustees and the appellant, the priority among which depended upon the priority notice given to Lloyd's.[21] Three of their Lordships—Viscount Kilmuir, L.C., and Lords Morton and Cohen—held simply that the appointment of 1933 did not confer upon the son any equitable beneficial interest in the investments and he was thus never capable of assigning or charging the investments at all.

In view of the *dicta* of Lord Macnaghten in *Ward* v. *Duncombe*[22] and Eve, J., in *Hill* v. *Peters*[23] and upon the facts before them, their Lordships considered that the rule in *Dearle* v. *Hall*[24] should not be extended beyond its present limits to the situation where the assignor had no beneficial interest to assign. Lord Reid and Lord Keith, however, whilst agreeing that the son had no beneficial interest in the fund, did not consider this fact sufficient ground to defeat the application of the rule. Their Lordships considered that there must be a "significant distinction" from the position in *Dearle* v. *Hall*[25] before the doctrine could be dismissed. In the words of Lord Reid:

> I have great difficulty in regarding it as a significant distinction that the bankrupt (son) in this case never had a beneficial interest, whereas the assignor in a typical *Dearle* v. *Hall*[26] case had a beneficial interest until he assigned it to the first assignee. What ground is there for preferring the second assignee in the case where the assignor once had a beneficial right but not where the assignor never had such a right?

It is respectfully submitted that his Lordship by this statement had failed to appreciate the question of the condition of entitlement necessary *ab initio* to invoke the doctrine. Before a person can assign an equitable right in an equitable interest he must first have that equitable interest. The common law maxim "*nemo dat quod non habet*," although cut across to a certain extent in equity by the *bona fide* purchaser doctrine, demands the possession of such an interest. Indeed the majority of the Court prescribed the holding of a beneficial interest as a condition precedent to the application of the rule in *Dearle* v. *Hall*[27]. His Lordship went on to dismiss the appeal on the ground that the settlement trustees (the alleged first assignees) were *cestuis que trust*, and that as such they were not required to give notice of the trust to the holder of the trust.

Lord Keith, although not without reluctance, bowed to the decision of

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[20] (1823) 3 Russ. 1.

[21] This alternative submission by the appellant was shortly dismissed by the Court. Viscount Kilmuir ((1959) 1 W.L.R. 8, 14.) held that there was no dealing by the bankrupt with the chose in action, because the benefit of the chose in action was vested in the respondent trustees, and never at any moment belonged to the son in equity. He was, in the words of the Court of Appeal, a mere conduit pipe in the conveyancing scheme.

[22] (1893) A.C. 369, 384 ff. [23] (1918) 2 Ch. 273, 279. [24] (1823) 3 Russ. 1.

[25] *Ibid.* [26] *Ibid.* [27] *Ibid.*

the majority that the doctrine should not be extended to a case where the assignor never had a beneficial interest. "Though I might pause long before conceding the logic or reasonableness of such a limitation, I am not prepared on the authorities which have been cited to differ on a point which is so peculiarly a matter of English equity law."[28] His Lordship considered that the Scottish decision of *Redfearn* v. *Somervail*[29] would require "more consideration" where in other circumstances there might arise new situations for the application of the doctrine beyond its present limits. *Redfearn* v. *Somervail*[30] although containing similar facts to *Lyle's Case*[31] was distinguished by the other Law Lords mainly on the basis of the difference between English and Scottish law. In Scotland there has never been a separate court or a separate system of equity, and therefore there has never been a sharp distinction between legal and equitable rights. Lord Keith, however, considered that, although it was a Scottish decision, the judges were applying English law and would have reached the same decision in like circumstances in an English case.

These judgments of Lord Reid and Lord Keith by their apparent readiness to apply the doctrine to situations beyond what may be called the typical *Dearle* v. *Hall*[32] situation, blur the clear picture presented in the three former judgments. Viscount Kilmuir sets out four pre-requisites before the doctrine can be invoked—there must be a fundholder, a person who has, or has had, an equitable beneficial interest, and a first and a second assignee. If all of these are not present together the rule cannot be applied. Lords Reid and Keith, however, consider that *Dearle* v. *Hall*[33] may apply where there is in fact no beneficial interest in equity, this not being, in their view, such a "significant distinction" as to preclude its application. These *dicta* thus present an unfortunate loophole which could be used in later judicial attempts to extend the doctrine to new situations.

It is submitted that the conclusion, inherent in the speeches of Viscount Kilmuir, Lord Cohen and Lord Morton, that the doctrine should not be extended beyond its already prescribed limits conforms with the true policy and basis of the rule and that the question of policy has not been fully considered in the speeches of Lord Reid and Lord Keith. It would surely be anomalous if the doctrine, which arose chiefly out of a desire to prevent fraudulent dealings by assignor cestuis que trust at the expense of *bona fide* subsequent assignees, were to be allowed to be used as a tool to perpetrate frauds by the subsequent assignees. *Re Dallas*[34] shows that this situation could occur, for example, by the subsequent assignee persuading a trustee to relinquish his trusteeship and by then being the first to give notice to the new trustee. Undoubtedly the doctrine is binding law and cannot now be altered without legislative intervention, but to allow an extension beyond its present limits could cause grave injustice. *Re Dallas*,[35] it is felt, should be regarded as the limit of the rule's extension and any attempt to overreach this should be rejected.

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[28] (1959) 1 W.L.R. 8.
[29] (1813) 1 Dow. 50.
[30] *Ibid.*
[31] (1959) 1 W.L.R. 8.
[32] (1823) 3 Russ. 1.
[33] *Ibid.*
[34] (1904) 2 Ch. 385.
[35] *Ibid.*