

1856.

Joseph
V.
Heaton.

created in favour of the party postponed. It is stated by Sir *Edward Sugden*, in his treatise on the law of vendors and purchasers, that upon the purchase of a chose in action, or of any equitable right, it is the invariable practice of the profession to require notice of the sale to be given to the trustees; and he states further, that a purchaser of any equitable rights, of which immediate possession cannot be obtained, should, previous to completing his contract, inquire of the trustees in whom the property is vested whether it is liable to any incumbrance; and he adds, that if the trustee make a false representation, equity would compel him to make good the loss sustained by the purchaser in consequence of his fraudulent statement.

Judgment.

It is clear then that the English rule is, that the purchaser of such an equitable right, omitting to give notice to the trustee, omits that which it is the invariable practice of the profession to do, and is consequently guilty of gross negligence, and that to the prejudice of a subsequent purchaser of the same equitable right, because it enables the *cestui que trust* to commit a fraud upon him by inducing him to believe that there is no prior charge affecting the property, a belief which the usual diligence on his part, and probably no amount of diligence, would enable him to correct. While if notice had been given to the trustee the subsequent purchaser would be safe whether the trustee disclosed the fact to him or not.

In the absence of notice it is assumed that the subsequent purchaser advanced his money upon the faith that no prior charge of which he had not notice did in fact exist. This prior purchase may have been of the whole right of the *cestui que trust* or of a charge upon it only. In either case it appears a plain equity that it should be postponed to the right of the subsequent but diligent purchaser, whose money may be placed in jeopardy or wholly lost through the negligent omission of the prior purchaser.