But, when the principle is applied to a case like the present, it wholly fails. In the first place no negligence is shewn, for an omission to give notice is not negligence unless the party omitting knew of that of which he omitted to give notice. In the second place, there was no advance of money by the party claiming this priority, upon the faith of the non-existence of the incumbrance sought to be postponed. And thirdly, there was no loss or danger of loss in consequence of the existence of the prior incumbrance, but the position of all parties remained the same. It was prudent and diligent certainly in any party interested in the second fund to notify the person who held it, in order to prevent his parting with it, but to give him a priority on that ground would be to prefer him to those before him, to reverse the rule *qui prior est in tempore potior est in jure* merely as a *reward* for the quickness and diligence which he had used, without any loss or change of position resulting from the omission of those prior to him, and without any negligence on their part being shewn.

1856.

Joseph v. Heaton.

Judgment.

There is another ground which would appear to prevent the application of the principle in this case. Messrs. *Rubridge* and *Cameron* were solicitors for all the judgment creditors except *Heaton*, and the plaintiffs would therefore have notice of the prior incumbrances, in which case, even if an advance be made, the principle does not apply.

Two other cases were cited by Mr. *Crooks*, they rest upon the same principle as the others to which I have referred. In one of them *Rice* v. *Rice* (a), the bill was filed to enforce a lien for unpaid purchase money; a conveyance had been made with the usual receipt endorsed, and the title deeds were delivered to the purchaser, who, upon the following day, created an equitable mortgage by deposit of the title deeds. It was held that the vendors had enabled the purchaser to

(a). 2 Dr. & W. 78.