

ISSN: 2476-8510



جامعة الحكمة، إلورن - نيجيريا
**AL-HIKMAH UNIVERSITY,
ILOIN, NIGERIA.**



LAW JOURNAL 2016

LAW JOURNAL 2016

Published by:
FACULTY OF LAW,
AL-HIKMAH UNIVERSITY,
ILORIN, NIGERIA,
© 2016

ISSN: 2476-8510

All rights reserved: No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording or any information storage and retrieval system, without the prior permission in writing from the author or publisher.

Printed by:
TAKBIR PRESS:
08052178834

Dr. Solomon O. Afolarin
Dept. of Private & Property Law
Faculty of Law, University of Ilorin.

EDITORIAL BOARD

Editor-in-Chief
Prof. A. T. Shehu

Editors
Dr. H. A. Hammed
Mrs. K. O. Mohammed Lawal
A. Y. Abdulraheem
Mr. A. A. Yusuph

Secretary
Mrs. K. O. Mohammed Lawal

Consulting Editors

Prof. P. E. Bondzi-Simpson	University of Cape Coast, Ghana
Prof. (Dr.) Manoj Kumar Sinha	National University of Judicial Sciences, Kolkata, India
Prof. M. Baderin	University of London
Prof. A. Zubair	University of Ilorin
Prof. W. O. Egbewole	University of Ilorin
Prof. M. M. Akanbi	University of Ilorin
Prof. A. A. Popoola	Obafemi Awolowo University, Ile-Ife
Prof. M. I. Sa'id	Usmanu Dan Fodiyo University Sokoto
Prof. I. Chiroma	Nigeria Law School, Abuja
Prof. E. A. Taiwo	Adekunle Ajasin University, Akungba

Contents

TITLE	PAGE
Editorial	iii
Instruction to Contribution.....	iv-v
Contents.....	vi-vii
Achieving Peace and Security in Africa: Involvement of African Peer Mechanism in Conflict Resolution in Rwanda...	1-24
An Appraisal of the Legal Framework for Combating the Menace of Secret Societies/Cults in Nigeria.....	25-39
An Assessment of the Legal Frameworks on Dispute Resolution in the Petroleum Industry in Nigeria: Towards Arbitral Process.....	40-56
An Examination of Price Policies in the Telecommunications Industries In Nigeria: Lessons from South Africa.....	57-72
Corporate Governance: An Appraisal of the Framework in Nigeria within the Perspective of Oecd Principles	73-96
Information Communication Technologies (ICTs) as an Instrument of Human Rights Protection in Nigeria.....	97-105
Parading of Crime Suspects and Media Trial - A Menace in the Administration of Justice in Nigeria.....	106-116
Preventing Different Judgements on Similar Cases: A Comparative Analysis on Implementation of Judicial Precedent in Nigerian and Malaysian Courts	117-133
Proof of Mental Abnormality: Some Practical Challenges Under the Nigerian Penal System.....	134-146
Rights of Detainees in Conflict Situations in Northern Nigeria: An Appraisal of Boko Haram Insurgency	147-158

Contents

TITLE	PAGE
Tackling Herders-Farmers' Conflict in Nigeria: A Survey of Legal Options.....	159-173
The Right to Redeem Pledged Land and the Liabilities of the Pledgee Under Customary Law in Nigeria.....	174-190
Enforcement of Arbitral Awards: Issues and Challenges	191-205
✓ Priority of Interests in Property and the Rule in Dearle vs. Hall.....	206-216
The Jurisprudence of Regional Human Rights Courts in the Protection of Environment: Promises and Challenges	217-237

expend resources trying to obtain enforcement of ICSID awards in various countries around the world.

Esponsing a private party's claim by its state, and the possibility of the state seeking an interpretation of obligations arising under the ICSID Convention as an alternative to execution, can aid enforcement, but they are still political measures, which may be ineffective in a world of different political considerations. A private party may retain only the hope that international embarrassment may induce the award debtor to comply with the award. The annulment process affects enforcement of awards in terms of time and resources. It provides a never ending cycle of opportunities to challenge the ICSID's arbitral awards. It is a control mechanism that itself lacks control.

The ICSID mechanism could be what it aims to be if, ICSID's Administrative Council, as a representative body of member states devise solutions to impediments which cause the mechanism to fall short of its objectives. The utility of the mechanism should not be predicated on the unpredictable conduct of the parties. Thus, it may be worthwhile to amend the ICSID Convention to eliminate the impact of sovereign immunity in the execution of awards. In the same vein, there should be a limit to the number of times losing parties may petition for annulment of arbitration awards.

PRIORITY OF INTERESTS IN PROPERTY AND THE RULE IN DEARLE vs. HALL

BY

DR. SOLOMON O. AFOLABI,

LL.B (Hons) Ife, B.L,LL.M (ABU), MBA (Unilorin), Ph.D
(ABU), Lecturer, Private & Property Law, University of Ilorin, Nigeria.
solomonafolabi101@gmail.com

Abstract

The desire by man to acquire property is limitless and there are circumstances where two or more persons may be laying claim to the same property and there will be need to determine the priority of interests among the rival claimants. The courts over the years have evolved the Temporal Order Rule of priority which is, "first in time is stronger in law" in determining priority of rival claimants to a given property. Apart from the Temporal Order Rule which means "first in time is stronger in law" which is being used as the basic rule in determining priority of competing interests in property, there is another rule developed under the English system which is referred to as the rule in Dearle vs. Hall. The rule in Dearle vs. Hall is an English common law rule to determine priority between competing equitable claims to the same asset. The rule broadly provides that where the equitable owner of an asset purports to dispose of his equitable interest on two or more occasions, and the equities are equal between claimants, the claimant who first notifies the trustee or legal owner of the asset shall have a first priority claim. This paper examined the broad application of the rule in Dearle vs. Hall to priority of interests in property, its pitfalls and criticisms and recommended that the rule be replaced with a system of registration of the competing encumbrances in pure personality.

Keywords: Priority, Interest and Property.

1. INTRODUCTION

It is not uncommon these days to see two or more persons claiming to have derived titles to a given property from the same person who previously owned the property. Circumstances may also arise where two or more persons would be laying claim to a given property and it could be that the various competing interests cannot be satisfied from the total aggregate value of the property that is subject to these interests.¹

Where the total value of the given property is substantial enough to satisfy the various competing interests, then there may be no problem since all the interests

¹ See Megarry, R., and Baker, P. V., *Snell's Principles of Equity* (27th ed. Sweet and Maxwell, London, 1973) 105, Maudsley, R. H., Hanbury and Maudsley *Modern Equity* (10th ed. Stevens and Sons, London, 1976), pp. 3-30, and Megarry, R., and Wade, H.W.R., *The Law of Real Property*, (4th ed. Stevens and Sons, London 1975) pp. 110-128. See also Kodilinye, G., *An Introduction to Equity in Nigeria*, (Daybis Ltd., Nigeria, Ibadan, 2001), pp. 1-6, Ikpo, C, *Issues and Principles in Equity*, Dimathis (Objective Press Ltd., Lagos, 2003), pp. 23-24, and Jegede, M.I., *Principles of Equity*, (Ethiopia Publishing Corporation, Benin, 1981, reprint 2007) 52

would be enforced on the given property. However, in most cases, the aggregate interests in the property may exceed the total value of the property. Where this happens, the question arises as to which of the rival claimants would be settled first from the proceeds of the property.²

Although, the basic rule that is recognized both in law and equity, is that priority of competing interests in property is determined by the order of their creation but this is not applicable in all situations. For example, in order to determine priority among successive mortgages, section 119 *Property and Conveyancing Law*³ provides that every mortgage affecting a legal estate in land whether legal or equitable shall rank according to its date of registration under the land instruments Registration law. Also, section 194 *Property and Conveyancing Law*⁴ provides that priority shall rank according to the date of registration. However, where none of the competing interests is registered, then the old rule of first made, first paid applies. In the same vein, section 14 of *Land Registration Law of Kaduna State*⁵ provides that every instrument relating to land must be registered within 6 months between a Nigerian and non-Nigerian if document are executed in Nigeria and within 12 months if the document are executed outside Nigeria otherwise the transaction become void. Section 16 of Land Registration Law of Kaduna State makes provision for priority among registered instrument. It provides as follows:

Every instrument registered so far as it affects land takes effect, as against other instruments affecting the same land from the date of its registration and every instrument registered before the commencement of this law shall be deemed to have taken effect from the date provided by the law in force at that time of its registration.

The effect of the above statutory provisions on priority of mortgages is that the principle of creation in time is not always the rule. It will not be the rule if there is requirement of registration in which case the first to register is the person whose interest will prevail.

The judicial approach to priority under native law and custom shows inconsistencies in the rules of priority. This position has been clearly demonstrated

²Adeoye, F.O., & Ogunniran, H, 'Priority of Interests under the Land Use Act', (1986), (2) (10) Journal of Business & Property Law, Lagos, p. 1.

³Cap 100 Laws of Western Nigeria, 1959. Some states created out of the old western region of Nigeria now have their separate laws with similar provisions to this section of the 1959 law.

⁴Ibid

⁵Cap. 85, Laws of Kaduna State of Nigeria, 1991

by the Nigerian Supreme Court in the recent case of *Etajata & 2ors vs. Ologbo & 1or*.⁶ In this case, the Supreme Court considered among other things circumstances when equitable interest in land under native law and custom will defeat legal estate, not necessarily as an exception to the general rule but as a matter of cause. The court came to a conclusion that:

If a party received title to land under native law and custom and there is a proof or evidence that money was paid for the land coupled with an entry in to possession, it will be sufficient even to defeat the title of a subsequent purchaser of the legal estate; if the possession is continuously maintained.⁷

In other words, if land is sold to a party without the execution of a formal deed of conveyance, his interest was no more than equitable. Therefore, if even, it was an equitable interest but it is coupled with possession, it cannot be overridden by a legal estate.⁸ In view of the above, it is safe to submit that transactions governed by native law and custom, has evolved its own rules for determining priority of competing interests in a given property. These criteria include: evidence of purchase, evidence that money was paid, entry into possession and continuous possession. Therefore under native law and custom, any of the rival claimants who is able to satisfy the above conditions notwithstanding whether he is holding equitable interest, will have priority over other claimants. This is to say that the rule of native law and custom seem not to recognize the dichotomy between equitable interest and legal interests in property.

However, it is shown in this work that the maxim "he who is first in time is stronger in law" might not hold in all situations. The evolution of the doctrine of bonafide purchaser of the legal estate for value without notice had introduced a new dimension to the application of the general basic law on priority of interests, hence the problem in this area.

It has been observed that the doctrine of bonafide purchaser of the legal estate for value without notice which was evolved to modify the Temporal Order Rule may only find expression in competition between legal interests and equitable interests. The doctrine may not be applicable in competition between two or more legal interests. And in the case of transactions under customary law, the doctrine of bonafide purchaser of the legal estate is generally inapplicable.

It is also shown in this paper that even under the English Law; it is not in all cases that the Temporal Order Rule applies *mutatis mutandis*. For example, where the

⁶(2007) All FWLR (pt. 386) p. 584

⁷Ibid.

⁸Orasanmi vs. Idowu (1959) 4 FSC p. 40; Soremekun vs. Shodipo (1959) LLR p. 30 Oshodi vs. Balogun and Ors 4 WACA p. 1.

competing interests relate to successive assignments in pure personality, the Temporal Order Rule might not automatically apply. The applicable rule is as laid down in *Dearle vs. Hall*⁹ which provides as follows;

When the owner of an equitable interest in pure personality creates more than one incumbrances on it, the priority of the incumbrancers does not depend on the dates of creation of their respective incumbrances but on the dates of which the trustee received notice of the incumbrances, subject to the qualification that a later incumbrancer who has notice of an earlier incumbrance at the date of taking his security cannot obtain priority by being the first to give notice to the trustee.

In other words, "priority as shown in *Dearle's* case depends upon the order in which notice of the dealings was received by the persons entitled to receive it. But, if notice is received substantially simultaneously, priority will depend upon the order in which the interests were created."¹⁰

2.0 CONCEPTUAL CLARIFICATION OF KEY WORDS:

2.1 PRIORITY

The word "priority" has been defined by Black's Law Dictionary as 'the status or being earlier in time or higher in degree or rank; precedence ... An established right to such precedence; esp., a creditor's right to have a claim paid before other creditors of the same debtor receive payment.'¹¹

Priority is again defined as the right to be first or ahead of others. The right also can apply to mortgages, deeds of trust or being given priority in the order they were recorded. In law, the maxim is that "he who has the precedence in time has the advantage in right," among common creditors as he who has the oldest lien has the preference.¹²

According to Farlex¹³ priority may mean any of the followings, that is, precedence, especially established by order of importance or urgency or an established right to precedence or an authoritative rating that establishes such precedence or a preceding or coming earlier in time or something afforded or deserving prior attention.¹⁴

⁹(1823) 3 Russ 1

¹⁰Fabunmi, J.O, *Equity and Trusts in Nigeria*, (Ile-Ife University Press Ltd; Ile-Ife 1986) 73.

¹¹op.cit. at p. 1212

¹²Jegede, M.L., op.cit. pp. 52-53

¹³The Free Dictionary by Farlex <http://legal-dictionary.thefreedictionary.com/priorities> accessed on 21/10/2010 at 3.15pm

¹⁴Ibid

1.2.2 INTEREST IN PROPERTY

The term 'interest' has been defined in the Black's Law Dictionary¹⁵ in the following manner: "...Legal share in something, all or part of a legal or equitable claim to or right in property"¹⁶ The definition above indicates that an interest could be a share, claim, right or title to a thing. The share, claim, right or title to the thing could either be legal or equitable in nature. Interest is a comprehensive term to describe any right, claim or privilege that an individual has toward real or personal property. It is an intangible property in a thing.

A legal interest is a right in or over land or property generally, recognized by law having fulfilled the requirements of law. For example, in England under the Law of Property Act 2002, only interest owned in terms equivalent to a fee simple absolute qualify as legal interest. In Nigeria, a right of occupancy either in form of statutory right of occupancy or customary right of occupancy in land is recognized as legal interests under the Land Use Act.¹⁷ This means the highest interest in a thing e.g. fee simple, seisin, allodia, radical title, right of occupancy etc. A legal interest can also be a right or interest in land or property that is governed by common law or legislation rather than the practices of equity.

Equitable interests are rights in property originally recognized by the Court of Chancery as distinct from legal interests recognized in the common law courts. They arose in cases where it was against the principles of equity for a person to enforce a legal right.¹⁸ Originally, equitable rights (e.g. a trust or the equity of redemption under a mortgage) were enforceable against the person with a legal right over property in question. Later however, those who were given the property by the holder of the legal interests took it subject to the holder of the equitable interests; later still, anyone who bought property knowing about the existence of equitable interests was bound by them. Therefore, everyone took property subject to equitable interests, except those who bought it without knowledge of the existing equitable interests.¹⁹

2.2 PROPERTY

When a layman is asked to define "property" he is likely to say that "property" is something tangible "owned" by a natural person or persons, a corporation or a unit of government. But such a response is inaccurate from a lawyer's view point, for at

¹⁵Bryan, A.G., op.cit. at p. 815

¹⁶Ibid, 816

¹⁷Sections 5&6 of the Land Use Act, Cap.L5, Laws of Federation of Nigeria, 2004

¹⁸See Megarry, R., and Baker, P. V., *Snell's Principles of Equity* (27th edn. Sweet and Maxwell, London (1973) p.105. Maudsley, R. H., Hanbury and Maudsley *Modern Equity*, (10th edn. Stevens and Sons, London 1976), pp. 3-30, and Megarry, R., and Wade, H.W.R., *The Law of Real Property*, (4th edn. Stevens and Sons, London 1975) 110-128. See also Kodilinye, G., *An Introduction to Equity in Nigeria*, (Daybis Ltd., Nigeria, Ibadan, 2001), pp.1-6, Ikpo, C, *Issues and Principles in Equity*, (Dimathis Objective Press Ltd., Lagos, 2003), pp. 23-24, and Jegede, M.L., *Principles of Equity*, (Ethiopia Publishing Corporation, Benin, 1981) reprint (2007) 52.

¹⁹[http://www.lawiki.org/lawwiki/legalinterest\(landandproperty\)](http://www.lawiki.org/lawwiki/legalinterest(landandproperty)) Accessed 21 October 2010

least two reasons, (i) It confuses "property" with the various subjects of "property" and (ii) It fails to recognize that even the subject of property may be intangible. To a lawyer, "property" is not a 'thing' at all, although 'thing' is the subject of property. Rather, property is a legally protected expectation of being able to draw such an advantage from the thing in question.²⁰ Declared ownership in and of itself is insufficient to constitute property in a legal sense. Rather the notion of property arises, where one can have his/her right to land or chattels respected and enforced by a court of law. Therefore to possess good title (and enforceable rights) on property one must acquire it legitimately, according to the laws of the jurisdiction in which one seeks enforcement.²¹

Black's Law Dictionary states that "in the strict legal sense, property is an aggregate of rights which are guaranteed and protected by the government and that the term "Property" includes not only ownership and possession but also the right of use and enjoyment for lawful purposes".²²

By contrast, Baron's Law Dictionary defines property as "one's exclusive right to possess, use and dispose of a thing" "as well as the object benefit of prerogative which constitute the subject matter of that right"

Property law in systems derived from English common law is divided into personal and real property. Smith²³ states the definition of property as follows;

The word property has a variety of meanings depending on the context in which it is used. Sometimes, it may mean ownership or title such as when it is said that property in the goods passes to the buyer immediately the contract of sale is concluded whether or not the good have been physically transferred to him.²⁴ It may mean the 'res' (thing) over which ownership may be exercised, such as where we refer to a car or Blackacre as 'A's property. Finally, it may mean an interest in a thing less than ownership but nevertheless conferring certain rights such as when it is said that 'B' as pledgee has 'special property' in the subject matter of the security.²⁵

Writing on the general meaning of property, Dadem,²⁶ is of the view that the term "property" has diverse meanings, but it is generally regarded as an aggregate of rights belonging to a person which is guaranteed and protected. According to the

²⁰ Cairns, H., *The Theory of Legal Science*, (The University of North Carolina press, Chapel Hills, 1941) 15

²¹ Paton, *Jurisprudence* (3rd edn, Oxford University Press, Oxford 1972) 505

²² Bryan, A.G, *Black's Law Dictionary* (5th edn, Western Group, St. Paul Minn, London, 1999) 1232

²³ Smith, I.O. *Practical Approach to Law of Real Property in Nigeria*, (Ecowatch Publication, Lagos, 1999) 1

²⁴ See for example Sections 16-19 of the English Sales of Goods Act. 1893

²⁵ See *Donald vs. Suckling* (1866) LR 1QB p. 585

²⁶ Dadem, Y.Y., *Property Law Practice in Nigeria*, (Jos University Press Ltd, Jos, 2009) 1

learned author the word "property" is commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal.²⁷ Property may mean the right of a person to something tangible and physical, such as a parcel of land. It may also relate to something intangible such as a right in a work protected by copyright.²⁸ In whatever form the word "property" is used, it is obvious that it relates to a thing and the relation of person (s) to that thing in form of acquisition, use, enjoyment and disposal. In this regard, Holland²⁹ remarks that the essence of all such right lies not so much in the enjoyment of the thing, as in the legal power of excluding others from interfering with the enjoyment of it.³⁰ For Dias,³¹ ownership is a right in itself distinct from its component jural relations, has always been useful for identifying certain group of interests and for distinguishing them from others.³²

3.0 THE RULE IN DEARLEVS. HALL

The Rule in *Dearle vs. Hall*³³ provides as follow:

When the owner of an equitable interest in pure personality creates more than one incumbrances on it, the priority of the incumbrancers does not depend on the dates of creation of their respective incumbrances but on the dates of which the trustee received notice of the incumbrances, subject to the qualification that a later incumbrancer who has notice of an earlier incumbrance at the date of taking his security cannot obtain priority by being the first to give notice to the trustee.³⁴

In other words, "priority as shown in Dearle's case depends upon the order in which notice of the dealings was received by the persons entitled to receive it. But, if notice is received substantially simultaneously, priority will depend upon the order in which the interests were created."³⁵

3.1 APPLICATION OF THE RULE IN DEARLE VS. HALL

Apart from the Temporal Order Rule which means "first in time is stronger in law" which is being used as the basic rule in determining priority of competing interests in property, there is another rule developed under the English system which is referred to as the rule in *Dearle vs. Hall*.³⁶ The rule in *Dearle vs. Hall*³⁷ is an English

²⁷ Bryan, A.G., *Black's Law Dictionary* (5th edn, Western Group, St. Paul Minn, London, 1999) 1216

²⁸ Ibid

²⁹ Holland, T.E., *Jurisprudence*, (Oxford at Alaramdan Press, Oxford, 1990) 179

³⁰ Ibid

³¹ Dias, R.W.M., *Jurisprudence*, (4th edn, Butterworths, London, 1979) 406

³² Ibid

³³ (1823) 3 Russ. p.1, (1823) 38E.R.p.479

³⁴ Ibid

³⁵ Fabunmi, J.O, *Equity and Trusts in Nigeria*, (Ile-Ife University Press Ltd; Ile-Ife, 1986) 73

³⁶ op. cit

³⁷ Ibid

common law rule to determine priority between competing equitable claims to the same asset. The rule broadly provides that where the equitable owner of an asset purports to dispose of his equitable interest on two or more occasions, and the equities are equal between claimants, the claimant who first notifies the trustee or legal owner of the asset shall have a first priority claim.

Under the rule, if A is owed money by X, and then A grants an equitable charge over that debt to B, and then grants a second equitable charge over the same debt to C, then the ability to enforce the charge by either B or C against the money in X's hands is dependent upon the giving of notice to X. The controversy in the rule relates to the fact that it is also a rule of *priority*, meaning that (if their rights are otherwise equal), the first one to give notice to X has the prior claim, irrespective of the order in which the equitable charges were granted.

Similarly, in many common law legal systems, where there is an assignment of a debt, the assignee cannot enforce the rights of the assigning creditor against the debtor unless notice of the assignment has been given, and until notice of the assignment has been given, the debtor can still discharge the debt by paying the money to the creditor, notwithstanding the assignment.

According to *Megarry and Wade*,³⁸ when beneficial interests under a settlement or trust for sale of unregistered land are assigned or mortgaged, the assignees or mortgagees preserve priority by giving notice of their interests to the trustees under the rule in *Dearle vs. Hall*; whereas in the case of registered land, priority between assignees and incumbrancers of life interests is regulated instead by the order in which the assignments or mortgages are protected by priority inhibitions or 'priority cautions' entered in the index of 'minor interests'. According to the learned authors, the sole function of this index is to take the place of *Dearle vs. Hall* notices. It is not part of the Register. The inhibition is used for an absolute assignment, the caution for other cases. The rule that the order of entry governs priority appears to be absolute; so that a mortgagee may be postponed to a subsequent mortgagee who enters his inhibition or caution first even though the subsequent mortgagee had notice of the prior mortgage when he advanced his money. It is noted here that the learned authors agreed that the index is useless and moreover a source of anomalies and traps. They suggested that the badly drafted provisions about it should be repealed so that the rule in *Dearle vs. Hall* as applied by the English Property Act 1925 can govern all cases without further formality.

³⁸ Megarry R.E., and Wade, W.R., *The Law of Real Property*, (5th edn, Stevenson & Sons Ltd., London, 1984) 223-224

4. CRITICISMS AND PITFALLS IN THE APPLICATION OF THE RULE IN *DEARLEVS. HALL*

Although the original decisions related to interests under a trust, most modern applications of the rule relate to the factoring of receivables³⁹ or multiple grants of equitable security interests. The rule has been subjected to some scathing criticisms,⁴⁰ and has been abrogated in a number of common law countries in the Commonwealth.

The rule in *Dearle vs. Hall*, has been controversial almost since its inception. In 1893, Lord Macnaghten said "I am inclined to think that the rule in *Dearle vs. Hall* has on the whole produced at least as much injustice as it has prevented."⁴¹ But this has not stopped it from being extended from a rule regulating the priority of interests in trusts to the regulation of the priority of proprietary interests in debts and other similar intangibles, such as rights under contracts, which is considerably more important in terms of modern commerce. The actual decision in *Dearle vs. Hall*, on its facts, is relatively uncontroversial. The beneficial owner of a trust fund assigned it first by way of security to A, and then outright to B, in each case for valuable consideration. A had not given notice of his assignment to the trustees of the fund and, accordingly, when B made enquiries of them, he did not discover the existence of the assignment to A because the trustees were not aware of it. B did give notice of the assignment to the trustees, and then A subsequently also gave notice to them. Plumer, MR and, on appeal, Lord Lyndhurst LC, each decided that B took priority over A. Judgment was given in favour of B for two reasons. The first was based on the general proposition that, as between two equitable interests, the first in time will only take priority, "if the equities are equal". In this case, by failing to give notice to the trustees, A had allowed the beneficiary of the trust to be able to hold himself out as being the unencumbered owner of the beneficial interest and had therefore enabled the beneficiary to hoodwink B into thinking he had not encumbered it. This is a perfectly straightforward application of the principle that the first in time will only prevail if the equities are equal and is not considered controversial. The second ground for the decision was that A's failure to give notice had left the beneficiary of the trust in apparent possession of the trust fund, and A could not, therefore, rely on this assignment in a dispute with B. This latter ground has been criticized as it appears to be based on the concept of reputed ownership in bankruptcy law, which had never previously been employed in determining priority between competing equitable claims. Nevertheless, on the facts of the case, most commentators feel

³⁹ A common scenario is where a company grants a floating charge over all its assets, including its book debts, to a bank, and then the company also purports to factor the book debts to an independent factor. As between the bank and the factor, the person who will have a priority claim to the receivables will generally be the person who first notifies the legal title holder (i.e. the debtor) of their claim.

⁴⁰ See for example, Odiah, F., *Legal Aspects of Receivable Financing and Commercial Law*, (2nd edn, RedGoode 2000), in which the author indicates: "It is high time that the rule in *Dearle vs. Hall* was abolished" at p. 705

⁴¹ *Ward vs. Duncombe* (1893) AC 369

that justice was done because A had allowed the beneficiary to commit a fraud on B, and therefore A should rank behind B.

However, it was later discovered that the rule was turned from an example of the principle which says that the first in time rule will not apply if the equities are not equal into an absolute rule that the first to give notice will take priority unless the later assignee was a volunteer⁴² or was aware of the earlier assignment at the time he obtained his assignment.⁴³ The rule applies even if the later assignee made no enquiries of the trustees⁴⁴ and even if the first assignee was not negligent in failing to give notice, for instance because he was not aware of it⁴⁵ or because there was no one to whom notice could be given.⁴⁶ In *Ward v Duncombe*,⁴⁷ the House of Lords decided that the rule that notice determines priority of dealings applied regardless of the conduct of the competing assignees.

In spite of the criticisms of the way in which the rule in *Dearle vs. Hall* has developed, there is much to be said for the concept that the priority of assignments or charges over debts should, as a general rule, depend on the date notice is given to the person who owes the debt. At least, this is because the person who owes the debt will get a good discharge by paying the debtor unless he has been notified of the assignment or charge. Once a debt has been paid, it ceases to exist, and the priority rule recognizes this fact. That is not to say that, in appropriate cases, it would not be possible for one creditor to trace the proceeds of the debt into the hands of another, but a simple rule that both priority and discharge depend on notice has much to recommend it.

Most of the academic criticism of the rule is to the effect that it has been carried too far. Whilst it is generally accepted for a subsequent assignee for value to take priority over an earlier assignee by giving notice before he becomes aware of the earlier assignment, it seems harsh for the earlier assignee to lose priority where the notice is given by the subsequent assignee after he is aware of the earlier assignment. The net result is the priority depends upon the subsequent speed of response of the parties once one or both of them, become aware of the problem.

The Law Commission of England and Wales, as part of a wider view of priority rules relating to security interests has recommended the abolition of the rule in *Dearle vs. Hall* in relation to security interests and assignments of receivables only, and its replacement with a system of registration.⁴⁸ To date, such recommendations have not been implemented.

⁴²In *Re-General Horticultural Company* (1889) 32 Ch. D.p.512

⁴³*Re-Holmes* (1885) 29 Ch. D.p.789

⁴⁴*Foster v Cockerell* (1835) 3 CL & Fin.p.456

⁴⁵*Re Lake* (1903) 1 KB.p.151

⁴⁶*Re Dallas* (1904) 2 Ch. D.p.385

⁴⁷(1893) AC.p.369

⁴⁸The English Law Commission Consultation Paper No. 164 (CP.NO.164 of 2002) and a more detailed consultative report (CP.NO.176 of 2004) on registration of company security interests, company charges and property other than land in place of filing notice in England and Wales.

5. CONCLUSION

Just as it has been observed above, the rule in *Dearle vs. Hall* has no much significance in the determination of priority of competing interest in general property. The rule which is dependent on the dates of which notices of incumbrances are given in respect of successive assignments in pure personality as opposed to the date when those successive assignments were created is fraught with pitfalls and criticisms. The rule even if it will stand the test of time is very restrictive in its application. Just as under the English law, the application of the rule in *Dearle vs. Hall* is relatively unpopular in Nigeria as the Temporal Order Rule of priority still forms the basis for determination of priority of interests in property subject to local exception under the Nigeria property law. It is suggested that in order to make the rule relevant under general property law, it should be replaced with a system of registration of the competing encumbrances in pure personality.