

and as a general rule, there can be no doubt, that the assignee of a *chose in action*, not negotiable, takes its subject to the equities which existed against it, in the hands of the assignor. But the equities, subject to which it passes to the assignee, are the equities of the debtor himself, and not equities residing in some third person, against the assignor, for, as was observed by Chancellor Kent, in *Murray vs. Sylburn*, 2 *Johns. Rep. ch. 443*, the assignee may be unable, with the utmost diligence, to ascertain the latent equity of third persons against the obligee, whereas with respect to the debtor himself, he can go to him, and ascertain what claims he may have against the bond.

And the Court of Appeals of this state, in *Jones vs. Hardesty*, say, "he who takes an assignment of a *chose in action*, not negotiable, takes it subject to all the legal and equitable defences of the obligor, or debtor, to which it was subject in the hands of the assignor." It would, therefore, seem to follow, that the only equities which would attach against the second mortgage, and follow it in the hands of the plaintiffs, would be the equities of Hancock and Mann, and that the secret equity of Dawson and Norwood, or of Jones, founded upon the prior unrecorded mortgage, could not be urged against them.

My opinion upon this point, therefore, is, that the unrecorded mortgage of the 31st of July, 1845, is invalid against the plaintiffs, and others, holding notes, or acceptances secured by the recorded mortgage of the 11th of April, 1846; and that the notes of Hancock and Mann, held by Winn and Ross, trustees of Samuel Jones, Jr. which bear date prior to the date of the mortgage of the 11th of April, 1846, are not entitled to the benefit of the security, and must be excluded from any participation in the fund, raised, or to be raised, by a sale of the property embraced in it.

My opinion is founded upon the legal effect, of the failure or neglect, to record the first mortgage, and the registration of the second, independent of the positive agreement, and the motive for that agreement, which the bill charges, and Hancock proves, not to record the first mortgage. If this mortgage was, as alleged in the bill, and as proved by Hancock, withheld from