THE DISCHARGE OF LIENS BY JUDICIAL SALE IN PENNSYLVANIA.

It is a familiar principle that a judicial sale of real property discharges liens, but not estates or interests therein[1]—a principle founded on the experience that by such judicial action a better price is obtained for the property sold, with a consequent gain to the distributees of the proceeds.[2] In applying this rule, the question has sometimes arisen what estate or interest is covered by the rule. Thus dower both at common law and under the intestate law is an estate in the land and not a mere lien,[3] which terminates with the widow's death.[4] Likewise a widow's interest in her husband's real estate, charged on the part accepted by one of the heirs, is an estate, and is not divested by a sale under a subsequent encumbrance,[5] though the rule is otherwise should the widow die between the levy and the sale.[6] Likewise an easement in land is not extinguished by a sheriff's sale of the servient tenement, though at one time the two properties were vested in the same owner, if the ownership be apparent and continuous.[7] Likewise an interest in land acquired by a railroad company for the use of its business is an easement, an estate which cannot be dis-

[1] Western Pennsylvania R. Co. v. Johnston, 59 Pa. 290, 294 (1869).

[2] Presbyterian Congregation v. Wallace, 3 Rawle, 109 (1831).

[3] Diefenderfer v. Eshleman, 113 Pa. 305 (1886); Porter v. Lazear, 14 W. N. C. 261 (1883): Luther v. Wagner, 107 Pa. 343 (1884); Zeigler's Appeal, 1 Chester Co. 515 (1874). Says Judge Weand in Firman v. Hobensack, 14 Pa. Dist. Rep. 537 (1904): "The interest which A takes in this State in lieu of her dower at common law is an interest in land, and not a mere charge or lien, and the character of her interest is not changed by the Act of March 29, 1832, P. L. 190, which prescribes the form of ascertaining and assigning it, and changes somewhat the method of its use and enjoyment." Kunselman v. Stine, 192 Pa. 462 (1899).

[4] Grove's Appeal, 103 Pa. 562 (1883); Firman v. Hobensack, 14 Pa. Dist. Rep. 537 (1904); Commonwealth v. Snyder, 1 Del. Co. 404 (1882).

[5] Fisher v. Kean, 1 Watts, 259 (1832); Mentzer v. Menor, 8 Watts, 296 (1839); Vandever v. Baker, 13 Pa. 121 (1849).

[6] Riddle's Appeal, 37 Pa. 177 (1860).

[7] Kieffer v. Imhoff, 26 Pa. 438 (1856): Worne v. Marsh, 6 Phila. 33 (1865); Church v. Vonneida, 6 Phila. 557 (1868).

charged by judicial sale.[8] The rights of the corporation may indeed pass to another, but "subject to the constitutional right of the owner of the legal estate in the land". A judicial sale therefore does not divest the title of the owner in the land.[9] Consequently one's interest or estate in land which has been appropriated by a railroad company under appropriate proceedings, for which he has not been paid, is not divested by the judicial sale of the property and franchises of the company under a decree of foreclosure of the first mortgage.[10]

From the operation of this rule two classes of cases have been excepted; one class, and the more recent, by legislative enactment;[11] the other class in which the divestiture would work manifest injury. The cases falling under the older rule have been thus classified: (1) liens created by wills as permanent provision for wives and children; (2) liens or encumbrances that will not readily admit of valuation; (3) liens that were plainly intended to run with the land;[12] (4) liens under the control of the court.

Only a few cases falling under the older rule are found in the reports. Very often legacies have been declared to be a charge on land,[13] but the lien thereby created has usually been discharged by its sale. If the legacy is due at the time of the sale, the lien is discharged and the legatee must look to the proceeds for the payment;[14] only in the few cases in which the legacy is not due at the time of the sale does the lien continue.[15] And the

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[8] Martin v. Pittsburgh Southern R. Co., 28 Pitts. L. J. (O. S.) 156 (1880).

[9] Buffalo, New York & Phila. R. Co. v. Harvey, 107 Pa. 319 (1884); Western Pa. R. Co. v. Johnston, 59 Pa. 290 (1869); Gilmore v. Pittsburgh, Va. & Charleston R. Co., 104 Pa. 275 (1884); Philadelphia, Newtown & N. Y. R. Co. v. Cooper, 105 Pa. 239 (1884).

[10] Buffalo, New York & Phila. R. Co. v. Harvey, 107 Pa. 319 (1884).

[11] Act April 6, 1830, P. L. 293, 1 Purd., § 167, p. 1183.

[12] Heister v. Green, 48 Pa. 96, 102 (1864); Stewartson v. Watts, 8 Watts, 392 (1839); Washburn's Estate, 187 Pa. 162 (1898); Herr v. Groff, 17 Pa. Dist. Rep. 478 (1908); Eckert's Estate, 157 Pa. 585 (1893); Schnure's Appeal, 70 Pa. 400 (1872); Hodgson v. Gemmil, 5 Rawle, 99 (1835); Stone v. Massey, 2 Yeates, 363 (1798). See Moran's Estate, 13 Pa. Super. Ct. 351 (1900).

[13] Lobach's Case, 6 Watts, 167 (1837); McLanahan v. Wyant, 1 P. & W. 96 (1829); Hellman v. Hellman, 4 Rawle, 440 (1834); Hanna's Appeal, 31 Pa. 53 (1857); Drake v. Brown, 68 Pa. 223 (1871).

[14] Hiester v. Green, 48 Pa. 96 (1864); Hartzell's Estate, 188 Pa. 384 (1898); Walter's Estate, 197 Pa. 555 (1901).

same principle applies to a legacy payable in installments.[15] Thus a testator bequeathed a legacy to his son in trust for his grandson to be paid to him between the ages of twenty-one and twenty-five at the son's discretion. This legacy was charged on certain real estate. It was provided that if the grandson died before reaching twenty-five, the legacy was to lapse. Before the grandson reached twenty-one, the land was sold by the sheriff. When the grandson became of age the son declared in writing that the legacy was payable. The court held that the owners of the land were bound to pay the legacy with interest, for the lien ran with the land and was not discharged by its sale.[16]

Although an estate, a dower interest for example, cannot be divested by a sale,[17] the arrears of dower can be discharged by such action.[18] Thus a recognizance had been given in the Orphans' Court, in accordance with the statute, as a substitute for a widow's dower interest. The land was sold but the interest which ought to have been paid to the widow accumulated; and none was paid for a year and nine months. It was held that the property was discharged by the sale from the lien for the year's interest due and in arrear: but not from the lien of the nine months' interest not yet due, "because," said Mr. Justice Trunkey, "the widow's estate is not a lien, and the rent or interest in the nature of rent, which had not become due before the sale, remains as part of her estate. It has been often ruled that by such sale the lien of arrears due the widow is divested, but there is not even a dictum that the accruing interest not due at the time of the sale does not continue the lien."[19]

In the case of *Tospon* v. *Snipe*[20] an interesting distinction is drawn between arrears of dower and arrears of interest on land

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[15] *Ibid.*

[16] Dewart's Appeal, 43 Pa. 325 (1862); Schnure's Appeal, 70 Pa. 400 (1872).

[17] Schall's Appeal, 40 Pa. 170 (1861), overruling Kurtz's Appeal, 26 Pa. 465 (1856); Helfrich v. Weaver, 61 Pa. 385 (1869); Swar's Appeal, 1 Pa. 92 (1845); Zeigler's Appeal, 35 Pa. 173 (1860); Mentzer v. Menor, 8 Watts, 296 (1839); Fisher v. Kean, 1 Watts, 259 (1832).

[18] Dickinson v. Beyer, 87 Pa. 274 (1878); Plumer's Appeal, 11 W. N. C. 144 (1881); Luther v. Wagner, 107 Pa. 343 (1884).

[19] Luther v. Wagner, 107 Pa. 343 (1884).

[20] 116 Pa. 588 (1887).

bound by a mortgage on which judgment has been obtained. The court remarked that as a general rule the sheriff's sale of land bound by a mortgage on a judgment obtained for arrears of interest due on the mortgage debt divested the lien of the mortgage even though the principal debt was not yet due. "The reason is that the interest is a part of the debt and no distinction can be taken between a judgment for the interest and a judgment for the principal." This reason cannot be applied in the case of arrearages of interest due as dower, "because there is not, and cannot be, an identity of interest and principal.[21] The interest belongs alone to the widow; the principal belongs alone to the heirs and they cannot have it until after her death. She has not and never can have any right or title to any part of the principal, and hence a judgment for the interest is in no sense a judgment for the principal or any part of it. It is not due to the same persons nor in the same right, and cannot be considered as identified with it, either in fact or in legal contemplation."

If the lien is plainly intended to run with the land, it continues notwithstanding the sale. In *Blank* v. *Kline*[22] a husband and wife conveyed land charged with the payment of the legal interest of a sum of money to the grantor and his wife during their joint lives, and to her during her life if she survived her husband. On the same day the land was reconveyed to the husband subject to the same charge and subsequently the land was sold by the sheriff. Several years afterward they were divorced. The lien was not divested by the sheriff's sale nor by the divorce and extended to every part of the land conveyed; she could therefore collect the entire interest from the present owner of the land.

But the words must be clear and express to create such an intention.[23] A recital therefore on the face of a deed that the purchase money remains unpaid and is to be paid annually is not enough to create such a lien. Thus a widow to whom was devised during her widowhood the use of a lot, released it to the devisee's son, who had the remaining interest therein, in con-

[21] West Branch Bank v. Chester, 11 Pa. 282 (1849).
[22] 155 Pa. 613 (1893).
[23] Hiester v. Green, 48 Pa. 96 (1864); Rohn v. Odenwalder, 162 Pa. 346 (1894).

sideration of the payment to her of an annuity yearly. She did not however express in the conveyance any intention to charge the anuity as a lien on the land. The court held that the law would not imply such an intention and consequently none was thereby created.[24]

On the other hand a conveyance made by a husband and wife to their son "under and subject" to the payments of an annual sum to the husband during his life creates a fixed lien which will run with the land and is not divested by a subsequent sheriff's sale.[25] Conveyances of this nature are sustained.[26] In these cases the charge or lien runs with the land because this is the clear intent of the parties to the conveyance; and the lien must be continued in order to carry out that intention, as in providing for the annual payment of money during the life of a son, widow, or other person. The intention would be defeated by selling the land and paying a sum to the son or widow. In most cases of legacies which are a charge on land, the intention of the testator is executed by the payment of the specified amount at or within the time specified, and no intention is frustrated by the sale of the land and the payment of the proceeds or the proper amount to the legatee. Consequently a direction in a will subjecting land to the payment of a legacy, while clearly creating a lien, does not endow it with a permanent quality without some additional statement that the payment is to be continued for several years or during the life of the legatee, or is for an indeterminate amount. In other words, there must be some condition or requirement that cannot be satisfied by the sale of the land and payment of the money without disregarding the intention of the testator.

In cases that fall within the former class the land can be sold and the lien discharged by paying the amount designated;[27] in cases falling within the latter class the lien continues notwith-

[24] Hiester v. Green, 48 Pa. 96 (1864).

[25] Rohn v. Odenwalder, 162 Pa. 346 (1894).

[26] Heist v. Baker, 49 Pa. 9 (1864); Eichelberger v. Gett, 104 Pa. 64 (1883). See Hammond's Estate, 197 Pa. 119 (1900).

[27] Hammond's Estate, 197 Pa. 119 (1900); Brandt's Appeal, 8 Watts, 202 (1839); Hoover v. Hoover, 5 Pa. 351 (1847); Cable's Appeal, 91 Pa. 327 (1879); Swoope's Appeal, 27 Pa. 58 (1858); Washburn's Estate, 187 Pa. 162 (1898).

standing any sale that may be made. "The rule is," in the words of Mr. Justice Fell, "that the liens of pecuniary legatees which are determinate in value are discharged by a sheriff's sale of the land under a judgment obtained against the devisee unless they were plainly intended by the testator to be continuing liens."[28]

In *Weiler's Estate*[29] the testator gave to his sons all his real estate "for the sum of two thousand five hundred dollars". It was provided that after the death of his wife all his personal property was to be sold, and all debts paid, and the remainder was to be divided equally between his two children. The sons accepted the real estate but the valuation money was never paid, and the land passed to third parties, one's share having been sold by the sheriff, the other's by an assignee in bankruptcy. It was held that the acceptance of the real estate was a purchase to take effect after the widow's death, and the legal title was conditioned on payment of the valuation money, the lien for which was not discharged by the sale of the land.

In *Lake's Estate*[30] the testator provided that his two sons should get title to his real estate "by paying" some pecuniary legacies. The land was sold at a sheriff's sale, but the court declared the "legacies unpaid must be maintained as a fixed lien on the land. The purchasers had constructive notice of the charge and they were bound to know that it was a lien of such indeterminate value that would not be divested by the sheriff's sale. They will have to pay it therefore when it becomes due. Its value is incapable of being definitely ascertained, and it was created to run with the land."

In *Lancaster Trust Company* v. *Gochenauer*[31] a grantor's wife refused to sign a deed containing in the *habendum* clause a charge on the property of two hundred dollars, or one-third of the purchase money, "to be paid to the said grantor, his heirs and assigns, with interest annually until such time as the principal

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[28] Washburn's Estate, 187 Pa. 162, 166 (1898).

[29] 12 Lanc. L. Rev. 123 (1894).

[30] 2 Del. Co. 12 (1883), citing Cowden's Estate, 1 Pa. 267 (1845); Heist v. Baker, 40 Pa. 9 (1861); Heister v. Green, 48 Pa. 102 (1864); Helfrich v. Weaver, 61 Pa. 390 (1869).

[31] 14 Lanc. L. Rev. 265 (1897).

sum of two hundred dollars should be paid and legally released". Subsequently the plaintiff, having obtained a judgment against the grantee, issued an execution thereon and sold the property, but neither the charge nor the arrears of interest were divested by the sale. The court remarked that "it is not a statutory lien or an estate in land, in its terms, and therefore neither it nor the arrears of interest could be divested by a sheriff's sale".

The same rule is logically applied to an annuity, and it therefore continues as a charge after the sale of the land. In a recent case Mr. Justice Brown states that "the only reason why the future arrears of annuity, payable out of the land of the widow, have been excepted, is on account of the impossibility of computing their amount", thus making them fall under the second head of the old class of exceptions. "Therefore, as to them," he continues, "the purchaser has been held to take the land chargeable with the future payments."[32]

This reason, of course, does not apply to arrears that are due and payable; hence they can be discharged.[33]

Arrearages of ground rent, like those of dower or of annuity, are discharged by a judicial sale of the property.[34] The law is so well settled that the cases on appeal calling for its applications are rare. In one of these Mr. Justice Trunkey has thus stated the law:[35]

> "Arrears of ground rent, a lien on the land charged, upon a judicial sale of the land, are to be paid out of the proceeds. The owner of the ground rent cannot elect to refuse the money and continue the lien. When the sheriff makes the sale, he is bound to appropriate the fund in discharge of the liens in the order of priority, or pay the money into court.[36] A private sale of the

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[32] Walters v. Steele, 210 Pa. 219, 221 (1904).

[33] *Ibid;* Reed v. Reed, 1 W. & S. 235 (1841); Dickinson v. Beyer, 87 Pa. 274 (1878); Davison's Appeal, 95 Pa. 394 (1880); Luther v. Wagner, 107 Pa. 343 (1884). A testator gave to his nephew an annuity and "all" of his personal property to his wife. "We think", said the court, "the intention of the testator to exempt his personal estate from the payment of this annuity, and to charge it upon his lands is as clear as if he had expressly so declared in words". Nathan's Estate, 36 W. N. C. 185 (1895).

[34] Sergeant v. Fleckenstein, 9 Pa. Super. Ct. 557 (1899); Bantleon v. Smith, 2 Binn. 146 (1809); Pancoast's Appeal, 8 W. & S. 381 (1845); Mather v. McMichael, 13 Pa. 301 (1850); Fassit v. Middleton, 47 Pa. 214 (1867).

[35] Foulke v. Millard, 108 Pa. 230, 235 (1885).

land will not divest liens, and the owner of the ground rent in some circumstances may prosecute proceedings for collection without actual notice to the subsequent grantee. The latter purchases with knowledge of the charges, and often must protect himself.[37] A sheriff's sale divests the lien of the rent, no lien is divested by a private sale."

What is the effect against creditors of making a fraudulent conveyance of land encumbered with liens? If the land is sold by the sheriff under a judgment subsequently obtained against the grantor, the liens existing before the conveyance remain, and they are not payable from the proceeds of the sale.[38] The estate of the debtor, whatever that may be, is sold under the execution, and those liens only which attached after the fraudulent conveyance are payable in their order from the proceeds.[39]

Tax liens, also, in the absence of a statute, are discharged by judicial sale.[40] By the Act of 1901[41] taxes are a first lien on the property, and have priority in the distribution of the proceeds before any other obligation,[42] but, as will be presently seen, the sale does not divest mortgage liens. The tax liens, however, are not fixed, permanent, like mortgage liens and may be divested, if the property sells for enough to pay them.[43] Should there be a deficiency, then, in some places, the lien continues for that amount;[44] in others, the lien is divested whether or not the fund arising from the sale of the land taxed is sufficient to pay the full amount.[45] In Philadelphia, the tax lien is discharged by a

[37] Mather v. McMichael, 13 Pa. 301 (1850).

[37] Charnley v. Hansbury, 13 Pa. 16 (1850).

[38] Fidler v. John, 178 Pa. 112 (1896); Hiestand v. Williamson, 128 Pa. 122 (1889), affirming 1 Northampton Co. 148 (1888); Zaver v. Clark, 104 Pa. 222 (1883); Haak's Appeal, 100 Pa. 59 (1882); Byrod's Appeal, 31 Pa. 241 (1858); Fisher's Appeal, 33 Pa. 294 (1859), reversing 3 Phila. 224 (1858); Hoffman's Appeal, 44 Pa. 95 (1862); Dungan's Appeal, 88 Pa. 414 (1879); Anderson v. Alenorth, 16 W. N. C. 338 (1885).

[39] Hoffman's Appeal, 44 Pa. 95 (1862); Jacoby's Appeal, 67 Pa. 434 (1871).

[40] Clinton County v. Harrisburg Trust Co., 21 Pa. Dist. Rep. 760 (1912).

[41] Act June 4, P. L. 364.

[42] Clinton County v. Harrisburg Trust Co., 21 Pa. Dist. Rep. 760 (1912).

[43] Act May 28, 1907, P. L. 280; Clinton County v. Harrisburg Trust Co., 21 Pa. Dist. Rep. 760 (1912).

[44] *Ibid.*

[45] Pittsburgh v. Wright, 13 Pa. Dist. Rep. 723 (1904); Act Feb. 27, 1860, P. L. 85; Shaw v. City of Allegheny, 115 Pa. 46 (1886).

sheriff's sale, if the proceeds of the sale are insufficient to pay them: if they are not, the lien continues for the unpaid balance.[46] In 1824[47] the tax was first made a lien in Philadelphia and continued until it was paid; in 1845[48] the law required the tax to be registered in order to continue the lien; the next year, the law required a suit to be brought within five years after they became due, otherwise the lien ceased.[48]

On the judicial sale of land, all judgments in force, whether against the present or prior owner, divests the lien; and they must be paid from the purchase money according to priority.[49] "And if a sheriff's sale of land, subject to the lien of a judgment be made, pending a *scire facias* for its revival, the lien of the judgment is discharged, and it is no consequence to the purchaser whether judgment be subsequently entered against the defendant, reviving the judgment for its full amount."[50] On the other hand, the lien of a judgment is not discharged by the sale of one of two tenants in common who took subject thereto.[51] Likewise, if devised land is subject to the lien of a judgment and also to the maintenance of the widow, a sale under a judgment against the devisee will not discharge the widow's lien.[52]

The lien on decedents' estates for debts is not a continuing one, but is limited by statute. It is true that by the law of Pennsylvania, the paramount rights of creditors are regarded, and distribution among kindred is made only of the *residuum* whether of real estate or of personal goods, after the creditors

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[46] Acts of Feb. 3, 1824, P. L. 18, March 11, 1846, P. L. 114; Smith v. Simpson, 60 Pa. 168 (1869); Philadelphia v. Powers, 214 Pa. 247 (1906).

[47] Act Feb. 3, P. L. 18, 8 Sm. L. 189; Act April 16, P. L. 488.

[48] Act March 11, P. L. 114; Philadelphia v. Hiester, 142 Pa. 39 (1891); Philadelphia v. Kates, 150 Pa. 30 (1892). By the General Act of May 4, 1889, P. L. 79, the lien was limited to two years unless it was entered of record, and limited to five years unless revived and continued by writ of scire facias within that period and duly prosecuted to judgment. See Verona School District v. McKay, 15 Pa. Dist. Rep. 531 (1906).

[49] Jack v. Jones, 5 Wharton, 321 (1840); Bank of North America v. Fitzimmons, 3 Binn. 342 (1811); Custer v. Detterer, 3 W. & S. 28 (1841); Kelhofer v. Herman, 6 Phila. 308 (1867); Commonwealth v. Alexander, 14 S. & R. 257 (1826); Stiles v. Bradford, 4 Rawle, 394 (1834).

[50] Trunkey, J., Foulke v. Millard, 108 Pa. 230, 236 (1886).

[51] Sinclair v. Baker, 1 Del. Co. 305 (1882).

[52] Mix v. Ackla, 7 Watts, 316 (1838).

are paid.[53] In the beginning, their lien "remained for an indefinite length of time" until 1797, when their lien was restricted to seven years, and was reduced to five years by the Act of 1834. Of late years the legislative tinker has been very busy in changing the restriction.[55]

Prior to 1830[56] the lien effected by a mortgage was discharged by a judicial sale of the property like the other liens already mentioned. By the act of that year mortgages were made an exception to the general rule, and the lien was preserved of mortgages "prior to all other liens upon the same property except the mortgages, ground rents, and the purchase money due to the Commonwealth". This act was a consequence of the decision in *Williard* v. *Norris*[57] in the previous year, that the purchaser at sheriff's sale of land, subject to a mortgage, sold under a judgment obtained subsequently to the execution and recording of the mortgage, took the land discharged of the lien of the mortgage.

This act, however, partly failed to protect mortgage liens in Philadelphia because of the Act of 1824,[58] giving precedence to tax liens. This defect was cured by the Act of 1867,[59] which prevented the divestiture of the liens of a mortgage by a sheriff's sale under a junior encumbrance, both when a municipal claim had been filed, which, though accruing subsequent to the mortgage, had by law been given priority thereto, and also when taxes, charges, or assessments had been filed which accrued subsequent to the mortgage, and had by law been given similar priority. The law, however, did not prevent the divestiture of the lien of a mortgage by a sheriff's sale under a junior encumbrance, when taxes, charges, assessments, or municipal liens had accrued and claims therefor had been filed prior to the recording

[53] McMurray v. Hopper, 43 Pa. 468 (1862); Horner v. Hasbrouch, 41 Pa. 169 (1861). See George W. Biddle's discourse on the lien of the debts of a decedent before the Law Academy, 1854.

[54] Trevor v. Ellenberger, 2 P. & W. 94 (1830).

[55] 3 Troubat & Haly's Practice, §§203-206, p. 2789.

[56] Act of April 6, P. L. 293, 1 Purd., §167, p. 1183.

[57] 2 Rawle, 56 (1829); Fisher v. Connard, 100 Pa. 63, 68 (1882).

[58] Act Feb. 3, P. L. 192.

[59] Act March 23, P. L. 44.

of the mortgage.[60] Therefore a mortgage to the Commonwealth for purchase money is not divested either by the common law or by statute by a sheriff's sale.[61] Nor is the lien of a prior mortgage disturbed by a sheriff's sale under a junior judgment, though it be entered on the bond accompanying the mortgage;[62] nor is a coal lease mortgage discharged by a sheriff's sale under executions on judgments on claims for labor subsequently performed. Though preferred debts and liens on the funds raised by the sheriff's sale, the prior mortgage is not thereby divested.[62a] Nor is an intervening mortgage discharged which is the first valid encumbrance after a prior mechanics' lien, which is void on its face, on land sold under a junior judgment.[63] Nor is an unrecorded mortgage discharged if the land is sold expressly subject thereto, of which the purchaser had notice.[64] Again, if a purchase money mortgage be recorded within sixty days, it is not discharged by the sheriff's sale; consequently the mortgage is not entitled to take any of the proceeds.[65] And if two purchase money mortgages are given the same day, one of which is subject to the other, the lien of the latter will not be discharged by a sheriff's sale under the former.[66]

Questions have arisen concerning the continuance of the lien when the mortgagor or his friends have purchased the land at the sale. Accordingly, it has been decided that when the land is sold under a judgment and purchased by the judgment cred-

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[60] Fisher v. Connard, 100 Pa. 63 (1882): Rhein Building Association v. Lea, 100 Pa. 210, decided the same year. The court held that in the city and county of Philadelphia a sheriff's sale under any junior encumbrance did not divest the lien of a mortgage even where there had been a claim for taxes registered prior to the recording of the mortgage. This protection was given to mortgages by the Acts of April 11, 1835, P. L. 190, and April 16, 1845, §4, P. L. 488.

[61] Duncan v. Reiff, 3 P. & W. 368 (1832).

[62] Commonwealth v. Wilson, 34 Pa. 63 (1859); Cross v. Stahlman, 43 Pa. 129 (1862), overruling Whitehead v. Purnell, 2 Miles, 434 (1840).

[62a] First Nat. Bank of Mahonoy City v. Sheafer, 149 Pa. 236 (1892).

[63] Goepp v. Gartiser, 35 Pa. 130 (1859).

[64] Muse v. Letterman, 13 S. & R. 167 (1825); Ziegler's Appeal, 35 Pa. 173 (1859); Crooks v. Douglass, 56 Pa. 51 (1867); Ashmead v. McCarthur, 67 Pa. 326 (1871); 8 Vale 23657.

[65] Bratton's Appeal, 8 Pa. 164 (1848).

[66] Pease v. Hoag, 11 Phila. 549, 32 L. I. 220 (1875); Miller v. Fluck, 8 Pa. C. C. 585, 26 W. N. C. 585 (1890).

itor, by agreement with the mortgagor to reconvey on payment of his judgment, the equitable estate is never out of the mortgagor and the mortgage is not discharged.[67] But when the mortgage lien has been discharged by a judicial sale to a stranger, it cannot be revived by the mortgagor's re-acquisition of the title through the purchaser at the sale.[68] Mr. Justice Green, in commenting on the cases in which this rule has been applied, said:

> "In both of these cases the purchaser at the judicial sale was a total stranger to the title and under no obligation to protect the title against any encumbrances. He therefore took the lands divested of the liens which were sought to be enforced, and when he subsequently conveyed to the former owner, the purchaser took the same title which he held."[69]

On the other hand, when a person takes title to land subject to two mortgages, he cannot at a subsequent sheriff's sale under the first mortgage purchase the property and hold it divested of the lien of the second mortgage.[70] If this is attempted, the owner of the second mortgage may obtain redress in equity by obtaining a decree to continue the lien of his mortgage.[71] In applying this rule to the mortgagee and would-be purchaser of the second mortgage the court is simply requiring him to observe this well-known rule, that when the defendant in an execution or the owner of land whose duty it is to pay prior encumbrances, fails to perform that duty, by reason of which the land is sold and he himself becomes the purchaser, he takes in accordance with his former title, and the second encumbrance, especially if this be a mortgage, is not discharged.[72] And whenever the defendant has purposely misled the owner of the second mortgage from appearing at the sheriff's sale or maintaining his rights, equity will grant relief.[73] In

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[67] Good v. Schoener, 1 Pitts. L. J. 82, 10 L. I. 151 (1853).

[68] Rauch v. Dech, 116 Pa. 157 (1887), overruling Cleary v. Kennedy, 16 W. N. C. 313 (1885); Rushton v. Lippincott, 119 Pa. 12 (1888); Kennedy v. Borie, 166 Pa. 360, 364 (1895).

[69] At page 364.

[70] Kennedy v. Borie, 166 Pa. 360 (1895).

[71] *Ibid.*

[72] Taylor v. Smith, 2 Wharton, 432 (1837); Woodburn v. Bank, 5 W. & S. 447 (1843); Good v. Schoener, 10 L. I. 151 (1853); Cleary v. Kennedy, 16 W. N. C. 313 (1885); Clark v. Martin, 49 Pa. 299 (1865).

[73] Kennedy v. Borie, 166 Pa. 360 (1895).

Saunders v. *Gould*[74] the land sold at sheriff's sale was bid off by the attorney of the execution defendant in good faith for the protection of his interests, though the deed was taken by a third person who advanced the money and who was to reconvey on payment to him of the money thus advanced. The transaction was declared to be valid, the lien was discharged, and no question was raised about its continuance. In the recent case of the *Equitable Building and Loan Association* v. *Thomas*[75] a mortgage was given on a tract of land that was subsequently divided and became the property of two different owners. The portion belonging to one of them was sold on a judgment which was junior to the lien of the mortgage covering the entire tract. The owner of the mortgage of the entire tract purchased the land at sheriff's sale. It was held that the purchase satisfied the mortgage on his own land only, but did not satisfy that on his neighbor's.

When a husband and wife are seized by entireties and the husband survives, a sheriff's sale on a judgment against the husband will discharge a mortgage executed by both after the entry of judgment. The reasoning of the court by Mr. Justice Green is:

> "As against the wife, the mortgage was undoubtedly the first and indeed the only lien. As against the husband, the judgment was the first lien and the mortgage the second, simply because the judgment was obtained before the mortgage was given. Had the wife survived, the mortgage would certainly have had precedence to the exclusion of the judgment, because the estate bound by the lien of the judgment was defeasible by the death of the husband before the wife. For the same reason, if the husband survived the wife, the estate of the latter was divested, and the mortgage only became operative against the husband because he had joined in its execution. But as to him, it was not the first lien, he having become subject to a judgment at a time anterior to the giving of the mortgage."[76]

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[74] 124 Pa. 237 (1889).
[75] Equitable Building & Loan Association v. Thomas, 216 Pa. 571 (1907).
[76] Fleck v. Zillhauer, 117 Pa. 213 (1887).
[77] Merriman v. Richardson, 5 W. N. C. 9 (1878).
[78] Cook v. Neal, 6 Montg. Co., 147, 176 (1890).

A lien award does not become a lien until it is actually filed. Its existence therefore does not operate to discharge a mortgage given between the date of the award and the time of filing it.[77] Likewise a mortgage preceded by a defective mechanics' lien is not discharged by a sale under a subsequent encumbrance.[78] Again, if the first lien is a mortgage and the second is a mechanics' lien and the property is sold under a subsequent judgment, the mortgage is not divested by the sale; nor is oral evidence admissible to show that the lien antedated the mortgage.[79] But if the mortgage recites the existence of buildings on the premises, and mechanics' claims have been filed subsequent to the date of the mortgage, showing on their face that materials and work were furnished for the buildings prior to the date of the mortgage, a purchaser may assume that the lien will be discharged by the sale.[80]

If a corporation which has issued bonds is reorganized, is the lien of the bonds thereby discharged, or does it continue? On one occasion the franchises of a corporation were sold by virtue of a judgment and execution subject to a mortgage to secure bonds. It was reorganized under the same name and creditors obtained judgment against the original corporation and proceeded to execution and sale of its property. The court held that the first sale extinguished the original corporation; that the second sale therefore was a nullity and did not divest the lien of the mortgage.[81]

On what record of the mortgage may the purchaser rely in purchasing? If a purchaser has actual notice of an unrecorded mortgage, he is not at liberty to disregard it.[82] But generally he is not bound to look into the actual facts of payment or the in-

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[77] Hillard v. Tusten, 172 Pa. 354 (1895); Wheelock v. Harding, 4 Pa. Super. Ct. 21 (1897). See Reading v. Hopson, 90 Pa. 494 (1879).

[78] Reynolds v. Miller, 177 Pa. 168 (1897).

[79] Reynolds v. Crindge, 1 Pa. Dist. Rep. 693 (1892).

[80] Muse v. Letterman, 13 S. & R. 167 (1825); Stackpole v. Glassford, 16 S. & R. 163 (1827); Twelves v. Williams, 3 Wharton, 485 (1838); Tower's Appropriation, 9 W. & S. 103 (1845); Towers v. Tuscarora Academy, 8 Pa. 297 (1848). For additional cases see note 45.

tentions of the parties further than they have been made accessible to him in the record.[83] In *Saunders* v. *Gould*, Mr. Justice Clark remarked:

> "A purchaser is not bound to look beyond the record. The payment of a prior lien not satisfied of record will not protect a subsequent mortgage from being discharged by sale."[84]

Nor does the agency through which the sale is effected change the law.[85]

How do mistakes in conveyances of the names of parties affect liens on the land conveyed? A conveyance was made to a man by a wrong name, by which he subsequently mortgaged the land. Subsequently it was sold on a judgment obtained against him by his proper name in the interval between the conveyance and the mortgage. It was held that while the plaintiff was entitled to the proceeds, the mortgage was a paramount lien and was not disturbed by the sale.[86] Again, on a *scire facias sur mortgage*, which was a lien on several properties, the prothonotary by mistake omitted one of them. The judgment and sale did not discharge the lien of the mortgage on the one omitted.[87]

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[83] Magaw v. Garrett, 25 Pa. 319 (1855); Coyne v. Souther, 61 Pa. 455 (1869); Reading v. Hopson, 90 Pa. 494 (1879); Meigs v. Bunting, 141 Pa. 233 (1891); Eckels v. Stuart, 212 Pa. 161 (1905); Horner v. Scott, 242 Pa. 432 (1913).

[84] Saunders v. Gould, 134 Pa. 445 (1890).

[85] Wylie's Estate, 7 Pa. Dist. Rep. 748 (1898); Devine's Appeal, 30 Pa. 348 (1858); Helfrich v. Weaver, 61 Pa. 385 (1869); Hacker v. Cozzens, 92 Pa. 461 (1880); Lewis' Estate, 14 W. N. C. 499 (1884).

[86] McCue v. McCue, 4 Phila. 295, 18 L. I. 165 (1861).

[87] Miller's Appeal, 11 W. N. C. 506, 2 Penny. 72 (1882).