MARSHALLING ASSETS WITH REFERENCE TO THE RIGHTS OF SUCCESSIVE PART PURCHASERS AND INCUMBRancers.

That equality is equity is a favorite maxim, especially in the administration of assets insufficient to satisfy all demands, but another maxim, as old as the law itself, *quia prior est tempore, potior est jure*, embodies a principle which equity has always recognized. "First come, first served," is a free and easy translation, which is nevertheless quite accurate.

A legal maxim is the most general of general rules, and really indicates but the point of view from which a Judge looks upon the facts of a case. The question here discussed has been considered from both points of view, and with such variety of opinion that it may be worth while to review the cases. The conclusion which seems upon the whole the most reasonable, I would state, in the following proposition: If a paramount incumbrancer of two funds, by his election of remedies, disappoints a junior creditor, who has a lien upon one of them only, the latter shall, to that extent, be substituted to the lien of the paramount incumbrance upon the other fund bound by it, as against the debtor and all claiming under him, by lien or title, subsequent in time.

Illustration: A tract of land is mortgaged to A., and then a portion is mortgaged to B., and afterwards the remainder to C. If A. makes his mortgage debt out of the land mortgaged to B., whose lien is thus extinguished, B. has a right...
to use A.'s lien upon the land included in C.'s mortgage, if this is subsequent in time to his own; but if C.'s mortgage is prior in time, his equity is superior to B.'s.

It has been law for centuries, that persons whose estates are bound by a common incumbrance should contribute towards its payment. Where, however, the question arose between the grantor of a portion of such estate, who had himself created the incumbrance, or his heir, and purchasers, the Year Books are not so clear, though it was soon settled, that, so far as the grantor himself was concerned, he could not have contribution from the grantee. In Trin. 17 Ed. II. (edition of 1678), 550 (1324), a scire facias had been brought against an heir upon his ancestor's recognizance and the sheriff had returned to a fi. fa. that the heir had nothing. The question debated was whether the plaintiff was entitled to a scire facias against the terre-tenants, and it was held that so long as the heir had assets, the tenants could not be charged. (Scrope, J. "Sil eust suy le scire facias vers les terres tenentz, il ne le eust pas en avant qe le heir eust este garny et tanque le heir eit, assez les tenantz ne serront pas charges et puis qe a le fieri facias le breve fuit retorn qe le heir navoit rie' ad presés per qi il covét que les tenz touz furét changez (chargez), etc.") Whether the heir was charged, however, as the ancestor, who was bound by his own act and liable for his own debt, or as a terre-tenant, and thus chargeable for his proportion, cannot be considered as settled, as appears from a dictum of Fyncheden, J., in Hil. 48 Ed. III. 5 (1375), "Car si un home fait statute marchant a un autre et alien sa terre per parcel a divers persons et retient part en sa maine demesn' et il devie et son heire entr', jeo die, q' cestuy a qui le statute fuit fait n'avera mye execuc' entierement de les terres l'heir mes solement per son proc' issint que il charge owelment (equally) chescun pur son porcion que il ad, etc.;" which Broke, Abr. Suit & Contribution 12, 13, doubts, on the authority of the earlier case; and Mr. Biddle, in his address before the Philadelphia Law Academy on Contribution among Terre-tenants (1868), agrees with 2 Wms. Saunders, 10, note, that the opinion of Fyncheden was more consistent with the feudal system.
It was but a step to give the terre-tenant, whose land had been taken in execution, appropriate relief by *audita querela* and *seire facias*, against the creditor and the other terre-tents who should be contributory. Thus, it was said *arguendo* in East. 17 H. VII. 6, “Mes si le recognisor fait feffement a plusieurs puis le recognisance et exec’ e’sue vers un des feoffees tantum il ser’aie per audita querela per c’q’il est lede p’s’torcieus execu’suir p’c’ q’il n’est chargeable forsque *selon* (solon) l’rate de sa terre.” And we read in the same year, 22, “Et fuit dit ibidem q’si le recognisor face feffement a’s divers homes et le recognissee suit execuc’des terres de l’un des feffees tantum, il puit in tiel cas avoir audita querela et fair le recognissee sui exec’ vers l’auters feoffees et issint que fair lour parties estre *contributories pur l’portion* (sed quaere hoe); mes au moinz il semble que il dischagerta bien sa terre *solong le rate*.” In 23 H. VIII, 40, cited Bro. Abr., *Audita Querela*, 39, it was said, “Home seisie de * * * acres es lie en statute marchant et fait feoffement a several personnes et execucion est sue vers lun del feoffes, è avera audita querela sur son surmise daver lauters feoffees destre contributioi ove luy. Mes if execucion soit sue vers le conisor mesme il navera tiel contribucion, car ce est sur son act demesne.” (See also p. 44.) And the law was settled in *Herbert’s Case*, 3 Co. 11, b, where on a *seire facias sur recognisance* to the Crown, the Exchequer entered a general judgment by default against the heir of the conusor, although most of the land had been aliened by the ancestor (see s. c. Moor, 169), it was held, citing *Gawdie’s Case*, more fully mentioned in Moor, 169, that the heir could have no contribution from the grantees, for *haeres est alter ipse et filius est pars patris*, even if the purchasers took without valuable consideration; but in case no assets descended, it was added, that “when land shall be charged by any lien, the charge ought to be equal, and one alone shall not bear all the burden, and the law in this point is grounded on great equity.” A reason given is that the statutes, 11 Ed. I. Acton Burnell and 13 Ed. I. stat. 3, De *Mercatoribus*, provided that execution should be levied of all the lands of the conusor; but this argument would equally apply whether the heir had assets or not. The
decision may more safely be rested on the ground, that the grantees of one who has charged his land with an incumbrance, may justly throw the whole burden upon him who created it, and may assert this right as well against a volunteer who takes *cum onere*. The judgment, however, should not have been entered generally, but, as the case was settled, no judgment was pronounced in error.

It seems to be assumed, not only in *Harbert's Case*, but in the *Year Books*, that each terre-tenant had the right to compel equal contribution from *all* the others, without regard to the time of their respective purchases, by *audita querela* and *scire facias* after an extent, whereby the plaintiff's recovery was delayed until he sued execution against the whole land. "So, in this manner," says Coke, "every one shall be contributorie, *hoc est*, the land of every terre-tenant shall be equally extended." Lord Plunkett, indeed, in *Halty v. O'Flaherty*, Ll. & G. Temp. Plunkett, 213, considered that the question of the effect of priority of title was left open in *Harbert's Case*, in spite of the general language of the cases cited, and stated that he could find no discussion of it anywhere, or any allusion to it, even in the statutes 16 & 17 Car. II. c. 5, and 22 & 23 Car. II. c. 2, which altered the practice by allowing the execution to go on, saving to the party whose lands are extended his remedy by contribution. It is singular, but true, that the question was never raised between successive grantees of parcels of the same incumbered tract, but it was assumed by bench and bar alike, that all should contribute, as is shown by the italicized words in the above citations from the authorities: *Ross v. Pope*, Plowd. 72. Hence, a strange inconsistency. For, though the conusor of a statute might alien Whiteacre to A., and then Blackacre to B., so long as he retained Redacre, "*en sa maine demesn*,” sufficient to pay the debt, A. and B. were secure; yet if Redacre were conveyed to C., then A., B., and C. would contribute, "*ovelment chesuen pur son porcion.*” Thus, the grantee of incumbered property could never know whether he would or would not be called upon for contribution, for the question would depend upon the mere accident of his grantor selling the balance of the land so charged. It seems illogical that A., with an admitted
right against his grantor to throw the burden of the charge upon his remaining land, should be worse off as against the subsequent grantees, who need not, according to Harbert’s Case, be purchasers for value.

The Court of Chancery, in dealing with such questions, adopted, with few modifications, the rulings of the Courts of Law, the more readily as the maxim that equality is equity is favored by a Chancellor: Harvey v. Woodhouse, W. Kel. 6; Long v. Short, 1 P. Wms. 403. “The doctrine of equality,” said Eyre, C. B., “operates more effectually in this Court than in a Court of Law. The difficulty in Coke’s cases was, how to make them contribute. They were put to their audita querela or scire facias:” Dering v. Earl of Winchelsea, in the Equity Exchequer, 1 Cox. 818. So, at law, a surety could only be compelled to contribute to his co-surety for his aliquot proportion, though other sureties might be insolvent: Cowell v. Edwards, 2 B. & P. 268.

In fact, as early as Elizabeth’s reign, Chancery would enjoin the grantee of a rent-charge from levying the entire rent upon a parcel, Cary, 3, and although we meet with suits at common law for contribution at a later time, Erle v. Mullineux, 2 Bulst. 14, Blackstone v. Martin, 3 Id. 805, the advantages of equitable procedure and remedies were recognized.

It often became necessary, for example, to apportion a charge between tenant for life and remainder-man, to decide between heir and devisee, or in cases where the number of interests involved rendered the common-law remedy tedious or inadequate: White v. White, 9 Ves. 555; Queen v. Colborne, Cary, 150; Dolman v. Vavasour, Id. 132; Anon., Id. 32; Cf. remarks of Scrope, J., in 17 Ed. II. 551, and Rich v. Barker, Hard. 131; Case de Loddon Bridge, W. Jones, 273; cases of contribution to repair public bridges. Especially convenient was the equitable administration of the assets of decedent’s estates as between heir, devisee, legatee, and creditors by simple contract or specialty. The procedure of the common law was inadequate for the adjustment of conflicting rights, and yet many of the rules of equity were grounded in the common law. Thus in 1815, where the conosor of a statute died, having appointed the cognisee his executor, who
administered upon assets sufficient to pay the debt, it was
held that he could not afterwards have execution of the land
descended to the heir: Trin. 8 Ed. II., p. 282. See Trin. 7 R.
II., cited in Bellewe's Cases, Executions. The converse was
decided in 1664, in Armitage v. Metcalf, 1 Chan. Cas. 74, where
an heir who was compelled to pay his ancestor's bond was
reimbursed by the executor out of the personalty; though
other cases distinguished between an heir and a devisee:
Equity, it was said, will take away one man's unreasonable
gain in order to make up another's loss, and he who receives
the advantage ought to make the satisfaction: Anon., 2 Chan.
Cas. 4; Culpepper v. Aston, Id. 115. So, where lands charged
with an annuity were sold for the payment of debts, the an-
nuitant was decreed relief from other land: Kennoule v. Bed-
ford, 1 Chan. Cas. 295.

Thus, side by side with the doctrine of contribution, grew
up the kindred theory of marshalling, by which a party who
has two funds to satisfy his demand, is not permitted, by his
election of remedies, to disappoint another who can resort
to but one of them: Trimmer v. Bayne, 9 Ves. 209; Webb v.
Smith, 30 Ch. Div. 192. The principle was elaborated by
Lord Eldon, after consultation with Lord Redesdale, in Al-
drich v. Cooper, 8 Ves. 382; 2 Lead. Cas. Eq. 228; but, as we
have seen, it was of early date, especially in the administra-
tion of the estates of decedents or insolvents. In the case last
cited, Cooper had mortgaged his freehold, with a covenant to
procure admittance to a copyhold, and surrender the same, as
further security to the mortgagee. Before doing so he died,
and his heirs were admitted to the copyhold and surrendered
to the mortgagee. The personal estate having been exhausted
by payment to the mortgagee, the question arose on a creditor's
bill, whether the simple contract creditors were entitled to
have the copyhold marshalled to the extent to which they
were disappointed of the personalty; the contest concerned
not so much the general principle as its application to a copy-
hold, which it was argued was not technical assets and not
liable for debts further than by express contract. It was
held, however, that the doctrine of marshalling applies when-
ever there are two funds to be administered, entirely irrespective of their contractual liability. It is needless to remark that the rule of Aldrich v. Cooper has always been followed as a clear principle of equity, but its application in England gives rise to an inconsistency similar to that which we have noticed in cases of contribution at law.

If A. mortgages Whiteacre and Blakacre to B., and then conveys Whiteacre to C., the latter has an equity as against A. and B., that B. shall have recourse first to Blackacre, but if A. conveys Blackacre to D., then Whiteacre and Blackacre must contribute pro rata to pay B. Such, we have seen, is the rule at law. Suppose that the conveyance to C. is by the way of mortgage, the same rule obviously applies with a like result, for B. has two funds liable for his debt while C. has but one; B. therefore is restricted to Blackacre, or to reach the same and with stricter justice to B., C. is subrogated, after B. is paid, to B.'s lien against Blackacre. If this is a right at all, C. cannot be divested of it by any act of A., to which he does not assent, such as a conveyance or mortgage to D., a stranger. But in such case, the debtor having parted with all of his estate or equity of redemption, the doctrine of equity in England is that C. and D. have equal equities, and therefore should equally contribute.

In Barnes v. Racster, 1 Y. & C. Ch. 401 (1842), Racster mortgaged his land, consisting of Foxhall coppice and lot No. 32, as follows: In 1792, Foxhall to Barnes; in 1795, Foxhall to Hartwright; in 1800, Foxhall and No. 32 to Barnes; to secure as well the first and further advances; and in 1804, Foxhall and No. 32, to Williams, the subsequent incumbrancers taking with notice. The question arose in Barnes's foreclosure, whether, as No. 32 was sufficient to meet the whole of Barnes's claim, Hartwright could, as against Williams, compel Barnes to resort thereto, thus leaving Hartwright the first incumbrancer on Foxhall. It was argued in his behalf, that in 1800, before the subsequent mortgage was made to Williams, Hartwright had acquired a right of which no subsequent dealings of the mortgagor with Williams could deprive him. Vice-Chancellor Knight Bruce decided however that Barnes should be paid from the proceeds of Foxhall and
No. 32, according to their amounts, that the residue of the first fund should be paid to Hartwright and the residue of the second to Williams.

While it is true that the Vice-Chancellor reserved the question of what the rights of Hartwright and Williams would have been had Barnes's security upon No. 32 preceded and not followed Hartwright's security upon Foxhall, his opinion is broad enough to cover that case also, and indeed when it actually arose in *Bugden v. Bignold*, 2 Y. & C. Ch. 377 (1843), it was similarly decided.

Bignold took a mortgage of freehold, and afterwards of the freehold and copyhold estates for an additional advance, after which the freehold subject to the prior mortgage was mortgaged to Round, and finally the copyhold was mortgaged to Bugden without notice of the prior mortgage thereof to Bignold. Round and Bugden both claimed the proceeds of the copyhold estate, and, as in *Barnes v. Racster*, it was held that Round lent his money not only without notice of the security on the copyhold, but without notice of its existence at all and without prospect of any benefit from it. Bugden, however, was an innocent purchaser for value. Therefore the Bignold second mortgage should be charged, *pari passu*, on both freehold and copyhold. Upon reargument, the case of *Titley v. Davies*, 2 Y. & C. Ch. 399, decided by Lord Hardwicke in 1743, was relied on. In that case, Jenyns mortgaged to Shepherd an estate at Linwood, an estate at Westminster, and certain fee farm rents. He then mortgaged Linwood to Titley; then sold the rents to Peyton, and finally mortgaged Westminster to Davies. Titley paid off Shepherd's mortgage, and was allowed to hold all that was included in it, until he was paid not only Shepherd's mortgage but his own also. While this case is complicated by the manner in which it arose, so far as Titley was concerned, the result was precisely the same as if Shepherd had been paid by a sale of Linwood under foreclosure, and Titley had then been subrogated to the mortgage as against Peyton and Davies, whose rights were acquired subsequently to Titley's, and it is submitted with deference as the case is otherwise explained by eminent judges, that the decision of Lord Hardwicke in
this case, and *Lanoy v. Athol*, 2 Atk. 446, should have led to a different conclusion in the cases cited.

That *Barnes v. Racster* did not meet with the unqualified approval of the profession is apparent from a criticism in the *Jurist*, Vol. 7, Pt. II. p. 109, although, together with the later case of *Bugden v. Bignold*, it is supported by a reviewer in *The Law Times*, I. p. 397, July 15, 1843, who agrees with the first impression of the Vice-Chancellor in the latter case, that Bugden being an innocent purchaser for value, should be paid in full from the proceeds of the copyhold. It is admitted, however, that either view is inconsistent with *Titley v. Davies*.

The general creditors of a bankrupt, however, have no such supervening equity as to object to such marshalling. Thus, in *Gibson v. Seagrim*, 20 Beav. 614 (1855), Seagrim mortgaged his land to Godwin, with certain stock as additional security; he then mortgaged his land to Gibson; Godwin, and a prior mortgagee sold the land, and the balance, including the proceeds of the stock, was paid to Seagrim's assignee in bankruptcy, against whom Gibson claimed that the balance should be paid him, as Godwin had two securities while Gibson had but one, and so *Romilly*, M. R., decreed. S. P. by *Sugden*, L. C., *Baldwin v. Belcher*, 3 Drew. & War. 173 (1842). In *Anstey v. Newman*, 39 L. J. Ch. 769 (1870), a mortgagee of land, a portion of which was included in a prior voluntary settlement, was required to resort first to the unsettled land, because the voluntary settlement was good as against the subsequent unsecured creditors, though void as to the mortgagee.

In *Sober v. Kemp*, 6 Hare 155 (1847), a vendee of premises included in a mortgage, paid it, took an assignment, and filed a bill against his grantor's devisee and several mortgagees of the other premises included in the first mortgage. It was held by Vice-Chancellor *Wigram* that the plaintiff was entitled to the successive foreclosure of all the subsequent mortgages in default of redemption, on the ground that the mortgagees had no greater rights than their mortgagor.

It was said, however, by Vice-Chancellor *Turk*, in *Tidd v. Lister*, 10 Hare 157 (1852), that the cases decided since
Aldrich v. Cooper had not affected that decision, but it is impossible to study the opinions in Barnes v. Racster, and Bugden v. Bignold, without concurring in the criticism of Kennedy, J., in Cowden's Estate, 1 Pa. St. 267 (1845), who points out that the Vice-Chancellor in the former case speaks as if the right of the party claiming to have the assets or securities marshalled, depended on a contract made with him to that end, whereas marshalling seldom depends upon contract, but upon "mere principles of equity and general justice," as is said by Mr. Justice Story, in 2 Equity, § 1234. Mr. Justice Kennedy proves this very conclusively by the case of Aldrich v. Cooper itself, and the illustration employed by Lord Eldon, who effectually disposed of this very argument urged in behalf of the defendants that the copyhold estates, which were the subject of the suit, "were not liable to debts further than by express contract." (8 Ves. 885) Lord Eldon held in so many words at p. 389, that the application of the fund did not depend upon its being assets "either by will, or by contract, inter vivos, but upon the ground that the specialty or mortgage-creditor having two funds, shall not by his will resort to that by going to which he will disappoint as just a creditor who cannot resort to any other." It is true that both Lord Eldon, in Aldrich v. Cooper, and Lord Hardwicke, in Lanoy v. Athol, 2 Atk. 446, confined their opinions to cases where no third person was concerned, and it has been attempted as a conclusion therefrom, to exclude from the operation of the rule, the case of a subsequent purchaser or incumbrancer of some portion of the estate covered by the first lien. Lord Eldon's caution was characteristic, while Lord Hardwicke's opinion is clearly shown by the case of Titley v. Davies, supra. Judge Kennedy speaks of Barnes v. Racster, as laying down a new doctrine; and indeed the Vice-Chancellor in that case seems to suppose that the equity only arises on filing the bill (see 1 Law Times, 397), but it is submitted that there is no principle or authority to support this theory.

In Mower's Trusts L. R., 8 Eq. 110 (1869), funds A. and B. were mortgaged to Watson; then A. alone to Sustin, and finally A. and B. to William, subject to the payment of the two former. Fund A. was absorbed in payment of Watson's
marshalling assets.

mortgage, and it was held by Lord Romilly that B. should be applied to Sustin's mortgage in priority to Williams's. No opinion was delivered by the Master of the Rolls, and it is only possible to reconcile the decision with *Barnes v. Racster* with which he formerly said that he agreed (*Gibson v. Seagrims*, 20 Beav. 614), by distinguishing it on the ground that nothing was included in the third mortgage by its terms, save the surplus of both funds after the payment of both prior mortgages. It may be a question, however, whether such weight should be given to the wording of a mortgage of funds already mortgaged, which would naturally be said to be subject to the payment of the prior charges. The doctrine of the consolidation of mortgages is similar to tacking, but has been sometimes, though erroneously, believed to be an outgrowth of the principle of marshalling as applied in *Tiley v. Davies*; this, however, with deference to the opinion of Lord Hatherley, in *Wellesley v. Mornington*, 17 W. R. 355. In England, a Court of Equity will not allow a mortgagor to get back one of several mortgaged estates, unless he pays the mortgagee all that is due him, although a portion of his debt might be secured upon an entirely different property. And persons deriving title from the mortgagor, such as subsequent purchasers, or mortgagees of one, or a portion of one of the mortgaged estates, are held to take subject to the same equity of the mortgagee or his assignee, even though under assignment subsequent in date to the creation of the second mortgage: *Vint v. Padget*, 2 De G. & J. 611; *Beevor v. Luck*, L. R. 4 Eq. 537. Indeed, the rule was once extended to a case where not only the assignment of the mortgage, but even the mortgage itself being subsequent, was held to operate against an intervening mortgage of one estate: *Tassell v. Smith*, 2 De G. & J. 713; but this was afterwards overruled in *Mills v. Jennings*, 13 Ch. Div. 639; s. c. in House of Lords, 6 Ap. Cases, 698. See article in 69 Law Times, 94; 72 Id. 219; 6 Canadian L. T. 409; 19 Canada Law J. 121; 26 Solicitors' Journal, 356. The doctrine has not been followed in the United States, save in a few cases (*Jones on Mortgages*, § 1083), and is important in our present discussion, because the English cases following *Barnes v. Racster* are based upon the
equity of the "intervening" or subsequent "bona fide" incumbrancer, which argument might be supposed to apply with far greater force against the consolidation of mortgages, as indeed appears from Lord Hatherley's opinion in Wellesley v.Mornington, supra. However, as was forcibly said by the Chancellor in that case, when asked to overrule Barnes v. Raester, "the question of principle is not so easy as all that," and he added that if this should ever be done, it must be on very strong grounds.

In Ireland, the decisions proceed upon the other theory; thus, in Hamilton v. Royse, 2 Sch. & Lef. 315 (1805), Redesdale, Lord Chancellor, held that a purchaser takes subject to all equities to which the vendor was subject, and of which the purchaser had notice, and therefore where one took under a deed containing a recital of judgments affecting the land which he bought, and other land previously settled, he was bound not only with notice of the judgments but of the equities existing under the settlement, to have the settled property exonerated. Lord Chancellor Sugden, in Averall v. Wade, Ll. & G. Temp. Sug. 252 (1835), indeed, thought that this case went too far as against a subsequent purchaser, but the two decisions are entirely consistent. In the latter, the owner of several estates being indebted by judgments, settled one of his estates for valuable consideration, and afterwards acknowledged other judgments. It was held that the prior judgment should be thrown altogether on the unsettled estates, and that the subsequent judgment-creditors had no right to make the settled estates contribute. It was argued that, by virtue of the covenant, the grantee of the settled estate was, at the date of the settlement, entitled to have the prior judgments paid by the unsettled estates, and this right could not be divested by subsequent dealings between the settlor and third persons. Lord Chancellor Sugden seemed to think that such would be the case, even without a covenant that the estate was free from incumbrance, but put it on the much higher ground, as he called it, of the covenant, which equity would enforce by doing specifically what should have been done, and that no subsequent judgment-creditor could disturb that right, after it had attached, by demanding that
the settled estates should contribute to the prior judgments. In *Hartly v. O'Flaherty*, Ll. & G. temp. Plunk. 208 (1833), reversing s. c. Beatty, 61, a collector of excise settled his property upon his marriage, then having bought Huntingtower, mortgaged it to Lord Callan. He was then proved a defaulter, and died ten years after. His son, tenant in tail under the settlement, sold a portion of the land to Scott, and mortgaged other portion to Lewis. The crown debt having been satisfied out of Huntingtower (which, by various proceedings under the Irish law, was made subject to it), it was held that the mortgagee had no equity to enforce contribution by Scott and Lewis, who derived title for value under a settlement prior to the mortgage. "If the mortgagor," said Lord PLUNKETT, "sells a portion of his equity of redemption for valuable or good consideration, the entire residue undisposed of by him is applicable in the first instance to the discharge of the mortgage, and in case of the bona fide purchaser, and it is contrary to every principle of justice, to say that a person afterwards purchasing from that mortgagor, shall be in a better situation than the mortgagor himself with respect to any of his rights." Nor did the absence from the settlement of a covenant against incumbrances alter the equities of the case as between the several persons claiming title as purchasers under different deeds. See also *Be Fox*, 5 Ir. Ch. 541, and *Be Jones*, 2 Id. 544.

In *Lawder's Estate*, 11 Ir. Ch. 346 (1861), *Barnes v. Racster*, however, was recognised as correct, and was said to establish no new principle, while in *Rorke's Estate*, 15 Id. 316 (1865), it was intimated that *Barnes v. Racster* was inconsistent with *Hartly v. O'Flaherty*, which is undoubtedly so. The priorities in the latter case were the reverse of those in the case at bar. In *Rorke's Estate*, X. and Y. were mortgaged in 1846, and X. was conveyed in 1856, in consideration of natural love and affection. Y. was mortgaged in 1860, and upon sale thereof, the proceeds were sufficient to pay the first but not the second incumbrance. It was held that the conveyance of X., being voluntary, the mortgagee of Y. was entitled either to contribution or full payment from X. (see as to rights of

In *Lynch's Estate*, 1 Ir. Rep. Eq. 396 (1867), the incumbrances in the order of time were, *first*, a mortgage of two tracts, *second*, a judgment registered as a mortgage against one of them, and *third*, a judgment affecting both. The first lien exhausted the land on which alone the judgment mortgage was a lien, and the other tract was accordingly marshalled in its favor, postponing the latest lien.

In Canada, where the earlier Irish and English cases were both considered, the former were followed, and the theory adopted that the record of the paramount incumbrance was notice to a subsequent part purchaser of equities existing in favor of the intervening liens: *Boucher v. Smith*, 9 Grant, 347; and further, in accordance with what is believed to be correct theory, that the paramount incumbrancer is not bound in the absence of express notice from a junior, to retain all his security intact: *Trust Co. v. Shaw*, 16 Id. 446.

In the civil law, a third theory is adopted. If land is mortgaged to a creditor and then sold in parcels at different times to different persons, the first purchaser cannot, by paying the debt, acquire the right to be subrogated to the creditor as against the second or third purchasers, because he can apply the right acquired by subrogation only to that portion of the incumbered property which he himself has purchased. Nor, according to the civil law, has the first purchaser any claim for contribution as against the subsequent purchaser: his only remedy being a personal action against his vendor. It is argued, in support of this doctrine, that a purchaser who pays an incumbrance upon his property does so to secure his own possession, and has no intention to acquire the creditor's right against other property. A subsequent creditor, on the other hand, who pays a prior creditor, does so for the express purpose of acquiring his rights. But the purchaser of incumbered property is not a creditor in that sense. He has merely an action against his vendor. In another sense he is himself a debtor, or rather the property which he purchased is liable for the debt, and he has his choice either to give up that property or to make himself the debtor and to pay the
In this aspect of the case, it seems immaterial whether he stipulates for express subrogation or not, that is, as we may say, whether he pays the debt or takes an assignment of the lien, and such seems the result of the authorities as cited by Dixon on Subrogation, Ch. II., where they are ably considered. The learned author inclines to the opinion that the English rule of ratable contribution, as stated by Judge Story, Equity, § 1233, is founded upon a broader view of the principles of equity than either the civil law or the theory of exoneration in the inverse order of conveyance (as adopted by Chancellor Kent), and claims that it furnishes the only fixed measure for the respective liabilities of the several parties. Certainly the rule of the civil law furnishes no fixed standard; for the burden falls on whom the paramount incumbrancer chooses to place it. It is submitted, however, that the rule here maintained and first laid down in this country by Chancellor Kent both establishes a practical test of liability and avoids the theoretical inconsistency of the English rule.

In Clowes v. Dickenson, 5 Johns. Ch. 235 (1821), it was said that if there are several purchasers in succession at different times, there is no equality, and consequently no contribution between the purchasers to the discharge of the common incumbrance. The last purchaser sits in the seat of his grantor, as the heir represents his ancestor, and must take the land with all its equitable burdens; "it cannot be in the power of the debtor," argued the Chancellor, "by the act of assigning or selling his remaining lands, to throw the burden of the judgment or a ratable part of it, back upon" a first purchaser.

In Clowes v. Dickenson, the rule was in fact stated obiter, but it has been very generally followed in the United States. We propose to consider it as illustrated by the Pennsylvania cases, as they are numerous and conflicting, and besides remarkable in this, that some of them adopt unwittingly the rule of the civil law.

The Supreme Court of Pennsylvania in 1823, then composed of Judges Tilghman, Gibson, and Duncan, followed Clowes v. Dickenson in Nailer v. Stanley, 10 S. & R. 450. Nailer and Stanley had successively purchased of Vanleer,
subject to a judgment which was afterwards levied of Stanley's land, who brought assumpsit against Nailer to recover his proportionate share of the value of the land sold. The Court denied the right to recover, and held in addition that the remedy in such case would not be assumpsit but a special action *in rem*, the judgment in which would be *de terris*. It was supposed at one time, that this case was overruled by *Presbyterian Corporation v. Wallace*, 3 Rawle, 109 (1831), but the question was reconsidered in *Cowden's Estate*, 1 Pa. St. 267 (1845), and the rule of *Nailer v. Stanley* elaborately vindicated. It had previously been approved in *Ziegler v. Long*, 2 Watts, 205 (1834), and *Taylor v. Maris*, 5 Rawle, 51 (1835). In *Ramsey's Appeal*, 2 Watts, 228 (1834), a mortgagee was substituted, as against the general creditors of the intestate mortgagor, to the right of a prior judgment-creditor whose lien extended to the balance of the debtor's land sold by his administrator, and also to the judgment of a bank which had a lien upon some of its own stock held by the debtor. As this case has often been misunderstood, it is worth while to notice that when Chief Justice Gibson said that the doctrine was one of mere benevolence and not to be extended to the infringement of legal rights, he meant merely (as is apparent from the illustration used and the case at bar), that the doctrine was not to be employed to infringe the legal right of the paramount incumbrancer to make his money as safely, quickly and conveniently as he pleased, but it was expressly said that the legal rights of all the creditors are "subordinate to equities which affected the debtor whom they collectively represent," that is, that subrogation cannot be invoked as long as the first lien creditor is unsatisfied: *Kyner v. Kyner*, 6 Watts, 227; *Hoover v. Epley*, 52 Pa. St. 522; *Bank v. Petty*, S. Ct. Penn., January 3, 1887; *Neff's Appeal*, 9 W. & S. 36.

In Pennsylvania, the Act of April 22, 1856, P. L. 534, protects the right of the paramount judgment-creditor, and at the same time affords a remedy before a judicial sale at his instance, for the purchasers, by providing for the payment and assignment of his judgment and execution under the control of the Court: *Arna's Appeal*, 65 Pa. St. 72; *Phelps's Appeal*, 98 Id. 546; *Milligan's Appeal*, 104 Id. 508.
Miller v. Jacobs, 8 Watts, 477 (1835), was a contest over the proceeds of a sheriff's sale of land in Perry County, mortgaged successively to the plaintiff and the defendant. The bond accompanying the plaintiff’s mortgage was then entered in Philadelphia as a lien upon property of the mortgagor there situated, after which judgments were obtained in Philadelphia, subsequent to both mortgages. The defendant gave notice to the plaintiff to make his money out of the Philadelphia estate, but the plaintiff released the Philadelphia estate from the lien of his judgment in order that a private sale might be made of that estate; which being done, the subsequent judgments were satisfied from the proceeds, and the balance received by the owner. The Court below held that it was the common case of a creditor who, having two funds, was under an equitable obligation to keep that which was exclusively within his reach intact for the benefit of another creditor who had but one. The fund was therefore awarded to the defendant, but this was reversed in an opinion delivered by Gibson, C. J., who held that the paramount creditor having two funds was not bound to make room for the admission of one, by incommoding another who has equal claims. In that predicament, it is at his option to stand still. Between subsequent lien-creditors on distinct parts of the general fund, the legal course of execution is not to be disturbed, and a Chancellor suffers the general creditor to take satisfaction in the way most conducive to his convenience or the gratification of his caprice. This assumes that the equities of the parties are balanced, while, as was argued, the mortgages were liens in Perry before the judgments were obtained in Philadelphia, so that the defendant, being prior in time, was first in right, to which Judge Gibson answered: “But what has his lien in Perry County to do with an estate not bound by it?” It may be replied, nothing; but his right is not enforceable as his lien, but as and through another’s. It is by substitution only that he has any claim, and that arises because the prior incumbrancer has injured him by exhausting one security when he might have taken another. Besides, in Miller v. Jacobs, the paramount incumbrancer did not stand still, for despite express notice he relinquished his
lien upon the Philadelphia property. While a prior incumbrancer is not bound by record notice of a junior lien upon his own security to retain the whole thereof intact, he is bound upon notice, to use his own security, so as not to diminish another's. Such was the decision in the same year in Taylor v. Maris, 5 Rawle, 51 (1835), and such, notwithstanding Miller v. Jacobs, is the doctrine of Horning's Appeal, 90 Pa. St. 388; McIlvaine v. Assurance Co., 93 Id. 30; Wilbur's Appeal, S. C. Penn., April 1, 1881, and many other cases.

It is true that Miller v. Jacobs, having been argued before three judges, a bare majority of the court, from whom Judge Huston dissented, was reargued in Jacobs v. Miller, 5 Watts, 208 (1836), in his absence. The grounds of the former decision were affirmed, and in addition stress was given to an alleged agreement of Clark to suspend the registry of his mortgage (which was unaccompanied by a warrant to confess judgment). This agreement was neither noticed in the former opinion nor relied upon in argument, and indeed is so vaguely stated in the report of the evidence that its precise import cannot be determined. At all events, both opinions in Miller v. Jacobs put the decision squarely upon the ground stated in 5 Watts, 209, that "Clark lent his money on the direct security of the mortgaged premises, and that the party claiming under him can look to nothing else;" which is really the broad question we are discussing.

In 1840, Hastings's Case, 10 Watts, 303, was decided upon the contrary principle. There, Hastings mortgaged to Humes lot No. 68, which was subject to Evans's judgment, after which the debtor, Hastings, acquired other property upon which the Evans judgment, by revival, also became a lien. Then followed Alexander's judgment, and the properties having been sold by the sheriff, the contest was between Humes and Alexander, thus making a case similar to Barnes v. Raster. It was held, per Kennedy, J., that the equity of substitution existed on the part of Humes, before Alexander acquired his lien, and was therefore not affected or destroyed by it. "It is not easy," says Judge Hare, in his note to Aldrich v. Cooper, 2 Lead. Cases in Equity, 228, "to reconcile the decision of Miller v. Jacobs with the principle laid down
in *Hastings's Case*. Nor does it, as Chief Justice Gibson seems to have supposed, result exclusively from the obligation of the paramount lien creditor not to cover the property of the debtor from his other creditors. It has another root, that who of several claimants on a fund shall prevail, ought not to depend on the caprice of one of them, but on a settled rule.

If a mortgagor who acquires a judgment lien on all the real estate of the mortgagor after the execution of a second mortgage can, by the mere exercise of his volition, postpone the second mortgage to a junior incumbrancer, or *vice versa*, there is no reason why he should not turn the power to account by exercising it in favor of the highest bidder,” and Dixon on Subrogation, 84, notes a like objection to this, the civil law doctrine.

The principle of *Hastings's Case*, rather than that of *Miller v. Jacobs*, was followed in *Bruner's Appeal*, 7 W. & S. 269 (1844), though neither case was cited. Cooper owned two lots bound by Righter's judgment, of date February 14; and conveyed lot A. to Eagle on February 17. Two days thereafter, Giller recovered another judgment against Cooper, which bound only lot B. Then Eagle conveyed to Bruner, who also took an assignment of the Righter judgment, a lien on both lots, and Giller's assignee sold lot B. at sheriff's sale, whereupon the proceeds were claimed by both Bruner and Giller's assignees. Obviously, Eagle, under whom Bruner claimed, acquired A. before Giller obtained his junior judgment against B., and therefore Giller had no equity superior to Bruner. Judge Kennedy held that it would be singularly unjust and inequitable, if a prior purchaser of real estate for a valuable consideration should not have a preference in all cases against a subsequent lien or judgment creditor, citing *Averall v. Wade*, supra. Had Eagle, however, on purchasing, withheld some of the consideration money to satisfy the judgment, he or his assignee would to that extent have had no claim on the proceeds of the other lot.

In *Cowden's Estate*, 1 Pa. St. 267 (1845), Judge Kennedy again delivered the opinion of the Court, of which Gibson was then Chief Justice. This case well deserves to be called the leading case on the subject in Pennsylvania, as the theory
received very attentive consideration, though the facts are complicated and poorly reported. Cowden, as his father’s devisee, owned several tracts of land in Northumberland and Lycoming counties, subject to the charge of debts and legacies, and afterwards at different times severally incumbered by various mortgages and judgments. Judge Kennedy discusses the rule of Aldrich v. Cooper, and approves the doctrine of Chancellor Kent in Clowes v. Dickinson, in spite of the contrary opinion of Judge Story, and the authority of Barnes v. Raxter, and says, in summing up, “It does seem to be difficult, if not almost impossible, to conceive upon what principle of reason or sound sense the second creditor is to be divested or deprived of his right to have the securities marshalled so as to have the whole of his debt paid after the coming in of the third person the same as he had a right previously thereto.” It was therefore held that the debts and legacies should be paid from the proceeds of the land which was last incumbered, so that the latest incumbrancers should be paid only so far as they might be without disturbing the rights of the prior incumbrancers, “who being prior in time, may be said to have a superiority of right” (compare Conrad v. Harrison, 3 Leigh, 532).

Ebenhardt’s Appeal, 8 W. & S. 327, was decided a few months before Cowden’s Estate, and the same judge delivered the opinion, but upon another principle. Rice owned three lots of ground subject to Hein’s and Bender’s judgments. He conveyed No. 3 to Spinner for $400, of which $300 was secured by a note, stated to be “on account of Hein’s lien.” Waechter and Probst obtained judgments against Rice, which became liens on Nos. 1 and 2, and afterwards Ebenhardt obtained judgments against Spinner. Lots 1 and 2 having been sold at sheriff’s sale, the fund was awarded to Hein and Bender, while Waechter and Probst, not being paid in full, were ordered to be subrogated to Hein’s judgment lien on lot No. 3, to the amount of the $300 note. It might seem to follow from the cases cited, that after No. 3 was conveyed to Spinner by Rice, none of the subsequent judgments entered against Rice; liens only on Nos. 1 and 2, which he retained, could have any equitable claim as against Spinner; in other
words that Waechter and Probst are in a different position from Bender, whose judgment was obtained before the conveyance. But Spinner having expressly agreed to pay $300 of the Hein judgment, there is nothing inequitable in making him or his property contribute that much, of course to the betterment of Waechter et al., whose judgments moreover were prior to Ebenhardt's. Judge Kennedy, however, determined the case upon other grounds, viz., the remark of Lord Eldon, in Ex parte Kendall, 17 Ves. 520, that a creditor having a demand against two debtors (not two funds belonging to the same debtor), cannot be compelled by a creditor of one only to seek payment first from the other; the argument being that Rice was not the owner of both funds but of one, while Spinner, a stranger, owned the other. But, as Judge Sergeant, dissenting, remarked, Spinner bought the land subject to the judgment, and his creditors can be in no better position. Hein had a lien on two funds, one of which, subject thereto, became Spinner's afterwards. Had Spinner originally owned No. 3, and Hein obtained a joint judgment against both Rice and Spinner, then the facts might call for the application of the rule of Ex parte Kendall. Judge Bell, in commenting upon this case in the later case of Dunn v. Olney, 14 Pa. St. 223 (in which it is submitted a like error is made), agrees with Judge Sergeant, that sufficient weight was not given to the agreement of Spinner to pay the judgment pro tanto from the money withheld. If indeed we are not to give this effect to Spinner's note, the case should have been decided on the other ground, that the conveyance to Spinner ante-dated the judgments of Waechter and Probst.

Lloyd v. Galbraith, 32 Pa. St. 103 (1858), bears a strong resemblance to Ebenhardt's Appeal, and indeed was decided upon its authority. Galbraith owned three tracts of land, the Swan farm, lot No. 13, and the Anderson farm, all of which were bound by Elliott's judgment for $1000, entered May 26, 1856. He conveyed the Swan farm to Prosser for $3200 on November 18, 1856, taking notes for $2200 of the purchase-money, after which Bell & Co. obtained a judgment on January 5, 1857, against Galbraith, which of course bound
No. 13, and the Anderson farm. Then on March 18, 1857, Bell, Smith & Co., who had bought the notes given by Prosser to Galbraith, obtained judgment upon them against Prosser, and this judgment bound the Swan farm in the hands of Prosser, and subject to the Elliott judgment. Under these circumstances Elliott issued execution against the Anderson farm and lot 13, and the proceeds were paid to him. Bell & Co. thereupon claimed to be substituted to the lien of Elliott against the Swan farm. The case might perhaps have been well decided on the ground suggested above and noted by Judge Paxson, in Milligan's Appeal, 104 Pa. St. 503 (1884), in speaking of Ebenhardt's Appeal, that as the conveyance to Prosser had been made prior to the entry of Bell & Co.'s judgment against Galbraith, Bell & Co. were not entitled to the use of Elliott's judgment as against Prosser. Or better indeed, as Prosser had not paid the whole of the purchase-money, the case might have come within a generally recognized exception to the rule. For the whole doctrine of Nailer v. Stanley, it will be remembered, rests upon the obligation of a vendor of incumbered land to relieve it from the burden of the incumbrance: but if the vendee agrees to pay the lien or his ratable share of it or withholds so much of the purchase-money to meet such payment, he clearly has no claim to exonerations, nor can his own judgment-creditor claim higher rights. Such was the opinion of the Court in Zeigler v. Long, 2 Watts, 205; Bruner's Appeal, 7 W. & S. 269; In re McGill, 6 Pa. St. 504; Dunn v. Olney, 14 Id. 223; Carpenter v. Koons, 20 Id. 222; Beddow v. De Witt, 43 Id. 326; Dill's Appeal, 3 Penny. 489; Wilbur's Appeal, 10 W. N. C. 133 (S. Ct. April 1, 1881); while Ebenhardt's Appeal, 8 W. & S. 327; Lloyd v. Galbraith, 32 Pa. St. 103 (with deference to Judge Strong's opinion in Beddow v. De Witt); Conser's Appeal, 1 Penny. 128, appear opposed to this view, which might also have been relied on in Blank's Appeal, 6 W. N. C. 25 (S. Ct. March 11, 1878).

The rule of Ex parte Kendall has certainly been often misapplied, and even in itself deserves careful examination. It is acknowledged that, if A. has a lien upon funds B. and C., and D. has a lien upon fund B. only, equity will compel
A. in favor of D., and against the common debtor of both, to exhaust fund C. before impairing D.'s security, or what is the same thing, to substitute D. to A.'s rights against B. This rule Lord Eldon refused to apply to the case, where the two funds were the property of two different debtors; i.e., if A. is a creditor of B. and C., and D. a creditor of B. alone, A. cannot be compelled to satisfy his debt from C.'s property, in order that D. may obtain payment from B.'s; because in such case C.'s property would be taken to pay B.'s debt to D. To this, however, there is the well recognized exception, that if the relation of suretyship exists between B. and C., so that B. is a surety for C.'s debt, A. may be compelled to make him pay who is primarily liable, and leave the surety's property to pay the surety's debts: Huston's Appeal, 69 Pa. St. 485 (1871). The thought, however, which naturally suggests itself, is that as between two joint debtors, he who pays the common debt is entitled to contribution from the other of his share. Considered relatively to each other, as to one-half of the debt, each is primarily liable, as to the other half, secondarily; as to one-half, a principal, as to the other a surety. Suppose then in the case put, B. pays the whole of B. and C.'s debt to A., he may enforce contribution from C. of his share, and there is no injustice, consequently, in making C.'s property pay that proportion of A.'s claim in the first instance. In practice, however, it might be difficult to adjust the equities between B. and C. in a case where they are complicated, as often is, and always is assumed to be the case in partnerships: Knouf's Appeal, 91 Pa. St. 78. Equity, however, should not hesitate to afford relief on account of any difficulty in the way, especially as just here relief is most needed. A Court of equity cannot, like a Court of common law, excuse its failure by pleading a lack of appropriate machinery, and the old maxim of no wrong without a remedy meets with a practical refutation.

In McGinnis's Appeal, 16 Pa. St. 445 (1851), Herchelroth owned land in Cumberland and Franklin counties, both subject to MacLanahan's judgment. The next lien in Cumberland County was McGinnis's judgment, which was entered four days before Johnston's judgment was obtained in Fran-
lin. MacLanahan’s judgment was paid from the proceeds of the Cumberland estate, after which the Franklin estate was sold by the sheriff, and McGinnis claimed there to be paid the balance of his judgment in preference to Johnston’s judgment, because prior in time. It was held, however, on the authority of Miller v. Jacobs, 3 Watts, 477, that Johnston was to be preferred, because McGinnis’s lien in Cumberland had no connection with an estate in Franklin, bounded by liens there. But, in McDevitt’s Appeal, 70 Pa. St. 373, McGinnis’s Appeal was distinguished on the ground that McGinnis should have obtained an order of subrogation in Cumberland, before applying to the Court in Franklin County. In the case last cited, Devlin owned real estate in Chester and Philadelphia, incumbered by Claghorn’s judgment; after which Carson obtained judgment in Philadelphia, and then Devlin mortgaged his Chester property to McDevitt, and gave a judgment to Kitchenman. Carson then took an assignment of the Claghorn judgment in both counties, and both properties were sold at sheriff’s sale. It was held that when Carson’s judgment was entered in Philadelphia, Claghorn had two funds to resort to, while Carson had but one, so that, had a sale then taken place, there could have been no conflict of interests. Carson having the right of subrogation then, the recording of the McDevitt mortgage, and the entry of Kitchenman’s judgment a year later, could not alter the status of Carson’s judgment, and accordingly the fund in Chester County was awarded to Carson as assignee of Claghorn, so that his own judgment might come in as the first lien in Philadelphia.

In like manner was decided Delaware Canal’s Appeal, 38 Pa. St. 512. There, a judgment debtor mortgaged a portion of his land to the canal company, after which another judgment was recovered against him. The land included in the mortgage was sold upon execution and the mortgagee was subrogated to the rights of the first lien creditor against other land, although the mortgagee might, by entering up the bond accompanying its mortgage, have acquired a lien upon all the mortgagor’s land, and obtained a legal priority to the subsequent judgments. Strong, J., held that the judgment-creditors subsequent to the mortgage had no rights superior to
their debtor, but were affected by all the equities existing against him when they obtained their judgment. Compare Mechling’s Appeal, S. Ct. Penna. Oct. 19, 1885, which seems an inconsistent but hurriedly decided case.

But, again, in 1877, the Supreme Court reverted to the other theory in Hoff’s Appeal, 84 Pa. St. 40. Addams obtained a judgment against Phillips on April 11, 1870. In 1873 Phillips mortgaged the land to Hoff, and in 1874 bought other property. The Addams judgment was revived in March, 1875, and thus became a lien upon both tracts of Phillips. In July following Phillips sold the last acquired tract to Reiff for value, Reiff having no actual knowledge of the judgment. In 1876 the land mortgaged to Hoff was sold by the sheriff to pay the Addams judgment, and Hoff claimed to be subrogated to the Addams judgment against the land sold to Reiff, raising a similar question to that in Hastings’s Case, supra. Chief Justice Agnew, citing Miller v. Jacobs, said that when Phillips sold to Reiff, he had a right to sell, and Reiff to buy, so far as Hoff was concerned. Hoff had no right at law to interfere, had no lien upon the after acquired property, and his mortgage was not taken in view of that property. The only risk which Reiff took on himself was the Addams judgment, and when that was paid, as it was by the sale of the other land, his was free of the lien. Further, Phillips stood in the relation of principal to Reiff, for by the covenant in his deed, implied in the words “grant, bargain and sell,” he was bound to remove the incumbrance. Reiff therefore was superior to a surety, was a bona fide purchaser of the land with no actual knowledge of the Addams judgment, and his equity was therefore superior to Hoff’s. But it is one thing to pay a debt, another to divest a lien. Ramsy’s Appeal, 2 Watts, 232. The actual payment of the judgment was nothing, if in equity another creditor was entitled to use its lien. Reiff had record notice of the judgment, and could not claim that the creditor should have recourse first to the property remaining, for an examination there would have disclosed the prior Hoff mortgage. The argument from the covenants implied in Phillips’s deed to Reiff is aside from the question. Put it that Reiff became a surety.
for Phillips, what effect can that have upon Hoff, who at the date of the revival of the Addams judgment, had a right to have the assets marshalled? How could Phillips and Reiff deprive him of that right by a bargain and sale of the property?

Nor, as is stated in 84 Pa. St. 43, was Reiff prior in time to Hoff. That, were it true, would end the case; but it was not, as may be seen by a comparison of the dates when their rights attached.

In Milligan's Appeal, 104 Pa. St. 503 (1884), Hoff's Appeal was not noticed. Carothers owned lots 1, 2, and 3, subject to Chalfant's mortgage. He successively mortgaged No. 1 to Shaw, No. 2 to Stewart (who afterwards bought it in under his mortgage), and then conveyed No. 3 to Milligan. Carothers becoming bankrupt, his assignee sold No. 1, and applied the proceeds to the payment of the Chalfant mortgage. Shaw, whose mortgage was discharged by the sale, was held entitled to use the Chalfant mortgage against the tracts conveyed to Stewart and Milligan. Shaw was entitled to have the first lien paid out of the remaining land of Carothers, and this equity Carothers could not defeat by his subsequent dealings with Stewart and Milligan, who had record notice of Shaw's equity.

In Robeson's Appeal, 117 Pa. St. 628 (1888), the facts were essentially the same as in Hoff's Appeal. Graham owned the Hale tract, subject to the Woods judgment, and mortgaged it to Robeson in 1872 and May 1875. He acquired the Decatur tract in August 1875, and the Woods judgment by revival the same year became a lien on that also. In 1876 he mortgaged the Decatur tract to Meyers, and both tracts were sold by the sheriff to pay the Woods judgment. Robeson claimed the residue in preference to Meyers', and was held entitled, on the principle of McDvitt's Appeal and Hastings's Case; and Hoff's Appeal was distinguished, on the ground that Reiff, in the latter case, was a purchaser, not a mortgagee, and his deed contained an implied covenant by the grantor to indemnify him. But there is really no such distinction. The mortgage in Robeson's Appeal was in the ordinary form, and the covenant is implied from the words in the mortgage, just as in a
conveyance. Indeed the leading case on the Act of 1715, *Gratz v. Ewalt*, 2 Binn. 95, was the case of a mortgage, and the appellee's argument in *Robeson's Appeal* (see 21 W. N. C. 519), expressly urged that no such distinction could be drawn. Nor can it be said that Reiff was not bound by record notice of the judgment, because, as was said of the appellee in *Bobeson's Appeal* (see 21 W. N. C. 519), expressly urged that no such distinction could be drawn. While we may therefore approve of the decision in that case, it may be regretted that it was not placed upon proper grounds, by overruling *Hoff's Appeal*, which is in conflict with the earlier decisions.

A reference (by no means exhaustive) to the decisions in other States is added in a note.

**John Marshall Gest.**