funds in its shares, and we must, therefore, decide that the holders of such shares were properly placed on the list of contributories to the extent of so much of the Rs. 250 on each share as had not been already paid to the company at the time of the winding up.

As to the shares of the issue of new capital, they stand on a different footing. That issue was admittedly invalid, the resolution to increase the capital not having been come to in accordance with ss. 4 and 5 of the articles of association,—that is, "with the sanction of a special resolution of the company passed in general meeting." The shares, therefore, not having been validly issued by the company, and the invalidity not having been subsequently cured, as was done in *Sewell's case* (1), they never became a legal part of the capital of the company; and it [160] was, therefore, in the power of the company by a resolution of a general meeting to set aside the resolution of November, 1884, so far as that issue of shares was concerned, and validly undo what had been done under that resolution. This was effected by the resolution of 19th October, 1885, which set aside all that had been done under the resolution of 5th November, 1884, and virtually cancelled the shares issued under it. The persons who had taken up these shares ceased then to be holders of the shares and became creditors of the company in respect of the moneys they had paid on the shares and for which they were credited in the company's books in June, 1886; they cannot, therefore, be regarded as having been shareholders in respect of those shares when the winding up commenced. This case differs, therefore, from *In re Miller's Dale and Ashwood Dale Lime Company* (2), where there had also been an invalid increase of capital, but which had never been undone, and the shareholders who sought not to be placed on the list of contributories had kept the shares which had been invalidly issued for several years and were on the list of shareholders when the winding up commenced.

We must, therefore, reverse the orders appealed from of the Court below and send back the cases for fresh decisions having regard to the above remarks. Costs to abide the result.

Orders reversed.

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APPELLATE CIVIL.

Before Mr. Justice Bayley (Acting Chief Justice), Mr. Justice Jardine and Mr. Justice Telang.

CHUNILAL VITHALDAS (*Original Defendant No.* 2), *Appellant v.* FULCHAND (*Original Plaintiff*), *Respondent.** [20th February, 1893.]

Mortgage—Marshalling of securities—Notice of prior mortgage to subsequent mortgagee—Doctrine of marshalling applicable to mortgages in the Mofussil.

Before the extension of the Transfer of Property Act, 1882, to the Bombay Presidency, where two properties had been mortgaged to one person, and one of them was subsequently mortgaged to another person with notice of the former mortgage.

Held, such subsequent mortgagee had an equity to call for a marshalling of the securities in his favour so as to require the first mortgagee to proceed to realize

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* Second Appeal No. 224 of 1891.

(1) L.R. 3 Ch. 139. (2) 31 Ch. Div. 215.

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[161] his security in the first instance out of the property not mortgaged to the second mortgagee. *Jardine, J., diss.*

The English doctrine of marshalling of securities applies to mortgages in the Mofussil.

[F., 22 B. 304 (314).]

SECOND appeal from the decision of the First Class Subordinate Judge with appellate power at Ahmedabad, in appeal No. 11 of 1890.

Baria Pabadbhai Jalumji mortgaged two fields (Survey Nos. 83 and 695) to Vithaldas Bhagvan for Rs. 2,000 by a *san-khat* dated 15th November, 1876.

After the death of Vithaldas, his son Chunilal (defendant No. 2) and his grandson (the plaintiff) made a division of their joint family property. At that division the mortgage-debt due under the *san-khat* of 1876 was divided equally between the plaintiff and Chunilal (defendant No. 2).

In 1888 Chunilal obtained from the mortgagor a fresh mortgage-bond for his share of the debt due under the *san-khat* of 1876, and, by this new mortgage, field No. 83 alone was mortgaged.

Plaintiff then filed the present suit to recover his half share of the debt secured by the *san-khat* of 1876 and prayed for the sale of both the fields (Survey Nos. 83 and 695) included in the *san-khat*.

Defendant No. 1 (the mortgagor) pleaded that under the second mortgage-bond of 1888, which he had executed in favour of Chunilal (defendant No. 2), the latter had agreed to satisfy the plaintiff's half share of the debt, and that, therefore, he (the defendant No. 1) was not liable for the claim.

Chunilal (defendant No. 2) pleaded (*inter alia*) that the plaintiff must first proceed against field No. 695, and that, if any part of the money due to him remained unpaid, he might then be allowed to enforce his mortgage lien against the other field (No. 83), which was included in his own further mortgage of 1888.

The Subordinate Judge passed a decree for the plaintiff for Rs. 1,467-6 and costs to be realized by the sale of half of each of the two fields (Nos. 83 and 695), allowing the remaining half of both fields to defendant No. 2 for the portion of the debt due to him.

[162] On appeal, the lower appellate Court was of opinion that the English doctrine of "marshalling of securities" was not applicable to mortgages in the Mofussil, and following *Lala Dilawar Sahai* v. *Dewan Bolakiram* (1) and *Tadigotla Timmappa* v. *Lakshmamma* (2) held that Chunilal was not entitled to compel the plaintiff to proceed first against field No. 695. As a puisne mortgagee he had, however, a right to redeem plaintiff's mortgage.

The decree of the Subordinate Judge was, therefore, varied by declaring that Chunilal (defendant No. 2) had a right to redeem the plaintiff's mortgage on payment of Rs. 1,467-6-0 within three months from the date of the decree. On failure to redeem as directed, the plaintiff was at liberty to recover his debt by sale of both fields Nos. 83 and 695.

Against this decision Chunilal (defendant No. 2) preferred a second appeal to the High Court.

Rao Saheb *Vasudev J. Kirtikar*, for appellant (defendant No. 2).

Gokuldas Kahandas Parekh and *Nagindas Tulsidas*, for respondent (plaintiff).

(1) 11 C. 258. (2) 5 M. 385.

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The following authorities were cited in argument:—*Ram Dhun Dhur* v. *Mohesh Chunder Chowdhry* (1); *Moro Raghunath* v. *Balaji Trimbak* (2); *Nawab Azimat Ali Khan* v. *Jowahir Singh* (3); *Gossyen Luchmee Narain Poori* v. *Bicram Singh*(4); *Lala Dilawar Sahai* v. *Dewan Bolakiram*(5); *Gaya Prasad* v. *Salik Prasad* (6); *Bhat Khushalji Kuber* v. *Hari Prasad* (7); *Tadigotla Timmappa* v. *Lakshmamma* (8); Macpherson on Mortgages, p. 326; Tagore Law Lectures on Mortgages, p. 299; Transfer of Property Act (IV of 1882), s. 81.

1*st August*, 1892. JARDINE, J.—Defendant No. 1 mortgaged his two fields Nos. 83 and 695 to Vithaldas for Rs. 2,000 by a *sankhat*. After the death of Vithaldas, his heirs, the plaintiff and defendant No. 2, divided the interest of the mortgagee between them, taking in moieties, each moiety being, like the mortgage itself, secured on both the fields mortgaged. Afterwards defendant **[163]** No. 2 obtained from defendant No. 1 (the mortgagor) a fresh mortgage for his moiety of the debt; and for this fresh mortgage the field No. 83, and not the field No. 695, was made security. When the present suit was brought by the plaintiff to recover his moiety of the mortgage-debt by sale of the two fields, defendant No. 2 called evidence to prove that the plaintiff had relinquished in his favour his right to proceed against No. 83. The lower Court of appeal has found, on the facts, that there was no such relinquishment.

The case differs from those for which the 81st section of the Transfer of Property Act (IV of 1882) will make provision when that Act is extended to this Presidency, as it only applies the equitable rule of marshalling to cases where the subsequent mortgagee is without notice of the prior mortgage. This is the rule as stated in the second volume of Fisher on Mortgage from *Lanoy* v. *Duke of Athol* (9). As Chunilal had notice of the original mortgage, the case of *Khetoosee Cherooria* v. *Banee Madhub Doss*(10) is in point. There, after suggesting a *quære* whether the doctrine of marshalling securities should be introduced into India, the learned Judges declined to apply it in the case before them.

It is said at p. 491 of Macpherson on Mortgages (7th Ed.) that there does not appear to be a case in which the doctrine of marshalling has been applied to Mofussil mortgages. The case does not resemble *Moro Raghunath* v. *Balaji Trimbak*(2), where equity was applied, because the mortgagee had himself become interested in the equity of redemption. In the case of *Tadigotla Timmappa* v. *Lakshmamma* (8) the Court refused to apportion the debt, holding that the mortgagee was at liberty to claim that his security shall not be divided against his will. In *Indukuri Rama* v. *Yerramilli Subbarayudu* (11), the Court declined to deprive him of his legal rights. The English doctrine of marshalling is limited to cases where it will not prejudice the mortgagee's rights or improperly control his remedies. In the present case the **[164]** maxim "*sic utere tuo ut alienum non lœdas*," on which Story in his Equity Jurisprudence, s. 633, bases the doctrine, does not apply in derogation of rights, as defendant No. 2 at the time of the partition or afterwards might have made arrangements with the plaintiff.

I am of opinion that the lower Court of appeal was right in declaring that the plaintiff might recover his mortgage-debt by sale of both the fields, and that the appellant, defendant No. 2, has no good reason to complain about the decree made, which I would, therefore, confirm with costs.

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(1) 9 C. 406. (2) 13 B. 45. (3) 13 M. I. A. 404. (4) 4 C.L.R. 294
(5) 11 C. 258. (6) 3 A. 682. (7) P.J. for 1888, p. 355. (8) 5 M. 385.
(9) 2 Atk. 444. (10) 12 W. R. 114. (11) 5 M. 387.

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But as I have the misfortune to differ from my learned brother, we refer the appeal, under s. 575 of the Code, to the Acting Chief Justice.

1*st August*, 1892. TELANG, J.—The question which arises for decision in this case, on the facts found by the Court below, is whether when two properties are mortgaged to one person, and one of those properties is subsequently mortgaged to another person with notice of the former mortgage, such second mortgagee has any equity to call for a marshalling of the securities in his favour, so as to require the first mortgagee to proceed to realize his security, *in the first instance*, out of the property not mortgaged to the second mortgagee. The Subordinate Judge with appellate powers has decided, that the puisne mortgagee in this case has no such equity, relying on the decision in *Lala Dilawar Sahai* v. *Dewan Bolakiram*(1). In that case, however, the subsequent mortgagee's contention, which was negatived by the Court, went a good deal further than the contention we have to deal with, for there, as the Court points out, the defendants contended that "the plaintiff is *not entitled to a declaration* that the property is liable to attachment and sale, *unless he has shown* that he has exhausted the other property." The decision there consequently does not govern the present case. In the course of the judgment, however, reference is made to a case before Lord Chancellor Sugden, in which he pointed out, that while there might be a difficulty in working out a subsequent mortgagee's equity in England, where the prior mortgagee has "a right to compel [165] the debtor to redeem, or he may foreclose," it might be done in Ireland, "where the decree is ordinarily one not for foreclosure but for sale, and the mortgagee would be entitled to no more than his money, and the Court would deal with the surplus in such manner as it might think fit." This opinion of Sir E. Sugden is of very special authority in this Presidency, where, as Westropp, C. J., has laid down, the ordinary decree on a mortgage ought to be, as in Ireland, one, not for foreclosure, but for sale, and where the mortgagee is only entitled to his principal, interest and costs—*Ganpat* v. *Adarji* (2).

The learned Subordinate Judge relies also on two other authorities. The first of these—*Tadigotla Timmappa* v. *Lakshmamma* (3)—appears mainly to have turned on an entirely different question than the one before us, namely, the question raised by the claim of the defendant there to split up the mortgage security, and pay only a part of the whole mortgage money proportionate to the share of the mortgaged property purchased by him. This the High Court did not permit. Besides, the question there was apparently raised when the plaintiff had already sold and himself purchased the property on which he and the defendant both had a claim. That was a period when it would be too late to raise any question of marshalling. In the other case, too, it would appear that the attempt of the party who stood in the position of a puisne incumbrancer was, in the language of the Court, to "deprive" the prior incumbrancer "of his legal rights," and to affect the interests of third parties which had been created in the course of their enforcement. For there, too, the prior incumbrancer had sold the property to a stranger. And before the sale no question of marshalling had been raised at all.

It is well established in England, that the rule of marshalling will not be applied in favour of a subsequent incumbrancer when that will either really prejudice the rights of the prior incumbrancer or the rights

(1) 11 C. 258. (2) 3 B. 312. (3) 5 M. 385.

of third parties (1). And the cases now referred to were clearly well decided, according to that principle. Mr. Gokuldas, for the respondent, also relied on the case of [166] *Gaya Prasad* v. *Salik Prasad* (2), But it is difficult to say from the report what the real decision of the Court was on the point now under consideration. Pearson, J., was evidently in favour of marshalling so far as to direct that the plaintiff should first try to recover his amount by the sale of the property in the hands of the mortgagor, before he proceeded against the properties in the hands of the mortgagor's alienees, the second, third and fourth defendants—all of whom he placed on the same footing. It is not clear from the judgment of Oldfield, J., that he took the same view as regards the second defendant. But Straight, J. (p. 695, and see again p. 697) says that "the points upon which the difference of opinion has occurred between my two honourable colleagues relate to the claim of the plaintiffs as against defendants Nos. 3, 4"—who were prior mortgagees as well as subsequent purchasers, while the second defendant's only title was under a subsequent purchase. It is to be remarked, further, with reference to one of the points made in that case, and which would have a bearing on the case before us, that the property sold to the plaintiff was sold, as Sir C. Sargent points out in *Moro Raghunath* v. *Balaji* (3), by a private sale,—that is, as I understand, not by a sale for realizing the mortgage security; and, therefore, it was held, and if I may say so rightly held, that the defendants had no equity to compel the plaintiff to proceed to sell that property as if it was still liable to the mortgage. By the transaction of sale that property had become discharged from the mortgage lien before the second defendant had anything to do with any of the properties of the mortgagor, the first defendant.

If, then, the cases relied on are inapplicable, the question again arises, whether there is any such equity in favour of the subsequent mortgagee as is here claimed. In England, the doctrine is broadly laid down that such an equity exists. The cases go back ultimately to a decision of Lord Hardwicke, who laid it down that "if a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the Court, in order to relieve the second mortgagee, has directed the first to take [167] his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons" (4). And the note of Mr. Tudor points out that that statement of the doctrine is correct, except that the absence of notice is not an essential condition for its application. It is unnecessary to discuss, in detail, the authorities there referred to. They seem to bear out the view expressed, and in *Aldrich* v. *Cooper* (5), Lord Eldon nowhere refers to notice as in any way entering into the consideration of this equity. Further, it seems reasonable that this equity should be enforced, both in cases of notice and of no notice, because to refuse so to enforce it would have the effect not only of enabling the first mortgagee to disappoint a subsequent mortgagee—which is what the English cases say equity will seek to avoid—but also of frequently enabling the mortgagor to defraud such subsequent mortgagee.

(1) 2 W. and T. Leading Cases in Equity, pp. 111—8.
(2) 3 A. 682. (3) 13 B. 45.
(4) 2 White and Tudor (6th Ed.), p. 102. (5) 2 White and Tudor (6th Ed.), p. 82.

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This result must generally follow, unless the help of another doctrine of equity is called in, and the subsequent mortgagee is allowed to stand as a creditor against the other property although not mortgaged to him, as, for instance, is done in those cases mentioned in the judgment in *Aldrich* v. *Cooper* and in the notes to that case, where the Crown taking mortgaged property under an extent, other property of the mortgagor not mortgaged, but against which the extent might have been enforced, is treated in equity as if it was subject to the mortgage (1).

It must be admitted, that under the Transfer of Property Act (IV of 1882) this equity is by s. 81 made subject to the puisne incumbrance being without notice. But as the Act is not applicable to this case, we are not at present bound to adopt that rule as there laid down, and we may, I think, properly follow the rule laid down in England, which is not in any way unfair to the substantial claims of the prior incumbrancer, and which [168] avoids an injustice and possible fraud upon the rights of the puisne incumbrancer.

It is true that in *Khetoosee Cherooria* v. *Banee Madhub Doss* (2) the High Court of Calcutta made some remarks expressive of a doubt as to whether the equitable doctrine of marshalling should be applied in this country. These remarks, however, were merely made *obiter*, and were not intended to be decisive on the point. On the other hand, I think the doctrine is one of justice, equity and good conscience, and I see no objection to its application within due limits. And it may be pointed out, that the doctrine has, in fact, been already applied by this Court, even in cases of partition of Hindu family property—cases which the Courts are bound to decide according to Hindu law pure and simple. A purchaser or mortgagee for value of the share of an individual co-parcener in joint family property, even with notice that he is buying such a share, has been held entitled to have the family property marshalled in his favour, so far as that can be done "without doing injustice to prior incumbrancers or co-parceners" (3). This decision can only rest, I think, on the equity administered by the English Courts, as above explained, and must have been adopted to avoid the possible fraud to which I have adverted.

In the present case, there is no finding or proof or even allegation that any injury may be occasioned to the defendant by his having to sell, in the first instance, the property which is not mortgaged to the plaintiff. I am, therefore, of opinion that the Judge below was wrong in refusing to give the appellant the relief which he sought, except in so far as he claimed to redeem the respondent's mortgage. To that relief he was, no doubt, entitled. But he was also entitled, I think, to a decree declaring that, in the event of the appellant's failure to redeem as provided by the Subordinate Judge's decree, the plaintiff would be at liberty to sell the property mortgaged to him, but subject to the proviso that he must first sell the field No. 695 which is not mortgaged to the appellant, and only proceed against the other field in the [169] event of the proceeds of the first sale not being sufficient to satisfy the amount of his decree.

The Judges having differed in opinion, the case was referred to the then Acting Chief Justice (Bayley, J.) and was argued before him on the 13th December, 1892.

(1) Compare the hint thrown out on a similar point in the judgment in *Udaram* v. *Ranu*, 11 B. H. C. R. 76 (82).

(2) 12 W. R. 114.

(3) *Wamnajiv. Atmaram*, P. J., 1883, p. 337; see Mayne's Hindu Law, pl. 329 *Venkatarama* v. *Meera Lavai*, 13 M. 275.

Rao Saheb *Vasudeo J. Kirtikar*, for appellant (defendant No. 2).—The question is whether, when the subsequent mortgagee has notice of a prior mortgage, he has any equity to require the prior mortgagee to proceed in the first instance against such of the mortgaged property only as is not comprised in the subsequent mortgage. We contend that although we had notice we have a right to call for a marshalling of the securities in our favour. The doctrine of marshalling applies in India. The following authorities were referred to:—*Moro Raghunath* v. *Balaji* (1); *Nawab Azimat Ali Khan* v. *Jowahir Singh* (2), *Nanee Tara Naikin* v. *Allarakhia Soomar* (3); Story's Equity Jurisprudence, 634 (*a*); Ghose on Mortgages, p. 299; 2 White and Tudor's Leading Cases (6th Ed.), p. 109; *Heyman* v. *Dubois* (4); *Hughes* v. *Williams* (5); *Liverpool Marine Credit Co.* v. *Wilson* (6); *Tidd* v. *Lister* (7); *Bishonath* v. *Kisto Mohun* (8); *Mussamat Nowa Koowar* v. *Sheik Abdul Ruheem* (9); *Nanabhat* v. *Lakshman* (10).

Goculdas K. Parekh, for respondent (plaintiff):—We contend that in India the doctrine of marshalling securities has not been adopted where the subsequent mortgagee has had notice of the prior mortgage. In this case there was notice—*Lala Dilawar Sahai* v. *Dewan Bolakiram* (11); *Tadigotha Timmappa* v. *Lakshmamma* (12); *Indukuri Rama* v. *Yerramilli* (13); Fisher on Mortgage (4th Ed.), p. 667; *Lanoy* v. *Duke of Athol* (14); *Rodh Mal* v. *Ram Harakh* (15).

[170] Rao Saheb *Vasudeo J. Kirtikar* in reply.—In the case of *Nanabhat* v. *Lakshman* (10) there was notice, yet marshalling was allowed—*Toolsee Ram* v. *Nunno Lall* (16).

Cur. adv. vult.

JUDGMENT.

20*th February*, 1893. BAYLEY, C. J. (Acting).—The question for decision in this appeal is, whether when two properties are mortgaged to one person, and one of them is subsequently mortgaged to another person with notice of the former mortgage, such second mortgagee has any equity to call for a marshalling of the securities in his favour so as to require the first mortgagee to proceed to realise his security in the first instance out of the property not mortgaged to the second mortgagee.

The first mortgage was dated the 15th November, 1876. By s. 8, of "The Transfer of Property Act, IV of 1882" this equity is made subject to the second mortgage having been made without notice of the former one, but that section has no application to this case, as the Act was not extended to the Bombay Presidency until the 1st January 1893, (Notification, dated the 27th October, 1892, by the Government of Bombay).

Although it is said in Macpherson on Mortgages, p. 491, (7th Ed.) that there does not appear to be any case in which the doctrine of marshalling has been applied to Mofussil mortgages, and although a doubt was expressed by the High Court at Calcutta in 1869 as to whether the doctrine of marshalling of securities ought to be introduced into India, and thereby (as the Court said) to interfere with the legal rights of parties—see *Khetoosee Cherooria* v. *Banee Madhub* (17)—I entertain no doubt that such doctrine has been so introduced.

(1) 13 B. 45. (2) 13 M.I.A. 404. (3) 4 B. 573 (note).
(4) L.R. 13 Eq. 158. (5) 3 Mac. and G. 683. (6) L.R. 7 Ch. 507.
(7) 3 De G. M. and G. 857. (8) 7 W. R. 483.
(9) W.R. (1864), 374. (10) P.J. 1877, p. 83. (11) 11 C. 258.
(12) 5 M. 385. (13) 5 M. 387. (14) 2 Atk. 446.
(15) 7 A. 711. (16) 1 W. R. 353. (17) 12 W. R. 114.

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In two cases which came before Mr. Justice Couch and his colleagues in the High Court of Bombay in 1865, *viz.*, *Dada* v. *Babaji* (1) and *Webbe* v. *Lester* (2), it was held that although the English law is not obligatory upon the Courts in the Mofusssil, they ought, in the absence of special law and usage, in deciding a case according to "justice, equity and good conscience" (Regulation IV of 1827, s. 26), to be guided by the principles [171] of English law applicable to a similar state of circumstances. The Courts, however, will not, in such a case, apply rules of English law, which, though well-established and binding on English Courts, are yet so special in their nature and origin as to be inapplicable to the different circumstances of this country, and accordingly the Court of first instance (Ordinary Original Civil Jurisdiction), refused to apply the rule in *Shelley's case* to an agreement by the members of a Parsi family relating to an estate in the Island of Salsette, in the Mofussil of this Presidency—see *Mithibai* v. *Limji Nowroji Banaji and others* (3), a decision which was affirmed in the Court of appeal (I. L. R. 6 Bom. 151)—both Courts holding that such well-established rule was a law of property or tenure based on feudal considerations and was unsuited to the circumstances of India. It is unnecessary for me to point out, in detail, what Mr. Justice Telang has already done, and I venture to think correctly, in his judgment in this case, that the authorities relied on by Mr. Goculdas K. Parekh, the pleader for the respondent (original plaintiff in the Court below), are inapplicable and may be distinguished from the present case. I am of opinion that there is such an equity in favour of the subsequent mortgagee (the present appellant) as is claimed on his behalf. In the argument before me I did not understand it to be denied that the doctrine of marshalling had been applied in the Courts in India, but it was urged that it had not been carried further than that it is applicable where the second mortgagee had no notice of the first mortgage. No doubt in the case before Lord Hardwicke (*Lanoy* v. *The Duke of Athol* (4), reference is made to the second mortgagee having no notice of the first mortgage, but subsequent decisions pay no regard to the absence of such notice, and do not refer to notice as in any way entering into the consideration of this equity. In the note in Tudor's Leading Cases in Equity, Vol. 2, p. 109, (6th Ed. 1886) Mr. Tudor says that it seems to be immaterial whether the second mortgagee has notice of the first mortgage or not. In the leading case of *Aldrich* v. *Cooper* (5), decided by Lord Chancellor Eldon in 1803, he says (p. 388) 'If a party has two funds, a person [172] having an interest in one only has a right in equity to compel the former to resort to the other if that is necessary for the satisfaction of both.' See also at p. 394 the instances he gives of the rule that a person having a double fund shall not by his option disappoint another who has only one. In *Baldwin* v. *Belcher* (6) the Lord Chancellor of Ireland (Sir Edward Sugden, afterwards Lord St. Leonards) states the rule without any qualification. He says: 'The rule of law is perfectly settled. If there are two creditors who have taken securities for their respective debts, and the security of the first creditor ranges over two funds, while the security of the other is confined to one of those funds, the Court will arrange or marshal the assets, so as to throw the person who has two funds liable to his demand on that which is not liable to the debt of the second creditor.' In *Gibson* v. *Seagrim* (7), two properties X and Y were mortgaged

(1) 2 B. H. C. R. 36 (38). (2) 2 B. H C. R. 55. (3) 5 B. 506.
(4) 2 Atk. 446. (5) 8 Vesey, 381. (6) 3 Dru. and War. 173.
(7) 20 Beav. 614.

to A, and afterwards X was mortgaged to B. The Master of the Rolls held that B was entitled to have the securities marshalled so as to throw A's mortgage, in the first instance, on estate Y. See also *Re Mower's Trusts* (1) to the same effect.

The learned pleader for the appellant, Rao Saheb Vasudev Jagannath Kirtikar, cited two passages in Ghose's Tagore Lectures for 1875-76, p. 299, where it is stated that the doctrine of marshalling had been adopted by the Courts in India as a rule founded in equity and good conscience, and that although in some of the earlier cases it was laid down that marshalling could not be insisted on by an incumbrancer with notice of the prior mortgage (*Lanoy* v. *The Duke of Athol* (2)) the rule was considered too narrow, and that the distinction had since been abolished (*Gibson* v. *Seagrim* (3); *Tidd* v. *Lister* (4)). The appellant's pleader relied upon a decision of Melvill and Kemball, JJ., in *Nanabhat* v. *Lakshman* (5) as a case of marshalling with notice of the first incumbrance. As it is difficult to collect what are the facts of the case from that report, I have examined the record and the notes of the argument in Mr. Justice Melvill's note-book. From [173] these it appears that Lakshman (original defendant No. 1) on 3rd January, 1868, mortgaged certain trees on his land to Nanabhat (original plaintiff) to secure Rs. 150 then borrowed, payable in two years. The suit was brought on the 3rd January, 1876, to recover the above sum, and a like sum for interest, or to recover possession of the mortgaged trees. The mortgage bond had been registered in Book I relating to immoveable property. Nanabhat in suit No. 51 of 1870 sued Lakshman for Rs. 100, and on the 15th March, 1870, obtained a decree, attached the field and trees, besides other property. A prohibitory order of 23rd January, 1871, published on the 11th February, 1871, expressly mentioned the mortgage. On the 6th July, 1871, the property was purchased by Vishnu Gopal, who, on the 6th September, 1871, sold to Narayan, father of Vaman (original defendant No. 2). The Subordinate Judge found that the bond was proved, that the plaintiff had not possession of the mortgaged trees, and only decreed that plaintiff should recover Rs. 300 from Lakshman, and dismissed the claim against Vaman, laying his costs on plaintiff. The District Judge confirmed the decree with costs.

The plaintiff appealed to the High Court on, amongst others, the following grounds:—(1) that the lower Court had erroneously held that the mortgaged property (*viz.*, 9 mango and 20 babul trees) was moveable property; (3) that the lower Court erroneously held that the appellant's lien upon the trees would not follow the trees into the hands of the purchaser at a Court sale, who had purchased the trees with full notice of the mortgage lien; (4) that the judicial sale of the trees having been clearly made subject to the mortgage lien, the purchaser was bound to pay the mortgage amount on the trees.

For the appellant it was argued before Melvill and Kemball, JJ., that registration was sufficient notice, and that, at any rate, the auction-purchaser was bound even if the sale had not been made expressly subject to the mortgage. On the other side, it was contended that the land was not mortgaged, only the trees, and that by Act XX of 1866 standing timber is moveable property, and that plaintiff ought to recover his debt from the whole moveable property.

(1) L. R. 8 Eq. 110. (2) 2 Atk. 445. (3) 20 Beav. 614.
(4) 10 Hare 140 (157). (5) P. J. for 1877, 83.

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[174] The Court delivered the following judgment:—

"If notice be necessary, in order to affect a purchaser at a Court-sale, the registration of the plaintiff's mortgage bond was sufficient notice. Vishnu Gopal purchased both land and trees at the auction-sale, and if he had searched the register, as he was bound to do, he would have ascertained the existence of the plaintiff's lien on the trees by virtue of his mortgage bond, which was registered in Book I relating to immoveable property. Under these circumstances, we consider that the plaintiff's lien upon the mortgaged property remains valid, though in execution he should be obliged to proceed, in the first instance, against any portion of the mortgaged property which may remain in the hands of the mortgagor before he proceeds against any of the property held by the defendant Vaman. If the defendant Vaman or his father has made away with any of the trees, he is liable for their value, which must be ascertained at the time of the execution. We amend the decrees of the Courts below and award the plaintiff's claim for Rs. 300, and direct that the same be recovered from the defendant Lakshman personally, or from the mortgaged property, and also from the defendant Vaman personally, to the extent of the value of any of the mortgaged trees which may have been cut down after the land came into the possession of his father Narayan. Costs on defendants throughout."

It will thus be seen that the High Court considered that the plaintiff's lien upon the mortgaged property remained valid, though in execution he should be obliged to proceed, in the first instance, against any portion of the mortgaged property which might remain in the hands of the mortgagor before he proceeded against any of the property held by the defendant Vaman,—that is, it compelled the plaintiff to proceed against his mortgagor and such mortgagor's property before he proceeded against Vaman, the son of Narayan, who had purchased from Vishnu Gopal the auction-purchaser. The Court in that manner arranged or marshalled the assets available for the satisfaction of the original mortgage lien of the 3rd January, 1868.

In the present case, as pointed out by Mr. Justice Telang, there is no finding, or even allegation, that any injury will be occasioned [175] to the prior incumbrancer by his having to sell, in the first instance, the field which is not mortgaged to the appellant.

For the above reasons, I am of opinion that the view taken by Mr. Justice Telang is the correct one, and I concur in the form of the decree which he proposes should be made. Appellant to have his costs throughout.

Decree varied.