12 A. B. A. J., 441 (1926), "The Four Blood Groups in Evidence," 76 Solicitors' Jour., 138 (1932), "Bernstein Blood Test as Evidence," 66 Irish Law Times, 111 (1932).

In regard to whether there would be any objection to the introduction in evidence of the results of such a blood test, no Ohio decision has been discovered. The only case encountered bearing upon that point is a criminal bastardy action brought in Pennsylvania. Expert testimony based upon blood tests was given in evidence to show that the defendant could not have been the father of prosecutrix's child. The jury disregarded the evidence, found the defendant guilty, and the trial court sustained the verdict. The county court reversed the decision upon appeal and granted a new trial upon the ground that, in view of the uncontroverted expert testimony based on scientific knowledge, the verdict was not supported by the evidence. *Commonwealth* v. *Zamorelli*, 17 Pa. D. & C., 229 (1931).

In the ordinary case of this character, it would appear that no very substantial objection could be offered to the introduction of evidence of this nature. Consequently, an improvement is made possible in the conduct of cases of this character by the availability of a new type of evidence.

CHARLES C. SMITH.

RIGHT OF MORTGAGEE OF A SURETY TO COMPEL A PRIOR MORTGAGEE TO RESORT TO A PERSONAL REMEDY AGAINST HIS PRINCIPAL BEFORE APPROACHING PROPERTY OF THE SURETY MORTGAGED AS SECURITY

Charles A. Wheeler executed promisory notes to Ollie, Grover, and Floyd De Long. Charles E. Wheeler was surety on the notes; as security he executed a mortgage on property owned by him alone. Charles E. Wheeler subsequently executed a second mortgage on the same property to the defendant Rockey to secure the individual debt of Charles E. Wheeler. Plaintiff is the assignee of the notes and mortgage executed to the De Longs; she prays for an in rem foreclosure; no personal judgment is asked. Charles E. Wheeler died before the suit was instituted. His heirs and Rockey are the defendants. Rockey alone answered. He alleged that Charles E. Wheeler died insolvent, that insufficient funds will be realized from a sale of the property to satisfy both mortgages and that Charles A. Wheeler, the principal on plaintiff's notes, has property. He prayed that plaintiff be required to take a personal judgment against Charles A. Wheeler and levy on his property before resorting to the proceeds of the mortgaged land.

Held. The remedy of marshaling assets is not available when its application will delay or inconvenience the paramount incumbrances in collecting his debt. To secure relief under the doctrine of marshaling assets both funds must belong to the same debtor and the senior creditor must have a lien on both funds. *Parker* v. *Wheeler* et al. 47 Ohio App. 301 (Ohio Bar Aug. 27, 1934).

The remedy of marshaling securities rests on the equitable principle that a person having two funds to satisfy his claims shall not at his pleasure be able to defeat the claims of a party having but one fund. Pomeroy, Equity Jurisprudence 2nd Ed., vol. 5, pp. 5078. Being an equitable remedy it must be

exercised on equitable principles. Hence the requirements that there must be two tangible funds or pieces of property to which one party may resort and that he must have a lien on both funds or properties. *Creps* v. *Baird* 3 Ohio St. 277 (1954), *Kellogg* v. *Chicago R. Co.* 3 Ohio Dec. Rep. 300; 26 Ohio Jur. 100, 103. It would be inequitable to compel a lien holder to resort to a mere chose in action, a personal remedy against the debtor, or to pursue a course which would delay or inconvenience him merely to protect a subsequent lien holder who has taken an imperfect security. These principles fully support the result reached in *Parker* v. *Wheeler*, supra. If the court had rested its decision solely on these grounds no fault would be found with the case; but the court attempts to support the decision on other principles more open to question.

The rule is often broadly stated that assets will be marshalled only among the creditors of a common debtor. As so stated it is usually invoked to frustrate the attempt of some creditors of a common debtor to compel other creditors, who have recourse to both the debtor and a surety, to fall back upon the surety. In such a case the rule is obviously equitable. The surety has an equitable right, now reenforced by statute, to have his principal's property applied to the satisfaction of the debt to the exoneration of the surety's own. Furthermore a creditor seeking to compel resort to the surety would ultimately be in no better position. The creditor desiring such a course would be a later, imperfectly secured incumbrancer. If the surety were compelled to pay the debt he would be entitled to be subrogated to all the rights against his principal held by those creditors to whom he made payment. G. C. 12194. By virtue of this subrogation the surety's rights would be superior to those of the later incumbrancer who would be in the same position as if no report to the surety had been compelled. Both the surety and the prior incumbrancer would be put to inconvenience without any benefit accruing to the later incumbrancer. *Mason* v. *Hull* et al. 55 Ohio St. 256 at 274, 45 N. E. (1896).

The great Lord Eldon discusses the doctrine of marshalling assets in *Ex parte Kendal* 1 Rose 71, 17 Ves. Jr. 514 (1811). He recognizes the general rule that usually both funds must belong to a common debtor, but he also recognizes an important qualification of the rule. At page 520 in 17 Vesey Jr. he says, "It was never said, that, if I have a demand against A and B, a creditor of B shall compel me to go against A, without more; as, if B himself could insist, that A ought to pay in the first instance; as in the ordinary case of drawer and acceptor or principal and surety; to the intent that all the obligations, arising out of these complicated relations may be satisfied: but, if I have a demand against both, the creditors of B have no right to compel me to seek payment from A, if not founded on some equity, giving B the right for his own sake to compel me to seek payment from A." The exception so stated is within the spirit of the rule; marshaling should be permitted only where it was just and equitable that one debtor should exonerate the other. There is nothing in *Mason* v. *Hull*, supra, in conflict with this exception. That case rests on the ground that a subsequent lienholder cannot require a paramount judgment creditor to first exhaust the land belonging to a surety on which the judgment is a lien.

The exception has been recognized in this country In *Huston's Appeal* 69 Pa. 485 (1871) it was held that if one of two joint debtors is primarily

liable, marshaling may be enforced for the benefit of the creditors of him who is only secondarily liable. The court in *Hodges* v. *Hickey* 67 Miss. 715, 7 So. 404 (1890) stated the general rule that equity will marshal only where parties are creditors of the same debtor but it recognized the exception that where independent equities exist giving rise to a duty on the part of one debtor to pay in exoneration of another, the court will enforce this duty by subjecting the fund of the principal debtor.

The same principles have been applied to cases of in rem rights against land. In *Blanchard* v. *Naguin* 116 La. 806, 41 So. 99 (1906) a mortgage was made covering two pieces of property; the entire debt was owed by one mortgagor. The court held that the property of the other could not be made to contribute to payment unless the proceeds of the sale of the first proved insufficient to satisfy the mortgage. The mortgagee was allowed to seize both tracts but the mortgagor not owing the debt could demand the sale of the other tract if sufficient to satisfy the mortgage.

In *Ginnipiac Brewing Co.* v. *Fitzgibbons* 73 Conn. 196, 47 Att. 128 (1900) the holder of a judgment against a husband who had conveyed his property to his wife by a deed voidable by his creditors, was allowed to compel a mortgagee of this property and of property owned by the wife alone but covered by the same mortgage, to resort in the first instance to the land of the wife.

In the light of these cases and others slightly less in point, the unqualified statement in *Parker* v. *Wheeler* that both funds must belong to the same debtor appears erroneous, particularly as applied to the facts of this case. The mortgagor was a surety; he was entitled to exoneration against his principal. In the absence of the other factors in the case Rockey as a creditor of the surety would be entitled to claim this right of exoneration and compel the plaintiff to exhaust the fund of the principal. The case is clearly within the exception to the rule. The ultimate result of the case, that Rockey is not entitled to a marshaling of assets, is supportable on the major part of the court's reasoning. The plaintiff would be unreasonably delayed and inconvenienced by being required to pursue his personal remedy against Charles E. Wheeler instead of his easier in rem right against the mortgaged property. Under the doctrine of marshaling assets there are not two funds to which plaintiff has recourse. For that doctrine there must be tangible property of some kind; a mere chose in action such as the personal liability of a debtor is not such a fund. 26 Ohio Jur. 103. But the general rule that both funds must belong to the same debtor has no application to the case.

ANGUS M. HOLMES.

INSURANCE COMPANY'S RIGHT TO TERMINATE NON-EXCLUSIVE AGENCY CONTRACT

Weisant had been an agent for the defendant insurance company in the city of Youngstown for several years and on November 17, 1929, was appointed district agent. The contract between the parties provided that the company might terminate the agency upon Weisant's failure to write $150,000 worth of paid-for insurance annually; also that Weisant should receive renewal