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Circuity of Lien--A Problem in Priorities

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CIRCUITY OF LIEN—A PROBLEM IN PRIORITIES

By CARVILLE D. BENSON, JR.[*]

PART I. PRESENT METHODS OF DISTRIBUTION

STATEMENT OF THE PROBLEM.—The problem to be considered
arises in the distribution of a fund in cases where the lien first
in point of time is postponed for some reason to one or more of
the later liens, and the fund is not large enough to pay all of the
lienholders in full. This happens, for example, if land is mort-
gaged to A, who fails to record his mortgage; and later the land
is mortgaged to B, who records his mortgage but has notice of
A's mortgage; and still later the land is mortgaged to C, who
records his mortgage but has no notice of A's mortgage. Under
the prevailing type of recording statute, C's mortgage is prior to
A's, and so we have the circuity of lien,—A is prior to B, B is
prior to C, and C is prior to A. Under various statutory pro-
visions, the same situation may arise in other ways and with
respect to more than three liens.[1]

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[*]Associate Professor of Law, The George Washington University Law
School, Washington, D. C.
The writer is deeply indebted to his brother, Lieut. Wm. Howard Ben-
son, U. S. N., who has actively participated at all stages in the preparation
of this article.

[1]The following examples may be noted:

(1) Unrecorded deed of trust, recorded deed of trust, judgment. Neff's
Adm'r v. Newman, (1928) 150 Va. 203, 142 S. E. 389.

(2) Judgments not docketed, judgments docketed, trust deed. Hill v.
Rixey, (1875) 26 Gratt. (Va.) 72.

(3) Mortgage omitting part of land by mistake, mortgage of land
to one with notice of mistake, attachment without notice of mistake. Good-
bar & Co. v. Dunn, (1884) 61 Miss. 618.

(4) Unrecorded purchase money mortgage, mechanics' liens, recorded
mortgage. Miller v. Stoddard, (1893) 54 Minn. 486, 56 N. W. 131. See
note, (1926) 36 Yale L. J. 129, 134.

(5) Mortgages not re-filed, mortgage re-filed with notice, mortgage
without notice. Day v. Munson, (1863) 14 Ohio St. 488.

(6) Judgment without execution, mortgage, judgments on which exe-
cutions have been taken out. Clement v. Kaighn, (1862) 15 N. J. Eq. 47.

(7) Mortgage not certified, judgments on debts incurred prior to the
mortgage, judgments on debts incurred after the mortgage. Dyson v.
Simmons, (1877) 48 Md. 207.

(8) Federal taxes not certified, state taxes, mortgage, judgments. Fer-
ris v. Chic-Mint Gum Co., (1924) 14 Del. Ch. 232, 124 Atl. 577.
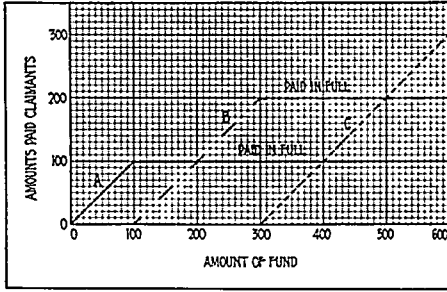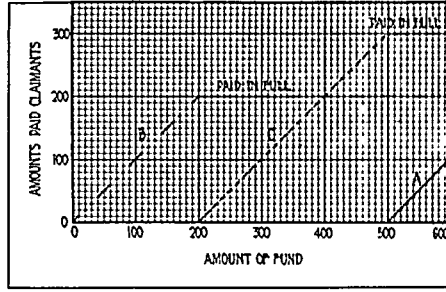
CHART 1.   Pennsylvania Method
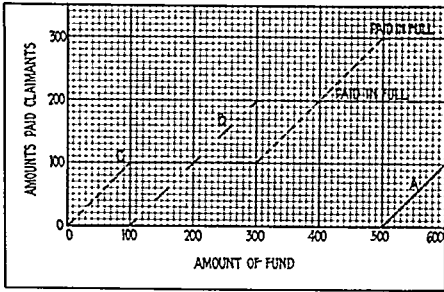

CHART 2.   New Jersey Method

CHART 3.   Bacon v. Van Schoonhoven Method
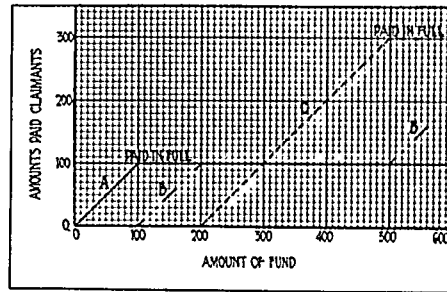

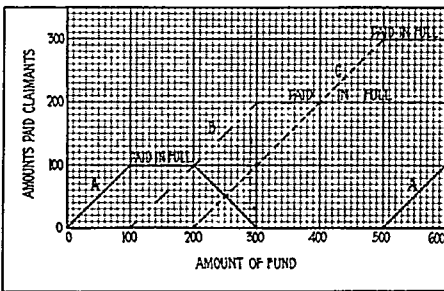CHART 4.   Goodbar & Co. v. Dunn Method
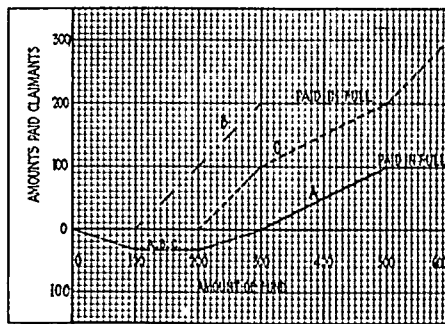

CHART 5.   Day v. Munson Method

CHART 6.   Proposed Method

We shall not consider the problem of the determination of the order of the liens in a given case but shall consider only the problem of the distribution of the fund after the order of the liens has been determined.

The courts of different states have worked out five methods of distribution of the fund in cases of circuity of lien. Before examining these methods, however, let us look at some of the risks assumed by the lienholders in the case of circuity of lien resulting from a failure of the first mortgagee to record. A, upon making his advance, acquires a first mortgage. Due to his failure to record, however, his expectancy of a preferred position may not be realized. B, who has actual notice of A's mortgage at the time he makes his advance, assumes the risk of postponement to it. C, who has notice of B's mortgage at the time he makes his advance, assumes the risk of postponement to it. But C has no notice of A's unrecorded mortgage. He does not contemplate being postponed to it, and the recording act operates to sustain him. C's mortgage becomes prior to A's. Thus, the expectancy of A to have a first lien is not realized, but the result is proper in view of policy considerations as to recording.[2]

Let us now examine briefly the present methods of distribution. For purposes of discussion we shall call the lienholders "claimants." Let A's claim be first in point of time, B's claim be second, and C's claim be third.

PENNSYLVANIA METHOD.—In Pennsylvania, the fund is applied first to the payment of A's claim, then to the payment of B's claim, and then to the payment of C's claim.[3]

The reasoning of the court can be stated simply. A is prior to B, who is prior to C.[4]

This method of distribution operates to give A an unwarranted advantage: the priority of C's claim is disregarded and A is paid first. B is dealt with fairly: the fund is applied to the payment of his claim after A's prior claim has been paid. C is treated unfairly: he is not paid until after both A and B have been paid in full even though his claim is prior to A's.

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[2]To be sure, the risks assumed will differ as to different types of liens, but the above situation is typical.

[3]Wilcocks v. Waln, (1824) 10 Serg. & R. (Pa.) 380; Manufacturers' & Mechanics' Bk. v. Bank of Pa., (1844) 7 Watts & S. (Pa.) 335; Thomas's Appeal, (1871) 69 Pa. St. 120; Miller's Appeal, (1888) 122 Pa. St. 95, 15 Atl. 672.

[4]Thomas's Appeal, (1871) 69 Pa. St. 120, 122.

The application of this method to a simple case, in which A's claim is $100, B's claim is $200, and C's claim is $300, is illustrated by Chart 1. The chart represents in graphic form the amounts that A, B and C would receive in the distribution of any given fund from zero to $600,—the sum of the claims. Thus, if the fund is $200, A receives payment in full, $100; B receives $100; and C does not receive anything. If the fund is $500, A receives payment in full, $100; B receives payment in full, $200; and C receives $200.

Similar charts of the same example will be used in the discussion of the other methods of distribution.

NEW JERSEY METHOD.—In New Jersey, the fund is applied first to the payment of B's claim, then to the payment of C's claim, and then to the payment of A's claim.[5]

Here A is postponed to both B and C because of his laches.[6]

It appears that this method of distribution gives B an unwarranted advantage: the priority of A's claim is disregarded and B is paid first. C is dealt with fairly: the fund is applied to the payment of his claim after B's prior claim has been paid. A is treated unfairly: he is not paid until after both B and C have been paid in full even though his claim is prior to B's.[7]

Chart 2 shows that if the fund is $200, B receives all of it, payment in full. If the fund is $500, A does not receive anything; B receives payment in full, $200; and C receives payment in full, $300.

BACON V. VAN SCHOONHOVEN METHOD.—In *Bacon v. Van Schoonhoven*,[8] the New York court applied the following method

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[5]Clement v. Kaighn, (1862) 15 N. J. Eq. 47; Andrus v. Burke, (1901) 61 N. J. Eq. 297, 48 Atl. 228; Meeker v. Warren, (1904) 66 N. J. Eq. 146, 57 Atl. 421.

The same method was employed in Hill v. Rixey, (1875) 26 Gratt. (Va.) 72; Gurnee v. Johnson's Ex., (1883) 77 Va. 712; Renich v. Ludington, (1878) 14 W. Va. 367; McClaskey & Crim v. O'Brien, (1879) 16 W. Va. 791; and Ferris v. Chic-Mint Gum Co., (1924) 14 Del. Ch. 232, 124 Atl. 577.

[6]Clement v. Kaighn, (1862) 15 N. J. Eq. 47, 58, 59.

[7]The method is applied, but criticised, by Pitney, V. C., in Andrus v. Burke, (1901) 61 N. J. Eq. 297, 48 Atl. 228. See Hoag v. Sayre, (1881) 33 N. J. Eq. 552, infra note 12.

[8](1879) 19 Hun 158; aff'd (1882) 87 N. Y. 446.

The same method was employed in a recent Virginia case, Neff's Adm'r v. Newman, (1928) 150 Va. 203, 142 S. E. 389 (criticised in (1928) 15 Va. L. Rev. 90) ; but the court applied the New Jersey method in earlier cases. See supra note 5.

Ohio now seems to use this method. See infra note 15.

It was used in Miller v. Stoddard, (1893) 54 Minn. 486, 56 N. W. 131. See infra note 11.

in the distribution of the fund: (1) Deduct from the fund the amount of A's claim and apply it to the payment of C's claim, and then to the payment of A's claim. (2) Apply the remainder of the fund first to the payment of B's claim; then to the payment of the unpaid balance, if any, on C's claim; and then to the payment of A's claim.

This method of distribution seems to proceed upon the theory that the problem of distribution arising from circuity of lien is identical with the problem of distribution arising from an agreement between A and C that C shall stand in the shoes of A.[9]

The two problems are quite distinct. Where there is circuity of lien and A has lost his priority as to C, he still retains his priority as to B. The only result of A's misfortune as far as C is concerned is that C stands in the position of a second mortgagee instead of in the position of a third mortgagee,—there is only one prior claim, B's. Nothing has happened to put C ahead of B and into A's shoes as in the case where we have an express agreement.[10]

It is submitted that this method of distribution, which is applicable if there has been an express agreement,[11] is not applicable to a case of circuity of lien.[12] In the latter type of case, it operates

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[9]Hoag v. Sayre, (1881) 33 N. J. Eq. 552, 561; see criticism by Dixon, J., dissenting, at 562. See infra note 12.

Several articles on this subject are based upon the same approach. Tucker, The Deeds of Trust Puzzle, (1895) 1 Va. L. Reg. 4 (see (1895) 1 Va. L. Reg. 254, The Deeds of Trust Puzzle—A Reply, by J. B. Moon), White, A Problem in Priorities, (1926) 25 Ohio L. Bull. & Rep. 116; note, The Three Cornered Priorities Puzzle, (1922) 8 Va. L. Rev. 550.

[10]Such an agreement is called by various names: "waiver or priority," "subordination agreement," "subrogation agreement."

[11]C should be permitted to stand in the shoes of A and to apply the amount of A's claim first to the payment of his own claim and then to the payment of A's claim. B, then, should be permitted to have the remainder of the fund applied to the payment of his claim. The courts are not in accord as to the method of distribution from this point on. Wayne Int. Building & Loan Ass'n v. Moats, (1897) 149 Ind. 123, 48 N. E. 795; Malmgren v. Phinney, (1892) 50 Minn. 457, 52 N. W. 915 (in Miller v. Stoddard, (1893) 54 Minn. 486, 56 N. W. 131, a case of circuity of lien, the court applied the same method); Albert & Kernahan, Inc. v. Franklin Arms, Inc., (1929) 104 N. J. Eq. 446, 146 Atl. 213; Fidelity Union Title & Mortgage Guaranty Co. v. Magnifico, (1930) 106 N. J. Eq. 559, 151 Atl. 499; Raleigh Nat'l Bank v. Moore, (1886) 94 N. C. 734.

[12]In Hoag v. Sayre, (1881) 33 N. J. Eq. 552, reversing Sayre v. Hewes, (1880) 32 N. J. Eq. 652, the court purported to follow Clement v. Kaighn, (1862) 15 N. J. Eq. 47, supra note 5, in a case presenting a variation of the problem. The claimants stood in the following order: A prior to B, B and C concurrent, C prior to A. The court deducted from the fund the amount of A's claim and applied it to the payment of C, and then applied the remainder of the fund to the payment of B and C, pari passu. It

unjustly as to A in that his claim is postponed to the claims of B and C in most cases. In the cases where C's claim is less than A's claim, A will receive the part of his claim that is not needed to pay C, but he will not receive the rest of it until after B has been paid. B is dealt with fairly: the fund is applied to the payment of his claim after the amount of A's claim has been deducted. C is given an unwarranted advantage.

From Chart 3 we see that if the fund is $200, A does not receive anything; B receives $100; and C receives $100. If the fund is $500, A does not receive anything; B receives payment in full, $200; and C receives payment in full, $300.

GOODBAR & CO. v. DUNN METHOD.—In *Goodbar & Co. v. Dunn*,[13] the Mississippi court applied the following method in the distribution of the fund: (1) Deduct from the fund the amount of B's claim and apply it to the payment of A's claim, and then to the payment of B's claim. (2) Apply the remainder of the fund first to the payment of C's claim; then to the payment of A's claim; and then to the payment of B's claim.

It seems that this method of distribution is based upon the theory that C should be kept in his original position and that between A and B, A should come first.[14]

This method operates to give A an unwarranted advantage:

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is submitted that this is the Bacon v. Van Schoonhoven method,—C, who is prior to A, is permitted to stand in the shoes of A, and the remainder of the fund is applied to the payment of B and C in the order of their relative positions (here they are concurrent). Clearly, it is not the method applied in Clement v. Kaighn,—where A is disregarded at first and the fund is applied to the payment of B and C according to their relative positions, and then to the payment of A. In Andrus v. Burke, (1901) 61 N. J. Eq. 297, 48 Atl. 228, and Meeker v. Warren, (1904) 66 N. J. Eq. 146, 57 Atl. 421, supra note 5, cases on all fours with Clement v. Kaighn, the court of chancery considered Hoag v. Sayre as affirming the method applied in Clement v. Kaighn, and applied the Clement v. Kaighn method. Three later cases approve Hoag v. Sayre as giving the method of distribution in cases where there had been waivers of priority: Albert & Kernahan, Inc., v. Franklin Arms, Inc., (1929) 104 N. J. Eq. 446, 146 Atl. 213; Thirteenth Ward Building & Loan Ass'n v. Kanter, (1929) 105 N. J. Eq. 338, 147 Atl. 809; Fidelity Union Title & Mortgage Guaranty Co. v. Magnifico, (1930) 106 N. J. Eq. 559, 151 Atl. 499. In the last case, the syllabus by the court states the method applied in Hoag v. Sayre without any qualification, but it is expressly stated in the case that there was a waiver of priority. In Vanderhoff v. Wasco, (1932) 109 N. J. Eq. 463, 158 Atl. 323, a case involving both waiver of priority and circuity of lien, the court purported to follow Hoag v. Sayre but made an unexplained departure from it.

[13](1855) 61 Miss. 618.
This method was used in Dyson v. Simmons, (1877) 48 Md. 207, and Porter v. Ourado, (1879) 51 Neb. 510, 71 N. W. 52.

[14]Goodbar & Co. v. Dunn, (1855) 61 Miss. 618, 624.

A is paid first even though C's claim is prior to A's claim. It operates to the injury of B in that his claim is postponed to the claims of A and C in most cases. In the cases where A's claim is less than B's claim, B will get the part of his claim that is not needed for the payment of A's claim, but he will not get the balance of his claim until after C is paid. The method works fairly as to C: the fund is applied to the payment of his claim after the amount of B's claim has been deducted.

Chart 4 shows that if the fund is $200, A receives payment in full, $100; B receives $100; and C does not receive anything. If the fund is $500, A receives payment in full; $100; B receives $100; and C receives payment in full, $300.

DAY V. MUNSON METHOD.—In *Day v. Munson*,[15] the Ohio court applied the following method in the distribution of the fund: (1) Deduct from the fund the amount of A's claim, and apply the remainder of the fund to the payment of B's claim. (2) Deduct from the fund the amount of B's claim, and apply the remainder of the fund to the payment of C's claim. (3) After the payment of the above amounts to B and C, respectively, apply the remainder of the fund to the payment of A's claim.

This method of distribution seems to be based upon the theory that after B and C have been paid as junior lienholders, A should have the remainder of the fund applied to the payment of his claim because, in fact, he is first.[16]

It appears that this method is objectionable as to A. In some cases it works to his advantage, in other cases to his disadvantage. A is a junior lienholder, just as B and C are junior lienholders, and he should be permitted to share in the distribution only as they are. There is no objection to the treatment of B and C.

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[15](1863) 14 Ohio St. 488.

The same method was favored by Dixon, J., dissenting, in Hoag v. Sayre, (1881) 33 N. J. Eq. 552; and by Pitney, V. C., in Andrus v. Burke, (1901) 61 N. J. Eq. 297, 48 Atl. 228.

Ohio has not applied the above method in later cases, but seems to have favored the method of Bacon v. Van Schoonhoven. See Babbett v. Morgan, (1877) 31 Ohio St. 273; Investment Co. v. Johnson, (1900) 10 Ohio C. D. 752; Walbridge v. Barrett, (1901) 11 Ohio C. D. 634; Donnelly v. Lulfs, (1918) 12 Ohio App. 305. In Campbell v. Sidwell, (1899) 61 Ohio St. 179, 55 N. E. 609, the court states that the amount of C's claim should be applied to the payment of B's claim and then to C's claim. It does not state what is to be done next. For a review of the Ohio decisions, see C. C. White, A Problem in Priorities, (1926) 25 Ohio L. Bull. & Rep. 116.

[16]Day v. Munson, (1863) 14 Ohio St. 488, 493; Dixon, J., dissenting, in Hoag v. Sayre, (1881) 33 N. J. Eq. 552, 563.

Thus, we see from Chart 5 that if the fund is $200, A receives payment in full, $100; B receives $100; and C does not receive anything. If the fund is $500, A does not receive anything; B receives payment in full, $200; and C receives payment in full, $300.

SUMMARY.—The methods of distribution outlined above may be summarized as follows:

In the Pennsylvania method and the *Bacon v. Van Schoonhoven* method, B is treated as a junior lienholder and adjustments are made as to A and C. See Charts 1 and 3.

In the New Jersey method and the *Goodbar & Co. v. Dunn* method, C is treated as a junior lienholder and adjustments are made as to A and B. See Charts 2 and 4.

In the *Day v. Munson* method, B and C are treated as junior lienholders and adjustments are made as to A. Compare the distribution to B on Chart 5 with that on Charts 1 and 3; and compare the distribution to C on Chart 5 with that on Charts 2 and 4.

It is submitted that no one of these methods provides a just distribution among the claimants with respect to all possible variations of the fund. This failure is due to the fact that, in every case, one of the claimants is treated as a senior lienholder even though there is a claim prior to his.

PART II. PROPOSED METHOD OF DISTRIBUTION

1. General Principles

FUNDAMENTAL PROPOSITIONS.—The proposed method of distribution is merely an elaboration of the proposition taken to be fundamental, namely:

In cases of circuity of lien, each and every claimant stands in the position of a junior lienholder.[17]

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[17]This proposition and the following discussion refer only to the claimants who are affected by the circuity of lien in a given case.

The cases in which there is circuity of lien may be grouped as follows:

(1) Where no claim is prior to the first claim, as where the last claim is prior to the second claim.

(2) Where the last claim is not prior to any claim, as where the next to the last claim is prior to the first claim.

(3) Where the last claim is prior to the first claim.

(4) Where there is more than one circuity of lien, as where the next to the last claim is prior to the first claim, and the last claim is prior to the second claim.

Innumerable arrangements of the claims are possible.

In the first group of cases, the first claimant is to be paid and forgotten. The problem then is as to the distribution of the rest of the fund among the remaining claimants. Vanderhoff v. Wasco, (1932) 109 N. J.

It is immaterial how many claimants there are or how involved the order of the claims may be, there can be no one in the position of a first, or senior, lienholder. As to each one's claim there is at least one prior claim. The circuity of lien operates to throw all the claimants into one class,—that of junior lienholders,—and to make the original order of priority immaterial except for purposes of determining the sum of the amounts of the claims prior to each claim. Therefore, the problem of the distribution of a fund in all cases of circuity of lien is the same, namely, the adjustment of the rights of various junior lienholders.

In a case involving a normal succession of liens, a junior lienholder is entitled to have his claim paid out of the part of the fund remaining after all the claims prior to his have been paid. It is submitted that the rights of the junior lienholders are the same in a case of circuity of lien, namely:

Each and every claimant is entitled to have applied to the payment of his claim the part of the fund remaining after an amount equal to the sum of the claims prior to his has been set aside.

CLASSIFICATION OF CASES.—It appears at once that a division of the cases is necessary, because the fund in a given case may or may not be sufficient to pay all the amounts to which the claimants are entitled as junior lienholders. The possible types of cases may be seen by looking at the case we have considered in discussing the present methods of distribution. It may be stated as follows:

> Prior to A's $100 claim is C's $300 claim.
>
> Prior to B's $200 claim is A's $100 claim.
>
> Prior to C's $300 claim is B's $200 claim.

(1) If the fund to be distributed is $75, no claimant is entitled to any of it as a junior lienholder. Prior to each claim is a claim which is greater than the amount of the fund.

Eq. 463, 158 Atl. 323.

In the second group of cases, the last claimant is to be disregarded if the fund is less than the sum of the claims prior to the last claim. All the preceding claims are prior to his, and he should not receive any of the fund until they have all been paid in full. The circuity of lien does not improve his position. Wilcocks v. Waln, (1824) 10 Serg. & R. (Pa.) 380; Day v. Munson, (1863) 14 Ohio St. 488; Vanderhoff v. Wasco, (1932) 109 N. J. Eq. 463, 158 Atl. 323.

In the third and fourth groups of cases, all the claimants are involved in the problem of the distribution of the fund.

There is a variation of the problem in the cases in which two or more of the liens are concurrent. This type of case will be considered later. See Appendix B.

(2) If the fund is $240, A is not entitled to have any of the fund applied to the payment of his claim. The claim prior to his is $300.

B is entitled to have applied to the payment of his claim $240 less $100 (the amount of the prior claim), or $140.

C is entitled to have applied to the payment of his claim $240 less $200 (the amount of the prior claim), or $40.

The sum of $140 and $40 is $180, which leaves $60 of the fund undistributed.

(3) If the fund is $300, A is not entitled to have any of the fund applied to the payment of his claim. The claim prior to his is equal to the amount of the fund.

B is entitled to have applied to the payment of his claim $300 less $100, or $200, the full amount of his claim.

C is entitled to have applied to the payment of his claim $300 less $200, or $100.

The sum of $200 and $100 is $300, which is just equal to the amount of the fund.

(4) If the fund is $400, A is entitled to have applied to the payment of his claim $400 less $300, or $100.

B is entitled to have applied to the payment of his claim $400 less $100, or $300. But B's claim only amounts to $200.

C is entitled to have applied to the payment of his claim $400 less $200, or $200.

The sum of $100, $200, and $200 is $500, an amount greater than the fund.

Consequently, in a given case the values of the different claims will depend upon the amount of the fund to be distributed; and the fund may range from zero to an amount equal to the sum of the claims. Thus, depending upon the amount of the fund in a given case, we have the following classes of cases:

Class 1. Where the fund is so small that no claimant is entitled to any of it as a junior lienholder.

Class 2. Where the fund is more than sufficient to pay the amounts to which the claimants are entitled as junior lienholders.

Class 3. Where the fund is just sufficient to pay the amounts to which the claimants are entitled as junior lienholders.

Class 4. Where the fund is not sufficient to pay the amounts to which the claimants are entitled as junior lienholders.

2. Proposed Method of Distribution

CLASS 1.—If the fund is so small that no claimant is entitled to any of it as a junior lienholder, the fund is applied equally to the payment of all the claims.

Thus, if the fund is $75, A, B, and C receive $25 apiece.

In this type of case the circuity of lien causes a benefit which was not contemplated. No claimant is entitled to any of the fund as a junior lienholder, yet the claimants are entitled, collectively, to have the money applied to the payment of their claims. It is possible to put different values upon the three claims and to apportion the fund accordingly, but such an evaluation does not seem proper or necessary. No claimant can say that he is in a stronger position than the others with respect to such a fund. The fund should be divided equally among all the claimants. If such a division would more than pay any claim in full, the excess would be applied to the payment of the other claims.[18]

If the fund is any amount from zero to $100, the case falls in this class. See Chart 6, where the complete distribution of all possible funds is indicated. The line below the x axis indicates the distribution of the part of the fund to which no claimant is entitled as a junior lienholder, and the lines above the x axis indicate the amounts paid to the claimants as junior lienholders. With the fund at any given amount up to the sum of the claims, each claimant is entitled to the amount indicated above the x axis plus the amount indicated below the x axis.

CLASS 2.—If the fund is more than sufficient to pay the

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[18]If it is insisted, however, that a finer adjustment of the rights of the junior lienholders is needed, the following is suggested:

Set a relative value upon each claim and divide the amount to which no claimant is entitled as a junior lienholder (we shall call it the "remainder") according to the relative values of the various claims. One basis of evaluation is: the relative value of each claim is equal to the amount of the claim divided by the amount of the fund that would be necessary to pay the claim in full (the sum of the claim and the prior claims).

Thus, if A has a $200 claim and B has a $100 claim, the prior claims being $100 and $200, respectively, the value of A's claim is to the value of B's claim as $\dfrac{200}{200+100}$ is to $\dfrac{100}{100+200}$, or as $\dfrac{2}{3}$ is to $\dfrac{1}{3}$, or as 2 is to 1.

Each claimant needs a fund of $300 before he can be paid in full. With the fund at $300, A would be entitled to $200 and B would be entitled to $100. Or, A's claim has twice the value of B's.

Such an evaluation is applicable to all remainders, even though part payment of some of the claims has been made. In such cases it is necessary to make the evaluation upon the basis of the amounts still unpaid on the claims.

amounts to which the claimants are entitled as junior lienholders, the claimants are paid the amounts to which they are so entitled plus an equal share in the remainder. This is so as to funds from $100 to $299.99. See Chart 6.

Thus, if the fund is $240, B receives $140 as a junior lienholder, and C receives $40 as a junior lienholder; and A, B, and C divide equally the $60 remainder. The complete distribution is as follows: A receives $20, B receives $160, and C receives $60, a total of $240.

In this way full recognition is given to the rights of each claimant. A is not entitled to anything as a junior lienholder because the claim prior to his is greater than the amount of the fund. B and C are entitled to amounts as junior lienholders and the fund is sufficient to pay them. No one can claim a preferred position as to the $60 remainder of the fund, and it is applied equally to the payment of their claims, just as was done in the preceding type of case.[19]

CLASS 3.—If the fund is just sufficient to pay the amounts to which the claimants are entitled as junior lienholders, it is so applied. This is so as to a $300 fund. See Chart 6.

Thus, if the fund is $300, B receives $200, payment in full, and C receives $100. The fund is just sufficient to pay these amounts. A cannot complain as he is not entitled to receive any payment on his claim until the fund is greater than $300, the amount of the claim prior to his.

CLASS 4.—In this type of case the fund is not sufficient to pay all the amounts to which the claimants are entitled as junior lienholders. This occurs as to all funds greater than $300. See Chart 6.

Thus, if the fund is $400, A demands $100 as a junior lienholder, B demands $200, and C demands $200, but the sum of these amounts is $100 greater than the amount of the fund.

It is submitted that each claimant has an undisputed right to the amount claimed. Each one is a bona fide purchaser to the

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[19]In the type of case under consideration the application of the fund to the payment of the claimants as junior lienholders will pay a part or all of some of the claims and leave undistributed a part of the fund, which we have called the remainder. For the purposes of this note we shall call the amounts still unpaid on the claims the "adjusted claims." If the sum of the adjusted claims prior to any adjusted claim is always equal to or greater than the amount of the remainder in this type of case, no claimant will be entitled to any of the remainder as a junior lienholder. That this is so may be shown algebraically.

extent of his claim. Each one contemplated having a certain portion of the fund available for the payment of his claim. Nevertheless, the circuity of lien operates to prevent the realization of these expectancies, and one or more of the claimants must bear a loss which was not contemplated. It is proposed to make the apportionment of the loss depend solely upon the positions of the claimants as junior lienholders,—to make it depend upon the time when each one would be entitled to participate in the distribution of the fund if it were built up dollar by dollar.

We have seen that if the fund were $300 or less, there would be no conflict of interests; each claimant would get all that he was entitled to. If the fund is any amount greater than $300, there is a conflict of interests; there is not enough money to pay the amounts to which the claimants are entitled. The loss may be distributed fairly by considering the fund as if composed of two parts, namely, the part as to which there is no conflict of interests (from zero to $300), and the part as to which there is a conflict of interests (from $300 to $400); the two parts being distributed separately among the claimants entitled to participate in their distribution.

The operation of such a method is indicated by Chart 6.[20]

[20]*Distribution by portions.* In the distribution of funds for cases in Class 4, we have the choice of two methods which give exactly the same result. In the text above is given the method based upon a division of the fund into two parts. The other method is to distribute the fund by portions.

The fund in a given case may be considered as made up of portions such that for each portion the number of claimants is the same. Each portion is divided equally among the claimants entitled to share in its distribution and, at the same time, the first portion (as to which no claimant is entitled as a junior lienholder) is used, as long as it lasts, to pay the amounts to which the claimants are entitled as junior lienholders with respect to the succeeding portions, the portions being distributed in order. Any claimant that is paid in full drops out. See note 25, infra.

The application of this method to the case under discussion, with the fund at $400, is as follows:

The first portion of the fund is from zero to $100. No one is entitled to any of it as a junior lienholder.

The second portion is from $100 to $200. B has a right to have all of it applied to the payment of his claim. No other claimant has a right to participate in the distribution of this portion. Hence it is applied to the payment of B's claim.

The third portion is from $200 to $300. B and C have equal rights to have all of this portion, $100, applied to the payment of their respective claims. Obviously, the third portion is not sufficient to pay $100 to each of them, but as the first portion, zero to $100, is available to pay them, it should be so applied. B and C each receive $100. B is thus paid in full.

The fourth portion is from $300 to $400. Both A and C are entitled to have the $100 of this portion applied to the payment of their respective claims. To meet these demands we have only the $100 of the fourth portion;

In the distribution of the first $300 of the fund, B receives $200, payment in full, and C receives $100. In the distribution of the $100 from $300 to $400, A and C receive $50 apiece. The complete distribution is as indicated: A receives $50, B receives $200, payment in full, and C receives $150.[21]

DISCUSSION OF CHART 6.—It is submitted that Chart 6 demonstrates the fairness of the proposed method of distribution.

The line below the x axis shows that in the distribution of any remainder (the part of the fund as to which no claimant is entitled as a junior lienholder) each claimant shares equally.

The lines above the x axis show first, that in the application of the fund to the payment of the amounts to which the claimants are entitled as junior lienholders each and every claimant is treated as a junior lienholder,—each one begins to share in the distribution when, and only when, the fund exceeds the amount of the claim prior to his. They show secondly, that each junior lienholder is treated exactly the same,—the distribution conforms to a straight line function (that is, the rate of increase is constant and equal for all claimants at all times). Regardless of the amount of the fund, an increase of $1 in the fund causes an equal in-

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the first portion has been exhausted. Consequently, the available $100 is divided between A and C.

The complete distribution of the $400 fund is as follows: A receives $50 in the distribution of the fourth portion. B receives $100 in the distribution of the second portion and $100 in the distribution of the third, a total of $200,—the full amount of his claim. C receives $100 in the distribution of the third portion and $50 in the distribution of the fourth, a total of $150. The sum of $50, $200, and $150 is $400. See Chart 6.

[21]Two other methods of distributing the loss suggest themselves, namely:

(1) Apportion the fund among the claimants according to the amounts to which they are entitled as junior lienholders. See Kellogg, Priorities Puzzle Under Ship Mortgage Act, (1927) 2 Wash. L. Rev. 117.

(2) Apportion the fund according to the amounts of the fund available for the payment of the various amounts to which the claimants are entitled as junior lienholders.

These methods are objectionable because they do not effect a just distribution of the fund in the type of case under consideration. By the former method: A would get $43.75 more with the fund at $350 than he would get with the fund at $300, B would get $25 less, and C would get $31.25 more. By the latter method: A would get $38.89 more with the fund at $350 than he would get with the fund at $300, B would get $5.56 less, and C would get $16.67 more. In other words, B would get less *as a junior lienholder* with the fund at $350 than he would get with the fund at $300.

It is observed that under the proposed method A will get $20 if the fund is $240 but will get nothing if the fund is $300. Such a result is to be distinguished from the one just criticised, because A does not get anything *as a junior lienholder* until the fund exceeds $300. He gets a windfall of $20 if the fund is $240, and he is not in a position to complain if, under other circumstances, he does not get it.

crease in the amount received by each claimant who is entitled to that $1 as a junior lienholder.

PART III. WORKING OUTLINE OF PROPOSED METHOD OF DISTRIBUTION

INTRODUCTION.—As stated before, the proposed method of distribution is merely an elaboration of the proposition, that in all cases of circuity of lien, each and every claimant stands in the position of a junior lienholder.

To be sure, the details of the method of distribution were worked out with respect to the example under discussion, but the method is applicable to any case of circuity of lien for the same general features will be found, namely: As the fund is one amount or another, ranging from zero to the sum of the claims, (1) for low values, no claimant will be entitled to any of it as a junior lienholder, (2) for higher values, it will be more than sufficient to pay the amounts to which the claimants are entitled as junior lienholders, (3) for still higher values, it will be just sufficient to pay the amounts to which the claimants are entitled as junior lienholders, and (4) for still higher values, it will not be sufficient to pay all the amounts to which the claimants are entitled as junior lienholders.

CLASSIFICATION OF CASE.—First determine the class into which the case falls. This may be done as follows:

(1) Determine the amounts to which the claimants are entitled as junior lienholders, as follows:

    (a) Determine the sum of the claims prior to each claim.

    (b) As to each claimant, deduct the sum of the claims prior to his from the fund and, on paper, apply the excess of the fund to the payment of his claim.
    This will give the amount to which he is entitled as a junior lienholder. If no one is entitled to anything as a junior lienholder, the case falls in Class 1.

(2) Compute the sum of these amounts.

(3) Compare the sum of these amounts with the fund.

    (a) If the sum is less than the total amount of the fund, the case falls in Class 2.

    (b) If the sum is just equal to the total amount of the fund, the case falls in Class 3.

(c) If the sum is greater than the total amount of the fund, the case falls in Class 4.

DISTRIBUTION FOR CASES IN CLASS 1. — Divide the fund equally among all the claimants. If such a division would more than pay any claim in full, the excess should be applied to the payment of the other claims.[22]

DISTRIBUTION FOR CASES IN CLASS 2.—Pay each claimant the amount to which he is entitled as a junior lienholder. Divide the remainder of the fund equally among all the claimants. If such a division would more than pay any claim in full, the excess should be applied to the payment of the other claims.[23]

DISTRIBUTION FOR CASES IN CLASS 3.—Pay each claimant the amount to which he is entitled as a junior lienholder. This will exhaust the fund, the remainder is zero.[24]

DISTRIBUTION FOR CASES IN CLASS 4.[25]—Consider the fund as

[22]For example, see Appendix A, case 1.
[23]For example, see Appendix A, case 2.
[24]For example, see Appendix A, case 3.
[25]*Distribution by portions.*—The fund may be considered as made up of portions and the portions distributed among the claimants entitled to share in them. See supra note 20. The steps in the distribution are as follows:

(1) Determine the sum of the claims prior to each claim and arrange the sums in order, beginning with the smallest. Let P_a, P_b, P_c, etc. be the sums of the prior claims so arranged; let a, b, c, etc., respectively, be the claims to which they are prior; and let A, B, C, etc. be the corresponding claimants.

(2) Determine the portions of the fund. The first portion is from zero to an amount equal to P_a, the second portion is from an amount equal to P_a to an amount equal to P_b, the third portion is from an amount equal to P_b to an amount equal to P_c, and so forth, until the last portion is reached, which will have as its upper limit the total amount of the fund. See supra note 20 and Chart 6.

(3) Distribute the portions of the fund.

(a) Apply the second portion to the payment of A.

(b) Use the third portion and the first portion to pay A and B each the amount of the third portion.

(c) Use the fourth portion and any unused part of the first portion to pay A, B, and C each the amount of the fourth portion.

(d) Use the fifth and succeeding portions in like manner.

If, in the distribution of any portion, the first portion is used up, of course it will not be available for use in the distribution of the succeeding portions.

If the equal division of the money in any portion pays any claimant in full, he will drop out and will not be considered in the distribution of the succeeding portions.

If the equal division of the money in any portion is more than enough to pay any claimant in full, the part of the money not needed to pay him should be applied equally to the payment of the other claimants entitled to participate in the distribution of that portion, or if there are none, or if they have received the full amount of the portion, the unused amount should be considered as a part of the first portion and used as needed in the distribution of the succeeding portions.

made up of two amounts, (1) the amount which would constitute a Class 3 case and (2) the excess. Distribute the former amount according to the method given for cases in Class 3 and divide the latter amount among the claimants entitled to share in its distribution.[26] The steps in the distribution are as follows:

(1) Determine the amount which would constitute a Class 3 case. In other words, determine the amount of the fund at which the remainder is zero. If there is a succession of such amounts, determine the largest, that is, the upper limit of Class 3.[27] The determination of this amount is a process of trial and error.

    (a) In almost every case this amount is either an amount equal to one-half the sum of the claims or an amount equal to one of the sums of the prior claims.[28]

    (b) In the unusual case in which it is neither, it may be ascertained by plotting, but it is quicker in such a case to make the distribution by portions.[29]

(2) Distribute the part of the fund that comes within the limits of Class 3 as a separate fund, as if it were a Class 3 case. That is, determine the amounts of it to which the claimants are entitled as junior lienholders and pay them accordingly.

(3) Distribute the remaining portion of the fund as follows:

    (a) If, in a given case, the upper limit of Class 3 is equal to or greater than the largest sum of the prior claims, divide the remaining portion of the fund equally among the claimants who were not paid in full by the distribution of the first portion.[30]

    (b) In the unusual case where the upper limit of Class 3 is less than one or more of the sums of the prior claims:

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[26]For example, see Appendix A, case 4.

[27]The part of the fund that comes within the limits of Class 3 is always an amount at which the remainder is zero. In the above example, there is only one amount at which the remainder is zero, namely, $300. This is the usual situation, but in some cases the remainder is zero with respect to any amount between two points. For example, if the claims of A, B, and C are $100, $200, and $500, respectively, C being prior to A, the remainder is zero for all funds from $300 to $500. In such a case the upper limit of Class 3 is the largest amount of the fund at which the remainder is zero, namely, $500.

[28]In the case discussed in the text, it is $300, which is one-half the sum of the claims and also the amount of one of the prior claims. It is one-half the sum of the claims in the case discussed in Appendix A. It is the amount of one of the prior claims in the case in note 27, supra.

[29]See notes 20 and 25, supra.

[30]For examples, see note 27, supra, and Appendix A, case 4.

(i) Take the portion of the fund between the upper
limit of Class 3 and the next larger sum of the
prior claims and divide it equally among the claim-
ants entitled to share in its distribution.[31]

(ii) Take the portion of the fund to the next larger sum
of the prior claims, or, if there is none, to the total
amount of the fund and divide it equally among
the claimants who have not yet been paid in full.

APPENDIX

Appendix A. Application of the Proposed Method of Dis-
tribution to Manufacturers' & Mechanics' Bank v.
Bank of Pennsylvania

Let us apply the proposed method of distribution to an actual
case. We have chosen as a typical case, *Manufacturers' & Me-
chanics' Bank v. Bank of Pennsylvania.*[32]

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[31]We have to take this step because in such a case all the claimants
are not equally entitled to share in the rest of the fund. For example, if the
claims of A, B, C, and D, are $300, $400, $100, and $100 respectively, and
C and D are prior to A, we have the following situation:

Prior to A's $300 claim are the claims of C and D totaling $200.
Prior to B's $400 claim is A's $300 claim.
Prior to C's $100 claim is B's $400 claim.
Prior to D's $100 claim are the claims of B and C totaling $500.

Let the fund be $600. The upper limit of Class 3 is $450. With respect
to this $450 fund, the distribution is as follows:

A receives $450 — $200 = $250
B receives $450 — $300 = $150
C receives $450 — $400 = $ 50
D receives $450 — $500 = $ 0

Total $450

Normally, all of the claimants would share equally in the distribution
of the part of the fund from $450 to $600. Here, however, D is not en-
titled to share in the part of the fund from $450 to $500 because the sum
of the claims prior to his is $500. Hence the $50 from $450 to $500 is
divided equally among A, B, and C, and the $100 from $500 to $600 is
divided equally among A, B, C, and D.

The complete distribution of the $600 fund is as follows:

A receives $250.00 + $16.67 + $25.00 = $291.67
B receives $150.00 + $16.67 + $25.00 = $191.67
C receives $ 50.00 + $16.66 + $25.00 = $ 91.66
D receives .... $25.00 = $ 25.00

Total $600.00

[32]Supra, note 3.

In that case the claims were as follows:

Manufacturers' & Mechanics' Bank—mortgage..............$30,000.00

Bank of Pennsylvania—mortgage.................................... 25,000.00

Philadelphia Bank—judgment 6,730.40

J. & R. Elliott—judgment 1,579.15

West Branch Bank—judgment 15,495.00

Total amount of claims $78,804.55

The liens ranked in the order named except that the three judgments were prior to the first mortgage. There were other judgments of later date, the amounts of which were not given. As the fund to be distributed was less than $55,000.00, none of the judgment creditors received any of the fund by the distribution according to the Pennsylvania method, that is, the payment of the claims in the order in which they arose.

Let us indicate the claimants by A, B, C, D, and E; their respective claims by a, b, c, d, and e; and the sums of the prior claims by P_a, P_b, P_c, P_d, and P_e, respectively. We thus have:

A=M & M Bk.	a= 30,000.00	$P_a=$	c+d+e	=23,804.55
B=Bk. of Pa.	b= 25,000.00	$P_b=$	a	=30,000.00
C=Phila. Bk.	c= 6,730.40	$P_c=$	b	=25,000.00
D=Elliott	d= 1,579.15	$P_d=$	b+c	=31,730.40
E=W. B. Bk.	e= 15,495.00	$P_e=$	b+c+d	=33,309.55

We shall consider the case with respect to four funds to illustrate the four possible types of cases.

CASE 1. *Where the fund is so small that no claimant is entitled to any of it as a junior lienholder.*

Let the fund be $21,620.26.

By comparing the fund with the sums of the prior claims, we see that no claimant is entitled to any of it as a junior lienholder.

The fund should be applied equally to the payment of the five claims. One-fifth of 21,620.26 is 4,324.05.[33] As D's claim is only 1,579.15, there is an excess (4,324.05 — 1,579.15 = 2,744.90) available for distribution among the other four claimants. One-fourth of 2,744.90 is 686.22. The complete distribution is as follows:

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[33]Fractions of a cent are arbitrarily distributed.

A is paid.................4,324.06 + 686.22 = $5,010.28
B is paid.................4,324.05 + 686.23 = 5,010.28
C is paid.................4,324.05 + 686.22 = 5,010.27
D is paid in full ....1,579.15   = 1,579.15
E is paid.................4,324.05 + 686.23 = 5,010.28

　　　　Total $21,620.26

CASE 2. *Where the fund is more than sufficient to pay the amounts to which the claimants are entitled as junior lienholders.*

Let the fund be $32,843.60.

(a) Apply the fund (F) to the payment of the amounts to which the claimants are entitled as junior lienholders.

A is entitled to have applied to the payment of his claim: $F - P_a$ = 32,843.60 — 23,804.55 = 9,039.05. A will receive 9,039.05 on account.

B is entitled to have applied to the payment of his claim: $F - P_b$ = 32,843.60 — 30,000.00 = 2,843.60. B will receive 2,843.60 on account.

C is entitled to have applied to the payment of his claim: $F - P_c$ = 32,843.60 — 25,000.00 = 7,843.60. C will receive 6,730.40, the full amount of his claim.

D is entitled to have applied to the payment of his claim: $F - P_d$ = 32,843.60 — 31,730.40 = 1,113.20. D will receive 1,113.20 on account.

E is not entitled to have any of the fund applied to the payment of his claim at this time. The sum of the claims prior to his is 33,309.55, an amount greater than the fund.

The sum of the amounts paid to A, B, C, and D is 19,726.25. There is left 13,117.35 to be distributed as a remainder.

(b) Divide the remainder equally among A, B, D and E.

One-fourth of 13,117.35 is 3,279.34. A, B and E are each paid this amount; but D needs only 465.95 to be paid in full. The excess of his share (3,279.34 — 465.95 = 2,813.39) is divided equally among A, B and E, who each receive an additional 937.80. The complete distribution is as follows:

A is paid ....9,039.05 + 3,279.33 + 937.80 = $13,256.18
B is paid ....2,843.60 + 3,279.34 + 937.80 =   7,060.74
C is paid in full ....6,730.40 =   6.730.40
D is paid in full ....1,113.20 + 465.95 =   1,579.15
E is paid ....3,279.34 + 937.79 =   4,217.13

　　　　Total $32,843.60

Case 3. Where the fund is just sufficient to pay the amounts to which the claimants are entitled as junior lienholders.

Such a case would hardly occur in the problem under discussion, as it would occur only if the fund were one-half the sum of the claims, one-half of $78,804.55, or $39,402.27½. For purposes of computation, we shall retain the fractions of a cent.

Let the fund be $39,402.27½.

Apply the fund to the payment of the amounts to which the claimants are entitled as junior lienholders.

A is entitled to have applied to the payment of his claim: $F - P_a = 39,402.27½ - 23,804.55 = 15,597.72½$. A will receive 15,597.72½.

B is entitled to have applied to the payment of his claim: $F - P_b = 39,402.27½ - 30,000.00 = 9,402.27½$. B will receive 9,402.27½.

C is entitled to have applied to the payment of his claim: $F - P_c = 39,402.27½ - 25,000.00 = 14,402.27½$. C will receive 6,730.40, the full amount of his claim.

D is entitled to have applied to the payment of his claim: $F - P_d = 39,402.27½ - 31,730.40 = 7,671.87½$. D will receive 1,579.15, the full amount of his claim.

E is entitled to have applied to the payment of his claim: $F - P_e = 39,402.27½ - 33,309.55 = 6,092.72½$. E will receive 6,092.72½.

The distribution is as follows:

A is paid	$15,597.72½
B is paid	9,402.27½
C is paid in full	6,730.40
D is paid in full	1,579.15
E is paid	6,092.72½
Total	$39,402.27½

Case 4. Where the fund is not sufficient to pay the amounts to which the claimants are entitled as junior lienholders.

Let the fund be $70,476.17.

First distribute the amount of the fund that comes within the limits of Class 3 according to the method provided for cases in Class 3.

The distribution of that amount, as we have just worked it out in Case 3, is as follows:

A is paid ....$15,597.72½   Amount still due A is $14,402.27½
B is paid .... 9,402.27½   Amount still due B is 15,597.72½
C is paid in full 6,730.40
D is paid in full 1,579.15
E is paid .... 6,092.72½   Amount still due E is   9,402.27½

    Total ....$39,402.27½   Total $39,402.27½

Next, divide the remaining part of the fund equally among the claimants who have not been paid in full.

The remaining part of the fund is: 70,476.17 — 39,402.27½ = 31,073.89½.

This amount, which is less than the sum of the amounts still due upon the claims, should be applied equally to the payment of the claims of A, B, and E.

One-third of 31,073.89½ is 10,357.96½.

A and B are each paid 10,357.96½.

E, however, needs only 9,402.27½ to be paid in full. The excess of his share (10,357.96½ — 9,402.27½ = 955.69) is divided equally between A and B, who thus receive 477.84½ each.

The complete distribution is as follows:
A is paid ..15,597.72½ + 10,357.96½ + 477.84½ = $26,433.53½
B is paid ....9,402.27½ + 10,357.96½ + 477.84½ = 20,238.08½
C is paid in full ....6,730.40 =   6,730.40
D is paid in full ....1,579.15 =   1,579.15
E is paid in full ....6,092.72½ + 9,402.27½ = 15,495.00

    Total $70,476.17

Appendix B.   Concurrent Liens

A variation of the problem occurs where two or more liens are concurrent. This occurs in Hoag v. Sayre[34] and Investment Co. v. Johnson.[35]

There are two types of cases. On the one hand, a lien though concurrent with another may still be a junior lien. There may be one or more prior liens. For example, C may be concurrent with D, but B may be prior to C. It is submitted that the proposed method of distribution is applicable to such cases without alteration.

[34]Supra, note 12.
[35]Supra, note 15.

On the other hand, a lien as a result of being concurrent with another may not be a junior lien. There may not be any prior lien. For example, A may be prior to B, B be prior to C, and C be concurrent with A. There is no claim prior to A. It is submitted that the proposed method of distribution is also applicable to such cases without alteration, the only difference being that the sum of the claims prior to one claim is zero. Each claimant must stand upon the facts of his own case. B and C stand in the positions of junior lienholders. Each one must wait his turn in the distribution of the fund. However, there is no claim prior to A's claim. It is concurrent with C's, but neither B's nor C's is prior to it.

In the latter type of case it is necessary merely to determine the class to which the case belongs and make the distribution accordingly.

For example, let the claims of A, B, and C be $300, $400, and $200, respectively, A being prior to B, B being prior to C, and C being concurrent with A. The case may be stated as follows:

> Prior to A's $300 claim is no claim.
> Prior to B's $400 claim is A's $300 claim.
> Prior to C's $200 claim is B's $400 claim.

(1) If the fund is $350:

> A is entitled to payment in full....................$300
> B, as a junior lienholder, is entitled to........ 50
> C, as a junior lienholder, is entitled to........ 0
>
> Total $350

The sum of the amounts to which the claimants are entitled is exactly equal to the fund. The case is of Class 3, and the claimants receive the amounts to which they are so entitled. As there is a $400 claim prior to C's claim, he does not receive any of the $350 fund.

(2) If the fund is $600:

> A is entitled to payment in full $300
> B, as a junior lienholder, is entitled to 300
> C, as a junior lienholder, is entitled to 200
>
> Total $800

As the sum of the amounts is greater than the amount of the fund, the case is of Class 4 and the distribution should be made

accordingly. A would receive $300, B would receive $200, and C would receive $100.

In the unusual case in which there is a remainder, it should be divided equally among the claimants.