Interest Acquired by Purchaser at Foreclosure or Execution Sale

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INTEREST ACQUIRED BY PURCHASER AT
FORECLOSURE OR EXECUTION SALE

What is the nature of the interest acquired by a purchaser of
real estate at a foreclosure or execution sale in the state of Wash-
ington?1

In Atwood v. McGrath,2 by a divided court, the Supreme Court
of Washington, in a departmental decision, held that a sheriff's
certificate of sale does not vest title, is "nothing more than a
chattel real or chose in action," and can, therefore, when community
property, be validly assigned by the husband alone without his
wife's signature. In so holding, the court said.

"Whatever may have been inferred in Diamond v. Tur-
ner, 11 Wash. 189, 39 Pac. 379, cited by appellant, this
court has long and consistently held that a certificate of
sale executed by a sheriff does not vest title, being at
most but evidence of an inchoate estate that may or may
not ripen into an absolute title. See Singly v. Warren,
18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896, and cases
224, 198 Pac. 270, and cases there cited, Ford v. Nokomis
State Bank, 135 Wash. 37, 237, Pac. 314."

"Under the foregoing decisions, therefore, and our
statutes, the certificate of sale issued to McGrath was
nothing more than a chattel real, or chose in action, at
most, of which, as the husband of the community, he had
the sole management and control, and could sell, assign
and dispose of as he saw fit."3 (p. 408)

Attention is especially directed to the language of the court that
it has thus "long and consistently held," because the only object
of the present discussion is to set forth what the court has said
upon this subject, not so much for the purpose of laying bare the
somewhat striking inconsistency that at all stages of the court's
history appears in its reports on this subject, but to point out that,
in view of the contrariety of opinion on this point, Atwood v.
McGrath, supra, can probably not be regarded as the last word on
this frequently important subject. This appears so particularly

1 The situation is the same whether a sale or execution under an ordi-
nary money judgment or a sale under decree of foreclosure is involved,
sales in both cases being made under the same statute. State ex rel. Steele
v. N. W. & P. & H. Bank, 18 Wash. 118, 50 Pac. 1023 (1897) Hardy v. Her-
riot, 11 Wash. 460, 39 Pac. 958 (1895) Debenture Corporation v. Warren,
2 137 Wash. 400, 242 Pac. 648 (1926).
3 Italics ours.
because of the fact that in that case only one decision was cited to
the court on the point in the briefs by each of the respective par-
ties,\(^4\) notwithstanding the many cases (some rather obscurely hid-
den\(^5\)) in which the point has been touched. These will now be
taken up chronologically, and the court left largely to speak for
itself.

In *Murray v. Meade*,\(^6\) the court said

"It is not the confirmation that gives the equitable title to
the land, but it is the purchase at the execution sale and the payment of the purchase price according to the
terms of the sale. If the proceeding had been regular
up to the time of and including the sale, the equitable title
would pass to the purchaser. The confirmation is really
only the announcement of the legal determination of these
facts." (P 693)

In *Debenture Corp. v. Warren*,\(^7\) the court said

"It is contended upon the part of the respondents that
the title does not pass until the expiration of the time for
redemption, and that under the general rule the right to
possession would not accrue until such title passed. That
such is the law in the absence of any express statutes
upon the subject is conceded. But we have an express
statutory provision * * * And under it we must hold that
the purchaser is entitled to possession from the day of
sale." (P 314.)

In a later case, *State ex rel. Steele v. N W & P H. Bank*,\(^8\) here-
after quoted from, the court construes the foregoing case to have
held that title passed prior to the expiration of the redemption
date.

In *Hays v. Merchants Bank of Port Townsend*,\(^9\) the court said.

"The statute, Gen. Stat., Sec. 2172, gives to owners of
the lands abutting on tidelands the preference right to
purchase, and it cannot be maintained that the respondents

\(^5\) An effort has been made to find every Washington case in which the point has been touched. It will be obvious from reading the following pages that many cases have from time to time been overlooked as the point has arisen, largely so, undoubtedly because in many instances the point is not adequately digested and discoverable only by indirect methods of research and in some instances by good luck only
\(^6\) 5 Wash. 692, 32 Pac. 770 (1893)
\(^7\) 9 Wash. 312, 37 Pac. 451 (1894)
\(^8\) 18 Wash. 118, 50 Pac. 1023 (1897)
\(^9\) 10 Wash. 573, 39 Pac. 198 (1895).
were owners of the land covered by their certificate at any time prior to their receiving a deed. A judgment debtor, until after the expiration of the time to redeem real estate sold on execution, is the holder of the legal title, and must in all respects be treated as the owner of the land. Freeman, Executions, sec. 323, *Dray v. Dray,* 21 Or. 59, 27 Pac. 223, *McMillan v. Richards,* 9 Cal. 365, (70 Am. Dec. 655), *Curtis v. Millard,* 14 Iowa 128, (81 Am. Dec. 460)." (P 577)

In *Diamond v. Turner,* the court said.

"* * * but it does not follow that no title was acquired by the purchaser at the execution sale. The certificate of purchase and confirmation of sale were alone essential to pass the substantial title of the defendant in the execution to the purchaser at the sale. The execution of the deed after the time for redemption had expired was a purely ministerial act on the part of the officer, and could have been compelled by the purchaser, or those claiming under him, at any time in a proper proceeding for that purpose. Until the sale had been set aside, a certificate of purchase would be as fully protected as though the legal title had been conveyed by deed made in pursuance of the statute." (P 192.)

In *Hardy v. Herrwitt,* the court said.

"It follows that in this state the title of the mortgagor upon foreclosure sale, like the title of the judgment debtor upon execution sale, becomes extinguished and all that remains to him is the right to redeem, which is wholly statutory Independent of the statute, the mortgagor or judgment debtor would have no right to redeem from the sale. Rorer, Judicial Sales, (2 ed), sec. 1148, Freeman, Executions (2 ed), sec. 314, *Stoddard v. Forbes,* 13 Iowa 296, *Weiner v. Heints,* 17 Ill. 259, 3 Pomeroy, Equity Jurisprudence, sec. 1228, *Spoor v. Phillips,* 27 Ala. 193.

"The purchaser at such sale acquires the full legal title, carrying with it possession and the right to the rents and profits. The statute which gives to the debtor or mortgagor the right to redeem prescribes the time within and the terms upon which he may do so, and upon compliance with its provisions he becomes reinvested with the title. A purchaser at an execution sale acquires all the estate and interest of the defendant in execution, he succeeds to the title of the defendant in execution. All that remains in the debtor is the mere personal right secured by statute

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20 11 Wash. 189, 39 Pac. 379 (1895).
21 11 Wash. 460, 39 Pac. 958 (1895).
to repurchase the land within the time allowed by statute, and thus become restored to the estate he had in it at the time of the sale. This statutory right to redeem from the sale is essentially different from an equity of redemption. It is merely a privilege which the statute affords the debtor to be exercised in the manner pointed out by the statute, and, unlike an equity of redemption, it is not an estate in lands subject to levy and sale upon execution. *Parmer v. Parmer*, 74 Ala. 282."

"The purchaser becomes the absolute owner of the land, and, entering into possession, is entitled to the rents and profits, and the former owner has nothing but the naked right of redemption, which is irretrievably lost if it be not asserted in the time and manner prescribed by law *Spoor v. Phillips*, 27 Ala. 193, *Kannon v. Pillow*, 7 Humph. 281." (P 462.)

*Knap v. Austin*\(^\text{12}\) involved the same question as *Hardy v. Herrrott*, supra, and that court accepts the results of that case, over the vigorous dissent of Chief Justice Hoyt, but adds

"Now, there has been a good deal said as to the announcement in *Hardy v. Herrrott* of the doctrine that the title of the judgment debtor became extinguished by the sale of the land, and that all that was left to him was the equitable right to redeem, and that the purchaser at such sale acquired the full legal title, carrying with it possession and the right to rents and profits. Many cases sustain the doctrine therewith announced, but the decision of that technical question was not necessary to the decision of the real question involved in *Hardy v. Herrrott*, and it is not necessary to the decision in this case. It is a substantial benefit that is granted by the legislature, viz., the right to the possession or the right to the value of the possession under certain circumstances, and the legislature has as much power to bestow that benefit upon the purchaser with the legal title remaining in the redemptioner as it would if the legal title passed from the redemptioner to the purchaser at the time of the sale. The discussion of the title proposition is the discussion of a theory, and does not affect the practical fact that the legislature, regardless of the question of title, has conferred this right. So that we do not think it at all necessary to discuss that question here." (P 193.)

In *Hays v. Merchants' National Bank*,\(^\text{13}\) on rehearing of same case previously quoted from, the court said.

"This same question, viz., the right of the purchaser to

\(^{12}\) 13 Wash. 189, 43 Pac. 25 (1895)

\(^{13}\) 14 Wash. 192, 44 Pac. 137 (1896).
receive the rents of the land during the time between the sale and the redemption, again came before this court in the case of Knipe v. Austin, 13 Wash. 189 (43 Pac. 25), and it was again held that the right to the rents and profits accrued to the purchaser. But it was announced in that case that the technical question of whether or not the title of the judgment debtor became extinguished by the sale of the land, and that all that was left him was the equitable right to redeem, and that the purchaser at such sale acquired the full legal title, was not necessary to the decision of the real question involved in Hardy v. Herriott, and that it was not necessary to a decision in the case then being considered, that it was a substantial benefit that was granted to the purchaser, viz., the right to the possession, or the right to the value of, the possession, under certain circumstances, and that the legislature had as much power to bestow that benefit upon the purchaser with the legal right remaining in the redemptioner as it would if the legal title passed from the redemptioner to the purchaser at the time of sale.

"The rights acquired by the purchaser are statutory rights, the right of the owner to redeem is equally a statutory right. It must be confessed that either theory is surrounded by difficulties, for it would seem that there is no particular virtue in a sheriff's deed, but that under a statute like ours, which provides that the purchaser shall go into possession and receive the rents or the value of them, the thing which was sold was actually sold at the time of the execution sale, and the redemption was simply a purchase back under the provisions of the statute. On the other hand, it destroys the plain and evident meaning of the statute which grants the right of redemption, if an incident to the land is to be separated from it or destroyed by the sale, and cannot be redeemed, as would be the case here. The right to purchase the tide land in front of the upland is a valuable right incident to the upland, it is attached to the land.

"So that, whatever technical expressions may be used concerning the title passing from the judgment debtor to the purchaser, the substance of the statute must be considered, and we must hold that where the statute gives the judgment debtor the right to redeem that which was sold, it is a whole and effectual redemption which is provided for and not a redemption of a portion, or of the land itself stripped of valuable incidents, appurtenances, attachments, or whatever technical name may be applied to this incidental right.

"For these reasons, and believing that in substance there is no conflict between the original decision in this case and the decision in Hardy v. Herriott, and Knipe v.
In that case the question involved was whether the right to purchase tidelands existed in a purchaser at an execution sale of the uplands prior to the expiration of the statutory period of redemption. The court held not, although it is submitted that a more satisfactory view and one in full harmony with the earlier (and later) cases might have been taken.\footnote{15}

In \textit{State ex rel. Steele v. N W & P & H. Bank},\footnote{15} the court said

"Counsel for respondent cites the case of \textit{Debenture}..."
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Corporation v. Warren, 9 Wash. 312, in support of his position. The contentions in that case were that the title did not pass until the expiration of the time for redemption, and that sec. 519, supra, was not applicable to sales under mortgage foreclosures. Both of these contentions were decided in the negative."

That case involved the point whether the purchaser’s right to possession dated from the date of sale or from the date of confirmation. The court held that the first date was right.

In Singly v. Warren,17 the court said.

"A certificate of sale executed by a sheriff does not pass title. At most it is only evidence of an inchoate estate which may or may not ripen into an absolute title. While the purchaser at a judicial sale may be entitled to the immediate possession and the rents and profits of the premises, he cannot be said to hold the title until he receives a deed in pursuance of the sale. Hays v. Merchants’ National Bank, 14 Wash. 193 (44 Pac. 137), Reynolds v. Harris, 14 Cal. 667, Roberts v. Clelland, 82 Ill. 541."

"To hold that the respondent Tindall in this case has a good title to the premises in dispute would be to hold that his grantor was able to convert a defeasible into an indefeasible estate by the mere instrumentality of a conveyance. If the owner of a determined fee conveys in fee, the determinable quality of the estate follows the transfer. 4 Kent. Commentaries, 10.” (P 445.)

The foregoing case is the one that was cited by the court in the recent case of Atwood v. McGrath, supra, and has occasionally been cited in the interim, but without regard to the last quoted paragraph which recognizes a “defeasible estate”, or a “determinable fee” as passing. Moreover, Hays v. Merchants’ National Bank, supra, the only Washington case cited in support of the first quoted paragraph, obviously does not support it, as appears from the quotations herein previously made from the Hays case. At any rate, Singly v. Warren has been often ignored between then and now, as will hereafter appear.

In Board v. First Presbyterian Church19, the court said.

"A number of authorities are cited by both appellant and respondent, as to when the legal title passes and as to whether the legal title to land passes upon the sale or upon the confirmation of sale. It was said by this court in some

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17 18 Wash. 434, 51 Pac. 1066 (1898).
18 Italics ours.
19 19 Wash. 455, 53 Pac. 671 (1898).
of the cases cited, notably Hays v. Merchants' Bank, 10 Wash. 573 (39 Pac. 98), that the discussion of the title proposition was a discussion of a theory and did not affect the practical questions in that case, and so we think concerning that technical question here."

In Dane v. Daniel,20 the court held that both husband and wife were necessary parties to a foreclosure of community property, and that a proceeding against the husband alone was abortive. The reasoning is that the wife's interest cannot be "sold" without her being a party. The court said:

"The principal reliance of the respondent, however, is upon the contention that the title of the appellants passed by the original foreclosure proceedings and sale thereunder, leaving in them, if anything more than their statutory right to redeem, the right only to their day in court to contest the liability of the property to be sold for the satisfaction of the mortgage debt.

"The distinction is, that in the one line of cases it is held that the wife must be made a party and given an opportunity to defend, before the community property can be sold to satisfy the debt, while in the other, it is held that the property may be sold without her being joined in any of the proceedings prior to the sale, but that the sale is open to contest by her." (pp. 388, 391.)

In De Roberts v. Stiles,21 the court said:

"If title had passed by the sheriff's sale to a purchaser, that would undoubtedly be true. In that event all rights of the second mortgagee or his assignee would have been forever barred. But that is not the case presented here. When Fry took the title to this land by the quitclaim deed from Stiles, he stood in Stiles' shoes in all particulars, so far as his relation to this land was concerned. At the time Stiles deeded to Fry, he (Stiles) had the right to redeem from the mortgage sale, and by so doing the effects of the sale would have been determined, and he would have been restored to his estate, 2 Hills' Code, Sec. 515. This court has said in Singly v. Warren, 18 Wash. 434, 445 (51 Pac. 1066, 1069, 63 Am. St. Rep. 896),

'A certificate of sale executed by a sheriff does not pass title. At most, it is only evidence of an inchoate estate, which may or may not ripen into an absolute title.'

"In any event, aside from the question of where the title

20 Italics ours.
21 23 Wash. 379, 63 Pac. 268 (1900).
22 24 Wash. 611, 64 Pac. 795 (1901)
rests during the redemptionary period, the section of the status above cited provides for a complete restoration of the estate upon redemption being accomplished. The estate stands as if no sale had ever been made. Stiles, by his deed to Fry, transferred his right of redemption to Fry, and when Fry redeemed, the estate was restored, as if no sale had been made.\textsuperscript{223} (p. 618.)

It is plain from the italicised language in the foregoing quotation that the court expressly leaves the question open.

In Knowles v. Rogers,\textsuperscript{24} the court said.

\begin{quote}
"He also knew that the sale had not been confirmed, and that until such confirmation no deed could be made. Until then the legal title remained in the respondent. Hays v. Merchants' Bank, 10 Wash. 573 (39 Pac. 98), Hays v. Merchants' National Bank, 14 Wash. 192 (44 Pac. 137)" (p. 217)
\end{quote}

In Philadelphia Mige. & Trust Co. v. Palmer,\textsuperscript{25} the court said.

\begin{quote}
"While the court has had some difficulty in its attempts to define the status of such a purchaser with relation to the title to the land purchased, it construed the statutes as giving him all the benefits of ownership, even holding that he was not required to account for the rents and profits received between the time of sale and the subsequent redemption of the property therefrom by the original owner. Debenture Corporation v. Warren, 9 Wash. 312 (37 Pac. 451), Hardy v. Herrrott, 11 Wash. 460 (39 Pac. 958), Knipe v. Austin, 13 Wash. 189 (43 Pac. 25), Hays v. Merchants' National Bank, 14 Wash. 192 (44 Pac. 137), State ex rel. Steele v. Northwestern & P H. Bank, 18 Wash. 118 (50 Pac. 1023), Diamond v. Turner, 11 Wash. 192 (39 Pac. 379)

"A proceeding which, if valid, will give to an execution purchaser of land a substantial title, as well as all the rights and privileges which follow title, ought, when invalid, if pursued in good faith under a belief and claim of right, to give color of title sufficient to start in motion the statute of limitations."\textsuperscript{226} (pp. 463, 464.)
\end{quote}

In McManus v. Morgan,\textsuperscript{27} the court said.

\begin{quote}
"When appellant purchased the real property upon mortgage sale, he became entitled to the possession
\end{quote}

\textsuperscript{22} Italics ours.
\textsuperscript{24} 27 Wash. 211, 67 Pac. 572 (1902).
\textsuperscript{25} 32 Wash. 455, 73 Pac. 501 (1903).
\textsuperscript{26} Italics ours.
\textsuperscript{27} 38 Wash. 528, 80 Pac. 786 (1905).
thereof. Laws 1899, p. 93, sec. 15. He thereby acquired all the title to the mortgaged property which the mortgagors had. This title could be defeated only by redemption, or another sale, but, until a resale or redemption, the purchaser was for all purposes the owner. He certainly had a valid, subsisting interest in the property. In Diamond v Turner, 11 Wash. 189, 39 Pac. 379, this court said

"'Until the sale had been set aside, a certificate of purchase would be as fully protected as though the legal title had been conveyed by deed made in pursuance of the statute.'

"This language is particularly applicable to this case.'"  
(p. 532.)

In that case an action was brought to remove an alleged cloud on plaintiff's title to real estate five days after the plaintiff became the purchaser of the lands at a mortgage foreclosure sale, and before the appellant was entitled to a deed. The court held that in that case the plaintiff fell squarely within the provisions of the statute providing that "any person having a valid subsisting interest in real property and a right to the possession thereof may recover.

In Hyde v. Heaton, the court, in an opinion by Judge Dunbar, said

"'So that the pertinent question here is, not whether a lien obtained by a judgment has expired, but what interest in the land was conveyed to the creditor by the sale of the land by proceedings subsequent to foreclosure. Confirmation is simply the judicial sanction by the court of the sale, completing the legal transaction. It does not have the virtue of the sale itself, but is judicial evidence of the sale. It relates back to the time of sale, and supplies all defects excepting those founded in want of jurisdiction or in fraud. If the sale was made without jurisdiction, it could not be cured by confirmation. So that it is the legal sale and payment of the purchase price which gives the equitable interest to the purchaser, and not the confirmation, which is more of a ministerial act. It, therefore, follows that the purchaser has more interest than that of a mere lien on the land sold, and that the statute prescribing the duration of liens and judgments does not affect him.'"  
(p. 437-8.)

The language here used is squarely contrary to that used in the

28 43 Wash. 433, 86 Pac. 664 (1906).
29 Italics ours.
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later case of Cochran v. Cochran, and is predicated squarely on Morrow v. Moran, supra, and Diamond v. Turner, supra. After discussing the cases just mentioned, the court continues.

"Under these authorities the respondents had an equitable interest in land and, although confirmation of the sale was necessary to complete the legal title, the equitable title existed and could not be affected by lapse of time."


"Pending the redemption period the certificate of sale did not pass title, but it was only evidence of an inchoate interest which might or might not ripen into title. Singly v. Warren, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896." (p. 574.)

In Young v. Davis, the court said.

"By his purchase at the foreclosure sale, the purchaser Fish acquired the full equitable title in the property, which could only be defeated by a redemption from the sale within the year permitted by statute, by the mortgagor or his successor in interest. The title became absolute in Fish on the failure to redeem within the time, and descended to his heirs on his death, and was acquired by the respondents by their deeds from such heirs and became perfected in the respondents by the deed from the sheriff.

"The fact that a predecessor in interest of the appellant entered into possession of the land for a time, and made improvements thereon, does not affect the respondents’ title. Doubtless such acts tended to show good faith on the part of the purchaser, but the good faith of either party is not in question, it is a question of the superior title, and we hold the superior title to be with the respondents.

"Stang v. Redden, 28 Fed. 11, is a case in point on all of the questions presented here. It was there held under a statute similar to our own that the judicial confirmation of a foreclosure sale vests in the purchasers the full equitable title to the mortgaged premises, whether any deed is executed and delivered to the purchaser or not." (p. 507)

In Merz v. Mehner, the court said.

\[\text{Footnotes:}\]
\begin{itemize}
  \item \text{114 Wash. 499, 195 Pac. 224 (1921). See text to footnote 38.}
  \item \text{44 Wash. 569, 87 Pac. 335 (1906).}
  \item \text{50 Wash. 504, 97 Pac. 506 (1908).}
  \item \text{67 Wash. 135, 120 Pac. 893 (1912).}
\end{itemize}
"The sale under the foreclosure, of course, conveyed the whole title subject to redemption. The right of possession and the rents passed also to the purchasers. Rem. & Bal. Code, sec. 602. The other case, Merz v. Mehner, is conclusive of the question there presented, or which might have been presented. The record here shows that the plaintiffs themselves have not redeemed their interest in the property from the foreclosure sales." (p. 138.)

In State ex rel. Peel v. Clausen, the court said

"The company became the purchaser at the sale, and now holds the legal title subject to redemption." (p. 168.)

In Virges v. Gregory Co., the court said

"But even under that redemption statute, the decisions of this court hold, in effect, that the purchaser's title did not become absolute until the expiration of the period of redemption. Hays v. Merchants' Bank of Port Townsend, 10 Wash. 573, 39 Pac. 98; Hays v. Merchants' Nat. Bank of Port Townsend, 14 Wash. 192, 44 Pac. 137; Carroll v. Hill Tract Improvement Co., 44 Wash., 569, 87 Pac. 835." (p. 339.)

It will be observed that this case merely says that "the purchaser's title did not become absolute;" it does not say that no title passed.

In Cogswell v. Brown, the court said

"But under our holdings that the legal title will not pass until after the period of redemption has expired and the execution of a sheriff's deed, the rule was inconsistent and the law readily adapted itself to the theory that one in possession should account." (p. 627)

In Tibbetts v. Bush & Lane Piano Co., the court said

"It is apparent that the Bush & Lane Piano Company had succeeded to all the rights of the original mortgagors in the mortgaged property George v. Butler, 26 Wash. 456, 67 Pac. 263, 90 Am. St. 756, 57 L. R. A. 396. The original mortgagors had no further interest therein except a right to redeem." (p. 168.)

In Cochran v. Cochran, the court said.

"It has become the well settled law of this state that a

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94 Wash. 166, 162 Pac. 1 (1917)
97 Wash. 383, 166 Pac. 610 (1917).
102 Wash. 625, 173 Pac. 623 (1916)
111 Wash. 165, 189 Pac. 996 (1920)
114 Wash. 499, 195 Pac. 224 (1921).
mortgage, unlike a mortgage at common law, does not vest title in the mortgagee, but only creates a lien upon the land in favor of the mortgagee as against the interest of the mortgagor; and that a foreclosure sale of the land looking to the satisfaction of the mortgage debt creates no greater interest in the land in the purchaser at such sale, during the period allowed by statute within which the mortgagor may redeem. In other words, the mortgagor is not, by such sale, divested of his title to the land prior to the expiration of the redemption period, and can even then be divested of his title only upon his failure to redeem during that period. Rem. Code sec. 597, Hays v. Merchants' Nat. Bank, 14 Wash. 192, 44 Pac. 137, Singly v. Warren, 18 Wash. 434, 51 Pac. 1066; 63 Am. St. 896, De Roberts v. Stiles, 24 Wash. 611, 64 Pac. 795, Carroll v. Hill Tract Imp. Co., 44 Wash. 569, 87 Pac. 835.

"It seems plain, therefore, that the legal title to this land and the whole thereof at all times in question remained in appellant, and that respondent did not in any sense purchase any part of the land or the legal title thereto by furnishing and paying a portion of the redemption money as above noticed." (pp. 503-4.)

This language is contrary to what was said in Hyde v. Heaton, supra, and a number of other intervening cases.

In Oregon Mortgage Co. v. Hartford Fire Ins. Co., the court said.

"The status of a purchaser at execution sale while the property is still subject to redemption has been discussed in several cases. In Hyde v. Heaton, 43 Wash. 433, 86 Pac. 664, it was held that the equitable title passes by the sale, and the subsequent confirmation and deed confer the legal title, and that the statute relative to the duration of the judgment lien would have no further application to the purchaser after the sale. This case in no way overrules the previous case of Hays v. Merchants' Nat. Bank of Port Townsend, 14 Wash. 192, 44 Pac. 136, wherein it was held, modifying the previous case of Hardy v. Herrrott, 11 Wash. 460, 39 Pac. 958, that the relative rights of the purchaser and the former owner are whatever the statute gives, and the mortgagor was held to still be the holder of the legal title during the period of redemption, to the extent that he and not the purchaser would be entitled to the preference right to the purchase of tide lands given by statute to the owner of the upland." (pp. 188-9.)

In State ex rel. Bryant v. Starwich, the court said.

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4 Italics ours.
41 122 Wash. 183, 210 Pac. 385 (1922).
44 131 Wash. 101, 229 Pac. 12 (1924).
"The case of Hardy v. Herrwott, 11 Wash. 460, 39 Pac. 958, is also cited, and an excerpt from the opinion is quoted. The excerpt quoted bears only remotely upon the question here involved, but, aside from this, the principle it announces is no longer the law of this jurisdiction. See Knape v. Austin, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531, Hays v. Merchants' Nat. Bank of Port Townsend, 14 Wash. 192, 44 Pac. 137" (pp. 108-9.)

It is plain from the cases cited that all of the later cases to the contrary were overlooked, and, further, that the effect of the cases cited was not stated with entire accuracy.

In Lach v. Strohn,42 the court said

"There was an actual severance before the foreclosure sale was had, and it cannot be successfully argued that any vestige of title passed before such sale, if, indeed any then passed—a question we are not now called upon to discuss or decide. See Cochran v. Cochran, 114 Wash. 499, 195 Pac. 224, 198 Pac. 270, and cases there cited."43 (p. 493.)

The question in the foregoing case is left open.

In Sandberg v. Murphy,44 decided two weeks later, the court, in affirming the judgment, said.

"Appellant insists that respondents have no greater right to the property involved than they had as mortgagees, that they have an inchoate right by the foreclosure of the mortgage which may or may not ripen into title.

"To sustain these contentions appellant cites several of our cases where we have held that a mortgage does not vest title in the mortgagee but only creates a lien, that a certificate of sale executed by a sheriff under a mortgage foreclosure does not vest title, and a person holding a sheriff's certificate of sale is not the owner within the meaning of the terms of an insurance policy requiring notice of change of ownership, citing Singly v. Warren, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896, Cochran v. Cochran, 114 Wash. 499, 195 Pac. 224, 198 Pac. 270, Oregon Mortgage Co. v. Hartford Fire Insurance Co., 122 Wash. 183, 210 Pac. 385.

"These cases are not applicable to a case arising under a statute defining and granting the right to recover pos-

42 134 Wash. 490, 236 Pac. 88 (1925).
43 Italics ours.
44 134 Wash. 685, 236 Pac. 106 (1925).
session of an interest in or title to, real estate. Rem. Comp. Stat. sec. 785.

"Respondent and the trial court relied largely upon the case of McManus v. Morgan, 38 Wash. 528, 80 Pac. 786." (p. 687.)

The court then quotes with approval from McManus v. Morgan, supra, the following:

"When appellant purchased the real property upon mortgage sale, he became entitled to the possession thereof. Laws of 1899, p. 93, sec. 15. He thereby acquired all the title to the mortgaged property which the mortgagors had. This title could be defeated only by redemption, or another sale. But, until a resale or redemption, the purchaser was for all purposes the owner. He certainly had a valid, subsisting interest in the property. In Diamond v. Turner, 11 Wash. 189, 39 Pac. 379, this court said. 'Until the sale had been set aside, a certificate of purchase would be as fully protected as though the legal title had been conveyed by deed made in pursuance of the statute.' This language is particularly applicable to this case.

"So it is here, the holder of the sheriff's certificate of sale under the mortgage foreclosure certainly has a valid subsisting interest in the real property and the right to possession thereof and may recover the same." (p. 688.)

And again the court said.

"The extent of the right of the record owner, McCormick, at the time would be that if he redeemed from the mortgage foreclosure sale which alienated the property from him, he could maintain the same kind of an action that his alienee under the mortgage foreclosure has under the statutes cited in McManus v. Morgan, supra. The reasoning and principle announced in that decision are sound, the law governing the right of action is the same at present, and there is no reason for a departure therefrom." (p. 689.)

In the foregoing opinion Diamond v. Turner, supra, which was supposedly repudiated, and McManus v. Morgan, supra, are fully approved.

In Ford v. Nokomis State Bank (decided nine days after the
preceding case, and opinion by the same judge), the court said

"The contrary is true in this state, for in this state we have consistently held from Singly v. Warren, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896, to Cochran v. Cochran, 114 Wash. 499, 195 Pac. 270, that a certificate of sale executed by a sheriff does not vest title, that at most it is only evidence of an inchoate estate that may or may not ripen into an absolute estate. While a purchaser at a judicial sale may be entitled to the immediate possession, and rents and profits of the property, he cannot be said to hold the title unless he holds a deed in pursuance of the sale."49 (p. 45.)

The italicized words in the foregoing quotation overlook many of the cases subsequent to Singly v. Warren, and prior and subsequent to Cochran v. Cochran.

The foregoing quotation undertakes to distinguish the California and Montana cases, in which it is held an execution sale vests the legal title in the purchaser.

And the last case in which the point has been mentioned is the recent one of Atwood v. McGrath,50 with which this discussion was commenced, and, in which, in an opinion by the same judge who wrote the two preceding cases, the court said

"Whatever may have been inferred in Diamond v. (viz., that the grantee of the redemption right after execution sale holds the property, upon redemption by himself, subject to farther sale under the deficiency judgment against the debtor, because the "successor in interest is subjected to the same legal results and burdens as the judgment debtor would be subjected to," and because the grantee "stood exactly in the debtor's shoes") can be sustained without in any way denying that a defeasible title or determinable fee was acquired by the purchaser at the sale (although the court appears to think the two inconsistent). When the property is sold and a deficiency judgment taken against the debtor, it is suggested that the purchaser acquires a determinable fee, leaving only the right of redemption (the option to repurchase, which may be also regarded as an interest in land, Crowley v. Byrne, 71 Wash 444, 129 Pac. 113, 1912) The deficiency judgment remains a lien upon all the real property of the judgment debtor, and, therefore, remains a lien on the right of redemption. True, the right of redemption cannot be sold under this lien, but that is only because the statute forbids it until the right is exercised, but that prohibition is not inconsistent with its existence in a suspended state until the right of redemption is exercised, at which time it may be enforced. Hence the grantee of the redemption right acquires it subject to the deficiency judgment lien, which upon redemption may be exercised against him. The foregoing suggestion appears a satisfactory explanation of why the grantee of the redemption right holds it subject to all of the burdens that it is subjected to in the judgment debtor, his grantor.

49 Italics ours.
50 137 Wash. 400, 247 Pac. 648 (1926), decided six months after the two preceding cases. See footnote 2, supra.
Turner, 11 Wash. 189, 39 Pac. 379, cited by appellant, this court has long and consistently held that a certificate of sale executed by a sheriff does not vest title, being at most but evidence of an inchoate estate that may or may not ripen into an absolute title. See Singly v. Warren, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896, and cases there- in cited, Cochran v. Cochran, 114 Wash. 499, 195 Pac. 224, 198 Pac. 270, and cases there cited, Ford v. Nokomis State Bank, 135 Wash. 37, 237 Pac. 314." (p. 408.)

And the court holds, with only two judges concurring in the opinion, and one expressly dissenting on this point but concurring in the result, and another concurring in the result only, that a husband alone can assign a certificate of sale without his wife's signature.

It is submitted that, aside from the many subsequent cases that appear to be in conflict with it, the statement from Singly v. Warren, supra, has been misapprehended by the court. Clearly in the light of the rest of the sentence, the clause "does not vest title" means "does not vest absolute or indefeasible title." This is, furthermore, particularly emphasized by the second paragraph quoted earlier in this discussion from Singly v. Warren, and since then overlooked, in which the court uses the words "defeasible estate" and "determinable fee," thus indicating clearly that the word "title" previously employed was used in the sense of "absolute title" and not in the sense of "no title at all."

The foregoing review of the cases shows that right down to the most recent times the court has entertained all shades of opinion on this subject, holding that at a foreclosure sale (a) legal title passes subject only to a right of redemption, (b) that equitable title passes, (c) that a substantial interest passes, (d) that "a valid subsisting interest in real property" passes, (e) that no title passes, and (f) varying views as to when title passes, whether it passes at the sale, at confirmation, at the expiration of the period of redemption, or at the giving of the sheriff's deed subsequent to such expiration.

It is not the object of this discussion especially to advocate any one of the views that have heretofore been entertained by the court, but primarily to point out that in the light of the foregoing review, the question can hardly be deemed to be finally settled. It is suggested, however, that to hold that no title to real property passes at the sale is contrary to all commonly accepted notions of the legal effect of a sale. The statutes\(^\text{a1}\) dealing with the sale of prop-

\(^{a1}\) Rem. Comp. Stat., secs. 578-604.
erty under execution and redemption, throughout use the words "sale of property," and the sheriff is instructed "to sell real estate."

Section 584 provides that "upon the sale of real property under execution, decree or order of sale, when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases such property shall be subject to redemption as hereinafter provided." The distinction is between an absolute sale and a sale of property subject to redemption. The ordinary meaning of "redemption" according to the dictionary definition is "repurchase." Such a sale, therefore, is subject only to a statutory right of repurchase, the statute giving the debtor an option for one year to repurchase the property from the purchaser at the sale. In ordinary meaning a right or option of repurchase certainly recognizes some kind of a title in the person against whom the option is held.

Moreover, section 590 provides that the highest bidder at the sale "shall forthwith pay the money bid to the officer." The statute then contemplates a cash sale. In other instances a cash sale passes the title at the moment of sale. It seems a strained construction to hold that a transaction in which the sheriff sells "property" and the purchaser immediately pays the entire consideration, no title to real property passes to the purchaser.

Section 594 provides that "property sold subject to redemption may be redeemed." That is to say, the property itself may be repurchased. Under section 597 the certificate of sale given pursuant to section 584 is entitled to record, as is also the certificate of redemption in case a redemption is made. It appears that the sheriff by issuing the certificate of purchase acts as the statutory agent of the debtor to sell and convey the property, and that in issuing the certificate of redemption the sheriff acts as the statutory agent of the purchaser in reconveying from the purchaser to the redemptioner. These certificates, thus construed, satisfy all of the requirements of a conveyance of real estate.

Even Ashford v. Reese, 132 Wash. 649, 223 Pac. 29 (1925), recognizes that in the case of an ordinary real estate contract, an equitable title passes upon full payment of the consideration prior to the delivery of the deed. A sheriff's sale presents even a stronger situation because the "sale" is for cash without any antecedent "contract of sale."

The term "agent" is here not used in its technical sense as one acting with authority express or implied, from the principal. The sheriff acts as an agent of the law to do that which the parties would not voluntarily consent to do like a commissioner appointed by a court to convey real estate where a party refuses to do so. See Rem. Comp. Stat. secs. 605-611.
Section 597 further provides that the judgment debtor shall have one year from the date of sale "to redeem the property," that is, to "repurchase" the property.

It is further provided in the same section "if the judgment debtor redeem, the effect of the sale is terminated and he is restored to his estate." The last quoted sentence providing that the debtor shall be restored to his estate certainly appears to contemplate that he lost something by the sale.

The Supreme Court of Montana in McQueeney v. Toomey, having before it the identical language just quoted, held that the purchaser at the sale acquires legal title subject to the right of redemption, using the following language:

"It will be noted that our Code specifically says 'If the debtor redeem, the effect of the sale is terminated and he is restored to his estate.' This language is significant, and we feel that we might almost base our decision upon it alone."

Section 600 provides that the purchaser is entitled to the rents and profits until redemption, but he is now (under an amendment of the early law of this state) required to account in the event of redemption.

Section 602 gives the purchaser possession "from the day of sale until redemption."

Section 603 provides that the sheriff shall give "a deed of conveyance of the real estate so sold immediately after the time for redemption from the sale has expired." It is this last section which in some of the early cases is regarded as negativing the notion that any title passes prior to the expiration of the period of redemption because, it is suggested, otherwise the sheriff's deed would be a mere idle act if title passed prior thereto. This argument does not appear to be well taken, inasmuch as during the period of redemption, the purchaser holds, to use the language

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52 36 Mont. 282, 92 Pac. 561 (1907).
52 This change, however, is not inconsistent with the defeasible title theory, as has been supported. See Cogwell v. Brown, supra, 102 Wash. 628, 173 Pac. 623, 1918. As a matter of fact, it is entirely consistent with it, even more so than the early cases holding that there is no duty to account, in the event of redemption. It is because his title is defeasible that he must account in the event of redemption. The duty of the purchaser to account is no more inconsistent with the defeasible title or conditional fee theory, than the judgment debtor's being in possession during the year of redemption. See Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454 (1903), the last case quoted from in the text of the above article. See next footnote.
of *Singly v. Warren*, *supra*, a "defeasible estate" or a "determinable fee." Upon the expiration of the period of redemption the sheriff's deed evidences that the determinable fee (a title subject only to the statutory option to redeem or repurchase) has become absolute.

The foregoing analysis is directly supported by the decisions in the State of California, where the statute expressly provides that the purchaser at the sale acquires legal title. The Supreme Court of California in *Pollard v. Harlow*, 5 expresses that there was nothing inconsistent between the statute giving the purchaser the legal title at the time he receives the sheriff's certificate of sale, and the statute requiring the sheriff at the expiration of the year of redemption to give a deed. The court did so in the following language

"The language of section 700, Code Civ Proc., is that upon the sale of the property 'the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto,' which is to say unequivocally that he acquires the legal as well as the equitable title. The only qualifications are that (when not a leasehold of less than two years' unexpired term) the property shall be 'subject to redemption,' that a deed shall be subsequently given (Code Civ Proc. sec. 703), and that pending the time for redemption the possession shall remain with the defendant (Code Civ Proc. sec 706). But no one of these qualifications is inconsistent with the vesting of the legal title in the purchaser. With regard to the first, the case is simply the familiar one of a legal title defeasible upon the happening of a condition subsequent, and, as to the second, the deed gives 'to the purchaser no new title to the land purchased by him, but (is) merely evidence that the title has become absolute.' *Robinson v. Thornton, supra* (102 Cal. 680, 34 Pac. 120) Nor is the continued possession of the land by the judgment debtor any more incompatible with the existence of the legal title in another than in the ordinary case of a tenant and his landlord." 7

The foregoing analysis would seem fully to answer the argument made in some of the early Washington cases based upon the postponement of the execution of the sheriff's deed until after the expiration of the period for redemption, and is entirely in harmony with that portion of *Singly v. Warren*, *supra*, in which

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64 138 Cal. 390, 71 Pac. 454 (1903).  
65 Italics ours.
the court speaks of "a defeasible estate" and "a determinable fee," although *Singly v. Warren* in later times appears to be used (intermittently only, however) as foundation for an argument that no title passes to the purchaser.

In conclusion, it is merely observed that the preponderating weight of the Washington cases, appears to be in favor of the conclusion that real property is "sold" at the sale and a determinable title thereto acquired by the purchaser, and against the conclusion that the certificate of purchase is merely "a chose in action," as held in the recent case of *Atwood vs. McGrath*, supra, and it may be hoped that the divided opinion of the department of the court in that case on this subject may ultimately be thoroughly reviewed by the court *en banc.*

*ALFRED J. SCHWEPPE.*

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58 While rules of property should not be lightly disturbed, yet a series of conflicting opinions can hardly be said to establish a rule of property. In any event, the court has not hesitated to resolve similar conflicts in rules of property by a thorough reconsideration. *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634 (1917).

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