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Mortgages—Notice—Vendor and Purchaser—Vendor Note Charged with Constructive Notice of Subsequent Mortgage of Contract Purchaser's Equity—Mortgagee Required to Notify Vendor to Protect Security Interest.—Kendrick v. Davis, 75 Wash. Dec. 2d 470, 452 P.2d 222 (1969)

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MORTGAGES — NOTICE — VENDOR AND PURCHASER — VENDOR NOT CHARGED WITH CONSTRUCTIVE NOTICE OF SUBSEQUENT MORTGAGE OF CONTRACT PURCHASER'S EQUITY — MORTGAGEE REQUIRED TO NOTIFY VENDOR TO PROTECT SECURITY INTEREST. — *Kendrick v. Davis*, 75 Wash. Dec. 2d 470, 452 P.2d 222 (1969).

Seller and purchaser executed and recorded an installment contract for the sale of land which provided for forfeiture in the event of the purchaser's default. For security purposes, the purchaser transferred his interest in the contract and land to a mortgagee[1] by means of a recorded assignment of contract and deed. When the purchaser defaulted on the contract, the seller sent notice of intent to forfeit to the purchaser but not to the mortgagee, recorded a declaration of forfeiture, and brought an action to quiet title in himself.

The mortgagee appeared as a defendant in the seller's action, claiming that his security interest in the land could not be extinguished without notice to him by the seller. He contended that he, as well as the purchaser, was entitled to notice of intent to forfeit and to an opportunity to cure the purchaser's default by making the delinquent payments and assuming the purchaser's duties under the contract. The seller argued that he need not give notice to the mortgagee because he had no knowledge of the mortgagee's interest, the mortgagee having failed to notify him. The mortgagee replied that lack of actual knowledge did not excuse the seller from his duty to notify him and that, at any rate, the seller had constructive notice of the security interest because the assignment of contract and deed had been recorded.

Held: The recording of an instrument creating a security interest in a purchaser's equity under a land sale contract does not give constructive notice of the security interest to a person who acquired his interest in the land by an instrument which was recorded prior to the security instrument. The court explicitly overruled *Norlin v. Mont-*

1. The mortgagee contended that the transaction through which he acquired his interest was not a mortgage and that he was merely an assignee, but the court rejected that contention. Kendrick v. Davis, 75 Wash. Dec. 2d 470, 474, 452 P.2d 222, 225-226 (1969); *cf.* Middlesteadt v. Johnson, 75 Wash. 550, 553, 135 P. 214, 216 (1913). Consequently, the mortgage created a lien on the property in favor of the mortgagee. Swanson v. United States, 156 F.2d 442, 170 A.L.R. 258 (9th Cir., 1946); Fleishbein v. Thorne, 193 Wash. 65, 74 P.2d 880 (1938).

gomery[2] to the extent that it is inconsistent with the instant case and ruled that the burden is on the subsequent mortgagee to give notice of his interest to the holder of an antecedent interest. *Kendrick v. Davis,* 75 Wash. Dec. 2d 470, 452 P.2d 222 (1969) (Hill and Rosellini, JJ., dissenting).

It is clear that in Washington a purchaser of land under an installment contract may mortgage his equity in the property.[3] Furthermore, a number of cases prior to 1961 had held that the seller could not declare forfeiture of an installment contract without giving the holder of a security interest in the land notification of intent to forfeit and an opportunity to fulfill the purchaser's obligations under the contract.[4] The effect of these decisions was to protect the holder of a security interest against extinguishment of his interest by the default of a purchaser over whom he had no control.[5]

Also prior to 1961, the Washington court had construed the state's real property recording statutes.[6] Although some cases indicated that the recording of an instrument was notice to all the world,[7] such statements were inconsistent with the established rule in Washington that

2. 59 Wn. 2d 268, 367 P.2d 621 (1961), *noted in* 34 ROCKY MT. L. REV. 572 (1962). The language in *Kendrick* which overrules *Norlin* is in 75 Wash. Dec. 2d at 479, 452 P.2d at 228. *See* text accompanying notes 19-21 *infra.*

3. Scott v. Farnam, 55 Wash. 336, 340, 104 P. 639, 640-641 (1909). There has been conflict in the Washington cases for many years as to just what interest in the land the purchaser does have, but this does not affect the proposition that an installment purchaser may mortgage whatever interest he has. *Compare* First National Bank v. Mapson, 181 Wash. 196, 42 P.2d 782 (1935) *with* Griffith v. Whittier, 37 Wn. 2d 351, 223 P.2d 1062 (1950).

4. Smith v. Northern Pac. Ry., 22 Wash. 500, 61 P. 255 (1900); Brummett v. Campbell, 32 Wash. 358, 73 P. 403 (1903); Shaw v. Benesh, 37 Wash. 457, 79 P. 1007 (1905); Scott v. Farnam, 55 Wash. 336, 104 P. 639 (1909). All cases here cited involved mortgagees except *Shaw v. Benesh* which involved an assignee of the vendor.

5. It is arguable that, because the mortgagee is neither a party to the contract nor a third-party beneficiary, he should not be entitled to such notification. However, given the determination that the purchaser had an interest which could be mortgaged, the court in the cases cited in note 4, *supra,* apparently thought that mortgages of such interests would be valueless unless the mortgagee were given some way to protect his interest. The notification requirement was the logical protective device. The same result has generally been reached in other jurisdictions. *See, e.g.,* Davis v. Milligan, 88 Ala. 523, 6 So. 908 (1889); Stannard v. Marboe, 159 Minn. 119, 198 N.W. 127 (1924); Alden v. Garver, 32 Ewell 32 (Ill. 1863); Sinclair v. Armitage, 12 N.J. Eq. 174 (1858).

As noted by Judge Hill in his dissent in *Kendrick,* 75 Wash. Dec. 2d at 483-84, 452 P.2d at 231, once the mortgagee receives notice of the seller's intent to forfeit, he cannot acquire the right to perform the contract in the purchaser's stead without a conveyance from the mortgagor or foreclosure of his mortgage interest.

6. WASH. REV. CODE §§ 65.08.070, 65.08.080 (1958).

7. Strong v. Clark, 56 Wn. 2d 230, 232, 352 P.2d 183, 184 (1960); Allen v. Graaf, 179 Wash. 431, 439, 38 P.2d 236, 240 (1934).

the recording of an instrument was notice only to those persons acquiring interests in land subsequent to the filing and recording of the instrument, not to those whose interests antedated the recording.[8]

In 1961, in *Norlin v. Montgomery*,[9] the court was first faced with a fact pattern in which the policy of protecting mortgagees conflicted with previous interpretations of the effects of recording. The dispute was between an installment contract seller and a subsequent mortgagee of the purchaser's rights, as in *Kendrick*. Both instruments had been recorded, and the notice of intent to forfeit had been sent to the purchaser but not to his mortgagee, again as in *Kendrick*. Unlike *Kendrick*, however, in *Norlin* the seller accepted from the purchaser a deed which quitclaimed the purchaser's interest in the contract before forfeiture had been declared and before expiration of the time allowed to cure the default.[10] The *Norlin* court held that the seller had constructive notice of the mortgage at the time the contract was cancelled by the quitclaim deed, and therefore the quitclaim of the purchaser's interest was subject to the mortgagee's security interest. The court said,[11]

> [Mortgagee's] mortgage was recorded at the time the [vendor] accepted the quit claim deed, and [vendor] had constructive notice of the encumbrance which [the purchaser] had placed upon his equity in the property.... [Vendor] and [purchaser], because of [mortgagee's] mortgage, could not cancel the contract without a release from [mortgagee].

One possible interpretation of this statement is that when the seller accepted the quitclaim deed from the purchaser, she became, in effect, a "subsequent purchaser"[12] and was thus charged with constructive notice of the recorded mortgage. Consequently, the seller was required to notify the mortgagee of her intent to cancel the contract and allow him an opportunity to cure the purchaser's default.

By contrast, in *Kendrick*, the court rejected the mortgagee's con-

8. Finley v. Finley, 43 Wn. 2d 755, 764, 264 P.2d 246, 252 (1953); Waldrip v. Olympia Oyster Co., 40 Wn. 2d 469, 476, 244 P.2d 273, 278 (1952); Ryan v. Plath, 18 Wn. 2d 839, 863, 140 P.2d 968, 980 (1943); Ackerson v. Elliott, 97 Wash. 31, 41, 165 P. 899, 903 (1917).

9. 59 Wn. 2d 268, 367 P.2d 621 (1961).

10. Brief for Respondent, at 2-4, Norlin v. Montgomery, 59 Wn. 2d 268, 367 P.2d 621 (1961).

11. 59 Wn. 2d 268, 273, 367 P.2d 621, 624 (1961).

12. *See* cases cited in and text accompanying note 8 *supra*.

tention that it would be inequitable to extinguish his security interest without his being given the opportunity to cure the purchaser's default, and reasoned that as to *subsequent* mortgagees of whom the seller had no actual notice, the seller had no burden of notification.[13] To place such a burden on the seller, the court concluded, would force him to make an additional title search before declaring a contract forfeiture, in order to discover such subsequent interests.[14] The subsequent mortgagee, already charged with knowledge of the seller's prior recorded interest, would incur no additional burden of discovery or search because of a duty to notify the seller of his interest. Consequently, the court decided that the mortgagee, rather than the seller, should bear the burden of notification because that burden would be less an inconvenience to the mortgagee than to the seller.[15]

Inconveniences balanced, the *Kendrick* court reviewed prior cases to see if its view was contrary to earlier statements protecting mortgagees' interests or to doctrines concerning constructive notice by virtue of recorded instruments. It found, first, that its determination that the seller was not charged with constructive notice of interests recorded subsequent to his own was in accord with earlier decisions holding that the recording of an instrument did not constitute notice to holders of antecedent interests in the chain of title.[16] Turning to the decisions which protected the security interests of mortgagees in the purchaser's equity, the court found that, despite statements of general intent to protect such interests, almost all of these cases had involved situations in which the party holding the seller's interest either had received actual notice of the mortgagee's interest, or was a person whose interest in the property was created subsequent to the recorded mortgage, so that constructive notice was given.[17] The court distinguished these cases, preserving the mortgagee's right to notification where the seller has actual notice of the security interest or acquires his interest subsequent to the recording of the security instrument. But, under the *Kendrick* facts, where the seller was an antecedent party in

13. 75 Wash. Dec. 2d 470, 476-77, 452 P.2d 222, 227 (1969).
14. *Id.* at 477, 452 P.2d at 227-28.
15. *Id.*
16. *Id.* at 478, 452 P.2d at 228; *see* cases cited in and text accompanying note 8 *supra.*
17. 75 Wash. Dec. 2d 470, 478-79, 452 P.2d 222, 228 (1969); *see* cases cited in and text accompanying note 4 *supra.*

the chain with no actual notice of the mortgage, the court imposed on the mortgagee the burden of notifying the seller of his interest before becoming entitled to notice from the seller of intent to forfeit.[18]

The *Kendrick* court apparently interpreted *Norlin v. Montgomery*[19] as placing the burden of notifying a mortgagee of intent to cancel the contract on a seller antecedent in the chain of title with no actual knowledge of the recorded mortgage. It stated that *Norlin* was "the single exception"[20] to the cases distinguished. As a result, *Norlin* was overruled "to the extent it is inconsistent"[21] with *Kendrick*.

A restrictive analysis can reconcile *Norlin* and *Kendrick*. If the seller who seeks to extinguish the purchaser's interest by taking a quitclaim deed is regarded as the equivalent of a subsequent purchaser, then under recording statute doctrine he has constructive notice of all prior interests, including that of the purchaser's mortgagee, and therefore is obliged to notify the mortgagee of his intent to cancel the contract. By contrast, if the seller, instead of accepting a quitclaim deed, institutes forfeiture proceedings, he is not regarded as a subsequent purchaser and therefore, again under recording statute doctrine, he has no constructive notice of the subsequent interest of the mortgagee

18. 75 Wash. Dec. 2d 470, 479, 452 P.2d 222, 228 (1969). The court in *Kendrick* did not discuss, and apparently not consider, cases from other jurisdictions. Only a few cases have dealt with the problems here presented. Usually, the reported seller-mortgagee conflicts have involved actual notice by the seller, or the existence of a subsequent holder of the seller's interest, and have resulted in the decision that the seller should have notified the mortgagee. *See, e.g.*, Alden v. Garver, 32 Ewell 32 (Ill. 1863); Williams v. Corey, 21 N.D. 509, 131 N.W. 457 (1911). The result is in accord with the earlier Washington cases. *See* cases cited in and text accompanying note 4 *supra*.

The few cases involving a situation in which the seller, an antecedent party, had no actual notice are in conflict, and none is useful to a consideration of the issues involved in *Kendrick*. Miles Homes, Inc. of Iowa v. Grant, 257 Iowa 697, 134 N.W.2d 569 (1965) (result in accord with *Kendrick*) and Stannard v. Marboe, 159 Minn. 119, 198 N.W. 127 (1924) (result contrary to *Kendrick*) were based on statutes which have no equivalent in Washington. First Mortgage Corp. of Stuart v. deGive, 177 So. 2d 741 (Fla. App. 1965) (result contrary to *Kendrick*), the only other case involving the precise problem of *Kendrick*, relied on 59 C.J.S. *Mortgages*, § 184, at 746 (1949), which states:

> A mortgage given by one holding land under an executory contract for its purchase covers his interest . . . and the mortgagee cannot be ousted of his rights by a rescission of the contract of sale by the original parties to it.

However, an examination of the authorities cited by C.J.S. reveals that the only cases cited which involved antecedent parties wth no actual notice are Stannard v. Marboe, *supra*, and Norlin v. Montgomery, 59 Wn. 2d 268, 367 P.2d 621 (1961). It is thus apparent that the cited authority gives dubious support to the rule expressed.

19. 59 Wn. 2d 268, 367 P.2d 621 (1961).

20. 75 Wash. Dec. 2d 470, 478, 452 P.2d 222, 228 (1969).

21. *Id.* at 479, 452 P.2d at 228.

and is thus under no obligation to notify the latter of his intent to forfeit.[22]

But, the *Kendrick* court properly concluded that its decision necessitated the overruling of *Norlin*. To view the cases as consistent would be to ignore substance and favor form. In each case the seller was concerned with extinguishing the purchaser's interest because of a default. A doctrinal distinction which makes the seller's efforts to retrieve full title in himself subject to a mortgage if he accepts a deed but allows him to ignore the mortgage if he declares a forfeiture and brings a quiet title action runs counter to the normal and salutary inclination of men to settle their differences amicably by executing a deed in order to avoid litigation. Furthermore, the seller's purpose in declaring a forfeiture and bringing a quiet title action[23] is, in substance, the same as his purpose in accepting a quitclaim deed and recording it—to have on record a document which confirms full title in him. Under either approach, the seller's goal is to affect the record title.[24]

There is an additional practical argument for treating *Norlin* and *Kendrick* as conflicting. If they were construed as consistent, the burden of notifying the mortgagee of efforts to extinguish the mortgage interest would fall on the seller when he accepts a deed but not when he declares a forfeiture. The burden of notifying the seller of the

22. Under the facts of both *Norlin* and *Kendrick*, it can be argued that the contract was cancelled and that it is cancellation, rather than a subsequent attempt by the seller to retrieve record title, which extinguishes the mortgagee's interest. Applying this argument to *Kendrick*, the contract was forfeited by expiration of the time allowed to cure the default extinguishing the mortgagee's interest when that time elapsed. No duty to notify the mortgagee arose on the seller's subsequent attempt to quiet title because then the mortgagee no longer had any interest. Conversely in *Norlin*, the very deed by which the cancellation was effected served simultaneously as the seller's attempt to affect the record. Since the instrument designed to cancel the contract was also used to affect the record, it is not unreasonable to make the extinguishment of the mortgagee's interest depend on constructive notice of what the record contained when the deed was filed. On the basis of this argument, *Norlin* and *Kendrick* can be viewed as consistent.

23. Vendor brings his quiet title action in order to get a judgment showing that he has full title, which judgment is then recorded in accordance with WASH. REV. CODE § 65.04.070 (1958).

24. The court overruled the *Norlin* decision as inconsistent with that in *Kendrick* on the apparent ground that the cancellation of the contract in each case extinguished the mortgagee's interest *before* the seller took any action which would charge him with constructive notice. As shown above, however (note 22 *supra*), this rationale is inapplicable to the *Norlin* fact pattern, and the cases might, on this basis, have been found distinguishable. The argument in this section of the text, however, is that there are more substantial and more practical grounds for viewing the two decisions as conflicting.

mortgagee's interest would fall on the mortgageee in cases involving forfeiture actions but not in those involving a purchaser's quitclaim. There would be no way for anyone to know who has to notify whom of what under such a state of law until the seller decided to cancel the contract and elected to use one method or the other. For the mortgagee, this would mean that his notification duties would never be fixed legally until it is too late for him to cure a failure to notify.

It is evident then that the notification duties of both the seller and the mortgagee should not depend on the method the seller selects to terminate interests other than his own. It remains for this casenote to consider whether the *Kendrick* decision was correct in requiring the mortgagee of a recorded purchaser's equity interest to notify the seller of his interest before becoming entitled to notice from the seller of the latter's intent to forfeit or cancel the real estate contract.

The approach of the *Kendrick* court was to apply recording statute doctrine before reaching the equities presented by the mortgagee.[25] The court concluded that the seller was not charged with notice of the subsequent recorded mortgage because he was antecedent in the chain of title.[26] This ruling was undoubtedly a doctrinally correct application of earlier decisions concerning notice to antecedent parties.[27] However, several considerations suggest that the court should not have permitted adherence to precedent to preclude a rigorous examination of the equities of the mortgagee's position.

The recording statutes themselves do not state that recording of an instrument is notice only to subsequent parties.[28] The statute applicable to *Kendrick* provides only that when there is a failure to record, a subsequent purchaser without actual knowledge who records first will not have constructive notice.[29] The ruling that antecedent parties will not have constructive notice is a product of judicial interpretation.[30]

25. *Kendrick*, 75 Wash. Dec. 2d 470, 476, 452 P.2d 222, 227 (1969).
26. *Id.* at 477, 452 P.2d at 228.
27. *See* cases cited in note 8 *supra*. Judge Hill's dissent also calls the majority ruling "academically correct." 75 Wash. Dec. 2d at 480, 452 P.2d at 229. The *Kendrick* court applied the "no constructive notice" rule to decide that, because the seller had no notice, the mortgagee's interest was extinguished. The court thus refused to reach the mortgagee's equitable argument. *See* notes 13-18 and accompanying text *supra*.
28. WASH. REV. CODE §§ 65.08.070, 65.08.080 (1958).
29. WASH. REV. CODE § 65.08.070. This statute applies to the recording of a mortgagee's interest.
30. *See* cases cited in note 8 *supra*.

Such an interpretation has no connection with the two basic purposes of recording acts: 1) to penalize those who fail to record and 2) to protect those who record subsequent to such failure.[31] Rather, it apparently stems from a practical judicial recognition of customary methods of title search and use of records. A purchaser will have a search conducted to determine that the title he is about to take is clear, but after he records his acquisition instrument, he usually will not look at the record again. Realizing this, courts have decided that he will be charged with notice only of what the record contains at the moment the instrument is recorded and not with notice of what is recorded subsequently.[32] The courts reason that the purchaser conducts the title search with the intent of changing the record and thus should be charged with notice only of what the record contains at the moment he changes it.

By the same reasoning, in situations such as those presented in *Norlin* and *Kendrick,* where the seller's purpose is to change the record so that it will reflect full title in him,[33] he should be charged with what is in the record at the moment he attempts to effect the change. It should be immaterial that he already has an interest in the land. He is not antecedent in the chain of title as to the event he is attempting to record. He should thus be charged with notice of those interests appearing in the record, such as mortgages, at the time that he records. Such a requirement would not be opposed to the basic purposes of the recording acts.[34] However, the construction of the recording statutes adopted in *Kendrick* is contrary to the underlying rationale for the rule that antecedent parties do not have constructive notice of instruments which are subsequently recorded. That is to say, a real estate contract vendor who attempts to change the record to reflect full title in himself is not an antecedent party as to that event, but more properly deemed a subsequent purchaser. The result of *Kendrick* was compelled neither by the purposes of the recording acts nor by judicial interpretation of their application to antecedent parties.

Because the rule that an antecedent party is not charged with notice

31. Johnson, *Purpose and Scope of Recording Statutes,* 47 IOWA L. REV. 231 (1962).
32. *See* cases cited in note 8 *supra.*
33. *See* notes 23-24 and accompanying text *supra.*
34. *See* note 31 and accompanying text *supra.*

is a judicial construct,[35] the manner of application of that rule is within judicial power. Because the *Kendrick* holding is based on grounds of practicality, a modified application of the "no notice to antecedents" doctrine which better conforms to the practical realities of the situation would have been warranted. Such modification would not entail a rule that some antecedent parties are charged with constructive notice while others are not. A court would be justified in declaring that, whenever a contract seller seeks to cancel a contract, by whatever means, he becomes for the purposes of recording a subsequent purchaser. He is, in effect, repurchasing the equity of his purchaser.[36] As the seeker of a subsequent interest, the seller should be charged with notice of a recorded mortgage on the purchaser's interest, and be required to give notification to the mortgagee or to take subject to the mortgage.[37]

Moreover, the recording statute doctrine applied by the *Kendrick* court improperly cuts off consideration of the mortgagee's equities.[38] The recording acts were not intended as a substitute for equitable justice. It is true, as the court observed in *Kendrick*,[39] that the mortgagee, by searching the records before executing the mortgage, has notice of the seller's interest. Nevertheless, a strong argument for relieving the mortgagee of the burden of notifying the seller of his interest is presented by the equities of such cases.[40]

35. *See* cases cited in note 8 *supra*.

36. Although neither the purchaser nor the mortgagee has an estate in the land, it is clear that both take interests in the land. Griffith v. Whittier, 37 Wn. 2d 351, 23 P.2d 1062 (1950); Fleishbein v. Thorne, 193 Wash. 65, 74 P.2d 880 (1938); Scott v. Farnam, 55 Wash. 336, 104 P. 639 (1909). It is also clear that those interests are recordable. WASH. REV. CODE §§ 65.08.070, 65.08.080 (1958). If these parties both possess valid and recordable interests, of whatever nature, the seller can no longer possess those interests; therefore, in cancelling the contract, he is not merely retaining what was his all the time, but *retrieving* an interest which he had alienated. Thus, he may be charged with notice of the mortgagee's interest if it is recordable and recorded.

37. The same result could be reached by legislative action. In Standard v. Marboe, 159 Minn. 119, 198 N.W. 127 (1924), the court held that the mortgagee on vendee's interest was an "assign" of the contract, and entitled to notification of the impending cancellation under a Minnesota statute requiring that such notice be given to assigns. At present, Washington has no such statute.

38. Indeed, it is questionable whether anyone's equities should ever be destroyed by any construction or application of the recording acts, in view of the serious attacks on these statutes. *See, e.g.*, Cross, *Weaknesses of the Present Recording System*, 47 IOWA L. REV. 245 (1962); Cross, *The Record "Chain of Title" Hypocrisy*, 57 COLUM. L. REV. 787 (1957); MacDougal and Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125 (1939); Rood, *Registration of Land Titles*, 12 MICH. L. REV. 379 (1914).

39. 75 Wash. Dec. 2d 470, 477, 452 P.2d 222, 227.

40. *See* Brief for Respondent, at 9-11, Kendrick v. Davis, 75 Wash. Dec. 2d 470, 452 P.2d 222 (1969). This argument is developed in text accompanying notes 41-44 *infra*.

Under the facts of both *Norlin* and *Kendrick*, if the burden of notifying the seller of the mortgagee's interest is placed on the mortgagee and he fails in his obligation, the seller has the right to extinguish the mortgagee's security interest *in toto*, without compensation and without notification. On the other hand, if the burden is placed on the seller to notify the mortgagee of an intent to terminate interests other than the seller's, regardless of whether the mortgagee has notified the seller of his mortgage interest, and the seller fails in his obligation, the mortgagee has no immediate right to possession of the property, nor can he divest the seller of his interest without compensation.[41] At most, the mortgagee gains the right to reinstate the contract and foreclose his mortgage under statutory procedures.[42] If the mortgagee is unable or unwilling to fulfill the contract obligations, the seller could still regain the property free of encumbrances.[43] Even if the mortgagee assumes the purchaser's obligations, the seller will still receive the price he bargained for under the contract. It would be far more equitable to place a burden of notification on the party who seeks to extinguish the rights of another completely, than to penalize for failure to give notice one who seeks only the opportunity to perform obligations under the contract.[44]

Another reason for placing a burden of notification on the seller, whether or not the mortgagee has informed him of the mortgage interest, is the prospect of more certain adherence to the rule by the parties. When a seller seeks to declare forfeiture of a contract, he will generally seek an attorney to bring the ensuing quiet title action for him, and if the rule is clear that the seller must search the records and

41. This was made clear in both *Norlin* (59 Wn. 2d at 272, 367 P.2d at 624) and *Kendrick* (75 Wash. Dec. 2d at 475, 452 P.2d at 226).

42. *See* Kendrick v. Davis, 75 Wash. Dec. 2d at 483-84, 452 P.2d at 231 (Hill, J., dissenting) and authorities there cited.

43. In fact, in *Kendrick*, the mortgagee had tendered the entire purchase price, plus costs and attorney's fees of the seller, into court, seeking to do equity. 75 Wash. Dec. 2d at 472, 452 P.2d at 224.

44. A more general view of the equities involved leads to the same conclusion. Where a purchase money mortgage is taken by the seller, he must go through a complicated statutory process to recover the land, while the seller under an installment contract can summarily defeat the purchaser's interest because of a minor default, and the purchaser is given no absolute right of redemption. The whole development of this harsh practice has been severely criticized. 13 WESTERN RES. L. REV. 554 (1962); 35 BROOKLYN L. REV. 83 (1968). In addition, the harshness of this rule of forfeiture has led many courts to restrict the seller's rights wherever possible. Annot., 31 A.L.R.2d 8, 12-13 (1953). The *Kendrick* decision has the effect of expanding, rather than restricting, the seller's right to summarily extinguish the rights of others, and thus runs counter to the general trend which attempts to restrict these harsh results.

notify mortgagees of the purchaser's equity, an attorney will be aware of the notification requirement and fulfill it. In contrast, if the mortgagee must notify the seller of his interest before being entitled to notice of intent to forfeit, the mortgagee's burden may not be so often carried. Mortgagees, whether they should or not, may accept and record their mortgages without legal advice. Thus, the mortgagee, if burdened with a notification requirement, may lose his security interest by relying on the commonly accepted notion that recording protects him, at least to the extent of assuring him that he is entitled to be notified of actions which might extinguish his interest.

A final reason for placing a burden of notification on the seller is that the rule in *Kendrick,* which relieves him of notifying a mortgagee when he lacks actual knowledge, places a premium on ignorance. The seller without knowledge is protected, but the one who diligently inquires after the status of the property is charged with a burden of notification.[45]

In conclusion, the Washington Supreme Court should not have decided *Kendrick v. Davis* as it did. The decision would have been narrower had the court seized upon analytical possibilities for distinguishing *Norlin v. Montgomery* rather than overruling it. But given the result reached in *Kendrick,* the court properly overruled *Norlin* because the two decisions are, in substance, conflicting. The crux of the matter is that application of *Norlin* reasoning to the *Kendrick* fact pattern would have produced a more satisfactory result. The construction and application of the recording statutes by the *Kendrick* court was not dictated by the purposes of recording acts nor by the rationale of the rule that antecedent parties do not have constructive notice of what is subsequently recorded. The court should have decided that the seller and the mortgagee each had constructive notice of the other's interest. Then, reaching the equities of the case, the court should have placed the burden of notification of the impending forfeiture on the seller. This result would have conformed to the reasonable expectations of the parties, provided for uniformity of future practice, enabled the parties to fix notification obligations before choice of the method of forfeiture, and provided for greater certainty of application—all of which are lacking under the *Kendrick* decision.

45. *See* notes 17-18 and accompanying text *supra.*