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A Reconciliation of Priorities Under Executory Contracts for the Sale of Land

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nature that language announces, a later case indicates that the *dicta* in the *O'Brien* case will be given no such effect. *Weiffenbach v. Seattle* was a suit by an employee of the Seattle Cornice Works to recover damages from the city on account of severe injuries suffered by plaintiff by reason of the city's negligence.[35] Within the scope of his employment, at the time of the injury, plaintiff, while measuring the roof of a building, was injured by a current of electricity conveyed over a defectively strung high voltage wire. The court decided that defendant was immune from a common law suit within the provisions of the 1929 amendment; and that the plaintiff's only recovery is from the insurance fund established by the compensation act. As in the *Everett* case, the court's conclusion that the injury is compensable is not based on any consideration that it is compensable because the result of a hazard inherent in the plaintiff's employment.

Consideration of decisions reviewing the fundamental nature of the Washington Workmen's Compensation Act has revealed that, as the act itself indicates, the court has viewed the law as an industrial insurance statute imposing liability regardless of fault; and without regard to a requirement that the injury "arise" from the employment. This seems to be the decision of the court in the *Stertz* case. That rule, despite amendments of the act, has not been changed. No decision has determined that the Washington act does not make compensable all injuries suffered in the course of the employment without more.

Therefore, the recent pronouncement of the Washington court in *Boeing Aircraft Co. v. Department of Labor and Industries*, which charged the cost experience of the employer for injuries and deaths suffered by his employees, regardless of the fact that they were not the result of a hazard inherent in the meat-packing industry, is consistent with reason and decision. In so deciding, that court determined that the Washington act is operative no matter what the cause of the injury, or the hazard from which it resulted; but is, simply, where an employee of an extrahazardous industry is injured in the course of his employment. Consequently, it is plain that the *Boeing* case, which eliminated all element of fault from the operation of the Washington act, announces a concept of workmen's compensation which imposes on employers, as far as industrial injuries in extrahazardous industries are concerned, a liability wholly without consideration of fault.

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A RECONCILIATION OF PRIORITIES UNDER EXECUTORY CONTRACTS FOR THE SALE OF LAND

Among the many complexities of modern business and financial life none is fraught with more intricacies than the utilization of credit. Economic exigencies have dictated that many must purchase without the immediate ability to pay. The seller, likewise, has evidenced an eagerness to sell and transfer the possession of his property upon the receipt of a promise that payment will be subsequently made at a specified date. Thus commerce thrives and the needs of the community are satisfied. It is, however, necessary that the seller receive some further assurance, some more reliable protection than the mere promise of the

[35] 193 Wash. 528, 76 P.(2d) 589 (1938).

buyer to pay, and it has been as the result of such a need that the various types of security devices have been conceived and have thrived. Our present concern is with but one of these, namely the executory contract to buy and sell land. The scope of the treatment herein will be limited to a narrow, but important phase of the general problem—the rights of the vendee and those taking under him as against a creditor of the vendor who, subsequent to the initial transaction, obtains a judgment lien upon all of the debtor's property. The following apt hypothetical problem is illustrative of the questions which may and often do arise.

A contracts to convey Blackacre to *B* for $15,000. *B* pays *A* $5,000 and takes possession, the agreement being that the remaining $10,000 will be paid within two years and that *A* will then give *B* a warranty deed. *B* records the contract[1] and subsequently executes a mortgage on Blackacre to *C* as security for a loan from *C* of $8,000. Shortly thereafter *E*, a creditor of *A's*, obtains a judgment against *A* which was duly entered in the journal by the clerk,[2] thus becoming from that time a lien upon *A's* real property.[3] Neither *B*, the vendee, nor *C*, *B's* mortgagee, have actual knowledge of *E's* judgment lien. *B* continues to pay *A* the unpaid portion of the purchase price and having complied with the terms of the contract within the prescribed two-year period, is given a warranty deed by *A*. *C* brings an action to foreclose his mortgage, the $8,000 debt having been unpaid, and *E* comes in, contending that he has a better right against the property by virtue of his judgment lien to the extent of $10,000, which was the amount of his judgment and the portion of the purchase price which *B* had not yet paid *A* at the time the judgment was entered.

This fact situation presents several interesting problems, none of which have been definitively answered by the Washington court. First, let us consider the rights of the vendee as against the judgment creditor of the vendor. At common law the judgment of a creditor was not a lien upon the debtor's property.[4] This undesirable situation was first remedied by the British Parliament,[5] and subsequently all of the United States, including Washington,[6] have provided for statutory judgment liens.

That the judgment creditor has a lien upon the legal title remaining in the vendor is well settled in the majority of jurisdictions.[7] There

[1] Recordation of executory contracts for the sale or purchase of real property is authorized by REM. REV. STAT. § 10596-3.

[2] *See* REM. REV. STAT § 435.

[3] REM. REV STAT. § 445 provides that the real estate of a judgment debtor shall be subject to a lien of the judgment creditor to run for a period of six years from the date the judgment is rendered. REM. REV. STAT. § 445-1 states that the judgment lien shall commence from the date of entry, where the real estate affected is situated in the county in which the judgment was rendered.

[4] BLACK, A TREATISE ON THE LAW OF JUDGMENTS (1902) § 397. The author states that the sale instance at common law in which a lien was acquired upon land by a judgment was where the debt was owned the King.

[5] Statute of Westminster 2d, 13 Edward I, c. 18.

[6] *See supra* n. 3.

[7] Searle v. Bird, 94 Wash. 21, 161 Pac. 838 (1918); Heath v. Dodson, 7 Wn.(2d) 667, 110 P.(2d) 845 (1941); May v. Emerson, 52 Ore. 262, 96 Pac. 454, 16 Ann. Cas. 1129 (1908); McDonald v. Curtis, 119 Wash. 384, 205 Pac. 1041 (1922) (Dictum).

are, however, a few jurisdictions which hold that a judgment creditor acquires no lien on the property of the debtor where he has entered into an executory contract to sell the land.[8] Most courts taking the position last mentioned limit its application to those cases where the vendee was in physical possession of the property at the time the judgment was entered.[9] One learned author has stated the law on this question to be that:[10]

> "The legal title of a vendor who has not yet executed a conveyance is subject to the lien of a judgment against him to the extent of the purchase money still unpaid, that is, the lien binds the land so far as the rights of the vendee will not be affected thereby. If all the purchase money has been paid, the vendor has merely a bare legal title, which is not subject to the lien, and if part only, or none has been paid, the vendor's title is, by the weight of authority, subject to the lien . . ."

The small number of courts applying the minority rule follow an extremely strict construction of the doctrine of equitable conversion, the rationale being that since the equitable title in the land passes to the vendee upon the execution of the contract by the vendor to sell the land, the vendor has nothing but a bare legal title which he holds in trust for the vendee, and in consequence there is no interest to which the judgment creditor's lien can attach even though the vendee has paid none of the purchase price at the time of the entry of the judgment.[11] It would follow under such a rule that the vendee could safely pay the purchase price to the vendor even though he had actual knowledge of the existence of the judgment. That the result is not one to be commended seems reasonably apparent.

Where the vendee has actual knowledge of the judgment lien the courts hold with unusual unanimity that the vendee must pay the unpaid portion of the purchase price to the judgment creditor to the extent of the lien.[12] The Arkansas court has, however, taken a contrary view, holding that where the vendee made payments after having had actual knowledge of the judgment, he nevertheless took the entire property free of the lien.[13] The precise problem has been treated in Washington in the recent case of *Heath v. Dodson*,[14] but by indulging in somewhat ambiguous language the court created considerable doubt as to the exact rule in this state. The vendee admittedly had actual notice of the judgment lien at the time he made the controverted payments to the vendor, but the court in one place uses terminology which would indicate that mere notice, constructive as well as actual, would

[8] Bain v. Pitfield, 26 Man. 89, 28 Dom. L. R. 206 (1916); 33 WEST L. R. 681 9 *West Wkly* 1163; Montreal Bank v. Condon, 11 Man. 366.

[9] State Bank v. Sanders, 114 Ark. 440, 170 S. W. 86 (1914); Lynch v. Eifler, 191 Ill. A. 344 (1915); Cumming v. First Natl. Bank, 199 Iowa 667, 202 N. W. 556 (1925). For an excellent discussion of the basis of this conflict *see* Reid v. Gorman, 37 S. D. 314, 158 N. W. 780 (1916).

[10] 5 TIFFANY, A TREATISE ON THE LAW OF REAL PROPERTY (3d ed. 1939) pp. 708-9.

[11] Caltrider v. Caples, 160 Md. 392, 153 Atl. 455, 87 A. L. R. 1500 (1931).

[12] May v. Emerson, *supra* n. 7.

[13] State Bank v. Sanders, *supra* n. 9.

[14] 7 Wn.(2d) 667, 110 P.(2d) 845 (1941).

be a basis for the same result.[15] There can be no question but that the court correctly predicated its decision upon the fact that the vendee made these payments with knowledge of the judgment lien,[16] but it is urged that it should have left no doubt that where the vendee in possession has only constructive notice of the judgment lien, he is entitled to continue making payments of the unpaid portion of the purchase price to the vendor.[17] The weight of authority supports such a position,[18] but it should be noted that many jurisdictions have yet to consider this particular point, and at least one jurisdiction has held the docketing of the judgment binds the vendee, the theory being that he stands in the shoes of the vendor and consequently has imposed upon him the duty to search the records before making payments on the contract.[19] The reason for the majority rule has been aptly set forth by a distinguished authority as follows:[20]

> ". . . it is well settled that the latter (vendee), if in possession of the land sold, is not bound to ascertain, before making each payment, that no judgment has been obtained against his vendor. Whoever takes and keeps possession of land, by these acts of ownership, gives such notice of his rights to the whole world that no one can safely assume to act in ignorance of them. . . . The docketing of a judgment . . . while he is in possession of the land, is not notice to him of the charge thereby created on the purchase money remaining unpaid. He may, therefore, from time to time, pay to his vendor such sums as fall due; and he will always be entitled to the benefit of such payments, unless it can be shown that they were made with the actual knowledge of a lien on the vendor's interest in

[15] In p. 672 the court says, "The interest of the Denmans (vendors) in the real property they contracted to sell to the Vaughns is bound by the lien of Dodson's judgment of January, 1937, against the Denmans to the extent the contract was unexecuted. The lien of that judgment against the Denmans was enforceable by the judgment creditor against the vendees *with notice* as to all sums remaining unpaid by the vendees upon the contract." (Italics supplied.)

[16] In p. 673, the court states, "If the vendee *with actual notice* of the judgment pays the remainder of the purchase money to the original vendor *or assignee of the original vendor,* and payment is not valid as against the judgment creditors' lien on the land." (Italics supplied.) The statement of the court that the rule is equally applicable to payments made to assignees of the vendor raises another interesting question not decided by that case. Some courts have held, where the question has been adjudicated, that an assignment by the vendor prior to the entry of the judgment divests him of all interest in the land so that there is nothing upon which the judgment lien can attach. This is said to be true even though the assignment was to the vendee as payment of a debt owed by the vendor to the vendee. It would follow that under such a situation the vendee could not be required to pay the remainder of the purchase price to the vendor's judgment creditor, there being no lien to satisfy.

[17] Moyer v. Hinman, 13 N. Y. 180 (1855); Filley v. Duncan, 1 Neb. 134, 93 Am. Dec. 337 (1871) (dictum); Baldwin v. Thompson, 15 Iowa 504 (1864), where the court held that a vendee must have actual notice of the judgment lien in order to be bound thereby; When v. Tall, 55 Neb. 547, 76 N. W. 13, 70 Am. St. Rep. 397 (1898), ruling that docketing of the judgment is not constructive notice to the vendee.

[18] 2 FREEMAN ON JUDGMENTS (5th ed. 1925) pp. 2029-2030; 87 A. L. R. 1515; 1 BLACK ON JUDGMENTS (2d ed. 1902) p. 684.

[19] M'Mullen v. Wenner, 16 Serg & R. (Pa.) 18, 16 Am. Dec. 543 (1827).

[20] 2 FREEMAN ON JUDGMENTS, *supra* n. 18.

> the land. This construction of the law seems to have been dictated by a consideration of the hardship to be inflicted on the vendee in possession by establishing a different rule."

Tiffany states that the judgment lien is liable to be divested of whatever remains due the vendor by the vendee.[21] Although there is a paucity of authorities on the subject, it would seem that if the vendee is not in possession of the property, the docketing of the judgment is constructive notice to him of the lien and he pays the vendor at his peril.

The rule in the great majority of jurisdictions and the one which should be adopted in Washington when the court is confronted with the problem is, therefore, that if the vendee in possession under an executory contract does not have actual notice of the judgment lien against the interest of the vendor, payments made by him to the vendor vest in him a good legal title to the land which is divested of the judgment lien and hence is not subject to attack by the judgment creditor.[22] A recent Minnesota case held that if the property is not in the name of the vendor at the time of the entry of the judgment, the rights of the judgment creditor and his lien are subordinate to the rights of the vendee who has possession under an executory contract for a deed, even though none of the purchase price had been paid at the time the judgment was docketed.[23] It follows, then, that both upon authority and principle, *B*, the vendee in our hypothetical case, having paid the remainder of the purchase price to the vendor without actual notice of the judgment lien of *E*, has both the legal and equitable title in Blackacre and his interest therein cannot be contested by *E*.

With regard to the status of the mortgagee, *C*, a somewhat more complex problem is presented, a problem upon the particular point of which the cases are presently silent. That the vendee of real property under an executory contract can mortgage his equitable title is clear.[24] The Washington court has stated the rule to be:[25]

> . . . we find it to be well settled, that a vendee in possession of property under a contract of sale has an interest which can be conveyed or mortgaged . . .[26]

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[21] 5 TIFFANY, *supra* n. 10.

[22] Woodward v. Dean, 46 Iowa 499 (1877); Rogers v. Hussey, 36 Iowa 664 (1873); Baldwin v. Thompson, 15 Iowa 504 (1864); Hampson v. Edelen, 2 Harr. & J. 64, 34 Am. Dec. 530 (1806); Berryhill v. Potter, 42 Minn. 279, 44 N. W. 251 (1890); When v. Tall, 55 Neb. 547, 76 N. W. 13, 70 Am. St. Rep. 397 (1898); Moyer v. Hinman, 13 N. Y. 180 (1855); May v. Emerson, 52 Ore. 262, 96 Pac. 454, 16 Ann. Cas. 1129 (1908); 17 COL. L. REV. 47, "But as it would be manifestly unjust to compel the vendee to watch the records for entries of judgments or execution sales against his vendor, it is held in most jurisdictions that the vendee is entitled to the benefit of all payments made to his vendor prior to actual notice of the judgment lien or sale on execution."

[23] Roberts v. Friedall, 15 N. W.(2d) 496 (1944).

[24] Titcomb v. Fondu, J. & G. R Co., 78 N. Y. S. 226, 38 Miss. Rep. 630 (1902); Sheehan v. McKinstry, 105 Ore. 473, 210 Pac. 167, 34 A. L. R. 1315 (1922); Harris v. Zeuch, 103 Fla. 183, 137 So. 135 (1931).

[25] Scott v. Farnam, 55 Wash. 336, 104 Pac. 639 (1909).

[26] At first blush it might appear that this result is presently forestalled in Washington by the doctrine of Ashford v. Reese, 132 Wash. 649, 233 Pac. 29 (1925) where the court said that an executory contract for the sale and purchase of land created no equitable or legal title in the vendee. That case, however, on its facts was limited in its scope as to where the loss by fire should fall, and the court has not been disposed to extend the concept.

One court has gone to the extreme of saying that the want of title or possession by the mortgagor does not render the mortgage void.[27] The correct statement of the rule, however, is that any interest in real estate which is subject to sale or assignment can be mortgaged, but the mortgagor must have some interest in the land upon which he is purporting to execute the mortgage.[28] The mortgage by the vendee is valid even though the contract to purchase has not been recorded at the time the mortgage is executed.[29] A contract for an option to purchase land creates a mortgageable interest in the person holding the option.[30] The efficacy of the mortgage is dependent upon the subsequent performance by the vendee of the contract to purchase, and a default by the purchaser defeats the mortgagee's security.[31] However, it appears that the mortgagee has the right to complete the purchase if the mortgagor-vendee fails to perform his contract with the vendor,[32] and recordation of the mortgage is notice to subsequent purchasers of such right.

Since at the time of the execution of the mortgage the vendee had only an equitable title to the land, the mortgagee acquires no more than an equitable mortgage,[33] or, in the words of the Washington court, "a mortgage by the vendee operates as an equitable assignment of his interest in the property."[34] This, of course, follows from the rule that a mortgage passes the interest of the mortgagor whatever it may be.[35] The rationale is comparable to that used in cases concerning mortgages of property to be subsequently acquired, equity viewing the transaction as an implied contract to mortgage the property when the mortgagor acquires the legal title, the result being predicated upon the maxim that "equity regards that as done which ought to be done."[36]

Upon completion of the purchase contract by the vendee and the consequent acquisition by him of the legal title, the legal title inures to the benefit of the mortgagee.[37] With this principle the Washington court is in complete accord, as indicated by the discussion of the

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For two excellent comments on Ashford v. Reese, *supra*, *see* Lantz, *Rights of Vendees Under Executory Contracts of Sale*, (1928) 3 WASH. L. REV. 1, and Schweppe, *The New Forfeiture Clause Test in Executory Contracts for the Sale of Land* (1928) 3 WASH L. REV. 80.

[27] Grasswick v. Miller, 82 Mont. 364, 267 Pac. 299 (1928).

[28] 1 JONES, A TREATISE ON THE LAW OF MORTGAGES (8th ed. 1928) § 190.

[29] Simonson v. Wenzel, 27 N. D. 638, 147 N. W. 804 (1914).

[30] Tenvoorde v. Tenvoorde, 128 Minn. 126, 150 N. W. 396 (1915); Minnesota Building and Loan Ass'n v. Closs, et al., 182 Minn. 452, 234 N. W. 872 (1931); 1 JONES, *supra* n. 28.

[31] Sheehan v. McKinstry, *supra* n. 24.

[32] Scott v. Farnam, *supra* n. 25.

[33] Tenvoorde v. Tenvoorde, *supra* n. 30.

[34] Scott v. Farnam, *supra* n. 25.

[35] 1 JONES, *supra* n. 28, § 192.

[36] For an exhaustive treatment of the law with respect to after acquired property clauses *see* David Cohen and Albert B. Gerber, *The After Acquired Property Clause* (1939) 87 U. OF PA. L. REV. 635. *Also* Wm. Walsh, *Mortgages of Property To Be Subsequently Acquired* (1933) 10 N. Y. U. L. Q. REV. 311.

[37] Yellow Chiefs Coal Co.'s Trustee v. Johnson et al., 166 Ky. 663, 179 S. W. 599 (1915), where *X* held an option to purphase certain land and executed a mortgage to Y prior to the actual purchase thereof, the court held the mortgage was valid and that the title subsequently acquired by the mortgagor inured to the benefit of the mortgagee. *See* 1 JONES, *supra* n. 28, § 192.

point in *American Savings Bank and Trust Co. v. Helgesen*[38] where the question was in issue and in which the court said:

> It appears that when Erickson and wife executed the DeWees mortgage and this new mortgage on the land, they had not acquired legal title thereto. At that time they held the land under a contract to purchase, having paid only a part of the purchase price therefor. Thereafter they completed payment of the purchase price and received a deed vesting in them full legal title. It is insisted that the mortgage could in no event be any more than a charge upon the equitable interest in the land possessed by Erickson and wife at the time of its execution. This involves the question of whether the after acquired title of Erickson and wife inured to the benefit of the holder of the mortgage. . . . It is quite clear from the provisions of REM. & BAL. CODE § 8765, that under such a deed an after acquired title by the grantor inures to the benefit of the grantee. Under our decisions, the same rule applies as between mortgagor and mortgagee.

This is analogous to the situation where the grantee takes property subsequently acquired by the grantor which the latter had purported to convey prior to the time he had the title.[39] Likewise where the vendee-mortgagor assigns his rights under the contract to purchase the land to one having either actual or constructive notice of the pre-existing mortgage, the title accrues to the benefit of the mortgagee upon payment by the assignee of the unpaid portion of the purchase price within the stipulated time.[40]

In considering the respective rights of the judgment creditor and the mortgagee of the vendee we are dealing with the conflicting claims of alleged lienors as to the same property. The judgment creditor acquires no better interest in or title to the land than his judgment debtor had at the time the judgment lien attached thereto.[41] It is equally apparent that he can have no better right against the mortgagee of the property than he would have against the vendee-mortgagor. It is a fundamental precept of equity jurisprudence that prior equitable interests *in rem* are preferred to the general statutory lien of judgments subsequently docketed, and this is true although the judgment lien is of a legal nature.[42] In a leading text on the subject the rule is stated to be:[43]

> The equitable doctrine is, that a judgment and the legal lien of its docket binds only the actual interest of the judgment debtor, and is subject to all existing equities which are valid as against such debtor.

This rule is equally applicable even though the mortgage was unrecorded at the time the judgment lien attached to the property, and the Washington court has so held in the well reasoned case of *Dawson v.*

[38] 64 Wash. 54, 116 Pac. 837, Ann. Cas. 1913 A 390 (1911). Affirmed on rehearing in 67 Wash. 572, 122 Pac. 26, Ann. Cas. 1913 A 390. *See also* Osborn v. Scottish American Co., 22 Wash. 83, 66 Pac. 49 (1900); Weber v. Laidler, 22 Wash. 83, 66 Pac. 400, 90 Am. St. Rep. 726 (1901); Peoples Savings Bank v. Lewis, 37 Wash. 344, 79 Pac. 932 (1905); Gough v. Center, 57 Wash. 276, 106 Pac. 774 (1910).

[39] Bradley v. Fackler, 13 Wn.(2d) 614, 126 P.(2d) 190 (1942).

[40] Bull v. Shephard, 7 Wisc. 449 (1858).

[41] Simmon v. Clark, 151 Kas. 431, 99 P.(2d) 739 (1940).

[42] 2 POMEROY, A TREATISE OF EQUITY JURISPRUDENCE (5th ed. 1941) § 721.

[43] *Supra* n. 42.

McCarty.[44] The essential facts in that case were that *X*, being indebted to *Y*, executed a mortgage on Whiteacre as security for the debt in consideration of an extension thereof. *Y* failed to record the mortgage and in the interim *Z*, a prior creditor of *X*, filed a suit and obtained a judgment, having neither actual or constructive notice of *Y's* mortgage lien. In an action by *Y* to foreclose the court held that his lien as mortgagee was superior to that of *Z*, the judgment creditor. This case still represents the law in Washington and is founded upon the doctrine that a judgment creditor is not a *bona fide* purchaser for value.[45] As the Washington statute applicable to the recordation of a mortgage of real estate[46] distinctly states that mortgages not recorded in accordance with the provisions therein are void as against "subsequent purchasers or mortgagees in good faith and for valuable consideration," it is scarcely to be questioned that the rule as applied in Washington is sound both upon principle and by statutory construction.

There is, however, a conflict as to the right of the mortgagee of an unrecorded mortgage as against a subsequent judgment creditor, with many courts holding contrary to the rule as stated above and followed in Washington.[47] But it is significant that in most of the states so holding, the recording statutes are worded so as to expressly include judgment creditors within their protection. Where courts have favored the judgment creditor in the absence of a statutory mandate they must be considered as having, in this respect, at least, intentionally repudiated the aforementioned equitable doctrine.[48] It would, however, seem that even in those states where the majority concept prevails, the judgment creditor in our hypothetical situation could not succeed as against the mortgagee of the vendee, although the mortgage was unrecorded, because the lien has been lifted from the property at the time the legal title vests in the vendee-mortgagor, leaving no interest therein to which the lien of the judgment creditor can attach. To hold otherwise would be to give the judgment creditor a superior right against the vendee's mortgagee than he had against the property in the hands of the vendee.

It is submitted, therefore, that *C*, the mortgagee of *B*, the vendee in possession of Blackacre under an executory contract to purchase and who has paid the remainder of the purchase price to *A*, the vendor, without actual knowledge that a judgment lien has been docketed by *E*, the judgment creditor of *A*, should succeed in an action to foreclose the mortgage even as against an intervention by *E*, the latter being precluded from claiming any interest in or lien upon Blackacre by virtue of *A* having been divested of all interest, both legal and equitable, therein.

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[44] 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841 (1889). In accord *see* Oklahoma State Bank v. Burnett, 65 Okl. 74, 162 Pac. 1124, 4 A. L. R. 430 (1917).

[45] Lee v. Wrixon, 37 Wash. 47, 79 Pac. 489 (1905), wherein the court said, "A creditor who acquires title to his debtor's real property by attachment and sale on execution is not, in this state, a *bona fide* purchaser. He parts with no consideration on account of his purchase and consequently takes only such interest as his debtor has therein." *See also* Hacker v. White, 22 Wash. 415, 60 Pac. 114, 79 Am. St. Rep. 945 (1900).

[46] REM. REV. STAT. § 10596-1 *et. seq.*

[47] Gulley v. Thurston, 112 N. C. 192, 17 S. E. 13 (1893), where the court held that a judgment lies docketed prior to the recordation of a mortgage, but subsequent to its execution, was a prior lien. For a discussion of both the majority and minority rules see 4 A. L. R. 434.

[48] 2 POMEROY, *supra* n. 42, § 722.