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Creditors of Land Contract Vendors

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Noting the growing importance of creditors' remedies against vendors in land sale contracts, the author takes a thorough look at the issues and problems surrounding this generally neglected subject matter. Three remedies are available: a judgment lien on the land, garnishment of the land sale contract payments, and a creditor's bill. After an extensive discussion of the sparse case authority, the author makes an exhaustive theoretical and functional assessment of the various alternatives within each of these remedies. Although he concludes that a creditor's bill is generally the preferred remedy, the author also provides an insightful analysis of the possible applications and uses of all three remedies.

I. Introduction

WHEN A REAL ESTATE OWNER contracts to sell his land, he retains "legal" and probably record title, but the right to possession is often in the purchaser to whom he must convey title at some future time. The vendor's principal interest in the matter is the right to receive the balance of the purchase price, usually as modest monthly installments. A creditor with a claim against such a vendor may seek to reach this interest in one of several ways. First, the creditor may treat the vendor-debtor as the owner of the real property and either claim a judgment lien thereon, or levy execution or attachment on the land. Second, the creditor may garnish the land sale contract payments owed by the purchaser. And finally, if these remedies are unavailable or ineffective, the creditor may resort to a creditor's suit or statutory supplementary proceedings. This article will consider these devices in turn.[1]

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[1] The remedies of the purchaser's creditors are discussed in 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 24-26 (rev. ed. 1940); Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: I*, 44 YALE L.J. 559, 575-81 (1935); Note, *Rights of a Judgment Creditor Against a Vendor or Vendee Following an Executory Contract for the Sale of Land*, 43 IOWA L. REV. 366 (1958); Comment, *Are the Interests of Vendor and Purchaser Amenable to Creditors in Illinois?*, 1955 U. ILL. L.F. 754; Comment, *A Reconciliation of Priorities Under Executory Contracts for the Sale of Land*, 20 WASH. L. REV. 159 (1945). The trend is toward permitting the purchaser's creditors to use ordinary legal process, but many states still require a creditor's suit.

The impact of bankruptcy on land contract interests is considered in Note, *Bankruptcy and the Land Sale Contract*, 23 CASE W. RES. L. REV. 393 (1972). The impact

It should be stated at the outset that there are relatively few cases discussing these remedies and that many of these cases are of mature vintage. Frequently they exemplify mechanical jurisprudence at its dreariest. Perhaps it is inevitable that this kind of case, presenting no compelling emotional issues and likely to be only marginally lucrative, has not called forth the best efforts of courts and counsel. There are no reported decisions for many of the issues that must arise; presumably these problems have not been worth the effort of appellate litigation.

There are two justifications for exploring this neglected territory. First, use of the land sale contract as a marketing and financing device is increasing.[2] This, coupled with the proliferation of legal aid programs and the emerging concern about providing legal services for middle-income people, indicates that lawyers will have greater occasion to counsel clients on these problems. Second, the fact that the decisional law is fragmentary and uninspired suggests the need for a comprehensive effort to identify the relevant interests and values and to develop a cohesive policy.

II. JUDGMENT LIEN OR LEVY ON REAL PROPERTY

A. *Is the Vendor's Interest Lienable?*

A majority of American jurisdictions hold that a judgment creates a lien on real property that a judgment debtor has contracted to sell and that such property is subject to levy of attachment or execution like any other land.[3] The effect of this rule is not only that the vendor's interest may be sold on execution, but that the purchaser is obligated to pay the lien creditor any payments coming due after the lien attaches. This requirement has been qualified in all jurisdictions,[4] however, because of a realization that the purchaser,

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of the tax lien laws is covered in Lacy, *The Effect of Federal Priority and Tax Lien Legislation on Creditors of Vendors and Purchasers*, 50 ORE. L. REV. 621 (1971).

[2] *See* references cited in Note, *Bankruptcy and the Land Sale Contract*, 23 CASE W. RES. L. REV. 393, 396 nn.13, 14 (1972).

[3] 3 AMERICAN LAW OF PROPERTY § 11.29, at 85 (A. Casner ed. 1952); 3 R. POWELL, REAL PROPERTY at 710 (1952). *See also* Note, *Rights of a Judgment Creditor Against a Vendor or Vendee Following an Executory Contract for the Sale of Land*, 43 IOWA L. REV. 366 (1958); Comment, *Are the Interests of Vendor and Purchaser Amenable to Creditors in Illinois?*, 1955 U. ILL. L.F. 754; Comment, *A Reconciliation of Priorities Under Executory Contracts for the Sale of Land*, 20 WASH. L. REV. 159 (1945).

[4] The one early case holding that the purchaser must check the record before paying is M'Mullen v. Wenner, 16 S. & R. 18, 16 Am. Dec. 543 (Pa. 1827). It is scarcely conceivable that this case would be followed today.

at least if he is in possession,[5] should not be required to search the records before making each payment and hence may continue to pay the vendor in accordance with the contract until he receives actual notice of the lien.[6]

To a greater degree than commentators and courts have assumed,[7] the jurisdictions are split over whether a vendor's interest in a land sale contract is as lienable as land.[8] Although a clear holding can probably be regarded as determinative in any of the jurisdictions that have considered the matter, in a significant number of states the issue has not yet arisen. Accordingly it seems worthwhile to analyze a few cases in sufficient depth to develop the arguments and policy considerations.

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[5] For a suggestion that the lien docket may be constructive notice to a purchaser *out of possession*, see discussion of Wehn v. Fall, 55 Neb. 547, 76 N.W. 13 (1898); text accompanying note 25 *infra*.

[6] This qualification seems to have originated in Moyer v. Hinman, 13 N.Y. 180 (1855). Probably the most frequently cited example is May v. Emerson, 52 Ore. 262, 96 P. 454 (1908).

[7] *E.g.*, Heider v. Dietz, 234 Ore. 105, 115, 380 P.2d 619, 624 (1963), reporting only one state rejecting the majority rule — Iowa. Besides Iowa, however, the following states have, at one time or another, denied that property contracted to be sold is lienable or leviable as land of the vendor-debtor: Arkansas, Florida, Kentucky, Maryland, Missouri, North Carolina, South Carolina, Texas, and Wisconsin. Cases cited note 8 *infra*.

[8] Robinson v. Shearer, 211 Ala. 16, 99 So. 179 (1924) (lienable) Walker v. Fairbanks Inv. Co., 268 F.2d 48 (9th Cir. 1959) (Alaska–lienable); Snow Bros. Hardware Co. v. Ellis, 180 Ark. 238, 21 S.W.2d 162 (1929) (not lienable); Stecker v. Snyder, 118 Colo. 153, 193 P.2d 881 (1948) (not lienable); Pettus v. Gault, 81 Conn. 415, 71 A. 509 (1908) (mortgagee's interest not lienable); Hull v. Maryland Cas. Co., 79 So. 2d 517 (Fla. 1954) (not lienable — dictum, perhaps this case means only not lienable where nothing is due on contract); Jackson v. Faver, 210 Ga. 58, 77 S.E.2d 728 (1953) (lienable); McLaurie v. Barnes, 72 Ill. 73 (1874) (lienable), *but see* Reuss v. Nixon, 272 Ill. App. 219 (1933) (not lienable); Holman v. Creagmiles, 14 Ind. 177 (1860) (lienable); Cumming v. First Nat'l Bank, 199 Iowa 667, 202 N.W. 556 (1925) (not lienable); Cooper v. Arnett, 95 Ky. 603, 26 S.W. 811 (1894) (not lienable); Lambert v. Allard, 126 Me. 49, 136 A. 121 (1927) (lienable); Caltrider v. Caples, 160 Md. 392, 153 A. 445 (1931) (not lienable); Chisholm v. Andrews, 57 Miss. 636 (1880) (not lienable); Jones v. Howard, 142 Mo. 117, 43 S.W. 635 (1897) (not lienable); Christie v. Morris, 119 Mont. 383, 176 P.2d 660 (1946) (lienable); Wehn v. Fall, 55 Neb. 547, 76 N.W. 13 (1898) (lienable); Moyer v. Hinman, 13 N.Y. 180 (1855) (lienable); Moore v. Byers, 65 N.C. 240 (1871) (not lienable); Frank Lynch Co. v. National City Bank, 261 F. 480 (8th Cir. 1919) (North Dakota — lienable); Coggshall v. Marine Bank Co., 63 Ohio St. 88, 57 N.E. 1086 (1900) (lienable); Heider v. Dietz, 234 Ore. 105, 380 P.2d 619 (1963) (lienable); Mimnaugh v. Baker, 111 S.C. 490, 98 S.E. 337 (1919) (not lienable); Reid v. Gorman, 37 S.D. 314, 158 N.W. 780 (1916) (vendor's interest subject to attachment); Pevehouse v. Oliver Farm Equip. Sales Co., 114 S.W.2d 658 (Tex. Civ. App. 1938) (lienable), *but see* Dixon v. McNeese, 152 S.W. 675 (Tex. Civ. App. 1912) (not lienable); Heath v. Dodson, 7 Wash. 2d 667, 110 P.2d 845 (1941) (lienable), *but see* Lee v. Wrixon, 37 Wash. 47, 79 P. 489 (1905) (not lienable after contract price paid in full); West Virginia Pulp & Paper Co. v. Cooper, 87 W. Va. 781, 106 S.E. 55 (1921) (lienable); Mueller v. Novelty Dye Works, 273 Wis. 501, 78 N.W.2d 881 (1956) (not lienable).

An Oregon case, *Heider v. Dietz*,[9] is an appropriate initial example, not just because it is a recent espousal of the majority view, but because it suggests that the particular setting in which the general question arises may exert considerable influence on the answer. Mrs. Heider was the sole assignee of the original vendor's contract interest, and had been receiving payments on a land sale contract from purchaser Dietz. Legal title was, by virtue of a previous conveyance, vested in Mr. and Mrs. Heider as tenants by the entirety.[10] After a judgment was docketed against Mr. Heider, Dietz refused to make further payments until assured of a marketable title. Mrs. Heider brought suit for strict foreclosure, arguing that under the doctrine of equitable conversion a vendor's interest in the land is mere personalty and hence is not subject to a judgment lien. Dietz counterclaimed for specific performance of the contract, tendering the balance due and praying that the decree require the Heiders to convey free and clear of the judgment lien. The court, however, dismissed Mrs. Heider's claim for foreclosure on the ground that the judgment against Mr. Heider *was* a lien on the land, and therefore, the purchaser's suspension of payments was justified.

Mrs. Heider's argument stressed that while *May v. Emerson*[11] had held a vendor's interest subject to a judgment lien, a more recent Oregon case[12] had established that equitable conversion invariably applies whenever real property is sold under a title-retaining contract and, by necessary implication, overruled *May v. Emerson*. In *Heider* the Oregon Supreme Court replied[13] by noting Dean Pound's conclusion "that equitable conversion is not a condition of property for all purposes, but is only a name given to a situation resulting from the application of equitable doctrines to special states of facts."[14]

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[9] 234 Ore. 105, 380 P.2d 619 (1963).

[10] Though Mr. Heider presumably shared in the vendor's contractual interest through an oral assignment contemporaneous with the initial conveyance of title, the vendor later made a written assignment of the contractual interest to Mrs. Heider alone. She was conceded to be the owner of the contract rights, and she received all the subsequent payments made by Dietz. *Id.* at 107-08, 380 P.2d at 621.

[11] 52 Ore. 262, 96 P. 454 (1908).

[12] Panushka v. Panushka, 221 Ore. 145, 349 P.2d 450 (1960).

[13] The court recognized that it could avoid the equitable conversion issue by affirming the lower court's decree on contractual grounds: the judgment docketed against Mr. Heider had made it impossible for the Heiders to obtain title insurance, which was called for in the original sales contract and, in effect, adopted by the parties as their standard of title marketability. 234 Ore. at 110-11, 380 P.2d at 622. Thus, in view of the refusal of the title company to insure, there was at least a cloud on the title whether or not the creditor had any enforceable claim against the land.

[14] *Id.* at 114, 380 P.2d at 624. The reference is to Pound, *The Progress of the Law, 1918-1919*, 33 HARV. L. REV. 813, 831 (1920).

The recent case relied on by Mrs. Heider involved devolution on death. The *Heider* court concluded that the earlier court's treatment of a vendor's interest as personalty must be limited to the facts of that case:[15] "The reasons which persuade equity to hold that equitable conversion applies in devolution cases . . . do not necessarily carry over to cases involving the rights of third-party creditors having judgment liens upon real property."[16] Hence, the *Heider* opinion concludes, there is no compulsion to abandon the rule established in *May v. Emerson* and followed so uniformly elsewhere.

Two observations should be made about this case. First, the end result was the desirable avoidance of foreclosing a contract in which the purchaser apparently had built up a substantial equity and was able and willing to complete. Second, the opinion makes no effort to explain why a third-party creditor should be able to treat as realty an interest that would strike most people as quite personal — the vendor's right to receive the purchase price.[17]

The significance of what a third-party creditor may have at stake is better exemplified in *Mueller v. Novelty Dye Works*.[18] Here, the purchaser had made an initial down payment on a land sale contract, and a bank gave the purchaser a committment for the balance in return for a note and mortgage. Thereafter, a creditor of the vendor docketed a previously obtained judgment. The purchaser sued the vendor's creditor to quiet his title against the claimed lien and to enjoin sale on execution. The Wisconsin Supreme Court held for the purchaser, declaring that after the contract was entered into the vendor had only an interest analogous to a mortgagee's and that therefore the land was not leviable for his debts. The court stated that the vendor's interest could have been dealt with as personalty and "reached by proper procedure."[19]

Although the end result seems right, an evaluation of the case must take into account the court's unspoken but apparent concern for the bank's loan commitment made before the creditor's judgment

[15] 234 Ore. at 114, 380 P.2d at 624.

[16] *Id.* at 114-15, 380 P.2d at 624.

[17] Contrast, in this respect, the dissent in Panushka v. Panushka, 221 Ore. 145, 164, 349 P.2d 450, 459 (1960), which argues that husband and wife vendors should have the same interests in the contract proceeds as they had in the land sold because this was their probable intent. It is most unlikely that parties entering a contract have any intent about possible future creditors, and note that in the *Panushka* situation, the vendors' intent is not that their contract interest be realty but that it be held with rights of survivorship.

[18] 273 Wis. 501, 78 N.W.2d 881 (1956).

[19] *Id.* at 507, 78 N.W.2d at 884.

was docketed. Left unanswered, of course, are the questions of whether the result should have been the same if the creditor's suit had been commenced but not completed before the contract was closed, or if the contract had been closed with actual knowledge of the creditor's claim to a lien.

While these questions undoubtedly affect the equities of the case, the technical basis of the decision — that the creditor had not employed the appropriate means to reach an interest that is, after all, functionally indistinguishable from a mortgagee's — carries substantial weight and highlights the anomaly of the majority rule championed in *Heider v. Dietz.* Proponents of the majority rule may argue that a mortgagee,[20] or a trust deed grantee,[21] as a matter of record has only a security interest, whereas a contract vendor's record position is usually one of general ownership. The trouble with this reasoning is that the majority rule seems to apply even when the contract is recorded. Even more basically, the majority rule does not proceed on any theory of apparent ownership; the creditor is regularly limited to the vendor's actual interest,[22] and what he gets, that matters, is not the interest in the land but the right to receive the purchaser's payments.

A Colorado case, *Stecker v. Snyder*,[23] introduces a refinement on the majority rule that takes into account the "choateness" of the purchaser's interest. The court's approach suggests that a vendor's interest may become so tenuous that it is no longer worthy of being regarded as an interest in land and is therefore not lienable. In *Stecker* the court found that the vendor-debtor had an unlienable vendor's lien since the contract in question was "unconditional" — there was no provision for forfeiture and the vendor had made an absolute covenant to correct all defects if his title were found not marketable.[24]

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[20] *See* Hill v. Favour, 52 Ariz. 561, 84 P.2d 575 (1938).

[21] *See* Santers v. Los Angeles Fin. Co., 91 Cal. App. 2d 197, 204 P.2d 619 (Ct. App. 1949).

[22] *In re* Roger Craig, Inc., 199 F. Supp. 502 (D. Md. 1961), *rev'd on other grounds sub nom.* Bourke v. Krick, 304 F.2d 501 (4th Cir. 1962) (purchaser protected against vendor's trustee in bankruptcy); Hull v. Maryland Cas. Co., 79 So. 2d 517 (Fla. 1954) (purchaser protected); Williams v. Johns, 34 Ohio App. 230, 170 N.E. 580 (1930) (vendor's assignee protected); Lee v. Wrixon, 37 Wash. 47, 79 P. 489 (1905) (oral contract purchaser protected — part performance). Annot., 87 A.L.R. 1505, 1507 (1933), collects Ohio and West Virginia cases protecting oral-contract purchasers against vendors' creditors even without part performance.

[23] 118 Colo. 153, 193 P.2d 881 (1948).

[24] Previous Colorado cases holding that a judgment lien attaches to a vendor's interest were distinguished, to the court's satisfaction, on the ground that they involved

Wehn v. Fall[25] adds another "refinement" somewhat related to the foregoing one. There, the court announced the orthodox rule that the vendor's interest is lienable but that the lien is perishable to the extent that the purchaser makes payments on the contract without notice of the lien. The court then found that there was no proof of actual notice of the lien and said that constructive notice from the lien docket is not enough *when the purchaser is in possession.* The opinion illustrates the hardship of requiring the purchaser to re-search the judgment docket before making payment on the contract, but it is questionable whether there is significantly less hardship in the case of a purchaser not in possession.

Is there an echo in *Wehn v. Fall* and the Colorado cases of Dean Pound's suggestion that putting the purchaser into possession might be analogized to livery of seisin, "the substance of a common-law conveyance,"[26] and that a purchaser was not properly regarded as an equitable owner until the transaction had reached the point where he would be protected against forfeiture?[27] It may make sense to distinguish between purchasers in and out of possession on several grounds. First, a purchaser in possession gives notice of his interest to the creditor who is appropriately denied the right to compel a second payment of the price because of his failure to communicate with the purchaser. Second, a purchaser in possession is more likely than one out of possession to have made a record search and then a substantial payment. Third, a purchaser in possession is more likely to be an installment plan purchaser with a natural interest in avoiding

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contracts conditional upon a showing of title (as though this were a part of the *purchaser's* obligation!). The same idea had cropped up in Green v. Daniels, 115 F. 449 (8th Cir. 1902), an earlier Colorado case holding that a vendor's interest was subject to levy and sale on execution because the vendor had legal title, and distinguishing a yet earlier case holding that a grantor's lien is not an interest in land.

It is also interesting to note that Texas puts heavy emphasis on the difference between the position of a "holder of superior legal title" (*i.e.*, a true vendor) and that of a "mere lien holder" (*i.e.*, the holder of a vendor's lien note evidencing a reserved grantor's lien on conveyed land). The former may foreclose the contract without joining persons holding under the purchaser or may simply rescind extrajudicially upon the purchaser's default; the latter must proceed by ordinary foreclosure suit joining anyone whose claims to the land he seeks to cut off. In view of this evidently well-understood distinction and the Colorado cases just discussed, it is especially significant that Texas holds that a true vendor's interest, even of one who has made only an oral contract, is not subject to a judgment lien. *See* Hattan v. Bodan Lumber Co., 57 Tex. Civ. App. 478, 123 S.W. 163 (Civ. App. 1909). For other cases involving creditors of oral-contract vendors, see Caltrider v. Caples, 160 Md. 392, 153 A. 445 (1931); Annot., 87 A.L.R. 1505, 1509 (1933).

25 55 Neb. 547, 76 N.W. 13 (1898).

26 Pound, *The Progress of the Law, 1918-1919*, 33 HARV. L. REV. 929, 939 (1920).

27 *Id.* at 824.

repeated record searches. Whether these arguments justify the distinction draw in *Wehn* is certainly open to question, but at least they suggest a more rational basis for deciding whether to draw that distinction than does the metaphysical notion that a purchaser in possession has a "bigger" interest than one out of possession and that the interest of his vendor has correspondingly dwindled to the point of non-lienability.

In jurisdictions that follow the minority rule, the distinctions just discussed do not come into play. In such jurisdictions a vendor's interest is not an estate in land but instead merely a security title incidental to his contractual claim against the purchaser, and thus a creditor's judgment against the vendor is not a lien on the land. In *Snow Brothers Hardware Co. v. Ellis*,[28] for example, the vendor (Rogers), in exchange for a loan, placed a deed to the land in escrow under an agreement that if he failed to pay off the note within a year the note holder could "purchase" the deed by surrendering the note and paying an additional $2,650. Approximately three months later, Snow Brothers recovered a judgment against Rogers. Subsequently Rogers defaulted on the note, and the noteholder-purchaser exercised her right under the agreement and received a deed in fee. After this deed was recorded, execution was issued and levied on the land for Snow Brothers, and Ellis, a subsequent grantee, sued to enjoin the sale. The court might have argued, using a sort of reverse analogy to the *Stecker* and *Wehn* cases, that this particular vendor's interest at the time the creditor recovered judgment was so substantial as to be lienable. The court, however, did not use this argument but simply concluded that the vendor's creditor did not have a lien on the land. Although the court conceded that the creditor's judgment was a lien on the vendor's general ownership of the land, it insisted that the judgment was not a lien on the land itself but was instead a lien on the vendor's estate subject to all its infirmities — in particular the possibility of termination under the escrow agreement. The vendor's position under this agreement — including the right to receive the note and the $2,650 from the escrow agent — was that of a vendor and did not involve a lienable interest.[29] The case is right if it is correct to regard the $2,650, not as a "fruit" or incident of the vendor-debtor's ownership, but simply as

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[28] 180 Ark. 238, 21 S.W.2d 162 (1929).

[29] *Contra*, Chain O'Mines, Inc. v. Williamson, 101 Colo. 231, 72 P.2d 265 (1937); West Virginia Pulp & Paper Co. v. Cooper, 87 W. Va. 781, 106 S.E. 55 (1921).

a contract payment — as the "fruit" of a chose in action.[30] The court pointed out that the creditor had made no attempt to levy on the purchase money paid to the escrowee.

The *Snow* case points up the basic conceptual difference underlying the majority and minority rules. Is a land sale contract vendor better regarded as the owner of a determinable estate, with a right to receive the purchase price as one of the incidents of his estate, or as a party to a contract, the obligee of a chose in action holding title to the land only as security for the obligation? Conceptually there is nothing wrong with either view and no strong reason for preferring one over the other. Perhaps, however, some rational basis for preferring the majority (vendor's interest lienable) or minority (not lienable) rule may be found in functional considerations.

Two themes run through these cases, sometimes tacit but usually clearly discernible in the court's manner of speaking of parties and issues. First, there is the idea that technical obstacles should neither be put in the way of a deserving creditor nor aid debtors in avoiding their obligations.[31] Second, there is the reluctance to require a purchaser to make a second payment of an obligation already discharged in good faith.[32] These themes point in different directions, and the rule adopted in a jurisdiction is likely to be determined by which theme is dominant on the facts of the particular cases that come before the court.

This understandable method of adjudication carries the obvious danger that a rule producing a desirable end result in the first case to come before a court may not have such a benevolent effect in the next. In *Heider v. Dietz*,[33] for example, the purchaser, confronted with the rival claims of the vendor and his creditor, stopped paying altogether. The end result of holding that the vendor's interest was subject to the lien of his creditor's judgment was to excuse the purchaser's refusal to pay and thus avoid forfeiture of the contract. But suppose that in a future case a purchaser similiarly situated continued to make his contract payments. Will the Oregon court be

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30 *Cf.* Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369, 376-79 (1913). Purchase money payable under a contract formed by taking up an option after optioner's death goes to the personal representative rather than heir, not on any theory that the equitable conversion "relates back" to the giving of the option, but because "the money paid is the proceeds and a legal incident of the contract, which so far as it is property at all, is personal property. . . ." *Id.* at 379.

31 *Cf.* Heath v. Dodson, 7 Wash. 2d 667, 110 P.2d 845 (1941).

32 *Cf.* Mueller v. Novelty Dye Works, 273 Wis. 501, 78 N.W.2d 881 (1956); Traders' Nat'l Bank v. Price, 228 S.W. 160 (Tex. Comm'n App. 1921).

33 234 Ore. 105, 380 P.2d 619 (1963). *See* text accompanying notes 9-16 *supra.*

compelled by *Heider* to exact a second payment from him? Quite possibly it will avoid this by adopting the path followed by some other courts committed to the majority rule — by finding, somewhat artificially if necessary, that the purchaser paid without notice of the creditor's lien.

In *Jackson v. Faver*,[34] for instance, the purchaser paid off the contract after a creditor had recovered a judgment against the vendor. An auditor ruled that the creditor could sell the property on execution, noting that the purchaser, or at least his attorney, knew that the creditor's wrongful death action against the vendor was pending at the time the contract was entered into and was acquainted with the creditor's lawyer in that action. The supreme court disagreed: the purchaser had no duty to make inquiries about possible judgment liens.[35]

There are not many cases actually requiring a purchaser to make a second payment,[36] that is, holding the land subject to the lien of the vendor's creditor's judgment after the purchaser has paid the price in accordance with the contract. In fact, it may be fairly concluded that this is widely regarded as the decisive policy consideration. If this conclusion is correct the question arises whether this policy is adequately implemented by the qualification on the majority rule that protects a purchaser making contract payments without notice of the creditor's lien and places on the creditor the burden of proving such notice.

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[34] 210 Ga. 58, 77 S.E.2d 728 (1953).

[35] Similarly, in Christie v. Morris, 119 Mont. 383, 176 P.2d 660 (1946), the Montana court acknowledged that a judgment was a lien on the vendor's interest at the time the purchaser made his payment but held that the creditor had the burden of proving that the purchaser had had actual knowledge of the lien and that this burden was not satisfied by evidence that the purchaser had been given an abstract of title at the time he made his payment. *Compare* Wehn v. Fall, 55 Neb. 547, 76 N.W. 13 (1898) (the lien docket is not constructive notice to a purchaser in possession), *with* Olander v. Tighe, 43 Neb. 344, 61 N.W. 633 (1895) (appears to put burden of proof on purchaser).

[36] There appear to be only two really solid cases: Doe v. Startzer, 62 Neb. 718, 87 N.W. 535 (1901) (purchase price paid *before* judgment recovered but lien backdated to first day of term of court and held enforceable); West Virginia Pulp & Paper Co. v. Cooper, 87 W. Va. 781, 106 S.E. 55 (1921) (creditor sued vendor and attached property that purchaser had been given option to buy; purchaser took up option and paid vendor as per contract; seven years later creditor got judgment in suit against vendor and was allowed to enforce against land; no suggestion that purchaser knew about the attachment). *See also* Olander v. Tighe, 43 Neb. 344, 61 N.W. 633 (1895) (putting burden on purchaser to prove that he paid without notice of creditor's judgment). Two other cases requiring a second payment are: Robinson v. Shearer, 211 Ala. 16, 99 So. 179 (1924) (dirty hands: purchaser procured fraudulent endorsements in effort to show that he had made payments before date of creditor's judgment); Heath v. Dodson, 7

One case, *Jones v. Howard*,[37] expressly considered this question and answered negatively. There, the purchaser paid virtually all of the contract price after his vendor's creditor had levied on the land; then there was an execution sale under this levy, and finally a partition suit to decide whether the execution sale purchaser had bought anything, that is, whether there had in fact been an effective levy of execution. The Missouri court recognized that the current of decisions elsewhere favored the view that a vendor has a leviable interest but nevertheless decided that the better rule is that the vendor is, in effect, a lienor with no beneficial interest in the land save as security; the vendor's lien is a mere incident of the debt and must be reached by garnishment. The court observed that states following the majority rule have devised an exception to protect a purchaser in possession paying without notice of a creditor's lien and concluded that it was better to establish a general rule of no lien that would not require exception or qualification to prevent hardship.

The view of the Missouri court is undoubtedly a splendid vindication of the "don't-make-purchaser-pay-twice" theme, but does it submerge too completely the other theme — "don't-let-vendor-escape-his-debts"? The answer turns on the availability and efficacy of garnishment. More precisely, will a single garnishment of the purchaser, or escrow agent, reach payments coming due in the future? And will garnishment of an obligation reach the property security therefor? The point may be quickly understood, however, by harking back to two cases already mentioned. In *Snow Brothers Hardware*,[38] the creditor got his judgment against the vendor-debtor at a time when the purchaser had only an option to buy the land — an option exercisable, apparently any time after the vendor's note came due, by making a single payment of the entire purchase price to an escrowee who would presumably immediately remit to the vendor. Query whether garnishment was a practical remedy here and whether the Arkansas court's decision that the judgment was not a lien on the vendor's interest did not make it too easy for the vendor to turn readily reachable land into hard-to-find money.

On the other hand, in *Heath v. Dodson*[39] the Washington Supreme Court held that land for which the purchaser had paid the

Wash. 2d 667, 110 P.2d 845 (1941) (strongest kind of actual notice: creditor wrote letter and personally called on purchaser telling him to suspend payments to vendor).

37 142 Mo. 117, 43 S.W. 635 (1897).

38 Snow Bros. Hardware Co. v. Ellis, 180 Ark. 238, 21 S.W.2d 162 (1929).

39 7 Wash. 2d 667, 110 P.2d 845 (1941).

full price under the contract was still subject to sale on execution for the vendor's debts because the purchaser had made his payments after the creditor got his judgment and notified the purchaser, by letter and personal call, to stop paying the vendor. It may well seem that here the creditor should have been required to garnish. No difficulty in so proceeding was suggested, and why, after all, should the purchaser abandon performance of his contract just because some stranger writes him a letter?

A legal realist may object that the minority rule, and much of the preceding discussion, gives too much importance to the distinction between real and personal property. Cases that draw a distinction between legal and equitable interests are open to just criticism if they deny to a creditor of a land contract purchaser the easy access to his interest in the land that is available to a creditor of a holder of legal title. The goal ought to be to provide a simple, uniform machinery to collect debts. Absent an exemption deliberately created in aid of the debtor, it should be no harder for creditors to realize on one kind of property than another, and the courts should not be put to deciding unnecessarily technical questions about the availability of different remedies. Does all this apply with equal force here and should any distinction between the remedies of a creditor of a simple land owner and of an owner who has contracted to sell be rejected as artificial and turning on outmoded concepts?

I submit that the difference between real and personal property, or more to the point, between general ownership of land and a contractual claim to a money payment, is not just a conceptual distinction but has a functional justification. First, ownership of land is a matter of official record everywhere in the United States. Although many land contracts and assignments of contracts are recorded, with varying effect from state to state, perhaps more are not. Furthermore, because payments on the contract will very seldom be a matter of record, a rule treating vendors' interests like real property for purposes of judgment liens and levies of execution will produce disputes about validity and priority that must be resolved by the uncertain determinative of parol evidence.[40] Even more importantly, a rule that a judgment is a lien on the vendor's interest creates much undesirable uncertainly about the rights and duties of third persons. A purchaser should not be required to de-

[40] *E.g.*, Robinson v. Shearer, 211 Ala. 16, 99 So. 179 (1924) (finding that purchaser had falsified endorsements of payment dates on notes); Stecker v. Snyder, 118 Colo. 153, 193 P.2d 881 (1948) (finding that vendor had assigned his interest to a third party before the creditor's judgment was docketed).

cide, at his peril, between the rival, informal claims of his vendor and of his vendor's creditor, and perhaps of his assignee, nor should he be put to the trouble of an interpleader suit, nor be given an excuse to avoid all payments.[41] There is certainly much to be said for permitting, and requiring, a purchaser to pay in accordance with his contract until officially ordered to do otherwise.[42]

The foregoing "functional" argument for the minority rule has stressed the vendor's right to receive the purchase price as his important interest. It may be objected that he also holds legal title, and not only for security purposes but as the visible sign of the possibility that he will resume general ownership.[43] The majority rule, its proponents might argue, was essential to the desirable result reached in *Reid v. Gorman*.[44] In that case a creditor of the vendor attached the land after the contract was entered into but while vendor and purchaser were engaged in combat to rescind or foreclose it. Ultimately, the vendor obtained a decree foreclosing the purchaser's interest, and then a preexisting mortgage on the land was foreclosed and the land was sold. The issue in the subsequent litigation was whether the attaching creditor could redeem from the foreclosure sale as a junior lienor. The court held that he could so redeem because his attachment had created a lien on the vendor's interest.

After reviewing the theory and operation of both the majority and minority rules, it does not seem that either rationale developed by the courts is wholly satisfactory. I submit that it is possible to avoid many of the theoretical and functional problems in the majority and minority approaches by analyzing the facets of the vendor's position in terms of the creditor's rights. We could recognize that a judgment against a contract-vendor is a lien on his title and interest in the land (subject to the contract, of course) but deny that the lien attaches to his rights under the contract, that is, his claim to be paid the purchase price. Such a solution is consistent with

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41 *See* Heider v. Dietz, 234 Ore. 105, 380 P.2d 619 (1963); West Virginia Pulp & Paper Co. v. Cooper, 87 W. Va. 781, 106 S.E. 55 (1921).

42 *See* Cooper v. Arnett, 95 Ky. 603, 26 S.W. 811 (1894); Kratovil & Harrison, *Enforcement of Judgments Against Real Property*, 1951 U. ILL. L.F. 1, 23. *But see* Comment, *Are the Interests of Vendor and Purchaser Amenable to Creditors in Illinois?*, 1955 U. ILL. L.F. 754, 757-58.

43 Mixon suggests that the rate of default and repossession may be so high that it is more realistic to consider the installment land sale contract as a kind of landlord-tenant relationship. Mixon, *Installment Land Contracts*, 7 HOUSTON L. REV. 523, 552 (1970).

44 37 S.D. 314, 158 N.W. 780 (1916).

the end result in many of the cases stating the majority rule, such as *Heider*. It would satisfy the *Reid* policy of recognizing the creditor's interest, avoid the legal legerdemain, so deplored in *Heider*, of calling title to land personalty, and avoid the even greater anomaly of treating a simple contractual obligation as realty.[45]

B. *Is Sale on Execution Necessary to Divest the Vendor of his Interest?*

Does the majority rule that a vendor's interest under a land sale contract is subject to the lien of a judgment necessarily mean that a purchaser must commence making his contract payments to a judgment creditor as soon as he learns of the docketing of a judgment? Or does the docketing of a judgment merely mean that the vendor's interest is liable to be sold on execution and that the execution sale purchaser will become entitled to receive the contract payments when and if such a sale occurs? And, if the latter is true, does the execution sale purchaser acquire the right to receive all contract payments coming due after the date of the judgment lien, or only those coming due after the date of his purchase?

There is not much authority on these questions. It is usually assumed that the majority rule means that the purchaser becomes obligated to the creditor as soon as he receives notice of the creditor's judgment.[46] Whether this is in fact "the law" will be examined in this section.

May v. Emerson,[47] probably more often cited in support of the "usual assumption" than any other case, is really most equivocal. In *May*, an execution sale purchaser of the vendor's interest (not a judgment lienor) brought an action to eject the land sale contract purchaser. It failed because, while the plaintiff had acquired the vendor's interest, he had not put the purchaser in default by tendering a deed and demanding the balance due on the contract. The opinion plainly implies that the contract purchaser would be obligated to pay this balance, even though he had already paid it to

[45] *Cf.* Donley v. Youngstown Sheet & Tube Co., 328 S.W.2d 192 (Tex. Civ. App. 1959) (in Texas "royalty is realty" and a judgment is a lien thereon, but not on money paid into court by the oil company under the royalty arrangement); G. OSBORNE, MORTGAGES § 137 (2d ed. 1970) (mortgage does not attach to proceeds of insurance policy on destroyed mortgaged property, "a purely personal contract of indemnity" and not a "substitute res"). *But see In re* Evergreen Memorial Park Ass'n, 308 F.2d 65 (3d. Cir. 1962) (recognizing that a judgment lienor is entitled to the surplus produced by a foreclosure sale under a mortgage prior to the judgment lien).

[46] *See* note 3 *supra*.

[47] 52 Ore. 262, 96 P. 454 (1908).

the vendor, if such a demand were made; it is for this proposition that the case is always cited. It appears, however, that the contract purchaser got notice of the creditor's interest *only after the execution sale*, and, therefore, anything the court said about the obligation to make or the right to receive contract payments was said in reference to payments accruing after that sale. It is true that the court said, "[T]o the extent of the unpaid purchase price the creditor's lien will bind the property."[48] But perhaps more to the point, it also said:

> Defendant was not required to make the payments to plaintiff as they matured, until plaintiff acquired the vendor's rights. The vendee cannot assume to determine for himself, and at his own risk, the controversy between plaintiff and his debtor; and defendant need not go into equity to settle their differences. He may stand upon his contract, and when plaintiff has acquired the vendor's right to the money by perfecting title in himself the defendant will be justified in making payment to him. In *McMullen v. Wenner* . . . , it is held that the sale on execution binds the legal estate, and the execution purchaser stands in the place of the original vendor, and is entitled to the unpaid purchase money.[49]

That the Oregon court, for a time at least, read its decision in *May* as requiring an execution sale to displace the original vendor's right to receive the contract payments is made clear in *Pedersen v. Barkhurst*.[50] Citing *May*, the opinion stated that an assignee of a purchaser on a land sale contract was entitled to pay as per the contract until given notice that another party, in this case a mortgagee, had acquired the vendor's rights. The court noted that the mortgage was not a transfer of the vendor's right to receive payments on the land sale contract and that the mortgagee had made no attempt to acquire that right by foreclosure until after all the contract payments had been made.[51]

More recently, however, in *Heider v. Dietz*,[52] the Oregon court seems to read *May* as meaning that the mere docketing of a judgment against the vendor affects the rights and duties of the parties to the land sale contract. The holding in *Heider* is only that the creditor's judgment made the vendor's title unmarketable, and not even in dictum is it suggested that the purchaser becomes obligated

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[48] *Id.* at 267, 96 P. at 455.

[49] *Id.* at 268, 96 P. at 455-56 (citation omitted).

[50] 139 Ore. 483, 10 P.2d 347 (1932).

[51] *Id.* at 487, 10 P.2d at 348.

[52] 234 Ore. 105, 380 P.2d 619 (1963).

upon the attaching of the judgment lien to start making his contract payments to the creditor.[53]

I have found no case involving a direct action by a vendor's judgment lien creditor against a purchaser to enforce payment of the contract price. In fact, I am not aware of any case involving such a direct action even by an execution sale purchaser. The issue of when a purchaser becomes obligated to the vendor's creditor rather than to the vendor typically arises in a suit by the purchaser to enjoin sale of the vendor's interest on execution. A decision in favor of the lien creditor in such a suit does not mean that the purchaser becomes personally obligated to the creditor upon the attaching of the lien. Nevertheless, a decision in such a suit that there is a valid lien, enforceable by execution sale, for amounts coming due under the contract since the date of the creditor's judgment and already paid to the vendor implies in the strongest way that the purchaser *should have* made these payments to the creditor and so discharged his contractual obligation. Further, such a decision must mean that the payments to the vendor did *not* discharge the purchaser's obligation, and hence that the simple attaching of the lien must divest the vendor of his right as an obligee, whether or not it transfers this right to someone else. Thus, in the kind of situation which I have spoken of as requiring a second payment by the purchaser, any court error in speaking of the purchaser as becoming "obligated" to the lien creditor would be of negligible practical importance.

Since the authorities on when a purchaser becomes obligated to pay the vendor's creditor rather than the vendor are so fragmentary, we may justifiably inquire on first principles what the rule should be. Consideration of the effects of a judgment on a purchaser's interest may shed some light on the effects of a corresponding lien on a vendor's interest.[54]

In *Joseph v. Donovan*,[55] a judgment lien was filed against property that the judgment debtor was buying on contract. Subsequent-

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[53] The opinion concludes:

> [After the lien attached] the purchasers had no duty to continue to pay money to Mrs. Heider. Neither was it their duty, at their expense, to institute declaratory proceedings, or other litigation to remove the cloud on their title. They could rest upon their tender of the purchase money to Mrs. Heider, conditioned as it was upon performance by her, or, when sued, they could tender the money into court as they elected to do. They might also have impleaded the judgment creditor had they elected to do so.

Id. at 116, 380 P.2d at 624-25.

[54] *See* 2 A. FREEMAN, JUDGMENTS 1926 (5th ed. 1925). Kratovil & Harrison, *supra* note 42, at 2.

[55] 114 Conn. 79, 157 A. 638 (1931).

ly, the debtor carried out the contract and acquired legal title. The creditor then sued successfully to foreclose his lien by compelling a sale of the entire interest now held by his debtor. The bearing of this case on the present inquiry is twofold. First, the attaching of the lien effected no transfer of the rights and duties under the contract. It was still the judgment debtor-purchaser's right, and duty, to pay the price and the vendor's to convey to him. Second, the foreclosure resulted in a sale of the debtor's interest as it was at the time of the foreclosure sale. Usually, of course, a land sale contract purchaser's interest grows while the vendor's interest shrinks, but if a purchaser's interest should shrink, for example because of default, his lien creditor's interest will surely shrink correspondingly.[56]

An analogy to cases involving a mortgage of a vendor's interest is also helpful. In *Doolittle v. Cook*,[57] a purchaser was given full credit for contract payments made to his vendor even if made with knowledge that the vendor had mortgaged his interest. The mortgagee "was not entitled to receive the money on the notes until the failure of the payment of the money named in her mortgage. . . . Until the condition was broken she had no right to enter upon the land; nor till then had she any right to claim the notes or their proceeds."[58]

But is a judgment lien better likened to a mortgage or to a mortgage already in default which entitles the mortgagee to immediate possessory rights? The parties to a mortgage may expressly provide for some realization of the security interest without foreclosure. For example, the mortgagee may be given the right to demand rent payments owed by the mortgagor's tenant.[59] And perhaps even in the absence of any express provision, it is reasonable to infer such an intent when otherwise the security would be rendered substantially nugatory.[60] Should the same inference be drawn about the legis-

56 A creditor of a defaulting purchaser may enjoy some rights of rehabilitation or redemption, but this does not mean that the quantum of his interest is fixed as of the time the lien attaches. At most he will be able to do only as much as the defaulting purchaser could do to salvage his postion.

57 75 Ill. 354 (1874). This and the *Young* and *Jaeger* cases, discussed in note 60 *infra*, are considered in Z. CHAFEE & E. RE, CASES AND MATERIALS ON EQUITY 334-39 (5th ed. 1964).

58 75 Ill. at 358-59.

59 *E.g.*, King v. Housatonic Ry., 45 Conn. 226 (1877).

60 This inference probably explains the results in Young v. Guy, 87 N.Y. 457 (1882), and Jaeger v. Hardy, 48 Ohio St. 335, 27 N.E. 863 (1891), two casebook favorites involving facts identical to those in *Doolittle v. Cook* but holding that the purchaser was obligated to make his payments to the vendor's mortgagee as soon as he got actual notice of the mortgage.

lative intent in providing for judgment liens? It may be persuasively argued that a mortgagee ordinarily expects to collect his debt without resorting to the security whereas a judgment creditor is confronted with a defaulted, primary obligation. Hence a judgment lien should be analogized to a mortgage already in default. But to take the second step and argue that the proper analogy is to a mortgagee who has stipulated for extrajudicial rights of realization is considerably harder in view of the care with which legislatures have typically spelled out the method of enforcing judgment liens,[61] also considering that a judgment lien is a purely statutory creation,[62] and the *inclusio unius* maxim.

I conclude that the approach by principle and analogy tends against adoption of a rule that would entitle the creditor to receive the contract payments upon the mere attaching of a judgment lien. This approach is far from conclusive, however, and in determining which is the better rule, the one just stated or the "competing" rule that the vendor's right to the contract payments does not terminate until the execution sale, we must examine the problem functionally, as we did in considering whether a lien attaches at all.

The operation of the "competing" rule can be conveniently developed by considering the facts in *Reuss v. Nixon* [63] (even though the case did not apply the rule). There, the purchaser in a land sale contract refused to execute the note and mortgage required by the contract claiming that a creditor's judgment against the vendor was a cloud on the title. The vendor's assignee sued the creditor for a declaration that the judgment was not a lien, and the creditor counterclaimed for a determination that he was entitled to all moneys *yet to be paid* under the contract. The court ruled in favor of the vendor's assignee and expressed alarm at the idea that a subsequently docketed judgment could prejudice the purchaser's position under the contract. The court decided that it would be an "intolerable burden" on the purchaser to hold his contract in abeyance until it suited the creditor to enforce his judgment or to force him to commence interpleader proceedings.[64]

The court's argument would have been most appropriate if the creditor had been claiming a lien on the previously made contract payments. But that was not his claim. He sought a *court order*

[61] *E.g.*, ORE. REV. STAT. §§ 23.030, .040, .410-.750 (1971).

[62] *Cf.* 1 G. GLENN, *supra* note 1, § 20.

[63] 272 Ill. App. 219 (1933).

[64] *Id.* at 225.

concerning the disposition of *future payments* — a situation comparable to an execution sale of the vendor's interest. It is hard to see how granting this relief would expose this purchaser, or future purchasers, to the evils mentioned. On the other hand, the holding that the creditor's judgment was not a lien means that the vendor has succeeded in turning a vulnerable asset into easily secreted, and spent, money; the creditor can not now garnish the purchaser to any purpose because the purchaser is no longer obligated to his debtor — the original vendor — but rather to the assignee against whom the creditor has no claim.

Adoption of the "competing" rule — the rule that a vendor's interest is lienable but the rights and duties under the contract are not affected until there is an execution sale — would have given the purchaser all the protection the court was so concerned about and also would have given the creditor a better chance of collecting his judgment. Would such a ruling have been unfair to the vendor's assignee? It would mean that he would not get the benefit of the vendor's interest for which he presumably paid good money, but this is only what happens to anyone who buys property on which another holds a lien. Note that the assignee did not enter the picture until after the creditor's judgment was a matter of record — there would hence be no question of requiring him to make repeated searches of the records.

The "competing" rule will inevitably involve some delay for the mechanics of levy and sale, with the consequent danger of "wasting" of the vendor's interest if substantial payments are made on the contract between judgment and execution sale. The alternative rule — that the mere attaching of the lien obligates the purchaser to make payment to the creditor — avoids this danger but arguably at too great a cost in inconvenience and possible prejudice to the purchaser. If there is some less drastic way to avoid the danger to the creditor then a choice of the "competing" rule is indicated.

Several such less drastic ways may be suggested. The creditor may garnish contract payments coming due during the interim period; even if several garnishments are required to reach several installments, this inconvenience seems relatively minor. There is, however, the danger of a sudden, unscheduled payoff that would not be headed off by garnishment in many states because it is a payment not yet "due."[65] There are at least two possible defenses against this. First, a judgment creditor should be able to obtain a

[65] *See* text accompanying notes 84-86 *infra*.

temporary injunction, *ex parte*, and with a minimum of delay.[66] Second, a payment made not simply as a routine discharge of the purchaser's contract obligation but in payment of several installments, or the entire balance, in advance of the due date and with knowledge that a creditor has acquired a lien on the vendor's interest and is actively enforcing it, may be regarded as a fraud on the creditor.[67]

The first section of this article has focused on two main questions: (1) Is a judgment a lien on the vendor's interest in a land sale contract? (2) If it is, does the attaching of the lien effect an immediate transfer of the vendor's right to receive contract payments, or does it merely enable the sale of this right on execution? The answers to these questions should take into account both the need to devise an efficient remedy for the creditor and the need to protect the purchaser — a stranger, after all, to the creditor-vendor relation. The courts seem often to have responded solely on the basis of the evil — the obstruction of a creditor or the hardship of a second payment — that was prominent in the particular case before them. These questions are still open in many jurisdictions. The state of the law can be conveniently epitomized by outlining the courses I would pursue in various capacities.

As a judgment creditor, I would notify the purchaser of my lien and demand that he pay me. I would also garnish payments as they become due, and try to enjoin an irregular payoff, and proceed to levy and sell as fast as possible.

As a purchaser knowing of a judgment against my vendor, I would interplead the vendor and his creditor before making a substantial payment under the contract. If the payment due was not large enough to warrant the expense of an interpleader, I would tender payment to vendor (or creditor) on condition that I be given some satisfactory assurance that the payment would be a discharge of my obligation as against all concerned.

As a judge faced with deciding the question, I would lean toward the rule that a judgment is not a lien on the vendor's purely contractual rights, or, if it is a lien, that it does not affect the relations of the parties to the land sale contract until enforced by sale. But the choice in any given jurisdiction would depend on the avail-

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66 Doolittle v. Cook, 75 Ill. 354, 358 (1874). *Cf.* G. OSBORNE, *supra* note 43, § 134 (mortgagee out of possession may enjoin waste).

67 *Cf.* UNIFORM FRAUDULENT CONVEYANCE ACT §§ 3(a), 7; 1 G. GLENN, *supra* note 1, § 302; Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 19 COLUM. L. REV. 177, 180 (1919).

ability and efficiency of other creditor's remedies, in particular garnishment.

III. GARNISHMENT

A. *Are Land Sale Contract Payments Subject to Garnishment?*[68]

The question to be considered here is the essentially mechanical one of whether, and with what qualification, a creditor of a vendor may realize his claim by garnishing the purchaser. Most of the few reported cases dealing directly with this point deny garnishment on the ground that the purchaser's obligation is contingent on the vendor's production of a marketable title and a deed.[69]

But because the purchaser's obligation so often is conditional, and therefore correctly held not garnishable, it should not be assumed that all purchasers are automatically not garnishable.[70] Where the purchaser's obligation is plainly unconditional, there is no justification in the standard law of garnishment for holding it not garnishable.[71] The obligation is usually considered unconditional where, for example, a purchaser is obligated to make a series of periodic payments and the vendor is obligated to convey only when all these payments have been made.[72] Where a land sale contract calls for a

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[68] A word on usage seems appropriate. Encyclopedias, digests, legal compilers, and indexers of all sorts tend to associate garnishment and attachment. *E.g.*, 6 AM. JUR. 2D *Attachment & Garnishment* § 3 (1963); 7 C.J.S. *Attachment* § 1 (1973). It has always seemed to me, however, that garnishment bears exactly the same relationship to execution as it does to attachment. It is the method of executing either writ against the debtor's property in the hands of third persons or, more to the point in the present connection, against obligations owed the debtor.

Purists object to calling the service of a writ of garnishment a "levy" because the officer does not "lift", *i.e.* sieze, anything from the garnishee, and it is sometimes maintained that a garnishment creates no lien on any specific property or fund. This is all undoubtedly true but of little importance in the majority of cases. What really matters is that the officer obtains as effective possession as is possible or necessary to establish the priority of the garnishing creditor's interest over the debtor's choses in action or claims. A garnishee's payment, after garnishment, of his original creditor does not discharge his obligation; it may still be enforced by, or for the benefit of, the garnishing creditor.

[69] Annot., 134 A.L.R. 853, 862-64 (1941); Annot., 2 A.L.R. 506 (1919). *But see* White v. Simpson, 107 Ala. 386, 18 So. 151 (1895); Smith v. Butler, 72 Ark. 350, 80 S.W. 580 (1904) (allowing garnishment of purchasers).

[70] There is perhaps a hint of such an assumption in Cowell v. May, 26 Mont. 163, 66 P. 843 (1901), where garnishment was deemed ineffective because of a very mechanical conclusion that no debt was unconditionally due.

[71] 2 W. WADE, ATTACHMENT AND GARNISHMENT §§ 450, 484 (1886).

[72] Lea v. Blokland, 122 Ore. 230, 257 P. 801 (1927); Walker v. Hewitt, 109 Ore. 366, 220 P. 147 (1923) (independent covenant analysis — possibility that the vendor could not convey is no defense to an action on purchase money notes). Lee, *The Interests Created by the Installment Land Contract*, 19 U. MIAMI L. REV. 367 (1965).

single payment of the entire price, there is an understandable tendency to regard the purchaser's obligation as a "dependent covenant," conditioned upon conveyance to him of marketable title.[73] Even where the purchaser's obligation is unconditional, a court can be expected to be especially reluctant to compel payment of a substantial amount of the purchase price to a garnishing creditor since the purchaser would very likely have to sue the vendor to enforce the contract and run the risk that there was some irregularity in the garnishment proceedings.[74]

B. *Garnishment of Contract Payments Payable Through Escrow*

Does this practical reason for not allowing a purchaser to be garnished disappear when the vendor has put a deed and a title insurance policy or abstract in escrow at the outset of the contract period — an arrangement likely to become increasingly common as land sale contract usage becomes more sophisticated and institutionalized? On the question of the garnishability of a debt payable through an escrow, there is, as in many of the areas covered by this article, a dearth of direct authority. We must, therefore, proceed on general principle and on extrapolation from related decisions. A basic principle is that the escrowee, in the capacity of a receiver and remitter of payments, is merely an agent and not an assignee of the vendor. The fact that an escrow is set up to service a land sale contract does not alter the fact that the purchaser is obligated *to the vendor.* A distinction should be drawn between an escrow arrangement wherein the escrowee is to transfer payments to the vendor upon their receipt and one wherein the escrowee is to accummulate the payments on the price and make a lump remittance when the deed is delivered — often after procuring title insurance, discharging encumbrances, and paying commissions. The latter case may be likened to the "dependent covenant" contracts previously discussed, in that the vendor, and hence his creditor, has no right to demand payment until the transaction is closed. In the former, and probably more familiar situation, the purchaser is presently and unconditionally obligated to the vendor, and if this obligation is otherwise garnishable, the fact that it is payable through a conduit should make no difference.

A second principle relevant to our inquiry is that payment under

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[73] 3 AMERICAN LAW OF PROPERTY § 11.77 (A. Casner ed. 1952); Thorp v. Rutherford, 150 Ore. 157, 43 P. 2d 907 (1935).

[74] 2 W. WADE, *supra* note 71, §§ 504-07.

garnishment discharges the garnished obligation.[75] But is there any practical assurance that a garnished purchaser will be given credit for a such a payment on the books of the escrowee? In *Fox v. Pinson*,[76] Pinson sued to foreclose a mortgage, and Fox answered that she was not in default because she had been garnished in respect to certain installments by a creditor of Pinson. In denying this defense, the court said the purchaser Fox should have answered the garnishment by admitting the obligation, tendering payment thereof to the court, and requesting that it be applied to satisfaction of the note secured by the mortgage before being remitted to either the mortgagee or the garnishing creditor. What assurance was there that such a request would have been honored? Did the appellate court that decided *Fox v. Pinson* mean that the lower court that issued the writ of garnishment could have (and must have if "requested") ordered the payee to credit payment on the note even though the money went to the payee's creditor? This is not an unreasonable idea, certainly, since the payee would ordinarily be a party to the main action to which the garnishment was an ancillary proceeding. But would there be any basis for a comparable order to an escrowee holding the note for collection and presumably not before the court in any capacity? The ready answer is that garnishment is everywhere considered strictly a creature of statute, and the usual garnishment statutes make no provision for such a procedure — simple and sensible as it may be.

The third general principle to be considered is the one, reiterated in countless cases, that an escrowee must strictly observe the instructions given him. Taken literally, this principle suggests that an escrowee, instructed to deliver a deed only after he receives a specified amount and remits it to the vendor, must do exactly that. The actual cases, however, are not that strict. *Kauffman v. Kauffman*[77] is authority that an escrowee must deliver a deed to a purchaser who has paid the price directly to the vendor rather than through the escrow, and thus indicates that equivalent satisfaction of an escrow instruction is possible.[78] This corollary, coupled with the previously noted principle that payment under garnishment to a creditor's cred-

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[75] Windle v. Interstate Passenger Serv., Inc., 99 N.H. 449, 114 A.2d 670 (1955); First Nat'l Bank v. Big Bend Land Co., 38 N.D. 33, 164 N.W. 322 (1917); 2 W. WADE, *supra* note 71, § 512; *see* White v. Simpson, 107 Ala. 386, 18 So. 151 (1895).

[76] 172 Ark. 449, 289 S.W. 329 (1926).

[77] 130 Colo. 583, 278 P.2d 179 (1954).

[78] This idea is supported by Portuguese Am. Bank v. Schultz, 49 Cal. App. 508, 193 P. 806 (1920), and Gardiner v. Gardiner, 36 Idaho 664, 214 P. 219 (1923).

itor equals payment to a creditor, suggests that a purchaser should to able to pay under garnishment and still satisfy the escrowee that he has performed his side of the contract.

Escrowees have been given similar latitude. The courts in *Malcolm v. Tate*[79] and *Mains v. City Title Insurance Co.*,[80] for example, held certain unauthorized acts by escrow agents proper even though not within their instructions. In both cases the escrowees discharged encumbrances on the property with the contract money paid by the purchaser. Both courts decided this was proper because (1) the payment, while not strictly made *to* the vendor inured to his benefit since he was obligated to convey clear title and (2) the escrow agent had an obligation to insure that the purchaser in fact received clear title. It is hard to see why the same arguments should not apply with equal force if the purchaser had himself paid off the encumbrances and tendered the balance to the escrowee.

But even though the purchaser is presently and unconditionally obligated to the vendor, and his payment under garnishment would be credited against the purchase price, and the escrowee is justified in treating payment under garnishment as the equivalent of payment into the escrow — all factors militating in favor of a rule that a purchaser may be garnished in an installment escrow situation — a fourth factor may be sufficient to turn the balance against such a rule. This is the principle that the garnishee must not be prejudiced by the garnishment, and the consideration that it is one thing to say that payment under garnishment discharges the purchaser's obligation, and protects the escrowee if he chooses to deliver the deed, but quite another to say that the purchaser can expect these things to happen inevitably and without effort on his part. Most escrowees would probably be unwilling to risk liability by deviating from the letter of their instructions. Further, allowing the purchaser to be garnished would force him into litigation to get the deserved credit for his payment.

But even an escrowee who is cooperative in recognizing payment under garnishment as the equivalent of payment into the escrow, may not always help the garnished purchaser. A not uncommon escrow arrangement, for example, is one in which the escrowee is to apply all or part of the purchaser's payments to payments coming due on a vendor's mortgage on the property. The escrowee's attitude is irrelevant to the serious danger to the purchaser in allowing garnish-

[79] 125 Ore. 419, 267 P. 527 (1928).

[80] 34 Cal. 2d 580, 212 P.2d 873 (1949).

ment in this situation. A foresighted purchaser can avoid this danger by assuming the mortgage debt in the land sale contract. In this case, to the extent of the mortgage payments, the purchaser is indebted to the mortgagee and clearly not garnishable by creditors of the vendor.[81] But suppose this rather specialized danger has not been anticipated; now the purchaser owes each contract price installment to the vendor, and the escrowee's remittances to the mortgagee are in discharge of a debt of the vendor. Conceivably the vendor will make the payment due the mortgagee out of other funds when he learns that his contract payment has been intercepted by garnishment, but if he is a vendor already hotly pursued by garnishing creditors this seems a rather forlorn hope. In all probability the purchaser will have to make the mortgage payment, in addition to the contract payment to the garnishee, or see the vendor's title to the property he is buying destroyed by mortgage foreclosure.

It would seem, therefore, that a garnished purchaser is in only slightly less awkward position when the deed is in escrow than when it is not.

C. *Is the Vendor's Interest Lienable if Garnishment Is Unavailable?*

As suggested in Part II, the unavailability of garnishment as a remedy for the vendor's creditor might be a reason for stretching traditional concepts to recognize the vendor's contract interest as lienable real property. This suggestion may now be reconsidered, keeping in mind the rationale advanced above for holding that purchasers are not garnishable.

If a creditor of a vendor is properly denied the garnishment remedy because of the possibility of prejudice to the purchaser, it seems that there are even greater dangers inherent in a rule that the mere docketing of a creditor's judgment gives rise to a lien on the vendor's contract interest and entitles the creditor to receive all future payments. That is, if the purchaser begins to make his payments to the creditor as soon as a judgment attaches, he is probably even more likely to involve himself in litigation with the vendor, or the escrowee, than if he made such payments under garnishment. Hence, a rule requiring the purchaser to pay the creditor just because he has a judgment is even harsher than a rule permitting a purchaser to be garnished.

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81 2 W. WADE, *supra* note 71, § 444, *citing* Owen v. Estes, 5 Mass. 330 (1809).

On the other hand, if the main reason the purchaser is not subject to garnishment is that his obligation is conditional, then a better case can be made for recognizing a lien on the vendor's interests. A lien, after all, does not require the purchaser to make any payment to anyone; it merely warns him that if he should choose to make a payment on the contract he should investigate his payee. A purchaser's obligation is considered "conditional," and hence not garnishable, if this vendor cannot enforce payment by an action without tendering a deed.[82] But the rule is quite different when the vendor sues to foreclose the contract or effects a nonjudicial termination because the purchaser failed to make his payments. In such cases it is held that even a clear lack of title in the vendor is not a defense since the purchaser is adequately protected by the foreclosure decree requiring the vendor to convey if the purchaser tenders payment.[83] This reintroduces the possibility-of-prejudice argument. The purchaser must pay someone to fulfill his contract obligation. If he pays the vendor, and the creditor's judgment is a lien, he risks liability for a second payment; if he pays the creditor, he risks litigation with the vendor.

It appears, therefore, that the reasons against allowing purchasers to be garnished are at least as valid for holding that a judgment is not a lien on the vendor's interest. From this it might be concluded that a vendor's creditor should proceed by way of a creditor's suit in which the vendor, the purchaser, and the escrowee may all be joined as parties and a decree framed that will protect everyone's interests. This approach was discussed in the last chapter. However, before discussing the true creditor's suit, we must consider a variant form of garnishment available in some states.

D. *Garnishment Leading to Levy and Sale of the Vendor's Contract Interests*

Thus far we have been discussing what may be called "ordinary" garnishment — the everyday remedy culminating in a simple order to the debtor's debtor to pay a presently due and payable debt into court or to the sheriff.[84] Something more elaborate than this is needed to handle the installment land sale contract situation since the future installments, even if considered unconditionally "due," are

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[82] *See* text accompanying note 69 *supra.*

[83] Hanson v. Fox, 155 Cal. 106, 99 P. 489 (1909); Hawkins v. Rodgers, 91 Ore. 483, 179 P. 563 (1919).

[84] *E.g.*, ORE. REV. STAT. § 29.270 (1971).

not presently payable. It is widely agreed that obligations not yet payable are subject to garnishment, so long as the liability is fixed,[85] but it is equally clear that garnishment will not accelerate the date when payment must be made.[86] Nor is a succession of "ordinary" garnishments an adequate remedy to a creditor holding a sizable claim against a debtor whose principal asset is perhaps an equally sizable obligation but one payable in small installments. While I have found no case dealing directly with this situation, there are decisions from a number of states suggesting the possibility of handling this problem by a sale of the vendor's executory interest, as on execution, but under the authority of the garnishment statutes.

Heimes v. Heimes[87] is an example under one of these statutes.[88] Plaintiff sued on a note, and while the action was pending, defendant transferred all his property to his children who agreed in writing to pay him $75 each month for the rest of his life. Plaintiff obtained a judgment and levied on this annuity by serving notice on the defendant and his children. Appealing an order confirming the validity of the sale of this annuity, defendant contended that the sale was invalid because the sheriff never took possession of the contract and, thus, there was no levy. The appellate court affirmed, explaining that while the notice of sale had spoken of selling a promissory note, all concerned understood that it was the indebtedness evidenced by the note that was being sold. Under South Dakota statutes[89] such property may be sold on execution without obtaining possession of the written evidence of the debt.[90]

The significance of this case is that it involved not an order to pay, but a sale of an installment obligation through a procedure by

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85 2 W. WADE, *supra* note 71, § 484. *See, e.g.*, Harris v. Harris, 201 Ark. 680, 146 S.W.2d 539 (1941).

86 Only a rare court would be willing to order a purchaser to make his payments to the sheriff "from now on" or to issue a new order as each installment falls due on the strength of a single original garnishment. *See* Annot., 111 A.L.R. 392 (1937) (containing levy cases from New York, Massachusetts, Rhode Island, and a number of Canadian provinces, all based on express statutory authorization). Post-1937 cases from Connecticut, Indiana, New Jersey, and West Virginia are noted in V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 98, 106 (1964). These are also all applications of special statutes.

87 71 S.D. 355, 24 N.W.2d 335 (1946).

88 S.D. COMPILED LAWS ANN. §§ 15-18-17, -27, -34 (1967).

89 *Id.*

90 Plaintiff also asserted that the $500 sale price on an annuity the court had valued at $12,740 was grossly inadequate. The court noted, however, that the plaintiff-purchaser had offered to apply the payments made to him on the judgment and to restore the annuity to the defendant when the judgment was satisfied, and that this understanding was reflected in the judgment below and did equity between the parties.

the creditor essentially indistinguishable from garnishment: serving notice of his lien on his debtor's debtor.

Puissegur v. Yarbrough[91] is similar. There, the California Supreme Court held that by statute[92] mere service of a copy of a writ of execution on a bank holding an installment note for collection creates a lien that will prevail over a subsequent assignment of the note. Again the procedure followed by the creditor to collect his judgment operates much like garnishment. As in the South Dakota case, while the result turned to some extent on the local statute, the basic concept that a debtor's right to receive future installment payments is a *thing* that can be sold on execution seems capable of general application. Thus, even though the mechanical details of levy and sale may differ from state to state,[93] the possibility of applying this basic concept to a vendor-debtor in an installment land sale contract is obvious.

Do occasional cases in which creditors failed by simple legal process to seize their debtors' rights to receive future payments suggest valid arguments for withholding this remedy generally? In *Fisher v. O'Hanlon*,[94] a creditor failed to obtain his debtor's rights on a negotiable note secured by a mortgage containing a prepayment clause. The creditor recovered a judgment against the debtor and garnished the debtor's debtor. The creditor then attempted to foreclose the mortgage.[95] He failed, but only because the court held that the prepayment clause did not impair the negotiability of the note. The court assumed that, while a negotiable instrument may be attached only by a manual seizure of the note, a chose in action in non-negotiable form, even one embodied in a document, is not only subject to attachment but may be effectively attached by garnishing the obligor.

A Texas court interpreting a Wisconsin statute[96] in *Sheldon v. Stagg*[97] held that a simple promise to pay included in a contract could not be levied on since the statute provided for levy of execu-

[91] 29 Cal. 2d 409, 175 P.2d 830 (1946).

[92] CAL. CODE CIV. PROC. § 542.6 (West 1967), *as amended*, (West Supp. 1973).

[93] *Compare* ORE. REV. STAT. § 23.420(1) (1971) (if garnished debt not yet due, sheriff to sell "as other property") *with* N.Y. CIV. PRAC. LAW § 5231 (McKinney 1963) (order to person garnished under "income execution" to pay sheriff up to 10 percent of each installment as it comes due to judgment debtor).

[94] 93 Neb. 529, 141 N.W. 157 (1913).

[95] Joined in the suit were the debtor, the debtor's debtor, and the several successive holders to whom the note and mortgage had been negotiated.

[96] WIS. STAT. ANN. § 272.26 (1968).

[97] 169 S.W.2d 550 (Tex. Civ. App. 1943).

tion only on those notes "circulated as money" or "negotiable or payable to the bearer or holder."

Just as *Fisher* assumed that the Nebraska statutes permitted garnishment of nonnegotiable obligations, so *Sheldon* assumed that negotiable instruments are subject to levy. There appears to be a general legislative agreement that it is a good idea to let a creditor reach his debtor's right to receive future payments and that the variations in implementation from state to state are simply happenstance. The few existing cases thus seem to support the idea that a logically worked out code of creditors' remedies would provide a simple procedure for reaching any of a debtor's choses in action. Some of the special incidents of the land sale contract do, however, suggest possible complications in any effort to enable a vendor's creditors to reach his right to receive future contract installments by simple garnishment or levy on and sale of a chose in action.

Consider a debtor who has acquired a right to be paid money for property already transferred or services already rendered. Such a right may be transferred to his creditor without fear of harming the obligor. But the salient feature of the right of a debtor who is a land contract vendor is that it is a right to be paid for a consideration still to be executed. The question, thus, is whether we can give the vendor's creditor, by simple garnishment or levy, the power to enforce the purchaser's obligation without endangering the purchaser. Or, put another way, can we give the vendor's creditor this power effectively, recognizing that he will have trouble enforcing the obligation if the court scents the possibility of prejudice to the purchaser. In short can we provide assurance, given the limitations of ordinary garnishment and execution sales, that the purchaser will get title to the land in exchange for paying the price. This question is the subject of the following subsection.

E. *Effect of Garnishment on Security for the Garnished Debt*

It is axiomatic that the security for a debt passes as an incident of the debt upon a simple transfer of the debt. As with the other axioms we have noted — such as payment under garnishment discharges the debt and direct payment to the vendor satisfies the conditions of the escrow — it is not easy to find examples.[98] Nor is it

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[98] Puissegur v. Yarbrough, 29 Cal. 2d 409, 175 P.2d 830 (1946), and Sheldon v. Stagg, 169 S.W.2d 550 (Tex. Civ. App. 1943), *see* text accompanying notes 96-97 *supra*, assumed without discussing the point that the execution sale purchasers of notes had standing to foreclose the deed of trust (*Puissegur*) and vendor's lien (*Sheldon*) securing

easy to envision the mechanics of the debt security "passing as an incident." Suppose that a creditor of a vendor has garnished the purchaser or acquired the right to receive the purchase price by levy on and sale of a chose in action. Assume first that the purchaser willingly pays the price to the creditor, and the creditor gives him a deed to the property. Even if the vendor is properly regarded as the owner of a chose in action for which his reserved legal title to the land stands as security, the chain of title record may well be split between counties or even states, making it unlikely the purchaser will have an insurable title.[99] This problem suggests a friendly specific performance suit, with the vendor joined as a party, to establish purchaser's title on the record.

Assume instead an unwilling purchaser. He may be unable to pay the contract price or perhaps he questions the creditor's right to receive it or his ability to convey good title. By what form of proceedings may the creditor realize on the property security for the purchaser's obligation that is supposed to have incidentally passed to him? Osborne, writing of the closely analogous situation of the transferee of a debt secured by a mortgage, says:

> In title states, the transfer of the debt will carry with it in equity the security of the land. It will not give to the transferee the legal interest in the property. That will remain in the mortgagee.
>
> The lack of legal title will not prevent the assignee from bringing a bill in equity to foreclose. It will prevent him from enforcing his rights, such as bringing ejectment or a writ of entry at law, a customary mode of foreclosure in some states, which are dependent upon having legal title to the land. . . .
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> . . . The legal title to the land security may remain in the mortgagee or it may be transferred to a third party. Except where the mortgage is in the form of a deed absolute the fact of mortgage would be in the chain of title so that the third party could not be a bona fide purchaser. In such cases the mortgagee or third person who holds the bare security title will hold it in trust for the owner of the debt. If necessary he will be compelled to transfer it to him. Since it is an interest in real property, and, in theory, the legal title however attenuated, it can be transferred only by an in-

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them. In *Sheldon* the execution sale had been in Wisconsin and the lien was on Texas land. But in Butcher v. Kagey Lumber Co., 164 Ohio St. 85, 128 N.E.2d 54 (1955), the dissenting judges urged that a vendor's lien not only did not "pass as an incident" but, because of its personal nature was not even expressly assignable. 40 MINN. L. REV. 738 (1956), draws a distinction between grantor's liens (personal and nonassignable) and true vendor's liens (assignable).

[99] Using this assumption, I have presented a hypothetical chain to a title examiner and asked whether the purchaser had an insurable title. He answered "no" if the creditor's judgment and the execution sale did not appear in the county records where the deed was recorded, and he answered "might be all right" if all the transactions were spread on those county records and the execution sale "looked nice and clean."

> strument that is sufficient by the laws of the jurisdiction in which the property is to pass a legal interest. And, in general, the same requirements will be insisted upon as are necessary where the grantor is the full owner of the legal interest held in mortgage.[100]

This passage suggests that in a mortgage case an ordinary foreclosure suit should be brought by the transferee as plaintiff in the county where the mortgaged land lies. The mortgagee should be joined as a party defendant so that the decree may compel an effective transfer of the legal title and adjudicate any questions respecting the transfer from the mortgagee to the transferee.

The same technique is suggested in the land sale contract situation by *White v. Simpson*,[101] where, in order to recover on a judgment against a grantor, the plaintiff had garnished the grantee for money owed on the sale of land. But the purchaser was unable to pay the debt, and an execution against the land in question was returned unsatisfied because the purchaser claimed a homestead therein. The plaintiff then brought the present suit to foreclose the grantor's lien. A demurrer to the complaint was sustained below on the ground that equity will not aid the purely legal remedy of garnishment. This was reversed in the Supreme Court of Alabama holding that this garnishment was in effect a condemnation on the plaintiff's behalf of the grantor's legal claim against the grantee, and that the plaintiff could pursue any remedy, legal or equitable, that the grantor might have. In remanding for further proceedings, the court observed that since the grantee owed more than the amount of the plaintiff's judgment, the grantor should be made a party to the foreclosure suit in order to enable a complete disposition of the matter.[102]

Throughout this section on garnishment, we have continually inquired whether garnishment of the purchaser provides an adequate remedy to the vendor's creditor in order to answer a question raised earlier: Are we justified in ignoring the functional realities of the land sale contract relationship in order to hold that the vendor's interest is real property and hence subject to the lien of a judgment? From the foregoing it would not be unreasonable to say that garnishment of a purchaser is far from a simple remedy, that the complications introduced by escrow arrangements and by procedures for reaching future installments plus the policy of protect-

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[100] G. OSBORNE, *supra* note 45, § 224, at 443-44.

[101] 107 Ala. 386, 18 So. 151 (1895).

[102] *See also* Smith v. Butler, 72 Ark. 350, 80 S.W. 580 (1904), which involved a reserved vendor's lien and so is closer to a pure land sale contract.

ing the purchaser seem inevitably to require some kind of proceeding in a court of record, and that, in view of this, it should be left open to the creditor to use the more familiar and largely administrative mechanism of an execution sale of real property.

In answer to this argument, I submit that any supposed gain in speed or economy in this approach is nullified by the fact that an execution sale of land typically entails the possibility of a redemption,[103] and that the considerations justifying a right to redeem are conspicuously absent when the property of the debtor that is sold is a vendor's interest. These considerations seem to be: the somewhat outmoded idea that it is peculiarly serious to deprive a debtor of ownership of land; the difficulty of accurately valuing land; and the related danger of forced sale at a price far below fair market value. The first consideration is plainly inapplicable when the debtor is a person who has agreed to sell his land. As for the second, the value of an executory land contract can probably be estimated with more assurance than that of most kinds of property. For the final consideration, plainly the most important, the *Heimes*[104] and *White*[105] cases suggest that garnishment proceedings can provide a much more precise guard against forfeiture and unjust enrichment than is provided by redemption.

IV. CREDITOR'S BILL

In the preceding two chapters of this article I have demonstrated that mechanical difficulties are likely to seriously complicate efforts by a vendor's creditor to collect his debt by judgment lien or levy on the contract rights or by garnishment of the purchaser. Because of the limitations on these two approaches, I believe a creditor's bill, or creditor's suit,[106] is the best remedy from a theoretical standpoint.

The *American Law of Property*, after a similar analysis, also concluded that a vendor's interest should not be subject to a judgment lien: "This works no injustice upon the creditors, who may proceed by garnishment to reach the purchase money or by bill for

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[103] *E.g.*, ORE. REV. STAT. §§ 23.520-.600 (1971).

[104] Heimes v. Heimes, 71 S.D. 355, 24 N.W.2d 335 (1946); *see* text accompanying note 87 *supra.*

[105] White v. Simpson, 107 Ala. 386, 18 So. 151 (1895); *see* text accompanying note 101 *supra.*

[106] 21 AM. JUR. 2D *Creditor's Bills* § 1 (1965) defines a creditor's suit or bill as "an equitable proceeding brought by a creditor to enforce the payment of a debt out of property or interests of his debtor which cannot be reached by ordinary legal process." *See also* 21 C.J.S. *Creditor's Suits* § 1 (1940).

equitable execution to reach both purchase money and vendor's lien."[107] Two old cases from Iowa and Mississippi show the availability of such a bill,[108] and my research has uncovered no others. In fact, neither of the cases actually held that a creditor's bill lay to reach the vendor's interest; both were concerned with the validity of sales made under an ordinary writ of execution. Each held these sales void on the ground that a vendor's interest was not subject to levy or lien, and observed that the creditors should have proceeded by way of "bill in chancery" or "equitable proceedings." Nevertheless these were unusually strong dicta and, apart from the age of the cases, there is little reason to doubt that they correctly state the law for their respective jurisdictions. Elsewhere a creditor seeking to enlist the aid of a court of equity in order to reach a land sale contract vendor's interest must rely on the general principle that a creditor's bill will lie whenever legal process is inadequate and on examples of the use of a creditor's bill to reach a debtor's assets that are closely analogous to a vendor's interest.

Earle v. Grove,[109] for example, provides a very suggestive analogy even though the debtor's asset involved may seem far removed from a vendor's right. Upon the unsatisfied return of an execution on a foreign (New York) money judgment, the creditor commenced a creditor's suit in the local jurisdiction (Michigan) to reach the debtor-distributee's share of an estate and enjoined the distribution of the estate. The administrator sued in mandamus to dissolve the injunction. The writ was denied on the grounds that a creditor's suit is available whenever there is no effective legal remedy to reach a debtor's assets, and that it is unnecessary for the creditor to get a local judgment and run an execution thereon if this is impossible because of the debtor's nonresidence.[110] The special relevance of this case to the vendor-purchaser situation is found in the answer that the court gave to the administrator's argument that the local rule that an administrator was not subject to garnishment was an expression of state policy and should not be circumvented by allowing the creditor to proceed in equity. The court answered that the rule was based purely on mechanical difficulties, not policy considerations. These difficulties — that the administrator

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107 3 AMERICAN LAW OF PROPERTY, *supra* note 3, § 11.29, at 86 (footnote omitted).

108 Baldwin v. Thompson, 15 Iowa 504 (1864); Taylor v. Lowenstein, 50 Miss. 278 (1874).

109 92 Mich. 285, 52 N.W. 615 (1892).

110 *See* text accompanying notes 118-28 *infra*.

might not possess the facts necessary to answer the garnishment, or that even if he knew them, he could not bind the estate by admitting indebtedness, and that he might expose himself to a surcharge by paying the sheriff or creditor — would be obviated if the creditor proceeded by suit, and any payment made by the administrator was pursuant to court decree. The discussion in the preceding chapter about the dilemma that may be created for a purchaser or escrowee if he is held subject to garnishment[111] suggests exactly the same argument for allowing a vendor's creditor to proceed by suit.

Cooperstein v. Bogas[112] involved a bill to reach and apply the defendant's interest as a mortgagee in satisfaction of the plaintiff's judgment against him. The court declared that such relief could be granted but only where the decree is aimed at the defendant's interest in the note secured by the mortgage rather than in the mortgage itself. It should be noted that this case arose in a jurisdiction adhering to the title theory of mortgages. There is a very close analogy between the position of a title-theory mortgagee relative to the secured note and the position of a vendor relative to the obligation to pay the purchase price.

Tunnell v. Johnson[113] is a Texas "vendor's lien note" case which may be read as precluding the use of a creditor's bill by the vendor's creditor. The defendant had recovered a judgment against the plaintiff who thereafter conveyed certain lots in exchange for the vendor's lien notes. The defendant obtained a writ of execution under his judgment directing a sale of other land owned by the plaintiff. The plaintiff then proceeded to enjoin the execution sale on the ground that the land in question was his homestead. At trial, the sale of the lots came to light; the defendant asked for appointment of a receiver to collect and apply on his judgment the payments coming due on the vendor's lien notes if the land originally sought to be sold on execution should be found to be exempt as a homestead. The court denied defendant's request and, with regard to the vendor's lien notes, said, "[Defendant-creditor] had acquired no lien whatever upon the notes and is in no position to invoke the equitable powers of a court and through the instrumentality of an injunction and a receivership subject such property to

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111 *See* text accompanying notes 71-78 *supra*.
112 317 Mass. 341, 58 N.E.2d 131 (1944).
113 209 S.W. 451 (Tex. Civ. App. 1919).

the payment of her judgment."[114] It is true that the creditor had made no effort to reach the notes by legal process,[115] and that her judgment, recovered before the sale of the lots, was presumably a lien on them; these factors make the denial of equitable aid unremarkable. Nevertheless, the fact that the creditor learned of the notes only during the trial and that the debtor had commenced the injunction suit, plus the "equitable clean-up" principle,[116] suggest that the court took a rather myopic view of what equity can properly do for a creditor.[117]

Shuck v. Quackenbush[118] suggests that an equity court may exercise quasi in rem jurisdiction to enable a creditor to collect a simple money claim against an out-of-state debtor on the strength of a "seizure" of an in-state equitable asset. I found no case of this kind where the equitable asset was a land contract purchaser's obligation to pay the price, such obligation not being subject to legal garnishment under the law of the state in question.[119] A prediction of how a court would decide such a case may only be hazarded with the help of cases involving a debtor with some kind of equity in land located in the state of the forum,[120] the aid of general equitable

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114 *Id.* at 452 (citations omitted).

115 Traders' Nat'l Bank v. Price, 228 S.W. 160 (Tex. Comm'n App. 1921), indicates that a vendor's lien is not subject to legal process — at least not attachment.

116 *See* Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951).

117 A similar case is Todd & Hurley v. Garner, 63 Tex. Civ. App. 263, 133 S.W. 314 (1910). The creditor levied on land against which his debtor held vendor's lien notes. The debtor enjoined the execution sale on the ground that he had no leviable interest in the land. On appeal, the creditor argued that the vendor's lien was at least such an equitable interest as should be subjected by a court of equity to payment of its owners' debts. The court brushed him aside with the observation that he had not sought such relief below. Perhaps this implies that the Texas vendor's creditor could get equitable help if pleaded properly and timely. The result still seems a rather perverse refusal to aid the creditor considering his need for enforcement of the judgment, and the fact that the parties were already properly before the court in an injunction suit over the execution sale.

118 75 Colo. 592, 227 P. 1041 (1924).

119 If the obligation *is* subject to garnishment there is not much question that the courts will exercise *legal* quasi in rem jurisdiction. That is, the debt is regarded as an intangible asset of the debtor, located where the person of the debtor's debtor is and seizable by garnishing him. *See* Harris v. Balk, 198 U.S. 215 (1905); RESTATEMENT OF CONFLICT OF LAWS § 108 (1934). The holding in Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), that prejudgment garnishment of wages is a denial of due process has cast some doubt on all quasi in rem jurisdiction. While the holding was carefully limited to the case of a resident, wage-earner defendant, and it is scarcely to be doubted that the court was primarily motivated by the hardship too often associated with wage-earner garnishments, subsequent cases in the lower federal and state courts have considerably extended the principle. *See also* Stecker v. Snyder, 118 Colo. 153, 193 P.2d 881 (1948).

120 *See* Coleman v. Alcock, 272 F.2d 618 (5th Cir. 1959) (permitting "equitable at-

principles,[121] and the insights from the two following cases involving attempted creditor's suits against nonresident, nonserved, debtors whose only in-state asset was a money obligation.

In *Miller v. Maryland Casualty Co.*[122] the plaintiff casualty company obtained a personal judgment against the debtor in a Texas federal court. It then commenced a suit in equity in the Arkansas state court against the trustees of a testamentary trust of which the debtor was a beneficiary seeking a decree directing the trustees to pay her distributive share to the company until its judgment was satisfied. There was no personal service on the debtor in Arkansas, nor was the federal court judgment "domesticated" or any other personal judgment establishing the debt obtained against her in Arkansas. The Supreme Court of Arkansas affirmed the trial court's grant of relief: a creditor's suit lies to reach any property not subject to legal process; personal judgment and return of execution nulla bona are not required where impossible because of the debtor's nonresidence; jurisdiction in rem was established by the presence in the state of the trust corpus; service of process was effected on the trustees.

Coyne v. Plume[123] reached the opposite result. Here, the creditor garnished a trust company holding his debtor's accrued income[124] but did not make personal service on the beneficiary-debtor, a nonresident. The issue involved was whether there had been an effective seizure of the right to future accruing income that would support jurisdiction quasi in rem. The trial court decided that there

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tachment" under Florida law); First State Bank v. Fitch, 105 Fla. 435, 141 So. 299 (1932); National Tradesmen's Bank v. Wetmore, 124 N.Y. 241, 26 N.E. 548 (1891). *Contra*, Ladd v. Judson, 174 Ill. 344, 51 N.E. 838 (1898); Johnson v. Riley, 41 W. Va. 140, 23 S.E. 698 (1895). A distinction is sometimes drawn between a creditor's suit to set aside a fraudulent conveyance (no prior judgment at law required) and to reach equitable assets (only lies in aid of a judgment). *Compare* Bateman v. Hunt, 46 Misc. 346, 94 N.Y.S. 861 (Sup. Ct. 1905), *with* Dittmar v. Boni, 60 App. Div. 94, 69 N.Y.S. 708 (1901). Hamilton Michelsen Groves Co. v. Penney, 58 F.2d 761 (5th Cir. 1932), suggests that permitting an equity court to establish the existence of a debt and apply a seized asset to payment thereof is to deny the right to jury trial; but query if any more than in a legal quasi in rem action. The refusal of the federal courts to exercise equitable quasi in rem jurisdiction is better explained by the fact that there was no federal provision for *legal* quasi in rem jurisdiction prior to the amendment of FED. R. CIV. P. 4(e) in 1963; Davis v. Ensign-Bickford Co., 139 F.2d 624 (8th Cir. 1944).

121 "Equity not a tribunal for collection of debts" vs. "equity acts where legal remedy inadequate" plus "equity does not require the vain or impossible."

122 207 Ark. 312, 180 S.W.2d 581 (1944). *Cf.* Earle v. Grove, 92 Mich. 285, 52 N.W. 615 (1892).

123 90 Conn. 293, 97 A. 337 (1916).

124 At the time the trust company was garnished all of the accrued income on hand was subject to prior garnishments.

had been, relying on a statute[125] that gave equity courts power to direct a trustee to pay over income, as it accrues, to a creditor of a beneficiary. The Supreme Court of Errors reversed concluding that this power may be exercised only if jurisdiction has first been obtained by personal service on the beneficiary or seizure of *existing* property.

Even if *Coyne* is accepted, it is arguable that there is a material distinction between the position of a trustee and that of a land contract purchaser. The trustee's duty to pay attaches only when, and if, he realizes income from the trust res;[126] the purchaser is presently and unconditionally obligated to pay the future installments, and this obligation would seem to have as much existence as any intangible.

This analysis indicates that analogous case law and equitable principles support the use of a creditor's bill to collect the land sale contract payments — the only obstacle being that of obtaining quasi in rem jurisdiction where the debtor is out of state.[127] But whether the action proceeds on the basis of jurisdiction in personam or quasi in rem, the creditor will obtain that which he really desires, court adjudication of his rights. The purchaser will be protected from any danger of making a double payment by a court order directing him as to whom he should pay.[128] The vendor, the creditor's debtor, will have an opportunity to be heard on the merits of his case. While there may be no direct authority supporting the use of the creditor's bill in this situation, there is none denying it. In light of the protection which it provides all parties, courts should respond to the need created by the problems inherent in other remedies and allow creditors to reach payments under land sale contracts by means of the creditor's bill.

V. CONCLUSION

There are presently two methods most commonly used by a cred-

[125] Act of June 22, 1899, ch. 210 §§ 1, 2, [1899] Conn. Acts 1119, *as amended*, CONN. GEN. STAT. ANN. § 52-321 (1960).

[126] *See* Coward v. Barnes, 232 Ark. 177, 334 S.W.2d 894 (1960); Annot., 82 A.L.R. 2d 858 (1962) (cannot garnish landowner before crop harvested for amount to come due sharecropper).

[127] The extensions made in the constitutionality of long arm statutes largely obviate this problem. Since the vendor has entered into a contract with the vendee, he should be amenable to service of process in the vendee's state of residence — in most cases the state where the land is located. In any case, the situs of the land should be a forum in which the vendor and vendee have sufficient contact to warrant personal jurisdiction. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[128] *See* text accompanying notes 36-37 *supra*.

itor in proceeding against his debtor's interest as a land sale contract vendor: obtaining judgment lien or levy of execution as if the interest were in real property, or garnishing the land sale contract purchaser. Neither of these approaches is a truly satisfactory method of procedure. There are mechanical complications involved in their use, and exceptions to general rules have proliferated to prevent injustice in particular cases.

The jurisdictions are split over whether a vendor's interest is lienable, the majority holding that it is. However, within each of the two views, the courts have engrafted numerous exceptions and refinements to meet the equities of special cases.

In those states adopting the majority rule, that the interest is lienable, a second issue arises: when must the purchaser pay the creditor rather than the vendor? The courts vacillate on this issue, again the prevailing equities being a strong factor. If the courts decide that it is only after an execution sale that the creditor is entitled to payment, the creditor is faced with the possibility that much of the vendor's interest will be converted to cash before he can reach it. While there is no direct authority on the point, most courts would probably hold that the docketing of judgment alone requires the purchaser to pay the creditor. This places a heavy burden on the purchaser, normally alleviated by requiring that he have actual notice of the judgment before requiring him to pay the creditor directly.

Garnishment is inherently a poor method for collecting a large debt when installment payments come due in the small periodic amounts usually involved in land sale contracts. Because garnishment is a creation of statutes, courts are loath to extend the remedy to cover successive payments, especially when future payments are not yet due. Further, the fact that payment is conditioned upon delivery of marketable title places a hardship on the garnished purchaser. If he pays the creditor, he may be embroiled in litigation with the vendor to secure his title to the land.

Even in those states which allow a type of continuing garnishment, the creditor is not protected from an early payment of a substantial portion of the contract price by the purchaser. Because the purchaser may know that the vendor is relying on payments under the land contract to make payments on a mortgage, which payments are necessary to protect the title for both purchaser and vendor, this possibility poses a very real threat.

There are, however, some situations in which it is worthwhile to recognize or retain the remedy of simple garnishment of contract payments as a quick, cheap device that will sometimes work without any further proceedings. For example, garnishment should be employed on a small judgment payable in full by one or two contract installments or where the vendor will voluntarily execute the instruments necessary to protect the purchaser or the escrowee.

The answer to most of the problems presented lies in the creditor's bill, an equitable action in which all three parties are involved and can have their rights enforced and protected. This conclusion is most evident in jurisdictions that do not permit the entire contract to be reached by garnishment or levy and sale of a chose in action. Even in jurisdictions that do permit such action, it appears that some sort of equity proceedings will be necessary before matters are finally concluded. The court should be as fully able to establish the purchaser's title, assure equitable distribution of the price, and protect an escrowee in a creditor's suit as it could in a foreclosure, specific performance, or quiet title suit following garnishment. Moreover, there is something to be said for keeping everything under one judicial roof.

Although, to date, no cases directly support the use of a creditor's bill by a creditor of a land contract vendor, there is some analogous authority. The inadequacies of mechanically cumbersome legal remedies combined with the equitable clean-up doctrine favor allowing it as a remedy for the vendor's creditor. On balance, the creditor's bill would best protect the interests of all parties in the enforcement of a creditor's claim to payments due a land contract vendor.