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# Creditors' Rights--Judgment Liens and Priorities in Kentucky

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sary is said to be largely a question for the jury.<sup>20</sup> Here the rule is very confusing. Force amounting to killing or seriously wounding the tortfeasor should not be permitted and this is believed to be the law.

In conclusion it may be said that the law as to the right to defend property, although seemingly well settled, is in reality somewhat in confusion. As has been previously stated, the courts seldom base their decisions on defense and protection of property alone. It is believed that reliance solely upon protection of property as a defense in a criminal or civil case is impossible as a matter of law, except under situations coming within the recognized exceptions.

ANNE H. WOODS

### CREDITORS' RIGHTS—JUDGMENT LIENS AND PRIORITIES IN KENTUCKY

An important problem relating to rights of creditors is to determine when a judgment creditor acquires a lien on the property of a judgment debtor and the effect of such acquisition. Especially perplexing is determining the priorities of liens between the judgment creditor and other creditors and purchasers. An effort will be made to formulate from Kentucky statutes and decisions the correct procedure to be followed by the judgment creditor who desires to secure his judgment by obtaining and perfecting a lien on the debtor's property. The reader is advised, however, that the information gathered from the statutes and cases may be supplemented beneficially by an examination of lower court records in particular communities, because relatively few cases pertaining to this subject have reached the Court of Appeals.

There are divergent views in different jurisdictions as to the exact time when a lien on property of the debtor is created in favor of the judgment creditor.<sup>1</sup> This diversity can be attributed to the fact that the creation of liens is now almost universally based upon statutory law. In order to determine the proper procedure to be followed by the judgment creditor, it is necessary to examine the applicable statutes of the state in which the judgment is rendered. Not only do statutes

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<sup>20</sup> *Garner v. State*, — Miss. —, 2 So. 2d 828 (1941); *State v. Terrell*, 55 Utah 314, 186 P. 108 (1919).

<sup>1</sup> For a general discussion of the various state statutes and interpretations see 31 AM. JUR. 16 *et seq.*; 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 37 *et seq.* (1940).

differ as to the extent of protection afforded by the lien and as to the time of the creation of the lien, but also as to whether real and personal property should be treated alike for this purpose. Many states have statutes which provide that the rendition of the judgment itself constitutes a lien on real property.<sup>2</sup> Other state statutes provide that only when the judgment is docketed and properly recorded does it become a lien on real property.<sup>3</sup> Most of these states distinguish between real and personal property and require more than the rendition and docketing of the judgment to create a lien on personalty.<sup>4</sup> However, in a few of these states no distinction is made between real and personal property.<sup>5</sup> In those states which hold that the judgment does not create a lien on either realty or personalty but require a writ of execution, both are commonly treated in the same manner and the same execution is used.<sup>6</sup>

The Kentucky requirement is in accord with the latter group as to both real and personal property of the debtor. The pertinent statutory provision is:

"(1) An execution against property shall bind the estate of the defendant only from the time of its delivery to the proper officer to execute. The officer to whom the execution is delivered shall, on receipt of it, endorse thereon the day, month, year and time of day of its receipt by him."

Under this statute it seems that when the creditor has taken his writ of execution to the proper official<sup>8</sup> who endorses it, a lien is validly

<sup>2</sup> 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 40 (1940). For example, PA. STAT. tit. 12, sec. 868 (Purdon 1936).

<sup>3</sup> 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 40 (1940) states: ". . . the rule, in Massachusetts and some other New England states, [is] that a judgment is not a lien upon the debtor's land, but all other states have laws that make every judgment, when docketed in a book provided for that purpose a lien upon the debtor's land . . ., binding all subsequent purchasers." Kentucky, however, fundamentally follows the New England rule, note 7, *infra*.

<sup>4</sup> 31 AM. JUR. 23, for example PA. STAT. tit. 12, sec. 2291 (Purdon 1936).

<sup>5</sup> 1 HANNA AND MACLACHLAN, CREDITORS' RIGHTS 10, n. 2, for example ALA. CODE tit. 7, secs. 585, 588 (1940).

<sup>6</sup> See KY. REV. STAT. sec. 426.130 (1948). "Property shall be liable to levy and sale under execution in the following order: first, personalty; second, land."

<sup>7</sup> KY. REV. STAT. sec. 426.120 (1) (1948). This execution statute might be considered the same as the statutory provision for attachment liens in KY. CODE CIV. PRAC. ANN. sec. 212 (Carroll 1948): "An attachment binds the defendant's property in the county which might be seized under an execution against him, from the time of delivery of the order to the sheriff, in the same manner as an execution would bind it. . . ." Thus it would follow that attachment liens may be treated in the same manner as execution liens in determining the time at which they become binding on the property of the debtor. "A lien of attachment is the same as an execution lien. . . ." *Brown's Adm'r v. Gabhart*, 232 Ky. 336, 23 S.W. 2d 551 (1930).

<sup>8</sup> See KY. CODE CIV. PRAC. ANN., sec. 667 (Carroll 1948): "(1) Every process in an action or proceeding shall be directed to the sheriff of the county; or, if he

created against the debtor's interest in his property, both real and personal. For most purposes the decisions of the Kentucky Court have so held.<sup>9</sup>

In 1903, the court rejected a judgment debtor's contention that there was no lien upon his property because the sheriff had failed to inventory and appraise the property and thus had failed to levy the lien, and held that the lien was nevertheless valid from the time of delivery of the writ of execution to the sheriff.<sup>10</sup> Its position was reiterated in a 1940 case, the court holding that the moment the execution was placed in the hands of the officer for levy and collection a lien was created on the debtor's property to secure payment of the judgment.<sup>11</sup> Of course, a notable exception to this general rule is found in the case of a writ of execution or order of attachment delivered to the officer with orders to delay levy until further instructions. In such a case, the execution or order is not considered delivered for practical purposes until the date the officer is ordered to levy.<sup>12</sup>

The remaining problem under the Kentucky statute is the extent of protection afforded the creditor against third party interests. This problem seems to be divided into two phases: (1) protection against other execution creditors, i.e., priority of liens, and (2) protection against subsequent purchasers.

In determining priorities of liens, it is not difficult to conclude that the first execution delivered and levied by the officer obtains priority over subsequent liens. The difficulty arises in the following situation. "S" creditor takes a writ of execution to the sheriff and has it endorsed at 2:00 p.m. on January first. "J" creditor has a writ against the same defendant endorsed at 3:00 p.m. on the same day by the deputy sheriff. The deputy acts quickly and levies the junior execution of "J" immediately; the sheriff levies the senior execution of "S" later in the afternoon. The court has repeatedly held that "J"'s junior execution

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be a party, or be interested, to the coroner. . . ." Executions must be directed to and executed by the sheriff, unless he is a party or is interested. See *Gaudy v. Sanders*, 88 Ky. 346, 11 S.W. 82 (1889).

<sup>9</sup> The creditor's interest can extend no further than the interest of the debtor, I GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* 41 (1940). The lien, even after its perfection, will not attach to defeat one who has a prior equitable interest in the land. *Boswell v. Kirby*, 12 Ky. Opn. 412 (1884). An exception to this general rule is when the court finds that the prior equity is one which has not been exercised and is urged for the first time after the creditor's judgment. *Griffin v. Gingell et al.*, 25 Ky. Law Rep. 2031, 79 S.W. 284 (1904). The lien will never defeat the holder of a prior mortgage which has been properly recorded or of which the creditor has actual notice at the time he acquired the lien. *Jett v. Sheets*, 10 Ky. Law Rep. 197 (1888).

<sup>10</sup> *Richart v. Goodpastor*, 116 Ky. 637, 76 S.W. 831 (1903).

<sup>11</sup> *Fannin's Ex'r v. Haney*, 283 Ky. 68, 140 S.W. 2d 630 (1940).

<sup>12</sup> *Hood v. Pope*, 233 Ky. 749, 26 S.W. 2d 1043 (1930).

becomes a prior lien because it is first levied.<sup>13</sup> The result is that the execution which was last delivered and endorsed will be first satisfied. This creates an unfortunate situation because the diligent "S" creditor loses the prior lien through actions which were completely without his control. However, even if these decisions prevail, and the value of the debtor's property is only great enough to satisfy "J"'s lien, "S" is not necessarily without remedy. The sheriff has a statutory duty<sup>14</sup> to levy first those executions which he receives first, and thus "S" may be compensated through the bond of the sheriff, if it is found that the sheriff acted negligently in levying the junior execution first.<sup>15</sup> It might be added that when two executions come into the sheriff's hands at exactly the same time, he shall apportion the amount realized from the debtor's property according to the amount of the judgment of each.<sup>16</sup>

The second phase of the problem pertains to the protection afforded the holder of the lien against subsequent bona fide purchasers. The mere creation of a lien on the property of the debtor does not protect the holder against subsequent purchasers for value without notice of the lien.<sup>17</sup> In order to afford himself such protection against a purchaser of real property, the creditor must comply with the procedure for filing a notice of *lis pendens* which is:

"No action . . . or any lien . . . shall in any manner affect the right, title or interest of any subsequent purchaser, lessee, encumbrancer of such property, or interest for value and without notice thereof, except from the time there is filed in the office of the county clerk of the county in which such real property or the greater part thereof lies, a memorandum stating:

- (a) The number of the action, if it is numbered, and the style of such action or proceeding and the court in which it is commenced, or pending;
- (b) The name of the person whose right, title, interest in or claim to real property is involved or affected;
- (c) A description of the real property in the county thereby affected."<sup>18</sup>

In the case of personal property the creditor is not protected against a subsequent bona fide purchaser until a levy has been made, because

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<sup>13</sup> C.T.C. Investment Co. v. Daniel Boone Coal Corporation, 58 F. 2d 305 (E.D. Ky. 1931); Million v. Commonwealth, 40 Ky. 310 (1841); Tilford & Anderson v. Burnham & Ewell, 37 Ky. 109 (1838); Kilby v. Haggin, 26 Ky. 208 (1830); Arberry v. Nolan, 25 Ky. 421 (1829).

<sup>14</sup> Ky. REV. STAT. sec. 426.120(2) (1948).

<sup>15</sup> See Million v. Commonwealth, 40 Ky. 310 (1841).

<sup>16</sup> Ky. REV. STAT. sec. 426.120 (3) (1948): "If two or more executions come to an officer's hands at the same time and he is unable to make the amounts thereof, he shall apportion the sum made among the several executions so coming to his hands according to their amounts."

<sup>17</sup> Roark v. Bank of Fountain Run, 184 Ky. 109, 211 S.W. 561 (1919).

<sup>18</sup> Law v. Skaggs, 31 Ky. Law Rep. 1292, 105 S.W. 439 (1907).

the lien before that time is general in nature and not specifically binding upon any particular property.<sup>19</sup>

In conclusion: a writ of execution delivered to the proper official and properly endorsed by him (1) creates a lien upon the property of the debtor against whom the execution was issued (2) protects the creditor through priority of lien against subsequent writs of execution, except the subsequent execution which is first levied (3) protects the creditor against bona fide purchasers of real property only after the creditor has filed a *lis pendens* notice.

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### CECIL V. FARMERS NATIONAL BANK—TERMINATION OF LIMITED DIVORCES

In *Cecil v. Farmers National Bank*<sup>1</sup> the Kentucky Court of Appeals had before it a very novel and interesting question. The suit was brought by an alleged widow to establish a right of dower. She had married the deceased in 1941, but had obtained a divorce from bed and board from him in 1943. A property settlement by which the plaintiff accepted \$2,000 from her husband "in full settlement of her distributive right in his estate" was incorporated into the separation decree. Six months later the parties became reconciled, moved to another town and lived together as man and wife until his death in 1949. Neither of the parties ever petitioned for an annulment or modification of the separation decree. The question before the court was: did the reconciliation of the parties, who thereafter lived together as man and wife and so held themselves out to the general public believing that it was unnecessary to remarry, annul the separation decree and set aside their agreement wherein she relinquished her dower in his estate? The court held that it did not. However, they further stated, "this does not mean they could not mutually rescind their property settlement incorporated in the divorce judgment." Thus, the court sent the case back to determine the question of rescission.

The court was undoubtedly sound in holding that the parties could not by mere reconciliation and subsequently living together as man and wife abrogate the decree of limited divorce. The Kentucky Statutes permit the granting of a divorce from bed and board for any

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<sup>19</sup> *C.T.C. Investment Co. v. Daniel Boone Coal Corporation*, 58 F. 2d 305 (E.D. Ky. 1931).

<sup>1</sup> 245 S.W. 2d 430 (Ky. 1952).