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Creditors' Rights

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action. This appears to be the most feasible answer and the one with the most chance of success. Were the problem presented to the legislators, the unjustness of the present rule could be readily seen and corrected.

In conclusion, it is the opinion of the author that the court has failed to recognize the distinction between "husband's property" as used in non-community property jurisdictions and "husband's separate property" as used in Washington. Further, correct analysis of this problem in the future will require that the court distinguish the two questions of "characterization" which are involved. Therefore, it follows that Marsh's position is the correct one and should be used in analyzing cases dealing with the problem.

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CREDITORS' RIGHTS

Declaration of Homestead—Excess Value Subject to Judgment Lien—Good Faith Declaration. In the case of *Barouh v. Israll*,[1] *H* declared a homestead under facts which made it doubtful that the declaration was made in good faith. *H* later entered into an agreement to sell the property to *P* for $7,000.[2] A judgment was subsequently entered in favor of *D* against *H*. *H* then conveyed the property to *P* who did not have actual knowledge of the judgment. *D* then procured a writ of execution and levied on the property. *P* brought this action to quiet title and to enjoin the sale; a permanent injunction was granted. The judgment was affirmed on appeal.

The court held that since there was a declaration of homestead on file the judgment creditor of the grantor did not have a lien on the property and, since the land had been conveyed to a bona fide purchaser,[3] the judgment creditor could not contest the validity of the declaration.

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[1] 46 Wn.2d 327, 281 P.2d. 238 (1955).

[2] The court apparently attached no legal significance to this point and it was not discussed in the opinion. The writer will likewise ignore the point but it raises some interesting questions. Was this agreement a valid executory contract for the sale of the property? If it was, then the subsequent docketing of the judgment does not give the vendee notice and he can continue paying the vendor and is entitled to the benefits of these payments until he receives actual notice of the judgment. Heath v. Dodson, 7 Wn.2d 667, 110 P.2d 845 (1941). If it was not a valid contract, then the docketing of the judgment gives constructive notice to the vendee and he is not entitled to the benefits of payments made after the judgment was docketed. See RCW 4.64.010. Assuming it was a valid contract, a judgment lien still attaches to the actual interest of the vendor but the judgment does not affect the rights of the vendee. McDonald v. Curtis, 119 Wash. 384, 205 Pac. 1041 (1922).

[3] It is submitted that there is considerable doubt that *P* was a bona fide purchaser. See RCW 4.64.010 *et seq.*, which provides that after a verdict has been recorded

It is submitted that the holding is questionable on two counts: (1) the test adopted by the court to determine whether or not a lien attached to the property; (2) the failure of the court to determine whether or not the homestead was declared in good faith.

Our court has experienced difficulty in reconciling the judgment lien statute[4] and the homestead statute.[5] The difficulty seems to be in determining the interplay between these two statutes when the homestead is declared prior to the entry of a judgment against the declarant. Does the judgment lien attach to the property of the judgment debtor?

In the case of *Traders National Bank v. Schorr*,[6] it was held that a judgment lien does not attach to the property which was declared a homestead before the judgment was entered.[7] This case has been followed without question by subsequent cases.[8] Out of these cases has evolved the untenable position of our court that the declaration of a homestead, regardless of the value of the property, absolutely precludes a judgment lien from attaching.

The court in the *Barouh* case said at page 332: "At the time appellant's judgment was obtained the property in question was not subject to the lien of the judgment because a declaration of homestead, valid on its face was on file. . . ." So then the test to determine if a lien attaches to the property is whether or not a declaration is on file. Assuming the declaration is made in good faith, and the property exceeds the statutory allowance, does a lien attach to the excess value?[9] If the test adopted by the court in the *Barouh* case

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anyone subsequently acquiring the property from the judgment debtor does so with notice of the judgment lien. So unless this statute is going to be completely ignored, a necessary condition precedent to determining whether or not P was a bona fide purchaser would be to determine when P acquired an interest in the property, *i.e.*, before or after the verdict in favor of *D* was entered. As was pointed out in note 2 *supra*, the court failed to do this.

[4] RCW 4.56.190.

[5] RCW 6.12.010.

[6] 20 Wash. 1, 54 Pac. 543 (1898). The court also held that the judgment creditor could not realize on the excess value of the property under the general execution statute but must proceed under the appraisal procedure set out in RCW 6.12.140. It is not apparent from the opinion in the Barouh case under which statute the defendant was proceeding. If he was proceeding under the general execution statute the court was correct in enjoining the sale but should have expressly stated this was its reason for so holding.

[7] Locke v. Collins, 42 Wn.2d 532, 256 P.2d 832 (1953), when the judgment is entered before the homestead is declared, the judgment does become a lien on the property and the subsequent declaration of homestead does not extinguish this lien but merely "supersedes and suspends it."

[8] *In re* Shelton, 102 F. Supp. 629; Lyon v. Herboth, 133 Wash. 15, 233 Pac. 24 (1925); Security National Bank v. Mason, 117 Wash. 95, 200 Pac. 1097 (1921).

[9] The great majority of jurisdictions that have been faced with the problem of

is to be followed it becomes necessary to conclude that a lien would not attach. It is submitted that such a conclusion would be demonstrably wrong.

There is the dictum in the *Schorr* case that supports the position that no lien attaches to the excess in value. In that case the court said on page 9: ". . . and the view taken by counsel for respondents that such lien may attach to the excess in value above the homestead exemption is erroneous." Since this case the Washington court has not been squarely faced with the problem of whether a lien attaches to the excess.[10]

In light of the existing statutes in Washington, does the mere filing of a declaration of homestead preclude a lien from attaching to the property? In answering this question it will be helpful to examine the pertinent statutes. RCW 4.56.190 provides in part: "The real estate of the judgment debtor, and such as he may acquire, *not exempt*, shall be held and bound to satisfy . . . any judgment of the supreme or superior court in this state . . . and *every such judgment shall be a lien there-upon*. . . ." (emphasis supplied). It would seem that a lien attaches to all the real estate of the judgment debtor which is not exempt. What real estate is exempt? RCW 6.12.090 provides: "The homestead is exempt from attachment and from execution or forced sale, except as in this chapter provided; . . ." RCW 6.12.010 defines a homestead as: "The homestead consists of the dwelling house, *in which the claimant resides*, with appurtenant buildings, and the land on which the same are situated, and by which the same are surrounded, or land without improvements purchased *with the intention of building a house and residing thereon*. . . ." (emphasis added). Finally, RCW 6.12.050 states: "Homesteads may be selected and claimed . . . *but not exceeding in net value* . . . the sum of six thousand dollars." (emphasis supplied).

So then it seems that a homestead of the value of $6,000 is all that is exempt. Doesn't it logically follow that if the property is worth more than the statutory limit a judgment lien attaches to the

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whether a lien attaches to the excess have held that a lien does attach. See 52 A.L.R. 1333.

[10] In the case of American State Bank v. Butts, 111 Wash. 612, 191 Pac. 754 (1920), a judgment creditor sought to have a conveyance of a homestead set aside as fraudulent so the judgment lien could attach to the excess. The court held that it had not been proved that the homestead exceeded the statutory exception. The court could have summarily disposed of the appeal by holding that the lien could not possibly attach to the excess, but instead went into a lengthy discussion of the evidence offered to establish the value of the homestead. This seems to mean that the court recognized that a lien could attach to the excess.

excess? It seems to the writer that the existing statutes in Washington demand that this question be answered in the affirmative. It would be difficult for the legislature to employ language more clearly expressing its intent that all that is exempt is a homestead of the value of $6000 with a lien attaching to all the excess above this amount. Yet if the court in the *Barouh* case means what it says, no lien can attach to the excess as long as a homestead declaration 'valid on its face' is on file.

It is also important to note that the legislature has enacted a statute which enables the judgment creditors to realize on the excess over the exemption.[11] Since the excess can be levied upon it is not exempt and the judgment lien statute declares that the judgment is a lien on all real estate not exempt.

It becomes obvious from reading the opinion in the *Barouh* case that the court considered only one of the applicable statutes, *viz.*, the homestead statute, and completely ignored the judgment lien statute.[12] The court seemed to be relying on the generalization that if the homestead is declared before the judgment is entered no lien attaches to the land. The court failed to recognize that this general proposition is qualified by the statutes discussed above. The generalization is correct only if the property does not exceed the statutory limit of $6,000.

Rather than summarily holding that the filing of the declaration precluded a lien from attaching to the property, it is submitted the court should have first determined the value of the declarant's interest in the property.[13] If this interest exceeded $6,000 then the court should have held a lien attached to the excess. If the declarant's interest did not exceed $6,000 then it was correct to hold that the declaration precluded a lien from attaching to the property.

Turning now to the second doubtful point in the note case, the court stated, at page 331: "No citation of authority is necessary for the rule that a declaration of homestead must be made in good faith." Yet the court neglected to determine whether or not this homestead was so declared. The court held that the conveyance to a bona fide purchaser conclusively settled the issue of whether or not the homestead was declared in good faith.

[11] RCW 6.12.140.

[12] The court relies on the case of Meikle v. Cloquet, 44 Wash. 513, 87 Pac. 841 (1906), as authority for its holding. A reading of the Meikle case shows that the quotation relied on by the court is dictum, the court having already found the statute of limitations had run against the judgment.

[13] John Hancock Mutual Life Ins. Co. v. Wagner, 174 Wash. 185, 24 P.2d 420, 27 P.2d 1118 (1933), the value of a homestead is determined by the value of the client's interest in the property rather than by the fee simple value of the property.

One of the basic rules of construction, recognized by our court,[14] is that the construction of the statute should be made with reference to the *purpose* of the statute and a construction should be avoided which would pervert the object of the statute.

What is the purpose of our homestead laws? Our court has said the purpose of this statute is humane, *i.e.*, to preserve the home. If the premises are not actually intended to be used as a home, then the declarant is not within the protection of the statute, and the court will not allow this statute to be perverted into a subterfuge to enable a debtor to avoid payment of his debts.[15]

Yet isn't this just exactly what court has done in the *Barouh* case? It appears to the writer that the decision has turned the homestead statute into a vehicle of fraud which allows a judgment debtor to avoid the payment of his just obligations. A holding that a purchaser of a homestead closes the door on the judgment creditor to contest the validity of the declaration of the homestead is a complete perversion of the statute.

It is easy to become overly sympathetic to the purchaser, but it must be remembered that RCW 4.64.010 *et seq.* gives everyone constructive notice of the judgment lien. The end result is that since the purchaser has constructive notice of the judgment he can not be a bona fide purchaser. Hence he deserves no special treatment and occupies no better position with respect to cutting off the rights of the judgment creditor than does the vendor.[16] If the purchaser acquires an interest in the property before the judgment is entered then, of course, it is possible such a purchase is bona fide and the purchaser's rights are not affected until he receives *actual* notice of the judgment.[17]

In *Code v. London*[18] the court held that the judgment debtor could not enjoin the sale of property declared as a homestead because the declarant was not the head of a household. The court stated at page 283, "It seems to us entirely clear that, if homestead rights may be waived or lost by abandonment, *that such rights may not be obtained in the first instance unless there is a full compliance with the statutory requirements* relative to securing the homestead exemption" (emphasis

[14] State *ex rel.* Milwaukee Grain Elevator Co. v. Robinson, 186 Wash. 557, 59 P.2d 365 (1936); Smith v. St. Paul M. & M. R. Co., 39 Wash. 355, 81 Pac. 840 (1905).

[15] Schoenhieder v. Dehne, 96 Wash. 103, 164 Pac. 748 (1917).

[16] The judgment debtor can not enjoin the judgment creditor from levying on the property when the declaration of homestead was not made in good faith. Traverso v. Cerini, 146 Wash. 273, 263 Pac. 184 (1928); Canadian Bank of Commerce v. Kellough, 142 Wash. 335, 253 Pac. 124 (1927); Schoenheider v. Dehne, *supra*, note 15.

[17] Heath v. Dodson, note 2, *supra*.

[18] 27 Wn.2d 279, 178 P.2d 293 (1947).

supplied). Another requisite of our homestead statute before a homestead can be created is an intent by the declarant to reside thereon.[19] It would seem then that if the homestead is not declared in good faith, (*i.e.*, the declarant has no intention of using the property as a home), such a declaration does not give rise to a homestead which is exempt because there has not been full compliance with the statutory requirements. If the land is not exempt then of course the judgment becomes a lien against the property.

It is submitted that the mere filing of a declaration alone does not create a homestead exemption, but in addition to the filing of a declaration, the declarant must have a bona fide intention of using the property as a home. The absence of either of these two requisites would prevent the creation of a homestead. The court in the *Barouh* case seems to hold that the requirement of intending to use the property as a home is not necessary when a third party enters the picture. This is an example of judicial legislation rather than judicial interpretation.

REX M. WALKER

Creditors' Rights—Priority of Federal Tax Lien Over Mechanic's and Materiaman's Lien. In the case of *Fleming v. Brownfield,* 147 Wash. Dec. 772, 290 P.2d 993 (1955), the plaintiff, pursuant to the applicable statutes, filed a claim for a mechanic's and materialman's lien on September 18, 1953. Subsequently on the sixth of October 1953 the United States filed a notice of its tax lien. Plaintiff brought this action to foreclose his lien and the trial court found that the local lien was superior to the United States tax lien. The trial court's holding was reversed by the supreme court and the tax lien was given priority even though subsequent in time.

The court based its opinion on the case of *United States v. Security Trust and Savings Bank,* 340 U.S. 47 (1950), which held that only those liens which are prior in time *and* "specific and perfected" are superior to federal tax liens. The court concluded that since RCW 60.04.100 requires that an action be commenced to foreclose the local lien, such a lien is not specific and perfected under federal law but a mere contingent and inchoate lien and not superior even though first in time. Apparently before our local mechanic's and materialman's lien can be superior to federal tax liens the local lien must be converted into a judgment *before* the federal tax assessment list is received by the collector.

Mechanics Lien—Authority of Administrator. The case of *Larson v. Duclos.* 46 Wn.2d 344, 281 P.2d 458 (1955), was an action to foreclose statutory liens for labor and materials. The court had the following question before it: does the administrator of an estate, acting without the authority of the court, have power to enter into a valid contract on behalf of the estate to erect an addition to the estate property? The question was answered in the negative. The court reasoned that since the administrator could not charge the estate for the costs of the addition, the contractor and materialmen who performed the contract could not possibly have liens against the property of

[19] RCW 6.12.010, RCW 6.12.060.

the estate. Although the court did not expressly state why it was impossible for a lien to attach, the apparent reason is that if the lien was allowed this would be indirectly charging the estate for the contract which was directly unenforceable. The decision is one of first impression in Washington but is in harmony with the holdings of other jurisdictions which have passed on the question. *San Francisco Paving Co. v. Fairchild,* 134 Cal. 220, 66 Pac. 255 (1901); *Ness v. Wood,* 42 Minn. 427, 44 N. W. 313 (1890).

CRIMINAL LAW

Bigamy—Necessity of Proving Continued Cohabitation. In *State v. Lewis*[1] the court found it necessary to interpret the bigamy statute,[2] which reads in part: "Every person who, having a husband or wife living, shall marry another person, or continue to cohabit with such second husband or wife in this state, shall be guilty of bigamy. . . ."

The information charged that the defendant, having a wife living, did cohabit with a second wife in this state. The trial judge sustained the defendant's demurrer. The supreme court affirmed the trial court ruling that the allegation failed to charge a criminal offense. The court said that where the second marriage was entered into in this state, an act prohibited by the first provision of the statute, cohabitation need not be alleged or proved. The second provision was placed in the Act to meet those situations where a person contracts a bigamous marriage in another state and thereafter moves into this state and continues to cohabit with the second spouse in this state. Under that provision the prosecution must allege and prove, not merely that the defendant has cohabited with second wife in this state, but that the defendant *continues* to so cohabit.

The court stated that, under the statute, cohabitation must have commenced in another state and continued in this state. Under this interpretation we have two situations which are not prohibited but which the legislature no doubt intended to include within the statute. First, if the accused entered into the second marriage in another state and immediately brought his second spouse into Washington where cohabitation commenced, the accused's conduct would not come within the scope of the statute as there could be no cohabitation in another state which could be continued into Washington. The court in the *Lewis* case was not willing to follow the reasoning of the Iowa court[3] which assumed that because a marriage took place in another state, cohabitation commenced. Secondly, if the accused[4] entered into the

[1] State v. Lewis, 46 Wn.2d 438, 282 P.2d 297 (1955).
[2] RCW 9.15.010.
[3] State v. Nadal, 69 Iowa 478, 29 N.W. 451 (1886).
[4] The accused may be either a man or a woman, as the case may be. For the purpose of this discussion it is convenient to speak of the accused as the male spouse.