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Yes, West Virginia, There Is a Special Priority for the Purchase Money Mortgage: The Recognition of Purchase Money Mortgage Priority in West Virginia

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"YES, WEST VIRGINIA, THERE IS A SPECIAL PRIORITY FOR THE PURCHASE MONEY MORTGAGE:" THE RECOGNITION OF PURCHASE MONEY MORTGAGE PRIORITY IN WEST VIRGINIA

I. INTRODUCTION

The purpose of a title examination is to discover and review those documents to which the substantial body of real property law may be relevant.[1] In West Virginia, most title insurance companies and lending institutions require a sixty-year examination[2] of the records to ensure that previous owners of real property have not encumbered that property and that the current owner is vested with marketable title.[3] Using this title examination, financial lending institutions ("lenders") require purchasers to give the lender a mortgage or deed of

1 *See* John W. Fisher II, *The Scope of Title Examination In West Virginia: Can Reasonable Minds Differ?*, 98 W. VA. L. REV. 449, 452 (1996).

2 A longer period is often required for commercial transactions. *See id.*

3 *See id.* at 474.

trust on the real property that is being acquired via the loan to secure that loan. The expectation of the lender is that it will have first lien priority should the purchaser default on the loan.[4]

However, during the course of a title examination, a purchaser does not hold legal title to the real property being purchased. Thus, many practitioners do not examine the records for encumbrances, such as judgment liens against a purchaser, that may attach to that purchaser's interest in real property upon acquisition of that property.[5] One aspect of a judgment lien is that it attaches not only to real property the debtor owns at the time the judgment is rendered, but also to subsequent property the debtor may obtain.[6] Assuming a judgment against a purchaser has been properly recorded, any property that purchaser subsequently acquires legal title to instantly becomes encumbered by that judgment lien.[7] Moreover, actual knowledge of the judgment lien is not required, as a valid, properly recorded judgment lien provides lenders with constructive notice of the lien.[8]

Garrett Tire Center v. Herbaugh[9] illustrates the potential problem. In *Herbaugh*, the tire center obtained a judgment against Herbaugh on April 26, 1984.[10] The tire center's attempts to satisfy the judgment were unsuccessful because no assets could be located.[11] Subsequent to the judgment, Herbaugh purchased property and contemporaneously gave a purchase money mortgage to Farmers and Merchants Bank, which was recorded on January 30, 1985.[12] The bank eventually instituted a foreclosure proceeding, and the tire center inter-

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4 *See* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 7.2 (1997).

5 The author has derived this statement from conversations with practicing attorneys and law professors.

6 *See* W. VA. CODE § 38-3-6 (2004). The pertinent language states that "[e]very judgment for money rendered in this State, other than by confession in vacation, shall be a lien on all the real estate of or to which the defendant in such judgment is or becomes possessed or entitled." *Id. See also* Smith v. Davis, 76 S.E. 670, 672 (W. Va. 1912) (stating that a judgment lien "constitutes a legal lien upon . . . real estate owned at the date of the judgment or afterwards acquired.").

7 *See* W. VA. CODE § 38-3-6. It is assumed for this discussion that a judgment lien is properly recorded per West Virginia Code section 38-3-5 (2004) and West Virginia Code section 38-3-7 (2004). A judgment lien against the purchaser that arises before the acquisition of subsequent real property automatically has no priority if the judgment lien has not been properly recorded to provide notice. *Id.*

8 *See id.*

9 740 S.W.2d 612 (Ark. 1987).

10 *Id.* at 613.

11 *Id.*

12 *Id.*

vened, asserting its judgment lien attached before the bank's mortgage lien, and therefore, was superior.[13]

Resolving the issue, the Arkansas Supreme Court recognized the general rule, "to which there is little dissent" that a purchase money mortgage is entitled to preference over all claims or liens arising through the mortgagor, even if such claims or liens are prior in time.[14] In so holding, the court found that because the deed and mortgage are parts of one continuous transaction, "the deed was encumbered by the purchase money mortgage at the time it was filed;" therefore, the tire center's lien was junior to the bank's mortgage.[15]

This same issue may very well find its way to the West Virginia Supreme Court of Appeals, however, unlike Arkansas, West Virginia is without any guidance on the subject.[16] Specifically, West Virginia lacks any statutory or case law directly addressing the principle of purchase money mortgage priority.[17] Therefore, the priority of purchase money mortgages in relation to other liens and judgments is determined according to the West Virginia recording acts,[18] and no language exists in those acts that treats purchase money mortgages any differently than any other mortgage or conveyance of real property.[19]

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[13] *Id.* Interestingly, one of the tire center's other arguments was that even purchase money mortgages are not valid against a third party until recorded; thus, the tire center's judgment lien attached during the five-minute space of time after the deed was recorded but before the recordation of the purchase money mortgage. *Id.* The court, however, disposed of this argument citing that the fact the purchase money mortgage was filed five minutes after the deed was inconsequential because the deed and mortgage were part of one continuous transaction and recorded within a reasonable time to give notice. *Id.* at 614.

[14] *Id.* at 613 (citing Faulkner County Bank & Trust Co. v. Vail, 293 S.W. 40 (Ark. 1927)).

[15] *Id.* at 614.

[16] In *Herbaugh*, the Arkansas Supreme Court derived its ruling from the 1927 case of *Faulkner County Bank & Trust Co. v. Vail*, 293 S.W. 40 (Ark. 1927).

[17] Interestingly, West Virginia, like all fifty states, does recognize the priority of purchase money security interests (PMSI) through the Uniform Commercial Code. *See* W. VA. CODE § 46-9-324 (2004).

[18] "The recording acts identify those instruments which must be recorded in order to be valid against certain 'types' of persons or entities. Fisher, *supra* note 1, at 456.

[19] The West Virginia recording acts pertaining to real property are West Virginia Code sections 40-1-8 and 9 (2004). Section 40-1-8 applies to contracts involving the sale or lease of certain interests in real property, and therefore, is not relevant to this discussion. Fisher, *supra* note 1, at 459-60. Section 40-1-9, however, applies to every conveyance of real property and reads as follows:

> Every such contract, every deed conveying any such estate or term, and every deed of gift, or trust deed or mortgage, conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract, deed, trust deed or mortgage may be.

Id. See also W. VA CODE § 38-3-7 (2004). The pertinent phrase is as follows:

Under section 40-1-9, West Virginia is a pure "notice" jurisdiction as to subsequent purchasers for value without notice, and a "race" jurisdiction as to creditors.[20] The distinction between the two is that in a notice jurisdiction "the subsequent purchaser's rights are determined at the time of the 'conveyance transaction' based on notice or the lack thereof."[21] Thus, unlike a "race" jurisdiction, in a "notice" jurisdiction whether the prior grantee or the subsequent grantee records first is not material; what matters is whether the subsequent purchaser had notice of the previous conveyance.[22]

Moreover, West Virginia courts have long held that a mortgagee or third-party lender is considered a "purchaser" under the West Virginia recording statutes.[23] Regarding judgments, a "judgment does not constitute a lien as against a 'purchaser of real estate for valuable consideration without notice, unless it' is docketed in accordance with [West Virginia Code] 38-3-5."[24]

To illustrate, suppose *C* obtains a judgment against *A* and properly records. Subsequently, *A* purchases property from *S* and simultaneously gives *B* a mortgage for the purchase money. In a "notice" jurisdiction, because *C's* judgment was recorded before *B's* mortgage, *B* had constructive notice of *C's* lien, and therefore, was not "without notice." Because judgment liens attach to subsequent property a debtor may obtain,[25] and no exception exists providing spe-

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> No judgment shall be a lien as against a purchaser of real estate for valuable consideration without notice, unless it be docketed according to the fifth section of this article, in the county wherein such real estate is, before a deed therefor to such purchaser is delivered for record to the clerk of the county court of such county.

Id.

[20] The West Virginia Supreme Court of Appeals has never used the terms "notice" or "race" to describe this statute, however, its decisions clearly indicate that West Virginia is "notice" as to purchasers and "race" as to creditors. *See* Fisher, *supra* note 1, at 462; *see also* Clyde L. Colson, *Limits of Title Search Under the West Virginia Recording Act*, 56 W. VA. L. REV. 20, 24 (1954) (the former College of Law Dean writing that "priority depends not upon priority of recording but solely upon whether the second grantee at the time he became a purchaser had actual or constructive notice of the prior conveyance."). In regard to creditors, the Supreme Court of Appeals of West Virginia has declared that "[i]t is immaterial whether the creditor *has notice* or not, when the debt was contracted. The statute declares it void as to all creditors, without discriminating as it does in the clause touching purchasers, in respect to notice." Delaplain & Son v. Wilkinson & Co., 17 W. Va. 242, 244, Syl. Pt. 2 (1880) (citation omitted). For an excellent and more detailed discussion of the West Virginia recording acts, see Fisher, *supra* note 1, at 462-474.

[21] Fisher, *supra* note 1, at 463.

[22] *Id.*

[23] *See* Weinberg v. Rempe, 15 W. Va. 829, 858 (1879) (stating that "[a] deed of trust creditor is held to be entitled as a purchaser. . . [and a] mortgagee is also a purchaser"); *see also* Fisher, *supra* note 1, at 473.

[24] Fisher, *supra* note 1, at 470-71; *see also* W. VA CODE § 38-3-7 (2004).

[25] *See supra* note 6.

cial priority for purchase money mortgages, *C's* judgment lien would appear to have priority over *B's* subsequent mortgage lien.[26] Accordingly, whether West Virginia would adopt purchase money priority is an unresolved issue. Even though the overwhelming majority of jurisdictions recognize the priority,[27] no binding precedent exists in West Virginia in favor of adopting purchase money mortgage priority; therefore, depending upon particular factual circumstances, West Virginia courts could easily reject purchase money mortgage priority.

In order to demonstrate that purchase money mortgage priority is alive in West Virginia, this Article identifies the legal history that links, and hopefully binds, West Virginia to adopt purchase money mortgage priority. Part I of this Article provides a general overview of the issue. Part II begins by defining a purchase money mortgage, its elements, and policy explanations, followed by an examination of West Virginia's adherence to the common law, particularly the common law of Virginia and those common law doctrines that West Virginia has adopted that relate to purchase money mortgage priority. Part II closes by tying these elements and common law doctrines together to provide for purchase money mortgage priority in West Virginia, as well as a contemporary adoption of the priority and a brief note as to the possible consequences of a rejection of the principle. Part III three addresses the question that once West Virginia recognizes purchase money mortgage priority, will that priority extend to previously recorded federal income tax liens? Part IV addresses the same issue as it pertains to West Virginia state income tax liens.

II. A HISTORICAL LOOK AT THE PURCHASE MONEY MORTGAGE

A "'purchase money mortgage' is a mortgage given to a vendor of the real estate or to a third party lender to the extent that the proceeds of the loan are used to: (1) acquire title to the real estate; or (2) construct improvements on the real estate if the mortgage is given as part of the same transaction in which title is acquired."[28]

In the latter instance, "only that portion of the loan [proceeds] extended for the purpose of purchasing the property and the existing improvements" are entitled to purchase money priority.[29] Although deeds of trust, as opposed to mortgages, are utilized in West Virginia for the purpose of obtaining a lien on,

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[26] Again, this article is premised on the notion that the antecedent judgment lien has been properly recorded. *See supra* note 7 and accompanying text.

[27] *See infra*, notes 59-60.

[28] RESTATEMENT, *supra* note 4, § 7.2; *see also* 55 AM. JUR. 2D *Mortgages* § 325 (2002) ("A mortgage on land [that is] executed by a purchaser of the land contemporaneously with the . . . [acquirement] of the legal title thereto, or afterwards but as a part of the same transaction, is a purchase-money mortgage."); *see, e.g.*, MICHIE'S JURIS. OF W. VA. & VA., *Mortgages and Deeds of Trust* § 6 (2003) [hereinafter MICHIE'S].

[29] 55 AM. JUR. 2D *Mortgages* § 325 (2002).

or security interest in, land for such a transaction,[30] the security device is often termed a mortgage.[31]

Whether or not recorded, a purchase money mortgage "has priority over any mortgage, lien, or other claim that attaches to the real estate but is created by or arises against the purchaser-mortgagor prior to the purchaser-mortgagor's acquisition of title to the real estate."[32] This priority holds true "whether the mortgagee is the vendor or a third person who furnishes the purchase price."[33]

Several rationales have developed to explain purchase money priority. The traditional explanation lies in the doctrine of instantaneous (or transitory) seisin, which establishes that the execution of the deed and the mortgage are simultaneous acts; and therefore, "the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands, and without stopping vests in the mortgagee, and during such instantaneous passage no lien of any character can attach to the title."[34] Moreover, the deed and mortgage do not need to be executed at the same moment, or even on the same day, to make them contemporaneous, as long as "they were parts of one continuous transaction, and so intended to be, so that the two instruments should be given contemporaneous operation in order to promote the intent of the parties."[35]

To illustrate, in *Holland Jones Co. v. Smith*,[36] a judgment had been properly docketed against *A*.[37] *A* then purchased a parcel of land from *B*, thereafter giving a deed of trust to *C* several months later to secure the purchase

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30 *See* W. VA. CODE § 38-1-2 (2004) and MICHIE'S, *supra* note 28, at § 4 (stating that in West Virginia, the deed of trust "is the prevailing method, if not the universal practice").

31 *See* MICHIE'S, *supra* note 28. Deeds of trust and mortgages are essentially the same as both instruments are security devices used to convey an estate, or pledge of property, as security for the payment of money. *Id.* at § 3-4. The practical difference between the two instruments is the method of foreclosure. *Id.* at § 7. A mortgage conveys property to be used as security for the payment of a debt to the mortgagee and requires formal foreclosure proceedings. A deed of trust on the other hand, conveys property to a trustee to hold as security for the payment of a debt, and upon default by the debtor, the trustee may foreclose upon the property without application to a court. *See* Firstbank Shinnston v. W. Va. Insurance Co., 408 S.E.2d 777, 781 (W. Va. 1991); and Swann v. Young, 14 S.E. 426, 430 (W. Va. 1892).

32 RESTATEMENT, *supra* note 4, § 7.2; *see* Slodov v. United States, 436 U.S. 238, 259 n.23 (1978) (stating that "[d]ecisional law has long established that a purchase-money mortgagee's interest in the mortgaged property is superior to antecedent liens prior in time."). Note however, in order for a mortgagee to protect against subsequent interests that arise through the mortgagor after the purchase money transaction, the purchase money mortgage must be recorded or it loses its priority. RESTATEMENT, *supra*.

33 46 AM. JUR. 2D *Judgments* § 405 (2002); *see also* RESTATEMENT, *supra* note 4, § 7.2.

34 Goodman v. Riddick, 148 S.E. 695, 696 (Va. 1929).

35 *Id.*

36 148 S.E. 581 (Va. 1929).

37 *Id.* at 581.

money.[38] Even though *C* did not receive the deed of trust until several months after the original conveyance,[39] the determination as to whether the two transactions were contemporaneous was not determined by the respective dates of the deed of conveyance and the deed of trust, but whether or not the two instruments were a part of one continuous transaction and intended to be by the parties.[40]

Another theory rests on the principle that the title the purchaser receives is encumbered title, and thus, has the same status as a retained vendor's lien.[41] Simply stated, when a debtor obtains title to real estate, and at the same time gives a mortgage or deed of trust to either the seller or a third-party to secure the purchase money, a "prior judgment lien cannot attach because the purchaser never obtains title to the land, but acquires only an equity interest subject to the payment of the purchase money."[42] In essence, the debtor has not "owned" the real estate long enough to entitle his antecedent lienholder any rights to it; thus,

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38 *Id.*

39 *Id.* at 582.

40 *Id*; *see also* Summers v. Darne, 31 Gratt. 791, 801 (Va. 1879). The pertinent language reads:

> When, therefore, land is conveyed and the purchaser at the same time gives back a mortgage or other encumbrance to secure the purchase-money, he does not thereby acquire any such *seisin* or interest as will entitle his wife to dower, or his creditor to subject the land to his debts discharged of the mortgage. In such cases the deed and the mortgage are regarded as parts of the same contract, and constitute but a single transaction, investing the purchaser with *seisin* for a transitory instant only.

Id.

41 Guffey v. Creutzinger, 984 S.W.2d 219, 222 (Tenn. 1998). This rational for the purchase money mortgage priority, however, is slightly more difficult to apply to third-party lenders, although it is advanced in such cases. It is advanced by analogy

> that the purchase money mortgage always takes the place of an equitable interest in the property that precedes any lien or interest of any kind attaching to the purchaser's estate at the time of acquiring title. Where there is a prior contract of sale, this equitable interest consists of a specifically enforceable contract right to have the purchase money mortgage given on taking title and the equitable estate under the purchase contract is subject to this right. Where there is no prior contract the vendor retains on conveying title without receiving payment an equitable vendor's lien. When the purchase money mortgage is given it merely replaces and takes the priority of one or the other of these prior equities, and this is so whether it is given at once or subsequently, provided it is part of the same transaction. The third party lender of the purchase money is simply an extension of this [principle].

RESTATEMENT, *supra* note 4, § 7.2 (quoting 1 NELSON & WHITMAN, REAL ESTATE FINANCE LAW § 901 (3d ed. 1993)).

42 *Guffey*, 984 S.W.2d at 222.

where no statutory enactment intervenes, "the judgment creditor can acquire no better right to his debtor's estate than the latter himself has."[43]

Moreover, when conflicting claims arise between a purchase money mortgage and an antecedent judgment lien, a more modern explanation supporting purchase money priority is premised on intrinsic fairness.[44] Pragmatically, lenders loan money with the expectation that they will have a lien on or security interest in the real estate being acquired; therefore, but for the loan, the purchaser-mortgagor would have never received the property.[45] This "long-established" rule makes it unnecessary for purchase-money lenders to search for preexisting judgments, thereby reducing title risk in such transactions and encouraging purchase money financing.[46]

Additionally, "judgment lien creditors have not extended their credit in reliance on the right to be repaid out of *any* specific property."[47] Thus, the judgment creditor has not relied on a purchaser's acquisition of property because the judgment was entered before the property at issue was acquired.[48]

Purchase money priority also prevents lending institutions from having to pay antecedent judgments to protect their interests. In *Nelson v. Stoker*,[49] the issue revolved around whether the State of Utah's judgment lien against the mortgagor for unpaid child support had priority over a vendor's purchase money mortgage lien that was recorded after the State's judgment lien had been recorded.[50] To reconcile the dispute, the Supreme Court of Utah recognized that the "overwhelming weight of authority recognizes the special priority accorded a vendor's purchase money mortgage"[51] and held that the State's judgment lien was like any ordinary judgment lien,[52] and therefore, not superior to the vendor's purchase money mortgage.[53] Although the case directly addressed pur-

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43 *Holland*, 148 S.E. at 582; *see also Summers*, 31 Gratt. at 801 (stating that "[t]he creditor is in no just sense treated as a purchaser. He has no equity whatever beyond what justly belongs to the debtor.").

44 *Guffey*, 984 S.W.2d at 222.

45 RESTATEMENT, *supra* note 4, § 7.2.

46 *Id.*

47 *Guffey*, 948 S.W.2d at 222 (citing NELSON & WHITMAN, *supra* note 41).

48 *Id.*

49 669 P.2d 390 (Utah 1983).

50 *Id.* at 392.

51 *Id.* at 393.

52 The State's argument centered on the Public Support for Children Act, which provided that a lien under this act would have the same preference against the assets of the debtor as claims for taxes. *Id.* at 395. The Court noted that not all tax liens have special priority and refused to give the State's lien under this act any extraordinary priority. *Id.*

53 *Id.* at 395-96.

chase money priority when the vendor, and not a third-party, is the mortgagee, the court recognized in dicta its application to lending institutions.[54] Specifically, the court stated that to grant priority to the state's judgment lien, the holders of purchase money mortgages, "whether vendors or financial institutions" would be forced "to pay the judgment in order to protect their interest and maintain their priority."[55] Such a holding "would force lenders" to include "due-on-divorce" or "due-on-failure-to-pay-child-support" provisions when lending money.[56] That result, the court concluded, was not in the public's best interest.[57]

The rule giving priority to purchase money mortgages over outstanding interests acquired through the mortgagor, however, has not been limited strictly to judgment liens. It has also been applied to outstanding judgments of execution liens, welfare liens, and dower or homestead interests.[58]

Most jurisdictions have adopted this long-standing common law rule, either through statute[59] or case law.[60] Interestingly, along with West Virginia, only four other states do not have any case law or statute addressing the pur-

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54 *See id.* at 396.

55 *Id.*

56 *Id.*

57 *Id.*

58 55 AM. JUR. 2D *Mortgages* § 326 (2002).

59 *See* ARIZ. REV. STAT. ANN. § 33-705 (Michie 2000); CAL. CIV. CODE § 2898 (West 2000); DEL. CODE ANN. tit. 25 § 2108 (2000); D.C. CODE ANN. § 15-104 (2001); HAW. REV. STAT. § 506-2 (2000); IDAHO CODE § 45-112 (Michie 2003); IND. CODE ANN. § 32-29-1-4 (Michie 2002); IOWA CODE ANN. § 654.1213 (West 2000); KAN. STAT ANN. § 58-2305 (2002); MD. CODE ANN., REAL PROP. § 7-104 (2003); MISS. CODE ANN. § 89-1-45 (2003); MONT. CODE ANN. § 71-3-114 (2003); N.J. STAT. ANN. § 46:9-8 (West 2000); N.D. CENT. CODE § 35-03-10 (2004); 42 PA. CONS. STAT. § 8141 (2000); S.D. CODIFIED LAWS § 44-2-2 (Michie 2000).

60 *See* Sunshine Bank v. Smith, 631 So. 2d 965, 967 (Ala. 1994); Belland v. O.K. Lumber Co. 797 P.2d 638, 641 (Alaska 1990); Garrett Tire Center v. Herbaugh, 740 S.W.2d 612 (Ark. 1987); ALH Holding Co. v. Bank of Telluride, 18 P.3d 742, 745 (Colo. 2000); Zandri v. Tender, 4 Conn. Supp. 125 (1936); BancFlorida v. Haywood, 689 So. 2d 1052, 1054 (Fla. 1997); Hand Trading Co. v. Daniels, 190 S.E.2d 560, 561 (Ga. 1972); Roane v. Baker, 11 N.E. 246, 248 (Ill. 1887); Gully v. Ray, 57 Ky. 107, 114 (1857); Libby v. Tidden, 78 N.E. 313, 317 (Mass. 1906); Libby v. Brooks, 653 A.2d 422, 424 (Me. 1995); Stewart v. Smith, 30 N.W. 430, 431 (Minn. 1886); Demeter v. Wilcox, 22 S.W. 613, 615 (Mo. 1893); Omaha Loan & Bldg. Ass'n, v. Turk, 21 N.W.2d 865, 867 (Neb. 1946); Davidson v. Click, 249 P. 100, 102 (N.M. 1926); Shilowitz v. Wader, 261 N.Y.S. 351, 354 (1932); Slate v. Marion, 408 S.E.2d 189, 191 (N.C. 1991); Ward v. Carey, 39 Ohio St. 361, 363 (1883); United OK Bank v. Moss, 793 P.2d 1359, 1363 (Okla. 1990); Ladd & Tilton Bank v. Mitchell, 184 P. 282, 284 (Or. 1919); Cummings v. Consol. Mineral Water Co., 61 A. 353, 356 (R.I. 1905); DeSaussure v. Bollmann, 7 S.C. 329, 339 (1876); Guffey v. Creutzinger, 984 S.W. 2d 219, 221-22 (Tenn. 1998); Irving Lumber Co. v. Alltex Mort. Co., 468 S.W.2d 341, 343-44 (Tex. 1971); Nelson v. Stoker, 669 P.2d 390, 394 (Utah 1983); Goodman v. Riddick, 148 S.E. 695, 696 (Va. 1929); Bisbee v. Carey, 49 P. 220 (Wash. 1897); N. State Bank v. Toal, 230 N.W.2d 153, 155-56 (Wis. 1975); Van Patten v. Van Patten, 784 P.2d 218, 220-21 (Wyo. 1989).

chase money mortgage,[61] and one state recently had the purchase money priority issue before its supreme court.[62]

III. WEST VIRGINIA'S ADHERENCE TO THE COMMON LAW

Unless altered by statute, West Virginia has adopted the rules of the common law.[63] The common law in effect in West Virginia is the traditional English common law, unless amended by Virginia, in which case the common law would reflect the laws of Virginia prior to 1863.[64] In *TXO Production Corp. v. Alliance Resources Corp.*, TXO brought a frivolous lawsuit against Alliance allegedly to clear a purported cloud on the title to an oil and gas lease.[65] Alliance filed a counterclaim alleging that TXO's actions amounted to a "slander of [Alliance's] title,"[66] even though no West Virginia case law existed recognizing an action for slander of title.[67] The West Virginia Supreme Court of Appeals examined both the West Virginia Constitution and the West Virginia Code to conclude that the court must look to the common law of Virginia as of 1863.[68] Thereafter, the court found that slander of title had long been recognized as a common law cause of action,[69] and therefore, "could always be

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61 The author was unable to locate any purchase money mortgage priority law for: Louisiana, Nevada, New Hampshire, and Vermont.

62 A recent decision by the Michigan Supreme Court held that Michigan law does not provide for purchase money mortgage priority. That decision has been vacated and a more detailed discussion of the events of that case are discussed infra, Part III. E. *See* Graves v. Am. Acceptance Mortg. Co. 652 N.W.2d 221 (Mich. 2002), *vacated,* 658 N.W.2d 482 (2003).

63 *See* W. VA. CONSTITUTION Art. VIII § 13 (stating that "[e]xcept as otherwise provided in this article, such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature."); W. VA. CODE § 2-1-1 (2004) (which states that the "common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force . . . [unless it has been] altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the Legislature of this state"); TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 878 (W. Va. 1992) (Justice Neely writing that "the West Virginia Constitution commands that we recognize the English common law as of 1863.").

64 *TXO,* 419 S.E.2d at 878 n.4. For a good discussion of the history of the common law in West Virginia, see James Audley McLaughlin, *The Idea of the Common Law in West Virginia Jurisprudential History: Morningstar v. Black & Decker Revisited,* 103 W. VA. L. REV. 125 (2000).

65 *Id.* at 875.

66 *Id.*

67 *Id.*

68 *See id.*

69 *Id.* at 878.

brought in West Virginia."[70] Based on this interpretation, West Virginia is bound by its Constitution, Code, and case law to adopt the common law as it existed prior to 1863.[71] Therefore, the priority of the purchase money mortgage must be examined as it existed in Virginia in 1863.

A. The Common Law of Virginia

The Commonwealth of Virginia has never statutorily given priority to the purchase money mortgage; its case law however, reveals its adherence to this equitable principle.

The starting point in this analysis lies in the doctrine of instantaneous seisin.[72] In *Gilliam v. Moore*,[73] Gilliam conveyed a tract of land to Moore.[74] On the same day, Moore gave a deed to trustees to secure the purchase money due to Gilliam.[75] Later, the trustees sold the property pursuant to the trust deed.[76] At that sale, Gilliam purchased the property; however, before he was able to take possession, Moore died and his widow claimed she was entitled to her dower in the land.[77]

In holding that Moore's wife was not dowable, the Supreme Court of Virginia stated that "the two instruments were parts of one and the same transaction, and that the seizin of Moore was that instantaneous seizin. . .where the land was merely in transitu, and never vested in the husband."[78] The court went on to say that, although it could find no cases directly on point, "[t]he english books [ ] all lay down the position that a transitory seizin in the husband for an instant, does not entitle the wife to dower, and the point has been decided in the same way, in Massachusetts and New York."[79] Additional cases followed concerning a wife's claim of dower, and in all instances, the seisin in the husband was held to be transitory only, thus depriving the wife of dower.[80]

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70 *Id.* at 879.

71 However, a common law decision, like any other decision, is subject to reconsideration and may be overruled if it is found to be wrong. Long v. City of Weirton, 214 S.E.2d 832, 851 (W. Va. 1975).

72 *See supra* notes 34-40 and accompanying text.

73 31 Va. (4 Leigh) 30 (1832).

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* at 32.

79 *Id.*

80 *See* Wilson v. Davisson, 41 Va. (2 Rob.) 384 (1843); and Wheatley v. Calhoun, 39 Va. (12 Leigh) 264 (1841).

The Virginia Supreme Court expanded the doctrine in *Summers v. Darne*.[81] In defining the rights of creditors, the court stated that a creditor is not a purchaser and, in the absence of a statute, a "judgment creditor can acquire no better right to his debtor's estate than the latter himself has."[82] Thus, a court will "limit the lien of the judgment to the actual interest the debtor has;" the creditor is not entitled to any equity beyond what justly belongs to the debtor.[83]

Applying the above principle to a conveyance of land where the purchaser gave back a mortgage to secure the purchase money, the court stated that the purchaser did not acquire any seisin or interest that would entitle his wife to dower, "or his creditor to subject the land to his debts discharged of the mortgage."[84] In such cases, the purchaser's seisin is transitory only.[85]

In a complete adoption and recognition of the principle, *Cowardin v. Anderson*,[86] citing Chancellor Kent's Commentaries, stated that:

> In one instance a mortgage will have a preference over a prior docketed judgment, and that is the case of a sale and conveyance of land, and a mortgage taken at the same time in return to secure the payment of the purchase money. The deed and the mortgage are considered as parts of the same contract, and constituting one act; and justice and policy equally require that no prior judgment against the mortgagor should intervene and attach upon the land during the transitory seisin to the prejudice of the mortgage. . . . And it applies equally *in favor of a third person*, who advances the purchase money, and at the time of the conveyance, takes a mortgage on the land for his indemnity.[87]

Abiding by that language, Virginia courts have continually applied this principle.[88] Moreover, even though the express written acceptance of the principle did not occur in Virginia until after 1863, the Virginia courts derived each deci-

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81 72 Va. (31 Gratt.) 791 (1879).

82 *Id.* at 800.

83 *Id.* at 800-01.

84 *Id.* at 801.

85 *Id.*

86 78 Va. 88 (1883).

87 *Id.* at 90-91 (emphasis added).

88 *See* Holland Jones Co. v. Smith, 148 S.E. 581, 582-83 (Va. 1929); Goodman v. Riddick, 148 S.E. 695, 696 (Va. 1929); Moomaw v. Jordan, 87 S.E. 569, 570 (Va. 1916); Charlottesville Hardware Co. v. Perkins, 86 S.E. 869, 871 (Va. 1915); and Straus v. Bodeker's Ex'x, 10 S.E. 570, 575 (Va. 1889).

sion from the common law rules of England. Specifically, the great legal scholars of the English common law, such as Blackstone, Black, and Freeman, clearly recognized the priority of the purchase money mortgage over all other liens arising through the mortgagor.[89] Historically, then, the common law of Virginia and England each recognized the priority of the purchase money mortgage over antecedent judgments arising through the mortgagor.

B. The Virginia Recording Statutes

When West Virginia became a state in 1863, it codified many of its parent state's statutes. In fact, West Virginia's recording statutes are based upon a Virginia statute in force when West Virginia became a state, and were subsequently carried into the West Virginia Code, effective 1869.[90]

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[89] *See* A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 974 (Edward W. Tuttle ed., 5th ed. 1925). Freeman wrote:

> No doubt one against whom a judgment has already been docketed may purchase land, and at the same time he receives his conveyance may give, to secure any portion of the purchase money, a mortgage or trust deed, which will take precedence over the judgment as a lien on the lands purchased, whether the mortgage or trust deed be given to the vendor or to a third person who advances the money This reason is readily found when we remember that it is a universally recognized principle of law that no judgment lien can be a charge upon any greater interest than the defendant owns. A judgment against such a vendee must therefore be subordinate as a lien to that held by the vendor; and for this purpose it is perfectly immaterial whether the claim is put in the shape of a vendor's lien or of a mortgage to secure the payment of purchase money.

See also HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS, § 447 (2d ed. 1902). Black agreed, stating that:

> A mortgage or trust-deed given to secure the balance of purchase-money on a tract of land, executed simultaneously with the conveyance of the legal title and duly recorded, has priority of lien over judgments obtained against the purchaser anterior to the conveyance. In such case, the purchaser acquires only a temporary seisin, and not such an interest in the land as becomes subject to the lien of a judgment against him in preference to the mortgage, as the deed and the mortgage are but parts of the same transaction. And where the purchaser, at the same time he receives the conveyance, executes a mortgage to a *third person*, who advances the purchase-money for him, such mortgage is entitled to the same preference over a prior judgment as it would have had if it had been executed to the vendor himself.

Black further recognized that the execution of a mortgage for some distinct debt or liability, and not to secure the purchase money of the land, was not a purchase money mortgage, thus the judgment will be the superior lien. *Id. See, e.g.*, SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, RIGHTS OF THINGS, (Gavitt ed., Wash. Law Book Co. 1892) (saying "[t]he seisin of the husband for a transitory instant only, when the same act which conveys him the property conveys it again, will not entitle the wife to dower, for the lands were merely in trasitu, and never vested in the husband.").

[90] Pack v. Hansbarger, 17 W. Va. 313 (1880); *see also* Fisher, *supra* note 1.

Thus, Virginia, at the time West Virginia became a state, was a notice jurisdiction as to subsequent purchasers for value without notice: "All bargains, sales and conveyances, whatever, of any lands . . . ; and all deeds of trust and mortgages whatsoever. . . shall be void, as to all creditors and *subsequent purchasers 'for valuable consideration without notice*,'" unless properly recorded.[91] Additionally, West Virginia's statute regarding judgment liens is taken from the Code of Virginia of 1849: "No judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice," unless properly recorded.[92]

A literal reading of the Virginia statutes does not grant any special priority for mortgages given to secure purchase money. Subsequent purchasers are only protected to the extent such purchasers did not have notice of the antecedent interest, which leads to the conclusion that a properly recorded judgment lien should have priority over a subsequently recorded purchase money mortgage.

Nevertheless, as discussed *supra*, this was not the rule of law in Virginia.[93] In spite of no specific mention of purchase money priority in its statutes, Virginia has continually extended purchase money priority.[94] Similarly, West Virginia's recording statutes do not explicitly mention purchase money priority.[95] Nonetheless, because the common law doctrine granting special priority to purchase money mortgages was alive in Virginia despite the express absence of any statutory priority, West Virginia's codification of the Virginia recording statutes, and Virginia court interpretations as to those statutes, provides precedent for purchase money mortgage priority to apply in West Virginia.

C. West Virginia and the Doctrine of Instantaneous Seisin

Although no West Virginia case law exists specifically concerning purchase money priority, several cases exist that resemble the early Virginia cases relating to dower.[96] In *Roush v. Miller*[97] the plaintiff widow brought suit claiming she was entitled to dower in a tract of land that her deceased husband had

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91 *Pack*, 17 W. Va. at 322 (emphasis added).

92 *Id.* at 324-25.

93 *See supra* notes 72-89 and accompanying text.

94 *See supra* notes 90-92 and accompanying text.

95 *See supra* notes 16-22 and accompanying text.

96 *See supra* notes 73-80 and accompanying text.

97 20 S.E. 663 (W. Va. 1894).

mortgaged to defendant Miller to secure the purchase price.[98] In holding that the wife was not dowable in the property, the court stated:

> [b]ut it has always been held that where the land is conveyed to the husband, and he, by deed of the same date, conveys the land to a trustee, in trust to secure the purchase-money, the two conveyances are parts of one and the same transaction, and, the seisin of the husband being instantaneous and transitory, the widow to that extent is not entitled to dower.[99]

Furthermore, in its examination of the issue, *Roush* refers to the holding in *Cowardin*[100] that applied purchase money mortgage priority over previously recorded judgment liens arising through the mortgagor, whether or not the holder of the mortgage was the vendor or a third party.[101] The court stated that, although *Cowardin* was not a case involving the right of dower, "[it saw] no reason why the same principle should not be applied in such cases."[102] Additionally, several other West Virginia cases have applied instantaneous seisin as a bar to dower in property mortgaged to secure the purchase money.[103]

Moreover, the West Virginia Supreme Court of Appeals agrees that a creditor can have no better right to a debtor's property than what the debtor has. In *Smith v. Gott*[104] the court stated:

> It is well-settled law in this state that a judgment creditor can acquire no better right to the estate of the debtor than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which existed in favor of third parties, and a

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98 *Id.* at 664.

99 *Id.* (citing Gilliam v. Moore, 31 Va. 30 (1832)).

100 *See supra* notes 86-87 and accompanying text.

101 *Roush*, 20 S.E.2d at 664.

102 *Id. Cowardin* also held that a purchaser who, contemporaneously with the conveyance of the property, executes a trust deed of the same, has only a temporary seisin, not subject to judgment and that the interest of the judgment creditor is limited to the debtor's interest in the land sought to be subjected; therefore, he is not a purchaser, and has no equity beyond what belongs to the debtor. Cowardin v. Anderson, 78 Va. 88 (1883).

103 *See* Martin v. Smith, 25 W. Va. 579 (1885); Holden v. Boggess, 20 W. Va. 62 (1882); Hunter v. Hunter, 10 W. Va. 321 (1877); and Sinnett v. Cralle, 4 W. Va. 600 (1871).

104 41 S.E. 175 (W. Va. 1902).

> court of equity will limit the lien of the judgment to the actual interest which the debtor has in the estate.[105]

Based on these principles, when the conveyance and mortgage are contemporaneous, the purchaser-debtor has no interest in the property that would subject the property to his judgment creditor.[106] Accordingly, even though West Virginia has not specifically recognized purchase money mortgage priority, the above cases clearly recognize the common law policy explanations that help to form purchase money priority. Combining those holdings with Virginia common law and the persuasive nature of the law of the majority of other jurisdictions[107] provides West Virginia with the necessary fundamental precedent to rightfully adopt the priority of the purchase money mortgage over all antecedent judgment liens arising through the purchaser-mortgagor.

D. A Modern Approach to Purchase Money Mortgage Priority

As discovered through the research involved in this article, most jurisdictions recognizing purchase money priority had occasion to examine the issue early in their legal history. In the modern era, however, some jurisdictions, like West Virginia, have not been confronted with the issue. In Tennessee for example, a contemporary court had not addressed the issue of purchase money mortgage priority until 1998.[108]

In *Guffey v. Creutzinger*, the plaintiff obtained a judgment against the defendants and duly recorded his judgment lien in June and July of 1995.[109] Subsequently, the defendants, on November 27, 1995, purchased real property and contemporaneously gave a deed of trust on the property to defendant First Tennessee Bank for the purchase money.[110] Both the deed to the property and the bank's deed of trust were recorded two days later.[111]

The plaintiff, in an attempt to recover his judgments, brought suit asserting that his judgment liens had priority because they were recorded before the bank's deed of trust.[112] The bank on the other hand, asserted it had priority be-

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105 *Id.* at 177. This theory resembles the explanation for the rule as discussed *supra*, notes 41-43.

106 *See supra*, notes 41-43 and accompanying text.

107 *See supra*, notes 59-60.

108 *See* Guffey v. Creutzinger, 984 S.W.2d 219, 222 (Tenn. Ct. App. 1998).

109 *Id.* at 220.

110 *Id.*

111 *Id.*

112 *Id.* at 221. Plaintiff's argument centered on TENN. CODE. ANN. § 66-24-119 (1993), which stated that judgment liens attach to subsequently acquired property by the debtor if a proper abstract of judgment is filed. *Id.* Thus, because his lien was filed first, the defendants had construc-

cause its loan was in the form of a purchase money mortgage and the funds were used accordingly.[113] The trial court granted summary judgment for the bank, agreeing that its deed of trust had priority.[114]

On appeal, the Tennessee Court of Appeals recognized the issue had not appeared in Tennessee during the modern era.[115] The court first examined various sources all advancing purchase money priority.[116] Next, the court looked at Tennessee case law that gave a vendor's purchase money mortgage priority over an antecedent mechanic's lien,[117] and case law analogizing the contemporaneous element of purchase money mortgages relating to claims by antecedent judgment lien holders.[118]

Combining the above authorities and applying them to the facts before it, the court held that Tennessee recognizes the "special nature of purchase money mortgages" and found the title conveyed to the defendant-mortgagors was encumbered when conveyed; therefore, the plaintiff's judgment lien did not have priority over the bank's purchase money mortgage lien.[119]

Guffey illustrates that modern courts facing the issue of purchase money priority will extend the rule granting a purchase money mortgage priority over a previously recorded judgment lien against the mortgagor. Like West Virginia, Tennessee had already adopted some of the fundamental elements that form purchase money priority.[120] The Tennessee Court of Appeals also looked at decisions of other courts, the thoughts of legal scholars, and the policy explana-

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tive notice of the judgment; therefore, plaintiff's judgment lien took priority because it was recorded first.

113 *Id.* Despite the statute, the bank pointed out the "oneness" of the transaction and argued that the defendant-mortgagors had acquired encumbered title; thus, the judgment lien could not have attached in front of the purchase money deed of trust.

114 *Id.*

115 *Id* at 222.

116 *Id.* at 221-22. The court cited various secondary legal authorities, as well as cases from other jurisdictions. The court also looked at policy reasons that are the foundation for purchase money priority that this article has discussed *supra* notes 32-46 and accompanying text.

117 *Id.* at 222-23. The court cited Prichard Bros. v. Causey, 12 S.W.2d 711 (Tenn. 1929).

118 *Id.* at 223-24. The court cited Bridges v. Cooper, 39 S.W. 720 (Tenn. 1897). The court noted that *Bridges* gave the judgment lien creditor priority because the deed and mortgage did not take effect at the same time. *Id.* Had the deed and mortgage been "parts of a single transaction" the outcome would have been reversed. *Id. See Bridges*, 39 S.W. at 722.

119 *Id.* at 224. Interestingly, the court did note that the "one continuous transaction" theory is a legal fiction, but equity supports it, in part because the defendant-mortgagors did not have any interest in the subject property when the plaintiff's lien was filed; therefore, the plaintiff cannot rely on a detrimental reliance remedy. *Id.*

120 *See Guffey*, 984 S.E.2d 219.

tions advancing the priority.[121] Given this modern adoption of purchase money priority, as well as West Virginia's adoption of the common law when its statutes are silent, little authority exists for West Virginia courts to reject purchase money mortgage priority.

E. *The Michigan Supreme Court: An Attempt to Reject Purchase Money Mortgage Priority*

Should the issue of purchase money mortgage priority present itself to the West Virginia Supreme Court of Appeals and the court should find that such mortgages are not entitled to priority over antecedent judgment liens arising through the mortgagor, a recent case decided by the Supreme Court of Michigan is an example of the possible confusion that may arise. In *Graves v. American Acceptance Mortgage Corp.*,[122] a married couple purchased, by land contract, a home in 1987.[123] By 1994, however, the couple had divorced, and as part of the divorce judgment, the ex-husband was awarded the couple's interest in the property.[124] Alternately, the ex-wife was to be reimbursed $7,504 by her ex-husband for child support, rental, and land contract payments on other property the couple had owned.[125] As security for the payments, the ex-wife was given a lien on the couple's former home, and recorded this lien in September of 1994.[126]

Ironically, on the same date the ex-wife recorded her lien, the ex-husband mortgaged the same property that was subject to the ex-wife's lien to American Acceptance Mortgage Co., using the proceeds of the loan to pay off the original land contract and obtain title to the property.[127] The mortgage company recorded its lien on October 5, 1994; however, before recording, it assigned its interest to Boulder Escrow, Inc., which recorded its assignment on April 13, 1995.[128]

Next, however, the ex-husband defaulted on the mortgage and Boulder published a notice of a public auction on January 11, 1996.[129] The ex-wife, however, asserting that her ex-husband had failed to perform his obligations

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121 *Id.*

122 652 N.W.2d 221 (Mich. 2002) (per curiam).

123 *Id.* at 222.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

under the divorce agreement, sued her ex-husband, American Acceptance Mortgage, and Boulder to foreclose on her judgment lien.[130] Boulder then filed a cross-claim against the ex-husband for defaulting, and a counterclaim against the ex-wife asserting that Boulder's mortgage lien had priority over her judgment lien.[131]

The lower court held in favor of the ex-wife because her lien was recorded first; and thus, constructive notice had been given to subsequent purchasers.[132] The Michigan Court of Appeals, however, reversed, finding that the ex-husband's mortgage was a purchase money mortgage, and therefore, it had priority over the ex-wife's judgment lien.[133]

On appeal, in a per curiam opinion, the Michigan Supreme Court reversed the Court of Appeals and found for the ex-wife, yet left undisturbed the Court of Appeals finding that the mortgage was a purchase money mortgage.[134] In reversing, the Michigan Supreme Court first examined the Michigan recording statutes,[135] which it determined to be "race-notice," thereby placing instruments recorded first in priority over subsequent conveyances.[136]

After examining the statutes, it concluded that nowhere did the statutes "exempt purchase money mortgages from the 'first-in-time' recording priority."[137] Thus, the Michigan "legislature has decided to afford preference to the first-in-time recording encumbrance without giving any special preference to purchase money mortgages," and reversed the Michigan Court of Appeals.[138]

Following this decision, on a motion for rehearing, the Michigan Supreme Court vacated the above per curiam decision.[139] In doing so, the Michigan Supreme Court granted motions by the Real Property Law Section of the State Bar of Michigan and the Michigan Land Title Association for leave to file

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130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.* at 224.

135 *See* MICH. COMP. LAWS §§ 565.25 and 565.29 (2002).

136 *Graves*, 652 N.W.2d at 223; *see also* First of Am. Bank v. Alt, 848 F. Supp. 1343, 1347 (W.D. Mich. 1993) (reciting that "Michigan has adopted what is frequently known as a "race-notice" statute: the first interest holder to record takes priority, unless that individual has notice of a prior unrecorded interest.").

137 *Id.*

138 *Id.* at 224.

139 *See* Graves v. Amer. Mort. Co., 658 N.W.2d 482 (2003).

amicus briefs in the case.[140] The Michigan Association of Register of Deeds was also invited to file such briefs.[141]

The controversy over that holding was that the Michigan Supreme Court did not limit the holding to the specific facts of *Graves*.[142] The court could have reversed the court of appeals by holding that the mortgage was not a purchase money mortgage at all because the ex-husband already owned the property at the time American Mortgage loaned him the money to pay off the land contract,[143] however, the court did not, leaving the practitioner to wonder if the purchase money mortgage priority principle was not applicable in Michigan.[144]

After the decision was vacated and leave granted for appeal,[145] the decision was appealed, and after hearing oral argument,[146] the Michigan Supreme Court failed to clarify its position regarding the priority of purchase money mortgages.[147] Specifically, in reinstating the trial court's judgment, the Michigan Supreme Court held that the mortgage was not a purchase money mortgage because the ex-husband already owned the property at the time he took out the mortgage to pay off the land contract, and thus, the ex-husband's acquisition of the property and his obligations under the mortgage to American Acceptance were not part of the same transaction.[148] Thus, because the mortgage was not a purchase money mortgage, the ex-wife's judgment lien on the property had priority because it had been filed first.[149]

While that part of the opinion seems correct, the Court failed to address the priority issue. Specifically, the court held in its vacated, per curiam opinion that "the Michigan legislature has decided to afford preference to the first-in-time recording encumbrance without giving any special preference to purchase money mortgages."[150] However, by not addressing the priority issue on appeal, still unclear is the Michigan Supreme Court's position on purchase money mortgage priority.

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140 *Id.*

141 *Id.*

142 For a good discussion of the *Graves* case see Carl W. Herstein, 48 WAYNE L. REV. 815 (2002).

143 *See supra* notes 126-32 and accompanying text.

144 *See* id.

145 *See supra* note 140.

146 *See* Graves v. Am. Acceptance Mort. Corp., 677 N.W.2d 829 (Mich. 2004).

147 *Id.*

148 *Graves*, 677 N.W.2d at 834-35.

149 *Id.* at 618; *see also supra* note 136 and accompanying text.

150 Graves v. Am. Acceptence Mort. Corp., 652 N.W.2d 222, 224 (Mich. 2002) (per curiam).

Interestingly, in her concurrence, Justice Weaver addresses the confusion; specifically, she writes that because the Court in its per curiam opinion held that Michigan law did not recognize purchase money priority and then vacated that opinion only to later hold that the mortgage at issue was not a purchase money mortgage, the "Court's actions have caused confusion and instability in the law where there was none."[151]

She further writes to emphasize that the "overturning of the purchase money mortgage doctrine in that vacated opinion has no effect or precedential value."[152] Nonetheless, to further muddy the water for the practitioner, the majority, in a footnote, writes that because the priority of purchase money mortgages is not implicated in the case, "the concurrence should not be understood as the position of this Court."[153]

Similarly, just like Michigan's statutes do not exempt purchase money mortgages from Michigan's recording requirements to establish priority, neither do West Virginia's statutes.[154] However, a holding by the West Virginia Supreme Court of Appeals that purchase money mortgage priority does not exist in West Virginia could easily mimic the same type of confusion created by the Michigan Supreme Court. Thus, the *Graves'* cases provide an illustration of the potential confusion that rejecting purchase money mortgage priority may create, and thus, it may serve as additional authority to support the adoption of purchase money mortgage priority in West Virginia.

IV. FEDERAL INCOME TAX LIENS AND PURCHASE MONEY MORTGAGE PRIORITY

Once the purchase money mortgage has been given priority as to previously recorded judgment liens arising through the mortgagor, another question to answer is does the priority extend to a previously recorded federal income tax lien? A federal income tax lien is a creature of statute.[155] The lien is not valid against other competing interests until such lien is filed to provide proper notice.[156] In the case of real property, the lien is filed and indexed according to state law[157] in an office of the state where the property is located.[158]

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151 *Graves*, 677 N.W.2d at 836 (Weaver. J., concurring).

152 *Id.*

153 *Id.* at 831, n1.

154 *See supra* notes 18-19 and accompanying text.

155 *See* 26 U.S.C. § 6321 (2000). If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, additional tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

156 *See* 26 U.S.C. 6323(a) (2000). "The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's leinor, or judgment lien creditor

The federal income tax lien, then, enjoys no priority over mortgages or judgments that attach before the filing of the tax lien.[159] Thus, no absolute priority exists for the federal tax lien; a federal tax lien that attaches after the purchase money mortgage or deed of trust will be subordinate to that instrument.[160]

Given that the federal income tax lien enjoys no absolute priority over the solvent debtor, examining its priority as against a subsequently recorded purchase money mortgage is similar to that of judgment liens discussed in Part II above. Tax liens attach to all property, real or personal, belonging to the taxpayer at any time during the period of the lien, including any property or rights to property acquired by such person after the lien arises.[161] If the federal tax lien against the mortgagor attaches prior to the deed of trust for the purchase money, does the deed of trust have priority?

At first glance, one may assume that it does not. The tax code provides protection for certain interests even though a notice of lien has been filed pursuant to 26 U.S.C § 6321.[162] Specifically, the tax lien is not valid "as against a holder of a security interest[163] in such security who, at the time such interest came into existence,[164] did not have actual notice or knowledge[165] of the existence of such lien."[166]

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until notice thereof which meets the requirements of subsection (f) has been filed by the secretary." *Id.*

157 *See* id. In West Virginia, "[n]otices of liens upon real property for obligations payable to the United States and certificates and notices affecting the liens shall be filed in the office of the clerk of the county commission of the county in which the real property subject to the liens is situated." W. VA CODE § 38-10A-2(b) (2000).

158 *See* 26 U.S.C. 6323(f) (2000). For the purposes of this discussion, it is assumed that a federal income tax lien has been properly filed and indexed to give notice.

159 *See supra* note 136; *see also* 94 A.L.R.2d 748 (2003) ("While the Internal Revenue Code does not refer to choate and inchoate liens, the courts have held that a competing prior lien is entitled to priority over a federal tax lien if the competing lien is choate when the federal lien arises, but not if the competing lien is inchoate when the federal lien arises.").

160 *Id.* However, in the case of insolvency, the government's lien is granted specific priority. *See* 31 U.S.C. § 4713(a) (2000). The federal lien has priority against a prior specific and perfected lien in favor of a state or any other person. *See* United States v. Vermont, 377 U.S. 351 (1964).

161 *See* 26 C.F.R. § 301.6321-1 (2000). ("The lien attaches to all property and rights to property belonging to such person at any time during the period of the lien, including any property or rights to property acquired by such person after the lien arises.").

162 26 U.S.C. § 6323(b).

163 A security interest means "any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability." 26 U.S.C. § 6323(h)(1).

164 "A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth." *Id.*

Although purchase money mortgages are not directly addressed by the tax code, such mortgages are included in the term "security interest."[167] Applying this language, it would seem as though a purchase money mortgage, or any mortgage, would be superior to a federal tax lien only in those situations where when the purchase money mortgage came into existence, the holder of such mortgage did not have any notice of the federal tax lien.

Digging further into congressional intent, however, Congress, when enacting the Federal Tax Lien Act of 1966,[168] intended to preserve the priority of the purchase money mortgage.[169] Specifically, Congress stated that:

> It has generally been held that [purchase money mortgage] interests are protected whenever they arise. This is based upon the concept that the taxpayer has acquired property or a right to property only to the extent that the value of the whole property or right exceeds the amount of the purchase money mortgage. This concept is not affected by the bill. In view of the legislative history of the [Act], the Internal Revenue Service will consider that a purchase money security interest *or mortgage* valid under local law is protected even though it may arise after a notice of Federal tax lien has been filed.[170]

The United States Supreme Court addressed the issue recognizing that "[d]ecisional law has long established that a purchase-money mortgagee's interest in the mortgaged property is superior to antecedent liens prior in time."[171] Therefore, the Court reasoned that a "federal tax lien is subordinate to a purchase-money mortgagee's interest notwithstanding that the agreement is made

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165 For the purposes of the this statute, actual notice or knowledge occurs "in any event from the time such fact would have been brought to such individual's attention if the organization had exercised due diligence." 26 U.S.C. § 6323(i)(1). Due diligence occurs through reasonable routines regarded as regular duties used to communicate information to persons conducting a transaction. *Id.* Thus, under this definition, constructive notice would be actual notice if the person conducting a transaction would be normally required to uncover such information in his or her regular course of business.

166 26 U.S.C. § 6323(b)(1)(B).

167 Minix v. Maggard, 652 S.W.2d 93, 96 (Ky. 1983).

168 The Federal Tax Lien Act of 1966 is codified at 26 U.S.C. § 6321 (2000); *see also* 80 Stat. 1125 (1966).

169 Slodov v. United States, 436 U.S. 238, 259 n.23 (1978).

170 Rev. Rule 68-57 n.1, 1968-1 C.B. 553 (1968) (emphasis added); *see also* H.R. REP. NO. 1884, at 817 (1966).

171 *Slodov*, 436 U.S. at 259 n.23.

and the security interest arises after notice of the tax lien."[172] The Supreme Court, in arriving at this conclusion, also recognized that Congress had acted to preserve this priority when it enacted the Federal Tax Lien Act of 1966.[173]

Slodov, however, was a bankruptcy proceeding that did not expressly involve purchase money priority. The discussion of priority was stated in dicta to illustrate that the federal government's power to collect back taxes only extends to the extent of the taxpayer's interest in the property.[174] Thus, state law determines a tax debtor's interest in the property, and the lien cannot attach when the debtor has no interest.[175] Thus, the federal government's lien for unpaid income taxes does not have priority over a purchase money mortgage recorded after the tax lien because the debtor had no interest in the subsequently acquired property at the time the tax lien attached.

In *Belland v. O.K. Lumber Co.*,[176] the Alaska Supreme Court directly addressed the issue and applied the footnote in *Slodov*. Belland was an attorney hired by the O.K. Lumber Co. to handle a real property transaction.[177] His clients later sued him for malpractice because he had recorded various documents, including the deed of trust to secure the transaction, without discovering the existence of a federal tax lien, which had been recorded after his title report to his clients, but before the documents were recorded.[178] Belland contended that his clients had suffered no damage, and were therefore not entitled to any relief, because the deed of trust had priority over the federal tax lien as "it was in the nature of a purchase-money mortgage."[179]

The Alaska Supreme Court agreed, citing that when Congress enacted the Federal Tax Lien Act of 1966, it intended to preserve the priority of purchase money mortgages.[180] The court also reasserted the United States Supreme Court's interpretation in *Slodov*,[181] and held that the deed of trust was a pur-

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172 *Id.*

173 *Id.*

174 *Id.* at 257.

175 *Id.* at 259 n.19.

176 797 P.2d 638 (Alaska 1990).

177 *Id.* at 639.

178 *Id.*

179 *Id.* at 640. Like West Virginia, a deed of trust in Alaska is treated as a lien against the property, much like a mortgage. Thus, a deed of trust that would constitute a purchase money mortgage shall be treated as such. *See id.* at n.4.

180 *Id.* at 640.

181 *Id.* at 641.

chase money mortgage, and therefore, had priority over the federal tax lien.[182]

V. WEST VIRGINIA STATE INCOME TAX LIENS AND PURCHASE MONEY MORTGAGE PRIORITY

State tax liens operate much the same way as federal liens. Under West Virginia law, failure to pay state income tax subjects the taxpayer to a lien on the taxpayer's real and personal property.[183] Moreover, a tax lien is not valid as against an innocent purchaser for value without notice until recorded.[184] Therefore, no absolute priority exists in favor of the State's lien for unpaid income taxes. As long as the lien has been properly recorded to give notice, the lien would seem to fall under the "notice" principles of the West Virginia recording statute.

Although purchase money mortgages are not expressly exempted from the terms of West Virginia Code § 38-10C-1, neither are purchase money mortgages expressly exempted from the recording statutes for transfers of real property, judgment liens, or federal income tax liens. Yet, in each of those situations, the purchase money mortgage has priority; therefore, to then reject purchase money priority as to antecedent state income tax liens would create somewhat of an anomaly.

Furthermore, it has been held that "legal or equitable title to personal property must be vested in the taxpayer before the State is entitled to enforce its claim against said property to the prejudice of the seller."[185] In *Moran v. Leccony Smokeless Coal Co* , the State of West Virginia claimed its liens for unpaid gross sales tax and consumer's sales tax had priority over all other liens against the debtor.[186] In assessing the State's claim as against certain creditors under conditional sales contracts, where a balance of the purchase money was still due on the property sold, Justice Fox noted the "inherent unfairness in subjecting the property of one person to the obligation of another" and declined to adopt such a harsh rule.[187]

The court further held that that the creditors under these conditional sales contracts were entitled to priority over the State's liens.[188] Justice Fox

182 *Id.* at 642.

183 *See* W. VA CODE § 11-10-12 (2004) (the statute requires that any tax due and payable under this article "shall be a debt due this state. It shall be a personal obligation of the taxpayer and shall be a lien upon the real and personal property of the taxpayer.").

184 *See* W. VA. CODE § 38-10C-1 (2004).

185 Moran v. Leccony Smokeless Coal Co., 10 S.E.2d 578, 582 (W. Va. 1940).

186 *Id.* at 580.

187 *Id.* at 582.

188 *Id.* at 583.

stated that, "the seller of property . . . in retaining title to the property sold, holds a preference over all liens, other than the lien of a levy for property tax, which may be created against the same in the hands of the purchaser, for the purchase price of the property so sold."[189]

Even though *Moran* dealt directly with the sale of personal property, the court's rationale is easily applicable to purchase money mortgages on real property. First, just as *Moran* held that title to goods must be vested in the taxpayer before it can be subjected to a lien in favor of the State,[190] the same explanation is given when a debtor obtains title to real estate, and at the same time gives a deed of trust to either the seller or a third-party to secure the purchase money.[191] In such cases, a prior judgment lien cannot attach because the purchaser never obtains title to the land.[192] Thus, the judgment creditor can acquire no better right to his debtor's estate than the debtor has.[193] Given the holding of *Moran* and the nature of the purchase money mortgage, the of West Virginia's lien for unpaid income tax can only attach to title in property actually vested in the taxpayer.

Second, *Moran* gave a seller of property under a conditional sales contract a priority over all other liens, except for property taxes, created by the purchaser.[194] This is essentially the theory behind purchase money priority.[195] Therefore, where one purchases property and gives a deed of trust for the purchase money, the mortgagee's interest in the real property should be superior to the State's lien for unpaid income tax by the mortgagor-purchaser. For West Virginia to give priority to a vendor parting with personal property a superior lien over the State's lien, but not permit a mortgagee holding under a purchase money mortgage in real property to have the same priority would be an inconsistent application of the law. Thus, given the holdings of *Moran* and the nature of the purchase money mortgage, once West Virginia formally adopts purchase money priority, a purchase money mortgage should also be superior to an antecedent income tax lien in favor of the State West Virginia.

VI. CONCLUSION

The fact that the overwhelming majority of jurisdictions have adopted, in some way or another, the priority of the purchase money mortgage may lead

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189 *Id.*

190 *See supra* note 185 and accompanying text.

191 *See supra* notes 41-43 and accompanying text.

192 *Id.*

193 *Id.*

194 *See supra* notes 188-189 and accompanying text.

195 *See supra* Part II of this article.

some practitioners to simply assume that West Virginia recognizes this same principle. However, because no West Virginia law exists on the issue, the topic of the priority would be left for interpretation based upon the specific facts of a particular case.

Nonetheless, based upon the traditional notions of the priority, West Virginia should follow the majority rule concerning purchase money mortgages. West Virginia's Constitution, Code, and case law all clearly recognize that, unless changed by the legislature, West Virginia will apply the common law as it existed in Virginia as of 1863. Both the common law of Virginia and England recognize and apply purchase money priority; thus, in theory, West Virginia is bound by those applications.

Moreover, West Virginia's own recording statutes were taken from, and mirror, the recording statutes of Virginia. Just as purchase money priority was uniformly applied in Virginia despite that fact that the Virginia statutes never exempted purchase money mortgages from its "notice" requirement, the same application logically follows for West Virginia to apply the same.

Pragmatically speaking, even if the traditional explanations are considered "legal fiction" when regarding third-party lenders, the intrinsic fairness idea that lenders loan money with the expectation of having a lien on the real estate being acquired that is superior to any other interest is a sufficient explanation. Specifically, but for the loan, the mortgagor would have never received the property. In the modern era of numerous and complex real estate transactions, the rule encourages purchase money financing by reducing potential errors in title examinations.

Thus, once a purchase money mortgage has priority over antecedent judgment liens arising through the mortgagor, this same priority is specifically provided to it over antecedent federal income tax liens and logically to it over antecedent West Virginia state income tax liens. So yes, West Virginia, the principle of providing a special priority for the purchase money mortgage does exist in the Mountain State.

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