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Creator's Rights -- Status of Judgement Creditors Under the Recording Acts

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NOTES

Creditors' Rights

STATUS OF JUDGMENT CREDITORS UNDER THE RECORDING ACTS

Introduction

Prior to the enactment of the various types of recording statutes, the common law maxim of "prior in time, prior in right" was the controlling principle regarding conflicting conveyances from a common grantor. The rationale supporting the rule was that a grantor could convey only the actual interest possessed; consequently an attempt to make a subsequent grant of the same premises was in fact a nullity and ineffective against a prior grantee. The rigid application of the rule was conducive to fraud and in order to alleviate the injustice devolving upon innocent purchasers, recording statutes were enacted. Under modern statutes priority of interest varies significantly with the wording of the statutes, which may be classified into three basic types, namely, (1) race, (2) race-notice, (3) and pure notice.[1]

At common law judgment creditors were not treated as bona-fide purchasers and, like subsequent grantees, they could satisfy their claims only out of the actual interests of their grantee.[2] It is the purpose of this article to survey the effect upon judgment creditors of those recording statutes which do not expressly make provision for creditors. A few statutes expressly include creditors,[3] but the degree of protection varies with the language of a

[1] Pure race—first grantee to record has priority; pure notice—subsequent grantee, who has not recorded, protected if he does not have notice of prior conveyance; race-notice—first grantee to record without notice of prior conveyance has priority. See 4 AMERICAN LAW OF PROPERTY § 17.5 n.63 (Casner ed. 1952) for a classification of the state statutes under the above three types.

[2] Brace v. Duchess of Marlborough, 2 P. Wms. 491, 24 Eng. Rep. 829,830 (1728): "[O]ne cannot call a judgment . . . creditor, a purchaser, nor has such creditor any right to the land; he has neither *jus in re* nor *ad rem* . . . ." 24 Eng. Rep. at 830. A judgment creditor does not lend money on the credit of the land as does the mortgagee.

[3] *E.g.*, N.J. STAT. ANN. § 46:22-1 (1940); PA. STAT. ANN. tit. 21, § 351 (Purdon 1955); these statutes limit protection to subsequent judgment creditors. *Compare*, ARK. STAT. ANN. § 16-115 (1947); FLA. STAT. ANN. § 695.01 (1944), unrecorded conveyance void against creditors; ILL. ANN. STAT. c. 30, § 29 (Smith-Hurd 1934), all creditors without notice protected. It is to be noted that this latter group of statutes does not expressly limit protection to *subsequent* creditors.

particular statute and its judicial interpretation.

Resolution of the present question depends upon the answers to two fundamental questions. First, is a judgment creditor a member of the class protected by the statute; secondly, if so, is he subject to the same rules as to priority of legal interest as an innocent purchaser? The majority of jurisdictions in the United States do not expressly include creditors within the statutory language. For convenience these statutes may be placed into two categories: (1) those which expressly confine protection to bona fide purchasers,[4] and (2) those which purport to protect all third persons until the instrument of conveyance is recorded.[5]

Statutes Which Confine Protection To Bona Fide Purchasers

There are sixteen states which expressly limit the protection of their respective recording statutes to bona fide purchasers of a common grantor.[6] Clearly the design of such a statute is to prevent the perpetration of fraud upon a subsequent purchaser as well as to provide an accessible record of title for public inspection.[7] The scope of this type of statute has not been broadened by judicial interpretation. Since a judgment creditor was not a bona fide purchaser at common law, he is excluded from the protection of the recording act by the plain meaning of the statute. Consequently, a judgment creditor is powerless to satisfy his judgment by proceeding against real property which has been conveyed prior to judgment. The creditor's sole remedy is against the actual interest of his debtor and not the interest of record.[8]

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[4] CAL. CIV. CODE ANN. § 1214 (West 1954); GA. CODE ANN. § 29-401 (1952); IDAHO CODE ANN. § 55-812 (1948); IND. ANN. STAT. § 56-119 (Burns 1951); IOWA CODE ANN. § 558.41 (1950); MICH. STAT. ANN. § 26.547 (1953); MONT. REV. CODES ANN. § 73-202 (1947); NEV. COMP. LAWS § 1498 (1929); N. Y. REAL PROP. LAW § 291; OHIO REV. CODE ANN. § 5301.25 (Page 1954); ORE. REV. STAT. § 93.640 (1953); S.D. CODE § 51.1620 (1939); UTAH CODE ANN. § 57-3-3 (1953); WASH. REV. CODE § 65.08.070 (1951); WIS. STAT. § 235.49 (1955); WYO. COMP. STAT. ANN. § 66-119 (1945).

[5] COLO. REV. STAT. ANN. § 118-6-9 (1953); CONN. GEN. STAT. § 7091 (1949); KAN. GEN. STAT. ANN. § 67-223 (1949); ME. REV. STAT. ANN. c. 168 § 14 (1954); MD. ANN. CODE art. 21 §§ 19, 20, 21 (1951); MASS. ANN. LAWS c. 183 § 4 (1955); MO. ANN. STAT. § 442.400 (1949); N.H. REV. LAWS c. 477, § 7 (1942); OHIO REV. CODE ANN. § 5301.23 (Page Supp. 1954), applicable to mortgages only; R.I. GEN. LAWS c. 435, § 1 (1938); VT. REV. STAT. § 2648 (1947). *Compare* OKLA. STAT. ANN. tit. 16, § 15 (1951).

[6] See note 4 *supra.*

[7] Jackson v. Post, 12 N.Y. (15 Wend.) *588 (1836): "The object of the Recording Acts is to prevent frauds—to prevent the person having title to land from selling it more than once, and thereby defrauding one or more purchasers." 12 N.Y. at *594.

[8] Lytle v. Black, 107 Ga. 386, 33 S.E. 414 (1899).

Apparently the fact that he relied upon record ownership in extending credit is immaterial because the land was not security for the debt as it would be in the case of a mortgage.[9]

This principle has been applied in a multitude of situations. The owner of an unrecorded mortgage given to secure an antecedent debt is afforded priority over a judgment creditor whose judgment was rendered and docketed prior to the recording of the mortgage. Since the mortgage was valid between the parties an equity arose in the mortgagee at the time of execution which takes precedence over a judgment creditor who possesses no similar equity in the property.[10] Likewise, the failure to record a mortgage extension agreement until after a judgment is docketed does not confer any additional rights upon the judgment creditor.[11] Where the creditor attaches the property after it has been mortgaged by his debtor but before the mortgage is recorded, he is subordinated to the rights of the mortgagee, the attachment being, in reality, a nullity. The record owner's title is but a "mere shell and pretense," as there is no actual interest in the debtor to which a contingent lien can attach.[12]

The trustee under an equitable mortgage which was not capable of being recorded has the right to intervene and enjoin the sale of property by an execution creditor who relies upon record ownership in an attempted judicial sale of the property.[13] However, where the sale has been consummated there is a conflict as to the trustee's rights. There is substantial authority to the effect that a purchaser at a judicial sale becomes a bona fide purchaser within the meaning of the statute.[14] Justification for the result is that a judicial sale with all its incidents effects a substantial change in the situation of the parties analogous to that of

9 See note 2 *supra*.

10 Sullivan v. Corn Exch. Bank, 154 App. Div. 292, 139 N.Y. Supp. 97 (2d Dep't 1912).

11 Rich v. McCarthy, 198 Misc. 347, 98 N.Y.S.2d 638 (Sup. Ct. 1950).

12 Campbell v. Keys, 130 Mich. 127, 89 N.W. 720 (1902): ". . . [W]e do not see how the attaching creditor obtained any greater interest in the property levied upon than was then owned by the attachment debtor." 89 N.W. at 722.

13 Frank v. Hicks, 4 Wyo. 502, 25 Pac. 475 (1894); *cf.* Culp v. Kiene, 101 Kan. 511, 168 Pac. 1097 (1917). Although in the latter case the statute provided protection for all third parties, it was construed to exclude judgment creditors and execution purchasers.

14 Sills v. Lawson, 133 Ind. 137, 32 N.E. 875 (1892); Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923); Sternberger v. Ragland, 57 Ohio St. 148, 48 N.E. 811 (1897). In the latter case the court was influenced by the wording peculiar to the Ohio statute, which provides that "until so recorded [all conveyances except mortgages are] fradulent, so far as relates to a subsequent bona fide purchaser. . . ." See OHIO REV. CODE ANN. § 5301.25 (Page 1954); *compare id.* § 5301.23.

a conveyance in satisfaction of or to secure a pre-existing debt.[15] The result, of course, is in direct conflict with the established principle that a judgment creditor can proceed only against the actual interest of his debtor. If the debtor has divested himself of all actual interest there is logically no interest which can be levied on and sold at the judicial sale.[16] Under this view the purchaser at a judicial sale acquires only derivative rights for he is merely substituted for the creditor and consequently acquires only the actual right, title, and interest of the debtor. While the logical consistency of the latter view cannot be assailed, nevertheless there is much to be said for the former approach. In its operation it protects those who rely on record title in purchasing; since reliance has been the cause of a monetary detriment, the logic of the latter view should be rejected to protect a purchaser for value, such protection being the avowed intention of this type of statute.

It might appear from the foregoing that a judgment creditor is at the mercy of the ingenious debtor, who can employ devious methods to insulate his property from the creditor's claims. Fortunately the law will not give precedence to unrecorded conveyances where to do so would be manifestly unjust; likewise the courts hesitate to give an unrecorded conveyance priority where there is any taint of fraud. While judgment creditors may be denied the protection of the recording statute, they are protected to some extent by fraudulent conveyance statutes. Under the UNIFORM FRAUDULENT CONVEYANCE ACT any conveyance which renders or will render the debtor insolvent is fraudulent as to creditors if given without "fair" consideration.[17] This rule is applicable without regard to the actual intent of the grantor. Thus a grantee may be a purchaser for value under the recording statute, but the conveyance may be set aside if there is a lack of "fair" consideration.[18] Fair consideration also is necessary where one is engaged or is about to engage in business if the property

15 Sternberger v. Ragland, *supra* note 14.

16 Stauffacher v. Great Falls Pub. Serv. Co., 99 Mont. 324, 43 P.2d 647 (1935). The fact that the action to recover a judgment is commenced and the property attached prior to the execution of the deed has no effect on the prior right of the unrecorded grantee.

17 UNIFORM FRAUDULENT CONVEYANCE ACT § 4. See also § 2 for the definition of insolvency. The act has been adopted in twenty states.

18 *Id.* § 3. Fair consideration is that which fairly represents the value of the property. However, valuable consideration may be much less in quantum. "It seems to us that it would be a useless waste of time and energy to cite authorities in support of the proposition that $5 or any other stated sum of money is a valuable consideration within the meaning of the law of conveyancing." Strong v. Whybark, 204 Mo. 341, 102 S.W. 968, 969 (1907).

retained in the business after conveyance is an unreasonably small capital for the particular enterprise.[19] Likewise where one intends or believes he will incur debts beyond his ability to pay there must be fair consideration.[20] However, fair consideration will not prevent the avoidance of a conveyance where there is an actual intent by the grantor to hinder, delay, or defraud creditors,[21] but in such a case it has been held that the grantee knowingly must have participated in the fraud.[22]

Apparently, as to avoiding the conveyance because of fraud against the creditor, the same result will be reached where the Uniform Act has not been adopted: a fraudulent intent on the part of the grantor-debtor is not the controlling factor, and even where such an intent by the grantor is conceded, the conveyance will not be set aside unless there is proof that the grantee shared the fraudulent intent.[23] The burden of proof is often difficult to sustain for the mere failure to record is not presumptively fraudulent, nor is it evidence of fraud as to the grantee.[24] Additional indicia of fraud from which a fraudulent intent on the part of the grantee can reasonably be inferred must be shown. Among the "badges of fraud" are withholding the instrument from the record for an unreasonable length of time,[25] agreement between the parties that the grantee will not record,[26] intra-family conveyances,[27] indefinite testimony by the grantee as to the reasons for not recording,[28] and preferential conveyances in favor of a certain creditor.[29] Where the conveyance renders the grantor insolvent, there is a presumption of fraud, and the burden of rebutting the presumption then falls on the grantee.[30]

Generally, in order to constitute a fraud upon creditors, it must

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19 *Id.* § 5.

20 *Id.* § 6.

21 *Id.* § 7. *Compare* 52 STAT. 869 (1938), 11 U.S.C.A. § 96 (a) (b) (1939): this section provides for the avoidance of preferential conveyances made by an insolvent within four months prior to the filing of a bankruptcy petition.

22 See Enos v. Picacho Gold Mining Co., 56 Cal. App. 2d 765, 133 P.2d 663 (1943).

23 Grant v. Cherry, 199 Iowa 164, 201 N.W. 588 (1925); Campbell v. Remaly, 112 Mich. 214, 70 N.W. 432 (1897). (The Michigan Legislature adopted the Uniform Fraudulent Conveyance Act in 1919.)

24 State Sav. Bank v. Buck, 123 Mo. 147, 27 S.W. 341, 342 (1894) (dictum).

25 Hutchinson v. First Nat'l. Bank, 133 Ind. 271, 30 N.E. 952 (1892).

26 *Id.*

27 Weir v. Baker, 357 Mo. 507, 209 S.W.2d 253 (1948).

28 *Id.*

29 Curtis v. Lewis, 74 Conn. 367, 50 Atl. 878 (1902).

30 Weir v. Baker, 357 Mo. 507, 209 S.W.2d 253 (1948).

appear from the circumstances surrounding the transaction, that the instrument was withheld from the record by an active concealment for the purpose of giving the grantor a fictitious basis to secure credit; it is also necessary that that purpose be carried into effect by inducing creditors to detrimentally change their position in reliance upon the record title. Unless the creditors sustain this burden they have no cause to complain against unrecorded conveyances.[31]

A grant that is innocent when executed, however, may become fraudulent when withheld from the record for the purpose of concealing the fact that a large portion of the debtor's assets have been appropriated.[32]

Lack of consideration also may be indicative of fraudulent intent, and in several states there are statutes specifically making such a conveyance void regardless of any actual fraudulent intent, at least as to creditors existing at the time of the conveyance.[33] The typical situation involves a conveyance to a member of the debtor's family, particularly between husband and wife or parent and child. However, there is a presumption of consideration, and the burden of rebutting such presumption is upon the creditor.[34]

The failure to establish fraud does not exhaust the creditor's rights against the property where record title is in the debtor. Independent of fraudulent intent, the grantee's conduct, coupled with his failure to record, may constitute an estoppel, thus preventing him from asserting his actual ownership against bona fide creditors. While there is no necessity to prove fraudulent intent, it is incumbent upon the creditor to show a holding out by the grantee that the grantor is the actual owner or at least that the grantee acquiesced in the grantor's conduct. Necessarily, the grantee must have knowledge that his grantor is using the record title to induce false credit.[35] In order to estop the grantee it is

31 Corwine v. Thompson Nat'l Bank, 105 Fed. 196 (6th Cir. 1900).

32 Curtis v. Lewis, 74 Conn. 367, 50 Atl. 878 (1902). In this case there was an attempt to make a preferential conveyance. However, conveyances given as security or in payment of pre-existing debts are not per se fraudulent. See *Sullivan v. Corn Exch. Bank*, 154 App. Div. 292, 139 N.Y. Supp. 97 (2d Dep't 1912).

33 OKLA. STAT. ANN. tit. 24, § 10 (1951). See also Harry v. Hertzler, 185 Okla. 151, 90 P.2d 656 (1939).

34 Bain v. Ullerich, 189 Iowa 149, 177 N.W. 61 (1920). An unrecorded mortgage is presumed to be given for valid consideration, as under the negotiable instruments law of the state every negotiable instrument was deemed prima facie to have been executed for a valuable consideration. NEGOTIABLE INSTRUMENTS LAW § 24.

35 Robertson v. Schlotzhauer, 243 Fed. 324 (7th Cir. 1917); the court applied Indiana law.

also incumbent upon the creditor to prove detrimental reliance upon the grantor's apparent ownership. Consequently, where the debt was created prior to the execution of the conveyance, the assertion of an estoppel is precluded, as there is no possibility of detrimental reliance on record title.[36]

Estoppels have been especially prevalent in cases of intra-family conveyances. The wife of a debtor has been estopped to assert her title where she knows or ought to know that creditors might be dealing with her husband on the basis of his apparent ownership.[37] In the "husband to wife" situation, the husband is sometimes considered an agent acting in behalf of his wife,[38] with the result that any debts incurred by the husband may be satisfied out of her actual ownership. However, this theory appears to be nothing but an awkward manifestation of the fundamental estoppel doctrine.

Although an agreement not to record the instrument may not constitute fraud in some situations, it may nevertheless provide the basis for an estoppel, for ordinarily the purpose of the agreement is to avoid impairment of the grantor's credit.[39] While there may be no fraudulent intent, the agreement is certainly conducive to a "holding out," but of course there is always the necessity of detrimental reliance upon apparent ownership.[40]

In addition to the "badges of fraud," other factors which may raise an estoppel include payment of taxes, and possession and management of the property by the record owner.[41]

Statutes Which Purport to Protect All Third Parties

Although the wording of a particular statute may vary, the central theme of this type of statute is that an unrecorded conveyance is ineffectual against all third persons, although valid between the original parties.[42] The protection afforded by these statutes is much more comprehensive than the statutes which expressly protect only bona fide purchasers. However, the statu-

36 Stark v. Cooper, 203 Mo. App. 238, 217 S.W. 104 (1920).

37 Meltzer v. Shafer, 215 Iowa 785, 244 N.W. 851 (1932); see Corwine v. Thompson Nat'l Bank, 105 Fed. 196 (6th Cir. 1900).

38 Corwine v. Thompson Nat'l. Bank, *supra* note 37.

39 See Spitzley v. Garrison, 201 Mich. 363, 167 N.W. 882 (1918); Campbell v. Remaly, 112 Mich. 214, 70 N.W. 432 (1897).

40 Grant v. Cherry, 199 Iowa 164, 201 N.W. 588 (1925).

41 Meltzer v. Shafer, 215 Iowa 785, 244 N.W. 851 (1932).

42 See note 5 *supra*. The typical statute of this type reads: "No conveyance shall be effectual . . . against any other person but the grantor and his heirs, unless recorded. . . ." CONN. GEN. STAT. § 7091 (1949).

tory language may be deceptive if considered apart from judicial construction. Oklahoma's statute purports to protect "third persons," but the Oklahoma Supreme Court has interpreted this to mean that the only third person within the purview of the act is a bona fide purchaser.[43]

Notwithstanding the validity of the conveyance between the original parties, the comprehensive intent of this type of statute appears to negative the creation of any interest in the grantee which would conflict with the rights of third persons against the grantor. It has been said that the purpose of this legislation was to settle questions concerning priorities, and to enable all persons extending credit to the grantor to have the benefit of record ownership without becoming involved in questions of prior equities.[44] Of course the result is very harsh in regard to the innocent grantee who negligently fails to record. Consequently, the rule is given a narrow construction in contrast to the liberal interpretation given to the statutes which protect only bona fide purchasers. Thus, where a defectively recorded conveyance would not be binding against a subsequent purchaser, it is nevertheless superior to the ascertained rights of a judgment creditor.[45]

Since the judgment is afforded the protection of the act, it is imperative that the basis of priority be considered. Clearly a mere creditor is not a bona fide purchaser, nor is he an encumbrancer for value as he does not extend credit with the specific land as security.[46] Consequently as a naked creditor he has no interest in the land even though he may have relied upon ownership as a basis for giving credit. A creditor's right to satisfy his debt out of the debtors real property arises independently of the recording acts. Practically speaking he has no enforceable right until a judgment has been rendered in his behalf. The right created by the judgment is not in and of itself a right to the debtor's real property. At common law a judgment did not create any lien on the debtor's land:[47] a general lien on real property is purely a creature of statutes and its commencement varies with the applicable statute.[48] In some states a general lien on the

43 Oklahoma State Bank v. Burnett, 65 Okla. 74, 162 Pac. 1124 (1917). Judgment held inferior to unrecorded conveyance prior in time. See also, Culp v. Kiene, 101 Kan. 511, 168 Pac. 1097 (1917). The Oklahoma statute reads: "... no deed ... shall be valid as against third persons unless acknowledged and recorded as herein provided." OKLA. STAT. ANN. tit. 16, § 15 (1951).

44 Fosdick v. Barr, 3 Ohio St. *471 (1854). The statute under consideration applied only to mortgages.

45 Tousley v. Tousley, 5 Ohio St. *78 (1855).

46 See note 2 *supra*.

47 2 FREEMAN, JUDGMENTS § 916 (5th ed. 1925).

48 *Id.* § 918.

judgment debtor's real property arises from the first day of the term at which judgment is rendered,[49] while in others the judgment must be entered or a transcript filed in the local recorder's office.[50]

An attachment of the debtor's record property at the commencement of suit will give the creditor priority over a prior unrecorded grantee presumably because it is in the nature of a contingent lien intended to isolate the property to insure at least partial satisfaction of the debt.[51]

However, the creditor must also be wary of recording acts relating to judgments. The failure to record an execution judgment prior to the recording by a subsequent grantee shifts the priority back to the grantee.[52] This is the result although recordation of an execution lien normally relates back to the first step in acquiring title by execution levy.[53] This result is in accordance with the spirit of the recording acts by making every title, in so far as feasible, complete and apparent by a system of comprehensive recordation. On the one hand, creditors are protected from unrecorded conveyances, while on the other hand the statutes governing judgment liens place an affirmative duty upon the creditor to give notice of his rights by entry of the judgment or attachment.

In general the recording statutes which afford protection to judgment creditors are notice statutes.[54] It is well established that a judgment creditor forfeits the protection of the recording act if he has knowledge of a prior unrecorded conveyance.[55] While the decided cases do not expressly rest the creditor's loss

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49 *E.g.*, KAN. GEN. STAT. ANN. § 60-3126 (1949).

50 *E.g.*, COLO. REV. STAT. ANN. § 77-1-2 (1953); CONN. GEN. STAT. § 7225 (1949).

51 Wixon v. Wixon, 76 Colo. 392, 232 Pac. 665 (1925); Aronian v. Asadoorian, 315 Mass. 274, 52 N.E.2d 397, 398 (1943) (dictum). Query: Is the creditor obliged to attach the property even where the judgment has been entered and filed? See note 43 *supra*.

52 Schroeder v. Tomlison, 70 Conn. 348, 39 Atl. 484 (1898). Here A conveyed to B who neglected to record until after C had been granted an execution lien against the property. However, C failed to record his lien as required until after B had recorded the conveyance.

53 *Id.* at 487.

54 Of the twelve statutes listed at note 5 *supra*, only the Maryland statute (race-notice) and the Ohio mortgage statute (pure race) are excepted. 4 AMERICAN LAW OF PROPERTY § 17.5 n. 63 (Casner ed. 1952).

55 Goodwin v. Dean, 50 Conn. 517 (1883); Houghton v. Davenport, 74 Me. 590 (1883) (dictum); Hearn v. Purnell, 110 Md. 458, 72 Atl. 906 (1909); Woodward v. Sartwell, 129 Mass. 210 (1880); Brown v. Manter, 22 N.H. 468 (1851) (dictum); McDuff Estate v. Kost, 158 Atl. 373 (R. I. 1932) (dictum).

of priority on the notice provision of the statute, it would seem to be implicit in the statute that one who has notice of a prior conveyance — whether he be purchaser or creditor — is to be denied the benefits of the statute.[56] If this is true, then a statute which provides for pure notice when determining the rights of purchasers, becomes race-notice in effect when concerned with priority of judgment creditors. This practical "transition" arises in this manner: the subsequent purchaser need do nothing at all to prevail if he has no actual notice of the first conveyance and if the first purchaser has not recorded. In contradistinction to that, the judgment creditor will not prevail over a prior unrecorded conveyance in a pure notice jurisdiction if he does nothing even though he has no actual notice. Under statutory structure governing judgments, the judgment creditor must perform some affirmative public act in order to establish priority.[57] Thus, the race-notice effect is not derived solely from the recording act, but is of a hybrid nature: the notice concept is the result of the recording statute while the race concept is dependent upon the statutes peculiar to judgments.

Conclusion

The practical effect of each class of statute on creditors is a result of the combined policies of the legislature and the courts. On the one hand, where the statute, on its face, confines its protection to bona fide purchasers, the courts have uniformly excluded creditors from the protection of the statute, and reverted to established common law principles in order to ascertain the rights of judgment creditors. Assuredly the result is justifiable for it is quite obvious from the statutory language that only one class was meant to be protected from unrecorded conveyances.[58]

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[56] *E.g.*, "A conveyance . . . shall not be valid as against any person, except the grantor . . . and persons having actual notice of it, unless it . . . is recorded. . . ." MASS. ANN. LAWS c. 183 § 4 (1955).

[57] The creditor's affirmative act will constitute constructive notice to the grantee of the creditor's lien since it sets up a public record. The affirmative public act may take one of at least five forms: (1) actual recording of the judgment, (2) "entering" of the judgment, (3) filing of a transcript in the local recording office, (4) attachment and recording thereof, (5) or, if none of the above are required to be done or are in fact done, the court record of judgment given, in the county where the property is located.

[58] Some states specifically define bona fide purchaser to the exclusion of creditors, *e.g.*, ". . . and the term 'purchaser' as so used, shall be construed to embrace every person to whom any estate or interest in real estate shall be conveyed for a valuable consideration. . . ." WIS. STAT. § 235.50 (1955).

To reiterate, a judgment creditor was neither a purchaser at common law nor did he participate in any form of conveyance. It might be contended that the statute is too conservative in its practical effect, but that is within the discretionary province of the legislature. On the other hand one statute which literally purports to extend protection to all third parties has been interpreted in an ultra-conservative manner, which seems to delete a great deal from the obvious intent of the legislature.[59] By the liberal language found in the statute itself (third parties) something more than the bona fide purchaser must have been intended. Who else but creditors would seek to assert rights against the record ownership of the grantor? It is submitted that the judicial interpretation of this statute is in direct conflict with the apparent intent of the legislature, which must have intended "third person" to include all third persons and not merely bona fide purchasers for value.

Similar in apparent legislative intent to this statute are those which limit the validity of the conveyance to the immediate grantor and grantee. These statutes accomplish their intended purpose by minimizing the possibility of fraud upon interested creditors, while at the same time forcing compliance with the recording laws pertaining to judgment creditors. The policy of the legislature is by no means conservative, and judicial interpretation has, generally, been consonant with the liberal policy of protecting those who are farsighted enough to give notice of their rights. To deny protection to those who fail to avail themselves of the recording system is not to deny justice, for all are given equal opportunity to secure protection. Thus, under this type of statute the courts are implementing the over-all policy of the recording system — that all titles be complete and apparent on the record, with all persons being equally and adequately protected in their rights by compliance with the letter and spirit of the recording system.

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59 See note 41 *supra.*