

Have Judgment Lien Creditors Become "Bona Fide Purchasers"?

By Kraettli Q. Epperson

A Client with a Recording Problem

It has been said that an attorney does not like to be in the position of representing a client who has failed to utilize the county land records recording system to give the world constructive notice of the client's ownership interest or mortgage lien.¹

Generally, the failure to use the recording system only becomes a serious concern to your client ("First Person") if and when another person ("Second Person") records her instrument before your client, First Person, finally records her earlier document.² Until 1993, if the Second Person was a general money judgment lien creditor, under 12 O.S. § 706 ("Judgment Lien Creditor"), the attorney should have been comfortable — after doing a little research — telling the First Person client that her claim was superior to such Second Person's Judgment Lien claim. This advice would have been based on an analysis of the language of our two-part Recording Act, as consistently interpreted since before 1916 by the Oklahoma Supreme Court.³

Alternative Recording Acts

There are three basic types of recording acts used in the United States: (1) race, (2) notice and (3) race-notice.⁴

If Oklahoma had enacted a pure "race" Recording Act, the first person to record would always win — even if the first to record had actual knowledge of an earlier outstanding interest at the time she acquired her interest. At the other extreme, if Oklahoma had adopted a pure "notice" Recording Act, each and every subsequent person who acquired an interest in the same tract of real property would hold the senior position, if, at the moment of such

acquisition, she did not have either actual notice or constructive notice (*i.e.*, *record notice*) that there was an earlier outstanding interest. This result would hold true without regard to which grantee recorded their instrument first.⁵

The general consensus among Oklahoma practitioners is that Oklahoma has the hybrid statute known as the "race-notice" version, adopted by the vast majority of the States. Under such a statute, the first person to acquire an interest will have the senior interest, unless the second person both (1) initially acquires her interest without either actual or constructive notice that there is an already existing outstanding interest, and (2) records her instrument first. This approach (a) rewards the diligent person who promptly records her claim, but (b) refuses to recognize claims recorded by a person who acted in bad faith by acquiring an interest with actual knowledge of an outstanding, but unrecorded, conveyance.⁶

Oklahoma's Recording Act

Oklahoma's Recording Act has two parts. 16 O.S. § 16 is the second half of Oklahoma's Recording Act and states the basic "constructive notice" principal that "every conveyance of real property...from the time it is filed with the registrar of deeds is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrances or creditors."⁷

As noted in the 1956 *Straub* case, the terms of 16 O.S. § 16 — when viewed alone — have limited impact because they only impart notice to "subsequent purchasers" and do not help resolve the issue of who prevails where First Person receives an interest but fails to record her instrument until after Second Person both



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acquires an interest — while ignorant of the already existing interest — and records it first.⁸

The language of Section 16's companion statute, 16 O.S. § 15, declares that while an instrument is valid "as between the parties thereto" without being recorded, no "instrument relating to real estate... shall be valid as against *third persons* unless acknowledged and recorded...." While Section 15 could be — and perhaps should be — logically read to be silent as to whether or not an unrecorded instrument is valid against persons *other than* "third persons," its language has nevertheless been interpreted to mean that an earlier conveyance or encumbrance (1) **will not be valid** as to "third persons," (*i.e.*, subsequent "bona fide purchasers"), but (2) **will be valid** as to non-"third persons", such as subsequent Judgment Lien Creditors.⁹

Oklahoma's "Atypical" Recording Act

Neither of these two statutes (*i.e.*, §§ 15 or 16) provides the detailed language often found in typical race-notice recording acts — which not only state the basic principle that an instrument's recording imparts constructive notice to subsequent purchasers, but would also specifically declare whether Second Person must both (1) be without actual notice of First Person's earlier unrecorded interest when Second Person acquires her interest, and (2) record her (the Second Person's) instrument first, in order to defeat First Person's unrecorded claim of interest.¹⁰

In the absence of such specific language in Oklahoma's Recording Act, an attorney must look to existing cases from our Appellate Courts for guidance in advising clients. Since before 1916, the Oklahoma Supreme Court's position on the rights of Judgment Creditors has consistently been:

1. "The judgment lien contemplated by Section 5941, Comp. Laws 1909, * * * is a lien only on the actual interest of the judgment debtor, whatever that may be; therefore, though he appears to have an interest, if he has none in fact, no lien can attach." *J.I. Case Threshing Machine Co. et al. v. Wilton Trust Co. et al.*, 39 Okl. 748, 136 P. 769 (1913).
2. "The lien of a justice of the peace judgment, created by filing a transcript thereof in the district court under sections 5217, 5218, and 5148, Rev. Laws 1910, attaches only to the actual interest of the judgment debtor in the lands involved, whatever that may be, and therefore, though he appears to have an interest, if he has none in fact, no lien can attach." *Gilbreath et al. v. Smith*, 50 Okl. 42, 150 P. 719 (1915).
3. "It is admitted by plaintiff in error that there is but one question involved in this appeal; that is, whether the judgment lien was superior to the title of the pur-

chasers of said lots who had bought same from defendant in execution prior to the rendition of said judgment, upon which said execution was issued, but whose deeds had not been filed for record in the office of the register of deeds of said county prior to the levy of said execution upon said lots. The only question involved in this appeal is not an open one in this jurisdiction; it being beyond question that the plaintiff in error is not a third person, as defined in section 11954, Comp. Laws 1909 (section 1154, Rev. Laws 1910)." *Lunn v. Kellison et al.*, 66 Okl. 168, 153 P. 1136 (1917).

4. "A contract for land, bona fide, made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time. When the money is paid, according to the terms of the contract, the vendee is entitled to a conveyance, and to a decree in chancery for a specific execution of the contract, if such conveyance is refused. A judgment obtained by a third person against the vendor, mesne the making the contract and the payment of the money, cannot defeat or impair the equitable interest thus acquired, nor is it a lien on the land to affect the right of such cestui que trust. A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment; but the legal estate in the land is not vested in the judgment creditor, although he can convert it into money to satisfy his debt, by pursuing the proper means." *Adams v. White*, 40 Okl. 535, 139 P. 514 (1914).
5. "In short, the filing of the judgment only created a lien upon the interest in the real estate owned by the judgment debtor at the time of the filing of the lien, and if prior to the filing of such judgment lien the judgment debtor had mortgaged said real estate, the lien created by filing such judgment was subordinate to

such mortgages." *Oklahoma State Bank v. Burnett*, 65 Okl. 74, 162 P. 1124 (1917).

Oklahoma's Changed Recording Act.

Under the above holdings, the advice an attorney would give a client — who received a conveyance or mortgage but failed to file it of record until after a judgment lien was recorded against the client's grantor — would be to confidently assert their interest's senior status over the Judgment Lien Creditor's claim.

However, in 1993 the legislature amended 16 O.S. § 15 to add the **boldfaced** sentence to the statute's existing language:

Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate other than a lease for a period not exceeding one (1) year and accompanied by actual possession shall be valid as against third persons unless acknowledged and recorded as herein provided. **No judgment lien shall be binding against third persons unless the judgment lienholder has filed his judgment in the office of the county clerk as provided by and in accordance with Section 706 of Title 12 of the Oklahoma Statute.**

There is no official "Legislative History" in Oklahoma to assist the lawyer in determining why the Legislature wanted this sentence in Section 15. Earlier public policy rationale, as defined by case law, would deny Judgment Lien Creditors the benefits of the Recording Act — to the extent such benefits would have allowed them to defeat interests acquired through earlier unrecorded conveyances. The basis for this policy has apparently not changed. The Judgment Lien Creditors still "part with nothing to acquire the lien." *Lunn* at 169, quoting *Gilbreath*.

Second Person would not expect to defeat First Person Judgment Lien Creditor's claim, if the Second Person acquires an interest after the First Person Judgment Lien Creditor has already created a Judgment Lien by placing the

Judgment in the public land records (per 12 O.S. § 706).¹¹

A dispute arises only where First Person acquires (but does not record) an interest before Second Person's Judgment Lien is created by a proper filing of the Judgment, under 12 O.S. § 706. The question arises whether Section 15's amendment was intended to make clear who wins in the event of this type of a controversy.

While unpublished Oklahoma Court of Civil Appeals Opinions are neither precedential nor persuasive, a recent unpublished Division 4 Decision suggests what might be the impact of the 1993 amendment to 16 § 15.¹²

The Court of Appeals held in *Bumstead*:

Clearly, the 1993 amendment was to provide that a judgment Creditor has a valid lien against third parties from the date of filing the judgment, which in the case at hand was prior to the filing of the deed from Myron to Darrell and/or Dorothy. Prior to the 1993 amendment, the "third persons" as defined by section 15 referred to innocent purchasers for value or an incumbrancer, and did not apply to judgment lienholders. See *Lunn*, 66 Okla. at 169, 153 P. 1137. It is the position of the Defendant that the 1993 amendment conferred on judgment lienholders the right to proceed against third persons if the judgment was filed in the office of the county clerk. Plaintiffs contend, however, that section 15, as amended, does not apply to judgment creditors who are not "third persons" and that a judgment creditor cannot attach real property that has been previously conveyed, even though the deed has not been recorded. Based on the legislature's amendment to section 15, once a judgment creditor filed a lien Darrell and Dorothy would become "third persons," and if their deed was not on file (which it was not), the judgment lien would be valid against their property. In reviewing the language of the amended statute, we find that the plain language clearly discloses that the Defendant's judgment lien as to Lot 13 is superior to any claim of Plaintiffs.

A brief examination of the pre-amended and post-amended versions of Section 15 shows

that it clearly does not confer its benefits onto "third persons," but, instead, makes recorded instruments valid against "third persons." In general, "third persons" are simply persons who are not one of the two parties to the document — i.e., neither the grantor, nor the grantee. "Third persons" could include both grantees who acquired an interest before as well as after the competing conveyance.

In the pre-1993 case law, cited above, the courts have consistently concluded, using what might be characterized as twisted logic, that such "third persons," who are to "benefit" from Section 15 recordings, do not include Judgment Lien Creditors — as a group — and, therefore, the unrecorded interest of the earlier "third person" is not cut off by a creditor's recording of a judgment before the other "third person's" earlier document is recorded. Nevertheless, that is the holding of the earlier convoluted case law upon which we must base our current interpretation of the 1993 statute, as amended.

A deed or mortgage is immediately valid and binding between the parties to the instrument (e.g., the "Party of the First Part, and Party of the Second Part"), upon execution and delivery, even without recordation. However, a general money judgment does not create or grant an interest in land either in the debtor or in the creditor, even if they are each aware of the existence and terms of the money judgment. Likewise, "third persons," who would include prospective buyers or mortgagees, are not bound by, or subject to, the terms of the money judgment, even if they have actual knowledge of an unrecorded judgment before such prospective grantees acquire a competing interest.

The interest in real property created by a money judgment comes into existence (i.e., attaches) when it is filed in the Court Clerk's office. A Judgment Lien is not a voluntary interest granted by the debtor, but is a statutorily created interest impressed upon the debtor's real property, if and when the statutory requirements are met.¹³ A Judgment Lien's creation occurs only at the exact instant the recording requirements of 12 O.S. § 706 are met. There is not a period of time between the moment the Judgment Lien comes into existence (i.e., "attachment") and the moment that

constructive notice of the Judgment Lien occurs (i.e., "perfection").

If Oklahoma is truly a race-notice jurisdiction, and if the 1993 amendment of 16 § 15 truly confers on Judgment Lien Creditors the Recording Act benefits, as suggested by *Bumstead's* holding, then a Judgment Lien will be senior to an earlier unrecorded instrument, assuming the Judgment Lien Creditor had no actual knowledge of the outstanding interest before the money judgment was recorded under 12 O.S. § 706.

Conclusion

If *Bumstead's* holding is correct in its application of the 1993 amendment to 16 O.S. § 15, then an attorney will have to advise her client (1) the client needs to file her deed or mortgage as soon as the instrument is received to avoid her existing, but unrecorded, interest becoming junior to a later recorded money judgment's lien, and (2), if she holds a Judgment Lien, then she can now rely on the status of the public land records to determine what real property of the debtor can be sold at an execution sale with safety, free from any earlier unrecorded "third party" claims.

ENDNOTES

1. "The Unrecorded Mortgage Vis-a-vis A Judgment Lien, Or The Rights of A Trustee in Bankruptcy," 47 O.B.J. 121 (Fall 1976), Charles C. Green.

25 O.S. §§ 11, 12 and 13 provide as follows:

25 § 11:

Section 11. Actual notice

Actual notice consists in express information of a fact.

25 § 12:

Section 12. Constructive notice

Constructive notice is notice imputed by the law to a person not having actual notice.

25 § 13:

Section 13. Circumstances putting one on inquiry deemed constructive notice.

Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.

2. The phrase "First Person" herein refers to a person who acquires an interest in real property (e.g., a grantee or creditor in a deed or mortgage or judgment lien) before another person ("Second Person") acquires an interest in the same real property

3. 16 O.S. 1991 § 15: Necessity of acknowledgment and recording.

Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease or other instrument relating to real estate other than a lease for a period not exceeding one (1) year and accom-

panied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided. [emphasis added]

16 O.S. 1991 § 16: Instruments filed for record as constructive notice.

Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgages, encumbrances or creditors. [emphasis added]

Lunn v. Kellison, 66 Okl. 168, 153 P. 1136, syllabus (1917):

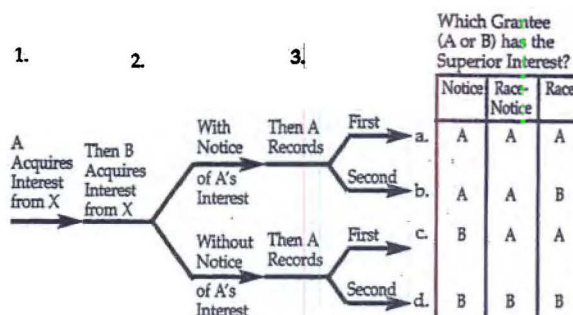
Held, that said judgment lien attached only to the actual interest of the judgment debtor in said lots, and that, though he appeared to have an interest in the lots sold, he had none in fact, and no lien attached to the lots so d. Held, further, that in a judgment lien the plaintiff therein is not a "third person," within the meaning of section 1195, Comp. Laws 1909 (section 1154, Rev. Laws 1910) [now 16 O.S. 1991 § 15].

4. "Race, Race-Notice and Notice Status: The American Recording System," 3 *Prob. & Prop.* 27 (May/June 1989), Ray Sweat: "The vast majority of the States use a hybrid Race-Notice Act."

5. Race-Notice Diagram

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RACE-NOTICE RECORDING ANALYSIS



6. See Endnotes 4 & 5.

7. See Endnote 3; 16 O.S. § 16 creates "constructive" notice whereby the recording of an instrument is deemed to give notice to "subsequent purchasers" even in the absence of actual notice. This fact situation - involving a "subsequent purchaser" - is not the difficult fact pattern! The twists and turns in the analysis of the parties' rights arise when a Second Person acquires an interest without either actual or constructive knowledge that an earlier First Person has already acquired an interest in the same property. Who should win in a dispute between these two apparently innocent purchasers? In a Notice jurisdiction, the Second Person wins because the First Person failed to protect herself by promptly filing her instrument. In a Race jurisdiction, whoever between these two parties wins the race to the courthouse has the senior interest. In a Race-Notice jurisdiction - which is the category where most authors think Oklahoma's statutes belong - the Second Person wins if she records first, but the Second Person does not win if the First Person records first. If the First Person records first, the Second Person loses because the Second Person does not get the use and benefit of the recording acts, if she fails to record first - and we then fall back on the principle of "first in time, first in right."

8. *Straub v. Swaim*, 296 P.2d 147 (Okl. 1956), at 148:

Plaintiff and defendant claim under a common grantor, John E. Swaim. John E. Swaim was the owner of the property here involved under a certificate of purchase issued by the Commissioners of the Land Office of the State of Oklahoma. In September, 1927, plaintiff bought the property in question from John E. Swaim by paying \$2,100 and agreeing to assume the balance due on the property to the

Commissioners of the Land Office, and immediately went into possession thereof. On November 12, 1927, John E. Swaim executed an assignment of his certificate of purchase to plaintiff. On the same day, John E. Swaim also executed the mineral deed to defendant. The assignment of certificate of purchase to plaintiff was filed in the office of the Commissioners of the Land Office on December 20, 1927, and a new certificate of purchase was then issued to plaintiff and recorded on December 29, 1927, in the office of the county clerk. Plaintiff thereafter paid out the balance due on the certificate of purchase and on November 27, 1928, was issued a patent by the Commissioners of the Land Office, which was recorded on December 7, 1928. The mineral deed to defendant was recorded on November 19, 1927.

and at 148-149:

16 O.S. § 1951 Sec. 16 provides:

Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds of record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrances or creditors.

It will be noticed that the effect of such statute is to make the recording of an instrument constructive notice only from the time of such recording and only as to subsequent purchasers, mortgagees, etc. Since the undisputed evidence in the case at the bar is that Plaintiff purchased the property and paid the consideration therefor in September, 1927, and took possession of the property immediately and thereafter received an assignment of certificate of purchase executed and delivered on November 12, 1927, it is difficult to see wherein the recording of defendant's mineral deed on November 19, 1927, could have any effect on plaintiff's rights or constitute notice to plaintiff of such deed. Plaintiff, having already bought and paid for the property, taken possession thereof and received a properly executed conveyance thereof at the time of the recording of defendant's mineral deed was not a subsequent purchaser and such recording therefore afforded no notice to him or did not keep him from being an innocent purchaser for value.

Unless the *Straub* case really turns on the existence of inquiry/constructive notice given to the Second Person by the First Person taking possession of the real property (while holding an unrecorded deed) before the second Person acquired her mineral deed, it suggests Oklahoma's statutory recording system is not a Race, Notice or Race-Notice system, but is some unknown type of system. In order to make sense of *Straub*, you must assume (1) the possession by the First Person acted as inquiry/constructive notice to the Second Person, before the Second Person acquired her interest in the property and (2) that Oklahoma is a Race-Notice jurisdiction.

See Endnote 1.

12 O.S. § 1993 Supp. 706.A. provides:

This section applies to all judgments of courts of record of this state; and judgments of courts of record of the United States not subject to the registration procedures of the Uniform Federal Lien Registration Act, Section 340i *et seq.* of Title 68 of the Oklahoma Statutes, which award the payment of money, regardless of whether such judgments also include other orders or relief.

A. Creation of Lien. A judgment to which this section applies shall be a lien on the real estate of the judgment debtor within a county only from and after a Statement of Judgment made by the judgment creditor or his attorney, substantially in the form prescribed by the Administrative Director of the Courts, has been filed in the office of the county clerk in that county.

1. Presentation of such Statement of Judgment and tender of the filing fee, shall, upon acceptance by the county clerk, constitute filing under this section.

2. A lien created pursuant to this section shall only affect the real estate of judgment debtors whose names appear in the Statement of Judgment.

9. See Endnote 3.

10. In the absence of a Recording Act, the common law follows the basic "First in Time, First in Right" principle, so that: as between two competing legal claims (e.g., two deeds), or as between two competing equitable claims (e.g., two contracts to sell), the earlier granted interest would win; a prior legal claim (e.g., a deed) would prevail over a later equitable interest (e.g., a contract to sell); and, unexpectedly, a prior equitable claim (e.g., a contract to sell) would lose to a later legal claim (e.g., a deed).

SAMPLE RECORDING ACTS:

Notice Act:

Arizona's statute provides (in part): "No instrument affecting real property is valid against subsequent purchasers for valuable consideration without notice unless recorded as provided by law***."

Race-Notice Act:

California's statute provides (in part): Every conveyance of real property *** is void as against any subsequent purchaser or mortgagee of the same property *** in good faith and for a valuable consideration, whose conveyance is first duly recorded ***"

Race Act:

Maryland's statute provides: "No deed of real property shall be valid for the purpose of passing title unless acknowledged and recorded as herein directed."

In spite of a general consensus that Oklahoma's Record Act is a "Race-Notice" version, it might be argued that Oklahoma's 16 O.S. 1991 § 15 language most closely matches the "Race Act" from Maryland.

11. See Endnote 8.

12. *Bumstead et al. v. Bumstead*, 67 OBJ 1889 (Okla. Div. 4: May 28, 1956).

The weight of Court of Civil Appeals Opinions is governed by the following statutes and rules:

"No opinion of the Court of Appeals shall be binding or cited as precedent unless it shall have been approved by the majority of the Justices of the Supreme Court for publication in the official reporter....Opinions of the Court of Appeals which apply settled precedent and do not settle new questions of law shall not be released for publication in the official reporter. The Supreme Court shall direct which opinion or decision, if any, of the Court of Appeals shall be published in the unofficial reporter." 20 O.S. § 30.5

"Opinions of the Court of Appeals which resolve novel or unusual issues may be designated for publication, at the time the opinion is adopted, by affirmative vote of at least two members of the division responsible for the opinion. Such opinions shall remain unpublished until after mandate issues, after which time they may be published in the unofficial reporter (Oklahoma Bar Journal) and official reporter (Pacific 2nd). Such opinions shall bear the notation 'Released for publication by order of the Court of Appeals' and shall be considered to have persuasive effect...." Rule 1.200 (C) (B) of Appellate Procedure in Civil Cases.

13. Judgment lien, being creation of statute [*i.e.*, 12 O.S. § 706], depends on compliance therewith. *In re Staples*, D.C., 1 F.Supp. 620 (1932).