

William & Mary Law Review

Volume 21 (1979-1980)
Issue 3 Combined Issues 3 & 4

Article 9

April 1980

Judgment Liens and Priorities in Virginia

Christopher R. Mellott

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Law Commons](#)

Repository Citation

Christopher R. Mellott, *Judgment Liens and Priorities in Virginia*, 21 Wm. & Mary L. Rev. 919 (1980), <https://scholarship.law.wm.edu/wmlr/vol21/iss3/9>

Copyright c 1980 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

JUDGMENT LIENS AND PRIORITIES IN VIRGINIA

The creditor who decides to prosecute a money claim has an array of remedies available to him to compel its payment. As this Note and others in the Symposium illustrate, the postjudgment collection remedies are rooted in Virginia's colonial period and have remained largely intact to the present day. In order for the creditor to select intelligently among the available choices, he first must develop an understanding of them. In Virginia, a judgment may be enforced against the debtor's personalty by a writ of *fiel facias*¹ or by a writ of garnishment.² The judgment itself, however, creates a lien only on the debtor's interest in real estate.³ This Note will focus on the judgment lien in Virginia, particularly the priority of the lien in relation to other judgment lienors, purchasers from the debtor, and creditors or third parties with an interest in the realty subject to the lien. Federal tax liens and bankruptcy provisions also will be discussed insofar as they affect the ability of the creditor to enforce the judgment lien.

The lien created by a judgment is one of the highest forms of security because it gives an otherwise unsecured creditor the right to force the sale of the debtor's interest in realty through a creditor's bill in equity.⁴ The judgment lien does not give rise to a proprietary right in the debtor's land;⁵ rather, the creditor obtains only the right to levy on any of the lands to the exclusion of interests arising after the judgment.⁶ The lien does not attach to a par-

1. VA. CODE § 8.01-474 (Repl. Vol. 1977). See Note, *Enforcing Money Judgments Against Personal Property in Virginia*, *supra* this issue.

2. VA. CODE §§ 8.01-511 to 525.

3. *Id.* § 8.01-458. See notes 47-71 *infra* & accompanying text. For a discussion of the common law and the early colonial history of judgment creditors' collection procedures and the development of the judgment lien, see Riesenfeld, *Enforcement of Money Judgments in Early American History*, 71 MICH. L. REV. 691 (1975), and Riesenfeld, *Collection of Money Judgments in American Law - A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155 (1957).

4. See *Hansucker v. Walker*, 76 Va. 753, 755-56 (1882); VA. CODE § 8.01-462 (Repl. Vol. 1977). The procedural aspects of enforcing a judgment lien through a creditor's bill in equity is discussed in E. MEADE, LILE'S EQUITY PLEADING AND PRACTICE (3d ed. 1952).

5. *Jones v. Hall*, 177 Va. 658, 664, 15 S.E.2d 108, 110 (1941).

6. *Id.* In *Jones*, the Virginia Supreme Court quoted extensively from Justice Story's opin-

ticular piece of property but operates as a general lien on all the debtor's realty. Enforcing the lien through a creditor's bill, however, is both costly and time consuming; consequently, in most cases the creditor will find it impractical. The lien's real value may lie in its utility as a means to encourage a reluctant but solvent debtor who is unwilling to risk losing his real estate or as a security device to preserve the creditor's claim until some future time when the debtor is able to satisfy the judgment out of other assets.

PERFECTION OF THE JUDGMENT LIEN AND THE DOCKETING PROCESS

In Virginia, the judgment must be docketed in the clerk's office of the county or city in which the debtor's real estate is situated in order to constitute a lien on that real estate.⁷ Virginia no longer

ion in *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386, 443 (1828):

"[The judgment lien] only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor, for this purpose, relates back to the time of his judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land. His title to it is not divested or transferred by the judgment, to the judgment-creditor. In short, a judgment-creditor has no *jus in re*, but a mere power to make its general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale, into the hands of the vendor or vendee, or to claim the purchase-money in the hands of the latter."

177 Va. at 664, 15 S.E.2d at 110. See 2 A. FREEMAN, LAW OF JUDGMENTS § 915 (5th ed. 1925).

7. VA. CODE § 8.01-458 (Repl. Vol. 1977). Section 8.01-458, formerly §§ 8-390 and 8-386, was changed substantially in 1960. 1960 Va. Acts ch. 466. Before the 1960 amendment, § 8-386 provided that a judgment rendered in Virginia, other than by confession in vacation, was a lien on all the Virginia real estate that the debtor possessed or was entitled to at the time the judgment was rendered or that he later acquired. If the case could have been heard on the first day of the term, the rendition date of the judgment related back to the first day of the term. Under the former law, the lien of a confessed judgment ran from the time of the day the confession was made. *Id.* §§ 8-355, -358, -386 (1950) (repealed 1977); see *American Bank & Trust Co. v. National Bank*, 170 Va. 169, 176, 196 S.E. 693, 696 (1938); *Hockman v. Hockman*, 93 Va. 455, 459, 25 S.E. 534, 535 (1896).

The primary change made in 1960 was that a judgment lien would commence only when recorded in the clerk's office in the city or county where the land was located. The relation back doctrine no longer applied, and the date the judgment was rendered had no effect on either commencement of the lien or the priority of judgment liens. Section 8-390, however, still required docketing to create a valid judgment lien only as against a purchaser for value without notice. A strange notice procedure resulted, requiring recordation and docketing of a judgment to create a lien against a purchaser for value without notice but requiring only

follows the relation-back doctrine, which states that a lien created by a docketed judgment relates back to the first day of the court term at which the judgment was rendered.⁸ Virginia law provides that a judgment lien is effective from the date of the original docketing.⁹ The docketing requirement notifies potential purchasers and lenders of a judgment lien on the debtor's land in that particular county or city without requiring them to check every clerk's office in the state. The docketing of a judgment to create a lien is a privilege of the creditor, not a duty; failure to docket will deny a creditor the benefit of the lien if the real estate is transferred or subsequent liens are established.¹⁰

Because the purpose of docketing is to provide notice to other interested parties, a judgment is not properly docketed¹¹ unless it is indexed.¹² The index must show the names of all parties to the suit; a judgment is not docketed as to a defendant in whose name it is not indexed.¹³ In determining whether the name docketed and

recordation to commence the lien as against all others. See Wiltshire, *The New Judgment Lien on Lands*, 1 U. RICH. L. REV. 313, 315 (1962). Present § 8.01-458 resolves this conflict by requiring docketing to commence the lien as against all the world. 1964 Va. Acts ch. 309.

The 1960 amendment also narrowed the scope of a judgment lien from a lien on all the debtor's Virginia realty to a lien on the debtor's lands in the county or city where the judgment is docketed. Section 8-386, now 8.01-431, also provided for commencement of the lien of a judgment by confession from the time the judgment was docketed in the clerk's office in the county or city where the defendant's land was situated. Judgments by confession in vacation that did not give rise to a lien until 1960 and only then from the date of confession now are subject to the same provisions regarding commencement of the lien as other judgments. VA. CODE § 8.01-445 (Repl. Vol. 1977).

8. See M. BURKS, COMMON LAW AND STATUTORY PLEADING AND PRACTICE § 342 (4th ed. 1952) (discussing Virginia's departure from the relation back doctrine and return to it before the most recent abandonment in VA. CODE § 8.01-458 (Repl. Vol. 1977)).

9. VA. CODE § 8.01-458 (Repl. Vol. 1977); see note 7 *supra*.

10. See text accompanying notes 107-10 *infra*.

11. The mechanics for docketing a judgment are covered by Virginia Code §§ 8.01-446 to 8.01-454. Sections 8.01-446 and 8.01-447 provide for entry of any Virginia or federal court judgment in special "judgment docket" books. Section 8.01-449 prescribes the content of the judgment docket book. VA. CODE §§ 8.01-446 to 454 (Repl. Vol. 1977).

12. *Id.* § 8.01-450. In *Fulkerson v. Taylor*, 100 Va. 426, 436, 41 S.E. 863, 867 (1902), the court stated that allegations of proper docketing in a bill to enforce a judgment are sufficient allegations of the judgment's indexing and that no proof of indexing is necessary if that fact is not put in issue. The court held that production of an abstract of the judgment that does not certify docketing and indexing is insufficient.

13. VA. CODE § 8.01-450 (Repl. Vol. 1977). See *Richardson v. Gardner*, 128 Va. 676, 686, 105 S.E. 225, 228 (1920); *Fulkerson's Adm'x v. Taylor*, 102 Va. 314, 317, 46 S.E. 309, 309 (1904); *Bankers Loan & Inv. Co. v. Blair*, 99 Va. 606, 611, 39 S.E. 231, 233 (1901).

indexed gives sufficient notice despite errors or omissions, the courts consider whether a third person exercising ordinary care and prudence would discover the existence and character of the judgment.¹⁴ For example, in docketing a judgment against a married woman, the omission of her maiden name is fatal to notice of the judgment.¹⁵ Assignments of a judgment also are entered on the docket book. Assigned judgments are enforced in the same manner as other judgments, except that they are enforced in the name of the assignees as plaintiff.¹⁶

TYPES OF JUDGMENTS CAPABLE OF CREATING LIENS

Money Judgments and Decrees

Virginia statutory law provides that properly docketed money judgments rendered in the Commonwealth by any state or federal court or by confession¹⁷ are liens on the debtor's real property¹⁸ Final awards and determinations by the court of law or equity¹⁹ directing the payment of money are included in the term "money judgments." Recognizances and bonds having the force of judgments also are included in the term "judgment" for the purpose of creating a lien.²⁰

Judgments against fictitious persons or corporations are not liens upon the property of the true owner. *Leckie v. Seal*, 161 Va. 215, 226, 170 S.E. 844, 848 (1933).

14. See *Fulkerson's Adm'x v. Taylor*, 102 Va. 314, 317, 46 S.E. 309, 309 (1904). In *Fulkerson*, the court held that use of the word "same" in the index beneath the debtor's name with reference to the page on which the judgment is recorded is sufficient. *Id.* at 316, 46 S.E. at 309.

15. *Bankers Loan & Inv. Co. v. Blair*, 99 Va. 606, 611, 39 S.E. 231, 233 (1901). A judgment should be docketed in all the names a defendant is known to use. If the judgment debtor changes his or her name by marriage, court order, or voluntary assumption of a new name, the clerk of the circuit court where the judgment was obtained must docket and index the judgment in the new name upon receipt of an affidavit stating the change in name. VA. CODE § 8.01-451 (Repl. Vol. 1977).

16. VA. CODE § 8.01-452 (Repl. Vol. 1977).

17. In any suit, a defendant may confess a judgment for an amount plus interest that the creditor is willing to accept. *Id.* § 8.01-431.

18. *Id.* § 8.01-458.

19. A decree in equity requiring the payment of money has the effect of a money judgment and the person entitled to benefit from the decree is a judgment creditor. *Id.* §§ 8.01-426 to 427. Originally, no decree of an equity court was a lien on the defendant's lands, nor could it be made so by issuing a writ of *elegit* because no execution could issue on a decree in equity. See *Hook v. Ross*, 11 Va. (1 Hen. & M.) 310 (1807).

20. VA. CODE § 8.01-465 (Repl. Vol. 1977).

In alimony and child support situations, a docketed support decree gives rise to a lien on the debtor's realty, even as to future installments,²¹ under the general judgment lien statute.²² The court also has power to charge specific realty with a lien.²³

A judgment rendered against the personal representative of a deceased debtor does not create a lien on the decedent's estate because a lien can be created only in debtor's lifetime.²⁴ If the judgment is against a defendant in his name and not in his official title as executor, administrator, personal representative, or trustee, it is a personal judgment binding the real estate of the defendant, not that of the estate.²⁵

A judgment that is void for lack of service of process²⁶ or insufficient service creates no lien and may be attacked in a collateral proceeding.²⁷ A docketed judgment that is not void but voidable, however, gives rise to a lien until the judgment is reversed.²⁸ If the

21. *Morris v. Henry*, 193 Va. 631, 70 S.E.2d 417 (1952). In many states, there is no lien for future installments. *See, e.g., Slack v. Mullenix*, 245 Iowa 956, 66 N.W.2d 99 (1954); *Brieger v. Brieger*, 197 Kan. 756, 421 P.2d 1 (1966); *Boyle v. Baggs*, 10 Utah 2d 203, 350 P.2d 622 (1966). *See generally* Annot., 59 A.L.R.2d 656 (1956).

22. VA. CODE § 8.01-458 (Repl. Vol. 1977). *Cf. Durett v. Durett*, 204 Va. 59, 63, 129 S.E.2d 50, 53 (1963) (contract in lieu of alimony approved by court does not create lien on debtor's realty).

23. VA. CODE § 8.01-460 (Cum. Supp. 1979). *See Wilson v. Wilson*, 195 Va. 1060, 1067, 81 S.E.2d 605, 613 (1954). In *Cannavos v. Cannavos*, 205 Va. 744, 748, 139 S.E.2d 825, 828 (1966), the court held that the chancellor has discretion to provide that the order for support payments should not be a lien on the obligor's real estate.

24. A judgment recovered by a creditor against the administrator of an estate evidences a debt in an equity proceeding against the heirs and devisees. *See Kidwell v. Henderson*, 150 Va. 829, 838, 143 S.E. 336, 340 (1928). *But see Lee v. Swepson*, 76 Va. 173, 176-79 (1882) (conditional decree directing executor to pay debts of estate constitutes lien on real estate of executor).

If the defendant dies after service of process but before judgment is rendered, the judgment is voidable. *See Alvis v. Saunders*, 113 Va. 208, 211, 74 S.E. 153, 154 (1912); *Robinnett's Adm'r v. Mitchell*, 101 Va. 762, 765, 45 S.E. 287, 287 (1903). *See also* note 28 *infra* & accompanying text.

25. *See Fulkerson v. Taylor*, 100 Va. 426, 434, 41 S.E. 863, 866 (1902); *Lincoln's Adm'r v. Stern*, 64 Va. (23 Gratt.) 816, 822 (1873).

26. *See American Ry. Express v. F.S. Royster Guano Co.*, 141 Va. 602, 608, 126 S.E. 678, 680 (1925), *aff'd*, 273 U.S. 274 (1927); *Staunton Perpetual Bldg. & Loan Co. v. Haden*, 92 Va. 201, 204, 23 S.E. 285, 286 (1895).

27. *See Pennoyer v. Neff*, 95 U.S. 714 (1877); *Harris v. Deal*, 189 Va. 675, 687, 54 S.E.2d 161, 166 (1949) (no rights obtained from void judgment); *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176, 178 (1887).

28. *See Fulkerson's Adm'r v. Taylor*, 102 Va. 314, 318, 46 S.E. 309, 310 (1904) (discussing

voidable judgment is being enforced by a bill in chancery, then the debtor cannot assail its validity because this attack would be collateral.²⁹ An independent proceeding is necessary to attack the judgment and dissolve the lien.

Under a properly docketed money judgment or decree in its favor,³⁰ the Commonwealth becomes a judgment lienor.³¹ The Virginia Code provides for a special sale of the debtor's real property under a writ of *fiery facias*³² when the Commonwealth is the judgment creditor.³³ Unlike the normal foreclosure sale, the writ must be enforced against the debtor's personalty before his real estate can be sold.³⁴

Criminal fines and other monetary penalties³⁵ payable to the Commonwealth give rise to a judgment lien on the real property of the criminal defendant when properly docketed. Section 19.2-340 of the Virginia Code provides: "Fines imposed and costs taxed in a criminal prosecution for committing an offense against the State shall constitute a judgment in favor of the Commonwealth, and, if not paid at the time they were imposed, execution may issue thereon in the same manner as upon any other monetary judgment."³⁶

Judgments of State, Foreign and Federal Courts

In Virginia, the clerk of court automatically docketes judgments rendered in circuit courts.³⁷ The judgments of the general district

a voidable execution).

29. *Id.*

30. The Attorney General of Virginia and other attorneys representing the Commonwealth are required to docket all judgments recovered in favor of the state in any city or county where the debtor owns real property in order to create lien. VA. CODE § 8.01-448 (Repl. Vol. 1977).

31. *Id.* § 8.01-458. Before creation of the statutory judgment lien in 1849, judgments in favor of the state were liens on the debtor's realty. See *Leake v. Ferguson*, 43 Va. (2 Gratt.) 420, 428 (1846); *Nimmo's Ex'r v. Commonwealth*, 14 Va. (4 Hen. & M.) 57 (1809).

32. This writ normally applies only to personalty. See note 1 *supra*.

33. VA. CODE § 8.01-201 (Repl. Vol. 1977). This special procedure is dealt with in *id.* §§ 8.01-196 to 216.

34. *Id.* § 8.01-203.

35. *Id.* § 19.2-341 (Repl. Vol. 1975).

36. *Id.* § 19.2-340.

37. *Id.* § 8.01-446 (Repl. Vol. 1977). Nevertheless, the creditor should verify that his judgment has been docketed.

courts, however, are docketed on the request of an interested party if he presents an authenticated abstract of the judgment or the district court judge properly files his book or certifies an abstract.³⁸ To create a judgment lien on real estate located within the state but outside the jurisdiction of the rendering court, the creditor must deliver an authenticated abstract of the judgment to the clerk of the circuit in the city or county where the land is situated; the clerk then will docket and index the judgment as he would a judgment rendered by that court.³⁹

Judgments and decrees of federal courts sitting in Virginia become liens on the debtor's realty in the same manner as a state court judgment;⁴⁰ they become liens on real property when docketed and indexed in the clerk's office where the property is located. To create a lien based on a foreign federal court judgment, the judgment first must be registered in a federal district court in Virginia.⁴¹ The United States Code provides that any final federal court judgment may be registered in any other federal district court by filing with it a certified copy of the judgment.⁴² Once registered, the judgment has the effect of a judgment of the district court where registered and may be enforced as such.⁴³ Accordingly, a foreign federal court judgment properly registered creates a lien on realty located in Virginia when it has been docketed in the manner prescribed for in-state federal judgments.

Because judgments of other states and foreign countries are without effect outside the territorial limits of the rendering jurisdiction, they cannot be docketed to create a lien on Virginia realty.⁴⁴ To acquire a judgment lien in Virginia based upon the judg-

38. *Id.* The clerks of the circuit courts are required to docket any judgment rendered by any court of the Commonwealth.

39. *Id.*

40. 28 U.S.C. § 1962 (1970).

41. *Id.*, VA. CODE §§ 8.01-447, -448 (Repl. Vol. 1977). See Note, *Judgments - State Statutes Prescribing Formalities of Recording Federal Judgments before They Become Liens*, 15 VA. L. REV. 86 (1928).

42. 28 U.S.C. § 1963 (1970).

43. *Id.*

44. *Aetna Cas. & Sur. Co. v. Whaley*, 173 Va. 11, 15, 3 S.E.2d 395, 396 (1939). See U.S. CONST. art. IV, § 1. The full faith and credit doctrine permits a creditor to enforce a state's valid in personam judgment in any other state. Virginia, however, like most states, requires a Virginia action on the foreign judgment to create a domestic judgment before state creditors' remedies can be used.

ment of another state or country, the plaintiff must obtain a domestic judgment by bringing an action at law on the foreign judgment. If, however, such an action on the judgment would be barred by the law of the rendering jurisdiction, Virginia courts will not entertain the action.⁴⁵ Furthermore, no action may be brought on a foreign judgment "rendered more than ten years before the commencement of the action."⁴⁶

THE NATURE OF THE JUDGMENT LIEN

Types of Interest in Real Property to which Judgment Lien Attaches

The judgment lien does not apply to specific property but to all the debtor's realty in the city or county where the judgment is docketed;⁴⁷ only upon foreclosure does the judgment lien operate against specific land. The lien attaches to the land itself and to most of the debtor's alienable interests therein, including equitable interests, unrecorded interests, and interests acquired after the judgment.⁴⁸ Interests that the record of title indicates the debtor held either before or after docketing are subject to the lien, unless the record also shows a prior transfer.⁴⁹ A docketed judgment also imposes a lien upon real estate that the debtor conveyed in fraud of the judgment creditor after the debt was incurred but before the judgment lien arose.⁵⁰

45. VA. CODE § 8.01-252 (Repl. Vol. 1977).

46. *Id.*

47. *Id.* § 8.01-458.

48. Certain types of property are exempt from creditors' claims. For example, any type of growing crop not severed from the land is exempt. *Id.* § 8.01-489. Properties qualifying for "homestead" or other exemptions are listed in *id.* §§ 34-1 to 34-28 (Repl. Vol. 1976). The homestead exemption of \$5,000 may be claimed by filing a homestead deed any time before attempted sale of that property. *Id.* § 34-4 (Cum. Supp. 1979), §§ 34-6, -17 (Repl. Vol. 1976). Also of significance to the judgment creditor is § 34-18, which provides that rents and profits from exempt property are also exempt. See Note, *The Failure of the Virginia Exemption Plan*, *supra* this issue.

49. VA. CODE § 8.01-458 (Repl. Vol. 1977). In order for a judgment creditor to subject real estate, or some interest therein, to a judgment lien, the debtor must have present or former title to the specific land or interest. *Miller v. Kemp*, 157 Va. 178, 190, 160 S.E. 203, 206 (1931).

For a discussion of the effect of the debtor's transfer of land on the judgment lien, see notes 111-28 *infra* & accompanying text.

50. See *Matney v. Combs*, 171 Va. 244, 250, 198 S.E. 469, 472 (1938); *Tucker v. Foster*,

A judgment creditor can obtain no greater right to the debtor's real estate than that possessed by the debtor when the judgment was docketed or thereafter.⁵¹ The right to foreclose is limited to the debtor's interest in the real estate and is subject to every liability and equity under which the debtor held the interest.⁵² If the beneficial or legal title of the judgment debtor appears on the record, then the judgment lien against the debtor is superior to the equities of third persons.⁵³ Conversely, if the judgment debtor holds equitable title not appearing on the record, then the judgment creditor's lien is subject to superior equities.⁵⁴ Furthermore, mere equitable title held in trust by the judgment debtor for others is not a property interest that can be subjected to a judgment lien.⁵⁵ The lien likewise does not reach a debtor's security interest in real property, such as a mortgage, deed of trust, or mechanic's lien.⁵⁶

When the judgment lien is created it attaches to the land of the debtor and to any improvements.⁵⁷ For example, if the debtor owns a piece of undeveloped real estate when the judgment is docketed and later builds a house on the property, then the lien attaches to both the dwelling and the lot. Similarly, if land subject to a judgment lien is sold later to a purchaser for value who makes improvements, then the lien also will attach to the improvements;

154 Va. 182, 192, 152 S.E. 376, 379 (1930). In *Tucker*, however, the court recognized that a judgment lien on fraudulently conveyed land is subject to the superior equities of a bona fide purchaser for value. 154 Va. at 193, 152 S.E. at 379.

51. See *Miller v. Kemp*, 157 Va. 178, 193, 160 S.E. 203, 207 (1931) (quoting *Floyd v. Harding*, 69 Va. (28 Gratt.) 401, 407 (1877)); *Savings & Loan Corp. v. Bear*, 155 Va. 312, 331, 154 S.E. 587, 594 (1930); *Powell v. Bell's Adm'r*, 81 Va. 222, 233 (1885).

52. See *Miller v. Kemp*, 157 Va. at 193, 160 S.E. at 207 (quoting *Floyd v. Harding*, 69 Va. (28 Gratt.) 401, 407 (1877)); *Savings & Loan Corp. v. Bear*, 155 Va. at 331, 154 S.E. at 594.

53. *Miller v. Kemp*, 157 Va. at 203-04, 160 S.E. at 211.

54. *Id.*

55. *Straley v. Esser*, 117 Va. 135, 145, 83 S.E. 1075, 1078 (1915) (debtor with legal title has no beneficial interest in the land that could be subject to a judgment lien when the purchase price was paid by another); *Coldiron v. Asheville Shoe Co.*, 93 Va. 364, 372, 25 S.E. 238, 241 (1896).

56. *Augusta Nat'l Bank v. Beard's Ex'r*, 100 Va. 687, 694, 42 S.E. 694, 696 (1902).

57. See *Nixdorf v. Blount*, 111 Va. 127, 128, 68 S.E. 258, 259 (1910); *Flanary v. Kane*, 102 Va. 547, 560, 46 S.E. 312, 316 (1904). Virginia Code § 8.01-166, dealing with improvements, has no application to a judgment creditor seeking to enforce his lien upon improved lands. *Flanary v. Kane*, 102 Va. at 558, 46 S.E. at 315 (referring to predecessor sections to § 8.01-166).

in such circumstances the docketing that created the lien constitutes notice to the purchaser.⁵⁸ Severable items such as timber and crops are considered part of the land and are subject to a judgment lien as long as they remain attached to the land.⁵⁹ If they are severed, then the judgment creditor cannot sue the debtor for waste; his remedy is a suit to enforce the judgment before severance or a writ of execution on the severed articles.⁶⁰ Timber and crops are forms of rents and profits derived from land; thus other forms of rents and profits arguably also would not be subject to the lien although the land itself would be.⁶¹

Because Virginia law recognizes the common law forms of concurrent ownership of property,⁶² the judgment creditor faces a number of obstacles when he seeks to enforce his lien against a debtor who owns his property jointly with others. Of course, if the judgment is against the cotenants jointly, then he may enforce the lien against the property regardless of the form of coownership.

The general rule is that a judgment lien based on a judgment rendered against an individual debtor attaches to the jointly held property.⁶³ Whether the lien can be enforced against the property, however, depends on the form of cotenancy. If the property is held as tenants by the entirety it cannot be severed by the individual act of either spouse.⁶⁴ This effectively immunizes entirety property from the claims of creditors of the individual spouses.⁶⁵ On the

58. *Nixdorf v. Blount*, 111 Va. at 129, 68 S.E. at 259 (1910); see *Flanary v. Kane*, 102 Va. at 560, 46 S.E. at 317.

59. See *Jones v. Hall*, 177 Va. 658, 665, 15 S.E.2d 108, 111 (1941) (quoting 2 A. FREEMAN, *supra* note 6, § 940).

60. *Id.* (quoting *Lee v. Keech*, 151 Md. 34, 133 A. 835 (1926)).

61. *Id.* (quoting 2 A. FREEMAN, *supra* note 6, § 940).

62. Virginia recognizes four forms of concurrent ownership in real property: tenancy in common, joint tenancy, tenancy by the entirety, and tenancy in coparcenary. The particular attributes of each form are discussed in 2 AMERICAN LAW OF PROPERTY (Casner ed. 1952) and R. MINOR, THE LAW OF REAL PROPERTY (2d ed. 1928). Virginia has abolished by statute tenancies by the entirety and joint tenancies except when the instrument creating the cotenancy expressly provides otherwise. VA. CODE §§ 55-20, 21 (Repl. Vol. 1974).

63. See, e.g., *Zeigler v. Bonnell*, 52 Cal. App. 2d 217, 126 P.2d 118 (1942); *People's Trust & Sav. Bank v. Haas*, 328 Ill. 468, 160 N.E. 85 (1927); *Eder v. Rothamel*, 202 Md. 189, 95 A.2d 860 (1953). See generally Annot., 111 A.L.R. 171 (1937).

64. *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E.2d 599 (1951); *Allen v. Parkey*, 154 Va. 739, 149 S.E. 615 (1929), *aff'd on rehearing*, 154 Va. 749, 154 S.E. 919 (1930). See Murphy, *Cotenancies: A Critique for Creditors*, 48 VA. L. REV. 405 (1962).

65. *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E.2d 599 (1951); *Allen v. Parkey*, 154 Va. 739,

other hand, property held as a joint tenancy or a tenancy in common may be liable for the debts of the individual cotenants. Virginia recognizes that both of these forms of cotenancy are alienable⁶⁶ and that alienability and liability for debts are inseparable.⁶⁷ The Virginia Code expressly provides that a lien creditor may compel partition of joint tenancies and tenancies in common in land to satisfy his lien.⁶⁸

An attribute of both the tenancy by the entirety and the joint tenancy is the right of survivorship. On the death of a cotenant, his interest in the property is extinguished and the surviving cotenants own the whole; the decedent passes nothing to his estate.⁶⁹ Therefore, a lien on property held as tenancy by the entirety or joint tenancy is lost if the debtor predeceases the other cotenants.⁷⁰ Conversely, should the debtor outlive the cotenants and thereby become vested with sole ownership of the property, his creditors may reach the entire estate. Tenancy in common has no right of survivorship feature and creditors of such a tenant can reach his interest even after his death.⁷¹

Statutory Limits on Enforcement of the Judgment Lien

Jurisdiction to enforce judgment lien is in equity by means of the creditor's bill;⁷² venue is in the city or county where the land is

149 S.E. 615 (1929).

66. *Leonard v. Boswell*, 197 Va. 713, 90 S.E.2d 872 (1956) (joint tenancy); *Murphy*, *supra* note 64, at 408.

67. *Mears v. Taylor*, 142 Va. 824, 128 S.E. 264 (1925); *Murphy*, *supra* note 64, at 408.

68. VA. CODE § 8.01-81 (Repl. Vol. 1977).

69. See generally 2 AMERICAN LAW OF PROPERTY, *supra* note 62, §§ 6.1, 6.6; *Murphy*, *supra* note 64, at 408.

70. *Murphy*, *supra* note 64, at 408.

71. In *Johnson's Ex'r v. National Exch. Bank*, 74 Va. (33 Gratt.) 473 (1880), executor of a deceased tenant in common sold the decedent's moiety to the surviving tenant subject to prior liens against the decedent. Judgment creditors of a subsequent purchaser of the moiety from the living tenant brought the enforcement suit. The court held that the surviving tenant purchased decedent's moiety subject to the lien of the executor's decree, but the lien did not reach the entire estate. The judgment creditors prevailed against the executor's decree, however, because they had no notice of it. *Id.* at 487.

72. VA. CODE § 8.01-462 (Repl. Vol. 1977). Virginia's use of the term "creditor's bill" differs from the use of the term in other states where it generally denotes supplementary or interrogatory-type proceedings.

located in whole or in part.⁷³ A judgment creditor need not proceed first against personalty of the debtor by execution; he may resort immediately to the court of equity to enforce his lien against real property.⁷⁴

Before a court in equity will decree a sale of the realty, the Virginia Code requires that the creditor establish that the rents and profits of all real estate subject to the lien will not satisfy the judgment in five years.⁷⁵ If insufficient rents and profits are not alleged or are alleged and denied, then the court must determine with reasonable certainty the five-year value of rents and profits before decreeing a sale.⁷⁶ If the parties do not seek to determine whether the rents and profits for five years are sufficient, they are presumed to have waived inquiry, and the court may decree a sale.⁷⁷ Inadequacy of rents and profits may be shown by the parties' pleadings, admissions, or evidence.⁷⁸ Additionally, the Code maintains the requirement that the amount of the judgment exceed twenty dollars, exclusive of interest and costs, before equity will enforce the

73. *Id.* § 8.01-261(3)(b). If the land overlaps two jurisdictions, the suit may be brought in either. *Id.* See *Clayton v. Hensley*, 73 Va. (32 Gratt.) 65, 71 (1879).

74. See *Moore v. Bruce*, 85 Va. 139, 142, 7 S.E. 195, 197 (1888); *Stovall v. Border Grange Bank*, 78 Va. 188, 191 (1883).

75. VA. CODE § 8.01-462 (Repl. Vol. 1977). This section deals only with jurisdiction of equity suits to enforce judgment liens. *Neff v. Wooding*, 83 Va. 432, 435, 2 S.E. 731, 732 (1887) (suit to enforce vendor's lien). See *Kyger v. Sipe*, 89 Va. 507, 511, 16 S.E. 627, 628 (1892) (suit to enforce deed of trust).

76. See *Neff v. Wooding*, 83 Va. 432, 435, 2 S.E. 731, 732 (1887); *Muse v. Friedenwald*, 77 Va. 57, 60-61 (1883); *Ewart v. Saunders*, 66 Va. (25 Gratt.) 203-207 (1874).

Virginia Code § 8.01-462 provides no procedure for determining the value of rents and profits. The court usually directs a commissioner to ascertain and report the annual rents and profits of the land. In making his decision, the commissioner should consider rental value of all the debtor's realty, including lands located elsewhere in the state. *Cf. Kane v. Mann*, 93 Va. 239, 244, 24 S.E. 938, 939 (1896) (debtor cannot agree with spouse not bound by judgment to have spouse's land included in the five year estimate). If the rents and profits for five years can satisfy the judgment, the rental terms are in the discretion of the court. *Compton v. Fabor*, 73 Va. (32 Gratt.) 121, 123 (1879). One authority interprets "rents and profits" to mean net rents and profits after paying cost of suit, current taxes, and other expenses from renting the property. See *M. Burks*, *supra* note 8, § 356.

77. *Brengle v. Richardson's Adm'r*, 78 Va. 406, 412 (1884); *Ewart v. Saunders*, 66 Va. (25 Gratt.) 203, 208 (1874); *M'Clung v. Beirne*, 37 Va. (10 Leigh) 410, 421 (1839).

78. See *Etter v. Scott*, 90 Va. 762, 766, 19 S.E. 776, 778 (1894) (quoting *Horton v. Bond*, 69 Va. (28 Gratt.) 815, 821 (1877)); *Neff v. Wooding*, 83 Va. 432, 435 (1887); *Horton v. Bond*, 69 Va. (28 Gratt.) 815, 821 (1877).

judgment by sale of the property⁷⁹

Redemption

A number of jurisdictions allow a judgment debtor or other interested party to redeem the debtor's realty within a certain period following a foreclosure sale.⁸⁰ Virginia, however, does not permit redemption.⁸¹ The reason for this policy is unclear. The rule seems harsh given the availability of immediate enforcement of the judgment lien. Without redemption, the debtor has little protection against the sale of his land at a price below its fair value.⁸² The threat of permanent loss of his land, however, may provide the debtor with an incentive to satisfy the judgment.

Duration of the Judgment Lien

Absent extension or revival, a judgment is enforceable only for a twenty-year period from the date it is rendered.⁸³ The continued validity of a judgment lien during this period requires no action by the creditor. If the statute of limitations has run, however, the creditor either must bring his case within certain exceptions, prove

79. VA. CODE § 8.01-463 (Repl. Vol. 1977). To enforce a smaller judgment, the creditor must give thirty days notice to the judgment debtor or his personal representative and to the owner of the real estate on which the judgment is a lien. *Id.* See *Sutherland v. Rasnake*, 169 Va. 257, 263, 192 S.E. 695, 697 (1937) (notice is mandatory).

80. See, e.g., ALASKA STAT. §§ 09.35.210 to .290 (1973); CAL. CIV. PRO. CODE §§ 700a, 702, 703 (West Cum. Supp. 1979), 701, 704-707 (West 1955); COLO. REV. STAT. §§ 38-39-102 (Cum. Supp. 1978), -103 (1973); KY. REV. STAT. ANN. §§ 426.530, 426.540 (Baldwin 1972); MASS. GEN. LAWS ANN. ch. 236, § 33 (West 1959); MINN. STAT. ANN. § 550-25 (West 1947).

81. Other states without a redemption procedure include North Carolina, Maryland, Pennsylvania, New Jersey, Texas, Florida, and Indiana.

82. This loss of protection is mitigated by statutes authorizing or requiring the fixing of minimum sale prices to avoid judicial upset of the sale. See, e.g., IND. CODE ANN. § 34-1-37-1 (Burns 1973); N.C. GEN. STAT. ANN. §§ 1-339.64 to 339.67 (Repl. Vol. 1969) (providing for reauctioning at higher prices). Virginia does not grant by statute such a judicial avoidance power. The court, however, has discretion to confirm a sale or to set aside the sale if the sale price is grossly inadequate. See, e.g., *O.K. Warehouse v. West*, 151 Va. 809, 812, 145 S.E. 253, 254 (1928); *Virginia Fire & Marine Ins. Co. v. Cottrell*, 85 Va. 857, 861, 9 S.E. 132, 133 (1899).

83. VA. CODE § 8.01-251(A) (Repl. Vol. 1977). Section 8.01-251 applies to judgment after June 29, 1948 and to judgments before that date that are not yet barred. *Id.* § 8.01-251(E).

Whether enforcement of a judgment lien is barred by the statute of limitation on the life of the judgment was decided affirmatively in the leading case of *Hutcheson v. Grubbs*, 80 Va. 251, 258 (1885). See *Flanary v. Kane*, 102 Va. 547, 557, 46 S.E. 312, 315 (1904).

that running of the statute was tolled, or seek an extension before he can maintain a creditor's bill.

Despite the running of the twenty-year limitation, a judgment lien is enforceable if the debt is secured by a mortgage, deed of trust, or vendor's lien⁸⁴ or if the debtor executed a written promise based on valuable consideration to pay the judgment.⁸⁵ Also, although enforcement is barred against a principal, the creditor may enforce the judgment against the surety⁸⁶

The Virginia duration statute contains the following tolling provision: "In computing the time, any time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted."⁸⁷ An order of reference for an accounting of judgment liens tolls running of the statute of limitations as to all judgment creditors who prove their lien under the order.⁸⁸ A decree that suspends execution also suspends the statute,⁸⁹ but an agreement between the parties prohibiting execution does not toll the statute.⁹⁰ A creditor who initiates a creditor's bill to enforce his lien thereby tolls the statute's running as to creditors and property in the suit.⁹¹ Whether a debtor's absence from the state tolls the statute, however, is unclear.⁹² Appeal of the

84. See *Paxton v. Rich*, 85 Va. 378, 383, 7 S.E. 531, 533 (1888) (a lien of a judgment based on a mortgage, deed of trust, or vendor's lien does not grow out of the judgment itself but is collateral to it and may be enforced in equity although the judgment is barred at law).

85. See *Bradshaw v. Bratton*, 96 Va. 577, 582, 32 S.E. 56, 58 (1899) (involving a debtor's charge that the judgment by confession was fraudulently obtained when creditor represented that a barred lien still attached to debtor's property).

86. A judgment recovered against both the principal and surety will be a valid lien against the surety for the statutory period in § 8.01-251, even if the judgment is barred as to the principal. *Fidelity & Cas. Co. v. Lackland*, 175 Va. 178, 187, 8 S.E.2d 306, 309 (1940); *Manson v. Rawlings' Ex'rs*, 112 Va. 384, 388, 71 S.E. 564, 566 (1911) (judgment barred against deceased principal still enforceable for remainder of surety's limitation period).

87. VA. CODE § 8.01-251(D) (Repl. Vol. 1977).

88. See *Gunnell's Adm'rs v. Dixon's Adm'x*, 101 Va. 174, 180, 43 S.E. 340, 342 (1903).

89. *Davis v. Roller*, 106 Va. 46, 50-51, 55 S.E. 4, 6 (1906).

90. Exceptions to the operation of the statute of limitations must be found in the statute itself, and the language does not mention agreements not to execute. *Clark v. Nave's Creditors*, 116 Va. 838, 841, 83 S.E. 547, 548 (1914). *Contra*, *Fulkerson v. Taylor*, 100 Va. 426, 435, 41 S.E. 863, 866 (1902) (execution issued on unconditional decree for money, in contravention of parties' agreement, is voidable only and is sufficient to toll the statute of limitations).

91. *Blair v. Rorer's Adm'r*, 135 Va. 1, 17, 116 S.E. 767, 773 (1923).

92. Prior to the revision of the Virginia Code resulting in Title 8.01, a debtor's absence from the state tolled the running of the statute of limitations except for suits to enforce judgment liens. VA. CODE §§ 8-33, -393 (Repl. Vol. 1957) (repealed 1977); see *Duffy v. Har-*

judgment,⁹³ sale by the debtor of realty subject to the lien,⁹⁴ and death of a party do not toll the statute.⁹⁵

A creditor or his assignee may prevent expiration of his judgment lien by making a motion to extend the judgment within the twenty-year period from the date of the original judgment or from the latest extension.⁹⁶ The motion must be filed in the Virginia court that rendered the judgment and must be accompanied by notice to the debtor.⁹⁷ Following an order to show cause why extension should not be permitted and a hearing on the motion, the court will grant the extension.⁹⁸ Under this procedure, a creditor may obtain an unlimited number of extensions against a living judgment debtor.⁹⁹ Once a judgment has been extended, it must be redocketed to create a lien.¹⁰⁰ The lien then relates back to the date of the original docketing and thus retains its priority.¹⁰¹

A judgment creditor who docketes his judgment before the death of the debtor may subject the decedent's realty to the lien. This is done without reviving the judgment after the debtor's death by bringing a creditor's bill against the decedent's personal representative, devisees, or heirs.¹⁰² A recent revision of the Virginia

stock, 137 Va. 406, 46 S.E.2d 570 (1948). The new § 8.01-229(D) carries forward the suspension of limitation for the debtor's absence but does not specifically except enforcement of judgment liens. *Id.* Section 8.01-229(H), however, does provide for the tolling of the statute of limitations in lien creditors' suits under certain circumstances but makes no mention of the debtor's absence. Likewise, § 8.01-251 which, according to the Reviser's notes following the statute, consolidates several old sections including § 8-393 does not provide for the debtor's absence to effect the statute of limitations. Therefore, it is unclear whether the debtor's absence does toll the statute with respect to judgment liens.

93. *See Seal v. Puckett*, 159 Va. 297, 303, 165 S.E. 496, 498 (1932).

94. *See Brown v. Butler*, 87 Va. 621, 626, 13 S.E. 71, 72 (1891).

95. VA. CODE § 8.01-229(B)(3) (Repl. Vol. 1977). *See Barley v. Duncan*, 177 Va. 202, 203, 13 S.E.2d 298, 298 (1941).

96. VA. CODE § 8.01-251(B) (Repl. Vol. 1977). The motion for extension under this section has replaced revival of a judgment by *scire facias*. *Id.* § 8.01-24.

97. *Id.* § 8.01-251(B).

98. *Id.*

99. *McClanahan's Adm'r v. Norfolk & W. Ry.*, 122 Va. 705, 719, 96 S.E. 453, 473 (1918).

100. VA. CODE § 8.01-458 (Repl. Vol. 1977).

101. *Id.* The new judgment does not merge with the original judgment so as to defeat the original lien; rather, the new judgment has the effect of renewing the old lien and therefore preserving its priority. *Hay v. Alexandria & W. R.R.*, 20 F. 15, 27 (E.D. Va. 1884).

102. *See James's Ex'r v. Lige*, 92 Va. 702, 705, 24 S.E. 275, 277 (1896). *See also Maxwell v. Leeson*, 50 W. Va. 361, 40 S.E. 420 (1901).

Code¹⁰³ eliminates the prior rule¹⁰⁴ requiring enforcement of the judgment within five years from qualification of the deceased debtor's personal representative. Although the new statute is silent on the enforcement limitation, the normal twenty-year limitation probably applies in this situation. Should the statute of limitation run on a judgment against a decedent, the creditor must file the motion for extension within two years from qualification of the personal representative.¹⁰⁵ This extension is for two years from the date the motion was filed, and only one such extension is allowed.¹⁰⁶ These restrictions on extension conflict with the interpretation that a judgment against a decedent now has a twenty-year life; perhaps, therefore, the prior five-year limitation was omitted erroneously

PRIORITIES UNDER STATE LAW

Priority Among Judgment Liens

Time of docketing is the key to determining priority among judgment liens. The priority rules establish a race in which the first judgment creditor to docket his judgment has a lien that takes priority over all liens of later docketed judgments.¹⁰⁷ The effect of priority is that the whole of the debtor's real estate in the county where the judgments are docketed must be applied first to satisfy the senior judgment lien. The lien of the next highest priority then receives satisfaction from the residue, if any, and distribution continues until all liens are satisfied or the asset is fully distributed.¹⁰⁸ If judgment liens are of equal priority,¹⁰⁹ they share pro rata in

103. VA. CODE § 8.01-251 (Repl. Vol. 1977).

104. *Id.* § 8-396 (Cum. Supp. 1976) (repealed 1977).

105. *Id.* § 8.01-251(B) (Repl. Vol. 1977).

106. *Id.*

107. *Id.* § 8.01-459. See *Buchanan v. Clark*, 51 Va. (10 Gratt.) 164, 181 (1853).

108. This rule is based on cases interpreting the earlier priority system, under which judgments were liens on the whole of the debtor's equitable estate. The present rule limiting the effect of the lien to the jurisdiction where docketed does not effect the outcome. The whole is applied first to the elder judgment and the residue to the junior judgment. *Haleys v. Williams*, 28 Va. (1 Leigh) 140, 142 (1829). See *Buchanan v. Clark*, 51 Va. (10 Gratt.) 164, 181 (1853); *Withers v. Carter*, 45 Va. (4 Gratt.) 407, 417 (1848).

109. If a judgment is divided and assigned to different creditors, one creditor may not assert his lien to the prejudice of the others; the liens are of equal rank. *Davis v. Roller*, 106 Va. 46, 51, 55 S.E. 4, 6 (1906).

foreclosure sale proceeds that are insufficient to satisfy fully all such liens.¹¹⁰

Priority of Judgment Liens on Property Transferred by Debtor

A major priority question is the judgment creditor's ability to enforce his lien against transferees of the debtor's real estate. If a debtor should sell land subject to a judgment lien, the judgment creditor has no right to follow the proceeds of the sale; his only remedy is against the real property to which his lien attaches.¹¹¹ As a general rule, if a recordable instrument mortgaging,¹¹² transferring, or assigning the debtor's real property is recorded before the judgment is docketed, then the innocent transferee for value under the instrument enjoys priority over the subsequently acquired judgment lien.

Four situations warrant consideration in determining a judgment lien's priority with respect to real estate transferred by the debtor. First, when the transferee purchases the real estate from the debtor after the judgment lien is created, he takes the land subject to the lien. Once the judgment is docketed, all subsequent transferees are considered to have notice of the lien and, therefore, are junior to it.¹¹³ Second, a transfer by the debtor that is recorded after the judgment is rendered but before it is docketed will defeat the rights of the judgment creditor. In this situation, the judgment creditor acquires no rights in the land because the debtor, having transferred his interest before the lien arose, no longer has any interest to which the lien may attach;¹¹⁴ the creditor can obtain no

110. *Janney's Ex'r v. Stephen's Adm'r*, 2 Pat. & H. 11, 23 (Va. 1856).

111. *Orphanoudakis v. Orphanoudakis*, 199 Va. 142, 150, 98 S.E.2d 676, 682 (1957); *Jones v. Hall*, 177 Va. 658, 666, 15 S.E.2d 108, 111 (1941); *Blackemore v. Wise*, 95 Va. 269, 273, 28 S.E. 332, 333 (1897).

112. For a discussion of the judgment lien's priority with respect to mortgages, see notes 140-46 *infra* & accompanying text.

113. *Sharitz v. Moyers*, 99 Va. 519, 525, 39 S.E. 166, 168 (1901); *Citizens Nat'l Bank v. Manoni*, 76 Va. 802, 807 (1882); *Redd v. Ramey*, 72 Va. (31 Gratt.) 265, 267 (1879). See *Hill v. Rixey*, 67 Va. (26 Gratt.) 72, 79 (1875). Similarly, if a judgment debtor transfers his land between the rendering of a judgment and its affirmance on appeal, the land remains subject to the original judgment lien. See *Jeter v. Langhorne*, 46 Va. (5 Gratt.) 193, 197 (1848); *M'Clung v. Berne*, 37 Va. (10 Leigh) 410, 416 (1839). As a practical matter, the purchaser of land from the debtor may avoid loss by paying the judgment debt and thereby releasing the lien.

114. See *Bowman v. Hides*, 80 Va. 806, 810 (1885). For the same reason, a judgment lien

better rights to the debtor's lands than the debtor is shown to have by the record of title.¹¹⁵ The third situation arises when the debtor transfers the property and the transfer is recorded before judgment. As in the second situation, because the transfer occurred before docketing, the purchaser for value without notice and takes the land free of the lien.¹¹⁶ Fourth, if the transfer occurs before the judgment is rendered but the transfer is not recorded at the time the judgment is docketed, the judgment lienor will prevail over the transferee. This is simply an application of the recording act; because the transfer is unrecorded, record title remains in the debtor and the lien attaches to the land at the time of docketing.¹¹⁷

A judgment lien's priority also may come into conflict with a contract for the sale of the land. An executory contract of sale between a debtor and a third party purchaser must be in writing¹¹⁸ and recorded in the city or county where the property is located¹¹⁹ to be valid against lien creditors. Virginia law once recognized a distinction between oral and written contracts of sale, holding that the recording requirements did not apply to oral contracts for the sale of land.¹²⁰ The Virginia Code, however, resolved the conflict between oral and written executory contracts by voiding oral real

does not attach to land of a vendee/debtor when the contract for sale of the land to the debtor is rescinded prior to docketing of the judgment against him. *Nelson v. Turner*, 97 Va. 54, 58, 33 S.E. 390, 391 (1899).

115. *Miller v. Kemp*, 157 Va. 178, 190, 160 S.E. 203, 206 (1931); *Nutt v. Summers*, 78 Va. 164, 173 (1883); *Floyd v. Harding*, 69 Va. (28 Gratt.) 401, 407 (1877). See note 49 *supra*.

116. See *Hill v. Rixey*, 67 Va. (26 Gratt.) 72, 74 (1875). In *Hill*, a creditor recovered a judgment in 1860 but did not docket it until 1868, while a second creditor obtained a judgment in 1861 that was docketed in 1866. The debtor conveyed the land in trust in 1865 and the deed was recorded in 1867. The second creditor's judgment lien took priority over the subsequently recorded deed, but the taker under the deed took prior to the first creditor because the deed was recorded before the first creditor docketed.

117. *Flanary v. Kane*, 102 Va. 547, 559, 46 S.E. 312, 316 (1904); *Price v. Wall's Ex'r*, 97 Va. 334, 336, 33 S.E. 599, 600 (1899); *Blakemore v. Wise*, 95 Va. 269, 273, 28 S.E. 332, 333 (1897); *Campbell & Co. v. Nonpareil F.B. & K. Co.*, 75 Va. 291, 293 (1881); *Young v. Devries*, 72 Va. (31 Gratt.) 304, 308 (1879); *March, Price & Co. v. Chambers*, 71 Va. (30 Gratt.) 299, 303 (1878); *Eidson v. Huff*, 70 Va. (29 Gratt.) 338, 342 (1877).

118. VA. CODE § 11-1 (Repl. Vol. 1978).

119. *Id.* § 55-96 (Cum. Supp. 1979).

120. See *McClanahan's Adm'r v. Norfolk & W Ry.*, 122 Va. 705, 711, 96 S.E. 453, 462 (1918); *Fulkerson's Adm'r v. Taylor*, 102 Va. 314, 319, 46 S.E. 309, 310 (1904); *Floyd v. Harding*, 69 Va. (28 Gratt.) 401, 413 (1877). The distinction between oral and written contracts was criticized for favoring oral contracts. See *Straley v. Esser*, 117 Va. 135, 142-43, 83 S.E. 1075, 1077-78 (1915).

estate contracts as to subsequent purchasers for value and creditors of the transferor.¹²¹

Court decreed sales of the debtor's land and sales to satisfy a junior lienor also raise priority problems. A purchaser at a judicial sale takes good title against a judgment creditor of the grantor, even if the deed of trust never has been recorded, provided all interested parties are before the court.¹²² If land is sold to satisfy a junior lienor, the purchaser takes the land subject to the senior judgment lien.¹²³

Because the judgment lien's priority depends upon docketing before the recording of the debtor's transfer, the judgment creditor should obtain the judgment and docket it as soon as possible, thereby giving notice of the lien to purchasers from the debtor. Before judgment, the creditor may secure his interest and give notice by means of attachment or *lis pendens*.¹²⁴ *Lis pendens* or attachment binds a subsequent bona fide purchaser for value, otherwise without notice, if there is

a memorandum setting forth the title of the cause or attachment, the general object thereof, the court wherein it is pending, the amount of the claim asserted by the plaintiff, a description of the property, and the name of the person whose estate is intended to be affected thereby.¹²⁵

Once recorded and indexed in the circuit clerk's office where the property is located,¹²⁶ the attachment or *lis pendens* subordinates the rights of a subsequent vendee who purchases the debtor's land while a suit against the debtor is pending to the rights of the creditor adjudicated in that suit.¹²⁷ After a judgment is obtained, a pur-

121. VA. CODE § 11-1 (Repl. Vol. 1978).

122. See *Campbell & Co. v. Nonpareil F.B. & K. Co.*, 75 Va. 291, 294 (1881) (this theory suggests the purchaser holds under the decree not the deed of trust); *Glazebrook's Adm'r v. Bagland's Adm'r*, 49 Va. (8 Gratt.) 332, 340 (1851).

123. *Sexton's Ex'r v. Patterson*, 1 Va. Dec. 551, 556 (1883) (error to direct payment of junior judgment out of proceeds from foreclosure sale in preference to senior lien).

124. Pursuant to § 8.01-550, attachment of any real estate in accordance with requirements of §§ 8.01-268 and 8.01-557 creates a lien on the property from the time of levy. VA. CODE § 8.01-550 (Repl. Vol. 1977).

125. *Id.* § 8.01-268.

126. *Id.*

127. *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 641, 93 S.E. 684, 694 (1917). Although no memorandum is filed, a voluntary purchaser *pendente lite* takes in subordination

chaser of the debtor's land is bound by a notice of docketed judgment, and no *lis pendens* or attachment is necessary¹²⁸

Order of Liability Among Alienees of Debtor's Land

The Virginia Code establishes the order in which property conveyed by a debtor after commencement of a judgment lien is used to satisfy the judgment.¹²⁹ Real estate retained by the judgment debtor will be applied first to satisfy the judgment.¹³⁰ If such lands are insufficient, property conveyed by the debtor will be appropriated, with the land last sold being liable first and so on in inverse order of alienation until the judgment is satisfied.¹³¹ Imposed upon this inverse order of liability is the rule that lands given away by the debtor are liable before lands conveyed for value.¹³² A purchaser for value from a donee, however, occupies the same position as if he had purchased from the judgment debtor when he purchased from the donee.¹³³ Real estate conveyed contemporaneously is liable on a pro rata basis.¹³⁴

Priority of Judgment Lien on After-Acquired Property

In Virginia, the judgment lien extends to after-acquired real es-

to the rights of the grantor's creditor adjudicated in the suit. *Davis v. Anderson*, 99 Va. 620, 624, 39 S.E. 588, 590 (1901).

128. *Sharitz v. Moyers*, 99 Va. 519, 525, 39 S.E. 166, 168 (1901).

129. VA. CODE § 8.01-464 (Repl. Vol. 1977).

130. *Id.* See *Blakemore v. Wise*, 95 Va. 269, 273, 28 S.E. 332, 333 (1897); *Dickinson v. Clement*, 87 Va. 41, 46, 12 S.E. 105, 107 (1890).

An alienee wishing to avoid liability must allege and prove that the debtor's lands are more than sufficient to satisfy the lien. *Preston v. National Exch. Bank*, 97 Va. 222, 226, 33 S.E. 546, 547 (1899).

131. VA. CODE § 8.01-464 (Repl. Vol. 1977). See *Nelson v. Turner*, 97 Va. 54, 59, 33 S.E. 390, 391 (1899); *Miller v. Holland*, 84 Va. 652, 654, 5 S.E. 701, 702 (1888); *Whitten v. Saunders*, 75 Va. 563, 567 (1881); *Harman v. Oberdorfer*, 74 Va. (33 Gratt.) 497, 501 (1880); *Shultz v. Hansbrough*, 74 Va. (33 Gratt.) 567, 583 (1880). The date of the deed is presumed to be the time of alienation. *Harman v. Oberdorfer*, 74 Va. (33 Gratt.) 497, 501 (1880); *Shultz v. Hansbrough*, 74 Va. (33 Gratt.) 567, 583 (1880).

132. VA. CODE § 8.01-464 (Repl. Vol. 1977). Among donees of the debtor's land, the same rule of inverse liability applies.

133. *Id.*

134. *Harman v. Oberdorfer*, 74 Va. (33 Gratt.) 497, 507 (1880) (if several lots are sold same day on same terms to several purchasers, each lot is subject to judgment lien against vendor in proportion to its relative value on day of sale); *Alley v. Rogers*, 60 Va. (19 Gratt.) 366, 391 (1896).

tate of the judgment debtor.¹³⁵ Virginia, however, rejects the majority rule, which grants equal rank to all liens existing at the time the land is acquired. Under the majority rule, existing liens attach simultaneously to the after-acquired property regardless of the order in which they were created; if the land is insufficient to satisfy the liens, then the lienors, being of equal rank, share pro rata in the distribution of proceeds from the sale.¹³⁶ Virginia, takes the minority position that the existing judgment liens attach to the debtor's newly-acquired land in the order in which the judgments originally were docketed.¹³⁷ The priority among judgment liens on the after-acquired property of the debtor, therefore, is the same as that on property in which the debtor had an interest when the judgment was docketed.

Consider the following example: creditor *A* recovers a judgment against debtor *D* and docketes his judgment in October, 1977; in October, 1978 creditor *B* who also has a judgment against *D* docketes. Subsequently, *D* acquires Blackacre. According to the majority view, both *A* and *B* would share ratably in the proceeds from the sale of Blackacre because their liens attach simultaneously and are of equal rank. In Virginia, however, *A*'s lien would have to be satisfied completely before *B* would be able to share in any of the proceeds.

Although the Code sections that establish the docketing priority¹³⁸ do not address specifically the question of after-acquired property priorities, the conclusion that judgment liens attach to after-acquired property in the order in which they are docketed is implicit in the statutory language.¹³⁹ Virginia's position suggests a misguided expression of the diligence policy that awards priority to the creditor who docketes his judgment first. No matter how dili-

135. See *Gordon v. Rixey*, 76 Va. 694, 698 (1882).

136. VA. CODE § 55-96 (Cum. Supp. 1979).

137. The judgment lienor acquires only the rights the debtor has in the real estate and takes subject to the deed of trust. See *C.B. Van Nostrand & Co. v. Virginia Zinc & Chem. Corp.*, 126 Va. 131, 139, 101 S.E. 65, 68 (1919).

138. VA. CODE § 8.01-458, -459 (Repl. Vol. 1977).

139. *Holland Jones Co. v. Smith*, 152 Va. 707, 711, 148 S.E. 581, 582 (1929); *Moomaw v. Jordan*, 118 Va. 414, 416, 87 S.E. 569, 570 (1916); *Charlottesville Hardware Co. v. Perkins*, 118 Va. 34, 38, 86 S.E. 869, 870 (1915) (quoting *Summers v. Darne*, 72 Va. (31 Gratt.) 791, 801 (1879)); *Strauss v. Bodeker's Ex'r*, 86 Va. 543, 548, 10 S.E. 570, 572 (1889) (quoting *Summers v. Darne*, 72 Va. (31 Gratt.) 791, 801 (1879)).

gent the judgment creditor is, his lien cannot encumber property the debtor does not own. The majority approach is preferable because it treats prior judgment liens equally with respect to after-acquired lands on which none of the lienors would have relied in extending credit or docketing their judgment.

Priority of Judgment Liens on Property Subject to Deeds of Trust or Mortgages

Land on which a judgment lien is created often will be subject to a deed of trust or mortgage held by a third person. Creditors and trustees secured by deed of trust or mortgages are considered purchasers for value¹⁴⁰ who must record the security instrument¹⁴¹ to take priority over subsequent judgment liens.¹⁴² Land acquired by the debtor after a judgment lien has commenced is subject to the lien.¹⁴³ If the debtor finances the purchase of land by giving a mortgage or a deed of trust, the mortgagee's or trustee's interest takes priority over the earlier judgment lien on a theory of transitory seisin.¹⁴⁴ In the typical deed of trust or mortgage acquisition, the purchaser-debtor theoretically receives the land and immediately reconveys it to the trustee or mortgagee to secure the purchase money. Therefore, seisin never actually rests in the pur-

140. See *Gordon v. Rixey*, 76 Va. 694, 698 (1882).

141. *Straley v. Esser*, 117 Va. 135, 145, 83 S.E. 1075, 1078 (1915). If only part of the purchase money is from a third party, the judgment creditor may subject the debtor's portion in the land to the judgment lien. *Sinclair v. Sinclair*, 79 Va. 40, 42 (1884).

142. VA. CODE § 8.01-458 (Repl. Vol. 1977). See *Brockenbrough v. Brockenbrough*, 72 Va. (31 Gratt.) 580, 593 (1879); *Hill v. Manser*, 52 Va. (11 Gratt.) 522, 525 (1854). A judgment is also a lien on the after-acquired vested remainder of a judgment debtor. *Wilson v. Langhorne*, 102 Va. 631, 642, 47 S.E. 871, 875 (1904).

143. See, e.g., *Hertweck v. Fearon*, 180 Cal. 71, 179 P. 190 (1919); *Cayce v. Stovall*, 50 Miss. 396 (1874); *Hulbert v. Hulbert*, 216 N.Y. 430, 111 N.E. 70 (1916); *Summers Hardware Co. v. Jones*, 222 N.C. 530, 23 S.E.2d 883 (1943); *Belknap v. Greene*, 56 S.C. 119, 34 S.E. 26 (1899); *Matula v. Lane*, 22 Tex. Civ. App. 391, 55 S.W. 504 (1900). Among the jurisdictions adopting this majority view, a number award priority among the equal lienors to the diligent creditor who first forces sale under his lien. See *Smith v. Lind*, 29 Ill. 24 (1862); *Bradley v. Heffernan*, 156 Mo. 653, 57 S.W. 763 (1900). Other jurisdictions hold that the diligent creditor's foreclosure does not destroy the equal rank of the liens and proceeds from the sale are distributed pro rata. See *Hulbert v. Hulbert*, 216 N.Y. 430, 111 N.E. 70 (1916); *Moore v. Jordan*, 117 N.C. 86, 23 S.E. 259 (1895).

144. VA. CODE § 8.01-458 (Repl. Vol. 1977). See *M. Burks*, *supra* note 8, § 349 (4th ed. Supp. 1961). *Burks* cites no authority except Virginia Code § 8-386, now 8.01-458.

chaser-debtor, and the judgment lien cannot attach.¹⁴⁵ Even though the debtor gets legal title when the purchase price is paid by another, the debtor has no beneficial interest in the land to which the judgment can attach.¹⁴⁶

Attachment as a Means of Enhancing Priority

If a creditor takes out a writ of attachment that is levied and recorded before judgment,¹⁴⁷ the subsequent judgment lien merges with the attachment lien and the date of the judgment lien relates back to the attachment.¹⁴⁸ The judgment lien has priority as of the date of attachment against bona fide purchasers of the attached land¹⁴⁹ and against other judgment creditors.¹⁵⁰ For example, creditor A, who brings an action against the defendant and levies attachment on specific property of the defendant, will prevail over creditor B, who obtains and docketes a judgment prior to creditor A's obtaining a judgment, if A's attachment occurs before B's docketing. A's inchoate attachment lien becomes choate upon judgment, and upon docketing, A's judgment lien merges with the attachment lien to date the lien from the time of attachment.

145. See VA. CODE §§ 8.01-458, -459 (Repl. Vol. 1977); M. BURKS, *supra* note 8, § 349 (4th ed. Supp. 1961).

146. Section 8.01-458 provides that money judgments shall be liens on real estate that the defendant owns or later acquires "from the time such judgment is recorded." The section can be read to mean that the lien commences and therefore attaches to the after-acquired property at the time the judgment is recorded. This interpretation supports the theory that priority is established by the order in which the judgments are docketed. This language also can be construed to mean that the judgment is a lien on the debtor's real estate, including that subsequently acquired, but not until it is docketed.

Section 8.01-459 provides "[J]udgments against the same person shall, as among themselves, attach to his real estate, and be payable thereout in the order of the priority of the lien of such judgments respectively." The phrase "in the order of the priority of the lien of such judgments," means in the order in which the judgments were docketed. No distinction is made in the section between real estate owned at the time of docketing the judgment and that subsequently acquired. If it includes after-acquired property, *Burks'* interpretation is in accord with § 8.01-459. See note 144 *supra*. If the term "real estate" is limited to that in which the debtor has an attachable interest at the time the judgment lien commences, then how the priority rules apply to after-acquired property is unclear.

147. VA. CODE § 8.01-557 (Repl. Vol. 1977).

148. *Trimble v. Covington Grocery Co.*, 112 Va. 826, 833, 72 S.E. 724, 726 (1911).

149. See text accompanying notes 124-27 *supra*.

150. VA. CODE § 8.01-557 (Repl. Vol. 1977). 31 U.S.C.A. § 191 (West Supp. 1979). I.R.C. §§ 6321-6323.

FEDERAL PRIORITIES

The Federal Tax Lien

Internal Revenue Code sections 6321 to 6323 contain federal tax lien priority provisions.¹⁵¹ Under section 6321, an assessed federal tax constitutes a lien in the government's favor on all real and personal property of the delinquent taxpayer.¹⁵² In most instances, the federal government's tax lien defeats the claim of a private creditor. Section 6323(a), however, protects certain creditors of the delinquent taxpayer by providing that the federal tax lien "shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor" whose interest arises before notice of the tax lien is filed in the office designated by state law for the recordation of liens against realty.¹⁵³

In Virginia, tax liens are docketed in the clerk's office of the circuit court in which the land is located.¹⁵⁴ Notice of the tax lien also must be indexed in a public index of liens maintained in the Internal Revenue Service office for the district where the property is situated.¹⁵⁵ State law determines whether and to what extent the taxpayer has property or a right to property to which a federal tax lien can attach.¹⁵⁶

Section 6323(a) bases priority on the traditional rule of first in time; if the judgment lien is created before the federal tax lien, it

151. Title 31, § 191 of the United States Code also creates a federal priority for tax debts owed the United States. See text accompanying notes 171-75 *infra*. For a thorough treatment of the federal tax lien, see W. PLUMB, *THE FEDERAL TAX LIEN* (3d ed. 1972).

152. I.R.C. §§ 6321-6323; Treas. Reg. § 301.6321-1 (1971). The lien on property of a taxpayer who refuses or neglects to pay his federal taxes also embraces after-acquired property. The lien is valid against the taxpayer's property interests from the time the deficiency assessment is made. Virginia courts also recognize the priority of a state tax lien over a judgment lien. See *Stevenson v. Henkle*, 100 Va. 591, 598, 42 S.E. 672, 675 (1902); *Thomas v. Jones*, 94 Va. 756, 759, 27 S.E. 813, 814 (1897); *Simmons v. Lyle's Adm'r*, 73 Va. (32 Gratt.) 752, 761 (1880).

153. I.R.C. §§ 6323(a), (f)(1)(A)(i). The liens listed in § 6323(a) have priority over the federal tax lien even if they are inchoate under the test announced in *Illinois ex rel. Gordon v. Campbell*, 327 U.S. 362 (1946). See notes 163-64 *infra* & accompanying text. Liens that are not listed, such as attachment liens, are not protected because of their inchoate nature. *United States v. Security Trust & Sav. Bank*, 340 U.S. 47, 52-53 (1950) (Jackson J., concurring).

154. VA. CODE § 8.01-446 (Repl. Vol. 1977).

155. I.R.C. § 6323(f)(4).

156. *Aquilino v. United States*, 363 U.S. 509, 515-16 (1960).

takes priority. Relation back theories will not alter this result, so the relation back of the judgment lien to a prior date of attachment cannot defeat a tax lien filed after attachment but prior to recovery and docketing of the judgment.¹⁵⁷

Revised Statute 3466 Preference

In addition to the priority of a federal tax lien, the federal government's claims receive preference over claims of other creditors pursuant to the federal priority provision of the United States Code, commonly referred to as section 3466.¹⁵⁸ Section 3466 applies to all debts owed the United States, including debts from federal contracts, guarantees, taxes, direct loans, and other claims. The statute provides as follows:

Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. The priority established under this section does not apply, however, in a case under title 11 [bankruptcy].¹⁵⁹

The statute creates an absolute priority in favor of the United States whenever the debtor is insolvent¹⁶⁰ or the decedent debtor's estate is insufficient to satisfy the government claim. The courts have limited section 3466, however, by recognizing administrative expenses¹⁶¹ and specific and perfected liens¹⁶² as superior to federal

157. *United States v. Acri*, 348 U.S. 211, 213 (1955); *United States v. Security Trust & Sav. Bank*, 340 U.S. 47, 50 (1950).

158. 31 U.S.C.A. § 191 (West Supp. 1979).

159. *Id.*

160. See note 177 *infra* & accompanying text.

161. See, e.g., *United States v. Weisburn*, 48 F. Supp. 393, 397 (E.D. Pa. 1943); *Hammond v. Carthage Sulphite Pulp & Paper Co.*, 34 F.2d 155, 156 (N.D.N.Y. 1928).

162. See *United States v. Gilbert Assocs.*, 345 U.S. 361, 365-66 (1953); *Illinois ex rel. Gordon Campbell*, 329 U.S. 362, 375 (1946); *United States v. Haddix & Sons*, 252 F. Supp.

claims if these expenses or liens arise before the debt owed the government.

In *Illinois ex rel. Gordon v. Campbell*,¹⁶³ the Supreme Court established a three-point test for determining whether a lien is choate, that is, specific and perfected, when the federal lien arises. The Court required the creditor's lien to be definite, not merely ascertainable in the future, as to the identity of the lienor, the amount of the lien, and the property to which it attaches.¹⁶⁴ In *United States v. Gilbert Associates*,¹⁶⁵ the Supreme Court added another criterion for determining whether a lien is specific and perfected; specifically, title and possession to the claimed property no longer must be in the debtor.¹⁶⁶ Because judgment liens encumber all the debtor's real estate and do not remove title and possession from the debtor until enforcement against specific lands, an unenforced judgment lien is inchoate and inferior to a federal claim.¹⁶⁷

Since *Campbell*, the Supreme Court has not found a lien to be choate for purposes of section 3466, leaving unanswered whether any lien ever can be sufficiently specific and perfected to defeat the federal priority.¹⁶⁸ The lower federal courts, however, have recognized certain liens as prior to federal claims in insolvency proceedings, including mortgages¹⁶⁹ and liens of creditors who have levied

634, 636 (E.D. Mich. 1966).

163. 329 U.S. 362 (1946).

164. *Id.* at 375 (citations omitted) (state statutory lien for unemployment contributions found not specific or perfected).

165. 345 U.S. 361 (1953).

166. *Id.* at 366. In *Thelusson v. Smith*, 15 U.S. (2 Wheat.) 396, 425 (1817), the Court reasoned that the debtor held no interest in land that could be subject to the federal claim if the debtor was divested of title and possession. See *United States v. Sullivan*, 19 F. Supp. 695, 700 (W.D.N.Y. 1937), *aff'd*, 95 F.2d 1021 (2d Cir. 1938) (a bona fide transfer, pledge, or levy of execution on judgment removes property from effect of federal preference § 3466).

167. See *United States v. Duncan*, 25 F. Cas. 927, 935 (C.C.D. Ill. 1850) (federal priority does not supersede judgment perfected by execution and levy on real estate).

168. See, e.g., *United States v. Vermont*, 377 U.S. 351, 358 (1964) (dictum that in § 3466 proceeding Vermont state tax lien would be subject to federal priority); *United States v. Gilbert Assocs.*, 345 U.S. 361 (1953) (town taxes inferior). See also Plumb, *The Federal Priority in Insolvency, Proposals for Reform*, 70 Mich. L. Rev. 3, 4 (1971).

169. See, e.g., *United States v. Guaranty Trust Co.*, 33 F.2d 533 (8th Cir. 1929), *aff'd*, 280 U.S. 478 (1930); *United States v. Boston & Berlin Transp. Co.*, 237 F. Supp. 1004 (D.N.H. 1964).

on property and taken possession of the property¹⁷⁰

A California federal district court in *Nesbitt v. United States*,¹⁷¹ recently held that the Federal Tax Lien Act of 1966 and Internal Revenue Code section 6323(a) do not create an exception to the governmental priority established by section 3466.¹⁷² Accordingly, a judgment lien must be choate under the criteria established in *Campbell and Gilbert Associates* to defeat a federal tax claim. The logic of the court's holding in *Nesbitt* is questionable. Little reason is apparent for section 6323(a) to specifically exempt judgment liens from the tax lien priority scheme if section 3466 overrides it. Section 6323(a) is the federal equivalent of a recording statute. Its aim is to protect the interests of potential purchasers, lenders, and judgment creditors of the debtor by requiring that before investing or deciding to sue for a debt, they be given notice of the federal tax lien.¹⁷³ The notice requirement has little value, however, to a judgment creditor who has enforced the lien in a foreclosure sale; at that point, the debtor has no interest to which the federal tax lien can attach.

Other courts have not followed the *Nesbitt* decision. Pre-*Nesbitt* Supreme Court cases recognized that the federal priority issue in insolvency proceedings differs from a judgment lienor's status under sections 6321 to 6323 of the Internal Revenue Code.¹⁷⁴ As the Second Circuit noted in the bankruptcy context, section 6323 is an exception to the federal government's section 3466 priority in state insolvency proceedings.¹⁷⁵ The important point is that judgment liens are treated differently in regard to federal tax liens and need not be choate to prevail, as they must be to defeat other federal claims under section 3466.

Whether the Supreme Court will follow *Nesbitt* is uncertain. What is clear is that few, if any, state liens will prevail over section

170. *Ideco Div. of Dresser Indus. v. Chance Drilling Co.*, 309 F. Supp. 305, 311-12 (S.D. Tex. 1968), *aff'd*, 422 F.2d 165 (5th Cir. 1970) (mechanic's lien); *United States v. Anthony*, 231 F. Supp. 414, 422 (S.D. Iowa 1964) (note secured by chattel mortgage).

171. 445 F. Supp. 824 (N.D. Cal. 1978).

172. *Id.* at 827-30.

173. 49 CONG. REC. 1802 (1913).

174. See *United States v. Vermont*, 377 U.S. 351, 358 (1964); *United States v. City of New Britain*, 347 U.S. 81, 86-88 (1954).

175. *In re Caswell Constr. Co.*, 13 F.2d 667, 670 (N.D.N.Y. 1926) (mechanic's lienor's petition to bankruptcy trustee for priority over federal claim).

3466. In *United States v. Oklahoma*,¹⁷⁶ the Court limited section 3466 government priority by restricting the definition of "insolvency." The Court held that something more than insolvency in the bankruptcy sense, debts in excess of assets, will be required; rather, the debtor must manifest insolvency in one of the three forms specified in section 3466: by assignment, by having his effects attached after absconding, concealing, or absenting himself, or by committing an act of bankruptcy.¹⁷⁷

Under the Bankruptcy Act of 1898,¹⁷⁸ the judgment creditor fared better against section 3466 claims if the debtor went into bankruptcy. For example, if the debtor committed an act of bankruptcy,¹⁷⁹ such as making a general assignment for the benefit of creditors, section 3466 insolvency was triggered. The judgment lien, being a general lien on all the debtor's property, was inchoate because it was not sufficiently definite as to the property to which it attached. Therefore, the lien would be subordinate to the federal claim. On the other hand, if the debtor filed a bankruptcy petition, then the lien would have to be satisfied in full before any payments would be made to the government as a general creditor with a priority.¹⁸⁰ The 1978 Bankruptcy Code¹⁸¹ has the same effect. Under section 507, federal taxes are relegated to sixth priority and government nontax claims become general claims against the estate.¹⁸² Consequently, the lien creditor is encouraged to commence

176. 261 U.S. 253 (1923).

177. *Id.* at 260-61; 11 U.S.C.A. § 101(26) (West Supp. 1979). The Court in *Oklahoma* required insolvency to be manifested by assignment, attachment of the debtor's effects after he has absconded, or an act of bankruptcy. 261 U.S. at 261. See also *Thelusson v. Smith*, 15 U.S. (2 Wheat.) 396, 400 (1817).

178. Bankruptcy Act of 1898, §§ 1 - 74, 11 U.S.C. §§ 1 - 112 (1970) (repealed 1978).

179. Section 3(a) of 1898 Act states that a person commits an act of bankruptcy when he does the following: 1) makes a fraudulent conveyance or concealment of his property; 2) makes a preferential transfer; 3) permits, while insolvent, the creditor to obtain a lien on his property then fails to discharge the lien within 30 days or 5 days before the sale of the property; 4) makes a general assignment for the benefit of creditors; 5) allowed receiver to be appointed to take charge of his property while he is insolvent; 6) admits inability to pay his debts and expresses a willingness to be adjudged a bankrupt. 11 U.S.C. § 21 (1970) (repealed 1978). The 1978 Code does not contain this section.

180. See Bankruptcy Act of 1898, § 64, 11 U.S.C. § 104 (1970) (repealed 1978). See also D. EPSTEIN, *DEBTOR-CREDITOR RELATIONS IN A NUTSHELL* 83-87 (1973).

181. 11 U.S.C.A. §§ 1-2256 (West Supp. 1979).

182. *Id.* §§ 502, 507. Without special priority under § 507, the nontax debt owed the government must be satisfied out of the assets of the estate available to general claimants

involuntary bankruptcy¹⁸³ against a debtor who also is liable for a federal claim under section 3466.

Circuity of Priority Problems

The federal priority scheme embodied in section 3466¹⁸⁴ and the Federal Tax Lien Act¹⁸⁵ is superimposed on the state priority system. This may result in a circuity of priority problem. Suppose the debtor has three creditors: the federal government and two claimants under state law. State law provides that as between state liens, that first in time has priority. Under the federal scheme, the priority of a state lien vis-a-vis the federal claim depends on the choateness of the state lien. If only the junior state lien is choate, then the federal claim defeats the senior state lien but is subject to the junior state lien. When the debtor's assets are insufficient to satisfy all three claims, distribution becomes a problem.

In *United States v. City of New Britain*,¹⁸⁶ the Supreme Court resolved the problem by establishing a two-step analysis.¹⁸⁷ First, the total amount of claims that takes prior to the government under federal law is set aside. State priority law determines how this is to be divided among the claimants. The government is entitled to the remaining portion, if any. For purposes of illustration, consider the following example. Debtor's total assets equal \$1500, the senior state lien is for \$300, the junior lien is for \$400, and the federal claim is \$2,000. Because the junior lien is choate but the senior lien is not under federal law, only \$400 is set aside. Out of the \$400, however, state law awards \$300 to the senior lienor and the \$100 balance to the junior lienor. The remaining \$1100 goes to the government.

JUDGMENT LIENS UNDER THE NEW BANKRUPTCY CODE

The Automatic Stay

Bankruptcy has the effect of superseding pending state actions

under § 502.

183. *Id.* § 303.

184. 31 U.S.C.A. § 191 (West Supp. 1979).

185. I.R.C. §§ 6321-6323.

186. 347 U.S. 81 (1954).

187. *Id.* at 86-88.

and permits the bankruptcy trustee to invalidate much that was done in the state proceedings.¹⁸⁸ Section 362 of the Bankruptcy Code of 1978¹⁸⁹ provides an automatic stay of all creditors' enforcement efforts against the bankrupt or persons indebted to the bankrupt.¹⁹⁰ Sections 362(a)(2) through 362(a)(5) stay any creation, perfection, or enforcement of a judgment, or the lien created by it, against property of the bankrupt or of the estate.¹⁹¹ Thus, the stay, applicable to all types of bankruptcy cases,¹⁹² allows the court to conduct a bankruptcy proceeding without piecemeal outside litigation.¹⁹³

Bankruptcy does not discharge a valid judgment lien obtained more than ninety days before filing of the bankruptcy petition.¹⁹⁴ Due to the automatic stay, however, the lienor may not initiate enforcement proceedings without the bankruptcy court's permission.¹⁹⁵ The bankruptcy court may terminate or modify the automatic stay for cause, such as lack of adequate protection of the secured interest¹⁹⁶ or lack of any equity in property deemed unrec-

188. See notes 211-32 *infra* & accompanying text.

189. Pub. L. No. 598, 92 Stat. 2549 (1978) (codified at 11 U.S.C.A. §§ 101-2256 (West Supp. 1979)).

190. 11 U.S.C.A. § 362 (West Supp. 1979). The justification for staying actions against debtors of the bankrupt is that all property owned by or owed to the bankrupt becomes property of the bankruptcy estate. See *id.* § 541.

191. *Id.* §§ 362(a)(2) - §§ 362(c)(2)-(a)(5).

192. The stay covers liquidations, reorganizations, repayment plan cases, and municipal debt adjustments. See H.R. REP. No. 595, 95th Cong., 2d Sess. 174, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6135.

193. The 1898 Act used the stay of suits against the bankrupt to permit the bankruptcy court to handle more effectively the bankrupt's debts by requiring all claims to be decided by the bankruptcy court. Bankruptcy Act of 1898, 11 U.S.C. § 614 (1970) (repealed 1978). See *Kennison v. Philadelphia & Reading Coal & Iron Co.*, 38 F Supp. 980, 982 (D. Minn. 1940).

194. Although a judgment is recovered within the ninety-day period, the lien on the bankrupt's property is not invalidated by the 1978 Code if the creditor's action was commenced prior to that period. See *Metcalf v. Barker*, 187 U.S. 165, 174 (1902) (dealing with the 1898 Act and its four-month preference period).

195. See *Straton v. New*, 283 U.S. 318, 321-22 (1931) (dealing with former § 614, the automatic stay provision of the 1898 Act, and the four-month rule); *New River Coal Land Co. v. Ruffner Bros.*, 165 F 881, 887-88 (4th Cir. 1908) (under 1898 Act, bankruptcy courts could enjoin state foreclosure and lien enforcement proceedings and forbid state officers from executing judgment).

196. 11 U.S.C.A. § 362(d)(1) (West Supp. 1979). The bankruptcy trustee has a duty to protect adequately the secured property. See *id.* §§ 361-364.

essary for the debtor's reorganization.¹⁹⁷ A judgment lienor therefore may request termination of the automatic stay in order to proceed with enforcement of his lien in state court.¹⁹⁸

Status of a Judgment Lienor

The 1898 Bankruptcy Act treated the creditor with a judgment lien on property in the bankrupt estate as a secured creditor whose claim took priority over that of an unsecured creditor.¹⁹⁹ Under the Bankruptcy Code of 1978, a judgment lienor whose lien cannot be avoided by the bankruptcy trustee is likewise a secured creditor. To retain the advantage of his lienor status, however, the creditor must file a claim as a secured creditor pursuant to section 501.²⁰⁰

As a secured claim, a valid²⁰¹ judgment lien takes priority in the bankruptcy distribution; the trustee must satisfy the judgment lien to the extent of the realty securing the lien before any payments are made to general creditors or creditors with section 507 priority.²⁰² Although the 1978 Code does not state expressly this proposition, it is implicit in section 507(b). Section 507(a) establishes the general order of priority in distribution. If a secured claim, entitled to adequate protection under the 1978 Code²⁰³ does not receive such protection, section 507(b) grants that claim priority over every other allowable claim, including those given special priority

197. *Id.* § 362(d)(2).

198. If the validity of the lien is established and the amount of the lien exceeds the value of the security to the estate, the court will grant the request for relief. For a discussion of the automatic stay and an overview of the 1978 Code, see Klein, *The Bankruptcy Reform Act of 1978*, 53 AM. BANKR. L.J. 1, 20 (1979); Rendleman, *Liquidation Bankruptcy Under the '78 Code*, *supra* this issue.

199. See *Straton v. New*, 283 U.S. 318 (1931). In *Straton*, the Supreme Court recognized that bankruptcy law contained "no express provision preserving liens acquired by legal proceedings more than four months before the petition was filed." *Id.* at 322. The Court concluded, however, that the secured status of a lienor followed by implication from the fact that § 67(f) "voids only liens obtained by legal proceedings within [the four month] period." *Id.*

200. 11 U.S.C.A. § 501 (West Supp. 1979); see S. REP. NO. 989, 95th Cong., 2d Sess. 5, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5791. For discussion of the bankruptcy court's jurisdiction over assets subject to secured claims, see *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 737-38 (1931).

201. A valid lien here refers to a lien not subject to attack under the various avoidance provisions. See notes 202-29 *infra* & accompanying text.

202. See 11 U.S.C.A. § 507(b) (West Supp. 1979) (by implication).

203. See *id.* §§ 361-364.

in section 507(a).²⁰⁴ Claims fully secured by valid liens thus pass through bankruptcy unaffected unless the claim is disallowed under section 502.²⁰⁵ A valid judgment lien, however, remains junior to valid senior liens as determined under state law and accordingly takes in distribution of the secured asset.²⁰⁶

Section 506 of the 1978 Code focuses on the status of undersecured creditor.²⁰⁷ The undersecured creditor has a secured claim to the extent of the value of his collateral and an unsecured general claim for the balance.²⁰⁸ Therefore, if a judgment lienor's claim exceeds the value of the realty subject to his lien, he has a secured claim to the extent of the land value and an unsecured general claim for the remainder. Section 506(b) entitles an oversecured creditor, such as a judgment lienor whose claims is less than the value of realty subject to his lien, to interest on the claim and any reasonable fees, costs, or charges based on the agreement giving rise to it.²⁰⁹ Any part of the security in excess of the allowable claim goes to the bankruptcy trustee for the benefit of general creditors.²¹⁰

Invalidating the Judgment Lien

Several provisions of the 1978 Code give the trustee or the bankrupt debtor power to invalidate a judgment lien on property in the bankrupt estate. Section 544(a) of the Bankruptcy Code, the "strong arm clause," gives the trustee the powers of a day of bank-

204. *Id.* § 507(b); see 95 CONG. REC. H11,095 (daily ed. Sep. 28, 1978).

205. 11 U.S.C.A. § 506(d) (West Supp. 1979); see *id.* §§ 502(d), (e). Section 502 deals with the allowability of claims. Of particular interest to the judgment lienor is § 502(d), which disallows claims that the trustee may invalidate under the various avoidance provisions. See *id.* §§ 522, 544, 545, 547, 548, 549.

206. See H.R. REP. NO. 595, *supra* note 192, at 357, reprinted in AD. NEWS, *supra* note 192, at 6313.

207. 11 U.S.C.A. § 506 (West Supp. 1979).

208. *Id.* § 506(a). See H.R. REP. NO. 595, *supra* note 192, at 356, reprinted in AD. NEWS, *supra* note 192, at 6311.

209. 11 U.S.C.A. § 506(b) (West Supp. 1979). See H.R. REP. NO. 595, *supra* note 192, at 356, reprinted in AD. NEWS, *supra* note 192, at 6311.

210. *Oldden v. Tonto Realty Corp.*, 143 F.2d 916, 921 (2d Cir. 1944). The trustee also may recover expenses of preserving or disposing of property securing an allowed claim. 11 U.S.C.A. § 506(c) (West Supp. 1979). The legislative history adds that such expenses are allowed if the value of property exceeds the sum of these claims. See H.R. REP. NO. 595, *supra* note 192, at 357, reprinted in AD. NEWS, *supra* note 192, at 6313.

ruptcy judgment creditor or bona fide purchaser.²¹¹ The policy of this section is to prevent unperfected security interests from defeating the claims of general creditors by allowing the trustee, as a hypothetical judgment creditor or purchaser, to use state law to avoid the off-record transfer. Because the 1978 Code defines "transfer" to include an involuntary disposition of an interest in property,²¹² a judgment lien potentially is subject to avoidance as an off-record transfer if perfected or docketed after the bankruptcy petition is filed.

Section 544(a)(1) gives the trustee the power of a hypothetical creditor with a judicial lien²¹³ commencing on the date the bankruptcy petition is filed. According to state recording statutes, the trustee's hypothetical judicial lien would be prior in time and thereby prior in right to a judgment lien unperfected on the day of filing.²¹⁴ Having thus lost his lien and his secured status, the judgment creditor becomes a general creditor of the bankrupt estate.

Section 545 permits the trustee to avoid certain statutory liens. Although regulated by statute, a judgment lien is not a statutory lien²¹⁵ and does not come within the scope of this section.²¹⁶

Section 547 of the 1978 Code governs the trustee's ability to avoid preferential transfers of the bankrupt's property.²¹⁷ As defined in the statute, a transfer is a preference and thereby voidable by the trustee if it meets the following conjunctive criteria. Within the ninety days immediately preceding filing of the bankruptcy pe-

211. 11 U.S.C.A. § 544(a) (West Supp. 1979). This provision is the successor of § 70c of the 1898 Bankruptcy Act, 11 U.S.C. § 110c (1970) (repealed 1978).

212. 11 U.S.C.A. § 101(4) (West Supp. 1979).

213. A "judicial lien" means a lien obtained by legal or equitable process, including judgment, levy, or sequestration. *Id.* § 101(27). Sections 544(a)(2) and 544(a)(3) grant the trustee the powers of a hypothetical creditor with an unsatisfied execution or of a bona fide purchaser, respectively. Section 544(a)(3) is of little value in states like Virginia where recordation is required to establish the validity of a transfer as against the world. The provision is necessary, however, in states with recording statutes that require recordation of security interests in realty to prevail against bona fide purchasers only.

214. See note 107 *supra* & accompanying text.

215. The 1978 Code defines a "statutory lien" to be a "lien arising solely by force of a statute on specified circumstances or conditions, but not [a] judicial lien." 11 U.S.C.A. § 101(38) (West Supp. 1979).

216. *Id.* § 545.

217. *Id.* § 547. Section 547 succeeds § 60 of the 1898 Act. Bankruptcy Act of 1898 § 60, 11 U.S.C. § 96 (1970) (repealed in 1978).

tion and while insolvent, the debtor must transfer property to or for the benefit of a creditor in satisfaction of an antecedent debt, thereby enabling the creditor to receive more than he would in a hypothetical day of bankruptcy distribution.²¹⁸

A judgment lien created within the ninety day period prior to filing of the bankruptcy petition is a preference under the above section 547(b) definition. As discussed earlier, a judgment lien is a transfer.²¹⁹ It benefits the judgment creditor²²⁰ by giving him priority over other creditors. Because it secures the debt represented by the judgment, a judgment lien is a transfer for or on account of an antecedent debt. The 1978 Code creates a presumption of insolvency during the ninety-day period.²²¹

To determine whether the alleged preference falls within the ninety-day period, a transfer is made when the lien is perfected.²²² In Virginia, the date of transfer for judgment liens is the date of docketing. Calculation of the ninety-day period requires exclusion of the day of docketing and inclusion of the day the petition was filed.²²³

The final test for a preference is whether the creditor receives more by the transfer than he would be in a bankruptcy distribution.²²⁴ The court compares what the creditor received under the judgment lien with what he would receive if there was no judgment lien in a hypothetical bankruptcy distribution on the day of trans-

218. 11 U.S.C.A. § 547(b) (West Supp. 1979). See H.R. REP. NO. 595, *supra* note 192, at 177, 372 reprinted in AD. NEWS, *supra* note 192, at 6137, 6328. These five requirements change the former preference test, which required proof of insolvency at the time of the preferential transfer and proof that the creditor had reasonable cause to believe the debtor insolvent. Section 547 eliminates the reasonable cause requirement and reduces the former four-month preferential period to ninety days. The ninety days is expanded to one year, however, if the transferee is an insider or has reasonable cause to believe the debtor is insolvent. Therefore, the reasonable cause test is not entirely dead.

219. See note 212 *supra* & accompanying text.

220. A judgment creditor comes within the Code's definition of "creditor" as an entity with a claim. 11 U.S.C.A. § 101(9) (West Supp. 1979). "Claim" is defined in *id.* § 101(4).

221. *Id.* § 547(f).

222. *Id.* § 547(e)(1)(A). Upon docketing by the judgment creditor, a bona fide purchaser from the debtor loses his ability to obtain a superior interest in the debtor's real estate. Thus docketing meets the test for perfection established by § 547(e)(1)(A).

223. FED. R. CIV. P. 6(a), R. BANKR. P. 906(a). Section 547(e)(2) provides a ten-day grace period within which to perfect, but otherwise dates the transfer from docketing or, if not perfected at filing, from the day before filing. 11 U.S.C.A. § 547(e)(2) (West Supp. 1979).

224. 11 U.S.C.A. § 547(b)(5) (West Supp. 1979).

fer.²²⁵ Because the creditor would recover as a general creditor absent the lien, a judgment lien obtained within the ninety-day period meets this final requirement for a preference and therefore may be invalidated.

Under section 549, the trustee also has power to avoid transfers that occur after commencement of the case.²²⁶ A judgment lien commencing or enforced without court permission after the bankruptcy petition is filed constitutes a postbankruptcy transfer voidable by the trustee.²²⁷ Judgment lienors do not qualify as good faith purchasers under section 549(c) because they do not take by voluntary transfer.²²⁸

Section 546(a) contains a statute of limitation on the exercise of the trustee's avoidance powers.²²⁹ The limitation is the earlier of two years from the trustee's appointment or from the close or dismissal of the case.²³⁰ Section 546(b) permits a judgment lienor in jurisdictions that date a judgment lien by the relation back doctrine to perfect his lien against the trustee and avoid invalidation even though the judgment is recovered or the lien arises after bankruptcy.²³¹ Because Virginia no longer recognizes the relation back doctrine,²³² section 546(b) has no application to Virginia judgment liens.

Section 522, the exemption provision in the new Act, confers limited avoidance powers on the bankrupt debtor.²³³ Under section 522(f), the debtor may avoid the fixing of a judicial lien on his interests in property to the extent such lien impairs an exemption. Either of two exemption schedules are available to the debtor

225. *Id.* Under the former preference section, whether a creditor had received a preference was determined by the actual effect of the alleged preference when bankruptcy resulted, not by the effect on a hypothetical distribution at the time of the transfer. *Palmer Clay Prod. Co. v. Brown*, 297 U.S. 227, 229 (1936) (construing §§ 60(a) and 60(b) of the 1898 Act). Under the 1978 Code, the judge must consider how the estate would be distributed among all the creditors at the date of the transfer.

226. 11 U.S.C.A. § 549 (West Supp. 1979). Under this provision, the trustee must act within two years of the petition's filing or before the case is closed or dismissed. *Id.* § 549(d).

227. *Id.* § 549(a)(2)(B).

228. *Id.* § 549(c).

229. *Id.* § 546(a).

230. *Id.*

231. *Id.* § 546(b).

232. See note 8 *supra* & accompanying text.

233. 11 U.S.C.A. § 522 (West Supp. 1979).

under the 1978 Code: (1) state exemptions plus nonbankruptcy federal exemptions and property owned as tenancy by the entirety or joint tenancy; or (2) the federal exemption schedule in section 522(d), which includes jointly-owned and entireties property if the state exempts these.²³⁴ The 1978 Code, however, also allows states to prohibit use of the federal exemption schedule.²³⁵ The 1978 Code provides each state with the option of denying its citizens the availability of the federal exemption scheme; Virginia recently has elected to limit the exemptions in bankruptcy to those provided under state law.²³⁶ A Virginia debtor in bankruptcy therefore can avoid a judgment lien only to the extent the lien encumbers property covered under the state \$5000 homestead exemption.²³⁷

CONCLUSION

The judgment lien is the primary means by which a money judgment can be enforced against real property but it is also one of the least used creditor's remedies. If insurance to satisfy a judgment, does not exist garnishment or execution against the debtor's personal property generally offers the creditor a simpler and less costly method of enforcement. Nevertheless, the judgment lien on real property still provides an important tool to the otherwise unsecured creditor and, concomitantly, provides some modicum of protection to the debtor. Because the enforcement procedure is both expensive and time consuming, the judgment lien discourages the creditor from resorting to its use when only small amounts are at stake, thereby ensuring the debtor that he will not lose his home or other realty when the debt is for insignificant amounts. The creditor, however, is protected when the debts are sizable and warrant a creditor's bill by allowing him to proceed against the debtor's most valued possession, his land. Also, should the debtor choose bankruptcy over payment, the lien gives the creditor a priority over the other general creditors. Even though the lien may be

234. *Id.* § 522(b).

235. *Id.*

236. VA. CODE § 34-3.1 (Cum. Supp. 1979).

237. *Id.* § 34-4. The dollar limitation in the Virginia homestead exemption statute is \$5,000, as compared with the more liberal \$7,500 limit in the federal exemption schedule. 11 U.S.C.A. § 522(d)(1) (West Supp. 1979).

enforced infrequently, the priority it offers the creditor over subsequent and general creditors plus the leverage it provides the creditor in his dealings with the debtor ensures its continued importance in the future.

CHRISTOPHER R. MELLOTT