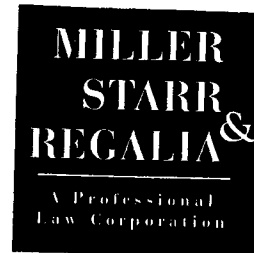


By Edmund L. Regalia and Basil Shiber



# PRIORITY MATTERS

## ESTABLISHING THE RELATIVE STATUS OF VARIOUS REAL ESTATE LIENS CAN PRESENT SOME SURPRISING TWISTS

**A** client buys a home for \$350,000, with \$250,000 of this amount derived from a bank loan secured by a deed of trust executed by the client. The remaining \$100,000 of the purchase price is in the form of the client's unsecured note made payable to the seller. At the time of the purchase, the client was a lessee under a one-year lease with an option to purchase, which he exercised.

During the course of the lease and before the purchase, a creditor obtained a judgment against the client and recorded an abstract of judgment with the county recorder's office. Also, during the course of the lease the client, with the permission of

the lessor, had started construction of an addition to the home and had employed a general contractor for this job.

A few months after the client acquired title, he lost his job. Unable to find immediate employment, he defaulted on all of his obligations. The general contractor promptly filed and perfected a mechanic's lien for the labor and material expended in constructing the addition to the home. The bank initiated foreclosure proceedings under its note and deed of trust, and the seller-lender exercised its right to accelerated payments under the unsecured note.

In the ensuing controversies among the various creditors, the client's attorney must

determine: 1) which creditor has priority over the others, and 2) which assets the creditors can reach in order to realize their claims.

In this scenario, the mechanic's lien claimant will be in first position with the right to resort to the real property through a foreclosure action. Thereafter, the mechanic's lien claimant will be able to pursue the client for any balance remaining unpaid after the property is sold at the foreclosure sale.

The bank will be in second position, but

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with the right to look only to the real property for the collection of its purchase-money note secured by deed of trust.<sup>1</sup> The seller will be able to establish its vendor's lien against the home, but in third position—junior to the bank lien. If there is inadequate equity in the property for satisfaction of the entire vendor's lien, the seller probably can look to the client for any balance remaining unpaid.

## **VENDOR'S LIENS, like purchase-money liens, originated long ago, although some of the attributes of vendor's liens might be analogized to more recently invented special liens afforded to mechanics, contractors, and subcontractors. But vendor's liens are unique.**

The judgment creditor comes into this mix in distant fourth place, but with the right to enforce the lien against the home property through foreclosure, and thereafter to pursue the client for the remaining unpaid balance owing on the judgment.<sup>2</sup>

The building blocks in support of these conclusions can be found in the interplay of the interests created by purchase-money liens, mechanic's liens, and vendor's liens. Of the three, the purchase-money lien is probably the closest to a superlien, which always takes priority, although the vendor's lien and the mechanic's liens also share some superlien characteristics. None of these liens, however, is a true superlien, such as a tax lien, but they can be characterized as partial superliens.<sup>3</sup>

**A** purchase-money lien is created by a mortgage or deed of trust in favor of the seller or a third-party lender to secure a loan made to the purchaser for the purchase of the property. This lien has a special priority status because it attaches to the property at the instant the buyer acquires title. Civil Code Section 2898(a) mandates this special priority position: "A mortgage or deed of trust given for the price of real property, at the time of its conveyance, has priority over all other liens created against a purchaser, subject to the operation of the recording laws."

The public policy expressed by this statute provides special protection to those who lend money for the purchase of real property. In order to assure that protection, the lien is deemed to arise immediately upon conveyance of the property to the buyer. No other lien can

zip in and attach to the purchaser's unencumbered interest, and there is no time when the purchaser holds the property unencumbered by the purchase-money lien.

This rationale is well explained in an old (1898) but seminal case, *Van Loben Sels v. Bunnell*.<sup>4</sup> Referring to the priority created by Civil Code Section 2898, the California Supreme Court stated:

This is but the recognition of an equitable principle which was early declared. It came into existence at a time when title, and not a mere lien, passed to the mortgagee by virtue of the mortgage.

The court described the legal history of this protection of the seller's interest in the property:

It was recognized that the vendor who had parted with his land, and had taken to secure payment of the purchase money a mortgage upon that same land, could not suffer an impairment of his security, and perhaps an absolute loss of a large part of the purchase price, by other rights such as dower, or the right of a judgment creditor attaching to the property in the brief time during which title was held by the vendee. To save this result equity formulated the fiction that when the deed and mortgage were part of the same transaction and well-nigh simultaneous in time, the seisin of the vendee was too short to allow the attachment to the property of any such lien or claim.

Finally, the court focused directly on the rationale supporting this special priority protection:

It is said in somewhat technical justification of the fiction that the execution of the deed and the mortgage, being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through him and vests in the mort-

gagee without stopping at all, and that during such instantaneous passage liens cannot attach to the title.<sup>5</sup>

The purchase-money lien duly created and recorded at the time of the conveyance has priority over most other liens, including mechanic's liens (when the work did not commence and was not physically apparent before the purchase), prior recorded judgment liens, simultaneously created vendor's liens, and contractual lien rights arising out of the provision of services and other land-related contracts.

As the last clause of Civil Code Section 2898 makes clear, the lien is subject "to the operation of the recording laws." Thus recording is necessary to assure the priority of the purchase-money lien. As an example, if, through an error, a deed of trust securing a loan made for payment of the purchase price is not recorded until a month after the conveyance of the property to the buyer, another lien claimant that records its lien during that month would take priority over the purchase-money lien, assuming the intervening lienholder was without notice or knowledge of the purchase-money lien.<sup>6</sup>

**T**he vendor's lien is unique. Like purchase-money liens, vendor's liens originated long ago, although some of the attributes of a vendor's lien might be analogized to more recently invented special liens afforded to mechanics, contractors, and subcontractors. A vendor's lien is created whenever a seller conveys title of real property to a buyer and a portion of the purchase price remains unpaid. Vendor's liens arise purely by operation of law and are waived if the seller takes security for the unpaid debt.<sup>7</sup> They exist only in favor of sellers, not third-party purchase-money lenders, and constitute a specific instance of the more general equitable lien.<sup>8</sup>

The vendor's lien is the subject of two sections of the California Civil Code. Under Section 3046, "[o]ne who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." Section 3048 of the Civil Code provides that the vendor's lien is "[v]alid against everyone claiming under the debtor, except a purchaser or encumbrancer in good faith and for value."

In short, the vendor's lien is fully effective though not in writing and not recorded. The lien, however, is subject to losing priority to an intervening encumbrancer who pays value and lacked adequate notice or knowledge of the existence of the vendor's lien.

Despite the plethora of decisions on the subject of liens and their priorities, the collision between two simultaneously created liens arising out of a purchase transaction—

## The Hierarchy among Real Estate Liens

	1 MECHANIC'S LIENS	2 PURCHASE-MONEY LIENS	3 VENDOR'S LIENS	4 CONSENSUAL LIENS	5 JUDGMENT LIENS
1 MECHANIC'S LIENS		1 senior to 2 if work starts before conveyance; junior if work starts after conveyance	1 senior to 3 whether work starts before or after conveyance—but not if 1 has notice or knowledge when work started after conveyance	1 senior to 4 if work starts before conveyance, otherwise junior	5 always junior to 1
2 PURCHASE-MONEY LIENS	1 senior to 2 if work starts before conveyance; junior if work starts after conveyance		2 always senior to 3	Unsettled law, but 2 probably always senior to 4	2 always senior to 5
3 VENDOR'S LIENS	1 senior to 3 whether work starts before or after conveyance—but not if 1 has notice or knowledge when work started after conveyance	2 always senior to 3		3 senior to 4 if the consensual contract lien is recorded before conveyance; junior thereafter unless consensual claimant has notice	Unsettled law, but 3 probably always senior to 5
4 CONSENSUAL LIENS	1 senior to 4 if work starts before conveyance, otherwise junior	Unsettled law, but 2 probably always senior to 4	3 senior to 4 if the consensual contract lien is recorded before conveyance; junior thereafter unless consensual claimant has notice		Unsettled law, but 4 probably always senior to 5
5 JUDGMENT LIENS	5 always junior to 1	2 always senior to 5	Unsettled law, but 3 probably always senior to 5	Unsettled law, but 4 probably always senior to 5	

**Assumes prompt recordation upon creation in all cases, except for vendor's liens**

the purchase-money lien and the vendor's lien—was not addressed in case law until 1992. In *Brock v. First South Savings Association*,<sup>9</sup> the seller of a parcel of property accepted the buyer's unsecured promissory notes for a part of the purchase price, and the buyer obtained a loan from a financial institution, secured by a deed of trust on the property, for the balance of the price. After the sale escrow closed, the buyer defaulted both on the secured loan and on the unsecured promissory notes given to the seller. The secured lender foreclosed upon the property, and then the unsecured seller filed suit against the lender, asserting that its vendor's lien had priority over the lender's purchase-money deed of trust.

The trial court, faced with the need to reconcile two apparently irreconcilable sections of the Civil Code—Section 2898 and Section 3048—gave priority to the vendor's lien under Section 3048. The trial court further found that the secured lender knew of the unsecured note taken by the seller prior to the close of escrow and therefore was not a good-faith encumbrancer.

In a lengthy opinion that discussed the

historical origin of both liens,<sup>10</sup> the court of appeal reversed, concluding that under the common law principles codified in the relevant statutes, "legal" liens took priority over "equitable" liens. Since the vendor's lien had always been considered an equitable lien, it was junior to the simultaneously created purchase-money deed of trust.<sup>11</sup> The court noted that each of the parties had offered ingenious explanations of the statutory language, but "these explications fail to persuade us that we could determine which statute controls here based on their literal language alone."<sup>12</sup> The court posed the issue as follows:

Assuming that a purchase-money mortgage and a vendor's lien arise at the same time, "this presents directly the question, which of the two liens occurring at the same instant of time has the superior equity, the one [the vendor's lien] a constructive one only, arising upon a secret trust by operation of law, or based upon the ground of its being a natural equity connected with the consideration of the property purchased, the other [the purchase-money mortgage] arising upon a specific legal

lien based upon written contract and made a matter of public record?"<sup>13</sup>

The *Brock* court referred to *Fisk v. Potter*,<sup>14</sup> an 1865 New York case, to answer this question. According to *Fisk*,

However potent this latent unwritten equity lien has been regarded in cases between vendor and vendee, it cannot be held in a court of equity that it possesses a higher claim than would a written and unrecorded [sic] mortgage. In regard to the latter, a search of the public records protects a purchaser against it. Upon every sound principle of the law of equity, as well as of public policy, bona fide purchasers and mortgagees who are about to invest money on the faith of title, should be held to have satisfied the demands of reasonable diligence, when they find an unincumbered [sic] record.<sup>15</sup>

The *Brock* court acknowledged that even though both liens were codified by statute in the 1872 Civil Code, the courts have continued to describe the vendor's lien as an equitable lien in keeping with the rule of con-

struction that statutes codifying existing common law should be viewed as a continuation of common law.<sup>16</sup>

In subordinating the vendor's lien to the purchase-money lien, the *Brock* court was undoubtedly correct according to other sound and practical reasons under current California law. Suppose, for example, that the seller had taken back a note secured by a junior deed of

mechanic's lien is a superlien in some limited aspects. For example, under Civil Code Section 3134, a mechanic's lien takes priority over any lien, mortgage, deed of trust, or other encumbrances upon the improvement and the site that attach subsequent to the date of "commencement of the work of improvement." A mechanic's lien also takes priority over liens for which the claimant had

dor's lien also will be junior to a mechanic's lien even when the work was commenced after the conveyance. This is because of the provision in Section 3048 that gives the vendor's lien priority except in relation to a purchaser "or encumbrancer in good faith and for value." Thus a mechanic's lien claimant who furnishes labor and materials for a project after the conveyance, without knowledge or notice of the alleged existence of a vendor's lien, will have priority over that vendor's lien.<sup>20</sup>

## **IN A CONTEST between a purchase-money lien and a vendor's lien—one consensual, known, and recorded; the other created by the operation of law, secret, unrecorded, and unenforceable until an action is filed—the purchase-money lien is the lien that prevails.**

trust recorded through the purchase escrow to secure the payment of the balance of the purchase price. Under Civil Code Section 580(b), California's antideficiency law, the seller could resort only to the security of the real property and usually would be subordinate to foreclosure by the secured third-party lender. Why should a seller that accepts an unsecured note have rights greater than the seller that accepted a secured note, including the right to assert the priority of the unsecured note through a vendor's lien, as against the third-party purchase-money encumbrancer whose lien was recorded?

In some situations, the seller, for good reasons, could decide to accept an unsecured note so that the seller could enforce its lien against the general assets of the purchaser in the event of default. But it would appear to be inequitable to allow the seller to contradict the statutory priority of the third-party purchase-money creditor with respect to resorting to the real property security.

Thus, in the contest between these two simultaneously created liens—one consensual, known, and recorded; the other created by the operation of law, secret, unrecorded, and unenforceable until an action is filed—the purchase-money lien prevails.

**A**n entire title of the Civil Code, Sections 3082 et seq., is devoted to mechanic's liens and other remedies for those who furnish labor and materials for the construction of real property improvements. Statutes dealing with priorities for mechanic's liens are set forth at Sections 3134 through 3140. A

no notice and which were not recorded at the time of commencement of the work of improvement.

Case law has established the rule that evidence of commencement of the work of improvement exists when there is apparent, visible physical activity or alteration at the site, such as trenching or digging for foundations or grading work.<sup>17</sup> Since mechanic's liens, once perfected, take priority on a relation-back theory to the time when work on the site commenced, a mechanic's lien will take priority over both a purchase-money mortgage or deed of trust and vendor's lien created after work commenced but prior to the mechanic's lien being recorded. In short, the super right of the mechanic's lien claimant cannot be evaded by transferring the property to another person after construction has actually commenced.<sup>18</sup>

However, it is equally clear that when the purchase-money deed of trust is recorded prior to the time of the actual commencement of the work, the mechanic's liens will be junior and subordinate to the purchase-money deed of trust. This is true even if the seller that recorded the deed of trust had encouraged the commencement of the work in its contract with the purchaser. The seller would be estopped from asserting priority for its purchase-money deed of trust only if the mechanic's lien claimants could prove detrimental reliance.<sup>19</sup>

The vendor's lien will be junior to a mechanic's lien recorded after the conveyance when the work of improvement is commenced prior to the conveyance, but the ven-

**P**erhaps the most lowly of this mix of liens is the judgment lien.<sup>21</sup> It is junior to the later-recorded purchase-money lien and also to the vendor's lien. Two cases stand out in any discussion and review of the junior status of a prior recorded judgment lien: *Mercantile Collection Bureau v. Roach*<sup>22</sup> and *Walley v. P.M.C. Investment Company*.<sup>23</sup>

In *Mercantile*, the court noted that a judgment lien is purely a creature of statute unknown at common law. A judgment lien will not attach to a mere equitable interest but only to property actually owned by the judgment debtor based on a vested interest in the land.<sup>24</sup> Accordingly, under the priority created by Civil Code Section 2898, the purchase-money lien has priority over the prior recorded judgment lien.

*Walley* is in accord but takes the analysis further: it shows that the clause of Section 2898(a) making the purchase-money encumbrance "subject to the operation of the recording laws" means only that the seller or third-party purchase-money lender is bound by notice derived from the record of the property being conveyed. The seller or third-party purchase-money lender are not required to search the record for liens against the purchaser existing before, or at the moment when, the title is conveyed to the seller. Similarly, as noted in *Ludy v. Zumwalt*, an even earlier case, when a seller records its purchase-money deed of trust concurrently with the deed to the buyer, the seller (and presumably the same would be true of a third-party purchase-money lender) will not lose priority by failing to examine the record for encumbrances created by the buyer on the property prior to the recording of the conveyance.<sup>25</sup>

A vendor's lien is also superior to a judgment lien. If the judgment lien is created prior to the conveyance of title that operates to create the vendor's lien, the statute gives priority to the vendor's lien except as to a purchaser or encumbrancer in good faith and for value. It seems clear that a judgment lien creditor, even though entitled under Code of Civil Procedure Section 697.30 to a lien against property subsequently acquired by the debtor, cannot satisfy the requirements of being a bona fide encumbrancer as against the later-

created vendor's lien in favor of the seller.

A closer question arises from the judgment lien that is recorded after the conveyance, because the secrecy of the vendor's lien (until a lawsuit is filed to enforce it) would deprive the judgment creditor of notice or knowledge of the existence of that lien. Even in this case, however, a judgment lien probably would be junior to the vendor's lien because a judgment lienor is not an encumbrancer in good faith and for value and is therefore subject to all prior interests in the property, whether known or unknown, recorded or unrecorded.<sup>26</sup>

Some interesting problems arise with respect to the relationship of other types of liens versus purchase-money or vendor's liens. In the oft-cited *Ludy*<sup>27</sup> case the issue of priority was litigated between 1) a water-supply contractor that had recorded its contract to supply water to an optionee of the property, and 2) the seller/purchase-money lender that had later sold the property to the optionee when the optionee exercised the option. In a lengthy opinion for its time, the court upheld the priority of the purchase-money mortgage over the prerecorded water sale contract and reinforced the rule that the conveyance and purchase-money mortgage are essentially one act.

In so doing, the *Ludy* court did not directly cite Civil Code Section 2898 but instead analyzed the situation pursuant to Civil Code Section 1213, which provides that an instrument gives constructive notice of its contents to subsequent purchasers and mortgagees from the date of the filing of the instrument. The court concluded that there was no obligation on the part of the seller, prior to recording its mortgage, to examine the record for prior liens created by the buyer/optionee because the optionee, prior to the exercise of the option, was a stranger to the claim of title.<sup>28</sup>

Unfortunately, the court then struggled to create a distinction between the pre-conveyance option held by the optionee and a hypothetical contract of sale, implying that in the latter situation the purchaser might have an interest in the property sufficient to create a lien prior to the subsequent purchase-money lien:

If the Zumwalts, at the time of executing the contract with the appellant, were connected in any way with the record title to the property, then the position of appellant here would be impregnable; but...it is clear to our minds that at the time mentioned, the Zumwalts had no more connection with the title to the property than any other person having no transaction with the owner of the land regarding

said property.<sup>29</sup>

This unfortunate dictum, made without an analysis of the effect of Civil Code Section 2898, led to further apparent confusion in the 1932 California Supreme Court case of *Chapman v. Great Western Gypsum Company*.<sup>30</sup> In that case, the owner of a leasehold interest containing an option to purchase the fee had mortgaged his lease to secure a debt. Thereafter, the lessee/mortgagor assigned the lease to a third party who had full knowledge of the mortgage. The third party exercised the option and obtained a conveyance of the fee. The court held that the lien of the mortgage followed the exercise of the option and attached to the fee in the hands of the third-party successor to the optionee.

Interestingly, in *Chapman* all parties conceded that the purchase-money mortgage involved in the case was entitled to priority over all the other liens. The court nevertheless went on to discuss and distinguish *Ludy* and noted that, under the *Ludy* analysis, the debtor in *Chapman* had a leasehold estate that "clearly indicated that [the debtor was] connected with the record title."<sup>31</sup>

Though the *Chapman* case did not involve an issue of priority, the adoption of the *Ludy* analysis leaves open a broader, and troubling, question, even recognizing that the parties in *Chapman* did not litigate, but rather conceded, the priority of the purchase-money mortgage: if the purchaser, prior to the purchase, has a recorded but lesser interest in the real property, is the lien of the subsequent purchase-money lender or vendor subordinate to the lien of the prior third-party lienor against the lesser interest, such as the lease involved in *Chapman*?

The answer is probably not, for several reasons:

- There was no discussion in *Ludy* concerning the effect of Civil Code Section 2898.
- In *Chapman*, the California Supreme Court, while appearing to adopt the analysis in *Ludy* and thus recognizing the validity of a lien against the leasehold as being transferred to the fee when the purchase option was exercised, did not discuss Section 2898 and the priority created by that section. Rather, the court noted that all parties had conceded the priority of the purchase-money mortgagee.
- Even though the statutes that confirm the existence of purchase-money and vendor liens make them subject to the recording laws,<sup>32</sup> and therefore will put the purchase-money encumbrancers and vendors on notice of the prior lien, the notice would extend only to the existence of the lien upon the junior interest, not the subsequently acquired fee interest in the property.
- The strong considerations of public policy that are implicated in these two special priority

statutes should overcome any claim that consensual lien interests in a part of the full bundle of fee property rights provides any priority for those rights.<sup>33</sup> Thus it is highly probable that both the purchase-money lien and the vendor's lien take priority over prerecorded rights and liens upon partial interests in the property even though the latter might be classifiable as real property.

There still are some additional questions not definitively answered with respect to the relationship between real property liens. Consider the situation of a delayed recording of the purchase-money deed of trust. As an example, suppose that due to a title company error the purchase-money deed of trust of the lender bank is not recorded until 10 days after the escrow has closed and title has been delivered to the purchaser. In the interim, a judgment lien is recorded against the purchaser. The judgment lien probably would still be inferior, because a judgment lienor could not establish its status as a bona fide encumbrancer under the recording laws. But this answer becomes less clear if the intervening lien is a consensual contract lien created in favor of a supplier of services or value to the property. And what if a contractor, at the purchaser's request, commences construction work on the property in the interim? In each circumstance the purchase-money lender would probably become junior to such encumbrancers, assuming that the latter were without notice or knowledge of the existence of the purchase-money security. The same result would follow with regard to the vendor's lien.

As to the relationship between the purchase-money lien and the vendor's lien, the delay in the recordation of the purchase-money lien probably would not have any effect on the outcome. Both liens are created at the time of the conveyance and the vendor could not claim that the purchase-money lienor was not an encumbrancer in good faith and for value.<sup>34</sup>

Suppose that a lender makes a loan to a purchaser for the acquisition of the property, but the loan also is made for other purposes, including, for example, construction on the property or for the general purposes of the debtor. To what extent can the lender claim purchase-money priority for its deed of trust? The most likely answer is that the priority under Civil Code Section 2898 can be claimed only for that portion of the proceeds that was used in the purchase of the property. A seller that took back unsecured paper for part of the purchase price might well have vendor's lien priority over the balance that is owed to the lender (i.e., not used in the purchase of the property),<sup>35</sup> assuming that the vendor had not waived its lien or was not estopped by virtue of representations or conduct relied

upon by the lender when it made its loan. In this situation, when the money loaned for the purchase is only a part of the lien being asserted by the lender, the results for the judgment creditors and the consensual contract lien creditors probably will be the same: both will be junior to the entirety of the lender's loan, assuming that the loan was recorded simultaneously with the conveyance.

The complex relationships among the purchase-money lien, the mechanic's lien, and the vendor's lien remain open to further court interpretation. (See "The Hierarchy among Real Estate Liens," page 55.) After all, these liens are only partial superliens. None is truly a superlien, such as the recurring liens for taxes and assessments, which always take priority notwithstanding the time of creation or recordation of the other liens, and are not subject to any attack based upon public policy analysis or statutory construction. ■

<sup>1</sup> In the case of a third-party lender, however, the anti-deficiency protection for the purchaser-borrower applies only if the security property contains four or fewer residential units and the property is occupied wholly or in part by the purchaser borrower. See CIV. CODE §580b.

<sup>2</sup> The hypothetical client in this example in most situations would probably have chosen bankruptcy as the most expeditious and efficient solution for this predicament. In the absence of fraud, the client will likely be discharged from personal liability for his various debts. Even in bankruptcy court, however, the scenario will probably be played out with about the same practical consequences as to the property, but only after relief from the automatic bankruptcy stay is obtained, allowing for the pursuit of state actions, or through adversary proceedings in the bankruptcy court itself.

<sup>3</sup> See REV. & TAX. CODE §2192.1.

<sup>4</sup> Van Loben Sels v. Bunnell, 120 Cal. 680 (1898).

<sup>5</sup> *Id.* at 683. In the absence of statutory special priority, different liens on the same property have priority according to the time of their creation. See CIV. CODE §2897. A general rule for real estate liens is that they attach in the order of their recordation. See 55 Cal. Jur. 3d, *Records and Recording Laws* §44, at 174-76.

<sup>6</sup> The "recording laws" referred to in CIV. CODE §2898 do not pertain solely to rules involving the recording of documents. Those same laws establish that a party that records first but with actual notice of another lien sufficient to defeat any claim to the status of bona fide encumbrancer will lose any claim to priority. See 55 Cal. Jur. 3d, *Records and Recording Laws* ¶¶45-46, at 177-84.

<sup>7</sup> Machado v. Bank of Italy, 67 Cal. App. 769, 776 (1924).

<sup>8</sup> Equitable liens require court action for their validity, priority, and enforceability. They constitute a charge upon specific property, and will usually be subject and subordinate to bona fide encumbrancers that have relied upon the record title in advancing money or taking other action secured by the mortgage or deed of trust against the property. See Title Ins. and Trust Co. v. Cal. Dev. & Co., 171 Cal. 173 (1915) (imperfect attempt to create a mortgage or other lien); Beal v. United Properties Co. of Cal., 46 Cal. App. 287 (1920) (same); Estate of Henshaw, 68 Cal. App. 2d 627 (1945) (equitable assignment of a fund); and other situations where justice and equity require that a party be pro-

tected or reimbursed through a lien whose scope and enforceability are determined by the court judgment itself. See, e.g., Jones v. Sacramento Savings, 248 Cal. App. 2d 522 (1967) (in order to avoid unjust enrichment, seller whose deeds of trust were entitled to priority because of violations to conditions of subordination was subject to equitable lien in favor of lender whose deed of trust was declared junior to the seller's deeds of trust); In re McConville, 110 F. 3d 47 (9th Cir. 1997) (lenders that loaned money in violation of bankruptcy stay were nevertheless entitled to an equitable lien against the property for the amounts actually advanced).

<sup>9</sup> Brock v. First South Savings Ass'n, 8 Cal. App. 4th 661 (1992), *rev. denied* (1993).

<sup>10</sup> The conclusions reached by the court in its extensive historical analysis might have been reached more simply by accepting the argument that the vendor's lien is a secret lien and cannot be given effect without a lawsuit filed to enforce it. Thus, in the absence of actual knowledge that the seller has taken unsecured notes as a part of the purchase price, it would appear that the purchase-money lender should take priority, because the recording laws would not give that lender any notice of the existence of the vendor's lien. However, the decision appears to sanction the priority of the purchase-money lien over the vendor's lien even when the purchase-money lender has notice before the close of the escrow that the seller will be taking unsecured notes for a part of the purchase price, as the trial court found in Brock.

<sup>11</sup> Brock, 8 Cal. App. 4th at 675-76.

<sup>12</sup> *Id.* at 668.

<sup>13</sup> *Id.* at 673-74.

<sup>14</sup> Fisk v. Potter, 41 N.Y. (2 Keyes) 64 (1865).

<sup>15</sup> Brock, 8 Cal. App. 4th at 674 (citing Fisk, 41 N.Y. (2 Keyes) at 74-5).

<sup>16</sup> Brock, 8 Cal. App. 4th at 675.

<sup>17</sup> See CIV. CODE §3102.

<sup>18</sup> Without this statutorily created priority for the relation-back theory in mechanic's liens, it is doubtful that the commencement of the work prior to a transfer of the property would create any argument in favor of the lien claimant for priority over either the purchase-money lien or the vendor's lien. However, it is possible that an estoppel theory might be utilized successfully in cases, for example, in which the seller arranged for the construction of the improvements.

<sup>19</sup> Rheem Mfg. Co. v. United States, 57 Cal. 2d 621 (1962).

<sup>20</sup> See Schut v. Doyle, 168 Cal. App. 2d 698 (1959) (a lumber company that took a note secured by a deed of trust from the landowner in consideration of previously furnished building materials had priority over the vendor's lien of the former owner when the lumber company had no notice of that lien).

<sup>21</sup> The rules regarding the priority of attachment liens and execution liens generally are the same as those for judgment liens.

<sup>22</sup> Mercantile Collection Bureau v. Roach, 195 Cal. App. 2d 355 (1961).

<sup>23</sup> Walley v. P.M.C. Investment Co., 262 Cal. App. 2d 218 (1968).

<sup>24</sup> Mercantile, 195 Cal. App. 2d at 357.

<sup>25</sup> Ludy v. Zumwalt, 85 Cal. App. 119, 129 (1927).

<sup>26</sup> 20th Century Plumbing Co. v. Sfragola, 126 Cal. App. 3d 851, 853-855 (1981); Hansen v. G. & G. Trucking Co., 236 Cal. App. 2d 481, 496 (1965).

<sup>27</sup> Ludy, 85 Cal. App. 119.

<sup>28</sup> *Id.* at 125.

<sup>29</sup> *Id.* at 133.

<sup>30</sup> Chapman v. Great Western Gypsum Co., 216 Cal. 420 (1932).

<sup>31</sup> *Id.* at 433.

<sup>32</sup> See Brock, 8 Cal. App. 4th at 670, in which the court

held that "subject to the operation of the recording laws" [in CIV. CODE §2898] means essentially the same thing as [CIV. CODE §3048's condition 'except a purchaser or encumbrancer in good faith and for value.'"]

<sup>33</sup> Cases have affirmed repeatedly that sellers of property are entitled to special consideration and protection in the law. See, e.g., Roskamp Manley Associates, Inc. v. Davin Dev. & Inv. Corp., 184 Cal. App. 3d 513, 517 (1986).

<sup>34</sup> The latter situation will rarely occur in practice, because usually the seller that takes back unsecured paper as a part of the purchase price will know the details of the third-party loan furnishing the rest of the purchase price. This is not always the case, however, in light of the confidentiality that some escrow companies impose on instructions submitted to them. In Brock, 8 Cal. App. 4th 661, there were various inconclusive contentions made about the degree of knowledge by the buyer and the third-party lender of the source and application of the monies utilized in the purchase transaction.

<sup>35</sup> In analogous circumstances, the Third District Court of Appeal in Lennar v. Buice, 49 Cal. App. 4th 1576 (1996), held that in reaching conclusions as to competing priority claims, a loan that was heavily modified could be split into two parts vis-à-vis an objecting junior encumbrancer: the amount of the original loan would have priority, followed next by the junior encumbrance, and then the balance of the original loan created by the modifications would take third priority.

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