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THE INTERESTS CREATED BY THE INSTALLMENT LAND CONTRACT*

RICHARD H. LEE**

The rights and obligations of the parties to an installment land contract are, of course, in large part the result of the particular clauses used in the instrument. But, in addition to this, certain legal and equitable doctrines apply to the rights of the parties and affect strongly the relationship of the parties to each other and to the rest of the world. Chief among these are the legal determination of the contract covenants as being dependent or independent, the doctrine of mutuality in its application to specific performance, and the doctrine of equitable conversion. The first two affect the relationship of the parties between themselves; the doctrine of equitable conversion has broader implications and not only determines the rights of the parties as parties, but may control the legal implications of their dealings with third parties, strangers to the contract. It is here proposed to examine some of these relationships and implications and their effect upon the nature of the parties' interests.

I. DEPENDENCE AND INDEPENDENCE OF THE COVENANTS

The distinction between covenants or promises which are mutually dependent and those which are said to be independent is an ancient one.1 If the law will not compel one party to perform his promise until the other party has performed, or stands ready to perform, the promise of the one who must perform first is said to be independent and that of the other is termed dependent. The ordinary contract for the sale of land contains promises which are mutually dependent.2 The purchaser's promise to pay the price is dependent upon the vendor's promise to convey a marketable title and vice versa. At the closing the two acts are performed simultaneously. Neither party must trust the other. Neither risks his performance upon a mere expectation of performance by the other. But with the installment land contract it is otherwise. Generally the obligation of the purchaser under the installment land contract to make periodic payments is not dependent upon any performance by the vendor. The obligations are mutual but the vendor has usually not promised to perform until the purchaser has fully performed.

If the vendor does not promise to perform until after the purchaser has made all of the payments, the purchaser assumes the risk that the

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* This is the first of a series of three articles dealing with the installment land contract. The others will appear in subsequent issues of the Miami Law Review. Portions of this material are taken from a dissertation submitted in partial fulfillment of the requirements for the J.S.D. degree at New York University.
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2. Id. § 663.
vendor may never perform. True, after he has fully performed, the purchaser may obtain specific performance of the vendor's promise, but only if this is possible. If the vendor has no title, or an unmarketable one, all that the purchaser can rely upon is a judgment for damages, and if the vendor is insolvent, he has nothing. Suppose the vendor has no title at the time that the contract is entered into; must the purchaser make all his payments with no security that the vendor will ever acquire at title? The answer, in many cases, is yes. This is just what the purchaser has contracted to do, and assuming that the vendor has contracted in good faith and has been guilty of no fraud, it is no ground for rescission of the contract that he has an unmarketable title. The vendor has contracted to deliver a title when the purchaser has made all his payments and not before. So long as it is possible for the vendor to do so, the purchaser must assume the risk that he will do so. Of course, if the vendor cannot possibly perform, either because it will be impossible for him to obtain a title, or because there is an incumbrance which cannot be removed, it may well be that there has been sufficient anticipatory breach to permit the purchaser to rescind or sue for damages. But, in the absence of fraud or of proof of the inability of the vendor to perform, the purchaser, as a general rule, may not complain of defects in the vendor's title prior to the time set for conveyance.

The implied warranty of seizin and right to convey that is said to be a part of the contract for the sale of land is generally interpreted as a warranty of these facts only at the time set for conveyance. It is no defense to a suit on a note given in part payment of the purchase price under an executory land contract that the vendor has not then a good title. The insolvency of the vendor, although an equity to be considered in a suit for rescission, will not of itself be grounds; it is of importance only when the purchaser can establish that the vendor will not be able to perform


4. Luette v. Bank of Italy, 42 F.2d 9 (9th Cir. 1930), cert. denied, 282 U.S. 884 (1930); Normandy Beach Properties Corp. v. Adams, 107 Fla. 583, 145 So. 870 (1933).

5. Compare Uniform Commercial Code § 2-609: Right to Adequate Assurance of Performance. (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.


8. See McLennan v. Church, 163 Wis. 411, 158 N.W. 73 (1916); Annot., 109 A.L.R. 242, 248 (1937).

9. Loveridge v. Coles, 72 Minn. 57, 74 N.W. 1109 (1898).
on the closing date. Only if the defects complained of are incurable will the purchaser be excused from further performance and allowed to recover payments made.

II. Mutuality of Performance

The purchaser cannot put the vendor in default by a premature tender of the purchase price. If the contract calls for installment payments and does not permit the purchaser to prepay, the courts will not rewrite the contract to allow him to do so. But is the converse true? Can the vendor compel the payment of the installment without making or tendering an actual conveyance? There are a few cases which would limit the vendor's recovery to the damages occasioned by the breach but would bar a recovery of the payments due. Of course, if all payments are due, then judgment for the price can justifiably be conditioned upon the plaintiff-vendor's delivery of a marketable title. In reality this is specific performance, no matter which side of the court the suit is brought on. But when the contract does not call for a closing until the installments are paid and suit is brought for an intermediate installment, the problem is fairly complicated. This too is really a suit for specific performance, even though the action may be at law for the debt due, and unless the vendor can give assurance of his own performance, there is a sufficient lack of mutuality of performance so that *equity* would probably not compel payment.

But this is a suit at law, and usually it is a suit on a promissory note. To compel the vendor to tender a deed into court and to show a marketable title would be to allow the purchaser to complain of the state of the vendor's title prior to closing, and this is not the general rule followed by the courts. The purchaser agreed to make his payments without security; his promise was an independent one; and most courts will hold him to it.

The presence of an acceleration clause at the option of the vendor could eliminate the question of mutuality, because, by accelerating, the vendor obligates himself to deliver title; that is, when the option is exercised, the performances of the parties become mutually dependent.

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14. *Restatement, Contracts* § 373 (1932). "Requirement of Security that the Agreed Exchange Will Be Rendered. Specific enforcement may properly be refused if a substantial part of the agreed exchange for the performance to be compelled is as yet unperformed and its concurrent or future performance is not well secured to the satisfaction of the court."
15. If the price is payable in installments and the deed of conveyance is to be given on receipt of full payment, the vendor can maintain action for each installment as it falls due. In such action, it is not necessary for him to tender a deed, in court or elsewhere; but he will not be given judgment if he is shown to have repudiated the contract or to have become unable to convey the agreed title as and when the contract requires. 3A *Corbin, Contracts* § 666 (1960).
of the vendor to tender a marketable title prior to bringing suit may be fatal if the action is at law, although if in fact his title is marketable, he should succeed either in law or in equity regardless of the tender. The giving of a conditional decree is usually thought of as an equitable function, but there is no reason why a court of law could not act in the same fashion and condition relief to the vendor upon proof of his own performance. In a state in which law and equity are "merged" these objections vanish.\textsuperscript{10}

III. EQUITABLE CONVERSION

Pomeroy has described the circumstances giving rise to equitable conversion in the following language:

A contract of sale, if all the terms are agreed upon, also operates as a conversion of the property, the vendor becoming a trustee of the estate for the purchaser, and the purchaser a trustee of the purchase-money for the vendor. In order to work a conversion, the contract must be valid and binding, free from equitable imperfections, and such as a court of equity will specifically enforce against an unwilling purchaser.\textsuperscript{17}

It will be noticed that conversion depends upon specific performance and not specific performance upon conversion. Why Pomeroy singled out specific performance against a \textit{purchaser} as the basis of conversion is difficult to understand. It would seem that specific performance available against the \textit{vendor} would also give rise to equitable conversion. Walsh has recognized this, saying:

The vendor-purchaser relation, involving these important changes in the interests of the parties, [equitable conversion] arises out of the right to specific performance which one has against the other, and where that right does not exist the relation does not arise.\textsuperscript{18}

Possibly there may be a conversion on one side but not on the other. In \textit{Buckmaster v. Harrop;\textsuperscript{19}} in which the memorandum was signed only by the \textit{vendor}, no conversion was found to exist whereby the \textit{heir} of the deceased \textit{purchaser} could compel a sale to him at the expense of the \textit{estate}. This is a sensible result, but it points up the artificial nature of conversion by implying that there can be half a conversion. Logically, of course, there can be no such thing. But in aid of justice, if half a conversion produces a more equitable result, then half a conversion it shall be. The court, in \textit{Buckmaster}, recognized this, saying, "The question must be the same whether a purchase or a sale is insisted on: was the ancestor himself bound?\textsuperscript{20}"

\begin{itemize}
\item \textsuperscript{16} Fairlawn Heights Co. v. Theis, \textit{supra} note 13.
\item \textsuperscript{17} 4 \textit{POMEROY, EQUITY JURISPRUDENCE} § 1161, at 479 (5th ed. 1941).
\item \textsuperscript{18} \textit{WALSH, EQUITY} § 86, at 415 (1930).
\item \textsuperscript{19} 7 Ves. 341, 32 Eng. Rep. 139 (Ch. 1802).
\item \textsuperscript{20} Id. at 345, 32 Eng. Rep. at 140.
\end{itemize}
Most of the defenses to specific performance of a land contract, if available at all, are available to only one party. Thus, even though a vendor guilty of misrepresentation might not be able to compel the purchaser to perform, yet the purchaser can enforce the contract, and this should be enough to work a conversion of the vendor's interest if not that of the purchaser. The same reasoning would apply when one party has been guilty of laches, or sharp practice, or when there has been a mistake in integration which can be reformed. But if there has been a mutual mistake as to the subject matter, such that neither party can obtain specific performance, then there can be no conversion. In the case of the typical installment land contract, the purchaser usually cannot compel specific performance until after the last installment is due and paid because until then the vendor is not in default, and the vendor cannot seek specific performance in equity to compel payment unless there is an acceleration clause because there is a lack of mutuality of performance.\(^2\) Should not this inability to obtain specific performance eliminate any equitable conversion? It well might.

Until September of 1962, Illinois, although recognizing equitable conversion, found itself in a decided minority as to when the doctrine applied. The leading Illinois case until it was overruled by *Shay v. Penrose*\(^2^2\) in 1962 was *Chappell v. McKnight*.\(^2^3\) That case was an action of ejectment, directly concerned with rights in land. The defendant purchaser was in possession under a contract which was enforceable, if at all, only against one of the several persons holding interests in the land. In view of his dubious title, the vendor could not have compelled specific performance, and although the court conceded that the purchaser could have brought specific performance for whatever title the vendor had, the fact that the purchaser could have avoided the contract at will, because of the defects in the proffered title, was controlling. The oft-quoted language of this case represents a logical view of equitable conversion as applied to the problem of title alone, however inappropriate it may be in deciding insurance claims or tax liabilities:

A mere contract or covenant to convey at a future time, on the purchaser performing certain acts, does not create an equitable title. . . . When the purchaser performs all acts necessary to entitle him to a deed, then, and not until then, he has an equitable title, and may compel a conveyance. (Bispham's Equity sec. 365). When the purchaser is in a position to compel a conveyance by a bill in chancery, he then holds the equitable title. Before that he only has a contract for a title when he performs his part of the agreement.\(^2^4\)

\(^1\) *Restatement, Contracts* § 373 (1932).
\(^3\) 108 Ill. 570 (1884).
\(^4\) Id. at 575.
If equitable doctrines are limited to matters properly before a court of equity then this insistence upon the right to specific performance as a prerequisite to conversion is correct. However, most courts hold that the contract works a conversion from the date of its execution and this "conversion" is used in the solution of a multitude of problems.25

Actually equitable conversion is a means to an end and not an end in itself. Courts find or do not find a conversion as a step in determining the rights of the parties in various fact situations. To say that unless both parties can have specific performance there can be no conversion, or to say that a right to specific performance by either one is sufficient to work a conversion, is meaningless unless we know why we are concerned with conversion. For instance, if our inquiry is whether there existed an insurable interest sufficient to support recovery on a fire insurance policy, a manipulation of the concept of equitable conversion may be intellectually stimulating, but a more fruitful inquiry would be whether under the facts the insured stood to lose substantially in the event the premises were destroyed by fire.

In Phenix Ins. Co. v. Caldwell26 the Illinois Supreme Court applied the Illinois rule that a purchaser under an executory land contract takes no title, legal or equitable.27 Ruling that there was no equitable conversion as a result of the insured having entered into a contract to sell the premises, it was a logical step to find that there was no breach of the clause in the vendor's policy which provided for forfeiture in the event of "any change ... in title or possession ... or if the title or possession be changed for any cause whatsoever ..." or that the insured have other "than unconditional exclusive ownership ... or if any other person or persons have any interest whatever in the property described ... ."28 This is a just result but a more pertinent inquiry would have been to have inquired into the reason for forfeiture clauses and to have considered whether the insured's actions increased the risk. To decide the case on the ground of equitable conversion, or the lack of it, may satisfy the literal requirements of the policy language but it works a blind solution to the problem.29

In Capps v. National Union Fire Ins. Co.30 the peculiar position of the Illinois courts on equitable conversion this time worked to the advantage of the insurance company and against a purchaser in possession under an installment land contract. Here again was a sole ownership

25. 4 POMEROY, EQUITY JURISPRUDENCE § 1162 (5th ed. 1941).
26. 187 Ill. 73, 58 N.E. 314 (1900).
29. Interestingly, the court further stated that when the vendor receives the insurance payment "he will hold it for the benefit of the vendee . . . ." (Id. at 81, 58 N.E. at 316.), an odd result if the vendee has no legal or equitable interest in the property.
clause in the insurance policy. The court decided in favor of the company saying, "It is definitely established by the decisions, of this court that the vendee under an executory contract of sale has neither legal nor equitable title to the property covered by the contract."

The weight of authority is contrary to these Illinois cases but not much more perceptive. A majority of courts recognize an equitable conversion from the time of execution of an enforceable contract for the sale of land and thus will find the purchaser to be and the vendor not to be the sole and unconditional owner. To apply the doctrine of equitable conversion may or may not work a just solution in a particular case but it frequently obscures more than it reveals. A rigid application of the doctrine to determine such varied matters as the right of a purchaser to redeem the property from a tax foreclosure sale, the right of a vendor to take crops from the land, and the right of the vendor to quiet title, could lead to absurd results.

If the effect of equitable conversion is, in equity, to constitute the vendor a trustee of the land for the purchaser, and incidentally for his own security as well, and to constitute the purchaser a "trustee" of the purchase money for the use of the vendor, as Pomeroy states, then the result is very much like that obtained by a mortgage in a title jurisdiction where the legal title of the mortgagor is held by him as trustee for the mortgagor and as security for payment of the debt, and the mortgagor owes the debt to the mortgagee. The distinction in legal theory between the results of equitable conversion and the result created by mortgage is very slight. In each case the legal titleholder holds his estate only as security for the payment of a debt and the debtor can aspire to the legal title when he has paid the debt due and not before. But the practical distinction between the position of the mortgagor and that of the purchaser is immense. The mortgagor comes under the protecting cloak of equity. He has a right to redeem the property by making payment in full at a considerable time after it is due, despite the fact that the agreement or mortgage may require that it must be made on the law day. This right or equity of redemption may, of course, be foreclosed by the vendor's suit in equity, but only upon such terms as the court deems equitable. Strict foreclosure, when it is permitted at all, will be allowed only when it will not work an unjust forfeiture.
The usual method of foreclosure is by sale, and the mortgagee may resort to the property only to the extent of his security interest. In fact, if a purchase-money mortgagee buys in at the foreclosure sale, he may be treated as though he had strictly foreclosed and be denied a deficiency decree. He will not be permitted inequitably to have the land and his money as well. But the purchaser under an installment land contract is not assured any such treatment. While it is true that if the vendor resorts to equity for specific performance the purchaser may complete the contract and retain the land if he has the funds, and that if he does not have the funds the land will usually be sold and the proceeds applied towards the payment of the price, which is similar to the mortgage result or to foreclosure of a vendor's lien, the vendor in the typical case need not resort to equity. He may rest content with either inaction or with his remedies at law. He may treat the purchaser's default as a total breach and by the terms of the contract forfeit all payments made and retain his title to the land as well, or he may bring suit for the installments as they come due without tendering a deed. If there is an acceleration clause, the vendor may accelerate the payments and bring suit for the balance due, although here, he will be required to tender a deed and a marketable title. Should the purchaser be in possession, the vendor can resort to ejectment to have him removed without accounting for the excess of the payments received over the actual damage. If the purchaser is not in possession the vendor may bring suit in equity to quiet his title, and if he does so, equity will not necessarily require him to do equity by returning the excess payments despite the maxim that he who seeks equity must do equity. Of course, if the contract is not recorded and the purchaser is not in possession, the vendor need resort to no action legal or equitable but may proceed to sell to a bona fide purchaser and deliver a valid title. The purchaser in default has had very little success in suits for restitution of the bene-

40. Id. § 318.
41. Taylor v. Prine, 101 Fla. 967, 132 So. 464 (1931) denied a purchase money mortgagee a deficiency decree. The granting of a deficiency is discretionary with the Chancellor and although the fact that the mortgagee is also the purchaser is not controlling, it may strongly affect the equities. In Taylor the court recognized that the mortgagee could still seek relief at law for the balance of the debt. Today, however, Fla. Stat. § 702.06 (1963) restricts the purchase money mortgagee to relief in equity if the Chancellor has denied a deficiency.
42. Until 1954 Florida adopted the position that a deficiency decree could not be rendered in a suit for specific performance, distinguishing specific performance from suit for the purchase price and holding choice of either to be an election barring resort to the other. McCormick v. Bodeker, 119 Fla. 20, 160 So. 483 (1935). But Clements v. Leonard, 70 So. 840 (Fla. 1954) receded from this position and allowed a money decree for the balance of the purchase price over and above the proceeds produced by the sale of the property, thus conforming to the weight of authority.
43. Lawrence v. Miller, 86 N.Y. 131 (1881).
44. A. Corbin, Contracts § 666 (1960).
45. Fairlawn Heights Co. v. Theis, 133 Ohio St. 387, 14 N.E.2d 1 (1938).
47. Pierce v. Jones, 109 Fla. 517, 147 So. 842 (1933).
fits conferred under the contract. Only when a court can be persuaded that the vendor has "rescinded" is the vendor under a necessity to disgorge his profit.

A well-known catchphrase of the law is "once a mortgage always a mortgage." This expression is frequently used to describe the effect of a deed, absolute on its face but intended as security. Such a deed will be construed as a mortgage regardless of its form, and equity will demand that the grantor have an equity of redemption even if, by the instrument, the grantor disavows his claim to such equity. There can be no sensible distinction between the case of a legal title conveyed to secure the payment of a debt and a legal title retained to secure such payment. But the fact remains that such a distinction is made, and it is made most frequently in those very cases in which the similarity of the contract for deed and the mortgage should require that each possess an equity of redemption.

Even the Florida statutory statements of the equitable principle do not seem to cover the installment land contract when it is used as security for payment of purchase money. The Florida statute is as follows:

*Instruments deemed mortgages—All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraint and forms as are prescribed in relation to mortgages. Provided, however, that no such conveyance shall be deemed or held to be a mortgage, as against a bona fide purchaser or mortgagee, for value without notice, holding under such grantee.*

This statute is declaratory of the general equitable principle that equity regards substance and not form. It is broad enough to cover the contract for deed or installment land contract when such a contract is part of a security arrangement for the repayment of a loan. But, although there is dictum that it applies to installment land contracts generally, there is no such holding, and the Florida courts have consistently denied the purchaser in default the relief they so readily give to defaulting mort-

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48. 3 AMERICAN LAW OF PROPERTY § 11.78 (Casner ed. 1952).
50. "It is only another way of saying that a mortgage cannot be made irredeemable." Lord Davey in Noakes v. Rice, [1902] A.C. 24, 32.
51. See United Farmer's City Market, Inc. v. Donofrio, 43 Ariz. 35, 29 P.2d 144 (1934); Iowa R.R. Land Co. v. Michel, 41 Iowa 402 (1875).
52. FLA. STAT. § 697.01 (1963).
agors. The dictum appears in *Huguley v. Hall*\(^5\) wherein Mr. Justice Roberts says, "We have not overlooked that in Florida the purchaser of real property pursuant to a contract for deed, who defaults, is ordinarily entitled to an equity of redemption in said property subject to the protection of a court of equity."

Despite this recognition of some equities in a defaulting purchaser, the decision in *Huguley* is a harsh one and the dictum itself is supported by authorities which are not in point. *Huguley* was an action in equity to quiet title brought by a vendor out of possession against a purchaser in default in possession. The defendant moved to dismiss the complaint for failure to state a cause of action; the motion was denied. Defendant then moved to transfer the case to the law side of the court on the grounds that the remedy at law, presumably ejectment, was adequate. This motion was also denied and the Chancellor entered a summary final decree for the vendor adjudging the contract "to be null and cancelled and to be foreclosed."\(^4\) The decree allowed the vendor to clear her title of the contract without any provision for foreclosure sale or any opportunity accorded the purchaser to assert an equity of redemption. The district court of appeal affirmed without a majority opinion. However, Judge Sturgis in a well reasoned opinion dissented to the effect that ejectment was the proper remedy and that quia timet did not lie on these facts. The Florida Supreme Court denied certiorari, justifying the decree on the ground that the purchaser failed affirmatively to assert an equity of redemption, if he had one, and that the purchaser's failure to demand a jury trial prevented him from objecting to a vendor out of possession bringing suit to quiet title.

One of the two cases cited by the supreme court in support of its dictum on the defaulting purchaser's equity of redemption does not deal with foreclosure of such an interest but is primarily concerned with the application of the recording acts.\(^5\) The other authority cited is *Mid-State Investment Corp. v. O'Steen*.\(^6\) In this case the plaintiffs had purchased and taken possession of a house and were entitled to receive a deed from their vendor. They had obtained the purchase money from the defendant on a loan, and to secure the loan and to provide for repayment they assigned their deed to the defendant and entered a contract to purchase back their land from him by making installment payments, which would eventually satisfy the debt and entitle them to a reconveyance. The contract was a typical installment land contract containing a clause providing for forfeiture of all payments made as liquidated damage in the event of the plaintiff's breach and permitting the "grantor" to re-enter. The plaintiff breached and the defendant entered. The

\(^5\) 157 So.2d 417, 418 (Fla. 1963).
\(^4\) Ibid.
\(^5\) Hull v. Maryland Cas. Co., 79 So.2d 517 (Fla. 1955).
\(^6\) 133 So.2d 455 (Fla. 1st Dist. 1961).
question before the court was the applicability of Florida Statute 697.01 to this set of facts. It was held that this arrangement constituted a mortgage and must be foreclosed by sale as a mortgage. There is nothing surprising about this. This would be the general result in most jurisdictions.\(^5\) But here there was clearly a loan, and the contract was a part of the security for repayment. This case does not imply that if this had been a straightforward installment sale, that the purchaser would have had an equity of redemption.\(^6\)

Other Florida decisions would indicate that the purchaser in default is at the mercy of the vendor. The purchaser in default has no right to recover his payments made.\(^5\) He may not require the vendor to do equity as a condition of the vendor quieting title against him.\(^6\) He is subject to ejectment without an accounting despite the fact that he has made substantial improvements on the property.\(^6\) Only if the vendor seeks specific performance or "strict foreclosure" is the purchaser given a chance to redeem and if he fails given an opportunity to participate in the proceeds of a foreclosure sale.\(^6\) If the land exceeds the value of the payment outstanding, few well advised vendors would resort to these two latter remedies.

**A. Creditor's Claims, Mechanic's Liens**

Whether or not a mechanic's lien will attach to the interest of the parties to a contract for the sale of the improved land depends upon many factors. In the first place, mechanic's lien laws are statutory and thus subject to variation in the several jurisdictions. Also the question of the would-be lienor's compliance with the statute may be involved. But, in essence, the problem of the mechanic's lien is but a part of the larger problem of liens in general. It seems to be generally agreed that a party may subject his own interest in land to the claims of his creditors. This merely shifts the inquiry to a determination of the extent of the debtor's interest in particular land. An early Louisiana case, *Thompson v. Duson*,\(^6\) reached the conclusion that a purchaser under an installment land contract had no interest in the land but merely a contract claim against the vendor even though the contract obligated the vendor "to

\(^{57}\) See 1 JONES, MORTGAGES § 294 (8th ed. 1928).

\(^{58}\) But see Note, 16 U. MIAMI L. REV. 493 (1962).

\(^{59}\) Burke v. Wallace, 98 Fla. 604, 124 So. 30 (1929).

\(^{60}\) Pierce v. Jones, 109 Fla. 517, 147 So. 842 (1933). But see Taylor v. Rawlins, 86 Fla. 279, 97 So. 714 (1923) where "rescission" requires restitution.

\(^{61}\) Dannelly v. Russ, 54 Fla. 285, 45 So. 496 (1907).

\(^{62}\) In Florida "strict foreclosure" is one of the judicially prescribed methods of realizing on the vendor's security. But this is not strict foreclosure in the traditional sense, where the vendor or mortgagee retains his legal title and the equitable interest of the purchaser or mortgagor is foreclosed unless he makes payment within the allotted time. Florida's "strict foreclosure" results in a judicial sale. Barnett v. Dollison, 125 Fla. 254, 169 So. 665 (1936); Wordinger v. Wirt, 112 Fla. 827, 151 So. 47 (1933).

make a title ... when he (the purchaser) shall call for the same.\textsuperscript{64} Thus, creditors of the purchaser could not subject the land to their claims. The attorneys for the creditors argued that the vendor should be allowed what, in effect, would be a prior vendor's lien, and that the property be sold and the general creditors be permitted to participate in the proceeds of the sale after the vendor recovered the balance of the purchase price due. The court rejected this argument. It was held that the purchaser had no title, and thus that he had no interest which the creditors could reach. Making allowance for the fact that this case arose in a civil law jurisdiction and that it is of early vintage, nevertheless this position is not inconsistent with those Illinois cases which follow the doctrine of \textit{Chappell v. McKnight}.\textsuperscript{65} However, the Illinois court in \textit{Mackey v. Sherman}\textsuperscript{66} recognized that a purchaser in possession under an installment land contract does have an interest and that it is subject to the claims of his creditors. The interest of the vendor was not affected. This case was a suit for specific performance brought by the vendor against the defaulting purchaser in which the lienholder was made a party defendant. The decree forfeited the purchaser’s interest, found the lien to be a cloud upon the vendor’s title and ordered it removed. The lienholder, as cross complainant, sought to assert the lien against the vendor’s interest. If the interest of the vendor were deemed an incumbrance within the meaning of the Illinois mechanic’s lien statute\textsuperscript{67} the lienholder would be at least a junior encumbrancer, but if the effect of the decree were to forfeit the purchaser’s equity leaving the vendor holder of the entire title, then the lienholder’s security would be destroyed with the destruction of the purchaser’s interest. In affirming the decree for the vendor, the court referred to \textit{Capps v. National Union Fire Ins. Co.},\textsuperscript{68} which follows the \textit{Chappel} doctrine. In \textit{Capps} it was stated that a vendee has no interest in the property subject to contract, either legal or equitable. The \textit{Mackey} decision appears to restrict the \textit{Capps} case to suits on fire insurance policies and expressly acknowledges the doctrine of equitable conversion as “fully recognized by the decisions of the courts of this state.”\textsuperscript{69} Although the precise basis for the decision in \textit{Mackey} is somewhat obscure, it seems to rest upon the proposition that “if it had been the intention to subject the rights of vendors to liens of this kind, notwithstanding the contract for improvements was made without their knowledge, acquiescence or authority, the legislature would have said so.”\textsuperscript{70}

Most of the insurance cases which rely upon the doctrine of \textit{Chappell v. McKnight} are really distinguishable from that case. They are not hold-
ings that the purchaser has no interest at all, because the sole ownership clause would be enough to defeat the purchaser's claim under the policy regardless of the nature of his right.\textsuperscript{71} However, those Illinois cases which hold that a \textit{vendor} has sole ownership despite the contract to sell\textsuperscript{72} are somewhat inconsistent with the cases in the same jurisdiction which allow a creditor to reach the purchaser's interest.\textsuperscript{73}

An effort to use the doctrine of merger to subject the vendor's interest to mechanic's liens created by the purchaser was unsuccessful in \textit{Else v. Cannon}.\textsuperscript{74} The plaintiff contended that the purchaser's equity was not destroyed by surrender to the vendor but merely merged into the entire title, with his lien now affixed firmly to the whole. In rejecting this position the court used common sense in disregard of legal logic and held that although the vendor now owned the equitable as well as legal title, still, so far as creditors of the purchaser were concerned, the purchaser's equity, if any, was all that could be reached. In view of the fact that the purchaser's equity is at most a mere philosophical concept after it has been surrendered to the vendor, this gave scant satisfaction to the lienholder. It would seem that once a surrender or forfeiture has taken place, the interest of the purchaser has been destroyed, and with it any lien that encumbered it.

In \textit{Staley v. Woodruff},\textsuperscript{75} a suit to foreclose a mechanic's lien, the plaintiff contractor had dealt with one Cox, a purchaser under an installment land contract. The plaintiff had built a house upon the land under a contract with Cox. Upon Cox's default under this contract plaintiff served notice upon Cox of his intent to file a lien. This notice was required by the statute to be served upon the "owner or proprietor," and a question was raised as to whether such a notice was adequate or whether it should also have been served upon Staley, the vendor. The court held that service upon the purchaser, Cox, was sufficient notice of lien under the statute but that the plaintiff-contractor's lien was subordinate to the lien of the vendor, and that upon sale, which was ordered, the vendor should receive the balance due on the purchase price of the land and the rest of the proceeds should be applied toward the mechanic's lien. The most interesting question raised by the facts was not answered. After the plaintiff had commenced his suit to foreclose his mechanic's lien, Cox had defaulted on the installment land contract, and Staley, the vendor, exercising his rights under the contract, declared a forfeiture. Staley argued that this extinguished any interest Cox had in the land and that there was nothing to which the mechanic's lien could attach. But the court held that the

\textsuperscript{71} The policy in \textit{Capps v. National Union Fire Ins. Co.}, 318 Ill. 350, 149 N.E. 247 (1925) provided that the policy should be void "if the subject of insurance be a building on ground not owned by the insured in fee simple . . . ." \textit{Id.} at 352, 149 N.E. at 248.
\textsuperscript{72} \textit{E.g.,} \textit{Phenix Ins. Co. v. Caldwell}, 187 Ill. 73, 58 N.E. 314 (1900).
\textsuperscript{73} \textit{Niantic Bank v. Dennis}, 37 Ill. 381 (1865).
\textsuperscript{74} 265 Wis. 510, 62 N.W.2d 3 (1953).
\textsuperscript{75} 257 Ala. 571, 60 So.2d 384 (1952).
rights of the parties were to be determined at the time the plaintiff's lien attached and that then Cox did have an interest and that such an interest could not be defeated by a subsequent forfeiture. This seems to miss the point. Admittedly Cox had an interest at the time the mechanic's lien attached, but that interest was then subject to forfeiture. If Cox's interest was subject to forfeiture it is difficult to see how the lien could be any less vulnerable.

In *Kennedy v. Atchison*\(^{76}\) it was held that when the interest of the purchaser was wiped out by judgment for his failure to comply with his contract, a mechanic's lien filed against the property as a result of the purchaser's contract with the improver was likewise wiped out. The lien failed with the purchaser's interest. This reasoning seems preferable to that applied in *Else, Mackey,* or in *Staley.* If the security to which a lien attaches ceases to exist, it is obvious that that is the end of it. In all of these cases the security was the purchaser's interest in the land, and if that was subject to forfeiture by the vendor upon the purchaser's breach, that was its nature. Forfeiture was an inherent weakness in the security. Whether the vendor's interest be title or, as was urged unsuccessfully in *Mackey,* and apparently successfully in *Staley,* an encumbrance is of no importance. The purchaser's interest was the one on which the lien was placed and when it ceased, the lien also ceased. Quite possibly, general equities concerned with preventing unjust enrichment to the vendor may have played a part in those decisions in which the lien outlives the destruction of the property to which it was attached. These equitable considerations however, should be adequately taken care of in most cases by the doctrines of estoppel or agency. *Staley* achieves an equitable result by treating the vendor's interest as merely a prior lien. But it can lead to inconsistencies unless the court is prepared to go all the way and treat the installment land contract and the mortgage as virtually one and the same thing.

If the vendor allowed the purchaser to act as his agent in contracting for improvements on the land, then the normal rules of agency will impose liability upon the vendor and a proper compliance with the statute will serve to subject his interest in the land to the lien.\(^{77}\) When the contract requires that the purchaser make improvements upon the land, there is a split of authority as to whether the interest of the vendor will be subject to mechanic's liens. In *Tremont Co. v. Paasche*\(^{78}\) the Florida court held the vendor liable. But in *American Transit Mix Co. v. Weber*\(^{79}\) in which the installment land contract provided that the purchaser would construct

\(^{76}\) 162 Kan. 694, 178 P.2d 987 (1947).
\(^{77}\) McLaurin v. Etchison, 276 P.2d 751 (Okla. 1954); Okmulgee Real Estate Dev. Co. v. Muskogee Materials Co., 261 P.2d 454 (Okla. 1953); Bourdo v. Preston, 259 Wis. 97, 47 N.W.2d 439 (1951).
\(^{78}\) 81 So.2d 489 (Fla. 1955).
a house upon the land, and the vendor filed and posted the statutory
notice of nonresponsibility, the court allowed the lien against the building
but denied it against the land. In *American Transit Mix* the California
court distinguished the lease situation from the vendor-purchaser rela-
tionship, pointing out that in the former the landlord’s reversion might be
enough to constitute the tenant an agent, and thus permit the lien to
attach to the land as well. Mere knowledge and consent by the vendor to
improvements contracted for by the purchaser will not cause the vendor’s
interest to be subject to the lien.  

**B. Risk of Loss**

The importance of a well drawn contract is, perhaps, nowhere so
clearly demonstrated as in the effort to apply general rules of law to the
particular problem created by the destruction of the subject matter of
an installment land contract. The contract should provide explicitly for
such an event; otherwise, when a loss occurs the burden is apt to fall
arbitrarily upon the party who, in justice, should be least obliged to bear
it. In the majority of American jurisdictions the risk of loss is placed upon
the purchaser from the time that the vendor-purchaser relationship
arises, regardless of who has possession and regardless of the fact that
the vendor may have been better able to protect the property. This is the
result of applying the doctrine of equitable conversion to a situation in
which it is wholly inapplicable. Merely because Lord Eldon raised a
fiction to a fact is no reason to perpetuate an unsatisfactory rule. While
it is true that if the purchaser were in fact the owner he would have to
bear the loss, applying equitable conversion does not make him the owner,
and in the last analysis his equitable title is nothing more than a right to
specific performance. One of the grave dangers in a concept such as equita-
ble title is that, despite our awareness of the concept’s limitations, our
thinking tends to be colored by the label we attach to it. From there it
is but a step to convert a minor misstatement into a major error; after
all, it is only a matter of degree.

As a result of dissatisfaction with the majority rule at least four
other theories have been advanced to solve the problem of risk of loss. A
substantial minority of courts have followed Massachusetts in
placing the burden of loss upon the vendor from the signing of the con-
tract until the delivery of the deed, even though the purchaser may be

80. Snodgress v. Huff, 218 Ark. 113, 234 S.W.2d 505 (1950); Denniston & Partridge
Co. v. Romp, 244 Iowa 204, 56 N.W.2d 601 (1953).
81. 3 AMERICAN LAW OF PROPERTY § 11.30 (Casner ed. 1952).
82. See Williston, *The Risk of Loss after an Executory Contract of Sale in the Common
84. See CHAFEE & SIMPSON, CASES ON EQUITY 495 n.75 (2d ed. 1946).
in possession. The fact of possession has been controlling in some jurisdictions and the loss placed upon the party in possession whether he be the vendor or the purchaser. Langdell urged that the risk of loss should be on the vendor until the date set in the contract for closing the title and that after that date the risk be on the purchaser unless the vendor be in default. Vanneman has suggested that the loss be born by the vendor unless the contract or the relationship of the parties indicates that such was not their intention.

The principal virtue of both the majority position which places the risk on the purchaser and the Massachusetts approach, which would place it upon the vendor, is simplicity. The majority purport blindly to apply equitable conversion while Massachusetts and those courts which follow it import a condition into the contract that damage to the subject matter shall render the contract unenforceable, thus leaving the loss upon the vendor. Neither of these results is satisfactory in that neither takes into account the real equities and intent of the parties in the event of loss prior to closing. The Uniform Vendor and Purchaser Risk Act attempts a statutory solution with considerable success, making the transfer of either title or possession the controlling factor in most instances. Although in the absence of statute the courts seem to follow either the majority or Massachusetts positions, there are so many variables possible in the vendor-purchaser relationship that many other factors play a part in the decisions. The inability of the vendor to make out a marketable title at the closing date was sufficient to shift the burden of loss from the purchaser to the vendor in Mackey v. Bowles. This would seem a natural corollary to the dependence of equitable conversion upon specific performance, but it is still too mechanical a rule to cover more than the specific case. Although Vanneman's position that the loss should be on the vendor unless the facts indicate a different intention has been criticized as "vague," it reflects the position of many courts. Such matters as who pays the premiums on fire insurance, whether the purchaser insists upon specific performance, and whether the vendor insists upon specific performance are all factors to be considered in the decision.

88. LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION 58-65 (2d ed. 1909) cited in CHAPEE & SIMPSON, *op. cit. supra* note 84 at 495 n.75.
89. Vanneman, *Risk of Loss, in Equity, between the Date of Contract to Sell Real Estate and Transfer of Title*, 8 MINN. L. REV. 127 (1924).
92. 9-c UNIFORM LAWS ANN. 313 (Noyes & Greene 1922-24).
94. See note 89 *supra*.
95. 3 AMERICAN LAW OF PROPERTY § 11.30 (Casner ed. 1952).
formance\textsuperscript{97} and the ever present problem of who had possession at the
time of the loss\textsuperscript{98} may be sufficient either to avoid the existing rule or
to reinforce its application. And, of course, if the contract provides that
the vendor shall deliver the property in as good condition as it was at
the execution of the contract, a loss occurring after execution but before
closing falls on the vendor.\textsuperscript{99} The existence of insurance covering the
damaged property is a further complicating factor. Many courts which
follow the majority rule, although placing the loss upon the purchaser,
give the purchaser the benefit of the vendor's insurance.\textsuperscript{100} Some American
courts, however, follow the English rule of \textit{Raynor v. Preston},\textsuperscript{101}
which recognizes that the insurance contract is a personal one, that
both parties to the contract have an insurable interest, and therefor
decline to give the purchaser on whom the loss must fall the benefit of
the vendor's insurance.\textsuperscript{102} The widespread dissatisfaction with the rule of
\textit{Raynor v. Preston}\textsuperscript{103} stems from the apparent injustice of allowing
the vendor the benefit of insurance and at the same time placing the loss
upon the purchaser. It is submitted that the real difficulty lies in failing
to construe the policy as one of indemnity only and thereby limiting the
vendor's recovery to his actual loss. Although “the mere fact that the
owner of property may possess other means of protecting himself against
the loss covered by the insurance does not deprive him of his insurable
interest in such property,”\textsuperscript{104} it is worth noting that if the \textit{other means}
consists of policies of insurance with other companies, the insured may
have but one recovery to the limit of his actual loss and the burden is
spread among the various carriers either by the pro-rata clause\textsuperscript{105} or
by subsequent suit for contribution.\textsuperscript{106} The existence of an insurable
interest is irrelevant in determining the amount of loss. In the vendor-
purchaser relationship, the extent of the vendor's loss depends upon the
allocation of the burden between himself and the purchaser, and that,
in turn, depends upon the particular rule in the jurisdiction.

\textsuperscript{98} In many of the cases following either the majority or Massachusetts rules, the
factor of possession was stressed as an additional equity. See Smith v. Phenix Ins. Co., 91
Cal. 323, 27 Pac. 738 (1891); Good v. Jarrard, 93 S.C. 229, 76 S.E. 698 (1912).
\textsuperscript{99} Rhomberg v. Zapf, 201 Iowa 928, 208 N.W. 276 (1926).
\textsuperscript{100} Bruce v. Jennings, 190 Ga. 618, 10 S.E.2d 56 (1940); Nelson Properties, Inc. v.
\textsuperscript{101} Several theories for this result have been advanced: that the vendor is a trustee, that
equitable conversion makes the purchaser, in equity, owner of the insurance as well as the
land, and that the insurance runs with the land. See 3 \textit{American Law of Property} \S 11.31
(Casner ed. 1952).
\textsuperscript{102} Brownell v. Board of Educ., 239 N.Y. 369, 146 N.E. 630 (1925).
\textsuperscript{103} See \textit{Vance, Insurance} (H.B.) 778 (3d ed. 1951).
\textsuperscript{104} Id. at 166.
\textsuperscript{105} “This Company shall not be liable for a greater proportion of any loss than the
amount hereby insured shall bear to the whole insurance covering the property against the
peril involved, whether collectible or not.” New York Standard Fire Policy (1943).
\textsuperscript{106} Thurston v. Koch, 4 U.S. (4 Dall.) 348 (1800).
In *Lampesis v. Travelers Ins. Co.* suit was brought by the insured purchaser against the carrier upon a fire policy. The defense was that the purchaser had suffered no loss because, in New Hampshire, the risk of loss is placed upon the vendor. However the court interpreted the rule as permitting the purchaser to rescind in the event of destruction of the property but as requiring him to pay the full purchase price if he desired specific performance. The purchaser having paid the full price, the loss shifted to him, and he was therefore allowed recovery to the full extent of the damage. This result is not consistent with the reasoning behind the Massachusetts rule which is based upon an implied condition voiding the contract in the event of destruction or substantial damage to the subject matter. If the burden of loss is upon the purchaser, as in the majority of jurisdictions, he must, of course, pay the full price if he wishes specific performance; he is liable for the full price if the vendor seeks specific performance, and he is denied restitution of payments made. When the burden is placed upon the vendor and a substantial loss occurs before the closing, a strict application of the Massachusetts rule should limit the purchaser's remedy to restitution of payments made. However, New Hampshire in *Lampesis*, by allowing specific performance if the purchaser pay the full price, undercuts the theoretical basis of the Massachusetts rule.

When the damage to the property is slight and the burden of loss is upon the vendor the purchaser will not be allowed to rescind, but he will be compelled to accept part performance with compensation. A good argument has been made for allowing the purchaser partial performance with compensation in all cases in which the risk of loss is on the vendor. Nonetheless, when the subject matter has been substantially changed and the contract price would thus be radically different from that agreed upon, rescission seems preferable in most instances.

For those who neglect to cover the problem of risk of loss in the contract, the solution of the *Uniform Vendor and Purchaser Risk Act* seems the most satisfactory. In the event that the parties have not provided for allocating the burden of damage to the property while the contract is executory, the Act proceeds to make the allocation upon two primary considerations. The first and most important one is the matter of possession or transfer of legal title, and the second is the materiality of the damage. If the vendor still retains title or possession and a material part of the property is destroyed, the vendor loses his right to enforce

113. 3 AMERICAN LAW OF PROPERTY § 11.30 (Casner ed. 1952).
114. 9-C UNIFORM LAWS ANN. 313 (Noyes & Greene 1922-24).
the contract and the purchaser may recover that portion of the price paid. If under the same circumstances only an immaterial part of the property is destroyed, the contract remains in full force but the purchase price is abated to the extent of the damage. On the other hand, if the purchaser is in possession or if he has obtained the legal title, then the loss falls upon him, and he cannot avoid the duty of paying the price, nor can he recover payments made.

C. Dower and Curtesy Interests

The right to dower or curtesy of the spouse of a party to an installment land contract is dependent upon many factors, some of which make sense and some of which do not. At common law no dower existed in a husband's equitable estate, and yet the husband was entitled to curtesy in the equitable estate of his wife. The rights of spouses in the property of each other are today largely statutory and subject to considerable variation in the several states. At common law, dower in the wife consisted of a life estate in one third of the lands of which the husband was seized in fee simple or fee tail at any time during coverture. Dower was inchoate during the husband's lifetime and became consummate at his death. Common law dower, however, did not extend to the equitable estates of the husband. Curtesy, at common law, was an estate for life in the husband in all lands of which the wife was seized in fee simple or fee tail during coverture provided issue of the marriage was born alive and capable of inheriting. Immediately upon the birth of issue the husband had an estate of curtesy initiate which became curtesy consummate upon the wife's death. Curtesy initiate was a freehold estate, assignable during the wife's lifetime and subject to the husband's debts as contrasted with inchoate dower which was a mere expectancy. At common law then, the husband of a purchaser would be entitled to curtesy despite the fact that his wife held only an equitable interest, but she would have no dower in lands held by her husband only as purchaser under a contract of sale. These common law rules have been superseded by statute in England. In America the statutory changes vary and include statutes which abolish both dower and curtesy and substitute a statutory share as in New York and

115. 2 Tiffany, Real Property § 497 (3d ed. 1939).
116. Id. § 558.
117. Id. §§ 551, 575.
118. Id. § 487.
119. 3 American Law of Property § 11.28 (Casner ed. 1952).
120. 2 Tiffany, op. cit. supra note 115, § 552.
121. Id. § 572.
122. Id. § 533.
123. The Dower Act, 1883, 3 & 4 Wm. IV, c. 195; The Administration of Estates Act, 1925, 15 Geo. V, c. 23.
124. N.Y. Real Property Law § 189 (curtesy abolished); N.Y. Real Property Law § 190 (dower abolished); N.Y. Decedent Estate Law § 18 (statutory share created).
statutes, such as in Florida, which extend dower to a one third interest in fee simple instead of just for life and include personalty owned at death as well as real property.\textsuperscript{125}

Whatever the rights of a surviving spouse may be in a particular jurisdiction, we are here concerned with the availability of those rights when the deceased spouse was a party to an executory contract for the sale of land. When the deceased was the vendor, and the contract was entered into prior to the marriage, no right superior to that of the purchaser inures to the benefit of the vendor’s surviving spouse.\textsuperscript{126} Whether the surviving spouse has “dower” in the purchase price or is entitled to a statutory share in personalty will depend upon the local law. However, if the contract is not specifically performed after the vendor’s death, but is rescinded, it will then be subject to the widow’s dower right.\textsuperscript{127} This would seem to indicate that equitable conversion no longer applies and the property is now, once again, “real” in the heirs. \textit{Rain v. Roper},\textsuperscript{128} a Florida decision during the period when dower was limited to real property, so indicates. This appears to be at variance with the rule that a contract to sell land entered into subsequent to the execution of a will devising the land works a revocation of the devise even though the contract is rescinded by mutual consent before the testator’s death.\textsuperscript{129} In Florida today, inasmuch as the statute extends dower to personalty owned by the husband at his death, the widow would be entitled to one third of the proceeds of the sale if it were completed, and thus her stake in the performance of the contract is negligible. Of course the widow of a vendor who entered into the contract to sell lands during the existence of the marriage, unless she has barred her dower by joining in the contract or otherwise, is entitled to assert her interest.\textsuperscript{130}

When, as in New York, the right of the surviving spouse is limited to a statutory share in the estate of deceased, no rights exist during the lifetime of the spouses and on the death of one, the other’s rights extend only to the property as it is at that time. If it is encumbered, or subject to a contract of sale, the survivor is subject thereto. Unless fraud be shown the parties may dispose of their individual property during their lives as they see fit without being subject to claims of their spouses.\textsuperscript{131}

\textsuperscript{125} \textsc{Fla. Stat.} § 731.34 (1963). The husband has no corresponding right and may be completely disinherited by his wife. \textit{Herzog v. Trust Co. of Easton}, 67 \textsl{Fla.} 54, 64 \textsl{So.} 426 (1914).

\textsuperscript{126} \textit{Rain v. Roper}, 15 \textsl{Fla.} 121 (1875); \textit{Norton v. McDevit}, 122 \textsl{N.C.} 755, 30 \textsl{S.E.} 24 (1898); \textit{Brown v. Security Savings & Trust Co.}, 140 \textsl{Ore.} 615, 14 \textsl{P.2d} 1107 (1932) (vendor not seized of an estate of inheritance, nor does widow have any interest in proceeds of sale as it is personalty); \textit{Detwiler v. Capone}, 357 \textsl{Pa.} 495, 55 \textsl{A.2d} 380 (1947).

\textsuperscript{127} \textit{Rain v. Roper}, 15 \textsl{Fla.} 121 (1875).

\textsuperscript{128} \textsc{Ibid.}

\textsuperscript{129} \textit{Walton v. Walton}, 7 \textit{Johns. Ch. R.} 258, 11 \textit{Am. Dec.} 456 (\textsc{N.Y.} 1823).

\textsuperscript{130} \textit{Peddicord v. Peddicord}, 47 \textsl{N.W.2d} 264 (\textsc{Iowa} 1951); \textit{Moore v. Markel}, 112 \textsl{Neb.} 743, 201 \textsl{N.W.} 147 (1924).

\textsuperscript{131} See generally \textsc{MacDonald, Fraud on the Widow’s Share} (1960).
In Florida, inchoate dower exists only as to real property. When the deceased is the vendor, then, the problem is whether an inchoate right attached during his lifetime, which is superior to the rights of the purchaser. If there is no inchoate right, or if there exists merely a right to a statutory share, the purchaser will take precedence over the surviving spouse of the vendor.

But when the deceased was the purchaser under an executory contract, the dispute is not usually between the vendor and the purchaser’s spouse, but between the spouse and the deceased’s estate. In Florida, when dower extends to personal property owned at death as well as to real property, the widow of the purchaser will not generally be much concerned as to whether her rights extend to the real property, which was the subject of the contract, as real property, or attach to her husband’s contract interest as personalty. But if the widow does elect dower, she cannot take her interest completely out of the personalty or completely out of the realty, but instead, she must take one third out of each. The Florida statute provides that “in all cases the widow’s dower shall be free from liability for all debts of the decedent and all costs, charges and expenses of administration; provided, that nothing herein contained shall be construed as impairing the validity of the lien of any duly recorded mortgage.” This might make possible a situation in which, by asserting her claim to one third of the property subject to the contract, the widow could compel the vendor to resort to the general assets for his purchase price, and even there he would be met by the widow’s claim to one third of those assets. If the estate were insolvent, a very real dispute could arise between the vendor and the widow as to the extent of the property subject to the widow’s dower and as to the existence of “ownership” in the decedent of the property contracted for. If the contract were not recorded, and in Florida it rarely would be, even treating the vendor’s interest as a lien would not protect him under the statute. In In re Payne’s Estate, the deceased had sold a partnership interest in a business to his fellow partners. He owed the partnership 12,500 dollars at the time he withdrew, and this he agreed to pay off at the rate of 100 dollars per month. The other partners, in turn, owed the decedent 23,850 dollars at the time of his death for his share of the partnership. The agreement between decedent and his partners was that upon his death the sum he owed the partnership would be secured by a charge or offset against the debt owed to his estate on account of the sale of his interest. The widow elected to take dower. The Chancellor awarded dower only in the net value of the debt owed by the partners allowing the offset as agreed upon by the decedent. The supreme court, however, held that the provision of the statute allowing dower free from

132. Ginsberg v. Ginsberg, 50 So.2d 539 (Fla. 1951).
133. FLA. STAT. § 731.34 (1963).
134. 83 So.2d 109 (Fla. 1955).
liability for all debts required an award to the widow of one third of the
gross amount due from the partners, presumably leaving the partnership
to some extent a mere unsecured creditor. The effect of this decision
would seem to make vital an inquiry into the nature of the purchaser's
interest. Is he an owner within the meaning of the statute, and if so,
is his ownership limited to the percentage of the purchase price he has
paid? Or is he not an owner at all, and is the common law rule that no
dower attaches to an equitable interest still the law in Florida? No
statute in Florida expressly changes the common law rule that the widow
of the owner of an equitable interest in land is not entitled to dower.
In a decision stating that Florida follows the common law rule, it has
been held that the wife of a cestui que trust is not dowable of lands, title
to which is in the name of the trustee. But in *Blount v. Bost*,
dower was granted the widow of a purchaser under an installment land contract
who sold his interest to Blount while the contract was still executory.
Blount completed the payments, whereupon the vendor gave a deed
to the original purchaser (the decedent) and he, simultaneously, deeded
to Blount. The court held that the erection of a building on the land
by the decedent was sufficient exercise of ownership of the equitable
title so that subsequent acquisition of the legal title at the closing, even
though but for an instant, was enough to allow the widow's inchoate dower
to attach. The dissent pointed out that, at most, the husband's legal
title was in trust for Blount, but apparently the needs of the widow were
too great to be denied. This suggests that not only may Florida not follow
the common law rule denying dower to the purchaser's widow, but goes
further and might indicate that inchoate dower exists in the equitable
interest of the husband.

It would be to the widow's advantage to be able to claim dower
in equitable interests under a statute such as that in Florida even when
the estate is wholly solvent. The inclusion of the gross value of the
property in the estate subject to dower would augment the dower at
the expense of the general estate. Dower being free of debts and con-
stituting share of the gross rather than the net would be increased even
though the purchase price would, of course, be paid out of the estate.

Much of the difficulty encountered in applying dower to the interest
of the purchaser under a contract for sale arises from the all or nothing
character of equitable conversion. It would be far simpler to allow dower
subject to the rights of the vendor and only to the extent of the purchase
price paid. But if the purchaser is the owner from the execution of the
contract, then it seems only logical that his widow should be entitled to
dower in the whole. To argue thus, however, is to raise problems of ex-

136. 97 Fla. 449, 121 So. 472 (1929).
So. 289 (1929).
oneration, inflation of the dower interest at the expense of the vendor and of the persons interested in the estate as creditors, legatees, or heirs. Perhaps this is why many states today adhere to the common law rule denying dower in equitable estates despite statutory modification of the other features of common law dower. The truth is that equitable ownership under a contract of sale is not ownership, but merely a right to acquire it.

The technical reason given for the inapplicability of dower to equitable estates at common law was that dower only lay in lands of which the husband was seized. When the deceased husband had not completed the payments under an installment land contract, the widow was held not entitled to dower because there was no seizin. However, despite the lack of seizin, the weight of authority today is that when the purchase price has been paid in full, the widow of the purchaser is entitled to dower. If one applies the former Illinois rule of Chappell v. McKnight, that only when specific performance is immediately available is there an equitable conversion, then equitable conversion is a satisfactory explanation for the granting of dower once the purchase price has been paid, despite the non-delivery of a deed. But it would be simpler to consider the interest of a purchaser who has paid the full purchase price as amounting to a legal seizin under the Statute of Uses and thus dowable at common law. Today, when the purchaser has only partially completed his payments under the contract, the common law rule denying dower in equitable estates prevails in most jurisdictions unless changed by statute.

So far, we have been concerned primarily with the rights of the widow of a purchaser who held land under a contract at the time of his death. The right to inchoate dower during her husband's lifetime is something quite different. When the husband is seized of a legal estate during coverture, the widow's dower attaches and when he has fully performed all the conditions of the contract and can call for immediate specific performance, the same result would seem to obtain. But when the contract is still executory, the purchaser is usually able to assign his interest without his wife's joinder and free from any claim of dower.

In those states in which a widow is entitled to dower in lands held by her husband at his death under a contract to purchase, the widow

139. 108 Ill. 570 (1884).
may require the personal representative to exonerate the property from the vendor's lien, even to the extent of applying the two thirds of the real estate not subject to dower.\textsuperscript{143}

Much of this discussion has been devoted to the rights of the widow. Curtesy which was available to the husband in his wife's equitable estate at common law, and which was a more substantial interest than dower, is no longer a potent factor in most jurisdictions. The statutes giving married women control of their property, substitution of a statutory share for common law curtesy, and the changed legal status of women in modern times have largely reduced its effectiveness.\textsuperscript{144}

D. Devolution on Death

The rights of heirs, next of kin, devisees and legatees may be affected substantially by equitable conversion. Although the old distinction between heirs and next of kin is no longer of great importance, due to the prevalence of statutes of descent and distribution, nonetheless, from time to time a testator may will his real property to one person and his personalty to another, thus necessitating an inquiry into the nature of property which is subject to a contract of sale. So also, the possibility of ademption of a devise when the testator has contracted to sell real property subsequent to the execution of his will involves a consideration of equitable conversion as well as an inquiry into the testator's intent. The priorities of creditors of the estate of either party to the contract may be affected by equitable conversion with possible concomittant side effects on the rights of devisees in the property subject to contract.

The nature of equitable conversion as a fiction is clearly revealed when it is sought to be applied to substantial rights. In the classic article on the subject,\textsuperscript{145} Harlan F. Stone has suggested that an application of general principles of equity would achieve the same or better results than adherence to equitable conversion and with less confusion. To call the vendor a trustee of the legal title is to strain the meaning of trust, in as much as the vendor generally has the right to profits, rents and issues until the closing date, has an insurable interest in his own right, and really holds the title as security without the necessity of foreclosure should the deal fall through. And to say that the purchaser is a trustee of the purchase price is but an inaccurate way of saying that he is a debtor, responsible for the payment of the purchase price.

If it is recognized that equitable conversion depends upon the avail-

\textsuperscript{143} Bowen v. Brockenbrough, 119 Ind. 560, 20 N.E. 534 (1889); Caroon v. Cooper, 63 N.C. 380 (1899).

\textsuperscript{144} Herzog v. Trust Co., 67 Fla. 54, 64 So. 426 (1914); Proulx v. Parrow, 115 Vt. 232, 56 A. 2d 623 (1948); 2 Tiff.

ability of specific performance, it may do no great harm to indulge the
fiction in determining the rights of the parties because a consideration of
the right in the light of the remedy will place the rights and obligations
of the parties in their proper perspective. But, when the mere existence
of the contract to sell land is held to work a conversion, the possibility
of error increases.

The doctrine of equitable conversion arose from Lord Eldon's state-
ment in Seton v. Slade that "the estate from the sealing of the contract
is the real property of the vendee."\(^{146}\) Taken literally and out of context,
this could lead to a concept of equitable conversion which Eldon certainly
did not envisage but which is the cause of much of our present confusion.
That Eldon was aware of the true nature of his statement is born out by
the sentence immediately preceding: "The effect of a contract for pur-
chase is very different at law and in equity. At law the estate remains
the estate of the vendor; and the money that of the vendee. It is not so
here."\(^{147}\) Thus the effect of the contract which is called equitable con-
version only obtains so long as the parties are in equity, or have a right
to equitable relief. And this in turn depends upon the right to specific
performance.\(^{148}\)

There is a distinction worth noting between equitable conversion
by contract and equitable conversion by will. When there is a direction
or a power in a will to sell real property the conversion may be said to
be the result of the testator's intent and, applying the cardinal rule of
testamentary construction, the intent should control. But when the prop-
erty is merely subject to a contract of sale, the parties realize that there
may be many a slip before the closing day and that that day may never
come. Here, the conversion is valid only so long as the contract is speci-
fically enforceable, or at least only so long as there can be resort to
equity. If the contract is rescinded by mutual agreement, or if it is unen-
forceable because of fraud or mistake or for many other reasons, to ad-
just the rights of the parties or other persons on the basis of conversion
is unrealistic. The intent in such a case is a conditional intent at best.

The truth is that, when land is under a contract of sale, both the
vendor and the purchaser have both legal and equitable rights and obliga-
tions. When either party to the contract dies with the contract still
executory the distinction between these rights becomes more apparent

\(^{147}\) Ibid.
\(^{148}\) A court of Equity considers that as done which ought to be done, and which it
will compel to be done. There is no conversion at law. And why? Not because a
Court of law disregards the obligation of the contract, for it gives damages for the
breach; but simply because a Court of law does not enforce specific performance.
Conversion as arising from a contract to sell is merely and exclusively the con-
sequence of the application by a court of Equity of the doctrine of specific per-
formance. Where there can be no specific performance there can be no conversion.
because the rights and the duties as well may have to be exercised or performed by other parties. But to allocate them on the basis of equitable conversion adds nothing.

In *Coles v. Feeney*, the executor of the deceased vendor sought specific performance of an outstanding contract for the sale of land without joining the devisees. In denying relief the court recognized the dependence of conversion upon specific performance and held that the devisees were necessary parties. "[T]he executor's power depends upon the establishment of that contract as against the devisees under the first clause of the will, and they are not parties to the bill." Thus the devolution of the property is made to depend upon an inquiry into the real rights of the parties and not upon a mere assertion of "equitable conversion."

Contrast this sensible approach with the result in *Walton v. Walton* in which a specific devise was held "revoked" by a contract to sell even though the contract was cancelled by mutual consent during the lifetime of the testator. In *Walton*, Chancellor Kent expressly refused to base his decision upon an intent to revoke on the part of the testator, but preferred to rest upon equitable conversion as having changed the nature of the property devised. Intent was considered to have been evidenced by the contract, but intent was not controlling. It would seem that in any event the testator's intent was conditional. A more extreme example of revocation by contract is found in *In re Gensimore's Estate* in which a wholly unexecuted and unenforceable contract made subsequent to the execution of a will was held sufficient to revoke that portion of the will dealing with the particular property. The unenforceability of the oral contract was deemed immaterial and its existence was held sufficient to revoke the existing devise to the testator's daughter. Such a result cannot depend upon equitable conversion, and, if justifiable on any ground, can only be made to rest upon intent to revoke. Nor does ademption provide a satisfactory reason for such a decision because the property remained unchanged in the testator's estate from the time of the drawing of the will until his death.

In the event of the death of both the vendor and the purchaser, Stone states that there should be four parties to an action for specific performance, "the vendor's heir to give title; the vendee's heir to receive the conveyance; the vendee's personal representative to pay the purchase price; and the vendor's personal representative to receive it." To this group, in a proper case, should be added any devisee of the property

149. 52 N.J. Eq. 493, 29 Atl. 172 (1894).
150. Id. at 495, 29 Atl. at 173.
152. 246 Pa. 216, 92 Atl. 134 (1914).
under either party's will as well as the residuary legatees of both. All of these parties have a substantial interest in the enforceability of the contract and all are entitled to a day in court.154

Ademption of a specific devise occurs when the land is subject to an enforceable contract of sale at the time of the vendor's death. This may be attributed to equitable conversion which adequately explains the result. But although equitable conversion is an adequate explanation, it is not a very satisfactory one. True, it can be argued that inasmuch as the testator intended to convert his land into money he intended the ademption and the mere accident of his death before the sale was fully executed should not prevent it. But intent is not the basis of ademption in English law.155 The general Anglo-American technique is to discover what is given by the will and to ascertain whether it is contained in the estate. If a specific thing is given and it is not in the testator's estate upon his death, the devisee is entitled to nothing.156 But when the contract is still executory at the vendor-testator's death the land is still a part of his estate. It does no good to say that the testator holds the land as "trustee" and that therefore he has no power to devise it. He is not a trustee. He is the legal owner of the land; if the sale does not go through he remains the owner of the land. He may treat the land as security for the purchaser's contract debt and sell it in satisfaction thereof, but he does not have to do so. Until the date set for closing he may or may not have the right to the profits of the land, but this right is the purchaser's only if the contract gives it to him. It generally follows the right to possession, and despite any concept of equitable conversion, when the vendor dies intestate, his heir, not his personal representative, is entitled to the rents and profits.157

Would it not be more consonant with the testator's intent and with substantial justice to treat the vendor's legal title as merely subject to the contract and thus to permit the devisee to take the land, bound by the terms of the agreement to make the conveyance but entitled to receive in his own right the purchaser's performance? The devisee would then have all the rights of the testator as well as all of his obligations. In the event of breach by the purchaser he could retain the land or resort to any of the remedies which would have been available to his testator. He could not hinder or help the sale anymore than could his testator. All this seems quite reasonable but it is not the law. Once the contract is entered into the land is considered as personal property and thus

adeemed\textsuperscript{158} unless there is a statute to the contrary.\textsuperscript{159} In \textit{Clapp v. Tower},\textsuperscript{160} even though the original contract of sale which was in force at the time of the vendor's death was foreclosed and the land retained by the executors, it was deemed to be personally and a subsequent sale by the executors was held good against the claims of the heirs.\textsuperscript{161} And on the other end of the contract the heir of the purchaser, not his administrator, is entitled to enforce the contract.\textsuperscript{162} Of course, the administrator would be a necessary party as it would be his obligation to pay the purchase price out of the personal estate. Even when the heir is willing to pay the purchase price out of his own pocket it has been held the administrator should be joined, as he has an obligation to the estate's creditors which is superior to the rights of the heirs. Should the personalty be inadequate to satisfy claims, the real property must be resorted to. The heirs take subject to this encumbrance.\textsuperscript{163}

Creditors of the estate of either the vendor or the purchaser may be affected if equitable conversion applies and there is a priority between real and personal property in the order in which assets are appropriated for the payment of debts. The personal representative of either party has a lien upon property of the deceased for the purpose of satisfying claims against the estate and thus should be a party to any suit for specific performance.\textsuperscript{164} Although theoretically, the creditors are bound to be paid so long as there are assets of the decedent sufficient for that purpose, as between the heirs and next of kin, or between devisees and legatees, it may make a substantial difference whether property is designated as real or personal, inasmuch as personalty is the primary fund for the payment of debts in most jurisdictions.\textsuperscript{165}

One of the principal injustices of the law of equitable conversion arises, upon the death of the purchaser, in the right of exoneration given to the heir or devisee of the land contracted to be purchased.\textsuperscript{166} This is not so much the fault of conversion, however, as it is of the doctrine of

\textsuperscript{158} Walton v. Walton, 7 Johns. Ch. R. 258, 11 Am. Dec. 456 (N.Y. 1823); 2 Bowe-Parker, \textit{Page on Wills}, § 21.73 (1960). Whether the result is called ademption or revocation is usually moot as the contract remains in full force, and the devisee claiming the proceeds of the sale is unsuccessful in either event. But in Walton, Chancellor Kent was more accurate in calling the result "revocation" because the contract had been rescinded during the testator's lifetime and thus the land was still in his estate at his death.

\textsuperscript{159} N.Y. DECEDED ESTATE LAW § 37; See 3 \textit{AMERICAN LAW OF PROPERTY}, \textit{op. cit. supra} note 156, § 11.26.

\textsuperscript{160} 11 N.D. 556, 93 N.W. 862 (1903).

\textsuperscript{161} See Courtney v. Hanson, 3 N.J. 571, 71 A.2d 192 (1950).

\textsuperscript{162} House v. Dexter, \textit{supra} note 154.

\textsuperscript{163} Downing v. Risley, 15 N.J. Eq. 93 (1862).

\textsuperscript{164} Ibid.

\textsuperscript{165} Dicus v. Scherer, 277 Ill. 168, 115 N.E. 161 (1917); Shaw's Guardian v. Grimes, 187 Ky. 250, 218 S.W. 447 (1919); George v. Brown, 84 W. Va. 359, 99 S.E. 509 (1919); Rollison, \textit{Wills} 579 (1939). \textit{But see} Fla. STAT. § 734.05 (1963) which specifically makes no distinction.

\textsuperscript{166} See 3 \textit{AMERICAN LAW OF PROPERTY} § 11.27 (Casner ed. 1952).
exoneration generally, and the injustice may be just as great when the devisee of mortgaged land is able to compel the executor to pay the debt and release the land from the lien. The injustice arises because, in most cases, it was not the testator’s intent that the devisee take the land free of the mortgage or of the vendor’s lien. Exoneration of homestead or of dower lands seems more justifiable only because the holders of such interests are special objects of the purchaser’s duty of support.167

If the testator indicated an intent to allow the personal representative recourse against the exonerated land, or if it might be inferred from the will, such recourse will generally be allowed.168 Most states, however, follow the common law rule of exoneration, and in the absence of an expression of the testator’s intent or of a statute, the devisee may compel the representative to discharge the obligation.169 New York has abolished the doctrine not only as to mortgages, but specifically as to vendor’s liens,170 and so has England.171 There is little justification for the doctrine of exoneration other than that “the law favors heirs rather than the executor,”172 and it remains merely as a trap for the unwary and a windfall to the devisee or heir.

IV. ASSIGNMENT

Two basic tenets of the law, freedom of alienation and freedom of contract, are in conflict in determining alienability of land contracts in which there is a stipulation against assignment. Those authorities which place their emphasis upon the “land” aspect of the transaction favor freedom of alienation.178 Those which regard the “contract” aspect as being of greater weight will uphold a non-assignment clause and deny an assignee the rights of the purchaser.174 The weight of authority favors freedom of alienation.175 As in the landlord and tenant situation,176 even those courts which will uphold a clause restricting assignment will construe the clause strictly177 and waiver will be found upon slight pretext.178

167. Fla. Const. art. X (homestead exempt from claims and from taxes up to $5,000 assessed valuation); Fla. Stat. § 731.34 (1963) (dower free from liability for debts of decedent).
168. 3 American Law of Property § 11.27 n.6 (Casner ed. 1952).
170. N.Y. Real Property Law § 250.
171. Real Estate Changes Act, 1854, 17 & 18 Vict., c. 113, amended by 30 & 31 Vict., c. 69 as to mortgages, and 40 & 41 Vict., c. 34 as to liens for unpaid purchase money.
172. Lumsden v. Fraser, supra note 157.
174. Lockerby v. Amon, 64 Wash. 24, 116 Pac. 463 (1911).
175. 3 American Law of Property, supra note 173 § 11.36; Annot., 138 A.L.R. 205, 211 (1942). It is interesting to note that the land aspect of the installment land contract prevails here, but that the contract aspect controls where remedies for breach are concerned. See 4 American Law of Property § 16.20 (Casner ed. 1952).
In the absence of a non-assignment clause the general rule is that both the vendor and the purchaser may assign their respective rights under the contract.\(^1\) And, of course, the purchaser may subcontract or enter into a new contract as vendor to another purchaser, provided he does not do so fraudulently.\(^2\) Under a subcontract the purchaser from the original purchaser does not acquire any rights directly against the original vendor, but he can compel his vendor to exercise his right to acquire the legal title.\(^3\) Assignment will not relieve a party to the contract from his obligations under the contract unless there is a novation.\(^4\) And if the performance promised by the assignor-purchaser was a personal one the vendor may insist upon his performing despite the assignment.\(^5\)

The assignee takes only the rights of his assignor, and, of course, is subject to any defenses which could have been raised against the original purchaser, but if there are no defenses, he is entitled to specific performance. The question of lack of mutuality might seem to be involved when the assignee has not expressly assumed the purchaser's obligation to perform. But by bringing suit for specific performance the assignee assures the vendor of mutuality of performance and his suit cannot be denied on grounds of lack of mutuality.\(^6\) When suit is brought by the vendor against an assignee of the purchaser who has not expressly assumed his assignor's obligations, there is a split of authority. The majority view represented by *Langel v. Betz*\(^7\) is that without an express assumption the assignee is under no duty to perform. The *Restatement of Contracts*\(^8\) adopts the other alternative and, treating the assignment rather like a deed poll, finds an assumption of the assignor's obligation arising out of the acceptance of the assignment. If the assignment expressly provides that the assignee assume the purchaser's obligation, then the vendor's suit against the assignee can be sustained on a third-party beneficiary theory.\(^9\)

The vendor under a land contract can assign both his contract right to the purchase price and his legal title to the land. If the contract is recorded or the purchaser is in possession or the assignee has actual knowledge of the existence of the contract, the legal title will be subject to

\(^{179}\) Lewis v. McCready, 378 Ill. 264, 38 N.E.2d 170 (1941) (purchaser's interest); Mundy v. Mundy, 296 Mich. 578, 296 N.W. 685 (1941) (vendor's interest).

\(^{180}\) See Walker v. Galt, 171 F.2d 613 (5th Cir. 1948).


\(^{183}\) Goodwin v. Rosser, 64 Fla. 299, 60 So. 341 (1912).


\(^{185}\) 250 N.Y. 159, 164 N.E. 890 (1928).

\(^{186}\) *Restatement, Contracts* § 164 (1932).

\(^{187}\) Adams v. Wadham, 40 Barb. 225 (N.Y. 1862). See Lawrence v. Fox, 20 N.Y. 268 (1859); 3 AMERICAN LAW OF PROPERTY, *supra* note 173, § 11.38, where subrogation, trust, agency, and privity of contract by substitution are also suggested as possible theories.
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the purchaser's contract rights. However, in many instances the contract is not recorded and in some jurisdictions a purchaser without actual notice of a prior purchaser's possession will take free of prior equities. Should the vendor assign his contract rights but retain the legal title, he will hold that title for the benefit of the purchaser and also as security for the person to whom the payments are due.

V. HOMESTEAD RIGHTS

Although homestead is a creature of statute or constitution and thus may vary from jurisdiction to jurisdiction, "it is an almost universal rule that a homestead may be claimed in lands in which the claimant has only an equitable interest." The Florida constitution defines homestead in two different fashions. In granting exemptions from forced sale under judicial process and requiring joint consent of both spouses for alienation, one section merely requires that the head of the household be the "owner" of the property. Ownership is not otherwise defined. But another section grants exemption of homestead from taxation to "every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home . . . ." Despite this difference in language, both sections have been interpreted as benefiting owners of equitable interests so as to exempt the property from forced sale by creditors, as well as from taxation up to the constitutional 5,000 dollar figure. The descent of homestead property in Florida is governed by statute, but the definition of such property is to be found in Article X, Section 1. In this context too, the word "owned" is interpreted as including an equitable estate. The purpose of the homestead laws is to protect the rights of members of the family and to secure a minimum of property for their benefit; to this end such laws are given a liberal construction.

A wife's homestead rights during the lifetime of her husband attach to property in which he has only an equitable interest under an installment land contract. To this extent homestead receives greater protection than does inchoate dower. As we have already pointed out, the general rule is that a husband who is a purchaser under a land contract

189. 1 AMERICAN LAW OF PROPERTY § 5.81 (Casner ed. 1952).
190. FLA. CONST. art. X, § 1.
193. FLA. STAT. §§ 731.05, 731.27 (1963).
196. Bigelow v. Dunphe, 144 Fla. 330, 198 So. 13 (1940); Jones v. Federal Farm Mortgage Corp., 138 Fla. 65, 188 So. 804 (1939); Suttle v. Wold, 117 Fla. 802, 158 So. 447 (1935); FLA. CONST. art. X, §§ 1, 4.
may assign his contract free of his wife's dower.\textsuperscript{197} But in Childs v. Lambert,\textsuperscript{198} an Arkansas case, the wife of a purchaser under an installment land contract was permitted to assert her homestead right despite her husband's abandonment of the contract and despite the intervention of bona fide purchasers. She had not joined in the abandonment and thus was not bound by it. It was held that she was entitled to perform the contract even though the vendor purported to forfeit the interest of the husband. This would appear to be the general rule.\textsuperscript{199}

VI. RENT CONTROL—MORTGAGE MORATORIUM LAWS

The application of rent control and mortgage moratorium laws to the vendor-purchaser situation is largely a matter of legislative intent and statutory construction. Although the payments under an installment land contract are sometimes spoken of as rent, they are not rent, but are part of the purchase price. The purchaser is not a tenant, nor is the vendor a landlord.\textsuperscript{200} The definition of "housing accommodations" covered by the \textit{Emergency Price Control Act} of 1942 is limited to property "rented or offered for rent."\textsuperscript{201} There have been a good many decisions to the effect that a vendor, holding over after the execution of the land contract is not a tenant and is not entitled to the protection of the O.P.A. regulations.\textsuperscript{202} There seem to have been fewer efforts made to bring a purchaser under the coverage of the O.P.A. rent regulations but it is quite clear that such efforts would have been in vain. In \textit{Johnson v. R. S. Constr. Co.},\textsuperscript{203} a purchaser sued the vendor for treble damages under a provision of the \textit{Emergency Price Control Act} authorizing such a remedy when there had been an overcharge of rent. The installment land contract provided that in the event of the purchaser's breach the vendor could treat the contract as ended and payments made should be considered as rent and as liquidated damages. It was also specifically provided that the vendor had the option to treat the defaulting purchaser as a tenant for the purpose of using the statutory eviction process. Upon the failure of the purchaser to make his payments the vendor sought summary ejectment for "default in the amount of $170 rental."\textsuperscript{204} Inasmuch as the installment payments greatly exceeded the registered O.P.A. monthly rental of 20 dollars, the purchaser brought suit to enforce the treble

\textsuperscript{197} McNeil v. McNeil, \textit{supra} note 142.
\textsuperscript{198} 230 Ark. 366, 323 S.W.2d 564 (1959).
\textsuperscript{199} 1 \textit{American Law of Property} § 5.81 (Casner ed. 1952).
\textsuperscript{200} Even though the instrument is designated a lease, if it is a contract to sell land it is not a lease. McCollough v. Home Ins. Co., 155 Cal. 659, 102 Pac. 814 (1909).
\textsuperscript{201} Ch. 26 § 302(f), 56 Stat. 36 (1942).
\textsuperscript{203} 80 F. Supp. 749 (D. Md. 1948).
\textsuperscript{204} \textit{Id.} at 751.
damage penalty. The court after distinguishing the sales contract from a lease, found for the vendor.

Although when regarded as a security device a contract for deed performs the same function as a purchase money mortgage, it is generally not considered as such under statutes dealing with mortgages. In White v. Jewett, a defaulting purchaser under an installment land contract was denied relief under a statute making foreclosure by sale the one action for the recovery of a debt or enforcement of any right secured by a mortgage, on the ground that the plaintiff-vendor in forfeiting the purchaser's payments and all his rights was merely cancelling a contract, not enforcing a debt. Although the Frazier Lemke Farm Mortgage Act specifically protects farmers who are purchasers under installment land contracts from "cancellation, rescission, or specific performance of an agreement to sell land," the court in White v. Jewett denied the purchaser relief on this ground because the federal courts have exclusive jurisdiction under the Frazier Lemke Act.

When there is no specific application of a statute to land contracts the purchaser gets scant protection. In Iowa, for instance, even when the statute dealing with mortgage foreclosures provides that "the vendee shall in such cases for the purpose of foreclosure be treated as a mortgagor of the property purchased and his rights may be foreclosed in a similar manner," forfeiture of the purchaser's contract rights is permitted if the contract so provides or time is made of the essence. True, the statute which permits forfeiture does require that it be on 30 day notice during which time performance by the purchaser will cure the default, but there is no equity of redemption and no requirement of foreclosure by sale. Iowa's moratorium continuance statute specifically provides for "contracts for the purchase of real estate" but even this merely delays the inevitable foreclosure or forfeiture of the purchaser's rights.

205. 78 P.2d 85 (Mont. 1938).
211. Iowa Code § 656.2(3) (1954).