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THE VENDOR'S LIEN IN FLORIDA†

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I. INTRODUCTION

The vendor's lien has been subjected to varied and sometimes inconsistent interpretations and applications.[1] Case after case restates the observation that the authorities are in almost hopeless conflict upon the question of rights arising under a vendor's lien.[2] Some of the difficulty diminishes, however, when it is recognized that the term, "vendor's lien," is applied to at least three distinct situations.

> [T]here is perhaps no subject of equity jurisprudence discussed in the books upon which there is a greater diversity of opinion than exists in relation to the origin, nature, and effect of a vendor's lien, against whom, and in whose favor, it avails; and how it may be discharged or waived. This conflict, how-

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1. Jones v. Carpenter, 90 Fla. 407, 413, 106 So. 127, 129 (1925); Woods v. Bailey, 3 Fla. 41 (1850); Holbrook v. Betton, 5 Fla. 99, 105 (1849); Bradford v. Marvin, 2 Fla. 463 (1849).

2. *E.g.*, Alabama-Florida Co. v. Mays, 111 Fla. 100, 109, 149 So. 61, 65 (1933); Hammond v. Peyton, 34 Minn. 529, 27 N.W. 72 (1886).

> ever, may be traced in part to the failure to observe the distinction between the lien implied in law in favor of the vendor who has parted with title and has taken no security for the unpaid purchase price, other than the personal obligation of the vendee, and the lien which the vendor has while he holds the legal title under an executed contract for the conveyance of land upon the payment of the purchase money, and the lien for the purchase money expressly reserved by the vendor in his deed.[3]

This article will examine the three different types of vendor's liens, delineate the principal distinctions, and attempt to evaluate the divergent rules applicable to each. Accordingly, the discussion is divided into three principal categories: (1) the vendor's lien without reservation of title; (2) the vendor's lien incident to reservation of title; and (3) the vendor's lien expressly reserved in deed or title.

II. IMPLIED LIEN-VENDOR'S LIEN WITHOUT RESERVATION OF TITLE

The implied lien is the true vendor's lien,[4] and properly may be included within the general class of equitable liens.[5]

> It is a creature of the courts of equity, founded upon the equitable presumption that, where the vendor has parted with his title and taken no security for the payment of the purchase money, the purchaser ought not in conscience be allowed to keep it without paying the consideration.[6]

This lien is implied in favor of a vendor for the unpaid purchase price of the land sold by him. It arises when the vendor does not take any lien or security, but relies instead on the personal obligation of the purchaser.[7]

A vendor's lien, after absolute conveyance,[8] is frequently asserted not to be a specific charge upon the property, but only an equitable right

3. Alabama-Florida Co. v. Mays, *supra* note 2, at 109-110, 149 So. at 65.

4. Alabama-Florida Co. v. Mays, *supra* note 2; Soderberg v. Davis, 118 Fla. 288, 159 So. 23 (1935); McKeown v. Collins, 38 Fla. 276, 21 So. 103 (1896).

5. Oliver v. Mercaldi, 103 So.2d 665 (Fla. 2d Dist. 1958); Special Tax School Dist. v. Hillman, 131 Fla. 725, 179 So. 805 (1938); Jones v. Carpenter, *supra* note 1. See also Boyer & Kutun, *Equitable Liens*, 20 U. MIAMI L. REV. 731 (1966).

6. Alabama-Florida Co. v. Mays, *supra* note 2, at 110, 149 So. at 65.

7. Lewis v. Cole, 108 Fla. 585, 146 So. 679 (1933); Johns v. Seeley, 94 Fla. 851, 114 So. 452 (1927); Rewis v. Williamson, 51 Fla. 529, 41 So. 449 (1906); DeLong v. Marshall, 66 Fla. 410, 63 So. 723 (1913); Bowen v. Grace, 64 Fla. 28, 59 So. 563 (1912); McKeown v. Collins, *supra* note 4; Woods v. Bailey, *supra* note 1; Atlantic Fed. Sav. & Loan Ass'n v. Kitimat Corp., 143 So.2d 719 (Fla. 2d Dist. 1962); Oliver v. Mercaldi, 103 So.2d 665 (Fla. 2d Dist. 1958). This implied lien is also called a grantor's lien.

8. The absolute conveyance of the legal title to the vendee is essential to the existence of the grantor's or vendor's lien. Moss v. Sperry, 140 Fla. 301, 191 So. 531 (1939), indicating that there is no vendor's lien, strictly speaking, where the owners have not conveyed the property. See also: Alabama-Florida Co. v. Mays, *supra* note 2; Bowen v. Grace, *supra* note 7; McKinnon v. Johnson, *infra* note 9.

of the vendor to resort to the property in case the purchase money is not paid.[9] This lien is not the result of any express agreement between the vendor and the vendee, but is simply an equity raised by the court for the benefit of the vendor,[10] and is enforced or denied between the parties as the exigencies of each particular case require.[11] Further, as later indicated, the implied vendor's lien is considerably less substantial[12] than the lien of the vendor who retains legal title under an executory contract to convey.[13] It also is considerably less substantial than the lien which is expressly reserved by a vendor in the deed.[14]

The implied vendor's lien has been regarded as being in the nature of an equitable mortgage,[15] inherent in the contract of sale and qualifying the ownership of the vendee.[16] This analogy is valid as to the effect of the two interests although the circumstances giving rise to their creation are not identical. The term "equitable mortgage" covers a variety of situations not particularly relevant to vendors' liens.[17] However, a significant number of equitable mortgages arise from consensual transactions

9. Atlantic Fed. Sav. & Loan Ass'n v. Kitimat Corp., *supra* note 7; Alabama-Florida Co. v. Mays, *supra* note 2; Lewis v. Cole, *supra* note 7; Shaylor v. Cloud, 63 Fla. 608, 57 So. 666 (1912); McKinnon v. Johnson, 54 Fla. 538, 45 So. 451 (1907); Johnson v. McKinnon, 45 Fla. 388, 34 So. 272 (1903); McKeown v. Collins, *supra* note 4.

An analysis of the statement may be in order. It is said on the one hand that the lien is not a specific charge upon the property, and on the other that the property may be resorted to in case the purchase money is not paid. If not originally, it would certainly seem that this equitable right does become a specific charge upon the property when enforcement is decreed. Apparently all that is meant by this common statement is that no perfected or matured lien is created until it is decreed by a court of equity. However, it does seem that the lien when decreed, assuming no superior intervening equities, is effective as of the time of the circumstances justifying its creation. See Atlantic Fed. Sav. & Loan Ass'n v. Kitimat Corp., *supra* note 7. Of course, since at that time there is no perfected lien or recordable instrument evidencing it, this equity of the vendor is susceptible to divestment or subordination in favor of a bona fide purchaser or mortgagee, or otherwise subject to defeasance, loss or refusal to decree such a lien as the circumstances or equities of the situation may require. The vendor's lien may be decreed against subsequent parties with notice of the existent equity. See Atlantic Fed. Sav. & Loan Ass'n v. Kitimat Corp., *supra* note 7. In Phelps v. Higgins, 120 So.2d 633, 635 (Fla. 2d Dist. 1960) the court stated:

> Equitable liens may arise, by operation of law from the conduct of the parties, from a variety of transactions to which equity will cause them to attach. Dewing v. Davis, Fla. App. 1960, 117 So.2d 747.

10. Cases cited note 9.

11. Edelson v. Quinn, 123 Fla. 670, 167 So. 535 (1936); Rewis v. Williamson, *supra* note 7; Shaylor v. Cloud, *supra* note 9; Johnson v. McKinnon, *supra* note 9.

12. See *infra* Part II, §§ B, C, E, F and H of text.

13. See *infra* Part III of text.

14. See *infra* Part IV of text.

15. Equitable mortgages may be defined broadly as security transactions which fail to satisfy the requirements of legal mortgages, but which nevertheless are treated as mortgages in equity. OSBORNE, MORTGAGES, 42 (1951).

16. Atlantic Fed. Sav. & Loan Ass'n. v. Kitimat Corp., 143 So.2d 719 (Fla. 2d Dist. 1962), not specifying but suggesting vendor's lien rather than equitable mortgage; Rewis v. Williamson, *supra* note 7; Wooten v. Bellinger, 17 Fla. 289, 301 (1879).

17. *E.g.*, the deed absolute construed as a mortgage and mortgages on equitable interests. See generally OSBORNE, *supra* note 15, chs. 2 & 4.

or agreements to create security interest.[18] In one type of these situations an equitable mortgage results when the agreement is ineffective to create a valid legal mortgage.[19] Thus, as to creation, the difference between an equitable mortgage and implied vendor's lien is simply the existence or non-existence of an agreement (not *legally* effective) to create a lien on the land conveyed. An equitable mortgage arises from a special agreement for lien, whereas a vendor's lien arises when there is no special agreement for security, the lien being imposed in equity as incidental to the obligation of the vendee (grantee) to pay the purchase price.[20] However, once created in a grantor-grantee transaction, the difference, if any, is minimal.[21]

The implied vendor's lien is applicable to sales of leases and real estate transactions involving both realty and personalty. Thus in *Oliver v. Mercaldi*,[22] the court, which recognized leases as conveying an interest in land,[23] held that a seller of a lease for a term of years is entitled to a vendor's lien for unpaid purchase monies in the same manner and on the same basis as the vendor of other legal or equitable interests in realty.

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18. These equitable mortgages in turn have been divided into three types: (1) specifically enforceable promises to give a legal mortgage, or to hold certain property as security; (2) agreements intended to create a security interest, but ineffective under conveyancing rules; and (3) agreements, in the form of promises or executed transactions, in which the subject matter of the security itself is equitable. OSBORNE, *supra* note 15, at 46.

19. Holmes v. Dunning, 101 Fla. 55, 57, 133 So. 557, 558 (1931):

> A lien created by contract, and not sufficient as a legal mortgage, is generally regarded as in the nature of an equitable mortgage. The form of the contract is immaterial, provided the intent to create security appears. . . .

Accord, as to these circumstances giving rise to an equitable mortgage: Atlantic Fed. Sav. & Loan Ass'n v. Kitimat Corp., *supra* note 16; Highland Crate Co-op. v. Guaranty Life Ins. Co., 154 Fla. 332, 17 So.2d 515 (1944).

20. See Special Tax School Dist. v. Hillman, *supra* note 5 and cases cited *supra* note 7 (showing that the vendor's lien does not depend upon an agreement for lien or security). The distinction between a vendor's lien and equitable mortgage is fully discussed in McKeown v. Collins, *supra* note 4.

The vendor's lien is not precluded when part of the purchase price agreed to be paid is the satisfaction of an encumbrance or the payment of the vendor's debt. Thus in Alabama-Florida Co. v. Mays, *supra* note 2, at 65 the court set forth the following:

> Where as a part of the consideration for the sale, the purchaser assumes the payment of an incumbrance upon the land, and, if the vendor is compelled to discharge such incumbrance, he may enforce a lien on the land to that extent. 39 Cyc. 1795 (1802). It has also been held that the vendor may enforce a lien when the purchaser fails to pay debts due by the vendor, which he has agreed to assume as a part of the consideration. 39 Cyc. 1803.

21. In Atlantic Fed. Sav. & Loan Ass'n v. Kitimat Corp., 143 So.2d 719, 721 (Fla. 2d Dist. 1962), the court stated:

> The Greens counterclaimed in the alternative for either a vendor's lien or for an equitable mortgage. The difference in the names of the two remedies sought can make no difference here if the conclusions of the chancellor are correct.

Accordingly the decree of the chancellor foreclosing an equitable mortgage was affirmed. The court reviewed the circumstances giving rise to each remedy and concluded (correctly it is submitted) that it was immaterial whether the remedy of the vendors was more properly denominated an equitable mortgage rather than a vendor's lien.

22. 103 So.2d 665 (Fla. 2d Dist. 1958).

23. De Vore v. Lee, 158 Fla. 608, 30 So.2d 924 (1947).

And in *Edelson v. Quinn*,[24] involving the sale of real property and incidental equipment and other chattels, the court upheld a vendor's lien against the real property for the balance due when there were no separate prices designated for the realty and personalty.

The vendor's lien is said to be independent of possession and thus may be implied even when the grantor retains possession.[25] Although this principle was dictum in the Florida cases asserting it,[26] there would appear no reason for not applying it in a proper case. If a grantor does remain in possession after conveyance, whether or not a vendor's lien is implied, the vendor should be liable to the purchaser for wilful damage or injury to the property, and is probably liable also for failure to take reasonable care of it.[27] In the absence of a contrary agreement, the duty to pay taxes falls on the legal title holder.[28]

A. *Applicability of Equitable Doctrines*

Since the implied vendor's lien is strictly an equitable doctrine the lien claimant should be subject to general equitable principles and defenses. The case of *Johnson v. McKinnon*,[29] more appropriately applicable to liens concomitant to reservation of title because the vendor had not yet delivered a deed, supports this principle. In the *Johnson* case, the vendor in possession who had committed waste was denied a vendor's lien on the basis of the clean hands doctrine. The possibility of a legal action was not discussed.

In *Cooper v. Ruff*,[30] a vendor had accepted two thousand dollars and a second mortgage on land in Pennsylvania as security for lands sold to the vendee in Florida. The vendor, aware of a first mortgage on the Pennsylvania land, held onto the second mortgage until the first had been foreclosed, with the resultant elimination of the second. He then claimed a vendor's lien upon the Florida property and alleged that his second mortgage was invalid because of a prior agreement of the mortgagor to exchange lands with a third party. The court, in addition to finding a

24. 123 Fla. 670, 167 So. 535 (1936).

25. Patton v. Meddick, 97 Fla. 1073, 122 So. 710 (1929); Johnson v. McKinnon, 45 Fla. 388, 34 So. 272 (1903).

26. In Patton v. Meddick, *supra* note 25, the grantee took possession so the principle was inapplicable; in Johnson v. McKinnon, *supra* note 25, the principle was inapplicable because a conveyance had not taken place as the vendor had not yet delivered a deed.

27. In Johnson v. McKinnon, *supra* note 25, where the vendor retained both title and possession, it was held that he could not recover against the vendee for waste since it was the vendor's responsibility, not the vendee's. There was, however, no suit or judgment against the vendor for waste. See generally Note, 48 HARV. L. REV. 821 (1935).

28. Johnson v. McKinnon, *supra* note 25, and McKinnon v. Johnson, 54 Fla. 538, 45 So. 451 (1907), held that the duty to pay taxes fell on the vendor when the deed had not yet been given.

29. *Supra* note 28.

30. 110 Fla. 442, 148 So. 870 (1933).

waiver by the taking of security,[31] held that the vendor should have put the vendee in status quo by returning the mortgage to him before closing the transaction. The court concluded that the vendor was estopped by laches from claiming a lien which he never intended to hold or claim at the time of the transaction.

B. *Statute of Limitations*

The vendor's implied lien may be enforced only so long as the legal remedy of action on the note or debt is not barred by the statute of limitations.

> The lien is a right created by law as an incident to the debt, and ceases to be available in equity when the debt is not enforceable at law. A vendor can ordinarily have no greater right by implication of law than he has by contract when the implied right is an incident to the contract right.[32]

The duration of this implied lien is thus much more limited than the vendor's lien ancillary to retention of title by the vendor,[33] and also more limited than the lien which is expressly reserved in a deed.[34] In these latter situations the vendor has an action on the lien for as long as twenty years although a legal action on the debt may be extinguished much earlier by the statute of limitations.[35] This apparent inconsistency may be justified on the basis that these other liens are in substance mortgages,[36] and that the twenty-year statute of limitations applicable to mortgages should control.[37] Dissatisfaction with the implied lien itself may be another factor in according it treatment different from that accorded to the other types of vendors' liens. The implied lien is, in fact, somewhat anomalous and contrary to both the spirit of the recording act and the policy of disfavoring secret conveyances and interests,[38] as the vendor has no recordable instrument representing his equitable lien. This, however, is not the complete answer, because the problem is not one of protecting innocent subsequent parties, since such parties will be protected even before the running of the statute of limitations on the debt.[39]

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31. *Ibid.* See also *infra* Part II, § E of text.

32. Shaylor v. Cloud, 63 Fla. 608, 611, 57 So. 666, 667 (1912).

33. See Part III, § C of text, *infra.*

34. See Part IV, § B of text, *infra.*

35. FLA. STAT. § 95.11 (1965), imposes the following periods of limitations:
(1) Instrument under seal—twenty years;
(3) Written contract or obligation not under seal—five years;
(5e) Unwritten contract or obligation—three years.

36. FLA. STAT. § 697.01 (1965), defines mortgage generally so as to include all written instruments for the purpose or with the intention of securing the payment of money. The statute is quoted *infra* note 131. See also that note, and note 170.

37. FLA. STAT. § 95.28 (1965).

38. See, *e.g.*, Chief Justice Marshall's remarks in Bayley v. Greenleaf, 20 U.S. (7 Wheat.) 46, 51 (1822); Justice Treat's criticism in Conover v. Warren, 1 Gilm. (Ill.) 498, 502 (1844).

39. See *infra* Part II, § H of text.

The lien becomes unenforceable even against the grantee himself after limitations have run on the debt. One possible justification is that equity has already been generous to the careless vendor by imposing a lien in his behalf when he failed to protect himself, and that to be entitled to this additional benefit he must diligently assert the lien before the debt is barred.

C. *Non-Transferability of Implied Vendor's Lien*

The weight of authority in the United States[40] and Florida[41] is that an implied vendor's lien is personal to the vendor and is not assignable. This rule, however, does not preclude the original acquisition of a vendor's lien in favor of a third person who may be considered to be practically, although not actually, a vendor.[42] However, such a lien, when implied in favor of a third person, is nevertheless not assignable.

> The process by which the mortgagee perchance became vested with a lien upon the land not encumbered by the mortgage in no way changed the character of the lien or enlarged the powers of the successor to the benefits thereof so as to make assignable that which could not be assignable before.[43]

In *Hedlund v. Jones*,[44] a corporation sold realty and took a promissory note as consideration. It later transferred the note as part of a division of the corporate property, and the transferee tried to enforce the vendor's implied lien. The court refused the attempt and reaffirmed the rule of non-assignability.

In England and some states, however, the lien is treated as other interests in land and is assignable.[45] Indeed it is difficult to justify the rule of non-assignability. As long as the rights of innocent third parties are protected,[46] there would appear no valid reason for not permitting transfer.[47] The other types of vendors' liens are freely assignable.[48]

D. *The Lien as a Substantive Property Right—Substitution of Security*

Somewhat inconsistent with the non-assignability rule is the characterization of the vendor's lien as a substantive property right.

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40. 4 POMEROY, EQUITY JURISPRUDENCE § 1254 (5th ed. 1941).

41. White v. White, 129 So.2d 148 (Fla. 1st Dist. 1961); Hedlund v. Jones, 114 So.2d 220 (Fla. 3d Dist. 1959); Alabama-Florida Co. v. Mays, *supra* note 2; McKeown v. Collins, *supra* note 4.

42. See *infra* Part II, § G of text.

43. Alabama-Florida Co. v. Mays, 111 Fla. 100, 114, 149 So. 61, 66 (1933).

44. 114 So.2d 220 (Fla. 3d Dist. 1959).

45. 4 POMEROY, *supra* note 40, § 1254.

46. See *infra* Part II, § H of text.

47. The non-assignability rule is criticized by Pomeroy, *supra* note 45.

48. See *infra* text Parts III & IV.

> [T]he right to retain an existing vendor's lien until the debt secured thereby is paid is a substantive property right. We think that it is a necessary corollary of this holding that, after this lien legally attaches to certain property, the lien cannot constitutionally be extinguished and other security substituted without the consent of the lien holder to such extinguishment and substitution.[49]

In *White v. White*,[50] from which the above quotation was taken, certain owners of realty petitioned the court to have a vendor's lien transferred to or converted into United States interest-bearing securities which they would deposit in the court's registry for protection of the vendor. The court cited the Supreme Court of Florida in *City of Sanford v. McClelland*[51] for the proposition that, "A lien is a qualified right or a proprietary interest, which may be exercised over the property of another. It is a right which the law gives to have a debt satisfied out of a particular thing."[52] The court then considered the nature of a vested right[53] and, in closing, made it clear that it was immaterial whether the substituted security was as good as or better than the lien sought to be supplanted. Regardless how attractive the offer of substituted security is, it cannot constitutionally[54] be forced upon the vendor in place of his vendor's lien.

E. *Waiver of the Implied Vendor's Lien*

A distinctive doctrine of the implied vendor's lien is the concept of waiver. This is predicated on the idea that the implied lien, being a creature of equity on behalf of one who takes no other security, is accorded only to those who rely solely upon the legal implication.

> The equitable lien which the law implies in the absence of an express lien or other remedy is for the benefit of the grantor of land, and it may be waived. Such waiver may be expressly made, or it may be inferred from facts and circumstances. Any conduct on the part of the grantor tending to show that he does not rely solely upon the legal implication in his favor may operate as a waiver of the grantor's lien.[55]

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49. White v. White, 129 So.2d 148, 152 (Fla. 1st Dist. 1961).

50. *Supra* note 49.

51. 121 Fla. 253, 163 So. 513 (1935).

52. *Id.* at 254, 163 So. at 514.

53. Quoting Pearsall v. Great No. R.R. Co., 161 U.S. 646, 673 (1896):
A vested right has been defined as 'an immediate fixed right of present or future enjoyment' and also as "an immediate right of present enjoyment, or a present, fixed right of future enjoyment."

54. White v. White, *supra* note 49, at 152.
The Constitutions of both the state of Florida and of the United States provide that no person shall be deprived of his property without due process of law. Section 12, Declaration of Rights, Florida Constitution; Fifth Amendment, United States Constitution. These constitutional provisions fully protect any impairment of vested rights.

55. McKinnon v. Johnson, 54 Fla. 538, 539, 45 So. 451, 453 (1907).

The doctrine of waiver generally is based on the presumed intent of the vendor. A review of the cases illustrates its application. *McKeown v. Collins*[56] stated that the vendor's lien is lost where any security is taken, whether the security is on the land or otherwise, and whether for all of the purchase money or for just a portion, unless there is an express agreement to the contrary.[57] It has been said also that it mattered not whether the additional security was valid or invalid.[58] The reasoning in these cases is that the vendor, by taking additional security, shows an intention not to rely solely upon the vendor's lien.[59]

In *Bryan v. More*[60] the vendor was held to have waived his vendor's lien when he conveyed the property directly to a third party corporation, which executed a mortgage to erect a building and then sold the land to a bona fide purchaser without notice. The theory of the court was waiver and not simply loss of an otherwise valid lien by conveyance to an innocent party.[61] It must have been inferred that the vendor was aware of the purchaser's plans. It was, therefore, his knowing cooperation which was inconsistent with claiming a lien, thus justifying a conclusion of waiver or voluntarily relinquishing a claim of lien.

The waiver of the vendor's lien is a defensive matter, and the burden of proving it rests on the defendant.[62] However, when the vendor takes a separate or independent security other than the personal obligation of the vendee, it is at least prima facie evidence of a waiver of the implied lien, and the onus is thereafter upon such vendor to prove that it ought not to have that effect.[63] A vendor's lien is not waived by the taking of the personal note or personal bond of the vendee, as these are regarded as mere evidences of the indebtedness.[64]

It is generally asserted that a vendor's lien is waived: by the taking of a mortgage, either on the land conveyed or on other property; by the taking of a note endorsed by a third person; and by the taking of any personal responsibility of a third person, unless the lien is expressly retained.[65] In the usual case of lien waiver by the taking of additional

56. 38 Fla. 276, 21 So. 103 (1896).

57. *Id.* at 289, 21 So. at 106, citing Woods v. Bailey, 3 Fla. 41, 70 (1850).

58. Oliver v. Mercaldi, 103 So.2d 665 (Fla. 2d Dist. 1958). The statement was dictum, however, since the court found no waiver because the vendor had been assured that the chattel mortgage encompassed the leasehold.

59. *Accord*, Cooper v. Ruff, 110 Fla. 442, 148 So. 870 (1933); Bryan v. More, 101 Fla. 31, 133 So. 338 (1931); Bowen v. Grace, 64 Fla. 28, 59 So. 563 (1912); McKinnon v. Johnson, *supra* note 55.

60. *Supra* note 59.

61. See *infra* Part II, § H of text.

62. Lucas v. Wade, 43 Fla. 419, 31 So. 231 (1901) (finding no waiver).

63. Bradford v. Marvin, 2 Fla. 463 (1849).

64. Special Tax School Dist. v. Hillman, 131 Fla. 725, 179 So. 805 (1938).

65. Cooper v. Ruff, *supra* note 59; Nelson v. Dwiggins, 111 Fla. 298, 149 So. 613 (1933); Woods v. Bailey, *supra* note 57.

security, such security consists of a mortgage upon the premises sold.[66]

The validity of the security taken deserves special consideration. In *Oliver v. Mercaldi*[67] the court stated that, "An intention to waive a vendor's lien is readily found, even by reliance placed by a vendor upon an invalid security."[68] This principle, dictum in *Oliver*,[69] was taken from *McKeown*[70] where it had been stated that waiver is not affected by the fact that the security proved unavailing.[71] The dictum was doomed. In *Special Tax School District v. Hillman*[72] the Supreme Court, while recognizing the rule laid down in *McKeown*, nonetheless pointed out that where notes or mortgages are void and ineffective, they do *not* afford any *security* for the purchase price or for an equitable obligation to pay the value of the property conveyed. Hence, under these circumstances, the court found no waiver of the vendor's lien, because there was no security taken.

> [T]here was no waiver of the vendor's lien, or of an equitable lien, if there was such, by this abortive attempt to give the vendors security by way of a mortgage on the land conveyed.[73]

A literal interpretation of the court's language and reconciliation of the judicial expressions (as possibly distinct from the holdings) would lead to the conclusion that the applicability of the waiver principle, resulting from the vendor's taking security, depends upon the validity of the security at the time it is given. If at that time the security is void and of no effect, then taking the ineffective security does not constitute a waiver of the implied vendor's lien. On the other hand, if the security is valuable when given, but later becomes worthless, then a waiver does result from taking such security. Although this result may appear desirable from the viewpoint of protecting the vendor, it is difficult to reconcile the non-waiver rule with the frequently quoted phrase that "additional security shows an intention not to rely solely upon the vendor's lien."[74] Although the security is valueless, if such knowledge is not had by the vendor, he is nevertheless relying on the security and the mere acceptance of it shows an intention to rely thereon.

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66. This opinion was expressed by the court in McKeown v. Collins, 38 Fla. 276, 21 So. 103 (1896).

67. 103 So.2d 665 (Fla. 2d Dist. 1958).

68. *Id.* at 668.

69. The statement was dictum because the lien was held not waived in *Oliver*, *supra* note 67.

70. McKeown v. Collins, *supra* note 66.

71. *Id.* at 290, 21 So. at 107.

That the additional security should prove unavailing does not affect the question. The lien is waived by the taking of additional security, because it shows the intention of the vendor not to rely upon his implied equitable lien. This intention is as well shown by an informal act as by one regularly done.

72. 131 Fla. 725, 179 So. 805 (1938).

73. *Id* at 735, 179 So. at 809.

74. Cases cited *supra* note 59.

The *Special Tax School District* case is a Florida Supreme Court decision, and that court has not since ruled on the point. That case was one where equitable considerations heavily favored the vendor. He had conveyed a valuable parcel of realty to the School District and had received security for the purchase price, but the whole transaction was void on behalf of the purchaser because the School District had not followed statutory procedures. In the meantime a substantial school building had been erected, so that the vendor, if not accorded equitable relief by the imposition of a lien, would have been seriously prejudiced. Thus, it is submitted, the court quite properly imposed a lien on the vendor's behalf.

It should be noted also that the discussion relative to a vendor's lien and non-waiver was dictum in the *School District* case since the court's decision was that there was no vendor's lien, but simply an equitable lien. The vendor's lien was said to be incident to a contract of sale under which the vendee was unconditionally liable to pay the purchase price. Since the contract in the case was void, and the District not liable under the contract, technically there was no vendor's lien.

The special equitable considerations in the *School District* case are probably the key to the whole problem. The vendor's lien is one type of equitable lien, and the equitable lien may be imposed where the circumstances, equity, and good conscience require it.[75] These general considerations, evident in the *School District* case, should apply with equal force to any case where the equitable lien is technically of the implied vendor's type. Thus, the rules announced as to creation, waiver, and similar doctrines may be intended as little more than guidelines to be utilized or not as the merits of the case dictate. The broad generalizations as to waiver probably reflect a general feeling of disapprobation of the vendor's lien as a secret security interest in favor of a careless grantor, but the very existence of the remedy permits a just result where general considerations of fairness favor the vendor. The reader is, therefore, cautioned, in all of these cases, to carefully distinguish the actual holding from the many generalities and "rules" recited in reaching that decision.

Two additional waiver problems are presented. A waiver problem arises when the purchaser borrows money from a third person and executes a mortgage on the acquired land to secure the loan, using the borrowed money to pay the vendor who has knowledge of the loan and mortgage. The question as to whether such knowledge constitutes a waiver of the vendor's lien for the unpaid balance of the purchase price has been answered in the negative. The courts have held that the transaction does not destroy or waive the vendor's lien where there is no additional conduct of the vendor which would amount to a waiver.[76] The

75. See Boyer and Kutun, *Equitable Liens*, 20 U. MIAMI L. REV. 731 (1966).
76. Patton v. Meddick, *supra* note 25; Bowen v. Grace, 64 Fla. 28, 59 So. 563 (1912).

obtaining of the mortgage by the vendee under these facts is solely an act of the vendee and the vendor is in no way involved in it.[77]

In the case of *Lewis v. Cole*,[78] a vendor of realty took a promissory note from the purchasers. He later assigned the note as collateral security in an unrelated transaction, and afterwards redeemed it. The question as to whether such transfer of the note constituted a waiver of the vendor's lien was answered in the negative. The court held that although the lien is personal to the seller with an assignment or sale of the note discharging the lien, a different result occurs when there is an intention to redeem.

> [T]he rule is that the assignment of the note as collateral security only is not a waiver of the lien, and where the assignor afterwards pays or redeems the note the lien is revived.[79]

F. *Creation on Conveyance to Third Persons*

1. CONVEYANCE BY DIRECTION OF THE PURCHASER

The vendor's lien may be imposed when the land is conveyed to a third person at the request or direction of the purchaser. Under these circumstances, the vendor's lien for the purchase money attaches to and follows the land in the hands of the one receiving title. This result occurs without any special agreement for retention of lien by the vendor, and the lien binds the land as if it were conveyed to the person who undertook to pay the purchase money.[80]

2. SALE BY PURCHASER BEFORE RECEIVING LEGAL TITLE

A vendor's implied lien may be raised in favor of a vendor of an equitable estate.[81] Thus, when a vendee under an executory contract to purchase sells his interest to another and directs the original vendor to convey to the third party purchaser directly, a lien attaches in favor of the second vendor although he is not the grantor and never had legal title.[82]

The rule in such a case may appear to be somewhat of an anomaly since the selling vendee has only an equitable interest in the land, not

77. In Bowen v. Grace, *supra* note 76, the vendee had taken a $1,000 loan for payment to the vendor and had signed a mortgage with the bank. The bank had knowledge of the vendor-vendee transaction and such facts as in law give rise to the lien in favor of the vendor. The bank's $1,000 mortgage was held not entitled to priority over the vendor's lien. The lien was held not waived by the vendor, because he had no duty owed to the vendee or the bank. He made no special agreement with them, and he did not participate with the vendee in securing the loan or in executing a mortgage on the land.

78. 108 Fla. 585, 146 So. 679 (1933).

79. *Supra* note 78, at 680.

80. Patton v. Meddick, 97 Fla. 1073, 122 So. 710 (1929); DeLong v. Marshall, 66 Fla. 410, 63 So. 723 (1913).

81. Johns v. Seeley, 94 Fla. 851, 114 So. 452 (1927).

82. *Ibid.*

legal title. The vendor's lien is generally asserted to be a right which the law by implication extends to the *grantor* of land who has *conveyed the title*,[83] and here the vendor's lien is raised in favor of one who is not a grantor. His position, however, is similar; and his equity is equally as strong. The word "grantor" is used rather broadly in the usual statement of the rule of implied vendor's lien. Perhaps a rephrasing of the rule in terms of a "grantor of land or transferror of his interest therein" would be desirable. At any rate, one court's explanation is interesting.

> The vendor of an equitable estate or interest in realty has a lien for unpaid purchase money, whenever under the circumstances the vendor of a legal estate or interest therein would have a lien.[84]

The court then went on to say:

> [T]hat the lien may be enforced in favor of one not the grantor. Thus, when one has purchased without taking a deed, and has subsequently sold to a third party, and had the land conveyed by the original owner according to his direction to the subvendee, the lien attaches in favor of the vendor, although he is not the grantor, and the legal title did not rest in him, but he owned and controlled it, and having the equitable title, the legal outstanding in another, on his selling the same and causing the holder of the legal title to make conveyance to the other person, equity will regard the substance rather than the form, and the lien arises in favor of the unpaid purchase money for the land conveyed.[85]

Although the explanation gets a little involved, it appears that the vendee, rather than succeeding to the original vendor's lien, acquires an independent lien when the circumstances warrant, and that the original vendor, if still unpaid, should be able to assert his own vendor's lien against all subvendees or transferees with notice.[86]

G. *Rights of a Third Person Not a Party*

> While ordinarily the lien is restricted to the grantor, and does not arise in favor of third persons not parties to the transaction, it may arise in favor of a third person who may be said to be practically, though not actually a vendor. Thus, where by agreement between the grantor and grantee the purchase money is to be paid to a third person, according to the general view, a lien may arise in favor of such third person.[87]

83. Alabama-Florida Co. v. Mays, 111 Fla. 100, 149 So. 61 (1933); DeLong v. Marshall, *supra* note 80; Bowen v. Grace, *supra* note 76; McKinnon v. Johnson, 54 Fla. 538, 45 So. 451 (1907).

84. Johns v. Seeley, 94 Fla. 851, 852, 114 So. 452, 453 (1927).

85. *Id.* at 852, 114 So. at 453, quoting from 29 AM. & ENG. ENCY. OF LAW, 733.

86. See *infra* Part II, § H of text.

87. Alabama-Florida Co. v. Mays, 111 Fla. 100, 111, 149 So. 61, 65 (1933).

Thus, if as part of the consideration for the land, the purchaser assumes payment of an indebtedness owed by the vendor to a third person, the latter may enforce a vendor's lien to the amount of his claim.[88] This does not mean that every creditor of the vendor has a lien upon the property. There must be a specific agreement by the vendee to pay the indebtedness.

When the agreement of the purchaser is to assume and pay, as a part of the consideration, an indebtedness secured by a mortgage on all or part of the land conveyed, the mortgagee is permitted to enforce a vendor's lien on the entire tract for the amount of his claim.[89] The principle according a vendor's lien to the vendor's mortgagee or creditor should be applicable even when the assumed mortgage involves land not conveyed to the vendee and even when the outstanding debt is not secured by a mortgage or lien at all. This rule permitting a third party to have a vendor's lien seems analogous to subrogation, but if this is the basis, it is seemingly inconsistent with the non-assignability rule.[90] Further, the implication of a vendor's lien in favor of a mortgagee would appear superfluous if the mortgage covers the identical land which is being conveyed and made subject to the vendor's lien.

H. *Rights of Transferees*

The vendor's implied lien is valid and enforceable against subsequent purchasers and transferees of the grantee unless such transferees qualify as bona fide purchasers without notice.[91] Purchasers from the vendee with notice of the lien before paying the purchase price take title subject to the vendor's lien.[92] Thus, in *Rewis v. Williamson*,[93] the vendor had sold and conveyed property to the vendee with the vendee owing a portion of the purchase money. The vendee in turn sold and conveyed to another purchaser or subvendee who knew that the original vendor was still owed a portion of the purchase money. Accordingly, it was held that the purchaser took the property subject to the vendor's lien. A transferee with notice is in the same position as his vendor.[94]

In *Bryan v. More*,[95] the court held that a purchaser for valuable consideration and without notice of the implied vendor's lien acquired

88. *Ibid.* The principle was really dictum in the case, however. A similar rule was asserted in *In re* Mesa Steel Corp., 229 F. Supp. 669 (D. Ariz. 1964), involving a "vendor's lien" based on the retained legal title as the grantor therein had not yet conveyed.

89. Alabama-Florida Co. v. Mays, *supra* note 87. The text principle was assumed but not decided in the *Mays* case.

90. See *supra* Part II, § C of text.

91. See *infra* cases cited in note 92.

92. Brownlow v. W. T. Harrison, Inc., 102 Fla. 446, 135 So. 848 (1931); Johns v. Seeley, 94 Fla. 851, 114 So. 452 (1927); DeLong v. Marshall, *supra* note 80; Bowen v. Grace, *supra* note 76.

93. 51 Fla. 529, 41 So. 449 (1906).

94. Oliver v. Mercaldi, 103 So.2d 665 (Fla. 2d Dist. 1958).

95. 101 Fla. 31, 133 So. 338 (1931).

the land free of the vendor's lien. Although the *Bryan* case apparently bottomed the decision on waiver, the lien should be lost in any event when the land is acquired by a subsequent bona fide purchaser without notice of the prior outstanding equity.[96] The burden of proof as to the good faith or lack of notice is on the one claiming to be such a bona fide purchaser.[97]

The problem of partial, as distinct from full, payment prior to the acquisition of notice of the outstanding lien may cause difficulty. It has been asserted that the vendor may enforce the lien against a subsequent purchaser without notice to the extent of the purchase price unpaid by him at the time he receives notice of the vendor's claim.[98] This "pro tanto" protection rule is frequently followed in analogous cases arising under the recording act.[99] As applied to lien cases, the rights of both parties can easily be protected by requiring the subsequent purchaser who acquires the land after notice to make subsequent payments to the lienor until either the lien is satisfied or until the entire consideration is paid. This rule and procedure should adequately cover the situation, but a recent case must be considered.

Wise v. Quina,[100] arising under the recording act, involved the rights of holders of unrecorded easements and the right of a claimed subsequent bona fide purchaser of the encumbered land without notice of the easements. The purchaser therein had paid eight thousand of the thirty-four thousand dollar purchase price and had executed an installment note and mortgage for the balance. It was stated that the securities (*i.e.*, the note and mortgage) were still held by the vendor at the time of notice. The court concluded that the grantee was a bona fide purchaser for value to

96. The text principle is applicable at common law under the doctrine that a legal interest prevails over a prior equitable interest where the competing equities are of equal merit and one of the equities is combined with the legal title. In the situation under discussion the subsequent purchaser (or mortgagee) gets a legal title (or mortgage) plus the equity derived from paying value without notice. He thus prevails over the original vendor who has only an equity. See generally, 1 BOYER, FLA. REAL ESTATE TRANSACTIONS p. 701 (1966); Myers v. Van Buskirk, 96 Fla. 704, 119 So. 123 (1928).

Strictly speaking the recording act is not applicable to the vendor's implied lien since that act provides that, "No conveyance, transfer or mortgage . . . shall be good and effectual in law or equity against creditors or subsequent purchases . . . unless the same be recorded. . . ." FLA. STAT. § 695.01 (1965). Since the vendor's lien is not a "conveyance, transfer or mortgage," and is not created by a recordable instrument, there is nothing to record and presumably no estoppel for not recording. The strong policy underlying the recording act, however, is given effect by protecting the bona fide purchaser rather than the vendor who relied on an equitable lien.

97. Johns v. Seeley, 94 Fla. 851, 857, 114 So. 452, 454 (1927), stated:

> Parties claiming to be bona fide purchasers for value without notice of a vendor's lien for unpaid purchase money must affirmatively show that they had not only purchased their interest for value, but that they had actually paid value therefor, before notice of the lien. (Citations omitted.)

98. DeLong v. Marshall, 66 Fla. 410, 63 So. 723 (1913).

99. 4 AMER. LAW OF PROPERTY, § 17.10, p. 559 (Casner ed. 1952).

100. 174 So.2d 590 (Fla. 1st Dist. 1965).

the full extent of the consideration agreed to be paid, and therefore the easements were destroyed. The court, quoting a previous decision, stated:

> If, however, a purchaser has notice, actual or constructive, of prior adverse rights in the land, *before he has paid the purchase price or has become irrevocably bound for its payment*, he is not protected as a bona fide purchaser, even though he may have received a deed purporting to convey to him the whole title, both legal and equitable.[101]

The term "irrevocably bound" was then construed to mean that one was so bound when he had no legal right to revoke the promise to pay, when he was contractually bound by legally enforceable instruments to make the payments or suffer the legal consequences of default.

It is submitted that the equating of "purchaser" with one "irrevocably bound" by contract is an extension of the purchaser concept. If a person is obligated under a non-negotiable instrument, he has available such personal defenses as failure of consideration in any subsequent suit by the obligee. Similarly, even if the note is negotiable, the obligor has available personal defenses in any subsequent action by the obligee as long as the note is not in fact negotiated. Thus, if the obligor is required to pay a third party claimant the balance of the purchase price after notice of an outstanding claim (as, for example, a vendor's lien), he would have a defense in any subsequent action by the obligee under these circumstances. Thus, the rule of pro tanto protection appears to be the fairest solution in these cases where notice is acquired after some, but not all of the purchase price is paid. If, however, a negotiable obligation is negotiated before notice, then the obligor does not have the benefit of personal defenses and he should be regarded as a purchaser to the full extent of the purchase price.[102]

I. *Enforcement*

The implied vendor's lien can be enforced against the vendee who fails to abide by the terms of the contract where the terms of the contract include, or are for something other than payment of money. Thus, in *Brownlow v. W. T. Harrison, Inc.*,[103] the vendee was obligated, as part of the consideration for realty sold to him, to return certain notes of the vendor that he held. Instead of returning and discharging all of the notes, he assigned one of them to a third person.[104] The vendor was held entitled

101. *Id.* at 593 (emphasis added), quoting from Myers v. Van Buskirk, 96 Fla. 704, 711, 119 So. 123, 125 (1928).

102. See generally, on the problem discussed in the text paragraph, 4 AMER. LAW OF PROPERTY § 17.10 (Casner ed. 1952).

103. 102 Fla. 446, 135 So. 848 (1931).

104. Actually this note had already been assigned at the time the agreement was made, but the vendor was unaware of this and of the vendee's inability to perform. The result would appear to be the same, however, whether he assigned the note before or after making the agreement.

to enforce a vendor's lien upon the property for the amount of the outstanding note plus interest accumulated from the date it was to be assigned to the vendor. The realty was ordered sold to satisfy the amount of the note and interest.

Where the vendee has, as part of the consideration for the land, agreed to pay a certain outstanding indebtedness of the vendor, a failure to do so will result in an enforcement of the vendor's lien for an amount equal to the outstanding indebtedness.[105] This rule applies whether the indebtedness is evidenced by an encumbrance upon the land or is personal in nature.[106] On foreclosure, the lien is enforced only to the extent of the actual consideration and interest accrued; the remedy apparently does not include attorney's fees.[107]

The vendor's lien is incident to a contract or agreement to pay the agreed purchase price. Thus in the *Special Tax School District* case,[108] where the court held the contract for the sale of the land void because of the lack of authority of the trustees of the school district to enter into the contract because of failure to follow statutory procedures, it enforced an equitable lien in the nature of a vendor's lien.

If there is an absence of indebtedness between the vendor and vendee, then a lien is non-existent and there can be no enforcement,[109] but if there is an indebtedness and a lien does in fact exist, the lien and foreclosure affect only the particular land sold by the vendor; they do not include other realty owned by the vendee.[110]

III. Vendor's Lien Incident to Reservation of Legal Title

The second type of vendor's lien is the interest of the vendor incident to his retained legal title after he has entered into a contract to convey.[111] During the existence of the contract and before conveyance (the situation herein considered), it may be somewhat anomalous to refer to the vendor's interest as a lien, and the terminology has been criticized.[112] The vendor

105. Alabama-Florida Co. v. Mays, 111 Fla. 100, 149 So. 61 (1933).

106. *Ibid.*

107. Israel v. Bean, 97 Fla. 636, 121 So. 806 (1929). The case is not as direct authority as it might be. No Florida case has been found allowing attorney's fees for enforcement of the implied lien. The lien imposed by equity will be for no more than that which general equitable considerations require in the particular case.

108. Special Tax School Dist. v. Hillman, 131 Fla. 725, 179 So. 805 (1938).

109. Kilcoyne v. Golden Beach Corp., 101 Fla. 1470, 136 So. 350 (1931). In this case the vendor retained legal title, but the principle would also be applicable to the implied lien.

110. White v. White, 129 So.2d 148 (Fla. 1st Dist. 1961).

111. Alabama-Florida Co. v. Mays, *supra* note 105; Aycock Bros. Lumber Co. v. First Nat'l Bank, 54 Fla. 604, 45 So. 501 (1907). Jasper v. Orange Lake Homes, Inc., 151 So.2d 331, 333 (Fla. 2d Dist. 1963) (involving taxation of agreements for deed), held that the vendor has "(a) lien upon the vendee's equitable estate as security for the payment of the purchase price according to the terms of the agreement."

112. To call this complete legal title a lien is certainly a misnomer. In case of a

still has legal title and it is certainly more substantial than the equity of the implied lien raised in favor of the grantor after conveyance. Nevertheless, the cases recognize that the vendor may treat his interest as a lien and enforce it as such.[113]

The doctrine of equitable conversion, whereby the vendor's interest (the right to the balance of the purchase price) is regarded primarily as personalty, and the vendee's (the beneficial ownership of the real estate) is regarded as realty, is generally used to explain the status of the parties under an enforceable contract to convey.[114] The doctrine is too well known to be labored here. Equitable conversion takes place only if the contract is specifically enforceable; thus conversion depends upon the availability of the remedy of specific performance and not vice versa.[115]

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conveyance, the grantor has a lien, but no title. In case of a contract for sale before conveyance, the vendor has the legal title, and has no need for any lien; his title is a more efficient security, since the vendee cannot defeat it by an act or transfer even to or with a *bona fide* purchaser. 4 POMEROY, EQUITY JURISPRUDENCE, p. 766 (5th ed. 1941).

True, equitable conversion treats his interest as security for the purchase price, but it would be somewhat of a strain even for equitable conversion to reduce his undoubted legal ownership to the status of a mere lien . . . but so long as title is still in his name, he is possessed of much more than an equity. . . . But a vendor under a contract for sale has legal title superior to all subsequent equities; it is a misnomer to call it a lien because it is actually a legal title retained as security. Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550, 557 (1965).

113. Aycock Bros. Lumber Co. v. First Nat'l Bank, *supra* note 111; Jasper v. Orange Lake Homes, Inc., *supra* note 111.

114. It has long been the law of this jurisdiction that the vendor's act in executing a contract to convey the legal title to property upon the payment of an agreed purchase price constitutes the vendee as the real beneficial owner, legal title remaining in the vendor as trustee with the obligation to convey upon compliance with the terms of the contract. Under the doctrine of equitable conversion, the vendor's interest thereon becomes personalty. Tingle v. Hornsby, 111 So.2d 274, 276 (Fla. 1st Dist. 1959).

See also: Hull v. Maryland Cas. Co., 79 So.2d 517 (Fla. 1955); Michaels v. Albert Pick & Co., 158 Fla. 877, 30 So.2d 498 (1947); Mannion v. Owen, 121 So.2d 816 (Fla. 1st Dist. 1960); Buck v. McNab, 139 So.2d 734 (Fla. 2d Dist. 1962).

The title in the hands of the vendor is sometimes referred to as the "naked legal title." Hull v. Maryland Cas. Co., *supra;* Michaels v. Albert Pick & Co., *supra;* Mannion v. Owen, *supra.*

The vendor is also referred to as a trustee of the legal title for the security and has the obligation to convey such title upon compliance with the terms of the contract. Atlantic Beach Improvement Corp. v. Hall, 143 Fla. 778, 197 So. 464 (1940); Marion Mortgage Co. v. Grennan, 106 Fla. 913, 143 So. 761 (1932); Miami Bond & Mortgage Co. v. Bell, 101 Fla. 1291, 133 So. 547 (1931); Insurance Co. of No. Am. v. Erickson, 50 Fla. 419, 39 So. 495 (1905).

115. Lee, *The Interests Created By The Installment Land Contract*, 19 U. MIAMI L. REV. 367, 370 (1965). The effect on the conversion principle of the fact that the contract may be specifically enforceable only on one side of the transaction was referred to by Lee where he considers half a conversion. This is of interest in connection with the type of arrangement discussed in the text *infra*, where the purchaser does not obligate himself to complete the payment.

Vance v. Roberts, 96 Fla. 356, 118 So. 205 (1928), held that contract provision restricting vendor's remedy to liquidated damages on breach by vendee does not preclude the vendee from obtaining specific performance against the vendor.

The lien of the vendor under a contract to convey has been characterized as merely another mode of expressing his equitable interest arising from the doctrine of conversion. It simply describes his right of enforcing his claim for the purchase money against or out of the vendee's equitable estate by means of a suit in equity.[116] Depending upon the jurisdiction, there are several remedies available,[117] including that of specific performance.[118] Since this article is concerned with the vendor's lien in Florida, discussion generally will be limited to the remedy of treating the interest as a lien and enforcing it as such.

At the outset it might be noted that under current usage in Florida there are several more or less distinct types of situations involving contracts to purchase. The first is an ordinary purchase or sales agreement, an executory contract to convey, wherein the purchaser makes a down payment, deposit or earnest money, on signing the contract with provisions that in a relatively short time (weeks or months) the transaction will be consummated and the balance of the purchase price paid and the deed delivered. This agreement frequently takes the form of a "deposit receipt." In contrast to this type contract are installment sales with the vendor retaining title until all, or substantially all,[119] of the installments are paid over an extended period of time. These installment sales may, in turn, be divided into two types: one often involving improved property where the purchaser actually goes into possession and exercises dominion and control over the land as a beneficial owner; the other usually involving unimproved land or property under development where the purchaser does not take possession and may be precluded from exercising substantial acts of dominion over the land. In fact, some of the agreements in this latter type situation are so drawn as not to be obligatory on the purchaser as to making all the payments, the principal obligation being on the vendor to convey when and if the purchaser does make all the payments. In Florida, the former type installment agreement is frequently called an "agreement for deed" and the latter type referred to as an "installment" sale or contract.

Considering the diversity of these transactions, plus the fact that

116. 4 POMEROY, *supra* note 112, at 768-769.

117. These are delineated briefly in Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550, 557 *et seq.* (1965). The contract itself might provide for alternative remedies.

118. In a suit for specific performance, if the vendee does not have funds to complete the transaction, the land will be sold and the proceeds applied towards the payment of the purchase price, and if the amount realized is insufficient, a deficiency decree may be granted. This is the rule in Florida since 1954. Clements v. Leonard, 70 So.2d 840 (Fla. 1954). Thus, although the end result of specific performance may be similar to foreclosure of the vendor's lien, there are both advantages and disadvantages of resorting to that remedy. These are delineated in Lee, *supra* note 117, at 556.

119. The agreement might provide that after a certain aggregate sum is paid, the vendor will execute a deed and take back a purchase money mortgage for the balance.

essentially different transactions (as, for example, a lending of money and taking of security, that is, a mortgage) may be cast in the form of a contract of purchase,[120] it might be expected that different concepts and principles should apply. There is as yet, however, no clear indication that a different analysis and approach is applicable.[121] The basic concept of equitable conversion is used without an expressed appreciation of any difference between the ordinary purchase and sale agreement and the "agreement for deed" situation. No reported cases have been found involving the arrangement where the vendee is not obligated under the agreement to complete the installments.[122]

A. *Enforcement*

Upon the vendee's default under the contract, the vendor's judicially prescribed procedure in Florida is to enforce payment by a suit similar to strict foreclosure.[123] In *Mannion v. Owen*,[124] the court, quoting from an earlier case,[125] stated:

> [A]nd both in England and America the vendor's equitable remedy consists in a suit in the nature of a strict foreclosure, by which the vendee is decreed to pay the price within a limited

120. See, *e.g.*, Mid-State Inv. Corp. v. O'Steen, 133 So.2d 455 (Fla. 1st Dist. 1961), where there was in fact a lending of money. The court quite correctly stated that the transaction was equivalent to a mortgage and required foreclosure proceedings in order to terminate the vendee's interest.

121. Except, that is, where the transaction is essentially something else cast in the form of a sales contract. See, *e.g.*, the *O'Steen* case, *supra* note 120.

It may be argued that in all of these cases, particularly in the installment transactions, the title retained by the vendor is security for the purchase price which the vendee is obligated to pay (assuming he is so obligated under the particular agreement), and that the mortgage analogy should govern. Statements in many of the cases cited *supra* note 114 support this conclusion. Although there is definitely a tendency in recent decisions to recognize the installment contract as essentially a security device, see Boyer & Ross, *Real Property Law*, 18 U. MIAMI L. REV. 799, 806 (1964), the protection afforded the defaulting vendee has, to say the least, been considerably less than that afforded a defaulting mortgagor. See, *e.g.*, Lee's articles on the *Installment Land Contract*, *supra* notes 115 and 117, 19 U. MIAMI L. REV. at 375-377, 563-565; Huguley v. Hall, 141 So.2d 595 (Fla. 1st Dist. 1962), *cert. denied*, 157 So.2d 417 (Fla. 1963), discussed *infra* text following note 159.

122. This type of agreement appears to be of recent vintage and no doubt was created to avoid the documentary stamp tax. State v. Green, 132 So.2d 761 (Fla. 1961), held that an agreement for deed providing for no personal liability of the buyer and that the seller will look only to the land for payment of the balance of the purchase price, is not subject to the documentary stamp tax. Gulf Am. Land Corp. v. Green, 149 So.2d 396 (1st Dist. 1962), *cert. denied*, 157 So.2d 70 (Fla. 1963), held that installment contracts, after the expiration of the time during which buyers had the right to change their minds, were written obligations to pay money and thus subject to the stamp tax.

123. Barnett v. Dollison, 125 Fla. 254, 169 So. 665 (1936); Wordinger v. Wirt, 112 Fla. 822, 151 So. 47 (1933); Marion Mortgage Co. v. Grennan, 106 Fla. 913, 143 So. 761 (1932); Miami Bond & Mortgage Co. v. Bell, 101 Fla. 1291, 133 So. 547 (1931); Schmidt v. Kibben, 100 Fla. 1684, 132 So. 194 (1931); Aycock Bros. Lumber Co. v. First Nat'l Bank, 54 Fla. 604, 45 So. 501 (1907). See also *infra* note 131 for a discussion of Mid-State Inv. Corp. v. O'Steen.

124. 121 So.2d 816 (Fla. 1st Dist. 1960).

125. Aycock Bros. Lumber Co. v. First Nat'l Bank, *supra* note 123.

> time, and in default of such payment the vendee's equitable estate is foreclosed and sold to pay the purchase price. . . .[126]

Thus, a suit in equity may be brought and the property sold where it is not inequitable to the vendee.[127] In bringing such suit, it is incumbent upon the vendor to show that he is not in default,[128] and the complaint must show that he is able to tender a deed and that he makes an offer to do so.[129] It has been pointed out that this procedure differs materially from the traditional strict foreclosure,[130] that the Florida procedure results in a judicial sale of the property in case the purchaser fails to cure his default within the alloted time, and that it is similar to the statutory procedure for the foreclosure of mortgage liens.[131]

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126. *Supra* note 124, at 821.

127. In Emmons v. Gracy, 61 Fla. 593, 594, 54 So. 899, 900 (1911) the court held,

> Where a contract for the sale of land is in the form of a bond for title given by the vendor, conditioned on the performance of the vendee's promises, a court of equity may upon a breach of the contract by the vendee foreclose his rights thereunder, and in granting appropriate relief may, at the instance of the vendor, who retained title, order a sale of the property, where it will not be inequitable to the vendee.

In Schmidt v. Kibben, 100 Fla. 1684, 1689, 132 So. 194, 196 (1931) the court held,

> [U]pon the default of the vendee the vendor has the correlative right to an equitable enforcement of the contract by requiring the payment of the consideration within a reasonable time, or in default thereof to have the rights of the vendee under the contract foreclosed.

128. Actual tender of the deed by the vendor or his assignee is not a condition precedent to the maintenance of a suit of foreclosure upon default of the vendee. Barnett v. Dollison, 125 Fla. 254, 169 So. 665 (1936); Smalley v. Sovereign Fin. Co., *infra* note 129; Miami Bond & Mortgage Co. v. Bell, *supra* note 123.

The vendor or his assignee were held not to be precluded from commencing suit, nor was foreclosure precluded because of the vendor's promise not to foreclose given in return for improvements erected by vendee, when the improvements were for the benefit of the vendee; there was a lack of consideration for the promise and there was an indefiniteness as to time and terms. Hygema v. Markley, 137 Fla. 1, 187 So. 373 (1939). A similar result applied to an agreement for extension of time for payments. If there is no consideration for such agreement then it is unenforceable. Mitchell v. Harper, 80 Fla. 338, 86 So. 246 (1920).

129. Smalley v. Sovereign Fin. Co., 102 Fla. 32, 135 So. 558 (1931). In Barnett v. Dollison, 125 Fla. 254, 169 So. 665 (1936), it was stated that where there were insufficient allegations in the complaint there was no basis for foreclosure, but there may be sufficient allegations to give the court jurisdiction to decree a forfeiture and cancellation of the original agreement, "[U]pon such terms and conditions as might be required in equity and good conscience. . . ." *Id.* at 262, 169 So. at 669.

This case and proposition was cited by the dissenting opinion in the district court in Huguley v. Hall, 141 So.2d 595, 600 (Fla. 1st Dist. 1962). The *Huguley* case is discussed *infra* text following note 159.

130. Lee, *supra* note 117, at 559.

131. FLA. STAT. § 697.01 (1966), defines mortgages as follows:

> 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 payment of money, whether such instrument be from the debtor or 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 the same regulations, restraints and forms as are prescribed in relation to mortgages.

In Mid-State Inv. Corp. v. O'Steen, 133 So.2d 455 (Fla. 1st Dist. 1961), there was an actual lending of money with lenders, who after receiving an "assignment" of the borrowers'

The lien aspects of the vendor's interest have been clearly recognized in situations where the vendor assigns his contract rights and the note representing the purchase money, but does not convey the legal title to the transferee. The court has stated that when a note has been given for the purchase money, the essential ingredients of a mortgage attach.[132] Thus, a transfer of the note amounts to an equitable transfer of the mortgage.[133] Therefore, the assignee of the note or transferee of the vendor's contract rights is entitled to foreclose, but in doing so, the vendor who still has the record legal title must be made a party to the foreclosure proceedings so that the purchaser at the sale will get a clear title.[134]

B. *Assignability*

Although the implied vendor's lien is not assignable,[135] the vendor's lien incident to the retention of legal title is freely assignable.[136] Indeed, this has already been indicated[137] in connection with enforcement of the lien. The lien is assigned when the vendor conveys his legal title since the lien is incident thereto.[138] Further, an assignment of the vendor's interest in the contract to convey, or an assignment of the note or other indebtedness representing the purchase price is also regarded as an equitable assignment of the lien.[139] The lien of the assignee cannot be for an amount in excess of the purchase money outstanding.[140]

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deed, entered into an agreement for deed with the borrowers. The contract required monthly payments and provided for forfeiture on default. The borrowing vendees were let into possession. The defendant-vendors, upon default by the plaintiff-vendees, entered the land and took possession of the personal property therein. The court held that the contract was in essence a mortgage, and as title was held only for security, the defendants had no legal right to repossess the real or personal property, and had no right to trespass upon the real property or exercise dominion over the personal property. The proper action to take was a suit for foreclosure; the defendants were guilty of trespass.

In cases where there has been no actual lending of money, the Florida courts have been considerably less solicitous of the rights of the defaulting purchaser. See LEE, *supra* note 117, at 377, wherein he states: "Other Florida decisions would indicate that the purchaser in default is at the mercy of the vendor." The author does point out, however, that if the vendor resorts to specific performance or foreclosure, then the vendee is given an opportunity to redeem or share in the proceeds of sale. It is not at all evident that in all contract situations the vendor must forclose his lien rather than resort to another remedy. See also 1 BOYER, FLA. REAL ESTATE TRANSACTIONS § 4.07 (1966), relating to damages.

132. Aycock Bros. Lumber Co. v. First Nat'l Bank, 54 Fla. 604, 45 So. 501 (1907).

133. *Ibid.*

134. Betton v. William, 4 Fla. 11 (1851). An assignor is a proper party if he has parted with all interest in the land, but is a necessary party if he still retains some rights.

When both the vendor and the vendee are joined in a foreclosure suit by the assignee, then the interests, if any, of both will pass by the foreclosure decree.

Accord, with text: Miami Bond & Mortgage Co. v. Bell, 101 Fla. 1291, 133 So. 547 (1931); Aycock Bros. Lumber Co. v. First Nat'l Bank, *supra* note 132.

135. *Supra* text Part II § C.

136. Alabama-Florida Co. v. Mays, 111 Fla. 100, 149 So. 61 (1933) (dictum); Aycock Bros. Lumber Co. v. First Nat'l Bank, *supra* note 132.

137. *Supra* text accompanying note 132.

138. Marion Mortgage Co. v. Grennan, 106 Fla. 913, 143 So. 761 (1932). In this case, however, there was also an assignment of the contract.

139. Aycock Bros. Lumber Co. v. First Nat'l Bank, *supra* note 132.

140. Marion Mortgage Co. v. Grennan, *supra* note 138.

Since the vendor under a contract to convey has a freely transferable interest, his creditors can attach such interest.[141] Therefore the vendor's lien incident to the retention of legal title is attachable by creditors. Although normally a creditor can attach only the actual or beneficial interest of the debtor,[142] creditors are within the protection of the recording act[143] so that in a proper case the "attachable" interest may be enlarged to what it appears as the record title when outstanding interests are not recorded at the time the creditor perfects his lien.[144] This should cause no difficulty but judicial statements may require careful scrutiny.

In *Hull v. Maryland Cas. Co.*,[145] after a judgment creditor of the vendor levied execution on land which had actually been conveyed to the vendee the land owner brought a quiet title suit. The vendee owner had not recorded the deed until twenty-three years after acquisition, but the agreement for deed was incorporated by reference in other instruments of record. The court held that title should be quieted against the judgment. The court on rehearing pointed out that the creditor would have had notice of the outstanding interest had he inspected the other instruments of record, that such record "constitutes notice not only of its own contents, but of such other facts as would have been learned. . . ."[146] This is well established principle and affords a sufficient basis for granting the relief requested. Since the creditor was charged with notice at the time of perfecting his lien, the rights of the vendee under the unrecorded contract were superior. Since the vendee now had complete ownership, the vendor had no interest which the creditor could reach. However, as a prelude to this decision, the court stated, citing *Hunter v. State Bank*,[147] that "*[w]ithout reference to the recording act*,"[148] the lien of a judgment creditor attaches only to the land of the judgment debtor, and since the doctrine of equitable conversion had acted upon the agreement to convey title, the vendor had merely a naked legal title as security and no interest in the land to which such judgment lien could attach.[149]

It is submitted that this statement was accurate but that the qualify-

141. 1 BOYER, FLA. REAL ESTATE TRANSACTIONS, p. 63 (1966).

142. Laganke v. Sutter, 137 Fla. 71, 187 So. 586 (1939); First Nat'l Bank v. Savarese, 101 Fla. 480, 134 So. 501 (1931); Hunter v. State Bank, 65 Fla. 202, 61 So. 497 (1913).

143. The recording act protects "creditors" and "subsequent purchasers for a valuable consideration and without notice" against prior unrecorded instruments. FLA. STAT. § 659.01 (1965).

144. In 1 BOYER, *supra* note 141, at p. 729, it is pointed out that cases in Florida have at times applied the rule that the creditor can reach only the actual interest of the debtor and at times have allowed him to reach the apparent interest as indicated by the record title. Of course, only lien creditors are entitled to the protection of the recording act, and the creditors must be without notice, actual, constructive or inquiry, of the prior unrecorded interest at the time the lien is acquired. See I BOYER, *supra* note 141, §§ 5.01, 5.02 and 28.02; Hull v. Maryland Cas. Co., *infra* note 145.

145. 79 So.2d 517 (Fla. 1955).

146. *Id.* at 519.

147. 65 Fla. 202, 61 So. 497 (1913).

148. 79 So.2d at 518. (Emphasis added.)

149. *Ibid.*

ing phrase "without reference to the recording act" must not be overlooked. Since the creditor was charged with notice of the vendee's interest at the time of acquiring the first judgment, the *Hull* case was a proper one for applying the principle that the creditor can reach only the actual interest of the debtor. Thus the statement that the vendor had no interest in the land to which the lien could attach was quite proper. The vendor had long since conveyed and had no beneficial interest at all in the land when the judgment was acquired. However, when a contract for sale has not been fully performed, although the doctrine of equitable conversion may be applicable, the vendor does have an actual interest in the land and such interest (whether called a vendor's lien, right to the purchase money, or otherwise characterized) should be reachable by creditors.

C. *Statute of Limitations*

The period of limitations applicable to the vendor's lien incident to a contract to convey is twenty years.[150] This twenty-year period is applicable although an action on the debt for the purchase price is barred earlier by limitations applicable to actions not represented by instruments under seal.[151] A leading case has stated the principle thus:

> A vendor's lien under an agreement or bond to convey, where the purchaser enters into possession without receiving a conveyance, is not barred by the statute of limitations until the lapse of twenty years without the payment of interest, or other recognition of the indebtedness on the part of the purchaser.[152]

Passage of time alone apparently does not bar the action, but possession of the vendee must be adverse. Possession only becomes adverse under circumstances which would make a mortgagor's possession adverse to the mortgagee. The analogy to a mortgage transaction is particularly valid and the twenty-year period is applied.[153]

Although the twenty years may not run so as to bar an action on the lien, payment may be established by circumstances such as would satisfy a jury that the continued existence of the debt was highly improbable.[154]

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150. Soderberg v. Davis, 118 Fla. 288, 159 So. 23 (1935).

151. FLA. STAT. § 95.11 (1965), *supra* note 35, lists periods of limitations generally applicable.

152. Soderberg v. Davis, *supra* note 150, at 24.

153. FLA. STAT. § 95.28 (1965), bars the lien of a mortgage after twenty years. Cases involving adverse possession against mortgagees and similar incumbrancers do not always cite § 95.28 but talk generally in terms of adverse possession. Hill v. Gordon, 45 Fed. 276, 279 (N.D. Fla. 1891), *appeal dismissed*, 149 U.S. 775 (1893) (analogizing a judgment lien to a mortgage), held that seven years adverse possession was not sufficient to bar a judgment lien and that twenty years would be required. FLA. STAT. § 95.11(1) (1965), bars an action on a judgment or decree of court after twenty years.

154. Soderberg v. Davis, *supra* note 150.

The holder of a vendor's lien may also be barred by the equitable doctrine of laches[155] irrespective of the time that has passed.[156]

D. *Vendee's Equity of Redemption*

On foreclosure of a vendor's lien in Florida, the vendee has a reasonable time in which to pay the balance due, and only upon failure to do so will he be foreclosed of all his equity, right, title and interest in and to the property involved.[157] Upon failure of the vendee to redeem, the land is sold to recover the outstanding purchase money.[158]

The vendee's equity of redemption seems sufficiently secure when the vendor resorts to a foreclosure action. When the vendor resorts to other remedies, however, the Florida courts are not always so solicitous of the vendee's position, and the equities afforded a mortgagor are frequently overlooked. In the recent case of *Huguley v. Hall*[159] the court did say: "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."[160] What the court did, however, was to let stand a judgment that the contract was "null and cancelled and to be foreclosed."[161] The suit was a quiet title action by a vendor out of possession against a defaulting vendee in possession. Unfortunately, from the viewpoint of the substantive rights of the vendee, preoccupation with the proper remedy (quiet title versus ejectment) may have resulted in less than adequate consideration to the equities of the purchaser. The decree allowed the vendor to clear title of the vendee's interest without any provision for foreclosure sale or opportunity accorded the purchaser to assert an equity of redemption.

The Florida Supreme Court, in denying certiorari in the *Huguley*[162] case, justified the decree on the ground that the purchaser had failed to affirmatively 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. The end result,

155. Cooper v. Ruff, 110 Fla. 442, 148 So. 870 (1933); Buck v. NcNab, 139 So.2d 734 (Fla. 2d Dist. 1962).

156. Shirley v. Lake Butler Corp., 123 So.2d 267, 271 (Fla. 2d Dist. 1960):

> The question of laches turns not merely upon the lapse of time, but also upon the nature and evidence of the rights involved and other relative circumstances occurring during the lapse of time.

157. Miami Bond & Mortgage Co. v. Bell, *supra* note 134; Schmidt v. Kibben, *supra* note 123; Aycock Bros. Lumber Co. v. First Nat'l Bank, *supra* note 132.

158. *Supra* note 127.

159. 157 So.2d 417 (Fla. 1963).

160. *Id.* at 418.

161. Huguley v. Hall, 141 So.2d 595 (1st Dist. 1962), *cert. denied*, 157 So.2d 417 (Fla. 1963).

162. 157 So.2d 417 (Fla. 1963).

permitting forfeiture of the equity of redemption without foreclosure, is difficult to reconcile with the cases heretofore delineated speaking of the vendor's lien and enforcement by foreclosure action. Further, the suit technically was one of quiet title, and it is difficult to see how the plaintiff vendor either did or attempted to do equity, which is normally a prerequisite to the attainment of equitable relief.

The case of *Mid-State Inv. Corp. v. O'Steen*[163] did, in fact, prevent arbitrary action on behalf of the vendor in terminating the rights of the vendee under the contract to purchase therein involved. However, as previously pointed out,[164] there was an actual lending of money in that case, and the transaction constituted a mortgage in fact under the Florida statute and not simply a sales arrangement. At this juncture, it seems that the redemption equity of an ordinary vendee depends considerably upon the nature of the remedy elected by the vendor.

When suit is brought to foreclose, and equity of redemption is asserted, the vendor should not receive an excess of the amount needed to satisfy the lien,[165] the outstanding balance of the purchase price money. The excess should be paid to the vendee for his equity of redemption, as any such surplus represents the value of the vendee's interest in the property.

IV. THE EXPRESSED VENDOR'S LIEN

The third type of vendor's lien is created by an express reservation of lien in a deed of conveyance.[166] It arises by virtue of a contract,[167] and not by implication of law. It is a matter of the expressed intent of the parties,[168] and arises when expressly stated in the deed of conveyance or other instrument.[169] In equity the vendor's expressly reserved lien is regarded as security in the nature of a mortgage for the unpaid purchase money.[170]

163. 133 So.2d 455 (Fla. 1st Dist. 1961).

164. *Supra* note 131.

165. The mortgage analogy should apply. See the *O'Steen* case, *supra* note 163.

166. Alabama-Florida Co. v. Mays, 111 Fla. 100, 149 So. 61 (1933); 4 POMEROY, EQUITY JURISPRUDENCE § 1255 (5th ed. 1941).

167. Highland Crate Co-op. v. Guaranty Life Ins. Co., 154 Fla. 332, 17 So.2d 515 (1944); Alabama-Florida Co. v. Mays, *supra* note 166; McKeown v. Collins, 38 Fla. 276, 21 So. 103 (1896).

168. Atlantic Fed. Sav. & Loan Ass'n v. Kitimat Corp., 143 So.2d 719 (Fla. 2d Dist. 1962); Alabama-Florida Co. v. Mays, *supra* note 166.

169. Highland Crate Co-op. v. Guaranty Life Ins. Co., *supra* note 167; Soderberg v. Davis, 118 Fla. 288, 159 So. 23 (1935); Alabama-Florida Co. v. Mays, *supra* note 166; Walker v. Sarven, 41 Fla. 210, 25 So. 885 (1899); Grantham v. Grantham, 168 So.2d 337 (Fla. 1st Dist. 1964).

170. Atlantic Fed. Sav. & Loan Ass'n v. Kitimat, *supra* note 168; Highland Crate Co-op. v. Guaranty Life Ins. Co., *supra* note 167; Alabama-Florida Co. v. Mays, *supra* note 166; McKeown v. Collins, *supra* note 167. In Harding v. Trenor, 157 F. Supp. 350 (D.N.D. 1957) the court also held an express lien to be in the nature of a mortgage. It cited 92 C.J.S. *Vendor & Purchaser* § 378B(1).

A. *Preservation Against Grantee's Conveyance*

Since the grantee has legal title, although an incumbered one, he can, of course, transfer his interest or convey the land to a third party. The transferee will take the title incumbered with the vendor's lien, and there will be no opportunity to defeat the lien by conveying to an innocent party without notice.[171] Thus, this situation differs substantially from that of the vendor who relies on an implied lien. As previously pointed out,[172] the implied lien may be lost by the grantee conveying to a bona fide purchaser without notice. In the case of the vendor's lien incident to reservation of title, the vendor is in no danger of losing his lien as the result of any transfer by the vendee, but under favorable circumstances the vendor can transfer to a bona fide innocent purchaser and defeat the right of the vendee.[173] The vendor has no such power in the case of a vendor's lien which is expressly reserved.[174]

Innocent third parties cannot cut off the interest of either the vendor or vendee in the case of an express lien, simply because there is no opportunity for attaining the status of a bona fide purchaser without notice of the rights of either party. The grantee has a deed which he records,[175] and the recorded deed contains a recital of the lien; hence everyone is charged with constructive notice of the rights of both parties.

> In contemplation of law the grantee accepted the deed of conveyance of the lands subject to the lien expressed therein for the stated amount as the balance of the purchase price, and subsequent purchasers took conveyance of the lands with notice of and subject to the lien expressly reserved in the conveyance itself.[176]

An express lien reserved in the deed of conveyance or other instrument is to be distinguished from the technical vendor's lien or implied lien; it is a lien by contract and not by implication. The lien thus reserved is a security in the nature of a mortgage, and has been said to be in reality a mortgage. *Id.* at 356.

Insofar as the mortgage analogy is concerned, the traditional mortgage took the form of a conveyance subject to defeasance on payment of the mortgage debt. This form is still commonly used in Florida although the mortgage in this state constitutes a lien only. Thus, in the case of an expressly reserved vendor's lien, the legal title being in the grantee with a lien reserved on behalf of the grantor, the form of the transaction conforms to present day substantive rights. In the vendor's lien incident to retained legal title, the transaction conforms more closely to the traditional mortgage form, except that instead of conveying the legal title for security, the legal title is retained for security.

171. See *infra* next paragraph of text.

172. *Supra* Part II, § H of text.

173. This can happen if the contract is not recorded, if there is no mention of the contract in recorded instruments, if the vendee is not in possession, and if the transferee has no notice of the contract. See generally, 1 BOYER, FLA. REAL ESTATE TRANSACTIONS, chs. 26-28 (1966).

174. See *infra* next paragraph of text.

175. Of course, if the grantee doesn't record his deed, there may be a contrary possibility. The grantee, however, will have the task of explaining his possession and claimed ability to convey when the record title indicates that his grantor is still the owner.

176. Wilson v. Davis, 80 Fla. 727, 86 So. 686, 687 (1920).

The liability of a subsequent purchaser to have his land subjected to the vendor's lien is justified on the theory that, "where a grantee takes a conveyance subject to a mortgage, he will be presumed to have included the mortgage debt in the purchase price."[177] The lien, as previously pointed out,[178] is equivalent to a mortgage, but even if it were not, the same rationale should apply to the purchase of land subject to any kind of lien or incumbrance. Thus, it generally follows in these cases that a "subsequent purchaser can interpose no defense to the pre-existing mortgage lien which he could not have interposed had he assumed to pay the mortgage. . . ."[179] The expressly reserved vendor's lien generally can be removed, whether by the grantee or any subsequent vendee, as a cloud on the title only by paying the amount due or showing an equity that discharges the lien.[180]

B. *Assignability and Limitations*

The expressed vendor's lien, being in effect a mortgage, is assignable or transferable.[181] The expressed lien is governed by the twenty-year statute of limitations and is not limited by any shorter period which may bar an action on the notes evidencing the indebtedness.[182]

C. *Enforcement*

Upon default of the vendee, the vendor's expressed lien may be enforced by a foreclosure suit in which the land is sold to satisfy his claim.[183]

V. CONCLUSION

The fact that the single term "vendor's lien" is employed to cover three distinct situations precludes the use of a few concluding remarks as to the desirability or utility of the vendor's lien as such. What is required, if concluding comments are in order, are comments concerning each of the vendor's liens. Aside from the obvious remark that it would be preferable to have three distinct names, one for each type of lien, a few observations are offered.

The vendor's expressed lien is predicated on a sound basis and should cause no more difficulty than any other type of perfected lien,

177. Zimmerman v. Hill, 100 So.2d 432, 433 (Fla. 3d Dist. 1958); Alabama-Florida Co. v. Mays, *supra* note 166.

178. *Supra* note 170.

179. Zimmerman v. Hill, *supra* note 177, at 433.

180. Cases cited *supra* note 170.

181. Ober v. Gallagher, 93 U.S. 199 (1876); Highland Crate Co-op. v. Guaranty Life Ins. Co., *supra* note 167; Alabama-Florida Co. v. Mays, *supra* note 166; Dunan Lumber Co. v. Travertine Corp., 120 Fla. 281, 162 So. 873 (1935).

182. Highland Crate Co-op. v. Guaranty Life Ins. Co., *supra* note 167; Wilson v. Davis, *supra* note 176. See also *supra* notes 150-153 and applicable text.

183. See Part II, § I and Part III, § A of text and accompanying notes. See also Grantham v. Grantham, *supra* note 169.

incumbrance or mortgage on realty. Since it is incorporated in the deed of conveyance, there is little if any opportunity for prejudicial surprise to innocent third parties. Matters of assignment, satisfaction, foreclosure, and clearing record title are similar to those applying to other liens, and should cause no particular inconvenience or difficulty. Although a deed and purchase money mortgage appears more routine and perhaps preferable because of greater familiarity, the expressed vendor's lien is substantially equivalent thereto. It is created by the vendor for his protection, and if he prefers to use it rather than a mortgage, there is no compelling reason why he should not be able to do so.

The vendor's lien incident to a retained legal title or contract to convey is a misnomer. It would seem preferable that the term vendor's lien not be used in this situation because the retained legal title and the contract provisions provide the vendor with sufficient security and protection. Although the mortgage analogy has a certain degree of relevance, unless the courts are willing to apply all the protective equities of a mortgagor to a vendee, regardless of the remedy sought by the vendor, the situation is not in fact equivalent to a mortgage. It is believed that certain contracts to convey, particularly certain installment contracts or agreements for deed, are essentially security devices, and mortgage principles should apply. In these situations, if a more appropriate name cannot be found, classifying the interest of the seller as a vendor's lien is appropriate, and all the restrictions applicable to enforcing or foreclosing mortgages should apply. What is needed, perhaps, is a judicial delineation of which contracts are, and which contracts are not, security devices.

The implied or true vendor's lien must stand or fall on other considerations. It is, in essence, a remedy afforded a grantor who neglected to protect himself by securing a mortgage or expressed lien. Because it is not created by a written instrument and there is no evidence of the outstanding claim, the equity of the vendor is justly lost if the land passes into the hands of an innocent purchaser for value without notice. Also, being a creature of equity, it is understandable if equity now requires reasonable diligence on behalf of the claimant who had already been careless in conveying without taking security. Thus, the lien is limited to the period of time during which the vendor can sue for the purchase price, and, as a further limitation, he must enforce the lien himself and cannot assign it. In this age of widespread education, facile information exchange, and lawyer accessibility, there would appear to be less need for the implication of the vendor's lien, as the ordinary grantor might be expected to protect himself by obtaining security when he parts with title. Nevertheless, some unusual circumstances might arise, and the implied lien is a handy device for achieving justice in an appropriate case.