Real Estate Contracts and the Doctrine of Equitable Conversion in Washington: Dispelling the *Ashford* Cloud

*Linda S. Hume**

I. Introduction

The installment real estate contract is often called the "poor man's mortgage."[1] Historically, it was used by sellers to finance land sales when there was no institutional funding available or when the buyer could not meet institutional lender criteria for funding. Once again, due to high interest rates and the unavailability of institutional funds, sellers are financing property sales with the poor man's mortgage.

Given the long history and recent increased use of the installment real estate contract (hereinafter referred to as the "installment contract"), it might be expected that the underlying doctrine was well-understood and furnished a high degree of certainty and predictability to the parties. Sadly, this is not so. Much confusion exists in Washington law about the nature of the respective interests of the buyer and seller in property that is subject to an installment land contract. Most of the confusion results from one line of decisions that held that the buyer had *no* interest, legal or equitable, in property being purchased under an installment contract containing a forfeiture clause.[2] This line, of course, includes the infamous *Ashford v. Reese*.[3] *Ashford* was overruled after fifty years of making mischief. The *Ashford* legacy, however, still causes confusion about whether Washington courts apply the doctrine of equitable conversion. It is also still unclear which legal principles Washington courts

* Visiting Professor of Law, University of Puget Sound School of Law, 1983-84. Professor of Law, University of Washington School of Law. California State College at Los Angeles, B.A., 1967; U.C.L.A., J.D., 1970.

1. The installment contract is a seller-financing device with seller retaining legal title as security for payment of the purchase price.

2. *See infra* text accompanying notes 8-13.

3. 132 Wash. 649, 233 P. 29 (1925), *overruled*, Cascade Sec. Bank v. Butler, 88 Wash. 2d 777, 567 P.2d 631 (1977).

should use to solve real estate contract problems.

In addition to the confusion created by *Ashford*, further confusion results from the failure to distinguish between the installment contract, wherein seller retains legal title as security for performance, and the marketing or earnest money contract, wherein the parties intend that title will be transferred to the buyer after a short closing period. The installment contract resembles a mortgage because it divides the incidents associated with property ownership between the parties to the contract.[4] Typically, however, the earnest money contract does not give any incidents of ownership to the buyer. Yet, in cases involving both kinds of contracts, courts often decide cases by applying property labels without considering relevant contract doctrine.

It is the principal thesis of this article that property and contract questions should not be solved independently and are most usefully approached in a distinct order. Because the installment contract divides the incidents of property ownership usually associated with legal title between the parties to the contract, it should be treated differently than the earnest money contract in which the incidents of ownership are not divided. In addition, it is important to first answer some remedial questions before proceeding to make decisions about the property interest of each party to the contract. To support this thesis, this article will explain in detail how the *Ashford* legacy has affected the treatment of real estate contracts in Washington. It will then compare the Washington approach with the doctrine of equitable conversion. Finally, it will suggest an analysis for real estate contract problems and apply that analysis to some remaining problem areas.

II. The Forfeiture Clause and Equitable Conversion

Prior to the appearance of the *Ashford* line of cases, the Washington Supreme Court had developed a consistent approach to real estate contracts. The decisions recognized that both parties to the contract had equitable interests with respect to the property.[5] Moreover, legal and equitable remedies attend-

---

4. *See infra* text accompanying notes 48-69.

5. Taylor v. Interstate Inv. Co., 75 Wash. 490, 493-94, 135 P. 240, 241-42 (1913). *See also* Barton v. Tombari, 120 Wash. 331, 207 P. 239 (1922), *aff'd*, 124 Wash. 696, 213 P. 1119 (1923); Conelly v. Malloy, 106 Wash. 464, 180 P. 469 (1919); Jackson v. White, 104 Wash. 643, 177 P. 667 (1919).

ant upon those interests and the contract itself were consistently treated in the decisions.[6] Following the appearance of *Ashford*, however, the courts began to treat questions about the nature of the "property" interest of each party in the subject matter of the transaction as separate from the contract aspects of the transaction. Now that *Ashford* is overruled, there should be no impediment to recognizing that both property and contract questions are present in each transaction, and to using principles from both doctrinal areas to resolve real estate contract cases.

A. *The Ashford Problem*

Although the judicial treatment of the installment contract forfeiture clause and its relationship to other remedies were established early and fairly consistently applied,[7] a separate line of cases appeared wherein the courts stated that the purchaser had *absolutely* "no title or interest, either legal or equitable," in property that was subject to an installment contract containing a forfeiture clause.

The notion that the purchaser had no interest in the property that was the subject matter of the contract if the contract contained a forfeiture clause blossomed in *Schaefer v. Gregory*[8] and *Ashford v. Reese*.[9] Both were risk-of-loss cases. In *Schaefer*, the seller was unable to deliver title to the buyer because the property under contract had been condemned for use as a military base; in *Ashford*, the buildings on the property under contract had been destroyed by fire. In both cases, the purchasers were permitted to rescind the contract and recover the purchase price. The court reasoned in each instance that the purchaser had no interest in the property subject to the contract because the contract contained a forfeiture clause. The loss, therefore,

---

6. The seller could enforce the contract by specific performance, Wood v. Mastick, 2 Wash. Terr. 64, 69, 3 P. 612, 614 (1881), or recover for damages for breach, Hogan v. Kyle, 7 Wash. 595, 598-99, 35 P. 399, 399-400 (1893). The seller could also recover for installments as they fell due, Underwood v. Tew, 7 Wash. 297, 300, 34 P. 1100, 1100-01 (1893). *Accord*, Auve v. Wenzlaff, 162 Wash. 368, 298 P. 686 (1931); Asia Inv. v. Levin, 118 Wash. 620, 204 P. 808 (1922); Roy v. Vaughan, 100 Wash. 345, 170 P. 1019 (1918). The seller might, however, be bound by specific contract language requiring that she use the forfeiture remedy exclusively, Wright v. Suydam, 72 Wash. 587, 131 P. 239 (1913), or be barred by laches from electing any remedy other than forfeiture, *Hogan*, 7 Wash. at 600-02, 35 P. at 401.

7. *See supra* notes 5-6.

8. 112 Wash. 408, 192 P. 968 (1920).

9. 132 Wash. 649, 233 P. 29 (1932).

had to fall on the holder of legal title, the seller, who could no longer deliver his promised performance.

The reasoning in these cases drew immediate criticism. The dissenting judges in *Ashford* demonstrated quite clearly that nothing in Washington precedent justified the statement that an installment contract purchaser had no property interest in the subject matter of the contract.[10] Law review commentators also pointed out that nothing about the presence or absence of a forfeiture clause in a contract supported such a statement.[11] The seller was not *required* to elect forfeiture; it simply was one of the remedial options open to the seller in the event the buyer defaulted.[12]

The *Ashford* court believed that it had to decide that either the buyer or the seller had the "property" that was the subject of the contract in order to decide which of the parties to the contract would bear the loss. This position is understandable because the doctrine of equitable conversion, the principal means for placing risk of loss in the real estate contract setting, was based on a similar premise—that risk of loss must be assigned to the party who had the property.[13] In fact, however, it is quite impossible to decide which party to an *installment* contract has "real property," because the usual incidents associated with ownership are divided between the parties in an installment land contract. A brief exploration of some of the well-known principles underlying the areas of contract and property

---

10. *Id.* at 652-66, 233 P. at 30-35.

11. *See, e.g.*, Schweppe, *Rights of a Vendee Under an Executory Forfeitable Contract for the Purchase of Real Estate: A Further Word on Washington Law*, 2 WASH. L. REV. 1, 9 (1926); Schweppe, *The New Forfeiture Clause Test in Executory Contracts for the Sale of Real Estate*, 3 WASH. L. REV. 80, 84-85 (1928). *But see* Lantz, *Rights of Vendees Under Executory Contracts of Sale*, 3 WASH. L. REV. 1 (1928).

12. Forfeiture is a remedy dependent upon the terms of contract. It is not a remedy possessed by the seller unless specifically written into the contract. Taylor v. Interstate Inv. Co., 75 Wash. 490, 494-95, 135 P. 240, 241-42 (1913). The boilerplate language necessary to provide the remedy developed early. The contract provides that "time is of the essence" in performance of the contract, and permits the seller to declare that the buyer's rights are forfeited if performance is not prompt. Contract language also typically allows the seller to keep all contract payments previously made by the buyer. If a "time is of the essence" provision is not contained in the contract, the purchaser has the entire contract period within which to pay. Lillis v. Steinbach, 51 Wash. 402, 404, 99 P. 22, 23 (1909). *See infra* note 52 for a discussion of infirmities in remedies.

13. Risk of loss was given to the holder of equitable title, the buyer, after the conversion. 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 368 (S. Symons 5th ed. 1941); 3 AMERICAN LAW OF PROPERTY § 11.22 (Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY].

will illustrate the difficulty of placing a label on an interest that amounts to less than the full panoply of rights we associate with legal title.

The law of property jealously guards the formalities accompanying the transfer of property, particularly real property, lest that bundle of rights we call "ownership" will not be acquired.[14] Without appropriate transfer, a buyer is left without rights to the property; she has only contract or tort claims. A contract claim can, of course, ultimately lead to a transfer of full legal ownership to the buyer, because specific performance is routinely awarded in cases where the subject matter of the contract is real property.[15] In order to obtain specific performance, however, a buyer must tender her own promised performance and pay the entire purchase price.[16] This is the typical earnest money situation. There is usually no need to worry about whether a buyer has rights in the property under this agreement, because such rights can be acquired as described above. More importantly, a buyer will not usually receive any of the usual incidents of real property ownership under the terms of an earnest money agreement.

The installment contract presents a different problem. Because legal title, together with the incidents of ownership it represents, remains in the seller, the formalities of legal transfer have not been observed, and theoretically the buyer can have no legal interest in the property.[17] Nonetheless, it is common to transfer such important incidents of property ownership as the right to possession to the installment buyer under the real estate contract itself. The buyer is not, however, in a position to require formal transfer of any property rights associated with the incident of ownership because part of the buyer's own performance is still owed to the seller.[18]

---

14. 2 J. POMEROY, *supra* note 13, § 366.

15. RESTATEMENT (SECOND) OF CONTRACTS § 359 (1979) [hereinafter cited as RESTATEMENT]; 5A A. CORBIN, CORBIN ON CONTRACTS § 1143 (1964).

16. Tender is required as a concurrent condition. RESTATEMENT, *supra* note 15, § 234; 3A A. CORBIN, CORBIN ON CONTRACTS § 689 (1960); Reese v. Westfield, 56 Wash. 415, 419, 105 P. 837, 839 (1909).

17. Without legal title neither the common-law real action nor the "modern" ejectment action could be maintained. 2 J. POMEROY, *supra* note 13, § 366. Therefore, equity became the only available forum.

18. A distinction was drawn, therefore, between a seller seeking forfeiture after a default in intermediate installments, and a seller seeking forfeiture after a default in the last installment. The latter was required to tender the deed representing her performance as a condition to forfeiture. Reard v. Ephrata Orchards, 78 Wash. 180, 185, 138 P.

If the parties to the contract agree to divide the incidents of ownership between the seller and the buyer over a period of time, it is incorrect to think of the seller as the "owner" of the property; some of the most important attributes of that ownership have been transferred to someone else. It is similarly inappropriate in property terms to think of the purchaser as the "owner," because the purchaser has only some of the rights associated with ownership, not the full panoply of rights the law recognizes as legal ownership. The real problem then with the installment contract is that the property concepts associated with it do not work well. The parties have contractually divided the usual incidents of property ownership between themselves; yet property concepts appear to demand that we apply the label "owner" to one or the other, but not to both.

The question of who shall be treated as the owner of property subject to a real estate contract is compounded by the presence of a forfeiture clause. The attributes of ownership that *have* been transferred to the buyer *may* be lost if the seller exercises the contractual right to terminate them under the forfeiture clause.[19] The substantial property rights already transferred are then subject to sudden and complete extinction. Put more

---

678, 680 (1914). This position has been rigorously criticized as a misapplication of theory. A seller seeking forfeiture is declaring that the contract is at an end and is seeking to keep the contract payments previously made as liquidated damages. Tender should be required only when the seller wants specific performance on the ground that it is inequitable to permit the seller to have both the land and the purchase price. 3A A. CORBIN, *supra* note 16, § 689 (1964).

19. Where seller keeps legal title as security for performance of an installment contract, she has an equitable right, derived from the legal title, to compel the buyer to perform the contract by paying the purchase price or to bar the buyer's rights under the contract. 3 AMERICAN LAW OF PROPERTY, *supra* note 13, § 11.73. The device used to accomplish this was foreclosure of the vendor's lien in equity. Foreclosure resulted in removing the cloud on title represented by the buyer's "equity" or the right to complete performance of the contract. The buyer's interest in an installment contract was foreclosed regularly in early Washington cases. Aylward v. Lally, 147 Wash. 29, 264 P. 983 (1928); Barton v. Tombari, 120 Wash. 331, 207 P. 239 (1922); Roy v. Vaughan, 100 Wash. 345, 170 P. 1019 (1918); Taylor v. Interstate Inv. Co., 75 Wash. 490, 135 P. 240 (1913); St. Paul & Tacoma Lumber Co. v. Bolton, 5 Wash. 763, 32 P. 787 (1893). These cases proceeded either on the theory that the seller's equitable lien was being foreclosed, or that the contract itself was being foreclosed as an "equitable mortgage." Foreclosure by sale was ordered and deficiency judgments were awarded following the sale. *See, e.g.*, Roy v. Vaughan, 100 Wash. 345, 170 P. 1019; Aylward v. Lally, 147 Wash. 29, 264 P. 983.

Forfeiture is foreclosure of the vendor's lien by operation of a condition subsequent—the forfeiture clause—contained in the contract. 3 AMERICAN LAW OF PROPERTY, *supra* note 13, § 11.76. *See also infra* note 94 for a discussion of the way *Ashford* affected foreclosure of the vendor's lien.

starkly, we are simply not accustomed to thinking that someone has "property" if it can be lost by the exercise of a "mere" contract right.

B. A Comparison of the Doctrine of Equitable Conversion and Ashford

The doctrines developed by courts of equity and *Ashford* approached this problem of contractually divided incidents of ownership in diametrically opposed ways. Equity courts, by means of the doctrine of equitable conversion, transferred complete ownership rights to the purchaser;[20] *Ashford* transferred none.[21] The history and development of the doctrine of equitable conversion provide a clue to the reason for equity's approach to the problem of ownership.

The doctrine of equitable conversion was a fiction invented by the English courts of Chancery to deal with a problem specific to property.[22] If either party to a land sale contract died while the contract was executory, it was necessary to settle the question of whether the decedent had real or personal property. This question required an answer because legal title to real property descended to the party's heirs or devisees upon the party's death. By contrast, personal property passed to the personal representative of the decedent's estate. For example, the seller's heirs or devisees were not parties to the contract and not necessarily bound to perform it. At the same time, the purchaser was an "innocent party" who presumably should not lose the right to continue performance of the contract and receive what had been bargained for—the property. On the other side of the coin, it was necessary to determine who had the right to receive the purchase money if the contract was performed, the heirs or devisees or the personal representative of the deceased seller's estate.[23]

---

20. 3 AMERICAN LAW OF PROPERTY, *supra* note 13, § 11.22.

21. "[W]e have consistently held in numerous cases that an executory contract of sale in this state conveys no title or interest, either legal or equitable, to the vendee. . . ." *Ashford*, 132 Wash. at 650, 233 P. at 30.

22. *See generally* 3 AMERICAN LAW OF PROPERTY, *supra* note 13, § 11.22. The doctrine began in the early seventeenth century and "reach[ed] logical symmetry some two hundred years later in the decisions of Lord Eldon . . . ." *Id.*

23. In equitable conversion states, equitable interests in land devolve as land to the purchaser's heir or devisee. *Id.* § 11.27. There is a split of authority on the question of whether the heir or devisee is entitled to have the contract balance paid out of the personal assets of the estate. *See generally* Annot., 4 A.L.R. 3d 1023 (1965). *But see In re*

Equity neatly solved this problem with the doctrine of equitable conversion. Under the doctrine, once an enforceable contract was concluded between the parties, equity *converted* the legal estate of the seller into an equitable estate in the buyer. Equity simply transferred all of the important incidents of ownership to the buyer and left the seller only with what was described as "bare legal title."[24] Each became a trustee for the other: the seller of legal title for the buyer, and the buyer of the purchase price for the seller. Once it was established that in equity the estate had been *converted* from the seller to the buyer, questions concerning real and personal property could be answered easily and neatly. The buyer had real property because the incidents of ownership had been transferred to her. The seller had personal property, the right to the purchase money. Contract rights were protected from the vicissitudes of untimely death, and time-honored property principles were not violated.

The *Ashford* court also considered the problem of a division of the incidents of ownership between the parties to a real estate contract. It took a wholly different approach, however, and decided that the buyer had *no* interest in the property.[25] The court reasoned that the presence of a forfeiture clause in the contract made it possible that the purchaser would never acquire rights in the property until the contract had been fully performed.[26] Consequently, the court ignored the fact that certain incidents of ownership, such as possession, had already been contractually given to the contract purchaser. The court announced that it would award the purchaser rescission and restitution of the amounts she had already paid on the contract because she had no interest in the property, and therefore should not bear the risk of loss to the buildings on the property.

The *Ashford* court in fact reached its decision based on unarticulated contract principles, although it claimed to be deciding on property grounds. It need not have chosen either to the exclusion of the other, and the result has plagued the under-

---

McNulta's Estate, 168 Wash. 397, 12 P.2d 389 (1932) (holding that the executor is not required to pay the contract balance from the estate).

24. 2 J. Pomeroy, *supra* note 13, § 368; 3 American Law of Property, *supra* note 13, § 11.22.

25. *See supra* note 21.

26. As previously mentioned, this was the only time the buyer could compel transfer of legal ownership through specific performance, since she had fully tendered her own performance. *See supra* note 16.

lying equitable conversion doctrine ever since. The plaintiff in *Ashford* had a contractual basis to suspend performance of her obligations and seek restitution—partial failure of consideration due to destruction of the subject matter of the contract.[27] This was sufficient to permit the court to grant the relief sought *regardless* of whether the plaintiff had an interest in the property.[28]

C. *Evaluation of the Doctrine of Equitable Conversion and Ashford*

The decision in *Ashford* furnished the basis for the arguments that the purchaser under a real estate contract has no interest in the property that is the subject of the contract until the contract is fully performed, and that Washington does not subscribe to the doctrine of equitable conversion. The first principle was argued repeatedly. With few exceptions, however, the broad principle was never applied in the decisions, and the rights recognized in the purchaser steadily grew.[29] Although the

---

27. *See infra* text accompanying notes 84-87.

28. The question that should have been addressed by the court was whether the damage to the subject matter of the contract was so extensive that the buyer could suspend performance and receive restitution of amounts previously paid. Some Washington cases have denied this relief if the damage was slight, or if damages were easily ascertainable and could be compensated by an abatement of the purchase price. *See, e.g.*, Mast v. Hoover, 126 Wash. 148, 217 P. 718 (1923); Capital Sav. & Loan Ass'n. v. Convey, 175 Wash. 224, 27 P.2d 136 (1933). This position is now known as the "Massachusetts rule" for dealing with vendor-purchaser risk-of-loss problems. 3 American Law of Property, *supra* note 13, § 11.30.

29. The purchaser's interest is mortgageable and assignable, Kendrick v. Davis, 75 Wash. 2d 456, 460, 452 P.2d 222, 225 (1969), and may be homesteaded, Desmond v. Shotwell, 142 Wash. 187, 189, 252 P. 692, 692 (1927). The purchaser may protest the formation of a special district as an owner, Committee of Protesting Citizens v. Val Vue Sewer Dist., 14 Wash. App. 838, 842, 545 P.2d 42, 44 (1976), and may share in the distribution of the assets of a special district that is dissolved, *In re* Horse Heaven Irrigation Dist., 11 Wash. 2d 218, 236-37, 118 P.2d 972, 980 (1941). The purchaser has the equitable right to complete performance of the contract and the right not to be disturbed in possession by the seller, Pratt v. Rhodes, 142 Wash. 411, 416, 253 P. 640, 641-42 (1927), and the right to contest a quiet title action to the property before legal title has passed, Turpen v. Johnson, 26 Wash. 2d 716, 727, 175 P.2d 495, 501 (1946). The purchaser's interest in the property may be attached by his creditors, State *ex rel* Oatey Orchard Co. v. Superior Court, 154 Wash. 10, 12, 280 P. 350, 350 (1929), subjected to execution and sale as real property, Eckley v. Bonded Adjustment Co., 30 Wash. 2d 96, 106, 190 P.2d 718, 723 (1948), and is "real estate" within the meaning of the judgment lien statute, Cascade Sec. Bank v. Butler, 88 Wash. 2d 777, 784, 567 P.2d 631, 634 (1977).

But see Daniels v. Fossas, 152 Wash. 516, 518, 278 P. 412, 413 (1929) (purchaser not a "freeholder"); Tieton Hotel Co. v. Manheim, 75 Wash. 641, 644-45, 135 P. 658, 659 (1913) (deceased purchaser has no community property interest capable of descending to

Washington Supreme Court has refused to adopt the doctrine of equitable conversion, it has consistently described the seller's interest in the property in the same way the interest is described in equitable conversion states.[30] Therefore, it seems safe to say that neither principle is actually reflected in the cases.

Neither the doctrine of equitable conversion nor the refusal to recognize any property interest in the purchaser is a particularly satisfactory approach for solution of all real estate contract problems. Both are all-or-nothing solutions to problems that are not all-or-nothing problems. The doctrine of equitable conversion was designed to answer questions that required distinctions between real and personal property. It was applied to answer questions other than the real property-personal property question because the "conversion"—the transfer of beneficial ownership—was broad enough to permit it. The *Ashford* approach was similarly inappropriate when in fact some of the incidents of ownership had been transferred to the buyer. Equitable conversion and its *Ashford* mirror image have almost no theoretical connection with the way courts do or ought to solve real estate contract problems where the incidents of ownership have been divided between the parties.

Part of the unsuitability of the doctrine of equitable conversion may be traced to its theoretical underpinnings. It rests on the equitable maxim that equity "regards that as done which ought to be done,"[31] as well as on the presumed intention of the parties. What ought to be done and what the parties likely con-

---

heirs); *accord, In re* Kuhn's Estate, 132 Wash. 678, 680-81, 233 P. 293, 294 (1925). The broad statements made in *Tieton* and *Kuhn's Estate* were disapproved in *In re* Marriage of Harshman, 18 Wash. App. 116, 124, 567 P.2d 667, 672 (1977).

30. The seller's right to receive contract payments is personal property, and is separate and distinct from the naked legal title retained as security. Freeborn v. Seattle Trust & Sav. Bank, 94 Wash. 2d 336, 340-41, 617 P.2d 424, 426-27 (1980). The decedent seller's interest in property under contract was personal property. *In re* Estate of Eilermann, 179 Wash. 15, 18, 35 P.2d 763, 765 (1934). Indeed, the court had held, just two years prior to *Ashford*, that a seller held the land in trust for a buyer whose contract was not in breach. Culmback v. Stevens, 158 Wash. 675, 680-81, 291 P. 705, 707 (1930). The court never repudiated this position, even after overruling *Ashford*, and has always described the seller's interest in terms identical to the terms used in the doctrine of equitable conversion. *See also* Meltzer v. Wendell-West, 7 Wash. App. 90, 497 P.2d 1348 (1972); Biehn v. Lyon, 29 Wash. 2d 750, 189 P.2d 482 (1948). Nonetheless, in *Cascade Bank*, 88 Wash. 2d 777, 567 P.2d 631, the court refused to adopt the doctrine of equitable conversion. *See also* Reed v. Eller, 33 Wash. App. 820, 827, 664 P.2d 515, 518 (1983)(holding that vendees do not become bona fide purchasers until they have paid the contract price, thus acquiring legal title).

31. 2 J. POMEROY, *supra* note 13, §§ 363-77, at 8.

templated when they entered the contract was performance. Therefore, equity would treat any contract that it could order to be specifically performed as if it had been performed.[32] This idea excluded from the conversion theory any contract that was defective because it had not been properly formed,[33] for example, oral contracts that violate the Statute of Frauds. At the other end of the continuum, it clearly included any contract that was already completely performed.[34] Equity courts would rarely order specific performance of a defectively formed contract, and would nearly always order specific performance of a contract that had been completely performed by the buyer. The difficulty with the doctrine lay in the stages in between those contracts where neither party had performed (most frequently, the earnest money contract) and contracts where part performance was still owed (the installment contract). Some of these contracts would be performed; some would not. There was no way to tell at the time the court was presented with a problem, other than current default of one of the parties, whether specific performance would ultimately be appropriate.

The Washington court simply refused to consider the in-betweens. A purchaser could not have specific performance, and therefore could have no interest in the property, until the purchaser's full performance had been tendered.[35] Jurisdictions following the doctrine of equitable conversion had difficulty with the in-betweens as well. Because the doctrine of equitable conversion took effect immediately upon concluding an enforceable contract,[36] equitable conversion transferred all of the incidents of ownership to the purchaser before the *actual* transfer, in some instances, of *any* of the incidents of ownership.[37]

---

32. *Id.* at 14-17.

33. 3 AMERICAN LAW OF PROPERTY, *supra* note 13, § 11.24.

34. Because land is unique, a contract for its sale may always be specifically performed. *See* RESTATEMENT, *supra* note 15, at 126-27.

35. Ashford v. Reese, 132 Wash. 649, 233 P. 29 (1932).

36. 3 AMERICAN LAW OF PROPERTY, *supra* note 13, §§ 11.22-.24.

37. For example, the risk of loss would shift to the buyer before transfer of possession, or any other incident of ownership. 3 AMERICAN LAW OF PROPERTY, *supra* note 13, § 11.30. *See also* 7 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 931-43 (W. Jaeger 3d ed. 1963) for an in-depth discussion of risk of loss in installment contracts.

Scholars such as Langdell[38] and Stone[39] demonstrated that the property theory underlying equitable conversion did not work well when a court could not determine whether a specifically enforceable contract would result at the time of suit.[40] It often produced inequitable results in cases where none of the incidents of ownership had been transferred to the buyer.[41] Conversely, Washington courts quickly discovered that the doctrine, or at least the notion behind it, separating real and personal property where required, had some real utility.[42] As the years passed, the decisions in fact treated the seller's interest as personal property and recognized that a buyer who had some of the incidents of ownership indeed had an interest in the property.[43] Jurisdictions following the doctrine of equitable conversion made similar retreats from strict application of the doctrine and recognized exceptions to deal with the in-between problems.[44]

In *Cascade Security Bank v. Butler*,[45] the decision overruling *Ashford*, the court refused to adopt the doctrine of equitable conversion as a rule of decision or even as a rule for guidance in resolving future questions that might arise in the vendor-purchaser relationship. This author believes that that was a wise course of action, because neither approach faces the problem of divided incidents of ownership present in the installment contract setting. In addition, adopting the doctrine would have thrown into question over fifty years of prior decisions that had eroded the extreme statements in *Ashford* and had delineated the rights and liabilities of buyer and seller in specific situations, both as between themselves and between each of them and third parties.[46]

---

38. "Langdell's elaboration of the doctrine of equitable conversion, which is the classic American exposition from a theoretical standpoint, is as much legal geometry as is Fearne's famous *Essay*." 3 American Law of Property, *supra* note 13, § 11.22, at 64 (quoting C. Langdell, A Brief Survey of Equity Jurisdiction (2d ed. 1908)).

39. Stone, *Equitable Conversion by Contract*, 13 Colum. L. Rev. 369 (1913).

40. An option setting is one example. *Id.* at 375-80.

41. An example is the typical earnest money situation where risk of loss is transferred to the buyer from the moment a binding agreement to purchase is entered into. *See* S. Williston, *supra* note 37, § 931.

42. For example, the doctrine is useful in deciding the nature of a decedent's interest at death. *In re* Estate of Eilerman, 179 Wash. 15, 35 P.2d 763 (1934).

43. *See supra* notes 29-30.

44. For example, at least five different views have developed on how to allocate fortuitous losses between the parties. 3 American Law of Property, *supra* note 13, § 11.30.

45. 88 Wash. 2d 777, 567 P.2d 631 (1977).

46. Hume, *Incidents of the Vendor-Purchaser Relationship (Equitable Conversion)*, 2 Washington Real Property Deskbook ch. 36 (1980). Reasonable minds do dif-

Nevertheless, the overruling of *Ashford* left lawyers and courts unsure whether a useful framework within which to solve vendor-purchaser problems existed in Washington. Recent decisions reflect this lack of guidance.[47] The framework does exist, however. An examination of the installment contract, with or without a forfeiture clause, and in the context of the common-law mortgage, helps to identify the framework and separate it from the doctrine of equitable conversion.

III. The Mortgage Analogy

Many have pointed out that the installment contract is a financing device similar to a mortgage or trust deed.[48] What is often ignored, however, is that the installment contract is virtually identical in form to the common-law mortgage.[49] The judicial treatment of installment contracts in Washington is also strikingly similar to the development of the common-law mortgage in equity.[50] Recognition of this similarity provides the initial base upon which to build an analytical approach to a resolution of property rights in an installment contract.

Sellers who self-finance are free to use the mortgage, the deed of trust, or the installment contract as a financing device. The installment contract is popular in seller self-financing, however, because it may include a forfeiture clause, which is not permitted in a mortgage or trust deed.[51] The forfeiture clause offers sellers three advantages in the event of failure of performance. First, it is, at least theoretically, self-executing.[52] Second, a seller

---

fer on this subject, however, and others believe that the doctrine of equitable conversion would furnish a useful tool of construction. *See* Nock, Strait & Weaver, *Equitable Conversion in Washington: The Doctrine That Dares Not Speak Its Name*, 1 U. Puget Sound L. Rev. 121 (1977).

47. *See infra* text accompanying notes 91-103.

48. G. Osborne, G. Nelson & D. Whitman, Real Estate Finance Law §§ 1.7, 3.25-.32 (1979).

49. In the typical installment real estate contract, the seller keeps legal title to the property until buyer has made all contract payments. Under the common-law mortgage, the mortgagor transferred legal title to the real property that was to secure the debt to the mortgagee. The transfer was either on condition subsequent, i.e., the estate transferred to the lender would end when the debt was repaid, or the borrower would have a right of re-entry when the debt was repaid. G. Osborne, Handbook of the Law of Mortgages § 5 (2d ed. 1970). Therefore, in both cases the lender is the party holding actual legal title.

50. *See infra* text accompanying notes 58-59, 64-67.

51. *E.g.*, Wash. Rev. Code chs. 61.12, 61.24 (1981).

52. *E.g.*, Sleeper v. Bragdon, 45 Wash. 562, 88 P. 1036 (1907). A seller need only declare her intention to forfeit, send proper notice if notice is required by the contract,

electing forfeiture need not return to the buyer contract payments already made.[53] Finally, forfeiture is optional; the seller is free to seek other remedies if they are more advantageous.[54]

The common-law mortgage also involved forfeiture. The contract between the parties determined their rights and was enforceable at law in strict accordance with the bargain made by the parties.[55] If the contract underlying the mortgage called for payment on a certain day, and provided that the borrower-mortgagor lost any right to the property if payment was not prompt, this agreement would be enforced at law.[56] In addition, because legal title was formally transferred to the lender, all of the incidents of ownership associated with legal title also transferred to the lender.[57]

Early Washington courts took a similar approach to forfeiture under real estate contracts. Forfeiture was granted for the failure of the buyer to pay on time despite the harsh consequences.[58] The law recognized then, as today, that the seller technically is entitled to all of the incidents of ownership,

---

and the forfeiture is effective without further action. This feature of forfeiture often proves illusory, however, because sellers must often litigate to clear title following forfeiture. G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 3.25 (1979). Some sellers attempt to prevent the buyer from recording the contract for just this reason. *See* Warren, *California Installment Land Sales Contracts: A Time for Reform*, 9 U.C.L.A. L. REV. 608 (1962).

53. The other major advantage of forfeiture was that it avoided the necessity of returning contract payments already made to the purchaser. If the contract did not include a forfeiture clause, a seller who wished to rescind would also have to make restitution to the buyer. *See, e.g.*, Reidt v. Smith, 75 Wash. 365, 134 P. 1057 (1913). Early decisions established that there was no injustice in permitting the seller to keep the contract payments already made for two reasons: first, it was said to be unfair to require the seller, without some compensation, to bear the risk of fluctuations in the value of the land, and second, the parties were left to the bargain they struck, however harsh. *See* Pease v. Baxter, 12 Wash. 567, 41 P. 899 (1895); Reddish v. Smith, 10 Wash. 178, 38 P. 1003 (1894); Drown v. Ingels, 3 Wash. 424, 28 P. 759 (1892).

54. Hogan v. Kyle, 7 Wash. 595, 35 P. 399 (1894) (damages); Underwood v. Tew, 7 Wash. 297, 34 P. 1100 (1893) (installments, as they fall due); Wood v. Mastick, 2 Wash. Terr. 64, 3 P. 612 (1891) (specific performance).

There was some skirmishing over whether judgments for the purchase price or past-due installments could be collected against other property of the buyer. After forbidding the collection of a "deficiency judgment" in Barton v. Tombari, 120 Wash. 331, 337-38, 207 P. 239, 241-42 (1922), the court approved enforcement of judgments for overdue installments against other property of buyers and distinguished its earlier ruling. Stevens v. Irwin, 132 Wash. 289, 293, 231 P. 783, 785 (1925).

55. G. OSBORNE, *supra* note 49, § 5.

56. *Id.*

57. *Id.*

58. *See supra* note 53.

including possession, because the seller holds legal title.[59]

Equity gradually relieved common-law mortgagors from the harshness of losing their land for delays in meeting the payment called for by the mortgage contract.[60] Courts frequently granted a grace period within which the borrower could pay the debt and recover or "redeem" the land. At first, the right was granted only in cases where other equitable grounds for relief were shown by the borrower.[61] Finally, however, the grant of a grace period was so common that the mortgagor was described as having an "equity of redemption." The equity of redemption was in theory full equitable ownership of the property securing the debt.[62]

The idea that the incidents of ownership normally associated with legal title were not held solely by the lender-mortgagee but rather had been divided between the lender and the borrower developed along with the equity of redemption. Central to this recognition was equity's insistence that the land was only security. It did not, therefore, seem appropriate that the lender who held legal title to the property only as security should have all of the associated incidents of ownership. Increasingly, equity found that the borrower-mortgagor rather than the lender-mortgagee had the right to important incidents of ownership such as possession.[63]

Washington courts also began to relieve installment contract buyers from forfeiture by granting them a grace period within which to bring payments current, or to pay the entire purchase price and receive the land.[64] Also apparent from the cases is a steady trend increasing the property rights of installment contract buyers.[65] Although only one case characterizes the

59. *See* Welch v. Hover-Schiffner Co., 75 Wash. 130, 134 P. 526 (1913). *See generally* 3 AMERICAN LAW OF PROPERTY, *supra* note 13, § 11.25.

60. 4 J. POMEROY, *supra* note 13, § 1180.

61. G. OSBORNE, *supra* note 47, § 6.

62. 4 J. POMEROY, *supra* note 13, §§ 1180-81.

63. *Id.* § 1181.

64. The theory is that the seller has waived the right to insist on strict performance in accordance with the "time is of the essence" clause if the seller has accepted late payments. The seller must then give the buyer notice of intention to insist on strict performance and an opportunity to cure defaults. Douglas v. Hanbury, 56 Wash. 63, 66, 104 P. 1110, 1112 (1909). *See also* Bulmon v. Bailey, 22 Wash. 2d 372, 377, 156 P.2d 231, 233 (1945), and Shaw v. Morrison, 145 Wash. 420, 424-25, 260 P. 266, 266-67 (1927). A buyer is not automatically entitled to the grace period within which to cure, but the cases granting an opportunity to cure on waiver grounds are legion.

65. *See supra* note 29.

buyer's interest as full equitable ownership,[66] others describe the buyer's property as "the beneficial interest and real ownership of land."[67] Recent cases also note the security function served by the installment contract.[68]

Equity courts' recognition of rights in a borrower whose lender held legal title to the property securing repayment of the debt had, of course, absolutely nothing to do with the doctrine of equitable conversion.[69] Washington courts, also totally without use of the doctrine, recognized that installment contract buyers have rights associated with real property in much the same way the equity courts increased those of the mortgagor.[70] This author suggests, therefore, that judicial recognition of the installment contract buyer's rights in Washington is due to tacit recognition that the installment contract buyer, like the common-law mortgagor, is intended to enjoy the beneficial use of the property during the life of the contract. It is *not* due to the coincidence that the doctrine of equitable conversion also transferred beneficial ownership of the property under contract to the buyer.

The mortgage analogy, particularly its security underpinning, should not be carried too far. The installment real estate contract has unique features that must be recognized for meaningful problem-solving. First, there are different kinds of contracts, and all contracts, in some sense, function as security for buyer's promises. The contracts may be distinguished, however, because some, principally installment contracts, divide incidents of ownership associated with real property between the parties. Others, such as the typical earnest money contract, do not. Whether the buyer has one of these incidents of ownership should be significant in deciding whether the buyer has the

---

66. Snuffin v. Mayo, 6 Wash. App. 525, 528, 494 P.2d 497, 499 (1972).

67. Committee of Protesting Citizens v. Val Vue Sewer Dist., 14 Wash. App. 838, 842, 545 P.2d 42, 44 (1976). *See also* Pratt v. Rhodes, 142 Wash. 411, 416, 253 P. 640, 641 (1927), where the purchaser's interest was characterized as an "equitable interest," and Freeborn v. Seattle Trust, 94 Wash. 2d 336, 340, 617 P.2d 424, 427 (1980), where the court states that in *Cascade Bank* it characterized the purchaser's interest as "real property."

68. Freeborn v. Seattle Trust, 94 Wash. 2d 336, 617 P.2d 424 (1980); Terry v. Born, 24 Wash. App. 652, 604 P.2d 504 (1979).

69. The equitable maxim supporting intervention in the common-law mortgage was that equity "regarded form rather than substance." This was a specialized application of the equitable maxim that underlay equitable conversion, "equity regards that as done which ought to be done." 2 J. POMEROY, *supra* note 13, § 376.

70. *See supra* note 29.

property right or duty associated with it. Second, breach of a real estate contract entitles the nonbreaching party to a remedy that may affect the initial contractual division of incidents of ownership.

IV. Separating Contract Questions from Property Questions

Both the doctrine of equitable conversion and its *Ashford* mirror image failed to consider the actual contractual provisions when attempting to decide which party had a right or duty associated with the real property that was the subject of the contract. However, there is no particular need to recognize property rights in a purchaser unless the contract itself allocates to the purchaser some incident of ownership associated with the property right. Consequently, the first inquiry should be the terms of the contract itself. If the contract has transferred an incident of ownership, such as possession, to the buyer, any property right attendant upon possession should likewise be transferred. Next, a court must consider the status of the contract. If the contract has been breached and the remedy for that breach terminates the contract, the contract allocation of incidents of ownership should be disregarded. Finally, the labels "real" and "personal" property should be avoided unless there is a willingness to acknowledge that these labels may change along with changes in the status of the contract.

A. *Contract Allocation of the Incident of Ownership*

Some of the post-*Ashford* courts struggled with the question of whether to permit contract purchasers to exercise a right normally dependent upon the legal ownership of real property, such as the right to sue a trespasser.[71] In these cases, defendants uniformly cited the broad statements in *Ashford* and argued that purchasers did not have a property interest sufficient to support the suit.[72] Although not explicit in the opinions, in each case the court looked to the manner in which the contract allocated the incident of ownership in question and permitted the party to whom the critical incident was given to maintain suit.

---

71. Kateiva v. Snyder, 143 Wash. 172, 254 P. 857 (1927).

72. *See supra* note 29. *See generally* Hume, *Incidents of the Vendor-Purchaser Relationship (Equitable Conversion)*, 2 Washington Real Property Desk Book ch. 36 (1980).

The right to possession is a critical right since it is one of the incidents of property ownership upon which other rights and duties often depend.[73] This right normally rests with the seller as the holder of legal title.[74] The standard installment contract, however, gives this right to the buyer.[75] In the post-*Ashford* cases, courts decided that if the buyer had the right to possession, it was enough to permit the buyer to recover for trespass,[76] share in the proceeds of a condemnation award,[77] protect the property from seizure by the seller's trustee in bankruptcy,[78] and protest the formation of a special district that would include the property being purchased.[79] Not even possession was needed in order for a buyer to protect his contract right to receive legal title by intervening in a quiet title action brought against the seller.[80] With logical symmetry, where the court treated the agreement as an earnest money that did not give the right to possession to the purchaser, it refused to permit the purchaser to sue for trespass.[81]

In all of these decisions, the argument that the purchaser had no interest in the property was routinely dismissed by the courts; they looked to the nature of the right asserted and determined that the contracts had given an incident of ownership associated with them to the purchaser. Such an inquiry should not overlook the possibility that both parties may have a protectable interest supporting a right to sue, and that the right need not be based on the possession of either real or personal property. For example, it may also be appropriate to permit the seller to sue the trespasser for damage to the real property, which, after all, is the seller's security. In other words, it is appropriate to look to the contract to determine the protectable

---

73. Examples are the right to crops growing on the land, Churchill v. Ackerman, 22 Wash. 227, 60 P. 406 (1900), and the right to collect rents, Erckenbrack v. Jenkins, 33 Wash. 2d 126, 204 P.2d 831 (1949).

74. *See supra* note 59.

75. See standard form A-1964, in Falconer, *Real Estate Contracts*, WASHINGTON REAL PROPERTY DESK BOOK ch. 37, standard form A-1964 at SU 37-25. Forms other than A-1964 are used in counties in Eastern Washington. *E.g.*, Form 1415, Yakima County.

76. Lawson v. Helmich, 20 Wash. 2d 167, 146 P.2d 537 (1944); Peters v. Bellingham Coal Mines, 173 Wash. 123, 21 P.2d 1024 (1933).

77. Pierce County v. King, 47 Wash. 2d 328, 287 P.2d 316 (1955).

78. Culmback v. Stevens, 158 Wash. 675, 291 P. 705 (1930).

79. Committee of Protesting Citizens v. Val Vue Sewer Dist., 14 Wash. App. 838, 545 P.2d 42 (1976).

80. Turpen v. Johnson, 26 Wash. 2d 716, 175 P.2d 495 (1946).

81. Allen v. Mickelson, 43 Wash. 2d 509, 262 P.2d 1024 (1953).

interest of each party without further labeling.

Looking to the contract allocation of the incident of ownership should also produce sensible and desirable distinctions between earnest money contracts and installment contracts. The two different agreements typically allocate the incidents of ownership between the parties in very different ways. The installment buyer should, like the mortgagor, possess more "property" rights because the contract has transferred more incidents of ownership to that buyer.

The analysis can be tested further by using the *Ashford* facts.[82] Following the destruction of the property, Mrs. Reese, the buyer, wanted rescission of the contract and restitution of all payments she had previously made. The Ashford-Reese contract was silent as to which party would bear a fortuitous loss.[83] When the contract is silent, one way to decide which party bears the loss is to place the loss on the party with "title"—either equitable title, as with the doctrine of equitable conversion,[84] or legal title, as in *Ashford*.[85] This formalistic approach first applies a property label. Once the label is applied, any further questions are solved by reference to the label. In the process, however, the contract between the parties, particularly the allocation of the incidents of ownership between them, is ignored.

Further examination of the contract, however, suggests a less formalistic, more policy-oriented method for decision. Mrs. Reese had possession. Where the loss occurs when one of the parties to the contract is in possession of the subject matter of the contract, it is logical to place the loss on that party, because the party in possession is in the better position to protect and insure the property.[86] This is the position taken by the Uniform Vendor and Purchaser Risk of Loss Act,[87] and is an exception to the allocation of risk of loss otherwise resulting from application

---

82. 132 Wash. 649, 233 P. 29.

83. Had the contract allocated risk of loss, the agreement between the parties would have been honored. *E.g.*, Gillingham v. Phelps, 5 Wash. 2d 410, 412, 105 P.2d 825, 826 (1940) (personal property).

84. 3 AMERICAN LAW OF PROPERTY, *supra* note 13, § 11.30, at 90.

85. 132 Wash. 649, 650, 233 P. 29, 30.

86. S. WILLISTON, *supra* note 37, §§ 931-43. *See also* U.C.C. § 2-509 (1978). Title has been abandoned as a method for allocating risk of loss in sales of goods.

87. UNIFORM VENDOR AND PURCHASER RISK OF LOSS ACT (1935). *See* Pierce County v. King, 47 Wash. 2d 328, 332, 287 P.2d 316, 319 (1955), citing the UNIFORM ACT with approval in allocating loss resulting from condemnation. The UNIFORM LAND TRANSACTIONS ACT § 2-406 (1975) adopts the same position.

of the doctrine of equitable conversion in some states.[88]

The fact that Mrs. Reese had the risk of loss under the suggested analysis does not necessarily mean that she could not have the relief she sought. If the loss caused a breach of contract, Mrs. Reese was entitled to an appropriate remedy. The remedy might affect who ultimately would bear the risk of loss, but it would do so for reasons other than the formalistic application of property labels. In addition, the remedy requested in a particular case can and should affect the ultimate allocation of benefits and burdens between the parties to the contract, as well as the rights of third parties vis-a-vis the parties to the contract.

B. The Status of the Contract or "The Remedial Connection"

The status of the contract is very important. Most cases are presented to courts in the context of a breach for which a remedy is sought. If a court determines that the appropriate remedial award terminates the contract, all of the incidents of ownership may be reassociated with legal title. This may extinguish any property interest in the buyer and change the characterization of the nature of the seller's interest from personal to real property.[89] Because the property labels may change with changes in the status of the contract, it is important to decide the remedial question first.

Again, the *Ashford* facts can be used to test the analysis. Mr. Ashford could no longer deliver his promised performance because of the destruction of part of the subject matter of the contract. Leaving aside property labels, he would either be excused from performing his obligation on grounds of impracticability of performance,[90] or be in breach. If his duties were excused, Mrs. Reese was entitled to suspend her own performance.[91] If in breach, Mrs. Reese could suspend her performance if the breach was material, and seek restitution of payments pre-

---

88. 3 AMERICAN LAW OF PROPERTY, *supra* note 13, § 11.30.

89. A similar process, called "reconversion," existed in conjunction with the doctrine of equitable conversion. When an equitable conversion had been effected by instructions in a will to sell real property and distribute the money, the beneficiaries could, under appropriate circumstances, elect to take the property in its unconverted form. This election resulted in a reconversion of the property into its original form. 4 J. POMEROY, *supra* note 13, §§ 1175-78; Annot., 130 A.L.R. 1379 (1941); *see, e.g.*, Estate of Morgan, 568 P.2d 892 (Wyo. 1977).

90. RESTATEMENT, *supra* note 15, § 263.

91. *Id.* §§ 267-68.

viously made on the contract.[92] If restitution was awarded, Mr. Ashford would suffer the loss because of the status of the contract, not because he held legal title. If, however, the breach was not material, the contract was still in effect. Mrs. Reese would have the risk of loss because she had possession. She might be entitled to damages for the loss, such as an abatement of the purchase price, but this would be because of the breach of the contract and not because Mr. Ashford had the risk of loss.[93]

It is especially important to determine the status of the contract when exercise of a forfeiture remedy is claimed. Proper exercise of the forfeiture clause terminates the buyer's right to continue performance and ends the contract.[94] Once the contract is ended, all incidents of ownership are reassociated with legal title. It is then inappropriate after forfeiture to recognize a property interest in the buyer or any interest in any third party that was dependent upon the buyer's property interest.

Cascade Security Bank v. Butler[95] serves as an example of the difficulty that could be encountered unless a determination of the propriety of forfeiture is made before deciding the nature and extent of property interests. The *Cascade Bank* court held that a purchaser under a partly performed installment contract had "real estate" within the meaning of the judgment lien statute.[96] This is appropriate because if the contract is completed the buyer will have full legal ownership of the property involved. The buyer's creditor should be able to establish its priority on

---

92. *Id.* §§ 237, 241.

93. *E.g.*, Capital Sav. & Loan Ass'n v. Convey, 175 Wash. 224, 27 P.2d 136 (1933). The author does not suggest by this analysis that the applicable contract doctrine is "better," or more likely to produce certainty. What is suggested, however, is that use of these rules, rather than property labels, is more likely to take account of the actual circumstances of the parties and therefore, is more likely to produce fair results.

94. 3 American Law of Property, *supra* note 13, § 11.76, at 191. In theory, forfeiture is foreclosure of the vendor's lien by operation of a condition subsequent contained in the contract. The vendor's lien, in the retained title situation, is an equitable right, derived from legal title to compel the buyer to perform the contract by paying the purchase price or bar the buyer's rights under the contract. *Id.* This should be distinguished from the vendor's lien sometimes claimed *after legal title has been transferred* in order to give the unpaid seller priority over others by means of a lien on the property transferred. The latter has been disapproved of in Washington because it is a "secret" lien and because the seller has the remedy of execution against the land after securing a judgment for the purchase price. Smith v. Allen, 18 Wash. 1, 50 P. 783 (1897). *See also* Shelton v. Jones, 4 Wash. 692, 30 P. 1061 (1892) for a good discussion of the distinction between the vendor's lien and the equitable lien arising from a title retention contract.

95. *See supra* note 45 and accompanying text.

96. 88 Wash. 2d 777, 567 P.2d 631.

this asset at the time of judgment and recover its judgment against the buyer's equity in the event that the buyer sells her interest prior to completion of the contract. If, however, the buyer's rights are extinguished by appropriate forfeiture, the judgment creditor's lien should also be extinguished.[97]

C. *Application of the Analysis*

A recent decision contains facts permitting application of all of the elements of analysis previously discussed. It is also an excellent example of the confusion that lingers despite the overruling of *Ashford*. In *Reed v. Eller*,[98] the parties entered into a real estate purchase agreement that was called an "earnest money." This agreement provided that a standard installment contract would be entered into by the parties when the contract balance had been reduced to a specific amount.[99] Although this agreement was called an "earnest money" contract, it gave possession to the buyer, permitted payment of the purchase price in installments through an escrow agent, and contained a forfeiture clause. When the buyer fell behind in payments, the sellers attempted to exercise their rights under the forfeiture clause and resold the property, again on an installment contract, to other buyers.

The Washington Court of Appeals applied the waiver and estoppel rules normally applied to forfeiture of standard installment contracts, despite the fact that the parties had called their agreement an "earnest money." The court was clearly correct in so holding. It recognized that the parties had allocated the incidents of ownership between themselves in a manner more like the standard installment contract than the typical earnest money. The court then ruled that the sellers had improperly

---

97. This follows from the general principle that a creditor acquires no greater right in an asset than is possessed by its debtor. Vandin v. McCleary Timber Co., 157 Wash. 635, 289 P. 1016 (1930). Any attempt to decide the creditor's interest in the property without first determining the status of the contract could result in giving the creditor greater rights in the property than its debtor possesses. For example, the lien of the creditor on the real estate of the seller disappears when the contract is performed, and apparently will not attach at all if the contract has been fully performed prior to the docketing of the judgment or execution under the statute. Heath v. Dodson, 7 Wash. 2d 667, 110 P.2d 845 (1941) (dicta). The statute construed in *Cascade Bank* has been amended to provide that the vendor's interest is not real estate within the meaning of the statute. 1983 Wash. Legis. Serv. ch. 45, 1st Ex. Sess. (West).

98. 33 Wash. App. 820, 664 P.2d 515 (1983).

99. *Id.* at 821-22, 664 P.2d at 516.

exercised their forfeiture rights under the contract and reinstated the agreement.[100]

The court then faced the question of priority between the original and subsequent purchasers. Here its analysis went awry. The court held that the subsequent purchasers could not be "bona fide purchasers" who could prevail over the original purchaser because they did not have legal title.[101] In its opinion, the court indicated that although *Ashford* had been overruled, the doctrine of equitable conversion is not in effect, and *Cascade Bank* does not ". . . alter the legal title requirement of the bona fide purchaser rule."[102] In so doing, the court abdicated its responsibility to look for principles outside of the doctrine of equitable conversion in order to solve the priority problem, and thereby confirmed that the effects of *Ashford* still linger.

In fact, the doctrine of equitable conversion would not have solved the priority problem in *Reed*. The doctrine would simply have transferred equitable estates to both parties,[103] leaving the court with the same problem—which of the competing equities prevails. Regardless of the label it used to describe the buyer's interest, after the *Reed* court decided that the forfeiture was improper on the first contract, it was left with two buyers, each possessing the right to complete the contract and receive legal title to the property. Neither buyer yet had legal title to the property; title remained with the seller. The court should, therefore, have ignored the location of legal title and decided which buyer had priority, because the buyers' interests were identical except as to the time of creation.[104]

One of the arguments made to the court in *Reed* illustrates the danger that the same simplistic arguments that followed in the wake of *Ashford*[105] will be made again, albeit clothed in *Cascade Bank* rhetoric. The subsequent purchasers in *Reed* argued that the most applicable precedent, *Peterson v. Paulson*,[106] had been overruled sub silentio by the *Cascade Bank* decision, and that *Cascade Bank* refused to adopt the doctrine of equitable

100. *Id.* at 826, 664 P.2d at 518.

101. *Id.* at 827, 664 P.2d at 518.

102. *Id.* at 827, n.2, 664 P.2d at 518, n.2.

103. *See supra* text accompanying note 24.

104. 2 J. POMEROY, *supra* note 13, §§ 413-15.

105. *E.g.*, Kateiva v. Snyder, 143 Wash. 172, 254 P. 857 (1927). *See supra* text accompanying note 72.

106. 24 Wash. 2d 166, 163 P.2d 830 (1945).

conversion. Two implications are present in this argument: one, all post-*Ashford*, pre-*Cascade Bank* decisions may have been overruled, and two, because *Cascade Bank* did not adopt the doctrine of equitable conversion, we are left with a body of overruled cases and no principles with which to replace them.

The answer to this contention is that between *Ashford* and *Cascade Bank*, the court decided many cases that recognized and defined both the seller's and purchaser's interest in property subject to a real estate contract.[107] *Cascade Bank* confirmed rather than overruled these cases, and its refusal to overlay a foreign body of doctrine—the doctrine of equitable conversion—acknowledges this.[108] The main thing the court said in *Cascade Bank* was that it no longer wanted to hear simplistic *Ashford* arguments.[109] One can surmise that the court might have as little interest in simplistic post-*Cascade Bank* arguments.

This author suggests that we are not merely cast adrift without principles to solve priority problems, as in *Reed*, simply because we do not have the doctrine of equitable conversion. Common law has developed doctrines to establish priorities among equitable interests.[110] These principles would also be appropriate in many instances to solve installment contract priorities.[111]

---

107. *See supra* notes 29-30. *See generally* Hume, *supra* note 46.

108. 88 Wash. 2d 777, 567 P.2d 631.

109. It is interesting that *Ashford* was overruled in a factually dissimilar case. *Ashford* could easily have been distinguished in *Cascade Bank*, as the court had done so many times before. Why then overrule? An answer is suggested in Radin, *The Trail of the Calf*, 32 CORNELL L. REV. 137 (1946).

> The term "overrule" in practice means just that. It means: "Do not cite this case hereafter in your arguments." For lawyers in citing cases rarely consider the actual case involved but merely use the opinion in order to cull from it such general statements as they think will afford good major premises for their own conclusions. It is just these general statements which the court has decided to reject and their "overruling" enforces this rejection.

Id. at 143.

110. The basic common-law rule, both in law and equity, was "first in time, first in right." An exception was made when the prior interest was equitable and the subsequent interest was legal. In that case, the later interest would prevail if the holder of the later legal claim was a purchaser for value without notice. 4 AMERICAN LAW OF PROPERTY, *supra* note 13, §§ 17.1-.3. *See also* G. OSBORNE, *supra* note 49, §§ 182-84.

111. Recording acts alter common-law priorities for interests included in the act. Executory contracts are excluded from the definition of "conveyance" in the Washington Act. WASH. REV. CODE § 65.08.060(3) (1981). Executory contracts, however, may be recorded and will give notice. WASH. REV. CODE § 65.08.080 (1981).

V. CONCLUSION

Real estate contract problems are analytically penetrable without the doctrine of equitable conversion. Analysis requires greater attention to the real estate contract itself, to possible breach of the contract, and to remedies for breach before attempting to decide the property questions associated with the contract. Most of all, sensible solution of real estate contract problems requires an exorcism of the ghost of *Ashford* and its method of reasoning. It is neither necessary nor desirable to reject all post-*Ashford*, pre-*Cascade Bank* cases as infected with the inappropriate *Ashford* reasoning. Nor is it necessary or desirable to select the doctrine of equitable conversion as a panacea. Analysis under the doctrine suffers from the same deficiencies as the reasoning in *Ashford*. Careful analysis can avoid formalistic solutions, and produce a desirable blend of principles that will furnish predictability and fairness for the parties to real estate contracts.