

# Equitable Conversion in Washington: The Doctrine That Dares Not Speak Its Name

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The desire for individuality is found in states as well as people. The nature of a federal system promises the opportunity for states to make unusual laws, but also provides pressures for legal uniformity among the states. These pressures, in turn, produce counter-pressures for nonconformity on the part of particular states. The result is that a state court or legislature sometimes will adopt a unique rule of law, of no discernible merit, for no apparent purpose other than defiantly to assert state identity.

Since the 1925 decision of *Ashford v. Reese*,<sup>1</sup> Washington has had the distinction of being the only American jurisdiction totally, albeit implicitly, to reject the doctrine of equitable conversion. *Ashford* was overruled in 1977, in a remarkable opinion<sup>2</sup> which simultaneously, and explicitly, rejected the doctrine of equitable conversion, thus maintaining Washington's unique status with respect to that doctrine. But the opinion failed to provide a substitute for either the rule of *Ashford* or the contrary doctrine of equitable conversion, both of which it emphatically abjured. The result is an unbroken line of Washington cases consistent with only one rule of law—the doctrine of equitable conversion. The effect of the opinion is thus de jure rejection and de facto adoption of equitable conversion. The process by which Washington has managed to achieve substantial conformity with the ma-

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1. 132 Wash. 649, 233 P. 29. The crucial language of the opinion was "an executory contract of sale in this state conveys no title or interest, either legal or equitable, to the vendee." *Id.* at 650, 233 P. at 30. This language is patently inconsistent with the doctrine of equitable conversion, under which a contract for the sale of real property works, in equity, a conversion, making "the purchase-money a part of the personal estate of the vendor, and . . . the land a part of the real estate of the vendee." *Lysaght v. Edwards*, L. R. 2 Ch. Div. 499, 507 (1876).

2. *Cascade Security Bank v. Butler*, 88 Wash. 2d 777, 567 P.2d 631.

majority of American jurisdictions, while resolutely maintaining a unique stance, warrants analysis.

### HISTORICAL BACKGROUND

*Ashford v. Reese* is the unavoidable starting point for any discussion of the historical development of Washington law governing the nature of parties' interests under an executory land-sale contract. Ashford entered into a contract with Reese to purchase from the latter a lot and building thereon, payment to be made at a monthly rate over a period of several years, with the buyer being obliged to pay the taxes. When about half the total purchase price had been paid, the building was destroyed without the fault of either party. Ashford sued for rescission of the contract and return of all monies paid thereon. A judgment in her favor was upheld by the Washington Supreme Court. The court relied on a line of cases<sup>3</sup> holding that an executory land-sale contract "conveys no title or interest, either legal or equitable, to the vendee,"<sup>4</sup> and held that risk of loss is upon the holder of the title—in this case, the vendor.

Although ample precedent supported the language of *Ashford*,<sup>5</sup> it was in no sense compelled by existing law. A lengthy and thoughtful dissent cited several cases which supported recognition of a real estate interest on the part of the vendee. And within two years of *Ashford*, a commentator had found three Washington cases, "misdigested and lost on the books,"<sup>6</sup> which neither the majority nor the separate opinions had considered, recognizing the doctrine of equitable conversion as the law of Washington.<sup>7</sup> But despite its want of originality, and its failure to make a conscious choice between two competing lines of authority, *Ashford* received enough note<sup>8</sup> to be considered the leading case defining the nature of a vendee's interest. And it was

3. The cases are summarized in *Schaefer v. Gregory Co.*, 112 Wash. 408, 192 P. 968 (1920).

4. 132 Wash. at 650, 233 P. at 30.

5. *Schaefer v. Gregory Co.*, 112 Wash. 408, 192 P. 968 (1920), and cases collected therein.

6. Schweppe, *Rights of a Vendee under an Executory Forfeitable Contract for the Purchase of Real Estate: A Further Word on the Washington Law*, 2 WASH. L. REV. 1, 2 (1926).

7. *Id.*

8. Lichty, *Rights and Estates of Vendor and Vendee under an Executory Contract for the Sale of Real Property*, 1 WASH. L. REV. 9 (1925); Schweppe, *supra* note 6; Comment, *The Vendor-Purchaser Relationship in Washington*, 22 WASH. L. REV. 110 (1947).

cited with approval in a 1929 decision.<sup>9</sup>

After 1929, however, there ensued a lengthy series of decisions in which *Ashford* simply was not followed. All of these decisions recognized that, for certain purposes, the vendee's interest must be regarded as one in real estate. Specifically, the vendee was: permitted to homestead the land which was the subject matter of the contract;<sup>10</sup> held entitled to specific performance of the contract;<sup>11</sup> given standing to seek relief against third party interference with his possession;<sup>12</sup> and given the right to maintain a trespass action, without requiring that the vendor do so.<sup>13</sup> The vendee's interest was treated as "real property" for purposes of an attachment statute.<sup>14</sup> A vendee was allowed to interpose a statute-of-limitations defense to a quiet title action.<sup>15</sup> A vendee's will was construed in such a manner as to treat his interest as real estate.<sup>16</sup> A vendee was recognized as a necessary party to a condemnation proceeding,<sup>17</sup> and as having a mortgageable interest,<sup>18</sup> and, the language of *Ashford* to the contrary notwithstanding, a "valid and subsisting interest" in the land.<sup>19</sup> The interest of the vendor also has been treated as personal property. Thus, the vendor was allowed to recover installments out of insurance money only as his interest may appear;<sup>20</sup> and for tax purposes, the Washington court has treated a vendor's interest under a partially executory contract as personalty.<sup>21</sup> The Washington Supreme Court was duly moved to note, obiter, that *Ashford* has "been whittled away until nothing remains."<sup>22</sup>

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9. *Daniels v. Fossas*, 152 Wash. 516, 278 P. 412.

10. *Desmond v. Shotwell*, 142 Wash. 187, 252 P. 692 (1927).

11. *Pratt v. Rhodes*, 142 Wash. 411, 253 P. 640 (1927).

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

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

14. *State ex rel. Oatey Orchard Co. v. Superior Court*, 154 Wash. 10, 280 P. 350 (1929).

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

16. *In re Levas' Estate*, 33 Wash. 2d 530, 206 P.2d 482 (1949).

17. *Pierce County v. King*, 47 Wash. 2d 328, 284 P.2d 316 (1955).

18. *Kendrick v. Davis*, 75 Wash. 2d 456, 452 P.2d 222 (1969).

19. *Griffith v. Whittier*, 37 Wash. 2d 351, 353, 223 P.2d 1062, 1063 (1950).

20. *Dysart v. Colonial Fire Underwriters*, 142 Wash. 601, 254 P. 240 (1927).

21. *In re Plasterer's Estate*, 49 Wash. 2d 339, 301 P.2d 539 (1956); *In re Eilermann's Estate*, 179 Wash. 15, 35 P.2d 763 (1934).

22. *Windust v. Department of Labor & Indus.*, 52 Wash. 2d 33, 37, 323 P.2d 241, 244 (1958). The court of appeals has proclaimed the death of *Ashford*. See *Goldfarb v. Dietz*, 8 Wash. App. 464, 506 P.2d 1322 (1973); *In re Estate of Verbeek*, 2 Wash. App. 144, 467 P.2d 178 (1970).

## THE CASCADE CASE

*Ashford* remained in this state of innocuous desuetude until the rendition of a certain decision in the Superior Court of Grant County.<sup>23</sup> The Cascade Security Bank had obtained a judgment against Frederick and Alvena Butler. On the date of judgment, Alvena Butler was in possession of certain lands in the county in which the judgment was entered, as vendee under an executory contract of sale. Ten days after the judgment was entered, Alvena Butler assigned her interest in the contract to intermediate purchasers who ultimately transferred their interest to W. J. and Helen Ringwood. Some months after entry of the judgment, and while the Ringwoods were in possession of the lands, the bank attempted to levy on the lands in satisfaction of the judgment. The bank's theory was that the interest of Alvena Butler in the lands was "real estate," within the meaning of the Washington judgment lien statutes,<sup>24</sup> and that the judgment thus automatically became a lien upon those lands.<sup>25</sup> Upon the intervention of the Ringwoods, the superior court entered a judgment and decree enjoining the levy and determining that the entry of the judgment against the Butlers conferred upon the bank no interest whatever in the land or the contract. This decision was based expressly on the proposition that under *Ashford*, the Butlers had "no interest" in the land which they were purchasing at the time the judgment against them was entered.<sup>26</sup>

The bank appealed. Shortly after the filing of the appellant's opening brief in the court of appeals, the Washington Supreme Court transferred the cause to itself for the express purpose of reconsidering *Ashford*.<sup>27</sup> The intolerably uncertain state of the law was illustrated by the trial court's following a decision gener-

23. *Cascade Security Bank v. Butler*, No. 22132 (Grant County Super. Ct. Mar. 14, 1975).

24. WASH. REV. CODE §§ 4.56.190 and 4.56.200 (1976). These sections provide that a judgment of a superior court is a lien upon any real estate of the judgment debtor located in the county in which the judgment is rendered.

25. See note 24 *supra*. The statements of fact contained in the text are taken from the Findings of Fact and Conclusions of Law filed by the trial court in *Cascade Security Bank v. Butler*, No. 22132 (Grant County Super Ct. Mar. 14, 1975).

26. Conclusions of Law, *Cascade Security Bank v. Butler*, No. 22132 (Grant County Super. Ct. Mar. 14, 1975).

27. On June 23, 1975, the clerk of the supreme court sent a letter to Dean Joseph A. Sinclitico of the University of Puget Sound School of Law, inviting the School of Law to file an amicus curiae brief in the *Cascade* case. The letter stated, in part: "The case raises the issue of whether *Ashford v. Reese*, 132 Wash. 649, 233 P. 29 should be overruled. That case holds that an executory contract for the sale of real estate creates no title, legal or equitable, in the vendee."

ally thought dead. The supreme court had, in theory, several options for resolving this uncertainty.

a. *Reaffirmation of Ashford*

Reaffirmation had some superficial appeal. By upholding a decision the courts have long and cheerfully ignored, the supreme court would strike a blow for *stare decisis*. The issue is whether the law should characterize a contract vendee's interest as realty or personalty. If the choice is regarded as essentially arbitrary, to be made only in the interests of legal certainty, then it makes sense to dust off a clear, if aged and ignored, rule.<sup>28</sup>

But the choice is not arbitrary. It involves jurisprudential considerations which courts ignore at their peril. There is no reason to think that the courts have ignored *Ashford* through malevolence, rebelliousness, or nescience. Rather, the likely explanation is that they have recognized that its application would in most cases produce undesirable results. A rule denying a contract vendee any "title or interest" in the land he is purchasing is so divorced from the understanding and expectations of the parties to the contract, and those dealing with them, that it cannot ordinarily be employed to work substantial justice in litigation among such persons. This is particularly true when the vendee has gone into possession of the land.

When a person buys land on an executory contract of sale, and goes into possession, he thinks of it and treats it as his own. He is free to, and often does, farm, build upon, or otherwise improve it, or even allow it to deteriorate (so long as he does not jeopardize the seller's security). Under the contract he normally is responsible for assessments against and taxes upon the land, and enjoys the services they finance. He may sell his interest, and when he does, realize the gain or suffer the loss caused by fluctuations in the property's value. In short, he has all the burdens and benefits of ownership. Most importantly, he knows that he has the right, universally honored, to obtain the fullness of ownership represented by legal title in fee simple, upon the occurrence of a condition within his control—full performance by timely payment of the purchase price.

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28. Justice Askren concurred in *Ashford*, even though the rule announced therein was not "in harmony with . . . the better authority," 132 Wash. at 651, 233 P. at 30, on the ground that *Ashford* restated an established rule upon which the bar and its clients have relied. He argued that stability of the court's decisions was more important than their soundness.

The seller, by contrast, no longer thinks of the land as his. His rights therein are limited to the preservation of his security. He can no longer justly convey the legal title to a third person—even if he has the legal power to do so. And he knows that he will get the land back only upon an event beyond his control—default by the purchaser. In no real sense is the land his; his right is to receive the purchase money.<sup>29</sup>

The rights transferred upon the execution of a land sale contract are the valuable incidents of ownership of the land. If the seller could not transfer them to the buyer, the latter would have no reason to buy land. The economic consequences of such a state of affairs would make feudalism appear dynamic.

It is important with respect to third parties as well that the law reflect insofar as possible the de facto transfer of ownership effectuated by a land-sale contract. A vendee's potential creditors, observing the vendee in possession of the land and receiving his good-faith assurance that he "owns" the land, will be understandably influenced in their credit extension decisions by the vendee's apparent ownership. That the creditor has the means to discover the precise nature of the vendee's interest in the land does not alter the fact that the creditor acts reasonably in relying upon apparent ownership, without requiring a title search before extending unsecured credit.<sup>30</sup>

The illusory nature of the *Ashford* doctrine becomes clear when the executory contract for the sale of land—particularly

29. Where a contract is of a short-term character, such as a binder, the intentions and expectations of the parties are somewhat different. In most cases, the buyer is not yet in possession and the seller may not have moved out. While it is true that the remedy of specific enforcement is available, the buyer may view the transaction as tentative, perhaps being willing to forfeit the earnest money he has paid if a better deal comes along.

Another transaction worth considering is that of a buyer-builder who buys raw land on contract, constructs improvements, and then sells it (perhaps financing it himself), using the down payment to obtain a deed from his vendor. The payment period of such a contract will typically be longer than that of a binder, but shorter than that of a long-term contract used as a security device.

The differences in the intentions and expectations of the parties to the various types of contracts is one reason for adopting the view suggested by the authors, *see* notes 46-48 *infra*, and accompanying text.

30. Although it would be possible to discover whether an occupier has a legally-recognized interest in the occupied land, or merely "contract rights" therein, the costs involved in so doing probably make such discovery economically infeasible in most extensions of unsecured credit. Had *Ashford* been reaffirmed, credit extenders might have added "contract buying" to "rent" and "own" on credit applications. Such an addition is apparently not required in light of *Cascade*.

It should also be noted that long-term contract vendees customarily record their contracts, while binders, though also recordable, customarily are not recorded. This may provide another indicium of the intent of the parties to particular kinds of contracts.

when the vendee has gone into possession and the contract provides for long-term installment payments of the purchase price—is looked upon as what it is: a method of financing land sales, with the vendor effectively lending the buyer the bulk of the purchase price. Under an executory contract for the sale of land, the vendor-lender has legal title, and the traditional view gives the buyer-borrower equitable title. There are, of course, alternative financing methods available, notably those involving mortgages and deeds of trust. In financing of land purchase by mortgage, the buyer-borrower has legal title and the lender a lien thereon, under the usual theory.<sup>31</sup> Under a deed-of-trust arrangement, the trustee has legal title, while the buyer-borrower has an equitable interest. These alternative methods of financing are determined by local practice or mutual convenience. Because all three involve the separation of a security and a beneficial interest, and all have a common purpose, it would be absurd to hold that there should be any real substantive difference in the treatment of the lender's and borrower's interests simply because the lender happens to be a vendor willing and able to "handle the financing" himself.<sup>32</sup>

Reaffirmation of *Ashford* would have been an attempt to perpetuate a doctrine which failed to give legal recognition to the legitimate expectations of parties to land-sale contracts, and those dealing with the parties. A rule so fundamentally unsound must either be applied, with resulting injustice, or disregarded. If it is disregarded, and nothing is put in its place, the result is simple lawlessness. The Washington courts chose, over five decades, to disregard *Ashford*, producing such lawlessness. They would be forced to disregard a revived *Ashford*. An effort to achieve legal certainty through resurrection of *Ashford* would therefore have been doomed to failure.

### *b. Adoption of Equitable Conversion*

The supreme court also had the option of adopting the doctrine of equitable conversion. Under that doctrine, "when a con-

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31. Washington follows the lien theory, *Fishbein v. Thorne*, 193 Wash. 65, 74 P.2d 880 (1937), though some other jurisdictions follow either "hybrid" or "title" theories. See G. OSBORNE, MORTGAGES §§ 14-16, 24-26 (2d ed. 1970).

32. Courts are increasingly recognizing this and treating contracts much as mortgages were treated in the early days of equity. See, e.g., *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973). The Uniform Land Transactions Act also recognizes this similarity, classing deeds of trust, mortgages, long-term installment contracts, and other devices as "security interests." Sections 3-102 and 3-103, and comments thereto.

tract for the sale of real property becomes binding upon the parties . . . the purchaser of the land is deemed the equitable owner thereof, and the seller is considered the owner of the purchase price."<sup>33</sup>

The doctrine of equitable conversion has the virtue of predominance; it has been declared the law in thirty-two American jurisdictions.<sup>34</sup> Its ancient acceptance<sup>35</sup> and widespread adoption provide a certain presumption of validity. It is by no means irrational. It "rests on the presumed intention of the owner of the property and on the maxim that equity regards as done what ought to be done."<sup>36</sup> Its particular virtue is that it gives legal effect to the parties' presumed desire that the vendee become the beneficial owner of the real estate which is the subject of the contract, and that the vendor retain only a security interest therein. It is thus not subject to the jurisprudential infirmities of the artificial doctrine of *Ashford v. Reese*, which refuses to recognize any title or interest other than legal title.

But the doctrine also has its drawbacks, and has been the subject of much justified criticism.<sup>37</sup> Its principal deficiency is

33. *Panushka v. Panushka*, 221 Or. 145, 149, 349 P.2d 450, 452 (1960).

34. See *Department of Revenue v. Baxter*, 486 P.2d 360 (Alaska 1971); *Lebrecht v. Beckett*, 96 Ariz. 389, 396 P.2d 13 (1964); *Snow Bros. Hardware Co. v. Ellis*, 180 Ark. 238, 21 S.W.2d 162 (1929); *Strauss v. White*, 66 Ark. 167, 51 S.W. 64 (1899); *In re Estate of Reid*, 26 Cal. App. 2d 362, 79 P.2d 451 (1938); *Dwyer v. District Court*, 188 Colo. 41, 532 P.2d 725 (1975); *Eddington v. Turner*, 27 Del. Ch. 411, 38 A.2d 738 (Sup. Ct. 1944); *Liberty Nat'l Bank v. Smoot*, 135 F. Supp. 654 (D.C. Cir. 1955); *Hull v. Maryland Cas. Co.*, 79 So. 2d 517 (Fla. 1954); *Shay v. Penrose*, 25 Ill. 2d 447, 185 N.E.2d 218 (1962); *Board of Comm'rs v. Midwest Assocs., Inc.*, 144 Ind. App. 264, 245 N.E.2d 853 (1969); *H. L. Munn Lumber Co. v. City of Ames*, 176 N.W.2d 813 (Iowa 1970); *Estate of Snyder v. Hampson*, 199 Kan. 487, 430 P.2d 212 (1967); *C. H. Brown Banking Co. v. Stockton*, 107 Ky. 492, 54 S.W. 854 (1900); *Tait v. Dante*, 78 F.2d 303 (4th Cir. 1935) (dictum; applying Maryland law); *Adams v. Harris*, 47 Miss. 144 (1872); *Estate of Briebach v. Kistner*, 132 Mont. 437, 318 P.2d 223 (1957); *Buford v. Dahlke*, 158 Neb. 39, 62 N.W.2d 252 (1954); *Sturgill v. Industrial Painting Corp. of Nevada*, 82 Nev. 61, 410 P.2d 759 (1966) (by implication); *In re Estate of Seifert*, 109 N.H. 62, 242 A.2d 64 (1968); *Butterer v. Santoro*, 24 N.J. Super. 361, 94 A.2d 525 (1953); *Mutual Bldg. & Loan Ass'n v. Collins*, 85 N.M. 706, 516 P.2d 677 (1973); *Scott v. Jordan*, 235 N.C. 244, 69 S.E.2d 557 (1952); *State Life Ins. Co. v. State ex rel. Kehn*, 192 Okla. 271, 135 P.2d 965 (1942); *Bauer v. Hill*, 267 Pa. 559, 110 A. 346 (1920); *Capwell v. Spencer*, 48 R.I. 401, 137 A. 699 (1927); *Pinson v. Pinson*, 150 S.C. 368, 148 S.E. 211 (1929); *Southern Ice & Coal Co. v. Alley*, 127 Tenn. 173, 154 S.W. 536 (1912); *Lampman v. Sledge*, 502 S.W.2d 957 (Tex. Civ. App. 1973); *Jelco, Inc. v. Third Judicial Dist. Court*, 29 Utah 2d 472, 511 P.2d 739 (1973); *Clay v. Landreth*, 187 Va. 169, 45 S.E.2d 875 (1948); *Tavener v. Baughman*, 129 W. Va. 783, 41 S.E.2d 703 (1947); *Estate of Fischer v. Fischer*, 22 Wis. 2d 637, 126 N.W.2d 596 (1964).

35. The doctrine apparently originated in *Seton v. Slade*, 7 Ves. Jr. 265 (1802). *Stone, Equitable Conversion by Contract*, 13 COLUM. L. REV. 369, 370 & n.12 (1913).

36. *Rockland-Rockport Lime Co. v. Leary*, 203 N.Y. 469, 480, 97 N.E. 43, 46 (1911).

37. Harlan Fiske Stone observed, as early as 1913, that "most of the difficulties and perplexities which attend the disposition of rights arising under contracts from the sale



paradoxical; its rigidity has produced an unacceptable level of uncertainty in the law. Harlan Fiske Stone pithily identified the root of the problem:

The statement which is so frequently made by writers on the subject that equitable conversion by contract arises from the "presumed intention" of the parties is only another way of saying that it does not rest upon intention at all, but depends rather upon the operation of rules of law regardless of the intent of the owner.<sup>38</sup>

The presumption that the parties intended to effect what amounts to an equitable conversion often has been treated as conclusive. The result is that the doctrine has become a fixed rule of law, designed for mechanical application without regard to the actual intent of the parties or the effectuation of any discernible policy. Such mechanical application frequently will produce injustice.<sup>39</sup> Rather than permit such injustice, courts have carved out a plethora of exceptions to the doctrine. The result has been the confusion and uncertainty which a fixed rule of law is supposed to prevent.<sup>40</sup>

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of land would never have risen had this fiction never been invented." Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369, 388. Another commentator, focusing on application of the doctrine in a particular jurisdiction, has stated that "in Wisconsin, the doctrine seems to have served more to confuse than to clarify the law," and suggested that reference to equitable conversion be eliminated altogether. Church, *Equitable Conversion in Wisconsin*, 1970 WIS. L. REV. 404, 429.

38. Stone, *supra* note 35, at 371.

39. The most common area in which perceived injustice was produced by strict application of equitable conversion was that of risk of loss of improvements by fire or other catastrophe. Such strict application would place the risk on the vendee. This was the very situation of *Ashford*, in which the doctrine was implicitly rejected. Since equitable conversion was conceived before contract notions of failure of consideration, the doctrine was much criticized. In most modern contracts, the risk of such loss is expressly allocated by a contractual provision. Where the vendee is in possession, risk of loss arguably should pass to him, as the party in the superior position to prevent the loss.

40. The point is explicated by Professor Church:

Legal rules are propounded to apply on a broad scale to many cases; but as time passes, as the policies which originally supported a rule change and application of the rule becomes extended beyond its original intended limits, lawmakers and commentators commence to carve out myriad exceptions to the rule, all in aid of preserving a desired degree of flexibility. In some instances, there are so many exceptions to a rule that the rule tends more to impart confusion and inconsistency to the law than logical simplicity. Conversely, too often a rule becomes so well entrenched, and its application so automatic, that great numbers of cases are decided without any recourse to public policy at all, and the rule becomes the master of policy rather than its servant. When a legal rule reaches either of these extremes in its development, it can safely be asserted that it has ceased to have sufficient utility to justify its continued application. It has either grown so complicated and technical that it defeats its original purpose of

The doctrine of equitable conversion thus suffers from one of the infirmities which characterizes its opposite, exemplified in *Ashford*. Both doctrines are rules designed for but incapable of rigid application. The judicial refusal to apply them rigidly causes them to be ignored or riddled with exceptions. The result is uncertainty. Adoption of the doctrine of equitable conversion in the *Cascade* case thus simply would have substituted one set of problems for another.

*c. Adoption of a Variant of the Doctrine of Equitable Conversion*

Several variants of the doctrine of equitable conversion can be found in American jurisprudence, and the *Cascade* court might have adopted one. The most common view, held by nine states,<sup>41</sup> requires complete performance on one side of the contract before equitable conversion becomes fully operative. When the contract has been partially performed, both parties have personal and real interests thereunder. The vendor does not hold a naked legal title, but retains a real property interest in the land until the entire purchase price has been paid, at which time the purchaser acquires a "perfect equity" in the land and the full real property interest therein. The vendor acquires a personal

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conceptual clarity, or it has preserved its own consistency at the expense of the relative disregard of the very issues and daily personal needs and problems which it was designed to resolve. Sometimes, after a long course of development, a rule manages to achieve both extremes simultaneously.

Church, *supra* note 37, at 404.

On the other hand, some of the doctrine's uncertainties arise from a judicial refusal to apply it when its application would, in a particular case, work undue hardship, *Chicago v. Salinger*, 384 Ill. 515, 52 N.E.2d 184 (1944); *National Bank of Topeka v. Saia*, 154 Kan. 740, 121 P.2d 251 (1942); *Clay v. Landreth*, 187 Va. 169, 45 S.E.2d 875 (1948), or contravene the manifest intent of the parties, *Atkinson v. Van Echaute*, 236 Ark. 423, 366 S.W.2d 273 (1963); *Parr-Richmond Indus. Corp. v. Boyd*, 43 Cal. 2d 157, 272 P.2d 16 (1954). Such a refusal does not alter the doctrine or create a generalized exception to it. Rather, it reaffirms the doctrine as an equitable principle which should not be applied to deny equity. The resulting uncertainties concerning the nature of a contract party's interest at a given time and under a given set of circumstances do not impeach the soundness of the doctrine. Rather, they uphold it by recognizing that the doctrine, properly understood, is flexible enough to avoid the injustices of overly-rigid application, and rational enough to consider public policy in determining whether to withhold application.

41. See *McGuire v. Andre*, 259 Ala. 109, 65 So. 2d 185 (1953); *First Security Bank v. Rogers*, 91 Idaho 654, 429 P.2d 386 (1967); *Lambert v. Allard*, 126 Me. 49, 136 A. 121 (1927); *Reynolds v. Fleming*, 43 Minn. 513, 45 N.W. 1099 (1890); *State v. Northwestern Improvement Co.*, 72 N.D. 393, 7 N.W.2d 724 (1943); *Sanford v. Breidenbach*, 111 Ohio App. 474, 173 N.E.2d 702 (1960); *Heider v. Dietz*, 234 Or. 105, 380 P.2d 619 (1963); *State Highway Comm'n v. Miller*, 83 S.D. 124, 155 N.W.2d 780 (1968); *State Highway Comm'n v. Rollins*, 471 P.2d 324 (Wyo. 1970).

property interest in the purchase money only as he actually receives it. As both vendor and vendee possess real property interests in the land, judgment creditors of each may have automatic liens on the land, subject to the non-debtor party's interest therein.

This view, like that of the other variants of the doctrine, has not produced sufficient litigation to warrant a practical assessment of its value. It may be theoretically superior to the doctrine of equitable conversion in its pure form, as this variant may more effectively protect the interests of third parties, such as creditors, without doing clear violence to the intent of the parties, by recognizing that both parties have real interests in the land during the performance period. If treated as a rigid rule, however, it is subject to the theoretical infirmities characterizing the rigid doctrines discussed earlier.

Another view, taken by the courts of Michigan and Massachusetts,<sup>42</sup> is essentially the same as the first variant, except that the doctrine of equitable conversion is applied only with considerable judicial reluctance. The courts taking this view stress that equitable conversion is an equitable doctrine and not a legal principle; its application is deemed purely discretionary. They seem to apply it only to avoid undue hardship to one of the parties. This rule, which has had extremely limited development, has the theoretical advantage of minimizing rigidity. But in its present state of development, it offers so little guidance to trial courts that it scarcely can be deemed a legal principle.

Another minor variation differs from the majority only in that the risk of loss does not shift from vendor to vendee until the latter goes into possession. This view, held by two states,<sup>43</sup> is nothing more than an exception to the doctrine of equitable conversion. It is a desirable exception, however, since it places risk of loss by destruction on the party in possession, who thus has the better opportunity to prevent the destruction. But it is otherwise as objectionable as the doctrine in pure form.

New York has a view of its own which defies easy identification. Early New York cases announced the doctrine of equitable conversion, but it has never been rigorously applied in that state. It has been judicially ruled inapplicable in the area of taxation,

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42. See *Baker v. Commissioner of Corps. and Taxation*, 253 Mass. 130, 148 N.E. 593 (1925); *Brooks v. Gillow*, 352 Mich. 189, 89 N.W.2d 457 (1958).

43. See *Anderson v. Yaworski*, 120 Conn. 390, 181 A. 205 (1935); *Skelly Oil Co. v. Ashmore*, 365 S.W.2d 582 (Mo. Sup. Ct. 1963).

and legislatively altered in the areas of succession and risk of loss. It retains, however, some applications as an equitable doctrine.<sup>44</sup> Although the New York view avoids the problem of rigidity, it fails to guarantee that the determination of whether to apply the doctrine in any particular case will be made with due regard to relevant policy considerations.

All jurisdictions which have considered the problem,<sup>45</sup> save Washington, have thus adopted some variant of the doctrine of equitable conversion, and none has purported utterly to reject it. But none of the approaches can be deemed completely satisfactory.

#### *d. Adoption of an Untried Approach*

If the Washington Supreme Court was not satisfied with any of the existing approaches to the problem, it could have adopted an untried approach. One such was suggested to it.<sup>46</sup> That approach is to regard the doctrine of equitable conversion as a tool of construction, designed to effectuate the presumed intent of the parties to the contract, when the actual intent cannot be ascertained<sup>47</sup> and no policy considerations militate against effectuation of the presumed intent.

This approach begins with the premise that the parties to a land-sale contract ought to be able to determine the nature, under the contract, of their respective interests in the land, absent some countervailing policy consideration. It recognizes that the parties ordinarily intend that the vendee acquire the real, beneficial interest in the property and the vendor retain only a naked legal interest as security for the balance of the purchase

44. See *Rockland-Rockport Lime Co. v. Leary*, 203 N.Y. 469, 97 N.E. 43 (1911); *Williams v. Haddock*, 145 N.Y. 144, 39 N.E. 825 (1895); *Estate of Keyworth v. Davis*, 19 A.D.2d 688, 241 N.Y.S.2d 616 (1963); *In re DeSteuers' Estate*, 199 Misc. 777, 99 N.Y.S.2d 739 (Sur. Ct. 1950); *In re Cantagalli*, 92 N.Y.S.2d 829 (Sup. Ct. 1949).

45. No relevant case law has been found in Georgia, Hawaii, Louisiana, or Vermont.

46. In response to the supreme court's invitation, see note 27 *supra*, the authors of this article filed an amicus curiae brief in the *Cascade* case, urging adoption of the approach advocated herein. The same view was urged at oral argument by one of the authors. Although we still believe this approach to be superior to any others suggested, we recognize that reasonable minds may differ on that issue, and do not fault the court for failure to adopt our approach.

47. It should be noted that adoption of fixed rules which, in application, may in fact thwart the intention of the parties, subserves the same interests as the statute of frauds and the parol evidence rule; *i.e.*, it obviates the risk of erroneous testimony in the ascertainment of the parties' intent by making that intent irrelevant. The benefit of such obviation ought to be weighed against the occasional injustice arising from adoption of a fixed-rule approach, in evaluating such fixed-rule doctrines as equitable conversion.

price. It accordingly presumes that the parties intended a conversion of real and personal estates of the sort occurring under the classic doctrine of equitable conversion. The presumption fails when confronted with substantial evidence of a contrary intent, or when it contravenes some discernible public policy, such as the need to protect the legitimate expectations or interests of creditors or other third parties. This approach would be used whenever it becomes important for a court to classify the nature of a contract party's interest as real estate or personal property.

This approach avoids the principal vices of *Ashford* and the doctrine of equitable conversion. It avoids *Ashford's* failure to give effect to the parties' actual intentions. And it avoids the rigidities of the two rules of law, one denying the possibility of a conversion of interest, and the other finding such a conversion in every case, without regard to the intent of the parties or any policy consideration.

But this approach is vulnerable to the charge that it produces uncertainties. In determining the nature of parties' interests, a court would be guided by criteria designed both to do justice in the particular case and to give weight to any identifiable public policy considerations. But no one could predict with complete certainty how a court would rule in any given case. For example, a creditor of a vendee could not assume with total confidence that a court ultimately would hold that the vendee's interest is realty and thus subject to the lien of any judgment which the creditor might obtain against the vendee.<sup>48</sup>

But the weakness of uncertainty is not necessarily fatal. Fifty years of experience with *Ashford* and 175 with the doctrine of equitable conversion show that both have fallen far short of providing their promised certainty. They also suggest that certainty of law in this area is an illusory goal. The endless judicial quest for rules susceptible of easy, mechanistic application is doomed to failure in an area of such demonstrated potential complexity as the nature of the interests of parties to a land-sale contract. The approach we have advocated tends to foster the determination of this issue in individual cases according to mandatory,

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48. It may well be that, for purposes of creditors' rights, an arbitrary rule is not only workable, but desirable. Such a rule would operate without regard to the intentions of the parties, whether or not such intentions were expressed. Arguably, all that *Cascade* did was provide such an arbitrary rule, leaving the courts free in other contexts to attempt to ascertain the true intention of the parties. See notes 49-52 *infra*, and accompanying text. However, the *Cascade* court did not indicate whether the intent of the parties should be given any relevance in any context.

precise criteria reflective of rational public policies. It does so at the expense of a probably illusory certitude. Its planned and foreseen uncertainties, however, seem preferable to the inevitable uncertainties and injustices of rigid rules that have been tried and found wanting.

### THE CASCADE DECISION

But the Washington Supreme Court did not avail itself of any of these options. In its decision,<sup>49</sup> the court did the following:

1. It expressly overruled *Ashford*.
2. It held that a vendee's interest is real estate, for purposes of the judgment lien statutes.
3. It refused to adopt the doctrine of equitable conversion.
4. It gave its ruling prospective application only, holding it inapplicable to the parties and affirming the judgment below, notwithstanding that the affirmed judgment was based on principles which the court overruled.

The most arresting and potentially troublesome aspect of the opinion is that, although the court gave clear and reasoned grounds for its two latter rulings,<sup>50</sup> it gave none at all for the first two. The court first overruled *Ashford*, noting that it had been

49. *Cascade Security Bank v. Butler*, 88 Wash. 2d 777, 567 P.2d 631 (1977).

50. The court's refusal to adopt the doctrine of equitable conversion was based upon an appreciation of the doctrine's uncertainties. "To adopt that doctrine would merely substitute a new set of uncertainty [sic] for the confusion which has followed *Ashford*." *Id.* at 783, 567 P.2d at 634. Three justices urged adoption of the doctrine, contending that its rejection promoted uncertainty. *Id.* at 788, 567 P.2d at 636. Neither opinion revealed an appreciation of the distinction between the uncertainties arising from overly-rigid application of the doctrine, leading to the development of numerous exceptions to it, and those uncertainties which result from a refusal, in the interests of equity, to withhold application of the doctrine in individual cases upon some rational policy ground. See note 40 *supra*.

Prospective application of the decision was based on the legally questionable, but pragmatically solid ground of detrimental reliance on *Ashford*. If the rule of *Cascade* were applied to the facts of that case, the Ringwoods would be required to satisfy the bank's judgment against the Butlers. The court held that the Ringwoods were entitled to rely on *Ashford*, and thus purchase Alvena Butler's interest under the contract without consulting the judgment rolls for the purpose of uncovering any judgments against her. The proposition that one can reasonably rely on a decision as attenuated as *Ashford*, see notes 10-22 *supra*, and accompanying text, is a trifle startling. But the court was confronted with a reality in which, it appears, title insurers had customarily failed to except from their policies any judgments against contract vendee-vendors. A retrospective application of the new ruling could work extreme hardships upon those insurers, and some private individuals. The court's apparent determination that there would be no countervailing social interest in a retrospective application seems reasonable.

The jurisprudential and jurisdictional questions raised by a judicial decision announcing a new rule of law which is not binding on the parties are intriguing, but beyond the scope of this article.

criticized by commentators and not followed by the courts.<sup>51</sup> Assuming that the court's implicit rationale for the overruling is that *Ashford* has been criticized and has not been followed, nothing in the opinion speaks to whether the criticism was justified and the judicial disregard understandable—the court never tells us what was wrong with *Ashford*. Further, the only apparent basis for the court's holding that a vendee's interest is real estate for purposes of the judgment lien statutes is that "other jurisdictions have so held."<sup>52</sup> The question of the soundness of the view held by the "other jurisdictions" is not addressed.

It will be observed that the *Cascade* decision is "judicial legislation," in a profound, though not necessarily pejorative, sense of that term. We do not mean to suggest that the decision constitutes a usurpation of legislative power. But it exemplifies lawmaking in the legislative, rather than the judicial mode. The legislature enunciates legal principles, often of narrow scope, which have only prospective application. The reasons for legislative enactments need not be, and ordinarily are not, expressly stated. These enactments are observed, at least so long as they enjoy a modicum of public support, simply because they emanate from a body charged with making laws. Judicial lawmaking, by contrast, is accomplished within the context of resolution of an ongoing dispute. The decision, whatever effect it may have on others, is binding on the parties. And the decision is customarily supported by reasoned argument. This argument gives the decision the persuasive effect which brings about its acceptance. The argument thus substitutes for the lawmaking mandate conferred upon the legislature. *Cascade's* ipse dixit announcement of its rulings, and their purely prospective application, clearly mark the case as legislative in its approach.<sup>53</sup>

The defects of the *Cascade* decision lie not in its rulings, but in the court's failure to provide anything resembling a ratio deci-

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51. 88 Wash. 2d at 781-82, 567 P.2d at 633-34.

52. *Id.* at 782, 567 P.2d at 634. The court cites two cases, *Mutual Bldg. & Loan Ass'n v. Collins*, 85 N.M. 706, 516 P.2d 677 (1973), and *Fridley v. Munson*, 46 S.D. 532, 194 N.W. 840 (1923). Both these cases pose and affirmatively answer the question of whether the judgment lien statutes of their respective jurisdictions are broad enough to encompass the "equitable estate" of the vendee. They thus implicitly recognize the existence of such an estate in the vendee, a recognition explicable only in light of the operation of the doctrine of equitable conversion.

53. We stress that our characterization of the court's approach as legislative does not imply criticism; the court could quite properly conclude that only a legislative action, *i.e.*, one of purely prospective application, could solve the problem created by half a century of reliance on *Ashford* by title insurers and others. See note 50 *supra*. The defect in the court's legislative approach lies in its failure to offer a reasoned ground of decision.

dendi for them. This departure from normal judicial practice guarantees that the decision will fail in its presumed purpose of settling the law.

The Washington Supreme Court did not merely eliminate the doctrine of *Ashford v. Reese*; it failed to put anything in its place. That is to say, it did not formulate a rule for determining, in a given case and for a particular purpose, whether the interest of a party to a land-sale contract should be treated as realty or personalty. This means that courts and lawyers seeking to make such a determination must attempt to identify such a rule. Such an effort is hampered by the supreme court's failure even to hint at the factors which might properly be considered in attempting to formulate a working legal principle. This failure would not necessarily present an insurmountable obstacle to the quest for a rule of law. If the court had merely overruled *Ashford* and declared the vendee's interest to be realty for purposes of the judgment lien statutes, even without offering a ratio decidendi, the search for a guiding legal principle would have ended with the doctrine of equitable conversion, the principal extant doctrine consistent with these rulings.

But, of course, the Washington court expressly rejected the doctrine of equitable conversion.<sup>54</sup> The question, then, is what effect this rejection will have on the search for a governing legal principle. And the answer, amazingly enough, seems to be that it will have no effect at all.

Although overruling *Ashford*, the court cited, with apparent approval, a host of decisions refusing to follow that case. These decisions remain the law of Washington, their validity implicitly enhanced by the *Cascade* opinion. The search for a guiding legal principle must begin with these cases, each of which determined, in a particular context and for a particular purpose, the real or personal character of the property interests of one or more of the parties to an executory contract for the sale of land.<sup>55</sup> In each case, the vendee's interest was held to be real estate or the vendor's personalty. From these cases, a governing legal principle must be deduced. And the only articulated principle consistent with all these cases is the doctrine of equitable conversion.<sup>56</sup> And the

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54. 88 Wash. 2d at 783-84, 567 P.2d at 634.

55. See notes 10-22 *supra*, and accompanying text.

56. These cases are not fully consistent with the principal variant of equitable conversion, see text accompanying note 41 *supra*, which recognizes that both vendor and vendee have real and personal interests in the property until the vendee has fully performed the contract. *In re Plasterer's Estate*, 49 Wash. 2d 339, 301 P.2d 539 (1956) and *In re Eiler-*



court, as noted, has given no hint as to the relevant considerations which might be employed in the formulation of an entirely new rule. Neither a trial court nor a lawyer could, therefore, confidently essay such a formulation.

It is thus inevitable that the bench and bar, faced with the necessity of determining, in any case not governed by clearly applicable precedent,<sup>57</sup> whether to treat a contract party's interest as real or personal property, will conclude that the determina-

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mann's Estate, 179 Wash. 15, 35 P.2d 763 (1934), both determined that, for taxation purposes, the vendor's interest is personalty. These cases also conflict with the New York rule, which refuses to apply equitable conversion for purposes of taxation. See note 44 *supra*, and accompanying text. The other variants of equitable conversion, discussed in the text accompanying notes 37 and 38 *supra*, are plainly inadequate to explain the Washington cases.

It is noteworthy that a 1972 decision of the Washington Court of Appeals expressly applied the doctrine of equitable conversion, stating that it was "in accord with the direction of the Washington case law since *Ashford v. Reese*." *Meltzer v. Wendell-West*, 7 Wash. App. 90, 95, 497 P.2d 1348, 1352 (1972).

Even more worthy of note, for its splendid irony, is that the ruling of *Cascade* that the vendee's interest is realty for purposes of the judgment lien statute is supported by a citation to two decisions which reach the same result upon a theory of equitable conversion. See note 52 *supra*, and accompanying text.

57. Fortunately, most of the cases requiring such a determination will be governed by the *Cascade* decision itself and the cases set out in notes 10-22 *supra*. But some will not. One of the questions no longer settled by existing law is that treated in *Ashford* itself: which party bears the burden of the destruction of the improvements on the property? Under the doctrine of equitable conversion, the loss falls on the purchaser, as holder of the equitable title. See *Brizler Corp. v. Weiner*, 39 Del. Ch. 578, 171 A.2d 65 (Sup. Ct. 1961). The placing of the loss on the vendee makes sense only if he has an insurable interest in the improvements, or is in possession and thus has the superior opportunity to prevent the destruction. Unthinking application of the doctrine of equitable conversion can thus reach a clearly unsound result. But a Washington trial judge, seeking fairly to allocate the loss caused by destruction of the improvements, can find no warrant in the case law for making his decision in light of any principle other than equitable conversion. If the question is the more complex one of whether to enforce a contract for the sale of land where a zoning change has rendered the land unusable for the buyer's purpose, a trial court might be persuaded to adopt the reasoning of the Supreme Court of Appeals of Virginia, which refused in such a case to apply the doctrine of equitable conversion on the ground that it would work a hardship on the buyer. *Clay v. Landreth*, 187 Va. 169, 45 S.E.2d 875 (1948). On the other hand, the trial court might feel constrained to apply the doctrine rigidly, on the ground that all existing precedent is consistent with the recognition and application of the doctrine. The court has, at all events, little or no guidance in identifying the policy considerations which should be weighed in reaching a sound result.

In many jurisdictions, a vendee who has made payments under a contract for land will, if the vendor defaults, have not only a right against the vendor for repayment, but also a lien against the land itself for the amounts paid. The accepted theory behind such a lien is that the payments create pro tanto an equitable interest in the vendee. 3 AMERICAN LAW OF PROPERTY § 11.78 (A. J. Casner ed. 1952). Washington recognized the vendee's lien in *Ihrke v. Continental Life Ins. Co.*, 91 Wash. 342, 157 P. 866 (1916). But although that case has often been cited for other portions of its holding, the vendee's lien has never been subsequently implemented. *Ashford* would apparently have ended the use of the accepted rationale. *Cascade* may have revived *Ihrke* and the vendee's lien.

tion must be governed by the doctrine of equitable conversion. The fact that the Washington Supreme Court has purported to repudiate the doctrine does not mean that the doctrine will not be applied; it means only that the doctrine will not be named. Judges and lawyers will scarcely fail to perceive that equitable conversion is in fact the law of Washington; the supreme court's purported rejection of the doctrine will serve only to inhibit judicial discourse, for no prudent court or counsel will dare publicly identify the principle by which cases must be decided.

### CONCLUSION

The Supreme Court of Washington correctly perceived the *Cascade* case as an opportunity to settle a troublesome question of long standing. It eagerly grasped this opportunity.<sup>58</sup> But the resultant decision merely perpetuated the unsettled state of the law. The opinion's deficiency lies in its failure to follow the necessary procedures for effective decision making. Its failure to give a reasoned basis for its declarations overruling the ancient and odious *Ashford* case and determining that the contract vendee's interest is real estate for a specified narrow purpose will have an effect precisely opposite that which the court intended. The court's failure to fill the legal vacuum created by the demise of *Ashford* ensures that this vacuum will be filled by the very doctrine of equitable conversion which the court emphatically and wisely rejected. The resultant de facto adoption and de jure rejection of the doctrine leaves the law in a state which can reasonably be characterized as peculiar.

And, of course, the court's work is not done. Absent unlikely legislative intervention,<sup>59</sup> the court will be obliged eventually to attempt to resolve the uncertainties needlessly created by its most recent bout with the decrepit but surprisingly agile doctrine of equitable conversion.

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58. See note 27 *supra*, and accompanying text.

59. In response to *Ashford*, the Washington House of Representatives passed a bill designed to limit the effect of that case by placing the risk of loss on a vendee in possession. The Senate's response was to pass a bill expressly recognizing an equitable interest in the vendee. Though both bills passed overwhelmingly, neither house of the legislature would accept the approach taken by the other. Neither bill was enacted, and no further effort to alter the result in *Ashford* was made during that legislative session. See Schweppe, *supra* note 6, at 1 & n.4. There is no reason to expect an effective legislative response to the *Cascade* decision.