LEGISLATIVE CHANGES IN THE LAW OF EQUITABLE CONVERSION BY CONTRACT: I

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THE rights, powers, duties and liabilities arising out of a contract for the sale of land as between the parties, and as between each party and third persons in relation to the land, are frequently regarded as derivable from the theory of an equitable conversion, in consequence of which the purchaser is regarded in equity as owner of the land and debtor for the purchase money and the vendor as a secured creditor having a legal position not unlike that of a mortgagee.¹ This doctrine of equitable conversion is applicable only when there is a specifically enforceable contract between the parties,² and the changes in the rights, duties, powers and liabilities of the parties which result from the making of the contract are consequences of the equitable right to specific performance.³ As between the parties to the contract, the doctrine is invoked in allocating the benefits and burdens incident to property in the land; as between the parties and third persons, it is invoked to determine the devolution upon death of the rights and liabilities of each party with respect to the land, and to ascertain the powers of creditors of each party to reach the land in payment of their claims. Whether the

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1. See Lord Eldon's remarks in *Seton v. Slade*, 7 Ves. 265, 274 (Ch. 1802), and Sugden's discussion in ST. LEONARDS, *HANDY BOOK ON PROPERTY LAW* (8th ed. 1869) 5-6. See also the remarks of Jessel, M. R., in *Lysaght v. Edwards*, 2 Ch. D. 499, 507 (1876).

2. See p. 563, *infra*.

3. See the remarks of Lord Parker of Waddington in *Howard v. Miller*, [1915] A. C. 318, 326. A few decisions have sought to deduce the right to specific performance of a land contract from the theory of equitable conversion. See, e.g., *Haughwout and Pomeroy v. Murphy*, 22 N. J. Eq. 531, 547 (1871); *Public Service Corp. of N. J. v. Hackensack Meadows Co.*, 72 N. J. Eq. 285, 287, 64 Atl. 976, 977 (1906). Historically, the theory of equitable conversion probably developed rather more by analogy to the law of trusts than on the basis of the doctrine of specific performance. See Bordwell, *Equity and the Law of Property* (1934) 20 IOWA L. REV. 1, 28-29.

doctrine is an unnecessary fiction, as has been ably urged,⁴ or whether it does in fact express an underlying principle in the decisions, it at least furnishes a convenient label to attach to cases of several related groups which, taken together, occupy an important corner in the law of real property.

This particular corner of the law was for a long period unusually free from legislative interference. The applicable principles were developed in a single court—the English Court of Chancery—beginning early in the seventeenth century and reaching logical symmetry some two hundred years later in the decisions of Lord Eldon⁵ and in the writings of Sugden.⁶ Later developments were regarded as being logical deductions from established doctrines. To be sure, there have been divergences of view on some matters, but these have been due, for the most part, to differences in what has been deemed sound deductive reasoning from accepted premises rather than to any questioning of those premises or conscious reliance upon considerations of mundane convenience or practical justice. This corner of property law thus has, like that which includes the classic learning as to contingent remainders and as to the application of the Rule against Perpetuities, an almost mathematical atmosphere. Langdell's elaboration of the doctrine of equitable conversion,⁷ which is the classic American exposition from a theoretical standpoint, is as much a legal geometry as is Fearne's famous *Essay*.⁸ But even in this heaven of juristic conceptions,⁹ the a-logical influence of the legislator has been making itself felt in recent years; and it is no longer possible to solve all problems involving equitable conversion by deductive reasoning from the principles laid down by the English chancellors and systematized by Sugden and Langdell.

An examination of the more important legislative changes, actual and proposed, in the law of equitable conversion by contract¹⁰ would, accord-

4. See Stone, *Equitable Conversion by Contract* (1913) 13 COL. L. REV. 369. See also Pound, *Progress of the Law—Equity* (1920) 33 HARV. L. REV. 813, 832: “. . . conversion is a name given to results reached on other grounds, not a fact from which we may reason for all purposes and with respect to the rights of all parties. . . .”

5. E.g., *Paine v. Meller*, 6 Ves. 349 (Ch. 1801); *Seton v. Slade*, 7 Ves. 265 (Ch. 1802); *Broome v. Monck*, 10 Ves. 597 (Ch. 1805).

6. SUGDEN [Lord St. Leonards], *VENDORS AND PURCHASERS* (14th ed. 1862) 175 et seq. The first edition of this work appeared in 1805.

7. LANGDELL, *A BRIEF SURVEY OF EQUITY JURISDICTION* (2d ed. 1908) 260 et seq. A considerable part of Langdell's discussion is concerned with equitable conversion by will. Cf. note 10, *infra*.

8. FEARNE, *AN ESSAY ON THE LEARNING OF CONTINGENT REMAINDERS AND EXECUTORY DEVICES* (1st ed. 1772). The last edition by Fearne himself is the fifth (1794).

9. Cf. VON JHERING, *SCHERZ UND ERNST IN DER JURISPRUDENZ* (1884) 245 et seq.

10. The law as to equitable conversion by will, although it developed along with the law of equitable conversion by contract and had some influence upon the development of

ingly, appear to be in order, both for the purpose of ascertaining the exact extent to which the field of that doctrine has been invaded by statutes and for the purpose of appraising the significance of that invasion.

I

DEVOLUTION UPON DEATH OF VENDOR OR PURCHASER

The doctrine of equitable conversion by contract had its origin in cases involving the devolution of rights and liabilities under land contracts upon the death of one of the parties. Suppose that the vendor who has contracted to sell Blackacre dies intestate before completion. Legal title descends to the heir,¹¹ but is the heir entitled to enforce the contract and receive the purchase money, or is the vendor's administrator entitled to the purchase money as personal estate and the heir liable to be deprived of legal title to the profit of the next-of-kin? Or suppose that the purchaser dies: His estate is liable for the unpaid purchase price, but who is to pay it, as between heir and administrator, and who is to get the land? The answer of classical equity to these questions was a clear-cut and logical one. The vendor from the time of the contract had a claim for money secured by a vendor's lien¹² on the land. On his death, his administrator succeeded to the money claim; and, in equity, the security followed the debt¹³ and could be realized upon by the executor although legal title had passed to the heir, a donee.¹⁴ The purchaser, on the other hand, from the time of the contract was regarded in equity as owner of the land and as debtor for the purchase money. On his death, his heir took this "land" by descent and his administrator became liable to pay the purchase money out of the personal estate and thus exonerate the land from the vendor's lien thereon.¹⁵ Thus, in the case of the ven-

the latter, need not be considered in this connection. Equitable conversion by will is wholly a part of the law of wills, descent and distribution; equitable conversion by contract has a wide importance in the law of vendor and purchaser. The former depends upon the intention of the testator; the latter does not depend upon intention, but rather upon rules of law as to consequences of the right to specific performance of a land contract. See Stone, *Equitable Conversion by Contract* (1913) 13 COL. L. REV. 369, 371. But cf. *Inghram v. Chandler*, 179 Iowa 304, 306, 161 N. W. 434, 435 (1917). The doctrines have scarcely more than a verbal unity.

11. 1 WILLIAMS, VENDOR AND PURCHASER (3d ed. 1922) 503 et seq.

12. This term is used, following 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1249, n. 1, to describe the security title of the vendor after the contract and before conveyance.

13. Cf. *Graham v. McCampbell*, 19 Tenn. 52 (1838); *Walker & Trenholm v. Kee*, 16 S. C. 76 (1881).

14. *Bubb's Case*, Freem. Ch. 38 (1678); *Moore v. Burrows*, 34 Barb. 173, 174 (N. Y. 1861); *Potter v. Ellice*, 48 N. Y. 321, 323 (1872); *Flomerfelt v. Siglin*, 155 Ala. 633, 640, 47 So. 106, 108 (1908).

15. *Milner v. Mills*, Mos. 123 (Ch. 1729); *Young v. Young*, 45 N. J. Eq. 27, 34, 16 Atl. 921, 925 (1889).

dor's death, legal title is taken from the heir to enable the administrator to recover the purchase price for the benefit of the next-of-kin; while, in the case of the purchaser's death, the heir receives the land *gratis* at the expense of the next-of-kin.

Under the common law canons of descent and rules as to distribution, the application of these principles operated to affect substantially the devolution of the rights and liabilities of intestate vendors and purchasers in most cases; but with the abolition of primogeniture and the enactment of modern statutes of descent and distribution,¹⁶ heirs and next-of-kin are commonly the same persons taking in the same shares,¹⁷ so that the application of the doctrine of equitable conversion frequently does not change devolution on intestacy. In this instance, legislation in no way directed at modification of the theory of conversion has had a large effect on the application of the theory and has rendered it of little practical importance in a substantial class of cases. But these statutes have had no such effect on testate devolution. Subject to some qualifications based on the actual or inferred intention of the testator, the same principles as to conversion are applicable between devisee and executor as between heir and administrator. On the purchaser's side, the devisee of land contracted to be purchased prior to the making of the purchaser's will gets the land, whether the devise is general¹⁸ or specific;¹⁹ and, under statutes which follow the Wills Act²⁰ with regard to devises of after-acquired real estate, the same result is reached in the case of land contracted to be purchased subsequent to the execution of the will.²¹ In this latter situation, the theory of equitable conversion is applied to the

16. E.g., N. Y. DECEDENT ESTATE LAW, § 83, as amended by Laws 1929, c. 229, § 6. The ADMINISTRATION OF ESTATES ACT, 15 GEO. V, c. 23, § 1 (1925), following 60 & 61 VICT., c. 65, § 1 (1897) goes further, providing that real estate shall devolve on the executor or administrator in like manner as chattels real.

17. This is not always the case even under the modern statutes which have adopted the general principle that real estate and personal property shall descend or be distributed to the same persons upon intestacy. See e.g., WIS. STAT. (1933) § 318.01 (exception where the deceased leaves a widow and lawful issue).

18. *Daire v. Beversham*, Nels. 76, 77 (Ch. 1661); *Greenhill v. Greenhill*, 2 Vern. 679 (Ch. 1711); *Potter v. Potter*, 1 Ves. 438 (Ch. 1750); *Dodge v. Gallatin*, 130 N. Y. 117, 124, 29 N. E. 107, 108 (1891); *Bailey v. Hoppin*, 12 R. I. 560, 569 (1880).

19. *Buck v. Buck*, 11 Paige 170 (N. Y. 1884); *Raymond v. Butts*, 84 Ohio St. 51, 95 N. E. 387 (1911), 84 Ohio St. 491, 95 N. E. 1154 (1911); *Ball v. Milliken*, 31 R. I. 36, 76 Atl. 789 (1910).

20. 7 WILL. IV and 1 VICT. c. 26 (1837). Under this Act and similar American statutes, a general or residuary devise will pass after-acquired real estate if the testator so intends. See 1 JARMAN, WILLS (7th ed. 1930) 380 et seq.; 1 PAGE, WILLS (2d ed. 1926) § 207, nn. 11, 13.

21. The rule as to general or residuary devises was otherwise prior to the Wills Act. *Langford v. Pitt*, 2 P. Wms. 630 (Ch. 1731). But cf. *Lessee of Smith v. Jones*, 4 Ohio 115 (1829).

new situation resulting from the statutory change. On the vendor's side, the executor is entitled to enforce the contract for the benefit of the personal estate, and a devisee who takes legal title²² under a will executed by the vendor prior to making the contract of sale holds this title in equity simply as security for payment of the purchase money to the executor.²³ The making of a contract to sell land previously devised is thus held to have the same effect in equity as the conveyance of such land would have at law.²⁴ Where, however, the devise is subsequent to the contract and is specific, it has been regarded by some courts as being in effect a bequest of the purchase money due on the contract.²⁵ This result is reached as a matter of construction without impugning the principle of equitable conversion.²⁶

Before passing to a consideration of the legislative changes, other than those indirect ones already mentioned, in the law of equitable conversion as applied in cases of devolution upon death, it is desirable to consider certain further features of the law in the absence of statute. In the first place, it is to be noted that the application of the conversion theory assumes a specifically enforceable contract. If neither vendor nor purchaser is entitled to specific performance, as, for example, where neither party has signed a memorandum in writing sufficient to satisfy the Statute of Frauds, the devolution of rights and duties upon the death of either party is the same as if no contract had ever been made.²⁷ If one party is not entitled to specific performance but the other party is, as, for example, in a case where partial performance with compensation could be obtained by the purchaser only, devolution on the side of the party who cannot enforce the contract is not affected,²⁸ nor, according to the authorities, is devolution on the side of the party who can compel specific

22. See *Cotter v. Laver*, 2 P. Wms. 623, 624 (Ch. 1731); *Hall v. Bray*, 1 N. J. L. 212 (1794).

23. *Farrar v. Earl of Winterton*, 5 Beav. 1 (Rolls Ct. 1842); *Coles v. Feaney*, 52 N. J. Eq. 493 (1894); *Donohoo v. Lea*, 1 Swan 119 (Tenn. 1851); *Church v. Hill*, [1923] Can. Sup. Ct. 642. *Contra*: *Estate of Lefebvre*, 100 Wis. 192, 75 N. W. 971 (1893).

24. See *Kent, C.*, in *Walton v. Walton*, 7 Johns. Ch. 258, 268 (N. Y. 1823): "... a valid contract, for the sale of lands devised, is as much a revocation of the will in equity, as a legal conveyance of them would be at law." See also pp. 568-569, *infra*.

25. *Heirs of Wright v. Minshall*, 72 Ill. 584 (1874); *Covey v. Dinsmoor*, 226 Ill. 438, 80 N. E. 998 (1907); *Rue v. Connell*, 148 N. C. 302, 62 S. E. 306 (1908). See also *Frick v. Frick*, 82 Md. 218, 33 Atl. 462 (1895) (residuary devise), noted in (1896) 9 HARV. L. REV. 489. *Contra*: *Knollys v. Shepherd* (H. L. 1824), reported in SUGDEN, LAW OF PROPERTY (1849) 223; *Guiry v. Condon*, [1918] 1 Ir. R. 23. The decision in *Knollys v. Shepherd* is severely criticized by Sugden. *Loc. cit. supra*. See also 2 JARMAN, WILLS (7th ed. 1930) 713 et seq. And see *In re Calow*, [1928] 1 Ch. 710, discussed in Note (1928) 6 CARR. B. REV. 792.

26. Cf. *Frick v. Frick*, 82 Md. 218, 227, 33 Atl. 462, 465 (1895).

27. *Buckmaster v. Harrop*, 7 Ves. 341 (Ch. 1802); *Rose v. Cunynghame*, 11 Ves. 550 (Ch. 1805); *Mills v. Harris*, 104 N. C. 626, 10 S. E. 704 (1889).

28. *In re Thomas*, 34 Ch. D. 166 (1886).

performance.²⁹ It is immaterial that the party who can enforce the contract in fact elects, after the death of the other, to do so. On the other hand, if there is a mutually specifically enforceable contract at the time when a party dies, his rights and duties devolve in accordance with the principles of equitable conversion even though the contract is not in fact specifically enforced. Thus, where the vendor dies while the contract is subsisting and specifically enforceable by and against him, his executor or administrator becomes entitled to the unpaid purchase money for the benefit of the legatees or next-of-kin; and if the purchaser fails to complete and the contract is not specifically enforced against him, the vendor's executor or administrator can enforce payment of this money out of the land in the hands of the vendor's devisee or heir.³⁰ On the same principle, an option which is exercised and so becomes a binding contract before either party dies effects a conversion³¹ although the contract is never in fact specifically enforced; but if the option is not exercised until after the death of the optionor, there is in the United States, no conversion³² (although the English decisions regarding this point are, erroneously, to the contrary);³³ and if the option is not exercised until

29. *Green v. Smith*, 1 Atk. 572 (Ch. 1738); *Broome v. Monck*, 10 Ves. 597 (Ch. 1805); *Newton v. Newton*, 11 R. I. 390, 394 (1876). See *Garnett v. Acton*, 28 Beav. 333, 337 (Ch. 1860); "[In order that there may be conversion on the purchaser's side] two things must exist at the death of the testator; first, a valid contract; and secondly, one which could be enforced against an unwilling purchaser."

30. *Curre v. Bowyer*, 5 Beav. 6, n. (b) (Ch. 1819); *Keep v. Miller*, 42 N. J. Eq. 100, 6 Atl. 495 (1886); *Rose v. Jessup*, 19 Pa. 280 (1852); *Leiper's Appeal*, 35 Pa. 420 (1860); *Robinson v. Pierce*, 278 Pa. 372, 123 Atl. 324 (1924). Conversely, where the purchaser dies under similar circumstances, his heir or devisee is entitled to the purchase money if the contract is not carried out. See *Whittaker v. Whittaker*, 4 Bro. C. C. 31 (Ch. 1792); *Hudson v. Cook*, 13 Eq. 417 (1872); *Mathews v. Gadd*, 5 So. Aust. L. R. 129 (1871). Cf. *LANGDELL*, op. cit. *supra* note 7, at 311 et seq.; *Stone*, *supra* note 10, at 382 et seq. In the case involving the heir or devisee and personal representative of the vendor, it is commonly said that the latter is entitled to the land. Cf. *Curre v. Bowyer*, 5 Beav. 6, n. (b) (Ch. 1819): "... the estate ... [belongs] to the next of kin, and not the heir at law." But the analysis in the text appears to be the accurate one. Thus, if the land had increased greatly in value, the heir or devisee should be entitled to the excess over and above the amount of the unpaid purchase money. There seem, however, to be no cases which are decisive on this matter.

31. *Helsel's Estate*, 255 Pa. 612, 100 Atl. 462 (1917).

32. *Inghram v. Chandler*, 179 Iowa 304, 161 N. W. 434 (1917); *Smith v. Loewenstein*, 50 Ohio St. 346, 34 N. E. 159 (1893); *Estate of Bisbee*, 177 Wis. 77, 187 N. W. 653 (1922). See also *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645 (1907); *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, 478, 97 N. E. 43, 45 (1911).

33. *Lawes v. Bennett*, 1 Cox Eq. Cas. 167 (Ch. 1785); *Townley v. Bedwell*, 14 Ves. 591 (Ch. 1808); *Collingwood v. Row*, 3 Jur. (N. S.) 785 (V. C. Kindersley 1857); *Weeding v. Weeding*, 1 J. & H. 424 (Ch. 1861); *In re Isaacs*, [1894] 3 Ch. 506. See also *In re Marlay*, [1915] 2 Ch. 264. But the heir or devisee of the optionor is entitled to the rents and profits until the option is exercised. See *Townley v. Bedwell*, 14 Ves. 591, 595 (Ch. 1808);

after the death of the optionee, there is no conversion on the optionee's side even on the English view.³⁴

One of the aspects of the law of equitable conversion as applied in devolution cases which early attracted legislative attention was the rule making it possible for an heir or devisee to demand that the purchase price of land contracted to be purchased by his executor or testator be paid out of the personal estate. Substantially the same situation presented itself in the case of mortgaged land where the mortgagor died without having paid off the mortgage. In each of these situations, while the equitable interest in the land (purchaser's "equitable title" or mortgagor's equity of redemption) passed to the heir or devisee, liability to exonerate the land from the encumbrance thereon (vendor's lien or mortgage) was held to fall upon the executor or administrator, who was required to apply so much of the intestate or residuary personal estate as might be necessary to that purpose.³⁵ In consequence, the heir or devisee was enriched and the residuary legatees or next-of-kin impoverished.

In re Marlay, [1915] 2 Ch. 264, 275, 279, 281. And where, after giving the option, the optionor specifically devises the optioned property, the devisee is entitled to the purchase price if the option is exercised. Drant v. Vause, 1 Y. & C. C. C. 580 (Ch. 1842); Emus v. Smith, 2 De G. & S. 722 (Ch. 1848); In re Pyle, [1895] 1 Ch. 724. In the recent case of In re Carrington, [1932] 1 Ch. 1, discussed in (1932) 48 L. Q. Rev. 458, (1933) 49 id. 173, (1931) 171 L. T. 538, (1932) 173 id. 396, (1932) 80 U. of Pa. L. Rev. 1025, the Court of Appeal held that the exercise, subsequent to the optionor's death, of an option on personal property specifically bequeathed, adeemed the bequest, and that the proceeds of the property went to the optionor's residuary legatees. This decision seems as indefensible on theory, even accepting the rule of *Lawes v. Bennett*, as it is unjust in practical effect.

The general rule of *Lawes v. Bennett* has been severely criticised by legal writers. See Hart, *The Inconsistencies of the Doctrine of Equitable Conversion* (1903) 24 L. Q. Rev. 403, 406 et seq.; LANGDELL, op. cit. *supra* note 7, at 269 et seq.; 2 JARMAN, WILLS (7th ed. 1930) 712. But cf. Stone, *supra* note 10, at 376 et seq. Indeed, a leading English authority has gone so far as to characterize *Lawes v. Bennett* as "a blot on the law relating to constructive conversion." Sweet, *Options of Purchase Contained in Leases* (1911) 55 Sol. J. 360, 361. There are dicta in accord with *Lawes v. Bennett* in a few American jurisdictions. See McKay v. Carrington, 1 McL. 50, 54 (C. C. D. Ohio 1829); Keep v. Miller, 42 N. J. Eq. 100, 107, 6 Atl. 495, 499 (1886); Chas. J. Smith Co. v. Anderson, 84 N. J. Eq. 681, 687, 95 Atl. 358, 361 (1915); Kerr v. Day, 14 Pa. St. 112, 115 (1850); Corson v. Mulvany, 49 Pa. St. 88, 100 (1865). But the only American decision to this effect has recently been explained and limited. See McGanna v. Hanan, 49 R. I. 349, 142 Atl. 659 (1928), explaining Newport Water Works v. Sisson, 18 R. I. 411, 28 Atl. 336 (1893).

34. In re Adams and The Kensington Vestry, 27 Ch. D. 394 (1884); Sutherland v. Parkins, 75 Ill. 338, 342 (1874); Gustin v. Union School-Dist., 94 Mich. 502, 54 N. W. 156 (1893); McCormick v. Stephany, 57 N. J. Eq. 257, 263, 41 Atl. 840, 842 (1893); Newton v. Newton, 11 R. I. 390, 393 (1876); CLARK, EQUITY (1919) § 111.

35. As to exoneration of mortgaged land, see 3 WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) § 494; Note (1927) 40 HARV. L. REV. 630. The decisions are collected in Notes (1920) 5 A. L. R. 488, (1922) 19 id. 1429, (1924) 29 id. 1246, (1931) 72 id. 709. As to exoneration of land contracted to be purchased by the decedent, see note 15, *supra*; Note (1929) 58 A. L. R. 436, 443 et seq.

From a strict logical standpoint, this result is reasonable enough. Once it is admitted that equitable interests in land devolve as land, it is clear that purchaser's interests and equities of redemption pass to the heir or devisee. But the duty to pay the debts of the decedent falls upon the executor or administrator to the extent of assets received. Hence he must pay the purchase money or mortgage debt out of the fund which he has to pay debts (*viz.*, the personal estate), and, since it was the decedent, not the land encumbered as security, that was primarily liable for debts, there is no reason in strict logic for allowing the personal representative recourse against the exonerated land, unless, in the case of death testate, an intention on the part of the testator to allow such recourse is expressed in or may be inferred from the will.³⁶ This rule, moreover, tended to protect the integrity of the landed property of decedents, and was entirely consistent with the general spirit of the old English land law, which "favours the heir."³⁷ But, however logical and however well suited to a society of landed gentry desirous of keeping their land holdings intact from generation to generation, the rule came to be looked at askance with the advent of a time when primogeniture was being abolished and land was coming to be regarded as being merely one species of property to be dealt with commercially and not as something almost sacrosanct.³⁸ It came to be believed, and with sound reason, that most testators, if their attention has been directed to the point, would have provided expressly that their purchasers' interests under land contracts and their equities of redemption should not be exonerated at the expense of their personal estate, and that most persons dying intestate would not have desired such exoneration. Moreover, the rule frequently operated in such a way as to cause great hardship and practical injustice.³⁹ Responsive to this belief, legislation providing that there should be no right of exoneration of mortgaged land upon intestacy, and none where the mortgagor died testate unless expressly provided for in his will, was enacted in England in 1854;⁴⁰ and in 1877 this rule was extended to the exoneration of land "from any other equitable charge, including any lien for unpaid purchase money."⁴¹ The effect of these statutes, commonly referred to as Locke King's Acts, is to leave the executor or administrator liable for the purchase money or mortgage debt due from the dece-

36. Intention to allow such recourse is inferred to prevent exoneration out of specific legacies and, in most jurisdictions, out of general legacies. But cf. *Brown v. Baron*, 162 Mass. 56, 37 N. E. 772 (1894).

37. *Shadwell v. C.*, in *Lumsden v. Fraser*, 12 Sim. 263 (Ch. 1841).

38. Cf. RADCLIFFE, *REAL PROPERTY LAW* (1933) 210.

39. See LOCKE KING, *INJUSTICE OF THE LAW OF SUCCESSION TO THE REAL PROPERTY OF INTESTATES* (1855) 134 et seq.

40. 17 & 18 VICT. c. 113 (1854), amended by 30 & 31 VICT. c. 69 (1867).

41. 40 & 41 VICT. c. 34 (1877).

dent, but to make that indebtedness ultimately payable out of the purchased or mortgaged land, if sufficient for the purpose, rather than out of the intestate or residuary personal estate. The heir or devisee thus takes subject to the vendor's lien or the mortgage, and the personal estate going to the next-of-kin or residuary legatees is unaffected unless the land is insufficient to pay the indebtedness due to the vendor or mortgagee, or unless, in the case of death testate, the testator expressly provides for exoneration.⁴²

There has been no legislation abrogating the right of exoneration in most of the United States, and, where such legislation exists, it is much less broad than in England. In New York, the right to exoneration of mortgaged property unless provided for in the mortgagor's will has been abrogated by an express statute,⁴³ but the courts have refused to extend the statute to cases where an heir or devisee seeks exoneration from a vendor's lien.⁴⁴ There is similar legislation in New Jersey,⁴⁵ and in Missouri the same result has been reached as to exoneration from subsequent mortgages under a statute⁴⁶ providing in terms that the mortgaging of property devised or bequeathed shall not revoke the devise or bequest, which shall "pass and take effect subject to such charge or incumbrance."⁴⁷ In Louisiana, where the matter has been worked out on a civil law basis, no right of exoneration from mortgages exists;⁴⁸ and in Massachusetts there is no such right in the case of land specifically devised unless provided for in the mortgagor's will.⁴⁹ And there is a

42. An intention to provide for exoneration is not to be inferred from "... a charge or direction for the payment of debts upon or out of residuary real and personal estate...." 40 & 41 VICT. c. 34, § 1.

43. N. Y. REAL PROPERTY LAW (1909) § 250.

44. *Lamport v. Beeman*, 34 Barb. 239 (N. Y. Sup. Ct. 1861); *Wright v. Holbrook*, 32 N. Y. 537, 590 (1865); *Bach v. Tuch*, 126 N. Y. 53, 59, 26 N. E. 1019, 1021 (1891).

45. 1 N. J. COMP. STAT. (Supp. 1924) 1971, § 134-46-a; *Swetland v. Swetland*, 100 N. J. Eq. 196, 206, 134 Atl. 822, 827 (1926); *In re Staiger*, 104 N. J. Eq. 149, 144 Atl. 619 (1929). An earlier statute providing that no personal action to recover a mortgage debt should be brought, except for the deficiency after foreclosure, had been held, after some vacillation, not to abrogate the right of exoneration. See 3 N. J. COMP. STAT. (1911) 3421, § 48; *Hill v. Hill*, 93 N. J. Eq. 567, 117 Atl. 256 (1922), *aff'd* 95 N. J. Eq. 233, 122 Atl. 818 (1923), overruling *Smith v. Wilson*, 79 N. J. Eq. 310, 81 Atl. 851 (1911), and *Atkinson v. Atkinson*, 84 N. J. Eq. 104, 92 Atl. 795 (1914).

46. 1 MO. STAT. ANN. (1932) 317, § 523.

47. *Hannibal Trust Co. v. Elzea*, 315 Mo. 485, 286 S. W. 371 (1926); *Gates v. Rice*, 320 Mo. 580, 8 S. W. (2d) 614 (1928); *Peck v. Fillingham*, 199 Mo. App. 277, 202 S. W. 465 (1918). The soundness of this interpretation of the statute has been doubted. See 3 WOERNER, *op. cit. supra* note 35, at 1733; Note (1927) 40 HARV. L. REV. 630, 634 (pointing out that the Missouri decisions abrogate the common law rule of exoneration "... only as to property mortgaged subsequent to the will, which seems curiously partial relief").

48. LA. REV. CIV. CODE (Merrick, 1925) Arts. 1440-1443; *Succession of Rabasse*, 47 La. Ann. 1126, 17 So. 597 (1895).

49. MASS. GEN. LAWS (1932) c. 191, § 23.

suggestion that the Oregon statute as to the redemption or sale of the mortgaged property of decedents⁵⁰ has abrogated the right of exoneration from mortgages in that state.⁵¹ No state, however, appears to have expressly provided by statute for the abrogation of the right of exoneration of land contracted to be purchased.

The contrast between the present English and American law as to exoneration is striking. In England, the legislature has effectively dealt with the entire problem and has brought about a situation where the law appears to be consistent with modern social and economic needs. In this country, most state legislatures have not dealt with the problem at all. Where the problem has been dealt with, it has been by means of piecemeal legislation resulting in only a partial solution. It would seem that the preparation by the National Conference of Commissioners on Uniform State Laws or other appropriate body⁵² of a model act patterned on the English legislation would serve a very useful purpose in making readily available a properly drafted form of statute and in stimulating the various state legislatures to activity in dealing with the exoneration problem.⁵³

Another aspect of the law of equitable conversion in devolution cases upon which legislative attention has been focused is the rule as to revocation of devises by subsequent land contracts. This rule is the equitable analogy to the rule at law as to revocation of devises by subsequent conveyances and is also closely related to doctrines as to ademption of specific legacies.^{53a} Where land devised or personal property bequeathed is transferred or destroyed by the testator and so does not form part of his estate at his death, the devise or bequest of such property is necessarily defeated.⁵⁴ There is some authority, moreover, that a conveyance of the devised land defeats a specific devise although the land is reacquired by the testator before his death,⁵⁵ and that an inopera-

50. ORE. CODE ANN. (1930) §§ 11-625, 11-626.

51. See *Howe v. Kern*, 63 Ore. 487, 496, 125 Pac. 834 (1912); 3 WOERNER, *op. cit. supra* note 35, at 1733, 1734.

52. Such as, e.g., the American Law Institute or the newly-formed Section on Real Property Law of the American Bar Association.

53. Cf. Fraser, *The Unfortunate Status of Certain Factors of Real Property Law and Suggested Remedies* (1934) 20 A. B. A. J. 684.

53^a. "Ademption", in the technical sense in which the word is used herein, means the revocation of testamentary gifts of personal property through the extinction of the subject-matter of the gifts or in some similar manner.—ED.

54. As to the revocation of devises by conveyance of the devised land, see 1 WOERNER, *op. cit. supra* note 35, at § 53. As to the ademption of legacies, see 3 *id.* §§ 446-450.

55. *Phillippe v. Clevenger*, 239 Ill. 117, 87 N. E. 858 (1909). *Contra*: *Estate of Hopper*, 66 Cal. 80, 4 Pac. 984 (1884); *Woolery v. Woolery*, 48 Ind. 523 (1874) (with dissent); *Morey v. Sohler*, 63 N. H. 507, 3 Atl. 636 (1885); *Gregg v. McMillan*, 54 S. C. 378, 32 S. E. 447 (1898). See 1 PAGE, WILLS (2d ed. 1926) § 467.

tive conveyance is similarly effective.⁵⁶ The reasoning of the decisions so holding is that the testator has shown an intention to revoke the devise. On the other hand, the present trend of authority is toward holding that an involuntary conversion of property will effect a revocation of a devise or the ademption of a bequest, although there is no basis for any argument that the testator so intended.⁵⁷ When, by an application of the principles involved in the doctrine of equitable conversion, a contract to sell devised land is given the effect in equity of a conveyance at law, similar problems arise, and, in general, similar results have been reached. Where there was at the time of the vendor's death a specifically enforceable contract to sell devised land, the application of the doctrine of conversion logically results in holding that the devise is revoked⁵⁸ unless it can be construed as a bequest of the purchase money,⁵⁹ even though the contract is rescinded or for some other reason is never in fact performed.⁶⁰ The decisions holding that the same result follows where the contract was rescinded or abandoned during the testator's lifetime⁶¹ are more doubtful, and can be supported only on the theory that the testator has manifested an intention to revoke the devise to which equity will give effect. And it seems difficult to sustain on any ground the suggestion that the making of an unenforceable contract to sell devised land revokes the devise.⁶²

The problem of ademption by equitable conversion of personal property has not often been raised;⁶³ a recent decision that such ademption is effected by the exercise, subsequent to the optionor's death, of an option to purchase personal property specifically bequeathed⁶⁴ seems open to grave criticism not only as misapplying the principle of conversion but also as extending it beyond its proper bounds.⁶⁵

56. Cf. 1 PAGE, WILLS (2d ed. 1926) § 458.

57. See Note (1932) 45 HARV. L. REV. 710; *Ametrano v. Downs*, 170 N. Y. 388, 392, 63 N. E. 340, 341 (1902). Cf. Smith, *Ademption by Extinction* (1931) 6 WIS. L. REV. 229; (1932) 17 IOWA L. REV. 552.

58. See cases cited in note 23, *supra*.

59. As where there is a specific devise subsequent to the contract to sell. See note 25, *supra*.

60. *Bennett v. Earl of Tankerville*, 19 Ves. 170 (Ch. 1811); *Tebbot v. Voules*, 6 Sim. 40 (Ch. 1833).

61. *Andrew v. Andrew*, 8 De G. M. & G. 336 (Ch. 1856); *Walton v. Walton*, 7 Johns. Ch. 258 (N. Y. 1823).

62. See *Gensimore's Estate*, 246 Pa. 216, 219, 92 Atl. 134, 135 (1914). *Contra*: *Re Fuller's Estate*, 71 Vt. 73, 42 Atl. 981 (1898); see *Crowe v. Menton*, L. R. 28 Ir. 519, 524 (1891); 2 JARMAN, WILLS (7th ed. 1930) 712.

63. Only a specifically enforceable contract will be treated in equity like a conveyance at law; contracts to sell personal property are not ordinarily specifically enforceable. Moreover, there is no substantial authority for applying the theory of equitable conversion to cases other than those involving land. But cf. *Virginia Shipbuilding Corp. v. United States*, 22 F. (2d) 38, 49 (C. C. A. 4th, 1927), cert. denied, 276 U. S. 625 (1928).

64. *In re Carrington*, [1932] 1 Ch. 1.

65. See notes 33 and 63, *supra*.

There can be little doubt that application of the rules as to revocation of devises by contracts to sell made by the testator which have been worked out in equity on analogy to the rules at law as to the effect of conveyances and attempted conveyances of devised land frequently brings about results quite different from those which the vendor-testator would have desired. This possibility has not, for the most part, been regarded as material by the courts which have invoked the doctrine of equitable conversion in such cases. They have proceeded rather on the basis of strict deductive logic than on the basis of practical convenience.

It is not at all surprising, therefore, that legislative intervention has been deemed necessary in a considerable number of jurisdictions. Thus, in New York, a contract to sell "any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies . . . , for a specific performance or otherwise, against the devisees or legatees, as might have been had against the heirs of the testator, or his next of kin, if the same had descended to them."⁶⁶ Similar legislation is in force in at least nine other states.⁶⁷ That such statutes are designed completely to do away with the doctrine that gifts by will are revoked or adeemed by contracts to sell the subject-matter of the gift seems tolerably plain; and yet there is authority to the effect that, where the contract of sale is enforced by the purchaser after the testator's death, the purchase money goes to the next-of-kin or residuary legatees and not to the devisee of the land contracted to be sold.⁶⁸ This view as to the effect of this legislation seems clearly erroneous. Not only does it prevent the statute from attaining its obvious purpose, but it makes the devolution of the vendor's property depend upon whether or not the contract of sale is in fact carried out after his death. There is surely no justification for introducing so fortuitous a factor in determining how property shall devolve. Although it is hardly to be supposed that this construction will be adopted in other states,⁶⁹ a wise draftsman of such legislation might well follow the example of the Alabama statute in providing expressly

66. N. Y. DECEDENT ESTATE LAW (1916) § 37.

67. See 1 WOERNER, *op. cit. supra* note 35, at 148. It is also provided by statute in these states and in New York that the mortgaging of land by a testator shall not revoke a devise thereof, but the land shall pass to the devisee subject to the mortgage. *Id.* at 148, n. 12. Cf. notes 46 and 47, *supra*. As to the effect of a mortgage on a devise in the absence of statute, see Note (1930) 65 A. L. R. 632.

68. *Ostrander v. Davis*, 191 Fed. 156 (C. C. A. 8th, 1911), construing what is now S. D. COMP. LAWS (1929) § 631.

69. See *Matter of Prentice*, 134 Misc. 343, 236 N. Y. Supp. 239 (Surr. Ct. 1929), in which the New York statute, which is substantially similar to the South Dakota statute involved in *Ostrander v. Davis*, *supra* note 68, was applied according to its terms.

that "the purchase money, when recovered by the executor of the testator, must be paid to the devisee."⁷⁰ If this is done, the possibility that the courts may emasculate the statute seems slight. The drafting of a model statute abolishing the rule of revocation of devises by contracts to sell might properly, it would seem, be taken up by the National Conference of Commissioners on Uniform State Laws or other appropriate body.⁷¹

II

RIGHTS OF SURVIVING SPOUSE OF VENDOR OR PURCHASER

Closely related to the problem of the devolution of the interests of the parties to a land contract as between heirs or devisees and next-of-kin or legatees is that of the rights of the surviving spouses of the parties.

At common law, the widow of a deceased vendor gets dower in the land contracted to be sold, and the surviving husband of a vendor is entitled to curtesy if issue has been born alive.⁷² In equity, however, the widow or surviving husband of a vendor who had contracted to sell land before marriage, like the surviving spouse of a trustee,⁷³ holds his or her legal estate in trust for the person equitably entitled to the land;⁷⁴ and it is immaterial that he or she had no notice of the contract at the time of his or her marriage with the vendor.⁷⁵ The rule is otherwise as to contracts made during coverture unless the surviving spouse (having capacity to do so) joins in the contract,⁷⁶ or unless the legislature has made it possible for one spouse to deprive the other of his or her interest

70. ALA. CODE ANN. (Michie, 1928) § 10588; see *Phillips v. Phillips*, 213 Ala. 27, 28, 104 So. 234, 236 (1925).

71. The same statute might well abrogate the rule as to revocation by mortgage also. Cf. note 67, *supra*. And it should give a quietus to any notion of the possibility of equitable redemption. Cf. notes 63 and 64, *supra*.

72. *Diamond's Admx. v. Billingslee*, 2 Har. & Gil. 264 (Md. 1828) (widow).

73. E.g., *Noel v. Jevon*, Freem. Ch. 43 (1678) (widow); *Bennet v. Davis*, 2 P. Wms. 316 (Rolls Ct. 1725) (surviving husband).

74. *Dooley v. Merrill*, 216 Mass. 500, 104 N. E. 345 (1913) (widow); *Brown v. Security Sav. & Trust Co.*, 140 Ore. 615, 618, 14 P. (2d) 1107, 1108 (1932) (same); 4 KENT, COMMENTARIES (12th ed. 1873) *50. The dower cases are collected in Note (1929) 63 A. L. R. 136. The vendor's widow was held not to be entitled to dower in the unpaid purchase money in *Detroit Trust Co. v. Baker*, 230 Mich. 551, 203 N. W. 154, 204 N. W. 773 (1925) (with dissent), overruling *In re Estate of Pulling*, 97 Mich. 375, 56 N. W. 765 (1893), and in *Brown v. Security Sav. & Trust Co.*, *supra*, at 620, 14 P. (2d) at 1103.

75. *J. J. Newberry Co. v. Shannon*, 268 Mass. 116, 167 N. E. 292 (1929). *Contra*: *Braxton v. Lee's Heirs*, 4 Hen. & Mun. 376 (Va. 1809).

76. See the discussion of the effect of the joinder of the wife of a vendor in an executory contract for the sale of land in *Brown v. Security Sav. & Trust Co.*, 140 Ore. 615, 618-19, 14 P. (2d) 1107, 1108 (1932).

in property acquired during coverture without the other's consent.⁷⁷ In some jurisdictions, the purely technical right of the surviving spouse to dower or curtesy at law in land contracted to be sold prior to coverture has been done away with by statute.⁷⁸ Moreover, there is an increasing tendency toward the abolition of dower and curtesy and the substitution therefor of some form of statutory heirship as between husband and wife.⁷⁹ Where such legislation has been enacted, the problem of the rights of the surviving spouse of the vendor becomes simply a question of the rights of a peculiar statutory heir.

The widow or surviving husband of a purchaser, cestui que trust, mortgagor, or other owner of an equitable interest in land of course does not get dower or curtesy at law. However, it was early held that the surviving husband of a cestui que trust⁸⁰ or mortgagor⁸¹ was entitled to curtesy in equity. Nevertheless, for obscure reasons,⁸² the widow of a cestui que trust⁸³ or mortgagor⁸⁴ was denied dower in equity; and the same rule has been applied to the widow of a purchaser under a land contract even though her husband was beneficially entitled to the land at the time of his death.⁸⁵ It has been held, on analogy to the dower cases, that the surviving husband of a purchaser is not entitled to curtesy in equity;⁸⁶ but this seems patently inconsistent with the established rule that the surviving husband of a cestui que trust or mortgagor is so entitled,⁸⁷ and the generalization may be ventured that, in the absence of statute, the widow of the owner of an equitable interest in land is not entitled to dower, while the surviving husband does get curtesy.

77. Statutes abolishing inchoate dower or curtesy [cf. notes 89, 98, 100, *infra*] should have this effect, since if the vendor can convey free of any claim of his or her spouse, he or she should be able to contract to do so.

78. E.g., KY. STAT. (Carroll, 1930) § 2135. 79. See note 99, *infra*.

80. Watts v. Ball, 1 P. Wms. 108 (Ch. 1708).

81. Casborne v. Inglis, 1 Atk. 603, sub nom. Casborne v. Inglis, 2 J. & W. 194 (Ch. 1738).

82. See Attorney General v. Scott, Cas. Talb. 138, 139 (Ch. 1735); D'Arcy v. Blake, 2 Sch. & Lef. 387 (Ir. Ch. 1805); 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 197; RADCLIFFE, REAL PROPERTY LAW (1933) 29. Holdsworth says, loc. cit. *supra*: "Probably the reasons which induced the chancellors to take this course were firstly, analogy to the rule applied to uses before the Statute of Uses, and secondly the fact that the wife's rights inconveniently restricted freedom of alienation." Perhaps the fact that curtesy might carry voting rights may have had something to do with the matter.

83. Bottomley v. Lord Fairfax, Prec. Ch. 336 (1712); Chaplin v. Chaplin, 3 P. Wms. 229 (Ch. 1733).

84. Dixon v. Saville, 1 Bro. C. C. 326 (Ch. 1783); Dawson v. Bank of Whitehaven, 6 Ch. D. 218 (1877).

85. Bowen v. Collins, 15 Ga. 100 (1854); Claiborne v. Henderson, 13 Va. 322 (1809); cf. Pritts v. Richey, 29 Pa. 71, 75 (1857).

86. Grandjean v. Beyl, 78 Neb. 349, 110 N. W. 1108 (1907).

87. Cf. Note (1909) 128 Am. St. Rep. 474, 483 et seq.

The denial of dower in equitable estates while curtesy therein was allowed became a subject of legislative consideration at an early date. Some jurisdictions, logically enough, enacted statutes providing for dower in equitable interests analogous in all respects to dower at law.⁸⁸ But there were obvious disadvantages involved in so doing. Dower at law, attaching as it does to any land of which the husband is seized at any time during coverture, interferes seriously with the marketability of titles; and many legislatures were unwilling to extend this clog on free alienability to equitable interests. The difficulty caused by curtesy was much less serious, partly because considerably less land was held and sold by married women than by married men and partly because, in many states, curtesy at law had been limited to property of which the wife was seized at her death and had not disposed of by her will.⁸⁹ Hence the more usual form of American statute, while providing for dower in equitable interests, limits the widow's rights to such as her husband owned at his death. An early North Carolina statute⁹⁰ may be taken as fairly typical: "... when a man shall die siezed of an equity of redemption or other equitable or trust estate in fee, his wife shall be entitled to Dower therein, subject to valid encumbrances thereon, in the same manner as she is now entitled to be endowed of a legal estate of inheritance." This statute has been held to give dower in equity to the widow of a purchaser under a land contract although the purchase price has not been paid.⁹¹ Such is the rule in a considerable number of states.⁹²

88. As in Iowa. IOWA CODE (1931) § 11990; *Hutchinson v. Olberding*, 136 Iowa 346, 348, 112 N. W. 647, 648 (1907). And in Virginia. VA. CODE ANN. (1930) § 5158; *James v. Upton*, 96 Va. 296, 31 S. E. 255 (1898). So also, now, in North Carolina. See note 90, *infra*. The Iowa statute gives statutory dower to the extent of a fee simple interest in one-third in value of the decedent's real estate to the surviving husband as well as to the widow.

89. This, for example, was the situation in New York prior to the recent extensive amendment of the Decedent Estate Law of that state by N. Y. Laws 1929, c. 229. Curtesy was expressly left untouched by DECEDENT ESTATE LAW § 80(4), and continued to exist; but DOMESTIC RELATIONS LAW § 50, providing that real property owned by a married woman should "continue to be her sole and separate property as if she were unmarried", taken in connection with DECEDENT ESTATE LAW § 10 and REAL PROPERTY LAW § 11, made it possible for a married woman to dispose of her land by conveyance inter vivos or by will free of any claim of her husband. The result was in effect to abolish curtesy initiate and to limit curtesy consummate to land not disposed of by the wife during her lifetime or by will. See *Hatfield v. Sneden*, 54 N. Y. 280, 287 (1873); *Albany County Sav. Bank v. McCarty*, 149 N. Y. 71, 85, 43 N. E. 427, 432 (1896); *Matter of Starbuck*, 137 App. Div. 866, 122 N. Y. Supp. 584 (1910), *aff'd* on opinion below, 201 N. Y. 531, 94 N. E. 1093 (1911). It is not wholly clear whether curtesy still exists in New York in this attenuated form. See N. Y. Laws 1929, c. 229, § 6.

90. N. C. Acts 1828-1831, c. 14. But North Carolina has since adopted the policy of giving dower in equitable estates of which the husband "was seized in fee at any time during the coverture". See N. C. CODE ANN. (Michie, 1931) § 4100.

91. *Thompson v. Thompson*, 46 N. C. 430 (1854).

92. See the cases collected in Note (1930) 66 A. L. R. 65, 70.

Moreover, it has been held that, under such circumstances, the widow is entitled to exoneration out of the equitable estate which has descended to her husband's heirs;⁹³ but the weight of authority is to the contrary.⁹⁴ In any event, the widow, like an heir or devisee, may claim exoneration out of her husband's personal estate.⁹⁵ Nowhere has this right been abrogated by legislation.⁹⁶ In a few states, however, the widow of the purchaser has dower only if the entire purchase price has been paid prior to her husband's death.⁹⁷

The legislation just discussed has been concerned with extending to equitable interests, at least to some degree, the dower rights of the widow which exist at law. Such legislation operates to make equitable conversion effective in favor of the purchaser's widow just as it is effective without statute in favor of the purchaser's surviving husband and against the vendor's surviving spouse. Other legislation which is important in determining the rights of the surviving spouse of the purchaser has an entirely different effect. In almost every jurisdiction, there has been extensive statutory modification of the common law rules as the property rights of the widow or surviving husband generally. Curtesy has been abolished or greatly limited in many states, and so has dower.⁹⁸ In a considerable number of jurisdictions, husband and wife are made statutory heirs of one another and take by descent rather than by marital right, although often the heirship is made immune from testamentary interference.⁹⁹ There has been a distinct tendency to provide for free alienability by each spouse of his or her property without regard for any

93. I.e., if the personal estate of the deceased purchaser is not sufficient to provide all the unpaid purchase money, the overplus will be raised, if possible, by selling the equitable interests of the heirs; and only thereafter will the equitable dower of the widow be proceeded against for any deficiency. *Caroon v. Cooper*, 63 N. C. 386 (1869); cf. *Bowen v. Lingle*, 119 Ind. 560, 563, 20 N. E. 534, 535 (1889).

94. *Greenbaum v. Austrian*, 70 Ill. 591, 594 (1873); *Harrison v. Griffith*, 67 Ky. 146, 148 (1868); *Church v. Church*, 3 Sandf. Ch. 434, 436 (N. Y. 1846); *Thompson v. Cochran*, 26 Tenn. 72 (1846).

95. *Williams v. Kinney*, 43 Hun 1, 8 (N. Y. Sup. Ct. 1887), aff'd without opinion, 118 N. Y. 679, 23 N. E. 1147 (1890); *Klutts v. Klutts*, 58 N. C. 80 (1859); *Love v. McClure*, 99 N. C. 290, 294, 6 S. E. 247, 249 (1888). But cf. *Poteet v. International Harvester Co.*, 153 Va. 304 (1929), 149 S. E. 512 (exoneration of dower from mortgage denied in accordance with what is stated to be the prevailing American rule); (1929) 16 VA. L. REV. 211.

96. It has been held that a statute abrogating the right of exoneration of mortgaged land theretofore existing in favor of heirs and devisees does not take away the widow's right of exoneration in respect of her dower. See *Gerhardt v. Sullivan*, 107 N. J. Eq. 374, 376, 152 Atl. 663, 664 (1930).

97. See the cases collected in Note (1930) 66 A. L. R. 65, 67.

98. See 1 WOERNER, op. cit. *supra* note 35, at § 106 (dower), § 121 (curtesy); Note (1925) 25 COL. L. REV. 938 (dower).

99. See Sayre, *Husband and Wife as Statutory Heirs* (1929) 42 HARV. L. REV. 330; 1 WOERNER, op. cit. *supra* note 35, at §§ 66-67.

claim of the other. In so far as such changes have been made in the interests of the spouses in each other's property at law, they are reflected in the rules applicable to equitable interests either by the express terms of the statutes involved or because rights in equitable interest are held to have incidents similar to corresponding rights in legal estates. The trend is thus toward the same rules at law and in equity as to the property rights of the spouses and toward a limitation of those rights in the interest of free alienability of land. An excellent illustration of this trend is to be found in the English legislation. The Dower Act, 1833,¹⁰⁰ gave dower in equitable as well as in legal estates, but limited it in both cases to land to which the husband was beneficially entitled at his death and had not disposed of by his will. The Administration of Estates Act, 1925,¹⁰¹ went still further. It abolished dower and curtesy in intestate realty,¹⁰² except in entailed interests,¹⁰³ and substituted therefor a system of non-forced statutory heirship as between husband and wife under which both are treated exactly alike.¹⁰⁴ In so far as such legislation is applicable, there are no longer special problems of the law of equitable conversion in the case of the surviving spouse of the purchaser, any more than there are in the case of the surviving spouse of the vendor.

III

RIGHTS OF CREDITORS OF VENDOR OR PURCHASER

The rights of creditors of the vendor or purchaser to reach the interest of their debtor in the land contracted to be sold or purchased depend in large part on the theory of equitable conversion. Since, on that theory, the purchaser is regarded as owner of the land and debtor for the purchase money and the vendor as holding legal title as security for payment by the purchaser, it logically follows that creditors of the purchaser should be able to reach the land subject to the vendor's lien thereon, while creditors of the vendor should be able to reach the land only to the extent of the vendor's security interest. This is the underlying conception on the basis of which the law in this field has developed; but that development has been shaped to a very considerable extent by

100. 3 & 4 WILL. IV, c. 195 (1833). See 3 HOLDSWORTH, *op. cit. supra* note 82, at 197.

101. 15 GEO. V, c. 23 (1925).

102. *Id.* at § 45. And it repealed the Dower Act, 1833. *Id.* 2d Sch., pt. II. Cf. *id.* § 51 (2). As to whether dower in devised realty still exists in England, see Farrer, *Dower and the New Legislation* (1930) 74 SOL. J. 50; the comments on this article by Eastwood, *id.* at 104, and Knox, *id.* at 186; Farrer, *Dower and the New Legislation—A Reply*, *id.* at 361; and the comment thereon, *id.* at 563. See also *id.* at 576.

103. Under the English property legislation of 1925, these are "equitable" interests. See RADCLIFFE, *REAL PROPERTY LAW* (1933) 220 et seq.; Schnebly, "Legal" and "Equitable" Interests in Land under the English Legislation of 1925 (1926) 40 HARV. L. REV. 243.

104. 15 GEO. V, c. 23, § 46(1)(i) (1925).

the existence of statutes as to executions and judgment liens, so that the practical applications of the underlying principle are intelligible only upon a somewhat detailed examination of this legislation.

If the creditors of the purchaser are to reach his interest under a land contract, not only must he be regarded in equity as having an interest in the land but there must be some procedure whereby such an interest may be reached and applied to the payment of the owner's debts. There is no difficulty, on the theory of equitable conversion, in regarding the purchaser as equitable owner of the land; but there are difficulties in reaching his interest. Under the early common law, lands were not subject to execution on private judgments.¹⁰⁵ The Statute of Westminster II,¹⁰⁶ however, partially subjected legal interests in real estate to a form of execution under the writ of *elegit*, and, as a result of legislation since that time, legal estates in land may be reached by judgment creditors, either by execution or by extent under an *elegit*.¹⁰⁷ But neither ordinary execution nor extent was applicable to equitable interests in land,¹⁰⁸ so that, in the absence of statutory aid, a creditor's only recourse in reaching such interests was and still is by bill in equity for equitable execution.¹⁰⁹ However, the speedier, cheaper and more effective remedy of execution has very generally been made available, at least to some extent, to the creditors of a purchaser under a land contract. The applicable statutes may be classified into three main groups: (1) What is still the most usual type of American statute¹¹⁰ is modelled on Section 10 of the English Statute of Frauds,¹¹¹ and operates, "after the analogy of the Statute of Uses, to vest the legal title in the purchaser under the execution whenever the execution debtor like a *cestui que use* . . . [has] the entire unencumbered beneficial interest."¹¹² Such statutes have usually been construed to allow the purchaser's interest under a land contract to be sold on execution if the entire purchase price has been paid but not otherwise.¹¹³ (2) In a few states, the interest of the purchaser under a land contract is subjected to sale on execution under specified conditions

105. See 2 FREEMAN, EXECUTIONS (3d ed. 1900) 881 et seq.

106. 13 EDW. I, St. 1, c. 18 (1285). See 3 HOLDSWORTH, op. cit. *supra* note 82, at 131.

107. See 2 FREEMAN, EXECUTIONS (3d ed. 1900) 882.

108. Nor could equitable interests in personal property be levied upon and sold under a *fieri facias*. See 1 FREEMAN, EXECUTIONS (3d ed. 1900) § 116.

109. As to equitable execution, see 4 POMEROY, op. cit. *supra* note 12, at § 1415, 5 *id.* § 2302.

110. See 2 FREEMAN, EXECUTIONS (3d ed. 1900) §§ 187-188; (1931) 15 MINN. L. REV. 841, 842.

111. 29 CAR. II c. 3, § 10 (1677).

112. 1 AMES, CASES IN EQUITY JURISDICTION (1904) 214, n. 2.

113. *Goodwin v. Anderson*, 13 Miss. 730, 743 (1846); *Ledbetter v. Anderson*, 62 N. C. 323 (1868).

by statutes dealing expressly with such interests.¹¹⁴ (3) An increasing number of states have statutes providing that execution may be levied on any interest in real estate, legal or equitable.¹¹⁵ These are construed as allowing execution upon the interest of a purchaser under a land contract regardless of whether or not the purchase price has been paid in whole or in part.¹¹⁶ The same construction has, moreover, been given to statutes much less specific in their terms, providing, for example, that all property, real and personal, of a judgment debtor may be sold on execution and that real estate shall include "lands, tenements and hereditaments and all rights thereto and interests therein,"¹¹⁷ or that lands and tenements, "including vested interests therein" may be sold on execution.¹¹⁸ Moreover, the states which allow executions upon equitable interests in land also hold, for the most part at least, that judgment liens attach to such interests.¹¹⁹ As a result of the growing tendency to enact legislation of this character, judgment creditors of purchasers under land contracts and of other equitable owners of real estate are coming to have the same remedies against their debtors as are available to judgment creditors of owners of legal interests in land or chattels.¹²⁰

When the judgment creditors of the vendor under a land contract seek to reach the land or the purchase money, the problems which arise must also be solved in their legislative setting. In every American jurisdiction, statutes make judgments liens upon legal estates in land (provided that statutory formalities as to docketing, recording, and so forth have been complied with)¹²¹ and provide that land may be sold upon execution.¹²² Where the land sought to be reached is subject to a con-

114. See 2 FREEMAN, EXECUTIONS (3d ed. 1900) 997 et seq.

115. E.g., ARK. DIG. STAT. (Kirby & Castle, 1916) § 3542; ILL. REV. STAT. (Smith-Hurd, 1933) c. 77, §§ 3, 10; MO. STAT. ANN. § 1172.

116. E.g., *Hardy v. Heard*, 15 Ark. 184 (1854).

117. *Reynolds v. Fleming*, 43 Minn. 513, 45 N. W. 1099 (1890), construing MINN. STAT. (Mason, 1927) §§ 9425, 10933-9. Cf. *State ex rel. Oatey Orchard Co. v. Superior Court*, 154 Wash. 10, 280 Pac. 350 (1929) (attachment of purchaser's interest); (1930) 5 WASH. L. REV. 79.

118. *First Nat. Bank v. Logue*, 89 Ohio St. 288, 106 N. E. 21 (1914), construing OHIO GEN. CODE ANN. (Page, 1912) § 11655. Subsequent to this decision, the legislature of Ohio amended the portion of § 11655 quoted in the text to read "including vested legal interests therein", 111 Ohio Laws 366 (1925); and in *Culp v. Jacobs*, 123 Ohio St. 109, 174 N. E. 242 (1930), it was held that, in consequence of this amendment, equitable interests in land were no longer subject to levy and sale upon execution.

119. See 2 FREEMAN, JUDGMENTS (5th ed. 1925) § 937. As to judgment liens on the interest of a purchaser under a land contract, see also *Rand & Co. v. Garner*, 75 Iowa 311, 39 N. W. 515 (1888); *Hook v. Northwest Thresher Co.*, 91 Minn. 482, 98 N. W. 463 (1904).

120. In New York, by the express terms of N. Y. CIV. PRACTICE ACT, § 513, the interest of the purchaser under a land contract is not subject to judgment liens and cannot be levied upon or sold on execution.

121. See 2 FREEMAN, JUDGMENTS (5th ed. 1925) §§ 916, 918, 936.

122. See note 107, *supra*.

tract of sale, however, these statutory rights of lien and of execution are affected in equity if the conversion theory be applied.

Statutes giving judgment liens on land commonly apply in terms as well where the judgment debtor has agreed to sell the land as where he holds it unencumbered. But in equity the creditor, since he has not given fresh value,¹²³ holds subject to the purchaser's equitable interest.¹²⁴ Where the entire purchase price has been paid, this means that the vendor's creditors get nothing in equity. Where the price or a part of it remains unpaid, many courts hold that a judgment creditor of the vendor who has complied with necessary statutory formalities gets a lien on the land to the extent of the unpaid purchase money.¹²⁵ This lien may be discharged by payment of the balance of the purchase money due although less than the amount of the judgment.¹²⁶ Moreover, if the purchaser pays the vendor in ignorance of the judgment, he is protected although the judgment is a lien of record.¹²⁷ But if the payment to the vendor is made with actual notice of the judgment, it has been said that the creditor's lien on the land is not affected.¹²⁸ This is consistent with the result reached by some of the decisions in the analogous case of payments made by a purchaser to his vendor with knowledge of a subsequent mortgage¹²⁹ or conveyance¹³⁰ by the latter. In these cases, however, it may be said that there is an implied assignment of the purchase money, which can hardly be claimed in the case of a judgment. Moreover,

123. Cf. 2 POMEROY, *op. cit. supra* note 12, at § 749.

124. *Lane v. Ludlow*, 6 Paige 316, n. (a) (C. C. S. D. N. Y. 1837); *Hampson v. Edelen*, 2 Har. & John. 64, 66 (Md. 1807); *Skinner & Sons' Co. v. Houghton*, 92 Md. 68, 86 (1900); *Filley and Hopkins v. Duncan*, 1 Neb. 134, 138 (1871).

125. E.g., *Simpson v. Niles*, 1 Ind. 196 (1848); *Courtney v. Parker*, 16 Neb. 311, 20 N. W. 120 (1884); *Coggshall v. Marine Bank Co.*, 63 Ohio St. 88, 57 N. E. 1086 (1900); *May v. Emerson*, 52 Ore. 262, 267, 96 Pac. 454, 456 (1908); *Reid v. Gorman*, 37 S. D. 314, 321, 158 N. W. 780, 783 (1916).

126. *Gaar v. Lockridge*, 9 Ind. 92 (1857).

127. *Burke v. Johnson*, 37 Kan. 337, 344, 15 Pac. 204, 208 (1887); *Filley and Hopkins v. Duncan*, 1 Neb. 134, 139 (1871) (good discussion). Cf. note 147, *infra*.

128. *May v. Emerson*, 52 Ore. 262, 267, 96 Pac. 454, 456 (1908); 2 FREEMAN, JUDGMENTS (5th ed. 1925) 2031. In *Lefferson v. Dallas*, 20 Ohio St. 68 (1870), a purchaser was held not protected as to payments made to his vendor pursuant to an oral contract with notice that the action which later resulted in a judgment against the vendor was pending. The court proceeded on the theory that the judgment lien was effective as of the first day of the term of court at which the judgment was rendered, which, as it happened, was an earlier date than that of the purchaser's payment. Even if the view be accepted that the purchaser is not protected in payments made after he knows of a judgment against his vendor, the theory of this decision seems difficult to justify.

129. E.g., *Young v. Guy*, 87 N. Y. 457, 462 (1882), *aff'g* 12 Hun 325, 328 (N. Y. Sup. Ct. 1877), 23 Hun 1, 7 (N. Y. Sup. Ct. 1880); *Jaeger v. Hardy*, 48 Ohio St. 335, 339, 27 N. E. 863, 864 (1891); *Franklin Finance Co. v. Bowden*, 36 Ohio App. 19, 22, 172 N. E. 698, 699 (1930), noted in (1931) 9 TEX. L. REV. 444.

130. E.g., *Ten Eick v. Simpson*, 1 Sandf. Ch. 244 (N. Y. 1844).

it is difficult to see why the purchaser's knowledge of a judgment against, or even of a mortgage or conveyance by, his vendor, should impose upon him the necessity of paying otherwise than in accordance with his contract.¹³¹ Some courts have held, and, it would seem, with sound reason, that the vendor's judgment creditors acquire no lien as against the purchaser even though the purchase price is unpaid and the purchaser knows of the judgment.¹³² This works no injustice upon the creditors, who may proceed by garnishment to reach the purchase money or by bill for equitable execution to reach both purchase money and vendor's lien.¹³³

Where land contracted to be sold is levied upon and sold on an execution against the vendor, the principle of purchase for value without notice may become operative. A third person who buys at an execution sale without notice, actual or constructive, of a prior contract for the sale of the land bought by him acquires that land free of the purchaser's interest.¹³⁴ Such is the result even though the execution buyer gets notice of the contract after the sale and payment of the price to the sheriff but before obtaining a sheriff's deed.¹³⁵ This exception to the usual rule that one must get in the legal title without notice in order to be protected as a bona fide purchaser¹³⁶ is justified on the ground that otherwise "few persons would accept the hazards of bidding at an execution sale."¹³⁷ Where the execution creditor himself buys at his own sale, the slight weight of authority holds that, since he has not given fresh value, he is not protected even though he has no notice of the prior contract.¹³⁸ The contrary view, which seems better calculated to promote the maxi-

131. Cf. *Doolittle v. Cook*, 75 Ill. 354, 358 (1874); *Frank v. Stratford-Hancock*, 13 Wyo. 37, 64, 77 Pac. 134, 141 (1904). But see *Stone, The Equitable Rights and Liabilities of Strangers to a Contract* (1919) 19 Col. L. Rev. 177, 180, where it is argued that a payment by the purchaser to the vendor with notice of a sale or mortgage of the land, "... although a discharge of the legal obligation, is such a participation by the vendee in the equitable wrong of the vendor as will make the vendee liable as upon a tort for interference with the equitable rights of the vendor's grantee". This argument necessarily proceeds on the theory that the grantee or mortgagee of the vendor will be treated as an assignee of the vendor's claim to the unpaid purchase money, and seems inapplicable to the judgment lien situation.

132. E.g., *State Bank of Decatur v. Sanders*, 114 Ark. 440, 170 S. W. 86 (1914); *Woodward v. Dean*, 46 Iowa 499 (1877).

133. See *Baldwin v. Thompson*, 15 Iowa 504, 508 (1864); *Taylor v. Lowenstein*, 50 Miss. 278, 282 (1874).

134. *Lessee of Paine v. Moreland*, 15 Ohio 435, 443 (1846).

135. *Duff v. Randall*, 116 Cal. 226, 231, 48 Pac. 66, 68 (1897); *Maroney v. Boyle*, 141 N. Y. 462, 470, 36 N. E. 511, 513 (1894); *Oviatt v. Brown*, 14 Ohio 285, 294 (1846).

136. See *HUSTON, ENFORCEMENT OF DECREES IN EQUITY* (1915) 122 et seq.

137. 3 *FREEMAN, EXECUTIONS* (3d ed. 1900) 1972.

138. See 3 *FREEMAN, EXECUTIONS* (3d ed. 1900) 1947.

mum realization on execution sales, has, however, considerable support in the decisions.¹³⁹

Where the buyer at the execution sale has notice of the contract (or, on the majority view, where he is the judgment creditor buying at his own sale), he takes subject to the purchaser's interest; hence, where the entire purchase price has been paid, he acquires nothing in equity,¹⁴⁰ and, according to a few courts, nothing at law.¹⁴¹ Moreover, where the purchaser has given notes for the price which have been negotiated by the vendor prior to the execution sale, a buyer at that sale acquires no right to the purchase money;¹⁴² and it would seem that the same result should follow where there has been an assignment by the vendor of the purchase money although not represented by notes.¹⁴³ Where, however, the purchase money or a part thereof is unpaid and the vendor has not assigned his rights, a buyer of the land at execution sale who has taken subject to the purchaser's interest is permitted by some courts to claim from the purchaser the amount due under the contract.¹⁴⁴ It is difficult to support these decisions except upon the dubious theory that the sale of the land is to be treated as a sale of the judgment creditor's lien on the land (provided he has such a lien¹⁴⁵); and the better rule would seem to be that the sale of land subject to a contract of sale on an execution against the vendor gives the buyer with notice no claim to the purchase money,¹⁴⁶ which must be reached by garnishment or by a bill for equitable execution to reach both purchase money and security. Even in jurisdic-

139. E.g., *Gower v. Doheney*, 33 Iowa 36 (1871); *Wood v. Chapin*, 13 N. Y. 509, 519, 525 (1856).

140. *Valentine v. Seiss*, 79 Md. 187, 28 Atl. 892 (1894).

141. *Fleming v. Wilson*, 92 Minn. 303, 100 N. W. 4 (1904). See also *Strauss v. White*, 66 Ark. 167, 51 S. W. 64 (1899) (notes given for purchase price).

142. *Leitch & Stubbs v. May*, 98 Ga. 714, 27 S. E. 151 (1896); *Jackson v. Snell*, 34 Ind. 241 (1870); *Blackmer v. Phillips*, 67 N. C. 340 (1872); *Catlin v. Bennatt*, 47 Tex. 165 (1877). The rule as to the effect of a conveyance by a vendor who has theretofore parted with purchase money notes is the same. *State Bldg. & Loan Assn. v. Faison*, 114 Ga. 655, 40 S. E. 760 (1901); Note (1925) 35 A. L. R. 28 (collecting cases). So also of a subsequent mortgage by the vendor. *Doolittle v. Cook*, 75 Ill. 354 (1874)¹. And a holder in due course of such notes has been held to prevail over a mortgagee of the grantee whose mortgage is prior to the transfer of the notes although subsequent to the contract of sale. *Gholston Bros. v. Northeastern Banking Co.*, 158 Ga. 291, 123 S. E. 111 (1924) (with dissent).

143. But cf. *Kinports v. Boynton*, 120 Pa. 306, 319, 14 Atl. 135, 137 (1888) (unrecorded assignment as collateral security).

144. *Hardee v. McMichael*, 68 Ga. 678, 680 (1882); *Fasholt v. Reed*, 16 S. & R. 266, 267 (Pa. 1827); *Patterson's Estate*, 25 Pa. 71 (1855). Cf. *Latin-American Bank v. Rogers*, 87 Fla. 147, 151, 99 So. 546, 547 (1924).

145. Cf. notes 125, 132, *supra*.

146. *Chisholm v. Andrews*, 57 Miss. 636 (1880); *Cooper v. Arnett*, 95 Ky. 603, 26 S. W. 811 (1894); *Jones v. Howard*, 142 Mo. 117, 125, 43 S. W. 635, 636 (1897). Cf. pp. 578-579, *supra*.

tions where the buyer at the execution sale can claim the purchase money, the purchaser is protected if he pays the vendor in ignorance of the sale.¹⁴⁷

In determining the rights of judgment creditors of the vendor under a land contract and of buyers of the land at sales on execution against him, recording acts may become important. For example, a statute may provide that recorded levies of execution on land shall create liens as "against all prior grantees and mortgagees of whose claims the party interested shall not have actual nor constructive notice."¹⁴⁸ Under such a statute, the question presents itself whether a purchaser under a prior unrecorded contract who pays his vendor without actual notice of the recorded levy is protected.¹⁴⁹ Many other problems of this general character arise under various types of recording legislation. Some of them have recently been ably discussed elsewhere.¹⁵⁰ Enough has been said here to indicate the essential importance of this and other legislation in determining the rights and remedies of the creditors of vendors and purchasers under land contracts, and to demonstrate the extent to which statutes have woven themselves into the very fabric of the law of equitable conversion as applied in such cases.

[To be concluded]

147. *Moyer v. Hinman*, 13 N. Y. 180 (1855). Cf. note 127, *supra*; *Young v. Guy*, 87 N. Y. 457, 461 (1882).

148. MICH. COMP. LAWS (1929) § 14618.

149. *Corey v. Smalley*, 106 Mich. 257, 64 N. W. 13 (1895) (holding the purchaser protected under these circumstances).

150. *Durfee and Fleming, Res Judicata and Recording Acts: Does a Judgment Conclude Non-Parties of Whose Interests the Plaintiff has No Notice?* (1930) 28 MICH. L. REV. 311 (also discussing the similar problems which arise in connection with unrecorded deeds and mortgages).