

9-1-1977

# The Installment Land Contract-A National Viewpoint

Grant S. Nelson

Dale A. Whitnman

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Contracts Commons](#), and the [Property Law and Real Estate Commons](#)

---

## Recommended Citation

Grant S. Nelson and Dale A. Whitnman, *The Installment Land Contract-A National Viewpoint*, 1977 BYU L. Rev. 541 (1977).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1977/iss3/2>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# The Installment Land Contract—A National Viewpoint†

*Grant S. Nelson\* and Dale A. Whitman\*\**

## I. INTRODUCTION

The installment land contract is rarely used in some states, but in many it is the predominant means of vendor financing of land sales. Much has been written about it, but nearly all of the literature focuses on the law of one particular state or another. Our purpose here is to provide a nationwide perspective, with particular attention to the states in which the contract has been widely used and extensively litigated. We propose to examine the reasons for the installment contract's popularity, its advantages and disadvantages, and the risks it presents to both vendor and purchaser.

The installment land contract is the most commonly used substitute for the mortgage or deed of trust. This device is also sometimes referred to as a "contract for deed" or a "long-term land contract." The installment land contract and the purchase money mortgage fulfill an identical economic function—the financing by the seller of the unpaid portion of the real estate purchase price. Under an installment land contract, the vendee normally takes possession and makes monthly installment payments of principal and interest until the principal balance is paid off. The vendor retains legal title until the final payment is made, at which time full title is conveyed to the vendee. Such contracts may be amortized over time periods as short as a year or two or as long as twenty years or more. During the contract period, the vendee normally will be required to pay the taxes, maintain casualty insurance, and keep the premises in good repair.

It is important to distinguish the installment land contract from the ordinary executory contract for the sale of land, variously known a "binder," a "marketing contract," or an "earnest money" contract. This latter type of contract is used primarily to establish the parties' rights and liabilities during the period between the date of the bargain and the date of closing, usually only

---

† Copyright © 1977 by Grant S. Nelson and Dale A. Whitman.

\* Professor of Law, University of Missouri—Columbia.

\*\* Professor of Law, J. Reuben Clark Law School, Brigham Young University.

a month or two later, on which title passes to the purchaser and security agreements, if any, are consummated. In contrast, the installment land contract governs the parties throughout the life of the debt, while the earnest money contract is completed at closing when the purchaser either tenders the full purchase price of the land or enters into a separate security agreement. Indeed, it is not uncommon for parties to agree to enter into an installment land contract at the closing date of the earnest money contract.

When a vendee defaults under an installment land contract the vendor has several traditional remedies. He may sue "(1) for the installments which are due with interest thereon; (2) for specific performance of the contract; (3) for damages for the breach; (4) to foreclose his vendee's rights; (5) to quiet title; or if he should desire, he may merely rescind the contract."<sup>1</sup> These remedies, however, often involve litigation that may be too slow or expensive to be practical, and some of them depend on the vendee's capacity to satisfy a money judgment. Consequently, only the quiet title action is used with any great frequency. Its assertion is usually an outgrowth of the vendor's claim to his purported rights under a forfeiture clause. This clause, found in virtually every installment contract, typically provides that "time is of the essence" and that when a vendee fails to comply with the contract, including the obligation to pay promptly, the vendor has the option to declare the contract terminated, to re-take possession of the premises without legal process, and to retain all prior payments as liquidated damages. Generally, the clause also relieves the vendor from all further obligation under the contract.

As one commentator has aptly pointed out, "[i]f the contract is enforceable as written and if title will not be clouded . . . [the installment land] contract gives the vendor a very favorable remedy, much more advantageous than would be available under a purchase money mortgage or deed of trust."<sup>2</sup> Indeed, under a mortgage or deed of trust, the defaulting mortgagor has a right to redeem (the equity of redemption) which the mortgagee can eliminate only by a foreclosure proceeding should the mortgagor prove to be uncooperative. The forfeiture clause in an installment

---

1. Comment, *Installment Contracts for the Sale of Land in Missouri*, 24 MO. L. REV. 240, 243 (1959).

2. *Id.* at 244. See also Comment, *Forfeiture: The Anomaly of the Land Sale Contract*, 41 ALBANY L. REV. 71, 73-74 (1977).

contract appears to give the vendor a remedy similar to foreclosure without any need for judicial action. For our purposes, however, it is important to emphasize that if the vendee resists forfeiture the installment land contract is advantageous only if it "*is enforceable as written and if title will not be clouded.*"

Installment land contracts have traditionally been used as mortgage substitutes in those states where the substantive law of mortgages and the foreclosure remedies are considered to be heavily pro-mortgagor. For example, in a substantial number of states, judicial foreclosure is the only method of foreclosing a mortgage. This procedure requires a full court proceeding in which all interested persons must be made parties, and is often time-consuming and costly. Against a mortgagor who contests the mortgagee's claims, it may take several years to conclude such an action. Thus, utilization of the installment land contract in such states, whatever its risks, is perhaps understandable. But the risks are high, as will be seen below.

## II. THE FORFEITURE REMEDY

### A. *Some General Considerations*

Traditionally, installment land contract forfeiture provisions were routinely enforced in favor of the vendor.<sup>3</sup> Enforcement of such provisions presumably was based on a desire to carry out the intent of the parties, even though forfeiture often resulted in a substantial loss to the vendee and in a windfall gain to the vendor.<sup>4</sup> Enforcement became especially burdensome on the vendee as the contract neared completion and the vendee's cash investment became increasingly substantial. Courts tended to ignore the mortgage substitute aspect of the installment land contract and to treat it instead as an executory contract for the sale of land.

Today, however, the foregoing description of forfeiture clause enforcement at best serves as a point of departure. As has been observed, the law in this area is not susceptible to orderly analysis: "Not only does the law vary from jurisdiction to jurisdiction, but within any one state results may vary depending upon the type of action brought, the exact terms of the land contract, and

---

3. See Note, *Forfeiture and the Iowa Installment Land Contract*, 46 IOWA L. REV. 786, 788 (1961); Note, *Florida Installment Land Contracts: A Time for Reform*, 28 U. FLA. L. REV. 156, 159 (1975).

4. Note, *Forfeiture and the Iowa Installment Land Contract*, 46 IOWA L. REV. 786, 788 (1961).

the facts of the particular case."<sup>5</sup> The interplay of these various factors makes it extremely difficult to predict whether the buyer's interest will be forfeited. While forfeitures are still occasionally judicially enforced,<sup>6</sup> it nevertheless can be safely stated that in no jurisdiction today will a vendor be able to assume that forfeiture provisions will be *automatically* enforced as written. This change is the result of both legislative and judicial intervention to ameliorate the harsh impact of automatic forfeiture.

### B. Statutory Limitations

Several states have attempted to alleviate some of the harshness in forfeiture clauses by enacting legislation regulating the circumstances under which forfeiture is permitted. These statutes often incorporate a "grace period" within which late payments must be accepted. Perhaps the best example of this type of legislation is the Iowa statute.<sup>7</sup> It provides that installment land contracts may be cancelled only by following a specified procedure. The vendor must provide written notification to the defaulting vendee and to the person in possession of the real estate; the notice must identify the real estate, specify the terms of the contract that have not been complied with, and inform the vendee that he has thirty days in which to correct his default. If the vendee performs within this time period, the forfeiture is avoided. If he does not, the notice of forfeiture, together with proof of service, may be recorded to constitute constructive notice of the completed forfeiture. Several other states have statutes similar to that of Iowa;<sup>8</sup> the grace period varies from thirty days in Iowa to as long as one year in North Dakota. In Minnesota, the grace period extends up to sixty days depending on the percentage of the contract price the vendee has already paid.<sup>9</sup> Some of these statutes permit nonjudicial forfeiture, while others allow it only by judicial action. It should be emphasized, however, that the purpose of these statutes is not to prevent forfeitures, but to alleviate the harshness of their operation.<sup>10</sup> In this connection several observations should be made.

---

5. Power, *Land Contracts as Security Devices*, 12 WAYNE L. REV. 391, 416 (1966) (footnotes omitted).

6. See, e.g., *Ellis v. Butterfield*, No. 12,086 (Idaho July 13, 1977), *petition for rehearing filed*, (Aug. 3, 1977).

7. IOWA CODE ANN. §§ 656.1-.6 (West 1950).

8. See, e.g., MINN. STAT. ANN. § 559.21 (West Supp. 1977); N.D. CENT. CODE §§ 32-18-01 to 06 (1976); S.D. COMPILED LAWS ANN. §§ 21-50-01 to 07 (1967).

9. MINN. STAT. ANN. § 559.21 (West Supp. 1977).

10. See Note, *Forfeiture and the Iowa Installment Land Contract*, 46 IOWA L. REV. 786, 797 (1961).

First, the statutory grace period approach, as a practical matter, is analogous to the mortgage law concept of strict foreclosure. This mortgage foreclosure method, rarely used in the United States, allows a judicial grace period during which the mortgagor either pays the mortgage debt or forfeits the land to the mortgagee.<sup>11</sup> Similarly, if a vendee under an installment contract fails to correct a default within the statutory grace period, he loses the land. It is perhaps ironic that in some respects the statutory contract forfeiture procedures are more "pro-vendee" than the strict foreclosure concept is "pro-mortgagor." Under strict foreclosure, the mortgagor must pay the *accelerated* debt or lose the land. On the other hand, in such states as Iowa and Minnesota, the defaulting vendee need only pay the *arrearages* within the grace period, rather than the accelerated debt, in order to reinstate the contract.<sup>12</sup>

Second, to some degree these statutes have institutionalized or formalized the forfeiture concept and, in so doing, may have tended to discourage judicial interference in those situations where the vendor complies with the statutory forfeiture method.<sup>13</sup> For example, the Iowa and Minnesota cases allowing forfeiture have been concerned for the most part with technical compliance with the statutory procedure and have tended to downplay any independent analysis of the fairness of the forfeiture.<sup>14</sup>

Finally, one practical advantage of statutory regulation is that it encourages the stability of land titles. Whatever the defects in such statutory regulation, title examiners in many of these states apparently routinely approve of the titles derived through the statutory proceedings.<sup>15</sup> There are at least two reasons for this. First, the tendency of the courts to discourage attacks on forfeitures on nonstatutory grounds encourages reliance on a forfeiture proceeding that complies with the applicable statute. Second, many of these statutes provide for the recording of a written and formalized memorial of compliance with the stat-

---

11. See G. NELSON & D. WHITMAN, *CASES AND MATERIALS ON REAL ESTATE FINANCE AND DEVELOPMENT* 229 (1976).

12. See *Hampton Farmers Coop Co. v. Fehd*, 257 Iowa 555, 559, 133 N.W.2d 872, 874 (1965); *Needles v. Keys*, 149 Minn. 477, 480, 184 N.W. 33, 34 (1921); 51 IOWA L. REV. 488 (1966).

13. Note, *Forfeiture and the Iowa Installment Land Contract*, 46 IOWA L. REV. 786, 797 (1961).

14. See, e.g., *id.* at 792; *Dale v. Pushor*, 246 Minn. 254, 75 N.W.2d 595 (1956).

15. Nelson, *The Use of Installment Land Contracts in Missouri—Courting Clouds on Titles*, 33 J. Mo. B. 161, 164 (1977).

ute.<sup>16</sup> As a result, the title examiner is able to rely on the record for evidence of a permissible forfeiture. This is true even where the original contract is recorded. On the other hand, in states that lack statutory control of the forfeiture process, the recording of a statement that forfeiture has occurred may be regarded by a subsequent title examiner simply as a self-serving assertion that in itself may constitute a cloud on title.

The Maryland statute takes a substantially different approach from those described above.<sup>17</sup> Where an installment land contract for the sale of residential property to a noncorporate vendee is involved, forfeiture is prohibited. The vendor can utilize the land to satisfy the vendee's debt only through a foreclosure sale identical to that used for a mortgage.<sup>18</sup> The vendee is entitled to receive any surplus from the sale—that amount by which the sale price exceeds the unpaid balance of the purchase price. Since installment land contracts are treated like mortgages in residential transactions, there is apparently no incentive to continue their use in the residential setting. On the other hand, the common law rules as to forfeiture presumably still apply to nonresidential installment land contracts.<sup>19</sup>

Recent Oklahoma legislation constitutes perhaps the most sweeping and decisive statutory regulation of installment land contracts. In one relatively short paragraph, an Oklahoma statute states that installment land contracts

---

16. The Iowa statute exemplifies such a provision:

If the terms and conditions as to which there is default are not performed within said thirty days, the party serving said notice or causing the same to be served, may file for record in the office of the county recorder a copy of the notice aforesaid with proofs of service attached or indorsed thereon (and, in case of service by publication, his personal affidavit that personal service could not be made within this state) and when so filed and recorded, the said record shall be constructive notice to all parties of the due forfeiture and cancellation of said contract.

IOWA CODE ANN. § 656.5 (West 1950).

17. MD. REAL PROP. CODE ANN. §§ 10-101 to 108 (1974); MD. R. P. W79.

18. MD. R. P. W70 to W72, W77.

19. Ohio legislation governing termination of installment land contracts is also somewhat unique. It combines the "grace period" function with the additional requirement that after either five years or payment of twenty percent of the purchase price, judicial foreclosure is required. Thus, forfeiture is permitted and regulated during the early part of the contract, whereas mortgage law takes over thereafter. See OHIO REV. CODE ANN. §§ 5313.01-.10 (1970). See also MONT. REV. CODES ANN. §§ 52-401 to 417 (Cum. Supp. 1975), in which the Montana Small Tract Financing Act of 1963 made possible an optional power of sale deed of trust mechanism for tracts of 15 acres or less. One commentator has suggested that this legislation makes the installment land contract in Montana unnecessary. See Note, *Toward Abolishing Installment Land Sale Contracts*, 36 MONT. L. REV. 110 (1975).

for purchase and sale of real property made for the purpose or with the intention of receiving the payment of money and made for the purpose of establishing an immediate and continuing right of possession of the described real property, whether such instruments be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall to that extent be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.<sup>20</sup>

The effect of this statutory provision is to treat all installment land contracts entailing a transfer of possession to the vendee as mortgages and thus to make the forfeiture remedy unavailable to a vendor. Thus, installment land contracts presumably have been rendered obsolete in Oklahoma. This legislation is especially significant in view of the fact that Oklahoma permits only judicial, and not power of sale, foreclosure of mortgages.<sup>21</sup>

### C. *Judicial Limitations*

Absent statutory regulation, numerous state courts have in recent years refused to enforce against a defaulting vendee forfeiture clauses that the courts have deemed unreasonable or inequitable. These courts have employed several approaches to save the vendee from forfeiture. Some cases, for example, have in effect conferred on the vendee a mortgagor's equity of redemption, permitting him to tender the remainder of the purchase price (or even his arrearages) in a suit or counterclaim for specific performance of the contract. Where the vendee was unable or unwilling to redeem, courts have occasionally ordered the judicial foreclosure of the land contract. Finally, some courts, after determining that a particular forfeiture clause is unfair, have extended to the defaulting vendee the right to restitution—the right to recoup his payments to the extent that they exceed the vendor's damages caused by the vendee's default. Of course, many state courts have not considered the forfeiture clause in all of the remedial contexts described above, nor have they always been theoretically precise. Some courts have utilized contract principles to protect the defaulting vendee from an inequitable forfeiture provision. Other courts have gone a long way toward simply treating the installment land contract as a mortgage—in much the same fashion as does the Oklahoma statute. Still others

---

20. OKLA. STAT. ANN. tit. 16, § 11A (West Supp. 1976).

21. OKLA. STAT. ANN. tit. 12, § 686 (West 1960).

have employed a confusing amalgam of mortgage and contract law. The following sections examine these various approaches employed by state courts to mitigate the harshness of forfeiture.

1. *Waiver by the vendor as an excuse for delinquency*

Frequently a vendor will accept one or several late payments from his purchaser without taking action to declare a forfeiture. When the vendor finally reaches the end of his patience and informs the purchaser that forfeiture has occurred, the purchaser may argue that the vendor's prior behavior constitutes a waiver of the time provisions of the contract and that the vendor is legally bound to accept the late payments. Often this dispute is presented to the court in the context of a purchaser's suit or counterclaim for specific performance of the contract. The vendee may be willing to tender the entire purchase price, or he may insist upon an opportunity to make up his arrearages and resume the original payment schedule.

Many cases have adopted the purchaser's position in this situation.<sup>22</sup> In effect, these cases hold that the vendor's waiver avoids the effect of the forfeiture clause and creates in the purchaser a right analogous to an equity of redemption. According to this view, if the vendor had given the purchaser clear notice that no further delinquencies would be tolerated, and if this notice had been given in adequate time to allow the purchaser to get back on schedule, the vendor might thereby have preserved his right of forfeiture as to future installments. Since he did not do so, the court itself will generally fix a reasonable time within which the purchaser must cure the delinquencies.

The courts of Missouri and Utah have been particularly inclined to employ this technique. One commentator aptly described the Missouri situation:

Thus, Missouri courts today seem hesitant to give full effect to forfeiture provisions as measures of liquidated damages in installment land contracts. They are likely to find that such provisions have been waived by the vendor due to such acts as

---

22. See *In re Northern Ill. Dev. Corp.*, 309 F.2d 882 (7th Cir. 1962), cert. denied, 372 U.S. 965 (1963); *Triplett v. Davis*, 238 Ark. 870, 385 S.W.2d 33 (1964); *Petersen v. Ridenour*, 135 Cal. App. 2d 720, 287 P.2d 848 (1955); *Krentz v. Johnson*, 36 Ill. App. 3d 142, 343 N.E.2d 165 (1976); *Miles Homes, Inc. v. Mintjal*, 17 Ill. App. 3d 642, 307 N.E.2d 724 (1974); *Pierce v. Yochum*, 330 N.E.2d 102 (Ind. App. 1975); *Soltis v. Liles*, 275 Or. 537, 551 P.2d 1297 (1976); *Stinemeyer v. Wesco Farms, Inc.*, 260 Or. 109, 487 P.2d 65 (1971); *Bradley v. Apel*, 531 S.W.2d 678 (Tex. Civ. App. 1975); *Williamson v. Wanlass*, 545 P.2d 1145 (Utah 1976); *Paul v. Kitt*, 544 P.2d 886 (Utah 1975).

his acceptance of late payments of principal or of interest on late payments after the delinquency of those payments. Furthermore, waiver of forfeiture provisions is equally likely to be found in any of the following in which a land installment contract is involved: viz., an action for ejectment by a vendor, an action for specific performance by a defaulting vendee, a counterclaim for specific performance by a defaulting vendee who is defendant to an action for ejectment, or even a trespass action by a defaulting vendee against his vendor concerning the land that is the subject of the contract. The finding that such a forfeiture provision has been waived would be very likely if the value of the land subject to the forfeiture provisions substantially exceeded the amount still unpaid under the contract.<sup>23</sup>

The waiver cases tend to be variable and difficult to reconcile. In some cases rather innocuous forbearances by vendors have been translated into favorable holdings for purchasers,<sup>24</sup> while in others quite substantial leniency has been unavailing.<sup>25</sup> In one Utah case,<sup>26</sup> for example, the vendees under an installment land contract for the purchase of a house made sporadic late payments for the first two years of the contract. Some monthly payments were missed entirely. The vendor repeatedly demanded that the contract be paid up to date, but from time to time the vendees were assured that no forfeiture was contemplated "at that time." Finally, more than two years from the date of the contract, the vendor declared a forfeiture and after unsuccessful negotiation brought an unlawful detainer action to have vendees ousted and the contract forfeited. The trial court concluded that the vendor had waived the strict performance of the contract. The Utah Supreme Court reversed the trial court and upheld the forfeiture in the following language: "Under the circumstances of this case, we believe that the buyers . . . were given a reasonable length of time to clear themselves of default. . . . They had not paid the equivalent of the rental value of the property for the time they occupied it."<sup>27</sup>

The quoted language is quite telling. Obviously the amount of the payments in relation to the rental value has nothing at all to do with whether there was an effective waiver by the vendor. It is difficult not to conclude that the court was manipulating the

---

23. 29 Mo. L. Rev. 222, 226 (1964) (footnotes omitted).

24. See note 22 and accompanying text *supra*.

25. See, e.g., *Economy Sav. & Loan Co. v. Hollington*, 105 Ohio App. 243, 152 N.E.2d 125 (1957); *Christy v. Guild*, 101 Utah 313, 121 P.2d 401 (1942).

26. *Pacific Dev. Co. v. Stewart*, 113 Utah 403, 195 P.2d 748 (1948).

27. *Id.* at 409, 195 P.2d at 751.

waiver concept as a means of deciding whether, in terms of fairness and economic equity, the purchaser should have another opportunity to make up his missed payments.<sup>28</sup> Such decision-making may be entirely salutary, but it should not be disguised.

## 2. *Recognition of an equity of redemption*

A number of jurisdictions have taken the view that the purchaser, notwithstanding his default, should be granted a final opportunity to make up the missed payments before losing his land. Some courts view this right, analogous to a mortgagor's equity of redemption, as unconditional, while others are inclined to recognize it only if the purchaser's prior payments add up to a substantial investment or "equity" in the property. Sometimes the existence of the right is made to turn on whether the purchaser's payments significantly exceed the property's rental value or some similar test. The critical point is that, unlike the cases discussed in the preceding paragraphs, these opinions do not rely upon a prior waiver by the vendor.

A typical case is *Nigh v. Hickman*,<sup>29</sup> decided by the Missouri Court of Appeals. There a vendee under an installment land contract covering farmland had paid almost 35% of the total purchase price. The vendee then defaulted on one payment by fifteen days, and the vendor refused to accept the late payment. The vendee sued for specific performance and tendered the balance owing on the contract. The appellate court held that the trial court correctly granted specific performance and that enforcement of the forfeiture clause would have been inequitable. Although the contract contained no "time of the essence" clause, the court indicated that the result would not have been different had such a clause been present.

The relationship between the granting of specific performance to a purchaser and more traditional mortgage concepts is illustrated by the Florida Court of Appeals' opinion in *H & L Land Co. v. Warner*.<sup>30</sup> There the vendee had made installment payments for about five years, but thereafter a four-year period elapsed during which no payments were made. During this period of nonpayment the vendor remained silent as to the vendee's

28. The court may have been confusing the waiver concept with the principle of equitable relief from forfeiture. See text accompanying notes 29-43 *infra*.

29. 538 S.W.2d 936 (Mo. App. 1976). See also *Key v. Gregory*, 553 S.W.2d 329 (Mo. App. 1977).

30. 258 So. 2d 293 (Fla. App. 1972). See also *Huguley v. Hall*, 157 So. 2d 417 (Fla. 1963); *Mid-State Inv. Corp. v. O'Steen*, 133 So. 2d 455 (Fla. App. 1961).

default. The vendee ultimately sued for specific performance, tendering the balance of the purchase price; the vendor counter-claimed for removal of the contract as a cloud on the vendor's title. The court granted specific performance and stated: "[T]he vendor under a specifically enforceable installment land sale contract, who has received part of the purchase price and has given the vendee possession of the land and the benefits and burdens of ownership, is in essentially the same position as a vendor who has conveyed the legal title and taken back a purchase money mortgage . . . ."<sup>31</sup> The court implicitly imposed at least three conditions to be satisfied in order to qualify for specific performance: (1) The vendee must be in possession or have a right to possession; (2) the contract must be specifically enforceable; and (3) the vendee must assert and exercise his right of redemption by tendering full performance.<sup>32</sup>

There are problems with these conditions, especially with the last two. Arguably, tying these latter two requirements together is an inconsistent blending of contract and mortgage law. It is axiomatic that a vendee in default does not have a right to specific performance of a contract. Yet under mortgage law the right to redeem is not exercised until there has been a default. In *Warner*, the second requirement was met because the court found that the vendor had waived the vendee's default. However, as has been pointed out:

By so holding, the court is going in circles. If one must tender the unpaid balance as a condition precedent to the vesting of the right of redemption, then one must exercise this right before one is entitled to it—an anomaly, to be sure. Thus, the rights of mortgagors will not be extended to purchasers in default who are either in straitened circumstances or unaware of the right of redemption—the very individuals whom the mortgage statutes were designed to protect.<sup>33</sup>

Notwithstanding this apparent anomaly, a more recent case reinforces the argument that, in general, Florida installment land contracts will be treated as mortgages for redemption purposes. In *Hoffman v. Semet*,<sup>34</sup> a Florida District Court of Appeals held that a vendee *in default* under an installment land contract had an equity of redemption and that the vendee's successor was enti-

---

31. 258 So. 2d at 295.

32. See Note, *Florida Installment Land Contracts: A Time for Reform*, 28 U. FLA. L. REV. 156, 168-70 (1975).

33. *Id.* at 170.

34. 316 So. 2d 649 (Fla. App. 1975).

tled to satisfy the total outstanding indebtedness due the vendor under the contract and to receive a conveyance of the real estate. The court cited *Warner* for the proposition that an installment land contract "must be deemed and held to be a mortgage, subject to the same rules of foreclosure and to the same regulations, restraints, and forms as are prescribed in relation to mortgages."<sup>35</sup> Unlike the situation in *Warner*, however, there had been no waiver of the default; therefore, the contract was not specifically enforceable within the implicit requirements of *Warner*. The *Semet* court did not deal with this difficulty. Instead, it simply repeated "equity of redemption" language in referring to the vendee's interest.

The Kansas case of *Nelson v. Robinson*<sup>36</sup> illustrates how a court can sometimes refuse to enforce a forfeiture provision and in addition can impose a remedy that treats the installment land contract involved as an equitable mortgage. The vendors in *Nelson* brought an action to cancel an installment land contract for the sale of farmland. The vendee was over \$1900 delinquent in back payments, but had paid nearly one third of the \$48,000 purchase price and had made valuable improvements to the land. The trial court refused to permit forfeiture, but rather ordered strict foreclosure of the contract. Under the terms of the decree, the vendee was given six months in which to pay the entire amount remaining due on the contract. Failure to so pay within that period would result in forfeiture of the land and back payments to the vendor. If the vendee paid only the arrearages within ten days of the decree, however, the redemption period would have extended to eighteen months. Interestingly, the vendee, and not the vendor, appealed, and the Kansas Supreme Court affirmed this exercise of equitable discretion of the trial court. It is noteworthy that the court here imposed the relatively rare mortgage remedy of strict foreclosure which was sought by neither party, but in which the vendor acquiesced.<sup>37</sup>

The *Nelson* decision clearly does not mean that all installment land contracts in Kansas will henceforth be treated as mortgages. If, for example, the vendee's stake in the property had been substantially less, perhaps immediate forfeiture would have been ordered.<sup>38</sup> The case, however, does illustrate that Kansas vendors

---

35. *Id.* at 651.

36. 184 Kan. 340, 336 P.2d 415 (1959).

37. This mortgage remedy is apparently the standard method in Wisconsin for terminating a vendee. See *Exchange Corp. v. Kuntz*, 56 Wis. 2d 555, 202 N.W.2d 393 (1972).

38. For a discussion of the significance of the proportion paid, see *Croft v. Jensen*,

cannot rely on automatic enforcement of the forfeiture clause. Thus, in Kansas, courts may very well apply the law of mortgages to some installment contracts and contract law to others.

In California, the movement toward recognition of a right of redemption for a defaulting vendee has received a considerable impetus from general statutory provisions, although their application was somewhat uncertain until fairly recently.<sup>39</sup> In *Barkis v. Scott*,<sup>40</sup> the California Supreme Court reevaluated a long line of earlier precedents dealing with forfeiture. The court concluded that when a forfeiture would otherwise result, the vendee can be relieved therefrom under section 3275 of the Civil Code which provides that

Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.<sup>41</sup>

The vendor in *Barkis* sought to quiet title and to enforce a forfeiture after the vendees inadvertently overdrew their bank account with their monthly house payment. The vendees' later efforts at payment were refused by the vendor. The supreme court held that section 3275 should provide relief from forfeiture and that the vendees had established the right to keep the contract in force. Here the default was, at most, negligent and not "grossly negligent, willful, or fraudulent."

In *MacFadden v. Walker*,<sup>42</sup> the California Supreme Court dealt with the "willful, but repentant defaulting vendee." There an elderly lady vendee had been in willful default over two years, but had paid over half of the purchase price. When the vendor sought to quiet title to the property, she counterclaimed for specific performance, tendering the full amount due and owing on the contract. The court held that the policy against forfeitures includes granting the right to specific performance even when the default is willful, reasoning that, when taken together, the prohibition against punitive damages contained in section 3294 of the Civil Code, the strict limitations on the right to provide for liqui-

---

86 Utah 13, 40 P.2d 198 (1935).

39. See Note, *Reforming the Vendor's Remedies for Breach of Installment Land Sale Contracts*, 47 S. CAL. L. REV. 191, 205 (1973).

40. 34 Cal. 2d 116, 208 P.2d 367 (1949).

41. CAL. CIV. CODE § 3275 (West 1970).

42. 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971).

dated damages contained in sections 1670-1671, and the provision of section 3369 that "neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case . . ." prevented a forfeiture having no reasonable relation to the damage caused by the vendee's breach even when that breach is willful. Although the court noted that "persuasive arguments" had been made by Professor John Hetland that installment land contracts should be treated like mortgages and deeds of trust and that willfully defaulting debtors should therefore have the right to redeem, it concluded that because the vendee was entitled to specific performance, "we need not decide whether she might also be entitled to some other remedy under the law governing security transactions."<sup>43</sup>

From the viewpoint of vendors, the trend illustrated above toward recognition of an equity of redemption is rather frightening. In the absence of statute, nothing but a court order can cut off an equity of redemption. In effect, this means that the vendor can be forced to litigate—precisely the thing he hoped to avoid by use of the installment contract. Even if the court will follow the example of the Supreme Court of Kansas, granting forfeiture in the event the purchaser is unable to redeem,<sup>44</sup> the vendor's situation is far less advantageous than he expected when the contract was signed.

### 3. *Restitution*

In a jurisdiction in which no equity of redemption is yet recognized, or in a case in which the purchaser cannot or will not redeem, traditional analysis would suggest that forfeiture should follow. But along this dimension, too, the courts have been actively reforming the law. Increasingly they are holding that forfeiture may not be "free" and that the vendor must return the payments he has received insofar as they exceed his actual damages. Some courts, such as those of Utah, take this position only in cases in which they conclude that an outright forfeiture would be "unconscionable,"<sup>45</sup> but this may simply mean that the purchaser would suffer a substantial net loss if no restitution were ordered.<sup>46</sup>

43. *Id.* at 816, 488 P.2d at 1357, 97 Cal. Rptr. at 541. See also *Williams Plumbing Co. v. Sinsley*, 53 Cal. App. 3d 1027, 126 Cal. Rptr. 345 (1975) (where breach not intentional).

44. See notes 36-37 and accompanying text *supra*.

45. *Jacobson v. Swan*, 3 Utah 2d 59, 278 P.2d 294 (1954).

46. The Utah court has had difficulty in reaching a consensus as to what is

The Utah cases usually measure the vendor's damages as the fair rental value of the property during the period of the purchaser's occupancy, plus such incidental damages as repairs and a sales commission upon resale.<sup>47</sup> In most of the fact situations presented, courts have concluded that these items exceed the purchaser's payments and that he is not entitled to restitution. For example, in *Strand v. Mayne*,<sup>48</sup> the vendees under an installment land contract for the sale of a motel had made payments of principal and interest of over \$19,000 on a \$41,500 purchase price. They also spent \$9,500 on repairs on the premises. Upon default, the vendors obtained possession by an unlawful detainer action. The vendees subsequently brought an action to recover the payments made under the contract on the ground that retention by the vendor was unconscionable. The Utah Supreme Court affirmed a summary judgment for the vendor, noting that the fair rental value of the motel up to the date of forfeiture, when added to the down payment the vendees had received on a resale of the property to a third party, exceeded the total of their payments to the vendors. The court observed that "[t]his clearly shows that the amount they have lost under the forfeiture provision is not unconscionable . . . ."<sup>49</sup> Similarly, in *Weyher v. Peterson*<sup>50</sup> the Utah court concluded, in affirming a judgment for a vendor under a forcible entry and detainer action based on a forfeiture clause, that the rental value and damages, totalling \$10,505, exceeded the \$9,387 the vendee had paid on the contract and found no inequity in refusing to allow the vendee to recover some of his payments.

Although vendees have generally not fared well in Utah litigation,<sup>51</sup> the reasoning of the above decisions indicates that complete vendor reliance on the forfeiture clause is probably misplaced. In the above cases, the court upheld forfeiture because it believed the vendor's actual damages, based on the property's fair rental value, exceeded the vendee's payments. In the few Utah cases in which the vendee's payments exceeded the vendor's

---

"unconscionable." See *Kay v. Wood*, 549 P.2d 709 (Utah 1976).

47. See, e.g., *Weyher v. Peterson*, 16 Utah 2d 278, 399 P.2d 438 (1965).

48. 14 Utah 2d 355, 384 P.2d 396 (1963).

49. *Id.* at 357, 384 P.2d at 398.

50. 16 Utah 2d 278, 399 P.2d 438 (1965).

51. One factor contributing to this litigation record is that few Utah vendees appear to record their contracts. Those who do record and subsequently default can probably settle with their vendors for at least the nuisance value of the suit which would be necessary to clear the vendor's title, since the damages and restitution issues are always litigable.

damages, the court did order restitution to the vendee of the excess.<sup>52</sup>

Florida cases also appear to impose a burden of showing unconscionability upon a purchaser who prays for restitution. Unfortunately, Florida courts have been less than carefully analytic in articulating the relevant test and thus have made the availability of restitution quite unpredictable. In *Chace v. Johnson*,<sup>53</sup> for example, the vendee was one year in default and sued to recover money totalling 80% of the contract price. The Florida Supreme Court ordered the vendor to return payments to the vendee that exceeded the vendor's damages. On the other hand, in *Sawyer v. Marco Island Development Corp.*,<sup>54</sup> where a vendor brought suit to remove from the record the interests of several vendees, one of whom was one year in default and who had paid 90% of the purchase price, a Florida appellate court held that vendee's interest could be extinguished without return of the payments made. Title to thirty-six lots was involved in *Sawyer*. Other vendees were also involved but were represented by a guardian ad litem because they did not appear. None of the vendees so represented had paid over 25% of the purchase price. The vendee who had paid the 90%, however, was personally represented. Despite the special circumstance of this last vendee, the court enforced forfeiture as to everyone, observing:

We see a substantial difference between the unjust enrichment which would result if a large deposit were forfeited within a short period of time and a situation where a vendor has removed his property from the market for several years while the vendee abandons the contract by ceasing to make further payments

. . . .<sup>55</sup>

The purchaser's restitution remedy is perhaps best developed in California. It should be noted first that, under the rule of *Venable v. Harmon*,<sup>56</sup> a vendor cannot receive a deficiency judgment regardless of his loss. Beyond this, California ant forfeiture cases also compel the vendor to return to the vendee any amount paid in excess of the vendor's damages. In *Freedman v. Rector, Wardens and Vestrymen of St. Matthias Parish*,<sup>57</sup> for ex-

---

52. *Kay v. Wood*, 549 P.2d 709 (Utah 1976); *Jacobson v. Swan*, 3 Utah 2d 59, 278 P.2d 294 (1954).

53. 98 Fla. 118, 123 So. 519 (1929).

54. 301 So. 2d 820 (Fla. App. 1974), *cert. denied*, 312 So. 2d 757 (1975).

55. 301 So. 2d at 821.

56. 233 Cal. App. 2d 297, 43 Cal. Rptr. 490 (1965) (based on CAL. CIV. PROC. CODE § 580b (West 1970)).

57. 37 Cal. 2d 16, 230 P.2d 629 (1951).

ample, the California Supreme Court held that it violated the public policies against forfeitures, penalties, and unjust enrichment to deny restitution, even to a vendee willfully in default. There have been problems, however, in determining the amount of restitution to which the vendee is entitled. Under the reasoning of the California Supreme Court decision in *Honey v. Henry's Franchise Leasing Corp.*,<sup>58</sup> the vendor apparently has the option of measuring his damages by either the "rental value" (giving restitution of the amount by which the vendee's payments exceed the fair rental value of the property while the vendee was in possession) or the "difference value" (giving restitution of the amount by which the vendee's payments exceed the difference between the current market value and the higher original contract price).<sup>59</sup> Professor Hetland points out that "rarely over the past few decades has the value of the property dropped so that the vendor prefers difference value to his alternative measure—rental value."<sup>60</sup> The choice is the vendor's, according to *Honey*, because permitting the vendee to make it would in effect give all installment vendees an option to convert their contracts into leases—an advantage the court hardly thought appropriate to give to a defaulter.

It is interesting to note that the economic results of the "difference value" measure of restitution are roughly similar to those of a judicial sale, in the sense that the market value of the property is debited against the vendor's claim. Of course, the two approaches are distinct, since in a restitution case the property's value is measured by the court upon the testimony of witnesses, rather than by a sale.<sup>61</sup>

---

58. 64 Cal. 2d 801, 415 P.2d 833, 52 Cal. Rptr. 18 (1966).

59. The court noted that since rescission was not sought by the vendor, the rental value standard was inappropriate; the court consequently held that the proper calculation involved the difference value.

60. J. HETLAND, SECURED REAL ESTATE TRANSACTIONS 52 (1974).

61. If the California Supreme Court's formulation of the "difference value" measure of restitution is taken literally, then it seems subject to serious criticism. The problem is illustrated by the following example.

Assume *P* buys property from *V* under an installment contract. The pertinent facts of the transaction are:

Purchase price	=	\$30,000
Down payment	=	2,000
Original debt	=	28,000, 8% interest, 25-year maturity
Monthly payments	=	216.11

Suppose default occurs after five years and that the value of the property has declined, so that:

Value of property	=	\$25,000
Balance on debt	=	25,836.58 (based on standard mortgage payment tables)

If foreclosure by judicial sale occurs, and if the costs of foreclosure are neglected and the sale brings fair market value, the sale proceeds will be \$25,000; V will be entitled to a deficiency judgment of \$836.58, assuming no antideficiency statute. (In California, no such judgment will be permitted if a one-to-four-family house is involved. CAL. CIV. PROC. CODE § 580b (West 1970).)

Suppose that V, instead of seeking foreclosure, elects to terminate P's rights under the contract and to make restitution, as he is permitted to do under *Honey*. V must restore to P all payments made in excess of V's loss. V elects the "difference value" measure of loss.

Payments made	=	\$14,966.60 (\$216.11 per mo. x 60 months) including \$2,000 down payment
(-) V's loss	=	5,000.00 (\$30,000 minus \$25,000)
Restitution	=	9,966.60

Thus, instead of being entitled to a deficiency judgment, V must pay back to P nearly \$10,000. This is, to say the least, a strange result.

The problem is that the court, in computing the amount of restitution, has ignored the "time value" of money. In a short-term marketing contract for \$30,000, if P breaches and V must remarket the property one month later for \$25,000, it is reasonably accurate to say that V's damages are \$5,000. See *Jensen v. Dalton*, 9 Cal. App. 3d 654, 88 Cal. Rptr. 426 (1970). If, however, the period between contract and breach is five years (during which V has not had possession), the \$5,000 damage figure is completely erroneous. Let us recompute V's damages, but in doing so translate all amounts involved to a single point in time by computing future values for each amount involved, using compound interest tables. We may select any point in time we wish, but a convenient reference point is the fifth anniversary of the sale—which happens to be the date of default. (This is convenient because nothing of financial significance happens thereafter, and whatever V's damages are on that date can easily be translated to their value on the date of judgment simply by adding interest.)

In order to make translations of values to any given date, we must assume some interest or discount rate. Let us use 8%, since it is the figure selected by the parties themselves when they initiated the transaction. Here is what actually happened:

#### Date

1-1-0	V gives up \$30,000 asset, receives \$2,000 cash.	
	Future value of \$28,000, as of 1-1-5	= \$41,715.66 (+)
2-1-0	V receives regular monthly payments of	
through	\$216.11. Future value of \$216.11/mo. for	
1-1-5	60 months	= \$15,879.08 (—)
1-1-5	V receives back the property, worth \$25,000	= \$25,000.00 (—)
	Subtracting what V received from what he gave up, damages	= \$ 836.58

Thus the "difference value" approach to restitution, properly computed, yields results exactly equal to a foreclosure sale. Of course, under California law, V cannot actually recover the \$836.58 deficiency. *Venable v. Harmon*, 233 Cal. App. 2d 297, 43 Cal. Rptr. 490 (1965).

No California case appears clearly to recognize the foregoing problem. Perhaps the closest is *Kudokas v. Balkus*, 26 Cal. App. 3d 744, 103 Cal. Rptr. 318 (1972), a "difference value" case in which the court refused to allow the vendees to claim, as part of their "payments," the interest they had paid prior to default on deeds of trust they had as-

#### 4. Foreclosure as a mortgage

The trend of the cases discussed above is clearly toward application of mortgage concepts to aid defaulting purchasers. The logical conclusion of this trend would be an absolute equivalency of installment contracts and mortgages, with foreclosure becoming the exclusive means by which a vendor could realize upon his security interest in the property. For a court to take this position should hardly seem surprising, for the judiciary reached the same conclusion long ago with regard to other forms of mortgage substitutes. Nevertheless, our research has disclosed only two states, California and Indiana, whose courts have indicated an acceptance of this view without legislative intervention.

California cases actually include no direct holding that foreclosure is a proper remedy in an installment contract default. However, a California Supreme Court decision, *Honey v. Henry's Franchise Leasing Corp.*,<sup>62</sup> and an opinion by the Ninth Circuit Court of Appeals, *Ward v. Union Bond & Trust Co.*,<sup>63</sup> imply that a judicial sale would be appropriate if at least one of the parties requests it. To date there appears to be no California appellate opinion in which either purchaser or vendor has sought a judicial sale, and thus the language in the cases mentioned must be regarded as dicta. If taken at face value, however, the language makes California the most protective state from the purchaser's viewpoint, with an equity of redemption, restitution, and judicial sale all available to him.

In Indiana the case for judicial sale is both better defined and less dependent on the wishes of the parties. In *Skendzel v. Marshall*,<sup>64</sup> the vendor sought a judicial declaration of forfeiture of a vendee's interest where the vendee had already paid \$21,000 of a \$36,000 contract price. The Indiana Supreme Court applied the concept that "equity abhors a forfeiture" and held that enforcement of the forfeiture clause was "clearly excessive" and

---

sumed. *Id.* at 756; 103 Cal. Rptr. at 325. Even this holding does not address the problem systematically.

The "future value" problem is also raised in "rental value" restitution cases, but its impact is relatively slight if the vendee's payments have been fairly regular prior to default and if they approximate the rental value of the property.

62. 64 Cal. 2d 801, 415 P.2d 833, 52 Cal. Rptr. 18 (1966).

One other decision by the California Supreme Court suggests the availability of foreclosure in the installment contract context. See *MacFadden v. Walker*, 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971).

63. 243 F.2d 476 (9th Cir. 1957).

64. 261 Ind. 226, 301 N.E.2d 641 (1973).

"unreasonable." More significantly, however, the court treated the installment land contract as a mortgage:

The Court, in effect, views a conditional land contract as a sale with a security interest in the form of legal title reserved by the vendor. Conceptually, therefore, the retention of the title by the vendor is the same as reserving a lien or mortgage. Realistically, vendor-vendee should be viewed as mortgagee-mortgagor. To conceive of the relationship in different terms is to pay homage to form over substance.<sup>65</sup>

The court ordered that the contract be foreclosed judicially in accordance with Indiana mortgage procedure. While the court did not absolutely rule out forfeiture in all cases, it did limit application of forfeiture to cases of absconding or abandoning vendees or to situations in which a minimum amount has been paid and the vendee seeks to retain possession while the vendor is making expenditures for taxes, insurance, and maintenance.

*Skendzel* has been followed in several subsequent decisions by Indiana appellate courts. For example, in *Tidd v. Stauffer*,<sup>66</sup> a defaulting vendee sought to obtain specific performance by paying the remaining balance where \$16,000 out of a \$39,000 contract price had been paid. The Court of Appeals of Indiana noted that forfeiture was inappropriate and directed the trial court to order judicial foreclosure of the contract in the event that the vendees failed promptly to pay the balance of the contract price. In *Fisel v. Yoder*,<sup>67</sup> a vendee in default who had paid one-fourth of the purchase price was allowed to continue to make payments on the contract; the vendor's request for forfeiture was denied. On the other hand, in *Donaldson v. Sellmer*,<sup>68</sup> the Court of Appeals of Indiana affirmed a trial court's award of forfeiture to a vendor where the vendee had paid \$7,000 out of a \$23,158 purchase price. There the appellate court agreed that the case fell within an exception to *Skendzel* in that the vendee "had wholly failed to perform his obligation to acquire adequate insurance and had allowed the property to deteriorate to such an extent that substantial repair was necessary before the house would even be habitable."<sup>69</sup>

65. *Id.* at 234, 301 N.E.2d at 646.

66. 308 N.E.2d 415 (Ind. App. 1974).

67. 320 N.E.2d 783 (Ind. App. 1975).

68. 333 N.E.2d 862 (Ind. App. 1975).

69. *Id.* at 866. In *Goff v. Graham*, 306 N.E.2d 758 (Ind. App. 1974), forfeiture of an installment land contract was upheld because of evidence showing that the vendee had failed to insure as required by the contract, had committed waste, and had deliberately

Thus in Indiana, in most instances where the defaulting vendee has a substantial equity, installment land contracts are now treated as mortgages. Because of the exceptions noted above, *Skendzel* does not go as far judicially as Oklahoma went legislatively in converting installment land contracts into mortgages. Nonetheless, the case constitutes the clearest judicial statement to date of that principle.<sup>70</sup>

There is every reason to expect this movement to continue, particularly in states in which there is little or no statutory regulation of land contracts. The same factors that induced the courts to treat other mortgage substitutes as mortgages—particularly the necessitous borrower's willingness to sign anything presented to him and the potential for a harsh and unwarranted loss of his investment as a consequence of his default—should and will almost surely be increasingly persuasive in the installment contract context.

It is sometimes argued that this trend is undesirable and that it is socially advantageous for the law to provide an extremely quick and cheap method for a vendor to terminate his purchaser's interest in the real estate upon default. Such a procedure, it is said, encourages the extension of credit to individuals whose creditworthiness is so poor that they would otherwise be unable to transact at all. There are, however, two errors in this argument. First, the cases discussed above illustrate that no vendor today can count on forfeiture under a land contract as being either quick or cheap; indeed, it is an invitation to litigation. Second, no procedure, however quick or cheap, can be justified if it amounts to foul play. The solution, of course, is not for the law to ignore the legitimate needs of installment contract purchasers, but to reform the modes of foreclosure commonly used for mortgages to make them as inexpensive and rapid as feasible, consistent with the requirements of fairness and due process. If this is done, land contracts (if they continue to exist at all) can be brought within the ambit of the more efficient mortgage foreclosure proceedings, and no one will have cause for complaint. Perhaps the growing tendency of the courts to treat land contracts as mortgages will bring pressure on state legislatures to accom-

---

neglected the property. The vendee had paid a down payment of \$1,950 and one monthly payment of \$562.62 on a contract price of \$61,750 amortized over 20 years.

70. For analysis of the Indiana situation, see Bepko, *Contracts and Commercial Law*, 8 IND. L. REV. 116, 117-20 (1974); Polston, *Survey of Recent Developments in Indiana Law—Property*, 10 IND. L. REV. 297, 298 n.4 (1976); Strausbaugh, *Exorcising the Forfeiture Clause From Real Estate Conditional Sales Contracts*, 4 REAL EST. L.J. 71 (1975).

plish the needed reforms of mortgage law.

In light of the judicial trend outlined above, we must ask why installment land contracts continue to be used. The question is particularly perplexing in those states in which relatively rapid nonjudicial foreclosure is available for mortgages or deeds of trust. The reason given several years ago by Professor William Warren may still be applicable: "[T]he vendor continues to use the instalment sale contract despite its deficiencies with regard to remedies because he is willing to gamble that the vendee's rights under this device will never be asserted and his own contractual advantages will not be challenged."<sup>71</sup> In addition, it is possible that neither most vendors nor most real estate brokers have an accurate concept of the risks of litigation that land contracts present today. Whatever the motivations of vendors, it is clear that the risks are inflating rapidly.

##### 5. *Constitutionality of forfeiture*

In recent years power of sale mortgage and deed of trust foreclosure procedures have been under increasing attack as violative of the due process clause of the fourteenth amendment.<sup>72</sup> The constitutional questions presented by these attacks may be raised as well in the context of installment contracts. Space does not permit a detailed discussion of these cases here, but in essence they have focused on two aspects of the foreclosure process: notice and hearing. Many power of sale statutes do not provide for any notice, or only notice by publication or posting, to the debtor and to junior lienors.<sup>73</sup> In addition, the statutes usually make no provision at all for a hearing, either before or after the foreclosure. If the due process clause is applicable to the foreclosure process, it is very clear that many statutes violate the standard articulated by the Supreme Court in *Mullane v. Central*

71. Warren, *California Instalment Land Sales Contracts: A Time for Reform*, 9 U.C.L.A. L. REV. 608, 633 (1962).

72. See Leen, Galbraith, & Gant, *Due Process and Deeds of Trust—Strange Bedfellows?*, 48 WASH. L. REV. 763 (1973); Nelson, *Deed of Trust Foreclosure Under Powers of Sale—Constitutional Problems—Legislative Alternatives*, 28 J. MO. B. 428 (1972); Pedowitz, *Current Developments in Summary Foreclosure*, 9 REAL PROP. PROB. & TRUST J. 421, 425-31 (1974); Comment, *The Constitutionality of the California Trustee's Sale*, 61 CALIF. L. REV. 1282 (1973); Comment, *Due Process Problems of Mississippi Power of Sale Foreclosure*, 47 MISS. L.J. 67 (1976); Comment, *Notice Requirements of the Non-judicial Foreclosure Sale*, 51 N.C.L. REV. 1110 (1973); Comment, *Power of Sale Foreclosure After Fuentes*, 40 U. CHI. L. REV. 206, 217-20 (1972).

73. See, e.g., D.C. CODE § 45-615 (1973); MISS. CODE ANN. § 89-1-55 (1972). Cf. MINN. STAT. ANN. § 580.03 (West 1947) (personal service on person in possession only).

*Hanover Bank & Trust Co.*,<sup>74</sup> since the notice they provide is "not reasonably calculated to reach those who could easily be informed by other means at hand."<sup>75</sup> The hearing standard is not quite so clear, but there is a strong probability that on the merits the total absence of a presale hearing would also be held unconstitutional.<sup>76</sup>

The application of these due process standards to installment contract forfeitures is somewhat uncertain, and no cases seem to have been reported. But some observations may nevertheless be safely made. Many contract forms do provide for direct mail notice to the purchaser as a prerequisite to forfeiture, and this would certainly meet the *Mullane* standard.<sup>77</sup> However, as in the case of mortgages, a contract procedure that provided only publication notice or the like would not. Installment contracts almost never provide for a hearing, and on this point they are as suspect as power of sale mortgages.

Whether it will ever be necessary for the contract forfeiture process to withstand scrutiny on the merits of the due process clause is questionable, however. Two defenses raised, often successfully, by power of sale mortgages appear to be similarly applicable to the contract situation. The first is waiver. If the contract itself contains language by which the purchaser authorizes a forfeiture by the vendor without notice or hearing, can the purchase later be heard to complain that his constitutional rights were violated? In related contexts, the Supreme Court has held that the efficacy of such a contractual waiver depends on a variety of factors, including the specificity of the waiver, the relative equality of bargaining power of the parties, the sophistication of the waiving party, and perhaps whether the waiver was part of a

---

74. 339 U.S. 306 (1950).

75. *Id.* at 319. This conclusion has been reached in three mortgage foreclosure cases. See *Ricker v. United States*, 417 F. Supp. 133 (D. Me. 1976); *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975); *Law v. United States*, 366 F. Supp. 1233 (N.D. Ga. 1973).

76. See *United States v. White*, 429 F. Supp. 1245 (N.D. Miss. 1977); *Ricker v. United States*, 417 F. Supp. 133 (D. Me. 1976); *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975); *Garner v. Tri-State Dev. Co.*, 382 F. Supp. 377 (E.D. Mich. 1974); *Northrip v. Federal Nat'l Mortgage Ass'n*, 372 F. Supp. 594 (E.D. Mich. 1974), *rev'd on other grounds*, 527 F.2d 23 (6th Cir. 1975). *Contra*, *Guidarelli v. Lazaretti*, 233 N.W.2d 890 (Minn. 1975).

77. Junior liens may, of course, be created by contract vendees. For example, a vendee may mortgage his contract interest. If such an interest exists and is recorded or otherwise readily identifiable by the vendor, failure of the vendor to provide notice to the junior lienor may raise the same due process issues as in the analogous first mortgage foreclosure situation. *But see Kendrick v. Davis*, 75 Wash. 2d 456, 463-64, 452 P.2d 222, 227-28 (1969) (holding, without discussion of constitutional principles, that the vendee's junior mortgagee was cut off by the vendor's forfeiture notwithstanding lack of notice).

printed contract.<sup>78</sup> Obviously each case must be litigated upon its facts, but in the typical installment contract transaction the waiver is probably not very explicit, is part of the printed form, and is generally not a point of negotiation; the purchaser will often be able to make at least a colorable argument that the purported waiver does not bind him.

The second defense that power of sale mortgagees have asserted in constitutional litigation is that no state action is involved in such foreclosures. State action is, of course, a prerequisite to applicability of the fourteenth amendment; if nonjudicial foreclosure is deemed a purely private process, no due process standard need be met. The plaintiffs in these cases have sought to show the presence of state action, pointing out that in most states in which power of sale foreclosure is widely employed, it is authorized and regulated by statute. A few early cases found state action to be present,<sup>79</sup> but the clear trend of recent decisions is against such a finding.<sup>80</sup> There is no Supreme Court decision yet on the point, but the probabilities are that state action will be found absent in the typical power of sale mortgage foreclosure.

Superficially, this conclusion seems equally valid with regard to installment contract forfeitures. By the terms of the typical contract, no judicial action is necessary to effect a forfeiture, and no state official is involved except perhaps the recorder of deeds, whose duties are entirely mechanical. However, both the Iowa-style recording-of-forfeiture statutes and the recent cases discussed above permitting redemption, restitution, or judicial sale

78. *Fuentes v. Shevin*, 407 U.S. 67, 94 (1972); *Swarb v. Lennox*, 405 U.S. 191 (1972); *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972). Mortgage foreclosure cases rejecting the mortgagee's waiver argument include *Ricker v. United States*, 417 F. Supp. 133 (D. Me. 1976); *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975); *Garner v. Tri-State Dev. Co.*, 382 F. Supp. 377 (E.D. Mich. 1974); *Law v. United States*, 366 F. Supp. 1233 (N.D. Ga. 1973). *Cf. Huggins v. DeMent*, 13 N.C. App. 673, 187 S.E.2d 412 (provision in deed for foreclosure upon default found to constitute sufficient notice for due process requirements), *appeal dismissed*, 281 N.C. 314, 188 S.E.2d 898, *cert. denied*, 409 U.S. 1071 (1972); 51 N.C.L. REV. 1110 (1973).

79. *See Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975); *Northrip v. Federal Nat'l Mortgage Ass'n*, 372 F. Supp. 594 (E.D. Mich. 1974). *Turner* relies heavily upon the rather peculiar participation of the clerk of the court in nonjudicial foreclosures under the then-applicable North Carolina statute.

80. *See Northrip v. Federal Nat'l Mortgage Ass'n*, 527 F.2d 23 (6th Cir. 1975); *Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166 (5th Cir. 1975); *Bryant v. Jefferson Fed. Sav. & Loan Ass'n*, 509 F.2d 511 (D.C. Cir. 1974); *Y Aleman Corp. v. Chase Manhattan Bank*, 414 F. Supp. 93 (D. Guam 1975); *Kenly v. Miracle Properties*, 412 F. Supp. 1072 (D. Ariz. 1976); *Lawson v. Smith*, 402 F. Supp. 851 (N.D. Cal. 1975); *Global Indus., Inc. v. Harris*, 376 F. Supp. 1379 (N.D. Ga. 1974); *Federal Nat'l Mortgage Ass'n v. Howlett*, 521 S.W.2d 428 (Mo.), *appeal dismissed*, 423 U.S. 1026 (1975).

at the behest of the purchaser may actually strengthen the state action argument. If the state, through its court system, actively superintends forfeiture procedures generally, its involvement is arguably sufficient to trigger the protections of the fourteenth amendment.<sup>81</sup> The fact that the contract itself says nothing about such state involvement is probably irrelevant. It may seem ironic that the state, by providing certain minimal protections, becomes constitutionally obligated to provide greater ones, but that peculiarity is actually built into the fourteenth amendment state action concept. In any event, these constitutional theories must be taken seriously; plainly, their existence further increases the litigation risk of the vendor who elects to secure his debt with an installment contract.

Even if the courts ultimately conclude that land contract forfeitures generally involve no state action, the current posture of constitutional litigation may well have a direct bearing on the future of the installment contract. This is true because in many of these cases the creditor is a government agency, so that the presence of governmental action is incontestably clear.<sup>82</sup> In all such cases to date, the security instrument in question has been a mortgage or a deed of trust; government agencies rarely sell land on installment contracts. Nonetheless, the holdings of unconstitutionality of power of sale foreclosure procedures that the courts are writing in these government agency cases will put increasing pressure on state legislatures to revise their power of sale statutes, bringing them into compliance with constitutional standards of notice and hearing. In some cases these legislative revisions may be so extensive as to sweep in the installment contract, placing it on an equal footing with the mortgage or deed of trust for foreclosure purposes. Even where this does not occur, the existence of a revised, constitutionally approved foreclosure procedure may be sufficiently attractive to vendors that they will adopt documents which employ that procedure, rather than continuing to assume the litigation risks inherent in the installment contract.

---

81. See *Northrip v. Federal Nat'l Mortgage Ass'n*, 372 F. Supp. 594 (E.D. Mich. 1974), *rev'd*, 527 F.2d 23 (6th Cir. 1975), in which the district court held the Michigan power of sale foreclosure procedure to be state action on the ground that the statute encouraged mortgagees to opt for nonjudicial foreclosure. The argument is not, however, a powerful one, and was rejected by the Sixth Circuit. Cf. *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) (finding an extensive scheme of state regulation of liquor licenses insufficient to implicate state action in the racial discrimination practices by a private club).

82. See, e.g., *United States v. White*, 429 F. Supp. 1245 (N.D. Miss. 1977).

### III. TITLE PROBLEMS UNDER INSTALLMENT CONTRACTS

#### A. *Problems for Vendees*

When a person purchases property as a vendee under an installment land contract, the chances of title problems with respect to the vendee's interest are greater than if the transaction were cast in the purchase money mortgage setting. This is true, to a large extent, even in those jurisdictions that have reduced the impact of the forfeiture provision by statute or judicial decision.

In the usual purchase money mortgage situation, the chances are extremely high that the purchaser will examine the seller's title and require it to be marketable. Even if the purchaser is not sophisticated enough to have the title checked, any third party lender involved in the transaction will insist upon a title insurance policy or at least upon an attorney's title opinion as evidence that the seller's title is good. On the other hand, in installment land contract situations there is a strong possibility that the vendor's title will not be examined at the time the contract is executed. Here there usually is no third party lender to insist upon title examination—the vendor serves that economic function, and he is unlikely to insist upon an examination of his own title. Moreover, many contract purchasers have low incomes and either cannot afford a title examination or do not recognize the need for it. Accordingly, many purchasers may unknowingly execute a contract, go into possession, and make substantial installment payments when in fact the vendor's title is encumbered by mortgages, judgment liens, or other interests perfected prior to the execution of the contract.<sup>83</sup>

The recording act can also cause substantial problems for an installment land contract vendee. In the usual purchase money mortgage transaction, the deed to the mortgagor and the mortgage or deed of trust will be recorded almost immediately. If there is no third party lender, the purchaser will record his deed as a matter of custom. Any third party lender involved will insist upon and carry out immediate recordation in order to protect itself against subsequent interests and encumbrances that may be created by or rise against the mortgagor. This recording by the mortgagee will also protect the mortgagor against any subsequent interests arising through the former owner of the land. On the other

---

83. See generally *Mixon, Installment Land Contracts: A Study of Low Income Transactions, with Proposals for Reform and a New Program to Provide Home Ownership in the Inner City*, 7 *HOUSTON L. REV.* 523, 545-46 (1970).

hand, in the installment land contract situation there is no third party stimulus for prompt recording. Many unsophisticated vendees do not record and, as we shall see later, actually may be prevented from recording by acts of the vendor.<sup>84</sup> Since vendors anticipate a high default rate among vendees, it is in the vendors' interest that the contracts not be recorded so that they may quickly resell to other purchasers without the necessity of a judicial proceeding to remove a title cloud posed by a recorded contract.<sup>85</sup> Suppose, for instance, that after executing the contract, a vendor either mortgages the land or sells it to another purchaser. While it is true in many jurisdictions that possession by the original vendee will constitute constructive notice to those dealing with the land thereafter and thus will be the equivalent of recording,<sup>86</sup> this is not universally the case. Even if possession does constitute constructive notice, establishing the existence of that possession could require litigation, while the fact of a recorded document would not.<sup>87</sup>

Even if the vendee does receive assurance prior to the execution of the contract that the vendor has good title, and even if the vendee records promptly, the installment land contract transaction could pose additional problems for the vendee that would not be present in a purchase money mortgage transaction. Suppose, for example, that four years into a ten-year installment contract, the vendor goes into bankruptcy. Section 70(b) of the Bankruptcy Act provides that "[t]he trustee shall assume or reject an executory contract."<sup>88</sup> Because of the rule of *In re New York Investors Mutual Group, Inc.*,<sup>89</sup> this statutory provision presents serious

---

84. See text accompanying note 103 *infra*.

85. See *Mixon*, *supra* note 83, at 547.

86. See, e.g., *Drey v. Doyle*, 99 Mo. 459, 12 S.W. 287 (1889); Comment, *Possession as Notice Under Missouri Recording Act*, 16 Mo. L. REV. 142 (1951).

87. Failure to record an installment land contract may also cause problems for the vendee when the vendor goes into bankruptcy. This is because section 70(c) of the Bankruptcy Act authorizes a bankruptcy trustee in his status as a hypothetical lien creditor to take advantage of state recording statutes to defeat an unrecorded interest. If, under state law, such a contract is recordable (and they generally are) and an unrecorded interest is invalid against creditors who obtain a judgment lien without notice of the unrecorded interest, a bankruptcy trustee may be able under section 70(c) to avoid the contract. *In re Sayre Village Manor*, 120 F. Supp. 215 (D.N.J. 1954); *Lacy, Land Sale Contracts in Bankruptcy*, 21 U.C.L.A. L. REV. 477, 493-97 (1973); *Lynn, Bankruptcy and the Land Sales Contract: The Rights of the Vendee Vis-A-Vis the Vendor's Bankruptcy Trustee*, 5 TEX. TECH. L. REV. 677, 694-99 (1974). Normally, however, possession will be the equivalent of recording. See *Lacy*, *supra* at 496. In some states where possession is not constructive notice, however, a nonrecording vendee in possession may be vulnerable under section 70(c). See note 86 *supra*.

88. 11 U.S.C. § 110(b) (1970).

89. 143 F. Supp. 51 (S.D.N.Y. 1956).

problems for a vendee. In that case, a land contract vendee contended that he was entitled to specific performance against the bankruptcy trustee who had disaffirmed the contract under the above statute. The vendee contended that disaffirmance divested it of its equitable title to the land. The court, however, concluded that any rights of the vendee originated solely in the contract and that section 70(b) apparently did not exclude contracts for the sale of real estate from the trustee's power to reject executory contracts. Professor Warren has commented that application of the *New York Investors* rule would leave an installment land contract vendee "with a claim for damages instead of a home."<sup>90</sup> Despite this criticism, subsequent decisions have followed the *New York Investors* case.<sup>91</sup> Professor Frank R. Lacy, however, has pointed out that the contracts in all these later cases may have been executory or earnest money contracts rather than true installment land contracts. He contends that true installment land contracts are the functional equivalent of purchase money mortgages: "[the vendee] has made his payments in reliance on a particular asset belonging to the vendor, and this, taken with his right of possession and the substantial protection against loss of his rights even though he may default, justifies full preservation of his right to the property in the vendor's bankruptcy."<sup>92</sup> Such equities do not exist in the "truly executory" contract contemplating conveyance, payment of the full price, and a closing date in the near future. It remains possible, however, that absent amendment of section 70(b), the principle of *New York Investors* will be applied to installment land contracts.<sup>93</sup>

While vendor bankruptcy presents risks to a land contract vendee, the existence of federal tax liens against the vendor is no longer a problem for the prudent vendee who has title examined prior to contract execution and who has actually recorded the

---

90. Warren, *supra* note 71, at 613.

91. See *Gulf Petroleum, S.A. v. Collazo*, 316 F.2d 257 (1st Cir. 1963); *In re Philadelphia Penn Worsted Co.*, 278 F.2d 661 (3rd Cir. 1960).

92. Lacy, *supra* note 87, at 483-84 (footnote omitted).

93. *Id.* at 481.

The proposed revisions of the Bankruptcy Act, which failed to pass in 1977, would solve this problem. If the trustee in bankruptcy rejects the contract, the purchaser in possession may elect to terminate the contract or to remain in possession. If he remains in possession, he must continue to make payments, but may offset against these payments any damages incurred because of rejection. The trustee in bankruptcy must deliver title to the purchaser in accordance with the provisions of the contract, but is relieved of all other obligations. H.R. 8200, 95th Cong., 1st Sess. (1977); see H.R. REP No. 95-595, 95th Cong., 1st Sess. 347-50 (1977).

contract. If the vendor is delinquent in payment of federal taxes, the United States may obtain a lien on "all property and rights to property, whether real or personal, belonging to [the delinquent taxpayer]." <sup>94</sup> This lien is ineffective against "any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof . . . has been filed" <sup>95</sup> in a designated place. Thus, for example, if a grantee recorded a conveyance of the taxpayer-grantor's property for adequate and full consideration prior to the filing of a tax lien and without actual knowledge of the lien, the grantee's title would not be encumbered by the lien. A fortiori, if the lien arose after the conveyance, the grantee is protected. Before the 1966 amendments to the Federal Tax Lien Act, however, there was case law indicating that a vendee who had taken possession under an installment land contract, but who had not received legal title, did not come within the statutory definition of a "purchaser" and thus was subject not only to preexisting unfiled tax liens, but also to liens for taxes arising against the vendor after the contract was executed and the vendee went into possession. <sup>96</sup> Now, however, that problem has been largely obviated by the rule which provides that a person who enters into a *written* executory contract to purchase property is afforded the protection of a "purchaser" with title. <sup>97</sup> Thus, in most situations the contract vendee who takes possession pursuant to an installment land contract is protected against unfiled tax liens arising against the vendor before the execution of the contract and against all such liens arising thereafter.

There is still, however, a potential pitfall for some vendees. Under the Federal Tax Lien Act, protection of the contract vendee as a "purchaser" is "conditioned upon his having taken whatever action is necessary under local law to protect his interest against subsequent purchasers without actual notice." <sup>98</sup> In most states the contract vendee's possession qualifies as constructive notice against such subsequent purchasers. However, in those states where possession does not so qualify, <sup>99</sup> recording is necessary. Thus, in view of the fact that many vendees do not record, it is conceivable that a vendee, after properly examining

---

94. I.R.C. § 6321.

95. I.R.C. § 6323(a).

96. See *United States v. Creamer Indus., Inc.*, 349 F.2d 625 (5th Cir. 1965); *Leipert v. R.C. Williams & Co.*, 161 F. Supp. 355 (S.D.N.Y. 1957).

97. W. PLUMB, *FEDERAL TAX LIENS* 73 (3d ed. 1972).

98. *Id.* at 73.

99. See note 86 *supra*.

title at the time of execution of the contract and promptly going into possession, may nevertheless be vulnerable to tax liens arising after the execution of the installment land contract.

### B. Problems for Vendors

As was pointed out earlier, there have been relatively few title problems for the vendor in those states that specifically regulate forfeiture by statutory procedure. In those states, of which Iowa and Minnesota are typical, the statutory procedure for termination has been institutionalized, and the statutes provide a mechanism for establishing record title in the vendor even if the vendee has recorded the contract. However, in states without such statutory mechanisms, and where the forfeiture clause is governed solely or largely by case law, there are potential title problems for the vendor. Indeed, in many such jurisdictions, the installment land contract "will provide the . . . vendor with an efficient and cheap method of regaining possession of the contract land and a merchantable title *only* if the vendee fails completely to assert his rights."<sup>100</sup> As one commentator has noted:

Thus, if, after default, the vendee moves out of possession, without protest and without having recorded the contract, the vendor will be able to resell the land to a person who will probably qualify as a bona fide purchaser. In practice this probably often happens and may explain, in part, why the installment land contract is continually used. The thing to remember, however, is that *any* device is practical if the other party does nothing to protect his rights.<sup>101</sup>

On the other hand, suppose the vendee attempts to protect his rights by recording his contract and thereafter goes into default. Even assuming that a court will find that enforcing forfeiture would be valid under the circumstances, it will take a judicial proceeding to make that determination. A statement or affidavit that forfeiture has occurred, recorded by the vendor, will probably not suffice.

Thus, the vendor is faced with the costly prospect of a quiet title action or some other judicial proceeding to regain a marketable title. The vendee, for settlement purposes, may very well be able to demand much more than what he has invested in the property as the price for a quit-claim deed.<sup>102</sup>

---

100. Nelson, *supra* note 15, at 165 (emphasis in original).

101. *Id.* at 165 (emphasis in original).

102. *Id.*

Some vendors try to eliminate such problems by attempting to prevent the recording of the contract. The most common method used to accomplish this is to omit an acknowledgment of the parties' execution of the contract. For any vendee represented by counsel, however, this method is easily circumvented by recording an affidavit in which the vendee refers to the installment land contract and attaches the contract as an exhibit. Or, as a variation, the vendee could execute and record an affidavit that incorporates the essential terms of the contract, including the legal description, the parties, and the important terms. Occasionally, a vendor will attempt to prevent recording by keeping *all* copies of the contract. Again, however, it would seem that the vendee could use the second affidavit method described above. After all, if in fact a land contract exists, it would surely not be improper for a vendee to summarize the terms of that contract in an affidavit. In jurisdictions that do not permit recordation of affidavits, another variant would be to record an acknowledged assignment of the purchaser's interest to a straw party and a reassignment back to the vendee.<sup>103</sup>

Vendors also occasionally attempt to discourage recording by the vendee by including a provision in the installment land contract that makes recording of the contract a ground for default and forfeiture. Such provisions may have a substantial deterrent effect because the risk of forfeiture can never be taken lightly. Nevertheless, such provisions probably violate the public policy of encouraging the recording of interests in real estate. Indeed, Professor Warren has indicated that it is doubtful that such clauses would be effective "to attain anything more than the hostility of the judge who has to interpret the contract."<sup>104</sup>

Stated simply, in states where the above title complications to the vendor can occur, the installment land contract can be a "pro-vendee" financing device. Where, for example, such contracts are used in a wholesale fashion as substitute financing devices in low income, low down payment situations, mass recording of such contracts by vendees could increase the vendees' practical economic interests in the involved real estate and possibly result in pervasive title clouds on substantial amounts of that

---

103. *Id.* at 165-66. As we shall see, a vendee's interest is mortgagable. See text accompanying note 108 *infra*. Thus, even if a vendee does not record, a recorded mortgage from the vendee will similarly cloud the title. It is unlikely that recording by the vendee under these circumstances will constitute slander on the vendor's title. See Nelson, *supra* note 15, at 166.

104. Warren, *supra* note 71, at 629.

real estate.

The foregoing, of course, is not intended to deemphasize the risks for the vendee under installment land contracts. Many of these risks have been discussed previously. Where the vendee has paid a substantial amount of the contract and then defaults, the vendor may choose to go to court to seek enforcement of a forfeiture clause. Notwithstanding clouds on the vendor's title, what if the court determines that forfeiture is reasonable? In that event a vendee could lose his entire equity without a public sale. In addition, some local recorders may occasionally block attempts by vendees to record evidence of their contracts.<sup>105</sup> In other words, the installment land contract device means, at best, uncertainty for both sides.

It is perhaps understandable that, notwithstanding the above risks, installment land contracts would be used in states where mortgages must be foreclosed by a costly and time-consuming judicial action. This helps to explain why such contracts are popular in Iowa and Illinois where such a judicial proceeding is the only foreclosure remedy. On the other hand, in many states, of which Missouri and Utah are typical, where the power of sale mortgage or deed of trust is permissible and where foreclosure is efficient and relatively inexpensive, reliance on the installment land contract is difficult to understand or justify.<sup>106</sup> Several possible explanations may be suggested. First, the use of installment land contracts may spill over from states where they have been used successfully for the good reasons discussed above to adjacent states where such use is especially dangerous for vendors. Second, many vendors may use land contracts in low down payment situations and take their chances that the vendees will be too unsophisticated to record or to otherwise protect their interests. Finally, many vendors may simply want to feel assured

---

105. A recorder who strictly adheres to statutory language defining recordable documents could conceivably justify a refusal to record such evidence of a contract. For example, Utah law provides for the recordation of conveyance instruments, but the definition of "conveyance" arguably eliminates the instrument here in issue:

The term "conveyance" as used in this title shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, aliened, mortgaged, encumbered or assigned, except wills, and leases for a term not exceeding one year.

UTAH CODE ANN. § 57-1-1 (1974).

106. While it is true that power of sale foreclosure has been under constitutional attack on fourteenth amendment due process hearing and notice grounds, those attacks have been meeting with diminishing success, primarily due to the reluctance of the courts to find state action in foreclosures by nongovernmental lenders. See notes 72-82 and accompanying text *supra*.

that they will receive their land back in the event of a default by the vendee. With a mortgage or a deed of trust, of course, the mortgagee must ultimately foreclose against a defaulting mortgagor; a third party could purchase at the sale, and the mortgagee thus could be left with money and not the land. Nonetheless, in view of the uncertainty of the enforceability of the forfeiture clause in many, if not most, jurisdictions that do not regulate installment land contracts specifically by statute, reliance on the forfeiture clause to regain one's land is dubious at best.<sup>107</sup>

#### IV. MORTGAGING THE VENDEE'S INTEREST: PROBLEMS FOR MORTGAGEES

As a vendee pays off his obligations under an installment land contract or if, in any event, the land goes up in value, the vendee's interest can become a significant economic asset. Thus, it is a relatively common practice for a vendee to seek to borrow money by using his interest as security for the loan. Functionally, of course, a mortgage on a vendee's interest is the economic equivalent of a second mortgage, because the vendor holds an interest analogous to a first purchase money mortgage on the land. Increasingly, the case law recognizes the proposition that the vendee's interest is mortgagable.<sup>108</sup>

To state this latter proposition, however, raises some serious questions. For many courts, the determination that the vendee has an interest which can be mortgaged includes the notion that mortgages of such interests are valueless unless the mortgagee has some way to protect his interest against the vendor's declaration of forfeiture. Thus, a number of cases have held that the vendor could not declare a forfeiture of an installment land contract without giving the vendee's mortgagee both notification of intent to forfeit and an opportunity to protect himself.<sup>109</sup> Furthermore, recording by the vendee's mortgagee constitutes, under the reasoning of these cases, constructive notice to the vendor of the mortgagee's existence and imposes a duty on the vendor to examine the title to the land prior to a declaration of forfeiture in order to insure that notice can be given to any subsequent mortgagee of the vendee's interest. One recent decision, however, has held

---

107. See Nelson, *supra* note 15, at 167-68.

108. See Davis & Son v. Milligan, 88 Ala. 523, 6 So. 908 (1889); Stannard v. Marboe, 159 Minn. 119, 198 N.W. 127 (1924); Fincher v. Miles Homes of Mo., Inc., 549 S.W.2d 848 (Mo. 1977) (en banc); Kendrick v. Davis, 75 Wash. 2d 456, 452 P.2d 222 (1969).

109. See, e.g., Stannard v. Marboe, 159 Minn. 119, 198 N.W. 127 (1924). See 45 WASH. L. REV. 645, 646 (1970).

that, absent actual knowledge of the mortgagee's existence, the vendor is under no obligation to notify the mortgagee of his intention to declare a forfeiture.<sup>110</sup> This case relied on the notion that the recording of an instrument constituted notice only to those acquiring interest in the land subsequent to a recording and not to those whose interests predated that recording. The practical effect of such reasoning will mean that a mortgagee, in order to protect himself, will be required to give actual notice to the vendor at the time the mortgagee takes his security interest.

Assuming that notification of an intent to invoke forfeiture reaches the vendee's mortgagee, how may the latter protect himself? It has been suggested that notification would permit the mortgagee to fulfill the obligations of the vendee under the contract.<sup>111</sup> If this means that the mortgagee may take over the vendee's interest without foreclosure of the mortgage, it would seem to be clearly erroneous, since it would confer on a mortgagee of the vendee greater rights than those possessed by a second mortgagee in the normal mortgage situation. In the normal situation, the second mortgagee, when the senior mortgage goes into default, has two options. First, he may pay off or redeem the senior mortgage and stand in the senior's shoes as an assignee of that mortgage. At that point, the second mortgagee would own two mortgages on the land and would have to foreclose one or both of them in order to acquire either money or title to the land. Alternatively, the second mortgagee could foreclose his mortgage, and the purchaser at that sale would buy the land subject to the first mortgage.<sup>112</sup> The foreclosing second mortgagee would get title only if he were the successful purchaser at the sale. Otherwise, the second mortgagee would have his lien paid off. But in no event can the second mortgagee acquire title to the land without himself foreclosing.

In applying the mortgage analogy to the installment land contract situation, it would seem that the vendee's mortgagee should have no greater rights than a "normal" second mortgagee. In other words, the vendee's mortgagee should have two options. First, he could pay off the defaulted land contract and have all the rights of an assignee of the vendor under that contract. Assuming forfeiture is enforceable in his jurisdiction, the

---

110. *Kendrick v. Davis*, 75 Wash. 2d 456, 452 P.2d 222 (1969). See also *Miles Homes, Inc. v. Grant*, 257 Iowa 697, 134 N.W.2d 569 (1965) (interpreting the Iowa statutory termination proceeding).

111. 45 WASH. L. REV. 645, 646 (1970).

112. See G. NELSON & D. WHITMAN, *supra* note 11, at 242-43.

mortgagee-assignee presumably could then himself invoke the forfeiture rights under the contract. But in no event should he be able to eradicate the vendee's interest without invoking the functional equivalent of foreclosure. Second, the mortgagee could choose to foreclose his mortgage on the vendee's interest. In that case the purchaser at the sale would buy the land subject to the vendor's rights. The mortgagee would either purchase the land himself or be paid out of the proceeds of the sale. This second option is, of course, highly risky, because if the vendor is able to invoke forfeiture promptly, the purchaser at the vendee's mortgagee's foreclosure sale may simply be buying nothing.

Very often, mortgagees of a vendee's interest make the mistake of taking an assignment of the vendee's interest and a quitclaim deed from the vendee as security for the loan to the vendee. This transaction, of course, will be treated substantively as a mortgage.<sup>113</sup> The problem is that the use of such documents means that the mortgagee's second option, foreclosure of his mortgage, must be accomplished by a costly and time-consuming judicial action. This is because the assignment and quitclaim deed will contain no power of sale, so that even if the particular jurisdiction permits nonjudicial foreclosure, the mortgagee could not utilize that remedy. Thus, if a mortgage on a vendee's interest is desired and if the applicable jurisdiction permits nonjudicial foreclosure, the mortgagee of the vendee should utilize a mortgage or deed of trust with an express power of sale instead of the assignment and quitclaim type documents.

## V. CONCLUSORY OBSERVATIONS

Traditionally, the forfeiture remedy available under installment land contracts has involved substantial risks for vendees and considerable benefits for vendors. In modern practice, however, the risk allocation has changed. To be sure, vendees under installment contracts may suffer severely when forfeiture occurs. They may also experience title problems that would not arise under a purchase money mortgage. But the use of installment land contracts also involves serious risks for vendors.

Vendors may also have to contend with problems of title. In some jurisdictions, a defaulting vendee may actually be able to demand a greater amount of money to relinquish his interest than

---

113. See *Kendrick v. Davis*, 75 Wash. 2d 456, 452 P.2d 222 (1969); Cunningham & Tischler, *Disguised Real Estate Security Transactions as Mortgages in Substance*, 26 RUTGERS L. REV. 1 (1972).

he has invested in the property. The alternative for a vendor seeking to remove a cloud on his title may be a costly quiet title action. Problems of this nature can be absolutely avoided only when the vendee completely fails to assert his rights. Given the increasing availability of legal services to the poor, however, it is likely that such rights will be asserted with increasing vigor in the future.

Beyond these problems with title, however, is a more basic difficulty for vendors. Simply stated, the contractual provision for forfeiture may be unenforceable in many situations. Given the various judicial approaches seeking to mitigate the harshness of forfeiture, the enforcement of the remedy will generally be uncertain at best. Except in those states that have enacted statutes approving forfeiture after a specified grace period has elapsed, vendor reliance on contractual forfeiture provisions is nothing short of foolish. Even in those states that regulate forfeiture by statute, however, the risk of a holding of unconstitutionality remains.

In view of the risks involved in land contracts in modern practice and the trend toward limiting the forfeiture remedy, the land contract should become an increasingly unattractive vendor financing option. As the undesirability of the land contract becomes more apparent, the alternative use of the mortgage or deed of trust should become more appealing to vendors. This will at least be true in those states that have statutorily provided for an expeditious and constitutional method of foreclosure. State legislatures that have not yet enacted statutes approving power of sale foreclosures that comply with due process standards should do so.<sup>114</sup> The enactment of such statutes will encourage a shift away from installment contracts and toward mortgages and trust deeds—a shift that will promote the interests of vendors and vendees while it reduces the risks to both.

---

114. For examples of recent attempts to create nonjudicial foreclosure procedures that will be quick, inexpensive, and constitutional, see WASH. REV. CODE ANN. §§ 61.24.010-.130 (Supp. 1976), discussed in Leen & Gose, *Non-judicial Deed of Trust Foreclosures*, WASH. ST. B. NEWS, July/Aug. 1975, at 36; UNIFORM LAND TRANSACTIONS ACT § 3-501(f); S. 2507, 93d Cong., 1st Sess. §§ 401-419, 119 CONG. REC. 32,166, 32,175-76 (1973). Each of these attempts greatly expands traditional notice provisions, but none has hearing requirements extensive enough to meet constitutional demands. An adequate hearing can, however, be built into a power of sale foreclosure statute without undue difficulty. See Nelson, *Constitutional Problems with Power of Sale Foreclosure: A Judicial Dilemma*, to be published in 43 MO. L. REV. (1978).