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I. INTRODUCTION

My interest in the contract for deed goes back to early childhood in Minnesota. I can remember as a child of six or seven listening to my parents bemoan the fact that they were purchasing their first home on such a contract. They envied their neighbors, most of whom were "lucky" enough to be financing their house purchases with mortgages. My parents were unable to come up with a large enough down payment for a conventional mortgage. Nor did my father qualify for a "no-down-payment" loan guaranteed by the Veterans Administration. Instead, the seller agreed to take back a contract for deed. Why were they so apprehensive about doing this? Why did they find a mortgage comparatively so appealing? While I clearly did not understand the details, I can remember my mother telling me that if they ever had trouble making the payments, they would lose the house faster with a contract for deed than with a mortgage. A few years later my parents were clearly happy and relieved when a somewhat lower contract balance and market appreciation enabled them to refinance the house with a traditional mortgage. I next remember confronting the contract for deed in Professor Terry Sandalow's second year law school course in Real Estate Transactions and being both intrigued and confused by whether it should be governed by its contract language form or its mortgage financing substance. Little did I know then that within a few years it would assume a major role in my professional career as a lawyer and academic.[1]

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1. *See* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW §§ 3.26-.37 (3d ed. 1994) [hereinafter REAL ESTATE FINANCE LAW]; Grant S. Nelson, *Use of Installment Land Contracts in Missouri—Courting Clouds on Titles*, 33 J. MO. BAR 161 (1977); Grant S. Nelson & Dale A. Whitman, *Installment Land Contracts—A National Viewpoint*, 1977 BYU L. REV. 541; Grant S. Nelson & Dale A. Whitman, *Installment Land Contracts—The National Scene Revisited*, 1985 BYU L. REV. 1.

For most of this century, the contract for deed has been the most pervasively used substitute for the mortgage or deed of trust. First, some terminology is important. Depending on the jurisdiction, this financing device is also called an "installment land contract," an "installment sale contract," a "bond for deed" or a "long-term land contract." A contract for deed is not an "earnest money contract" or a "binder." The latter device is simply an executory contract for the sale of land and does not serve a mortgage function; rather, it governs the rights and obligations of the parties during the short period between the time of its signing and the closing of the transaction. At the closing, a deed is delivered to the purchaser who usually executes and delivers a purchase money mortgage to an institutional lender or, in some situations, to the vendor. Indeed, it is usually at this stage that a contract for deed is executed to serve as a substitute for a mortgage to the vendor. While a precise definition of the contract for deed is elusive, it is perhaps appropriately described as "a contract for the purchase and sale of real estate under which the purchaser acquires the immediate right to possession . . . and the vendor defers delivery of a deed until a later time to secure all or part of the purchase price."[2]

From an economic perspective, the contract for deed thus serves the same purpose as a vendor purchase money mortgage. Both devices provide security for a seller of real estate who finances all or a part of the purchase price. In a typical contract for deed transaction, the vendee takes possession and makes monthly payments of principal and interest on the contract obligation until the contract is paid off. This amortization period may vary from a few years to twenty years or more. The vendor conveys legal title to the vendee only after the full contract obligation has been satisfied. During this contract period, the vendee is required to perform the normal obligations associated with being a mortgagor in possession. These include payment of real estate taxes, maintenance of casualty insurance, and keeping the property in good repair.

Vendors have traditionally favored contracts for deed over purchase money mortgages or deeds of trust. Why this

2. RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 3.4(a) (1997).

preference for a nontraditional financing device when it serves the same economic function as its well-established mortgage counterpart? The answer lies in the forfeiture clause found in virtually every contract for deed. This language makes "time of the essence" and provides that when a purchaser fails to comply with the terms of the contract, the vendor has the option to declare it terminated, to retake possession of the premises, and to retain the purchaser's prior payments as liquidated damages. To the extent that the forfeiture provision is effective, the contract for deed enables the vendor to avoid the purchaser's equity of redemption, the foreclosure process, and other traditional protections afforded to debtors under the law of mortgages.

This attempt to avoid the consequences of mortgage law is hardly unique in our legal history. For example, lenders for centuries have used as a security device an absolute deed from the borrower to the lender that contains no defeasance language. This deed is accompanied by an oral or written side agreement by which the lender-grantee agrees to reconvey the property to the borrower if the debt is satisfied. If, on the other hand, the borrower fails to pay as promised, the parties agree that the deed becomes absolute, and the borrower's interest in the land is terminated. Under the "conditional sale" variant on the absolute deed transaction, the deed may be accompanied by a second written document which purports to give the borrower-grantor either the option or contractual obligation to purchase the real estate described in the absolute deed. Courts have long been unsympathetic to these two attempts to circumvent the law of mortgages. Indeed, they have long permitted the grantor in each case to establish by parol evidence that the parties intended a security transaction and, where this burden is satisfied, treated the arrangement as a mortgage.[3]

The contract for deed did not initially confront such judicial disapproval. Indeed, at one time its forfeiture provision was

3. *See* REAL ESTATE FINANCE LAW, *supra* note 1, §§ 3.4-.19; RESTATEMENT, *supra* note 2, §§ 3.2-.3.

routinely enforced by many jurisdictions.[4] This apparent favoritism for the contract for deed has been described as follows:

> Enforcement presumably was rooted in a desire to effectuate the parties' intent, even though forfeiture often caused a substantial loss to the purchaser and afforded a windfall gain to the vendor. . . . Nevertheless, courts tended to de-emphasize the mortgage-like character of the contract for deed and to treat it instead as an executory contract for the sale of land.[5]

Why was this the case? After all, as one recent decision emphasized, "[i]f [the absolute deed] kind of forfeiture may not be enforced by the [grantee] according to the express terms of the agreement, why, then, should a forfeiture under a [contract for deed] be so enforced?"[6] There are at least three plausible reasons for this disparate treatment. First, in the absolute deed and conditional sale setting, the lender engages in a form of subterfuge. Courts may be intuitively hostile to attempts to use the language of sale to conceal a security transaction. With the contract for deed, on the other hand, the security intent is clear from the face of the document. So, too, is the intent to avoid the consequences of mortgage law. Perhaps, to some ironic degree, the tendency to enforce the contract for deed reflected a judicial reward for candor. One problem with this latter argument, of course, is that truthfulness never worked in standard mortgage settings, where attempts to have the mortgagor openly waive his or her equity of redemption were uniformly rejected as invalid "clogs" on that equity.[7]

A second and more likely reason for this judicial acceptance of the contract for deed and its forfeiture provision is historical. The contract for deed was a product of the second half of the

4. *See* Eric T. Freyfogle, *Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures*, 1988 DUKE L.J. 609, 610. According to Freyfogle:

> Decades ago the law was relatively clear. Courts enforced forfeiture clauses with few questions asked, except perhaps when a forfeiture was shocking in amount or otherwise grossly unfair. A vendor with an enforceable forfeiture clause could declare a default and forfeiture when a purchaser missed a payment. After the declaration, the vendor could recover his property and retain all of the purchaser's payments.

Id. (citations omitted).

5. RESTATEMENT, *supra* note 2, § 3.4 cmt. a.

6. Braunstein v. Trottier, 635 P.2d 1379, 1382 (Or. Ct. App. 1981).

7. *See* REAL ESTATE FINANCE LAW, *supra* note 1, § 3.1.

nineteenth century, a period when a "freedom-of-contract" perspective and its related laissez faire economic philosophy were making a substantial impact on American jurisprudence.[8] Not only were courts less prone to invoke equitable discretion during this period,[9] they generally thought "in terms of free-willing individuals entirely able to look after themselves rather than in terms either of classical equity or of a socialized law taking a realistic account of inequalities of economic position and bargaining power."[10]

Finally, and equally important, the contract for deed originated before the development and wide-spread adoption of power of sale foreclosure and similar nonjudicial counterparts. Judicial foreclosure, the only remedy then available to mortgagees, required a full court proceeding with the joinder of all interested junior interests and was, and still is, both time-consuming and costly.[11] In all likelihood, when the contract for deed came on the scene it was accepted as an innovative and efficient new land financing technique.

8. *See* Sidney P. Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II*, 44 YALE L.J. 754, 776 (1935) ("The doctrine that equity will enforce forfeiture provisions in land contracts where time is expressly made of the essence developed in this country during the latter half of the nineteenth century, at a time when extreme ideas as to 'freedom of contract' were influencing American judicial decisions in every field.") (citations omitted).

9. *See* Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905).

10. Simpson, *supra* note 8, at 776. As Professor Simpson described this period:

> [T]he classical chancellor who created the equity of redemption in the face of the strict law and who said that "necessitous men are not . . . free men," had given place to judges who regarded individual freedom of contract as fundamental in any civilized system of law and enforced the harshest of contract provisions without hesitation or searching of conscience unless constrained by binding precedent to relieve against them. The court of conscience had become a court strictissimi juris. In such an atmosphere, it was easy enough to put aside the tradition that equity would not enforce a forfeiture except in so far as that tradition had been enbalmed in direct precedents, and to develop a line of decisions holding that contracts for the sale of land which expressly made time of the essence and provided for the forfeiture of all payments theretofore made in the event of default would be enforced according to their literal terms, especially where prompt payment of all installments was made an express "condition precedent" to the purchaser's rights under the contract.

Id. at 777 (citations omitted). For examples of early cases reflecting this perspective, see *Heckard v. Sayre*, 34 Ill. 142 (1864); *Iowa R.R. Land Co. v. Mickel*, 41 Iowa 402 (1875); *Brown v. Ulrich*, 67 N.W. 168 (Neb. 1896).

11. *See* REAL ESTATE FINANCE LAW, *supra* note 1, at 491.

This Article, however, takes the position that, whatever its value historically, the contract for deed has no place in a modern land financing system. In so doing, this Article is a brief for the position of the *Restatement (Third) of Property (Mortgages)* that "[a] contract for deed creates a mortgage."[12] This Article will first explore the myriad approaches contemporary courts apply to the contract for deed. This examination will demonstrate that while they have reached no analytical or practical consensus, courts and legislatures have increasingly been focusing on this device with a mortgage law analogy in mind. This Article then will explore the core idea of the *Restatement* approach and its potential impact on these issues. Next, this Article will explore how the contract for deed raises a variety of additional important problems and how adoption of the *Restatement* approach will resolve them. These difficult issues include the following: title problems and related practical difficulties created by the contract for deed; the "executory contract" problem in bankruptcy; the rights of judgment creditors of contract for deed parties; and the complex problems confronting secured lenders in advancing credit to contract vendors or purchasers. Finally, the Article will demonstrate that continued use of the contract for deed is simply unnecessary because the vendors' need for a safe, efficient, and timely mechanism for dealing with delinquent purchasers can be satisfied within the confines of mortgage law. Indeed, the expanding state adoption of power of sale foreclosure increasingly obviates continued reliance on the contract for deed. At most, the Article will conclude, some slight modification of power of sale statutes may be necessary to make foreclosure more timely and efficient against purchasers who have paid only a small percentage of the mortgage obligation.

II. THE FORFEITURE CONCEPT

As noted above, the *raison d'etre*—the heart and soul—of the contract for deed is the forfeiture provision. Yet surprisingly, there is no clear consensus for its underlying rationale. Professor Freyfogle identifies two contradictory bases, the "forfeiture as rescission" and "forfeiture as contract

12. RESTATEMENT, *supra* note 2, § 3.4(b).

termination" theories.[13] Under the rescission approach, in the event of default, the vendor and purchaser are restored to their positions prior to the execution of the contract. As Professor Freyfogle explains,

> [t]he vendor is entitled to the property back in its original condition. He need not shoulder the loss if the property has declined in value, but he cannot reap the gain of any increase. The purchaser is entitled to the return of all payments and to the value of any improvements made to the property. Because the purchaser enjoyed the use of the property during the contract period, the purchaser must return this benefit to the vendor. As it cannot be returned in kind, the purchaser instead is obligated to pay rent. . . . [T]he vendor is not entitled to the benefit of his contractual bargain, if any, since the goal is to put the parties in their pre-contract positions. By the same token, the purchaser is also unable to claim any contract bargain benefits.[14]

Under the forfeiture as contract termination theory, the vendor terminates the contract, but it is not "unwound." Rather,

> the vendor is absolved of the duty of future performance under the contract—delivery of the deed. He also regains the property, since the purchaser's right to possession is entirely dependent upon the continued existence of the contract. The vendor can rightfully retain the purchaser's payments, in this case because they are viewed as liquidated damages.[15]

Professor Freyfogle observes that the two theories potentially provide useful alternatives for assessing the fairness of particular forfeitures and aiding courts in calculating the vendor's damages and the purchaser's restitution rights.[16] Professor Freyfogle also notes, however, that courts rarely distinguish between the two approaches and confuse elements of both.[17] Nevertheless, since contract for deed forms routinely use "forfeiture as contract termination" language,[18] it is fair to

13. *See* Eric T. Freyfogle, *Installment Land Contracts*, *in* 15 RICHARD R. POWELL ON REAL PROPERTY § 84D.03[2], 84D.31 (1997).
14. *Id.*
15. *Id.*
16. *See* Freyfogle, *supra* note 4, at 638-39.
17. *See id.*
18. *See, e.g.*, MINN. STAT. ANN. § 507, No. 54-M (West 1990).

say that most courts enforcing forfeiture provisions are more attuned to, and implicitly accepting of, the latter approach.

Whatever the underlying rationale, do modern courts generally enforce contract for deed forfeiture provisions in the absence of specific statutory authorization? According to one commentator, "[n]ot 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 the facts of the particular case."[19] The interplay of these latter factors make predictions concerning forfeiture especially problematic. True, recent decisions sometimes uphold forfeitures.[20] However, many of these cases involve purchasers who were repeatedly in default and who had paid a relatively insubstantial proportion of the contract price.[21] Moreover, in some cases, the "proforfeiture" result may be more related to the remedy sought by the purchaser than to a general judicial endorsement of the forfeiture concept.

The latter observation is clearly supported by *Russell v. Richards*,[22] a leading New Mexico Supreme Court decision. In that case the Richardses, as vendors and purchasers, executed a contract for deed for approximately $49,000. Sometime later, purchasers sold and assigned their interest to Russell, who paid $11,188 to purchasers in cash and assumed a $37,938 balance on the contract. After making seventy-two monthly payments to the Richardses, which reduced the principal of the contract to $26,504, Russell defaulted and the Richardses invoked

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19. Garrett Power, *Land Contracts as Security Devices*, 12 WAYNE L. REV. 391, 416 (1966) (citations omitted).

20. *See, e.g.*, Hicks v. Dunn, 622 So. 2d 914 (Ala. 1993); Smith v. MRCC Partnership, 792 So. 2d 301 (Ark. 1990); Grombone v. Krekel, 754 P.2d 777 (Colo. Ct. App. 1988); Long v. Smith, 776 S.W.2d 409 (Mo. Ct. App. 1989); Burgess v. Shiplet, 750 P.2d 460 (Mont. 1988); Russell v. Richards, 702 P.2d 993 (N.M. 1985); White v. Hughes, 867 S.W.2d 846 (Tex. Ct. App. 1993); Wilson v. Witt, 952 P.2d 214 (Wyo. 1998); *see also* Elizabeth M. Provencio, Note, *Moving from Colonias to Comunidades: A Proposal for New Mexico to Revisit the Installment Land Contract Debate*, 3 MICH. J. RACE & L. 283, 297 (1997) (recognizing that New Mexico upholds forfeitures).

21. *See, e.g.*, Smith v. MRCC Partnership, 792 So. 2d 301 (Ark. 1990) (upholding forfeiture after five-year default where purchaser had paid approximately 10% of the contract price); Grombone v. Krekel, 754 P.2d 777 (Colo. Ct. App. 1988) (enforcing forfeiture where purchaser defaulted repeatedly and where equity in real estate equaled approximately 10% of fair market value); Long v. Smith, 776 S.W.2d 409 (Mo. Ct. App. 1989) (approving forfeiture where purchaser's contract payments were proportionate to the reasonable rental value of the premises).

22. 702 P.2d 993 (N.M. 1985).

forfeiture. By that time the real estate had increased in value to $82,735. Russell then filed an action for damages against the Richardses for damages resulting from the default. The trial court held that Russell's contract interest was forfeited, but it also determined that the forfeiture shocked the conscience of the court. It entered a judgment for damages in favor of Russell for $56,724, representing her equity in the real estate. On appeal, the Supreme Court of New Mexico reversed the damages award. It held that the trial court abused its discretion in failing to give full effect to the forfeiture. While the supreme court determined that it was proper for the trial court to take into account Russell's reduction of the contract principal of $10,782 over six years, it was inappropriate to credit her with the $11,188 down payment she made to the original purchasers when she assumed the contract. In the supreme court's view, since this latter payment did not go to the Richardses, it could not count as a reduction of contract principal. More important, according to the supreme court, the trial court awarded damages against parties—the Richardses—who were not wrongdoers:

> We also agree with the Richardses that the trial court erred in awarding damages for Russell's loss of her interest under the contract. In order to recover damages there must be a right of action for a wrong inflicted on the party claiming damages; damage without wrong does not constitute a cause of action. Russell's loss of her interest under the contract did not result from a wrong committed by the Richardses, but from her default under the real estate contract for failure to make timely payment. The usual consequence of default, as clearly stated in the contract assumed by Russell, is forfeiture of all interest; only unusual equitable circumstances create an exception to that rule.[23]

Does *Russell* stand for the proposition that forfeiture will be enforced against a purchaser who has over a sixty-eight percent equity in the contract real estate? Hardly. Assume that the Richardses had foreclosed the contract as a mortgage and that they purchased at the foreclosure sale for $26,504, the principal amount owing on the contract obligation. Would Russell be

23. *Id.* at 996 (citations omitted).

entitled to a judgment against the Richardses for over $56,000 (the approximate difference between the foreclosure sale price and the fair market value of the land)? Surely not. No mortgage law principle enables a foreclosed mortgagor to obtain a judgment against a mortgagee-purchaser for her lost equity. At most, she would have the extremely remote possibility of having the sale set aside because of a grossly inadequate price.[24]

On the other hand, suppose that Russell, as a tardy purchaser, had instead brought an action against the Richardses for specific performance and, in so doing, tendered the balance of the contract price into court. To use a mortgage law analogy, Russell, a tardy mortgagor, would be filing suit to redeem. Would the New Mexico Supreme Court have denied specific performance and, in so doing, enforced the forfeiture provision under such circumstances?[25] It seems extremely unlikely. In the last analysis, what doomed Russell was the extreme nature of the remedy she sought.

III. STATUTORY REGULATION: INSTITUTIONALIZING FORFEITURE

Several states have attempted to ameliorate some of the harshness of contract for deed forfeiture through legislation.[26] Most such statutes mandate "grace periods" during which the purchaser can avoid forfeiture by payment of contract arrearages.[27] In addition, they frequently provide for nonjudicial procedures by which the vendor may terminate the purchaser's contract rights.[28] The Iowa statute is illustrative of this approach.[29] It provides that contracts for deed may be cancelled only by following a specified procedure. The vendor must afford written notification to the defaulting purchaser and to the person in possession of the real estate; the notice must

24. *See* RESTATEMENT, *supra* note 2, § 8.3(a).

25. *See infra* notes 39-45 and accompanying text.

26. *See* ARIZ. REV. STAT. §§ 33-741 to -749 (1996); IOWA CODE ANN. §§ 656.1-.7 (West 1987); MINN. STAT. ANN. § 559.21 (West 1990); N.D. CENT. CODE §§ 32-18-01 to -06 (1996); Ohio Rev. Code Ann. §§ 5313.01-.10 (Anderson 1989); TEX. PROP. CODE ANN §§ 5.061-.063 (West 1983); WASH. REV. CODE ANN. §§ 61.30.010-.911 (West 1988).

27. *See, e.g.*, IOWA CODE ANN. §§ 656.2, .4 (West 1987); MINN. STAT. ANN. § 559.21 (West 1990); OHIO REV. CODE ANN. § 5313.05 (Anderson 1989).

28. *See supra* note 25.

29. *See* IOWA CODE ANN. §§ 656.1-.7 (West 1987).

identify the real estate, identify the specific provisions of the contract that are in default, and inform the purchaser that he or she has thirty days in which to correct the default. Assuming the purchaser complies within this time period, the forfeiture is avoided. Absent compliance, the notice of forfeiture, together with proof of service, may be recorded to constitute constructive notice of the completed forfeiture. As a result, the real estate and all prior payments are forfeited to the vendor.[30]

These statutes serve two separate and distinct functions. The grace periods clearly temper the harshness of forfeiture. On the other hand, they also put the legislative *imprimatur* on the forfeiture concept. This approach largely avoids the uncertainty concerning forfeiture that is evident in many of the states that leave contracts for deed enforcement to the judiciary. Simply stated, such statutes tell a vendor: "Comply with the statute and forfeiture is enforceable." To be sure, courts in such states sometimes suggest that judicial relief from an "unconscionable forfeiture" may be available.[31] Moreover, statutory forfeiture has occasionally been denied in certain minor, nonmonetary defaults.[32] Nevertheless, judicial intervention in such statutory proceedings "tends to focus more on technical statutory compliance and interpretation than on an independent analysis of the fairness of forfeiture."[33] Statutory compliance also generally produces a marketable title for the vendor.[34]

IV. JUDICIAL LIMITATIONS ON THE FORFEITURE REMEDY

Thus far, we have seen that forfeiture receives, at best, limited support in states that do not regulate contracts for deed legislatively. In statutory regulation states, on the other hand, forfeiture is institutionalized and routinely available, albeit ameliorated to some degree. For the most part, however, courts have increasingly refused to enforce against a defaulting

30. *See id.*

31. *See, e.g.*, Jensen v. Schreck, 275 N.W.2d 374 (Iowa 1979).

32. *See, e.g.*, Lett v. Grummer, 300 N.W.2d 147 (Iowa 1981) (finding forfeiture impermissible where failure to make minor repairs did not threaten security).

33. REAL ESTATE FINANCE LAW, *supra* note 1, at 72.

34. *See* Nelson, supra note 1, at 164.

purchaser forfeiture clauses that they have deemed unreasonable or inequitable. These courts have utilized a variety of techniques in this process. A growing number of courts explicitly or implicitly recognize that a tardy purchaser has the functional equivalent of a mortgagor's *equity of redemption*.[35] Where this is the case, courts permit the purchaser to tender the balance of the purchase price in a suit or counterclaim for specific performance. This approach, however, does not give the purchaser who is unwilling or unable to redeem the right to compel foreclosure of the contract. Even where forfeiture is upheld, courts temper it by extending to the defaulting purchaser a *restitution* remedy.[36] This gives the purchaser the right to recoup the contract payments to the extent that they exceed the damages caused by the purchaser's default. Finally, some courts have taken the ultimate step of simply treating the contract for deed as a mortgage.[37] Where this is the case, the purchaser has both a mortgagor's equity of redemption and the right to insist that it be terminated only through foreclosure. This approach is adopted by the *Restatement*.[38]

Of course, the foregoing process has hardly been tidy or analytically pleasing. Some courts simply have not considered forfeiture in all of the above remedial contexts and many of their opinions are far from theoretically precise. Courts, for example, may grant a tardy purchaser specific performance and, in doing so, apply only contract analysis. The equity of redemption is simply not mentioned. While many courts use an almost pure mortgage law analysis, others employ a confusing amalgam of contract and mortgage law. Nevertheless, the trend is clear. In the absence of statutory sanction of forfeiture, courts display an increasing willingness to soften the impact of forfeiture or to avoid it altogether. The following sections examine these judicial approaches more closely.

35. *See infra* Part IV.A.
36. *See infra* Part IV.B.
37. *See infra* Part IV.C.
38. *See* RESTATEMENT, *supra* note 2, § 3.4(b).

A. Recognition of an Equity of Redemption

Numerous courts have held that a purchaser in default has the right to defeat forfeiture by tendering the contract balance.[39] While these cases often involve purchasers who have already paid a substantial part of the contract obligation,[40] some purchasers have been successful even though their previous payments represent as little as 16% of contract amount.[41] Some courts condition specific performance on the tardy purchaser being free of bad faith or gross negligence.[42] However, this good faith requirement has specifically been rejected in *Peterson v. Hartell*,[43] a leading California Supreme Court decision. In that case the purchasers had been in default for several years and their conduct could accurately be described as both wilful and grossly negligent. In rejecting any role for trial court discretion, the supreme court held that

> a vendee who has made substantial payments on a land installment sale contract or substantial improvements on the property and whose defaults, albeit wilful, consist solely of failure to pay further amounts due, has an unconditional right to a reasonable opportunity to complete the purchase by paying the entire remaining balance, plus damages before the seller is allowed to quiet title.[44]

By permitting the tardy purchaser to tender the balance of the purchase price and acquire title to the land, courts in effect are going a long way toward recognizing an equity of redemption in the purchaser. But note that most of the foregoing courts require as a condition for redemption one or both of the following: (1) that the purchaser be free of bad faith and gross negligence; and (2) that he or she have made either substantial payments on the contract or improvements to the premises. It is in these latter conditions that the foregoing

39. *See, e.g.*, Petersen v. Hartell, 707 P.2d 232 (Cal. 1985); White v. Brousseau, 566 So. 2d 832 (Fla. Dist. Ct. App. 1990); Jenkins v. Wise, 574 P.2d 1337 (Haw. 1978); Nigh v. Hickman, 538 S.W.2d 936 (Mo. Ct. App. 1976); *see* REAL ESTATE FINANCE LAW, *supra* note 1, at 100-06.

40. *See, e.g.*, Petersen v. Hartell, 707 P.2d 232 (Cal. 1985); Nigh v. Hickman, 538 S.W.2d 936 (Mo. Ct. App. 1976).

41. *See* Jenkins v. Wise, 574 P.2d 1337 (Haw. 1978).

42. *See* Curry v. Tucker, 616 P.2d 8 (Alaska 1980); Jenkins v. Wise, 574 P.2d 1337 (Haw. 1978).

43. 707 P.2d 232 (Cal. 1985).

44. *Id*. at 240.

cases stray from the mortgage law analogy. Mortgage law simply gives a tardy mortgagor the right to redeem until validly foreclosed—issues of his bad faith, gross negligence or failure to make substantial payments or improvements are irrelevant.[45]

B. Restitution to the Purchaser

Assume that a jurisdiction has not yet adopted the foregoing equity of redemption approach or that the purchaser is unable or unwilling to redeem. Here, a growing number of courts give the purchaser a "restitution" remedy. They hold that forfeiture may not be "free" and that the vendor is obligated to return the payments she has received to the extent that they exceed her actual damages.[46] Such damages normally consist either of the vendor's loss of bargain or the fair rental value of the real estate during purchaser's possession, plus incidental damages such as repairs and costs of resale.[47] Of course, this approach may be less pleasing to the purchaser than it seems. Frequently restitution is denied because the vendor's damages exceed purchaser's payments.[48] Moreover, even where the converse is true, some courts deny recovery to the purchaser unless the excess over the vendor's damages is "unconscionable" or at least "substantial."[49]

The restitution remedy has seen its most significant development in California. Note first that under *Venable v. Harmon*,[50] a vendor may not obtain a deficiency judgment

45. *See* RESTATEMENT, *supra* note 2, §§ 3.1, 6.4.

46. *See, e.g.*, Moran v. Holman, 501 P.2d 769 (Alaska 1972); Petersen v. Hartell, 707 P.2d 232 (Cal. 1985); K.M. Young & Assocs. v. Cieslik, 675 P.2d 793 (Haw. Ct. App. 1983); Howard v. Bar Bell Land & Cattle Co., 340 P.2d 103 (Idaho 1959); Randall v. Riel, 465 A.2d 505 (N.H. 1983); Bellon v. Malnar, 808 P.2d 1089 (Utah 1991); Weyher v. Peterson, 399 P.2d 438 (Utah 1965).

47. *See, e.g.*, Honey v. Henry's Franchise Leasing Corp., 415 P.2d 833 (Cal. 1966); Park Valley Corp. v. Bagley, 635 P.2d 65 (Utah 1981); Weyher v. Peterson, 399 P.2d 438 (Utah 1965).

48. *See, e.g.*, Park Valley Corp. v. Bagley, 635 P.2d 65 (Utah 1981); Strand v. Mayne, 384 P.2d 396 (Utah 1963).

49. *See, e.g.*, Clampitt v. A.M.R. Corp., 706 P.2d 34, 40 (Idaho 1985) ("When comparing the $747,100 in actual damages to $752,874 [purchaser's payments], the amount forfeited under the liquidated damages clause in this case appears fair and reasonable."); Warner v. Rasmussen, 704 P.2d 559 (Utah 1985) (holding where purchaser's payments were six percent greater than the vendor's damages, it was not "unconscionable" to deny restitution to the purchaser).

50. 43 Cal. Rptr. 490 (Cal. Ct. App. 1965).

irrespective of his loss. Moreover, California case law compels the vendor to return to the purchaser any amount paid in excess of the vendor's damages. In *Freedman v. Rector, Wardens and Vestrymen of St. Mathias Parish*,[51] for example, the California Supreme Court held that it violated state public policies against forfeitures, penalties and unjust enrichment to deny restitution, even in this case where the purchaser was wilfully in default. Later, *Peterson v. Hartell* reaffirmed that forfeiture "should become effective only upon [vendor's] payment of the sums due to [purchaser] as restitution."[52]

What is the restitution amount to which the California purchaser is entitled? Under the reasoning of the supreme court in *Honey v. Henry's Franchise Leasing Corp.*,[53] the vendor apparently has two options for measuring his or her damages. One option is to use the "rental value" (giving restitution of the amount by which the purchaser's payments exceed the fair rental value of the premises while the purchaser was in possession). The alternative is the "difference value" (giving restitution of the amount by which the purchaser's payments exceed the difference between the current market value and the higher contract price).[54] The latter approach is likely to be favored only in falling real estate markets. As Professor Hetland aptly pointed out, "rarely over the past few decades has the value of the property dropped so that the vendor prefers difference value to his alternative—rental value."[55] In any event, the choice is the vendor's, according to *Honey*, because permitting the purchaser to make it would in effect give all contract purchasers an option to convert their contracts into leases—an advantage the court hardly thought appropriate.[56]

C. Treatment as a Mortgage

As noted earlier,[57] several courts recognize an equity of redemption in the purchaser, albeit subject to certain limitations. These cases generally give the purchaser in default

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51. 230 P.2d 629 (Cal. 1951).
52. 707 P.2d 232, 242 (Cal. 1985).
53. 415 P.2d 833 (Cal. 1966).
54. *See id.* at 834.
55. JOHN R. HETLAND, SECURED REAL ESTATE TRANSACTIONS 52 (1974).
56. *See Honey*, 415 P.2d at 834.
57. *See supra* notes 39-45 and accompanying text.

the right to redeem by paying off the contract balance. However, a growing number of jurisdictions have taken the next logical step and largely concluded that contracts for deed must be governed both procedurally and substantively by the law of mortgages.[58] Under this approach, the purchaser who is unable or unwilling to redeem has the right

> to have the value of the land tested at a public foreclosure sale. If the property sells for more than the contract price, the purchaser has the right to the surplus. If the sale yields less than the contract debt the vendor, unless prohibited by statute, is entitled to a deficiency judgment.[59]

The judicial movement toward treating the contract for deed as a mortgage is most developed in Indiana. The leading case is *Skendzel v. Marshall*.[60] In that case the vendor sought a judicial declaration of forfeiture of a defaulting purchaser's interest where $21,000 of the $36,000 of the contract price had already been paid. In ordering that the contract be foreclosed in accordance with Indiana mortgage procedure, the Indiana Supreme Court stated that "[c]onceptually . . . 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."[61] The court limited forfeiture to cases of abandoning purchasers or to situations where a minimal amount has been paid on the contract and the purchaser seeks to retain possession while the vendor is making expenditures for taxes, insurance, and maintenance.[62]

Over the past two decades *Skendzel* has become firmly entrenched in Indiana law. Numerous appellate decisions either uphold or require judicial foreclosure of contracts for deed.[63] While most of these cases involve purchasers who have

58. *See* Kubany v. Woods, 622 So. 2d 22 (Fla. Dist. Ct. App. 1993) (dictum); Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973); Sebastian v. Floyd, 585 S.W.2d 381 (Ky. 1979); Bean v. Walker, 464 N.Y.S.2d 895 (App. Div. 1983); *see also* OKLA. STAT. ANN. tit. 16, § 11A (West 1983).

59. RESTATEMENT, *supra* note 2, § 3.4 cmt. b(3).

60. 301 N.E.2d 641 (Ind. 1973).

61. *Id.* at 646.

62. *See id* at 650.

63. *See* Looney v. Farmers Home Admin., 794 F.2d 310 (7th Cir. 1986); Nelson

made substantial reductions of contract principal, there are decisions mandating foreclosure where contract payments have been relatively minimal.[64] To be sure, a few past appellate decisions had affirmed forfeitures where there was significant principal reduction, but purchasers in those cases had committed significant nonmonetary defaults as well.[65] Moreover, at least one decision finds violative of public policy contract language by which the purchaser purports to waive his *Skendzel* rights.[66] While contract for deed forfeiture has not been put to rest completely in Indiana, it is fair to say that its final requiem will likely come sooner rather than later.

The foregoing approach is also reflected in New York intermediate appellate courts. In *Bean v. Walker*,[67] the tardy purchasers had paid almost half of the original principal amount on a contract for deed for the sale of a house. In addition, they had made substantial improvements to the property. The New York Supreme Court, Appellate Division, finding "no reason why the instant vendees should be treated any differently than the mortgagor at common law," reversed a trial court forfeiture decree and held that "the contract vendors may not summarily dispossess the vendees of their equitable ownership without first bringing an action to foreclose the vendee's equity of redemption."[68] However, the court also adopted the *Skendzel* limitations on the purchaser's right to the foreclosure remedy.[69] Subsequent decisions have imposed

v. Gurley, 673 N.E.2d 497 (Ind. Ct. App. 1996); Parker v. Camp, 656 N.E.2d 882 (Ind. Ct. App. 1995); S.B.D. Inc. v. Sai Mahen, Inc., 560 N.E.2d 86 (Ind. Ct. App. 1990); Tidd v. Stauffer, 308 N.E.2d 415 (Ind. Ct. App. 1974); Fisel v. Yoder, 320 N.E.2d 783 (Ind. Ct. App. 1974).

64. *See* Looney v. Farmers Home Admin., 794 F.2d 310 (7th Cir. 1986) (holding that under *Skendzel*, foreclosure, not forfeiture, should have been ordered even though purchaser had paid only $640 of principal on a $250,000 contract price where purchaser had paid over $122,000 in interest and where appreciation in land value created an equity in excess of $9,000).

65. *See, e.g.*, Phillips v. Nay, 456 N.E.2d 745 (Ind. Ct. App. 1983) (sustaining forfeiture decree where less than 10% of contract price was paid and purchaser also failed to insure or pay real estate taxes).

66. *See* Parker v. Camp, 656 N.E.2d 882 (Ind. Ct. App. 1995) (holding contract provision which permitted the vendor to obtain forfeiture until purchaser had paid 75% of the contract price void as a matter of public policy and inconsistent with *Skendzel*).

67. 464 N.Y.S.2d 895 (App. Div. 1983).

68. *Id.* at 898.

69. *See id.*

mortgage treatment in cases involving lower percentage principal reductions than in *Bean*.[70]

Kentucky has given the most unqualified support for treating the contract for deed as a mortgage. In *Sebastian v. Floyd*,[71] the Kentucky Supreme Court reversed a trial court forfeiture decree where the purchaser had paid nearly fourty percent of the principal balance on a contract for deed for the sale of a house. The court detected a "modern trend . . . to treat land sale contracts as analogous to conventional mortgages, thus requiring a seller to seek a judicial sale of the property upon the buyer's default."[72] Consequently, the court determined "that a rule treating the seller's interest as a lien will best protect the interests of both buyer and seller. Ordinarily, the seller will receive the balance due on the contract, plus expenses, thus fulfilling the expectations he had when he agreed to sell his land."[73] While the court cited *Skendzel* with approval, its opinion did not include the limitations on the foreclosure remedy suggested by the Indiana decision.

The Florida decisions, while sometimes conceptually imprecise, point unmistakably to the conclusion that a contract for deed is a mortgage and that a purchaser has an absolute right to its foreclosure. While there is no direct holding of the Florida Supreme Court to that effect, support for this proposition is plentiful in other appellate decisions. Numerous Florida cases recognize a tardy purchaser's right to redemption or specific performance.[74] Moreover, vendors themselves appear to treat contracts for deed as mortgages because they routinely choose to foreclose them as mortgages.[75] More important,

70. *See* Madero v. Henness, 607 N.Y.S.2d 153, 155 (App. Div. 1994) (holding that even though purchasers who had paid almost 1/3 of the contract price were in default, "given that . . . their interest therein had not been foreclosed, the [trial court] was eminently correct in ordering [vendor] to accept the insurance proceeds in payment of [vendee's] remaining obligations under the contract."); Call v. LaBrie, 498 N.Y.S.2d 652 (App. Div. 1986) (finding that payment by purchaser of over 12% of the contract price deemed sufficient to convert contract for deed into an equitable mortgage).

71. 585 S.W.2d 381 (Ky. 1979).

72. *Id.* at 383.

73. *Id.* at 384.

74. *See, e.g.*, White v. Brousseau, 566 So. 2d 832 (Fla. Dist. Ct. App. 1990); Hoffman v. Semet, 316 So. 2d 649 (Fla. Dist. Ct. App. 1975); H & L Land Co. v. Warner, 258 So. 2d 293 (Fla. Dist. Ct. App. 1972).

75. *See, e.g.*, Ricard v. Equitable Life Assurance Soc'y, 462 So. 2d 592 (Fla. Dist.

numerous Florida cases, in a variety of contexts, state that a contract for deed is a mortgage and must be foreclosed as a mortgage.[76] For example, in reversing the trial court's termination of a purchaser's contract for deed interest, the District Court of Appeals stated unambiguously in *White v. Brousseau*[77] that

> [a]n equity judgment may not . . . "cancel" a land contract buyer's equitable title or otherwise decree a forfeiture of the buyer-debtor's interest in land in favor of the seller-creditor. The land contract must be foreclosed in equity in the same manner as provided for foreclosure of mortgages and the equitable title of the land contract buyer, like the legal title of a mortgagor, terminated by a judicial sale.[78]

Unlike *Skendzel*, the Florida cases contain no language authorizing forfeiture in exceptional circumstances such as purchaser abandonment of the premises or where the purchaser has made only nominal payments on the contract.[79]

On the other hand, the California Supreme Court thus far has declined to confer full mortgage treatment on contracts for deed. In *Peterson v. Hartell*,[80] considered earlier in this Article, the court specifically rejected the urging of its then chief justice to treat the contract for deed as a mortgage for all purposes by limiting the vendor's remedy against a purchaser in default to foreclosure by public sale irrespective of whether substantial payments on the contract had been made. Because the purchasers in *Petersen* had made substantial contract payments and were willing to tender the balance due, they did not seek the foreclosure remedy. Consequently, the court noted that it "twice declined similar invitations to consider such innovations" and concluded that "sound development of the law in this

Ct. App. 1985); Parise v. Citizens Nat'l Bank, 438 So. 2d 1020 (Fla. Dist. Ct. App. 1983); Earnest v. Carter, 368 So. 2d 428 (Fla. Dist. Ct. App. 1979).

76. *See, e.g.*, Kubany v. Woods, 622 So. 2d 22 (Fla. Dist. Ct. App. 1993); Luneke v. Becker, 621 So. 2d 744, 746 (Fla. Dist. Ct. App. 1993) ("[T]he vendor . . . has no right to repossess the property; the vendor must proceed with a foreclosure action. Accordingly, the proper remedy in this case was not ejectment, but a foreclosure action.") (citations omitted); White v. Brousseau, 566 So. 2d 832 (Fla. Dist. Ct. App. 1990).

77. 566 So. 2d 832 (Fla. Dist. Ct. App. 1990).

78. *Id.* at 835 (citation omitted).

79. *See supra* text accompanying notes 60-66.

80. 707 P.2d 232 (Cal. 1985).

complex area can best be assured by limiting our holdings to the issues necessarily presented for decision."[81] Nevertheless, given the variety of limitations the California Supreme Court has already imposed on the use of the contract for deed, the chances are strong that full mortgage treatment is just a matter of time.

Mortgage treatment for the contract for deed has also been the product of legislation. Oklahoma, in a sweeping and decisive statute enacted in 1976, provides that:

> All contracts for deed 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.[82]

The foregoing statute treats all contracts for deed entailing a transfer of possession to the purchaser as mortgages and thus makes the forfeiture remedy unavailable.[83] Finally, the Uniform Land Security Interest Act (ULSIA), promulgated in 1985 by the National Conference of Commissioners on Uniform State Laws, but as of this writing not enacted in any state, adopts mortgage treatment for the contract for deed.[84] It provides:

> [T]his [Act] applies to any transaction, regardless of its form, intended to create a security interest in real estate. This [Act] governs security interests created by contract or conveyance,

81. *Id*. at 234 n.1.

82. OKLA. STAT. ANN. tit. 16, § 11A (West 1983); see also TEX. PROP. CODE ANN. §§ 5.091-.092 (West 1983) (requiring power of sale foreclosure of contracts for deed where 40% or more of the price has been paid, the contract is on land that is the purchaser's residence, the land is in a low-income county, and the land is within 200 miles of an international border).

83. *See* Panama Timber Co. v. Barsanti, 633 P.2d 1258 (Okla. Ct. App. 1980). For a good analysis of the Oklahoma statute, see Drew Kershen, *Contracts for Deed in Oklahoma: Obsolete, But Not Forgotten*, 15 OKLA. CITY U. L. REV. 715, 752 (1990) ("If attorneys use contracts for deed to transfer Oklahoma real estate, they have not accomplished legally anything different, under Oklahoma law, than if they had used a deed and mortgage.").

84. UNIF. LAND SECURITY INTEREST ACT § 102, 7A U.L.A. § 102(b) (1997).

> including a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract . . . and any other consensual lien or contract for retention of title intended as security for an obligation.[85]

In sum, several states, including such influential states as New York, Florida, and California have in large measure opted to treat contracts for deed substantively and procedurally as mortgages. Whether the movement to mortgage treatment is judicially inspired or the product of legislation, there is every reason to expect it to continue, especially in states in which the contract for deed has not been institutionalized by statute.[86]

V. OTHER VENDOR REMEDIES

Even where forfeiture is available, it will sometimes be an undesirable option for the vendor. This will be the case where the real estate is now worth less than the contract price. Of course, were the vendor a mortgagee under a mortgage or deed of trust, or should a court choose to apply mortgage law to the contract, the alternative remedies normally would be clear. The vendor could opt to foreclose and if the foreclosure sale yields less that what was owing, a deficiency judgment would be available for the difference between the sale price and the obligation.[87] Alternatively, the vendor could sue on the contract obligation, obtain a judgment for that amount and collect the judgment out of all of the purchaser's assets, including the contract land.[88]

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85. *Id.* (second and third alterations in original) (citations omitted).

86. See, for example, *Grombone v. Krekel*, 754 P.2d 777, 778 (Colo. Ct. App. 1988), stating:

> The decision whether an installment land contract is to be treated as a mortgage is committed to the sound discretion of the trial court, based on the facts presented . . . . There are numerous Colorado decisions which have required that an installment land contract must be foreclosed as a mortgage. There are also many cases which have refused to treat such an agreement as a mortgage.
>
> The factors to be used by the trial court include the amount of the vendee's equity in the property, the length of the default period, the wilfulness of the default, whether the vendee has made improvements, and whether the property has been adequately maintained.

Id. (citations omitted).

87. *See* RESTATEMENT, *supra* note 2, § 8.2(b).

88. *See id.* § 8.2(a).

Unfortunately, in most states, the vendor's options will hardly be so unambiguous. Courts commonly apply either contract law[89] or a confusing combination of mortgage and contract principles.[90] Moreover, even in states that largely utilize a mortgage law analogue in interpreting contracts for deed, courts have yet to confront or work through the myriad of collateral issues and implications that a mortgage characterization creates. However, sometimes contract remedies permit a vendor to achieve indirectly what is usually available as a matter of course in the mortgage law context. Also, sometimes a court will allow a vendor to opt for a mortgage remedy where forfeiture and contract law are not to his liking—in effect, he is permitted to "have his cake and eat it too." What follows is a description and analysis of some of these nonforfeiture remedies.

A. Specific Performance for the Price

Suppose a contract purchaser goes into default because the value of the real estate has dropped significantly below the remaining contract balance. In other words, the purchaser, who is otherwise able to pay, has made a rational decision "not to throw good money after bad." From the vendor's perspective, the ideal remedy would be specific performance. Under this approach, the vendor tenders title to the land and seeks an equitable decree compelling the purchaser to pay the balance of the contract price. The analogue, of course, is a vendor's action for specific performance where a purchaser fails or refuses to perform under an earnest money contract for the sale of land.[91] In this latter setting, specific performance is almost always granted. Should this remedy also be routinely available in the contract for deed setting?

In fact, vendors are frequently successful in their quest for specific performance,[92] although, in a few cases, as in the ear

89. *See, e.g.*, First Nat'l Bank v. Cape, 673 P.2d 502 (N.M. 1983); Park Valley Corp. v. Bagley, 635 P.2d 65 (Utah 1981); Stonebraker v. Zinn, 286 S.E.2d 911 (W. Va. 1982).

90. *See* Thomas v. Klein, 577 P.2d 1153 (Idaho 1978); Ellis v. Butterfield, 570 P.2d 1334 (Idaho 1977).

91. *See* REAL ESTATE FINANCE LAW, *supra* note 1, at 96.

92. *See, e.g.*, Steinhoff v. Fisch, 847 P.2d 191 (Colo. Ct. App. 1992); Puziss v.

nest money context,[93] courts require the vendor to establish that the remedy at law is inadequate.[94] Where this remedy is available, the court enters a decree against the purchaser for the full contract balance which is collectible by a judicial sale of the purchaser's assets, including the contract property. Note, however, that the conceptual roadblocks to specific performance are more troublesome in the contract for deed setting than with respect to its earnest money contract counterpart. The latter contract, because it is executory, typically provides for the payment of the balance of the contract price on one closing date, while the contract for deed, as a long term financing device, is usually amortized in installments over a longer period of time. Consequently, when a purchaser under an earnest money contract defaults on the closing date, the contract can be treated as completely repudiated, and a specific performance decree for the full contract price is hardly conceptually difficult. On the other hand, when a contract for deed purchaser defaults, a suit for more than the past due installments can be problematic for the vendor. This is because many contracts for deed, unlike most mortgage documents, contain no acceleration clause which permits the vendor to declare the entire contract balance due and payable upon purchaser default. Where this is the case, the vendor may only be able to sue for the past due installments plus interest.[95] To be sure, a court may occasionally come to the vendor's rescue by applying the contract doctrine of anticipatory repudiation as a basis for acceleration.[96] Nevertheless, the absence of an acceleration provision surely presents a substantial obstacle for the vendor seeking specific performance.

Geddes, 771 P.2d 1028 (Or. Ct. App. 1989); Simon Home Builders, Inc. v. Pailoor, 357 N.W.2d 383 (Minn. Ct. App. 1984); SAS Partnership v. Schafer, 653 P.2d 834 (Mont. 1982).

93. *See* Perron v. Hale, 701 P.2d 198 (Idaho 1985); Suchan v. Rutherford, 410 P.2d 434 (Idaho 1966); Seabaugh v. Keele, 775 S.W.2d 205 (Mo. Ct. App. 1989); Centex Homes Corp. v. Boag, 320 A.2d 194 (N.J. Super. Ct. Ch. Div. 1974).

94. *See* Holman v. Hansen, 773 P.2d 1200 (Mont. 1989); Williamson v. Magnusson, 336 N.W.2d 353 (N.D. 1983).

95. *See* Rickel v. Energy Sys. Holdings, Ltd., 759 P.2d 876 (Idaho 1988).

96. *See* Carpenter v. Smith, 383 N.W.2d 248 (Mich. Ct. App. 1985).

B. Action for Damages

In theory, a contract for deed vendor, like his earnest money contract counterpart, should be able to sue the purchaser in default for damages for breach of contract.[97] Using the earnest money analogy, the vendor's damages should be measured by the difference between the contract balance and the fair market value of the property as of the date of the purchaser's breach.[98] However, the damages remedy may only be available where the purchaser has abandoned the land. This is the case because where forfeiture is necessary to regain the property, an action for damages could well be barred by the election of remedies doctrine,[99] an issue explored later in this Article.[100] Perhaps more important, the vendor faces a significant pragmatic problem—the factfinder (very often a jury) must be convinced that the property, as of the date of the breach, was worth less than the contract price. In other words, the vendor may be in the unenviable position of persuading the fact finder that he or she convinced the purchaser to enter into a "bad deal." Obviously, where a purchaser is capable of satisfying a judgment, the vendor would confront fewer obstacles in suing for specific performance for the price. Not only is the election of remedies problem obviated, so too is the burden of proving damages.[101]

C. Foreclosure of Purchaser's Rights

As this Article explained earlier, several jurisdictions treat the contract for deed as a mortgage for most purposes.[102] Where this is the case, the vendor generally must foreclose the contract as a mortgage. However, in jurisdictions where the mortgage status of the contract for deed is less clear, courts sometimes give the vendor the option to *foreclose the contract for deed by judicial sale*.[103] This approach seems conceptually

97. *See* FREYFOGLE, *supra* note 13, § 84D.05[4].

98. *See* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE AND DEVELOPMENT 43 (5th ed. 1998).

99. *See* Herrington v. McCoy, 434 N.E.2d 67 (Ill. Ct. App. 1982).

100. *See infra* notes 111-121 and accompanying text.

101. *See* REAL ESTATE FINANCE LAW, *supra* note 1, at 99.

102. *See supra* notes 57-86 and accompanying text.

103. *See, e.g*, Rickel v. Energy Sys. Holdings, Ltd., 759 P.2d 876 (Idaho 1988); Mustard v. Sugar Valley Lakes, 642 P.2d 111 (Kan. Ct. App. 1981); Jones v. Burr,

problematic because the vendor is seeking a mortgage remedy under a device that, to a greater extent, is governed by contract law. In any event, where this approach is followed, to the extent the sale yields more than the contract balance, the purchaser is entitled to the surplus. Where the sale brings less than the contract balance, the vendor normally will be entitled to a deficiency judgment. Note that this foreclosure route is economically similar to the specific performance remedy. In each situation, the vendor obtains a judgment for the full contract balance, and that judgment may be satisfied out of the contract real estate. In addition, the purchaser in each setting bears the risk of postcontract decline in the value of the real estate.

Moreover, as we saw earlier in the specific performance context,[104] a judgment for the remaining contract balance usually is unavailable unless the contract contains an acceleration clause. The same problem exists when the vendor opts for foreclosure. Unless a court is willing to employ the anticipatory repudiation concept to make the remaining balance due and owing,[105] the vendor will be faced with the undesirable option of foreclosing for the past due installments.

To what extent then do the foreclosure and specific performance remedies differ? In the former context, "the vendor will have the protection of a lien on the contract real estate dating from the execution or recording of the contract."[106] This may not be the case in the specific performance setting. Here the vendor's lien may become effective only when the specific performance decree is entered. Consequently, this lien may well be subordinate to other postcontract liens created by, or arising against, the purchaser.[107]

In some states, including a few that have no tradition of foreclosing contracts for deed by judicial sale, the vendor will be

389 N.W.2d 289 (Neb. 1986); Mackiewicz v. J.J. & Assocs., 514 N.W.2d 613 (Neb. 1994) (dictum); Annotation, *Vendor's Remedy by a Foreclosure of Contract for Sale of Real Property*, 77 A.L.R. 270 (1932).

104. *See supra* note 96 and accompanying text.

105. *See, e.g.*, Gonzales v. Tama, 749 P.2d 1116 (N.M. 1988) (holding that mortgagee permitted to foreclose for entire mortgage obligation where default was substantial and of long duration).

106. REAL ESTATE FINANCE LAW, *supra* note 1, at 97.

107. *See id.*

able to obtain *strict foreclosure* of the purchaser's interest.[108] Under this approach, the contract is canceled and title to the land is quieted in the vendor. However, this remedy is subject to an important qualification. The purchaser is entitled to specific performance of the contract if he or she tenders the balance due on the contract within a "redemption period" set by the court. Note that a failure to redeem deprives the purchaser of any "equity" in the real estate. Consequently, some courts will award strict foreclosure only if the vendor establishes that the value of the real estate does not exceed the contract balance.[109] Where such an excess exists, the court may instead order judicial foreclosure by sale.[110]

D. The Election of Remedies Limitation on Vendors

In a traditional mortgage law setting, if the foreclosure sale yields less than the mortgage obligation and the mortgagor is personally liable on that obligation, the mortgagee has the right to obtain a judgment for the deficiency against the mortgagor.[111] This deficiency judgment normally is for the difference between the mortgage obligation and the foreclosure sale price.[112] Of course, several states place one or more statutory limitations on deficiency judgments. For example, a few prohibit deficiency judgments after the foreclosure of certain types of purchase money mortgages.[113] In addition, some states prohibit deficiency

108. *See, e.g.*, Canterbury Court, Inc. v. Rosenberg, 582 P.2d 261 (Kan. 1978); Ryan v. Kolterman, 338 N.W.2d 747 (Neb. 1983); Kallenbach v. Lake Publications, Inc., 142 N.W.2d 212 (Wis. 1966); *see also* Patrick A. Randolph, *Updating the Oregon Installment Land Contract*, 15 WILLAMETTE L. REV. 181, 211-12 (1979). Note that some of these courts specifically give the vendor the option of choosing forfeiture or strict foreclosure. *See* Walker v. Nunnenkamp, 373 P.2d 559 (Idaho 1962); Zumstein v. Stockton, 264 P.2d 455 (Or. 1953). A few courts grant strict foreclosure without characterizing it as such—instead, they grant a "grace period" during which the purchaser may pay the contract balance; if purchaser fails to pay, forfeiture is declared. *See* Jesz v. Geigle, 319 N.W.2d 481 (N.D. 1982); Moeller v. Good Hope Farms, 215 P.2d 425 (Wash. 1950) (holding grace period discretionary).

109. *See, e.g.*, Ryan v. Kolterman, 338 N.W.2d 747 (Neb. 1983); State Sec. Co. v. Daringer, 293 N.W.2d 102 (Neb. 1980).

110. *See, e.g.*, Walker v. Nunnenkamp, 373 P.2d 559 (Idaho 1962); Blondell v. Beam, 413 P.2d 397 (Or. 1966).

111. *See* REAL ESTATE FINANCE LAW, *supra* note 1, § 8.1.

112. *See id.*

113. *See, e.g.*, ARIZ. REV. STAT. § 33-729(A) (1996); CAL. CIV. PROC. CODE § 580(b) (Deering 1992); N.C. GEN. STAT. § 45-21.38 (1996).

judgments after power of sale foreclosure.[114] Moreover, some jurisdictions apply "fair value" legislation that substitutes for the traditional deficiency measurement, the difference between the mortgage obligation and the "fair value" of the foreclosed real estate.[115] Indeed, the *Restatement* adopts the latter fair value limitation.[116]

The contract for deed vendor likewise faces the substantial equivalent of antideficiency legislation; this is the case even in the overwhelming majority of states that have not enacted deficiency judgment prohibitions in the purchase money mortgage context. To the extent that a jurisdiction validates the forfeiture remedy, the election of remedies doctrine, a judicially created concept, prohibits the vendor from recovering the mortgage equivalent of a deficiency judgment.[117] Consider, for example, the following hypothetical. Suppose that a purchaser defaults on a contract for deed that has a current balance of $75,000 and that the vendor validly invokes the forfeiture remedy. After regaining the land, the vendor discovers that it is worth only $50,000. Because of the election of remedies doctrine, the vendor is barred from collecting from the purchaser the difference between the contract balance ($75,000) and the fair market value of the land ($50,000). This will be the case even where the purchaser's contract obligation is represented by a separate promissory note.[118] Moreover, a prior use of the forfeiture remedy has been held to bar an action against the purchaser for waste[119] or for reimbursement for

114. *See, e.g.*, ALASKA STAT. § 34.20-100 (Michie 1997); ARIZ. REV. STAT. § 33-814(E) (1996); CAL. CIV. PROC. CODE § 580(d) (Deering 1992); MONT. CODE ANN. 71-1-317 (1997).

115. *See, e.g.*, CAL. CIV. PROC. CODE § 726(b) (Deering 1992); N.D. CENT. CODE 32-10-04 (1996); TEX. PROP. CODE ANN. §§ 51.004, 51.005 (West 1983).

116. *See* RESTATEMENT, *supra* note 2, § 8.4.

117. *See, e.g.*, Nemec v. Rollo, 562 P.2d 1087 (Ariz. Ct. App. 1977); Hepperly v. Bosch, 527 N.E.2d 533 (Ill. 1988); Michigan Nat'l Bank v. Cote, 546 N.W.2d 247 (Mich. 1996); Gruskin v. Fisher, 273 N.W.2d 893 (Mich. 1979); Covington v. Pritchett, 428 N.W.2d 121 (Minn. Ct. App. 1988); Porter v. Smith, 486 N.W.2d 846 (Neb. 1992); Buckingham v. Ryan, 953 P.2d 33 (N.M. Ct. App. 1997); Trans W. Co. v. Teuscher, 618 P.2d 1023 (Wash. Ct. App. 1980).

118. *See* Brooks v. Sullivan, 728 S.W.2d 298 (Mo. Ct. App. 1987); Nemec v. Rollo, 562 P.2d 1087 (Ariz. Ct. App. 1977).

119. *See* Hepperly v. Bosch, 527 N.E.2d 533 (Ill. 1988); Risse v. Thompson, 471 N.W.2d 853 (Iowa 1991). *But see* Rudnitski v. Seely, 441 N.W.2d 827 (Minn. Ct. App. 1989), *rev'd in part*, 452 N.W.2d 664 (Minn. 1990).

moneys expended by the vendor to pay real estate taxes.[120] On the other hand, where a vendor eschews forfeiture and obtains a decree for specific performance, the election doctrine will not bar him or her from satisfying the decree out of the contract real estate and other assets of the purchaser.[121]

To be sure, courts and legislatures sometimes employ a variety of measures to ameliorate the harshness of the election of remedies doctrine. For example, some courts distinguish between notes given as part of the contract "downpayment" and those that finance the balance of the purchase price. Under this approach, the former type survive the termination of the contract and are enforceable while the election doctrine bars any action on the latter.[122] An Ohio statute provides that even though a contract for deed has been canceled, an award for damages may be entered against the purchaser if the latter "has paid an amount less than the fair rental value plus deterioration or destruction of the property occasioned by the [purchaser's] use."[123] Moreover, the Michigan Supreme Court has held that, "while the [vendor] may not accept or take possession and still seek money damages, he may, even after sending notice of forfeiture, refuse tender of possession and either commence an action for money damages or for foreclosure of the land contract."[124]

Notwithstanding the foregoing ameliorative measures, however, where the land is worth less than the contract obligation, a vendor contemplating forfeiture faces a substantial election of remedies dilemma. On the other hand, his or her undersecured mortgagee counterpart does not face a similar quandary. Unless the foreclosure is to take place in one of the few jurisdictions that prohibit deficiency judgments in the purchase money mortgage context, the foreclosing mortgagee

120. *See In re* Lacy, 115 B.R. 296 (D. Kan. 1990); Michigan Nat'l Bank v. Cote, 546 N.W.2d 247 (Mich. 1996).

121. *See* Summit House Co. v. Gershman, 502 N.W.2d 422 (Minn. Ct. App. 1993); *see also* REAL ESTATE FINANCE LAW, *supra* note 1, at 100.

122. *See* Novus Equities Corp. v. EM-TY Partnership, 381 N.W.2d 426 (Minn. 1986).

123. OHIO REV. CODE ANN. § 5313.10 (Anderson 1989). *See* James G. Durham, *Forfeiture of Residential Land Contracts in Ohio: The Need for Further Reform of a Reform Statute*, 16 AKRON L. REV. 397 (1983).

124. Gruskin v. Fisher, 273 N.W.2d 893, 896 (Mich. 1979); *accord* Porter v. Smith, 486 N.W.2d 846 (Neb. 1992).

will be able to obtain a deficiency judgment against anyone personally liable on the mortgage obligation.

VI. THE *RESTATEMENT* APPROACH: THE CORE CONCEPT

Thus far we have seen that an increasing number of courts and legislatures have been focusing on the contract for deed and its forfeiture clause with a mortgage law analogy in mind. Indeed, to the extent that a discernable judicial trend exists, it favors characterizing the contract for deed as a mortgage.[125] However, this process has hardly produced an analytical or practical consensus. While forfeitures are sometimes enforced, reliance on the forfeiture provision in jurisdictions that have not institutionalized it by statute is hazardous at best. What one commentator observed over three decades ago is still apt: "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 the facts of the particular case."[126] The interplay of these various factors makes it extremely difficult to predict whether a court will permit forfeiture of a purchaser's interest.

The vendor's nonforfeiture remedies are also problematic. While specific performance is often available, other remedies such as damages and foreclosure are less predictable. Moreover, obstacles like the election of remedies doctrine present further complications for the vendor.[127] As a result, the contract vendor is hardly assured of a predictable and efficient financing device.

The contract for deed, if anything, can be more problematic for the purchaser. To be sure, we have seen that courts and legislatures have placed significant restrictions on forfeitures. But forfeitures do happen and this can become especially burdensome on the purchaser where his or her equity is substantial. For example, we saw that the defaulting purchaser in *Russell v. Richards* forfeited a substantial equity to the vendor because she was unable to tender the contract balance.[128] Had the vendor been required to foreclose by public sale, the purchaser arguably would have been able to recover at

125. *See supra* notes 57-79 and accompanying text.
126. Power, supra note 19, at 416 (citations omitted).
127. *See supra* notes 111-24 and accompanying text.
128. *See supra* notes 22-25 and accompanying text.

least some portion of her equity. We now turn our attention to how adoption of the *Restatement* will resolve the foregoing and related issues.

A. The Contract for Deed is a Mortgage

The *Restatement* takes the unambiguous position that "[a] contract for deed creates a mortgage."[129] This means that it will be "governed procedurally and substantively by the law of mortgages."[130] This core idea is reflected in the following illustration:

> Vendor and Purchaser enter into a contract to sell Blackacre for $50,000. Purchaser makes a down payment of $5,000 and agrees to pay the balance in five equal annual installments of $9,000 plus interest at 10 percent. Upon satisfactory completion of this obligation, the contract calls for delivery by Vendor to Purchaser of a deed to the premises. If Purchaser defaults, the contract gives Vendor the right to terminate the contract and to retain prior payments by Purchaser as liquidated damages. Purchaser has the right to possession during the pre-conveyance period. Purchaser defaults on the first annual installment and Vendor declares a termination of the contract. Two months later, Purchaser tenders to the Vendor $45,000, the contract balance, together with accrued interest. Vendor does not foreclose the contract as a mortgage. Forfeiture is unenforceable. The redemption is effective and Vendor will be required to deliver to Purchaser a deed to the premises.[131]

Suppose, however, that the purchaser is either unable or unwilling to come up with the $45,000. The *Restatement* makes it clear that the purchaser has the right to force the vendor to foreclose the contract as a mortgage.[132] Equally important, the purchaser's rights in the foregoing settings do not depend upon whether substantial contract payments have been made. Indeed, the purchaser in the above illustration has the right to redeem or insist upon foreclosure even where minimal or no

129. RESTATEMENT, *supra* note 2, §3.4(b).
130. *Id*. cmt. d.
131. *Id*. illus. 1.
132. *See id*. illus. 2.

payments were made on the contract.[133] As the commentary to the *Restatement* stresses, a contrary approach would mean that

> [p]redictability would be sacrificed in each case to the need for a court to make a determination of whether the purchaser's financial stake in the property is sufficient to justify mortgage treatment. Moreover, because some contracts would continue to be subject to forfeiture and the application of non-mortgage law, courts would be confronted with the unfortunate need to maintain two separate and distinct bodies of law governing security interests in real estate.[134]

B. Attempts to Vary Mortgage Treatment by Agreement of Parties

To what extent will an agreement by the parties to vary the above results be enforceable? Stated another way, to what extent will an advance waiver by the purchaser of his or her redemption or foreclosure rights be effective? Here again the mortgage treatment is complete. "[T]he parties are permitted to vary [the result reached by mortgage law] only to the extent that parties to a normal mortgage transaction are so empowered."[135] Consider the impact of the latter principle on a common vendor tactic—the deed in escrow. Under this procedure, the purchaser is required at the time of executing the contract for deed to deliver to an escrow agent an executed quitclaim deed to real estate. In the event of purchaser default, the vendor notifies the escrow agent and the latter, pursuant to the escrow arrangement, records the deed. In a variation on this approach, the vendor, rather than an escrow agent, holds the quitclaim deed and records it after the purchaser's default. In the vendor's ideal world, the recording of the quitclaim deed will have the effect of terminating the purchaser's contract interest.[136] However, under the *Restatement* approach, the vendor's expectations will be defeated. Under a traditional mortgage law approach, if a mortgagor delivers a deed to the mortgaged premises to an escrow agent or the mortgagee, contemporaneous with the execution of the mortgage, the deed

133. *See id.* cmt. d.
134. *Id.*
135. *Id.*
136. *See* REAL ESTATE FINANCE LAW, *supra* note 1, § 3.31.

will be characterized as an invalid clog on the mortgagor's equity of redemption.[137] Because the *Restatement* treats the contract for deed as a mortgage and the purchaser as the holder of the equity of redemption, "the use of a contemporaneous deed in the contract for deed setting should likewise be ineffective."[138]

C. Effect on Other Vendor Remedies

We saw earlier in this Article that, in lieu of forfeiture, contract for deed vendors may be able to utilize other remedies against the defaulting purchaser.[139] These include actions for specific performance, damages, and foreclosure.[140] These remedies, as such, are unavailable under the *Restatement* approach. Nevertheless, functionally equivalent remedies are available under the law of mortgages. A mortgagee normally has the right to defer or forego foreclosure and sue on the mortgage obligation.[141] Similarly, under the *Restatement* approach a contract vendor, *qua* mortgagee, will be able to obtain a remedy that differs only semantically from an action for specific performance for the price.

> Moreover, to the extent that a deficiency judgment is available to a mortgagee where the foreclosure sale yields less than the mortgage obligation, so too will such a judgment be granted to the contract vendor after a foreclosure sale produces similar results. This mortgage remedy not only affords the vendor a practical substitute for a contract action for damages, but also gives the vendor the advantage of not having to prove the fair market value of the real estate, as would be required in an action for damages.[142]

An important *caveat* is necessary at this point. There is a danger that one might be misled into believing that the *Restatement* endorses or even contemplates the continued use of the contract for deed, albeit governed by mortgage law principles. This would be a clear misinterpretation of the

137. *See id.* § 3.1; RESTATEMENT, *supra* note 2, § 3.1 illus. 4, 5.
138. RESTATEMENT, *supra* note 2, § 3.4 cmt. g.
139. *See supra* notes 87-110 and accompanying text.
140. *See id.*
141. *See* RESTATEMENT, *supra* note 2, § 8.2.
142. *Id.* § 3.4 cmt. e.

Restatement's fundamental purpose—to eliminate the use of the contract for deed as a land financing device. By treating it as a mortgage, the *Restatement* seeks to remove any incentive for its continued use by land sellers. Ultimately, this Article will demonstrate that structuring land financing transactions solely within the norms of traditional mortgage law not only benefits both vendors and purchasers, but, equally important, decreases confusion and increases efficiency for courts and practitioners alike.

VII. THE *RESTATEMENT*: IMPACT ON OTHER IMPORTANT ISSUES

The continued use of the contract for deed as a land financing device raises other serious problems for both parties. Its use can cause substantial title problems for both purchaser and vendor alike. Purchaser bankruptcy filings also raise thorny issues. The rights of judgment creditors and mortgagees of both parties are conceptually clouded and often unpredictable. The balance of this Article explores these remaining problems. It will conclude that the best way to avoid these problems is by eliminating the contract for deed as a financing device.

A. Title Problems for the Purchaser

A contract for deed purchaser confronts a greater likelihood of title problems than does his or her counterpart in the standard purchase money mortgage transaction. In the latter setting, the chances are strong that the purchaser will examine the vendor's title in order to be assured of its marketability. Even where the purchaser fails to take this step, if a third party lender is involved in the transaction, it will insist upon a title insurance policy or some similar form of title assurance. In the contract for deed context the chances are strong that the vendor's title will not be examined when the contract is executed. Because there is normally no third party lender to insist on a title examination, the vendor has no incentive to have his or her own title examined. Moreover, many contract purchasers have low incomes and often either cannot afford the cost of a title examination or simply do not recognize the need for it. Consequently, many contract purchasers execute the contract, take possession ,and make substantial payments on the contract only to discover later that the vendor's title is encumbered by mortgages, judgment liens, or other precontract interests.[143]

The problem for the purchaser in the foregoing situation is that the vendor need not have marketable title until he or she is required to deliver the deed. Thus, while the purchaser is paying down the contract, the vendor is not obligated to establish marketable title and the purchaser cannot withhold performance in spite of substantial title defects.[144] The purchaser must rely on the vendor being able to correct such defects prior to the time the last contract payment must be made.

However, suppose the vendor's title is not defective at the time the contract is executed, but becomes so during the amortization period. Of course, if the purchaser records the contract when it is executed, there will be protection against any subsequent liens or other interests arising through or against the vendor.[145] However, many unsophisticated purchasers do not record and, as this Article explores later, may actually be prevented from recording by their vendors. "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."[146] Suppose then that after executing the contract for deed, the vendor either mortgages or resells the land. While in many jurisdictions the fact that the purchaser is in possession represents the functional equivalent of recording and will constitute constructive notice to those subsequently dealing with the contract land,[147] this is not invariably the

143. *See* John 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 HOUS. L. REV. 523, 545-46 (1970).

144. *See* Carter v. Rich, 726 P.2d 1135 (Idaho 1986); Stevens v. Wilson, 408 N.E.2d 496 (Ill. 1980); Rusch v. Kauker, 479 N.W.2d 496 (S.D. 1991); Neves v. Wright, 638 P.2d 1195 (Utah 1981).

145. *See* Hentges v. P.H. Feely & Son, Inc., 436 N.W.2d 488 (Minn. Ct. App. 1989); Hogan v. Weeks, 579 N.Y.S.2d 777 (App. Div. 1991); First Mustang State Bank v. Garland Bloodworth, Inc., 825 P.2d 254 (Okla. 1991).

146. REAL ESTATE FINANCE LAW, *supra* note 1, at 103.

147. *See, e.g.*, Life Sav. & Loan Ass'n v. Bryant, 467 N.E.2d 277 (Ill. 1984); Hentges v. P.H. Feely & Son, Inc., 436 N.W.2d 488 (Minn. Ct. App. 1989).

case.[148] Even if possession provides the requisite constructive notice, proving that possession could be difficult and require litigation.[149] Clearly, possession is hardly a satisfactory substitute for the certainty provided by a recorded document.

Note that in the traditional purchase money mortgage transaction this problem will not arise. A third party lender will insist that the deed to the mortgagor-purchaser and the mortgage be recorded promptly in order to protect itself against any subsequent interests and encumbrances that later may arise against or be created by the mortgagor. In the vendor purchase money situation, the purchaser will usually record his or her deed. Even if the purchaser fails to do so, the vendor knows that recording is always possible and will inevitably record the mortgage to protect against liens or other interests arising thereafter against the mortgagor. In both situations, the self-interest of the lender also ensures the protection of the mortgagor. This is so because the recording by the mortgagee will protect the mortgagor against any subsequent interests arising through or against the vendor.

B. Title Problems for Vendors

Where contracts for deed are heavily regulated by statute, such as in Iowa and Minnesota, vendors confront relatively few title problems. As this Article notes, statutory termination procedures in such states provide a generally effective mechanism for establishing record title in the vendor even if the contract is recorded.[150] However, the situation is dramatically different in those states where the contract for deed is governed solely or largely by case law. In those jurisdictions, the contract for deed "will provide . . . an efficient and cheap method of regaining possession of the contract land and a merchantable title *only* if the [purchaser] fails completely to assert his rights."[151] In other words, only if the defaulting purchaser vacates the premises without having recorded the

148. *See* Comment, *Possession as Notice Under Missouri Recording Act*, 16 MO. L. REV. 142 (1951).

149. *See, e.g.*, Beals v. Cryer, 426 N.E.2d 253, 256 (Ill. Ct. App. 1981) (holding purchaser's mowing of grass and weeds insufficient "visible, open, exclusive and unambiguous" evidence of possession so as to be the equivalent of recording).

150. *See supra* notes 26-32 and accompanying text.

151. *See* Nelson, *supra* note 1, at 165.

contract will the vendor be able to resell the property to a person who will probably qualify as a bona fide purchaser.

However, the vendor will be faced with substantial title problems if, either before or after default, the purchaser records the contract. Even if forfeiture is *in fact* valid in a given situation, it will take a judicial proceeding to make that determination and establish marketable title in the vendor. Surely, a self-serving affidavit from the vendor alone will not suffice to accomplish that result. As I noted two decades ago, "the vendor is faced with the costly prospect of a quiet title action or some other judicial proceeding to regain a marketable title. The [purchaser], 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."[152]

As a result, vendors frequently attempt to prevent the recording of the contract. They seek to accomplish this result by omitting an acknowledgment of the parties' signatures. However, a purchaser often overcomes this obstacle by executing and recording an affidavit that either refers to the contract or its essential terms. Sometimes the contract will simply be attached to the affidavit as an exhibit. Suppose, however, that statutes prohibit the recording of affidavits or land contracts, as is the case in a few states.[153] The purchaser's response may simply be to record an acknowledged assignment of the purchaser's interest to a straw party together with a reassignment to the purchaser.[154]

Some vendors, however, go to even greater lengths to avoid recording by the purchaser. This hostility to recording takes the form of a contract for deed provision that makes recording a ground for default and forfeiture. Such provisions may very well violate the public policy underlying the recording acts, which generally encourages the recording of interests in real

152. *Id.* at 165.

153. *See, e.g.*, FLA. STAT. ANN. § 696.01 (West 1994).

154. *See* Nelson, *supra* note 1, at 165-66. It seems unlikely the purchaser commits the tort of slander on title by employing the above recording methods. *See id.* at 166; *see also* Ridgewood Utils. Corp. v. King, 426 So. 2d 49 (Fla. Dist. Ct. App. 1982) (holding where recorded contract for deed was not entitled to be recorded because unacknowledged by the vendor, the vendor had no cause of action for slander of title where there was no showing the contract, as recorded, was false and that the vendor was damaged by the recording).

estate. As Professor Warren aptly noted, it is unlikely that such provisions will be effective "to attain anything more than the hostility of the judge who has to interpret the contract."[155] Nevertheless, the *in terrorum* effect of such provisions may well discourage the recording of contracts by many purchasers.

What are the practical implications of the foregoing for a vendor in a state that has not legislatively institutionalized the contract for deed? Sometimes I suggest to my students that the contract for deed can potentially be a "propurchaser" financing device, at least in situations where the contract is recorded and the purchaser has minimal equity in the property. Moreover, where the contract for deed is pervasively used in low income, low down payment situations, mass recording of those contracts "could increase the [purchasers'] practical economic interests in the involved real estate and possibly result in pervasive title clouds on substantial amounts of that real estate."[156]

Note that where the vendor uses a mortgage or deed of trust as the financing device and the jurisdiction has an efficient power of sale foreclosure process, the routine use of the nonjudicial process will terminate the purchaser's interest. Assuming this procedure is validly conducted, the vendor will not be required, as in the recorded contract for deed context, to use the judicial process to establish marketable title. Thus, the purchaser will not be able to "extort" money from the vendor for the delivery of a quitclaim deed.

C. Purchaser Bankruptcy: The "Executory Contract" Problem

A bankruptcy filing by a contract for deed purchaser raises a substantial problem that does not exist when the bankrupt purchaser is a mortgagor in a standard mortgage transaction. This is because of section 365 of the Bankruptcy Code which provides for the "assumption" or "rejection" of any "executory contract" of the debtor.[157] For example, assume that five years ago a vendor and purchaser execute a contract for deed with a $100,000 purchase price payable over ten years in equal annual installments. Suppose that the purchaser defaults on the fifth

155. William D. Warren, *California Installment Land Sales Contracts: A Time for Reform*, 9 UCLA L. REV. 608, 629 (1962).
156. REAL ESTATE FINANCE LAW, *supra* note 1, at 107.
157. 11 U.S.C.A. § 365(a) (West 1995).

payment and files a bankruptcy petition before the vendor takes any action to seek forfeiture or other state law remedies. If the contract for deed is treated as an "executory contract" under section 365(a) of the Bankruptcy Code, the vendor may compel the purchaser-debtor to assume or reject the contract. In the case of an assumption, section 365(b) requires the purchaser to cure the default, compensate the vendor for any damages caused by the default, and provide adequate assurance of future performance of the contract.[158] If the purchaser is unable to satisfy these requirements, the contract will be treated as rejected and the purchaser will lose the land.[159] If the value of the land exceeds the contract balance, the vendor will gain that surplus. Conversely, if the contract for deed is treated as a mortgage or security interest, rather than as an "executory contract," the vendor may not invoke the foregoing Bankruptcy Code sections and will be treated as a mortgagee in the bankruptcy proceeding.[160] Accordingly, the vendor will be entitled only to the contract balance rather than the land. Thus, if the land is sold at a bankruptcy sale and the sale price exceeds the contract balance, the purchaser's unsecured creditors, rather than the vendor, will be the beneficiaries.

Whether the contract for deed will be treated as a mortgage or security device rather than an executory contract assumes even more importance in the bankruptcy reorganization context. In that setting, if the contract is characterized as a mortgage, it can be made part of the reorganization plan and enhance the odds that the plan will succeed. For example, a farmer-debtor in a Chapter 12 reorganization may be able to reduce the contract balance to the land's current market value and have any excess over that value discharged after making modest plan payments.[161] If, on the other hand, the court treats the contract as "executory" and the purchaser-debtor (debtor-in-possession) is unable to cure the default and compensate the vendor for damages caused by the default, the land in all likelihood will be forfeited to the vendor and the chances for a

158. *See* Shaw v. Dawson, 48 B.R. 857 (Bankr. D. N.M. 1985).
159. *See id.*
160. *See In re* Booth, 19 B.R. 53 (Bankr. D. Utah 1982).
161. *See* REAL ESTATE FINANCE LAW, *supra* note 1, at 666.

successful reorganization will be substantially diminished, if not destroyed. This may especially be the case where the contract real estate is the purchaser-debtor's sole or major asset. "Executory" treatment may well mean liquidation, rather than reorganization, of the purchaser-debtor.

Courts are sharply divided on this "mortgage or security device vs. executory contract" question, although the cases favor slightly the "executory" characterization.[162] Courts often rely on Professor Countryman's definition of an executory contract as one "under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."[163] In applying this definition to the contract for deed, one federal court stated that

> the obligation of the [purchaser] to pay the purchase price according to the terms of the contract, and the obligation of the [vendor] to deliver title to the [purchaser] when full payment has been made, are both unperformed. Failure of either party to complete performance would constitute a material breach of the contract.[164]

In addition, the court indicated that mortgage or security device treatment of contracts for deed is justified only to the extent that state law treats them as such in other contexts.[165] Under

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162. For cases adopting the "executory contract" result, see, e.g., *In re Frontier Properties, Inc.*, 979 F.2d 1358 (9th Cir. 1992); *In re Terrell*, 892 F.2d 469 (6th Cir. 1989); *In re Speck*, 798 F.2d 279 (8th Cir. 1986); *In re Jones*, 186 B.R. 71 (Bankr. W.D. Ky. 1995); *In re Miskowski*, 182 B.R. 5 (Bankr. M.D. Pa. 1995). For cases favoring the "mortgage or security device" approach, see, e.g., *In re Streets & Beard Farm Partnership*, 882 F.2d 233 (7th Cir. 1989); *In re Heward Bros.*, 210 B.R. 475 (Bankr. D. Idaho 1997); *In re Vinson*, 202 B.R. 972 (Bankr. S.D. Ill. 1996); *Heartline Farms, Inc. v. Daly*, 128 B.R. 246 (Bankr. D. Neb. 1990), *aff'd*, 934 F.2d 985 (8th Cir. 1991); *In re Kratz*, 96 B.R. 127 (Bankr. D. Ohio 1988); *In re Booth*, 19 B.R. 53 (Bankr. D. Utah 1982). *See also*, Juliet M. Moringiello, *A Mortgage by Any Other Name: A Plea for the Uniform Treatment of Installment Land Contracts and Mortgages Under the Bankruptcy Code*, 100 DICK. L. REV. 733 (1996).

163. Vernon Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973).

164. Shaw v. Dawson, 48 B.R. 857, 860 (Bankr. D. N.M. 1985); *cf. In re* Streets & Beard Farm Partnership, 882 F.2d 233 (7th Cir. 1989) (holding that delivery of legal title is a mere formality and does not represent the kind of legal obligation that renders a contract "executory").

165. *See Shaw*, 48 B.R. at 862.

this view, bankruptcy courts in Florida, Indiana, Kentucky, New York, and Oklahoma, where contracts for deed receive mortgage treatment, will reach a different result than in New Mexico, where courts have not adopted such a characterization.[166]

Whatever else it is, the contract for deed is a land financing device that functions economically as a purchase money mortgage. Surely this common economic function, rather than semantic distinctions about the meaning of "executory," should govern whether the vendor, purchaser, or the latter's unsecured creditors reap the benefit of the contract land's excess value in the bankruptcy context. The *Restatement* approach can aid this process in two ways. First, one would hope that in interpreting section 365 of the Bankruptcy Code, bankruptcy courts will look to the *Restatement* for support in characterizing the contract for deed as a security device rather than an executory contract. Second, state court adoption of the *Restatement* approach will probably ensure that bankruptcy courts sitting in that state will treat the contract for deed as a mortgage or security device for section 365 purposes.

D. Judgments Against Contract for Deed Parties.

In virtually every state, a judgment creates a lien on the real property of the judgment debtor.[167] The mechanics of obtaining the lien and when it becomes effective vary from state to state. In some states, the lien arises upon entry of the judgment upon all real estate of the judgment debtor in the county in which the judgment is obtained.[168] In many other jurisdictions, this lien is created when the judgment is docketed (entered by a clerk in an appropriate docket book).[169] Nevertheless, the foregoing differences are minor and, as a practical matter, a judgment creditor is able to obtain a lien against the debtor's real estate almost immediately after the entry of the judgment. Moreover, the effective date of the lien under the foregoing standards also determines its priority as

166. *See supra* notes 22-25, 61-81 and accompanying text.
167. *See* DAVID G. EPSTEIN, BANKRUPTCY AND OTHER DEBTOR-CREDITOR LAWS 42-47 (1995).
168. *See id.* at 43.
169. *See id.*

against other judgment liens on the real estate. Thus, if the holder of the senior judgment lien forecloses first, it will wipe out the junior judgment lien. If the latter forecloses first, the sale will be subject to the senior judgment lien. On the other hand, the judgment creditor is not as fortunate with respect to the debtor's personal property. Normally the creditor will proceed by a writ of execution and no lien arises as against debtor's personal property until the sheriff actually levies on it.[170] As a practical matter, the first creditor to have an execution sale sells the property free and clear of the claims of other judgment creditors. Consequently, where the judgment debtor is either a purchaser or vendor under a contract for deed, determining whether the debtor's interest is realty or personalty can be crucial in determining the rights of the judgment creditor.

Courts have had no difficulty in dealing with the rights of the purchaser's judgment creditor. Most states hold that the purchaser's interest is real estate for purposes of judgment lien statutes and that the judgment creditor of the purchaser acquires a lien on the latter's interest from the date the judgment is docketed.[171] Courts use two theories to justify this result. Some employ the equitable conversion concept. Under this approach, from the time the contract for deed is executed, the purchaser's interest in equity is "converted" to real estate while the vendor's retention of legal title and the right to receive the remainder of the purchase price is characterized as personalty.[172] Alternatively, other courts simply conclude that the legislature intended to treat the contract for deed purchaser's interest as real estate.[173] This "legislative intent" approach is favored by these courts because of a general

170. *See id.* at 49.

171. *See, e.g.*, Bank of Santa Fe v. Garcia, 698 P.2d 458 (N.M. Ct. App. 1985); Fridley v. Munson, 194 N.W. 840 (S.D. 1923); Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987); Cascade Sec. Bank v. Butler, 567 P.2d 631 (Wash. 1977).

172. *See, e.g.*, *Garcia*, 698 P.2d at 458; Bartz v. Paff, 69 N.W. 297 (Wis. 1896); *see also* Linda S. Hume, *Real Estate Contracts and the Doctrine of Equitable Conversion in Washington: Dispelling the Ashford Cloud*, 7 U. PUGET SOUND L. REV. 233, 240 (1984).

173. *See, e.g.*, Joseph v. Donovan, 157 A. 638 (Conn. 1931); Hoffman v. Semet, 316 So. 2d 649 (Fla. Dist. Ct. App. 1975); *Wilkinson*, 740 P.2d at 1244; *Cascade Sec. Bank*, 567 P.2d at 631.

uneasiness with equitable conversion and its implications in such other areas as wills and trusts and devolution at death.[174]

On the other hand, courts have experienced substantial difficulty in dealing with the judgment creditor of the vendor. Traditionally, a substantial number of courts have treated the vendor's contract interest as real estate for purposes of judgment lien legislation.[175] Under this approach, the vendor's interest is real estate because he or she retains legal title to the land until the contract is fully paid and the deed is delivered to the purchaser.[176] Perhaps the real basis for this view is intuitive. Vendors often find psychological security in the contract for deed because they believe that they "get to keep title to the land" until the last payment is made. In other words, the average vendor surely believes his or her interest is real estate rather than simply the right to receive a stream of payments. Thus, in a certain sense, the traditional approach is consistent with the expectations of many vendors.

However, a growing number of jurisdictions characterize the vendor's interest as personalty for purposes of judgment lien statutes.[177] Some utilize the doctrine of equitable conversion to reach the conclusion that the vendor's interest is personalty.[178] A few take the position that since the purchaser holds the real estate, the vendor's interest logically must be personalty.[179] Finally, some courts simply hold that the vendor's contract rights are personalty because that result reflects legislative intent.[180]

174. *See, e.g.*, *Cascade Sec. Bank*, 567 P.2d at 631.

175. *See, e.g.*, Chain O' Mines, Inc. v. Williamson, 72 P.2d 265 (Colo. 1937); First Sec. Bank v. Rogers, 429 P.2d 386 (Idaho 1967); Bedortha v. Sunridge Land Co., 822 P.2d 694 (Or. 1991); Heath v. Dodson, 110 P.2d 845 (Wash. 1941); Mooring v. Brown, 763 F.2d 386 (10th Cir. 1985) (applying Colorado law); Gena Glaser Trueblood, Note, *Article 9 Governs Assignment of Vendor's Rights Under an Installment Land Contract as Security for a Debt:* Erickson v. Seattle Trust & Savings Bank (*In re* Freeborn), 47 MO. L. REV. 328, 330-31 (1982).

176. *See* Trueblood, *supra* note 175, at 331.

177. *See* Snow Bros. Hardware Co. v. Ellis, 21 S.W.2d 162 (Ark. 1929); Hull v. Maryland Casualty Co., 79 So. 2d 517 (Fla. 1954); Bank of Haw. v. Horwoth, 787 P.2d 674 (Haw. 1990); Marks v. Tucumcari, 595 P.2d 1199 (N.M. 1979); Cannefax v. Clement, 818 P.2d 546 (Utah 1991); Mueller v. Novelty Dye Works, 78 N.W.2d 881 (Wis. 1956).

178. *See* Marks v. Tucumcari, 595 P.2d 1199 (N.M. 1979); Mueller v. Novelty Dye Works, 78 N.W.2d 881 (Wis. 1956).

179. *See* Trueblood, *supra* note 175.

180. *See* Cannefax v. Clement, 818 P.2d 546 (Utah 1991).

Consider the implications of the foregoing two approaches in the context of the following hypothetical: A contract for deed vendor is entitled to collect $50,000 over the next five years. Creditor A then dockets a $20,000 judgment against the vendor in Boone County, where Blackacre, the contract land, is located. Creditor B then dockets a $40,000 judgment in the same county. Creditor B then holds an execution sale on the judgment and purchases the vendor's contract interest at the sale for $40,000. If we are in a state taking the traditional approach that the vendor's interest is real estate, Creditor B paid too much. Each creditor would have liens on the vendor's contract interest and the priority of their judgments would be determined by the order of docketing. Consequently, since Creditor B's judgment was docketed later than Creditor A's, Creditor B purchased subject to Creditor A's unpaid $20,000 lien. If, on the other hand, the jurisdiction treats the vendor's interest as personalty, Creditor B will be in a better position. As personalty, the judgment creditor can obtain no lien in it until it is levied upon by the sheriff pursuant to a writ of execution.[181] The date of judgment docketing does not establish priority; rather the levy by the sheriff is the crucial point. Creditor B's execution sale will sell vendor's contract interest, as personalty, free and clear of the other judgment irrespective of when it was docketed.

If the *Restatement* governed the foregoing situation, the vendor would instead be treated as a mortgagee. As such, the vendor would hold no title, legal or equitable, but rather a right to receive the balance of the obligation secured by a lien on Blackacre. Consequently, as in those jurisdictions rejecting the traditional "real estate" approach, the vendor will be treated as owning personalty in the same manner as one who holds a promissory note secured by a mortgage on Blackacre.[182] In other words, adoption of the *Restatement* would make it clear that the judgment creditor's rights will not vary depending upon whether his or her debtor is a vendor or a mortgagee.

181. *See* EPSTEIN, *supra* note 167, at 49.

182. *See* STEFAN A. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 166 (4th ed. 1987).

E. Mortgaging the Purchaser's and Vendor's Interests

1. Mortgaging purchaser's interest

Both payment on the contract obligation and increasing market value of the land increases the value of the purchaser's interest as an economic asset. Indeed, we have just seen how creditors of the purchaser attempt to reach this interest. More commonly, however, the purchaser seeks to borrow money and use this "equity" as security for the loan. Indeed, virtually all courts recognize that the purchaser's interest is mortgageable.[183] Functionally, of course, the purchaser's lender holds the economic equivalent of a second mortgage because the vendor's interest is analogous to a first purchase money mortgage.

Even though the purchaser's interest is mortgageable, lenders to the purchaser are often unclear about what type of security document to use. Some, for example, take an assignment of the purchaser's interest together with a quitclaim deed from the purchaser. This "package" will be treated as a valid mortgage,[184] but because of the probable absence of a power of sale, it will have to be foreclosed judicially, in a costly and time-consuming procedure.[185] The use of the assignment and quitclaim deed may stem from the lender's uncertainty about the nature of the purchaser's rights. Are they primarily contractual? Should the purchaser instead be treated as owning an equity of redemption? In any event, there is no reason why, if the jurisdiction permits power of sale foreclosure, that a deed of trust or mortgage with power of sale should not be used, just as is the case in the normal second mortgage lending context.

183. *See, e.g.*, Kendrick v. Davis, 452 P.2d 222 (Wash. 1969); *In re* Jones, 186 B.R. 71 (Bankr. W.D. Ky. 1995); *In re* Willingham, 139 B.R. 670 (Bankr. N.D. Ohio 1991); Petz v. Estate of Petz, 467 N.E.2d 780 (Ind. Ct. App. 1984); Stannard v. Marboe, 198 N.W. 127 (Minn. 1924); Fincher v. Miles Homes, Inc., 549 S.W.2d 848 (Mo. 1977); O'Neill Prod. Credit Ass'n v. Mitchell, 307 N.W.2d 115 (Neb. 1981); Shindledecker v. Savage, 627 P.2d 1241 (N.M. 1981); Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987); Dirks v. Cornwell, 754 P.2d 946 (Utah Ct. App. 1988). *But see* Arkansas Supply, Inc. v. Young, 580 S.W.2d 174 (Ark. 1979).

184. *See* Erikson v. First Nat'l Bank, 697 P.2d 1332 (Mont. 1985); O'Neill Prod. Credit Ass'n v. Mitchell, 307 N.W.2d 115 (Neb. 1981); *see also* REAL ESTATE FINANCE LAW, *supra* note 1, at 113.

185. *See* REAL ESTATE FINANCE LAW, *supra* note 1, §§ 7.11, .19.

The fact that the purchaser's interest is mortgageable raises a more fundamental issue than simply its documentation. What are the mortgagee's rights in the event the vendor declares a forfeiture? Generally cases hold that a vendor who has actual knowledge of the purchaser's mortgagee may not declare a forfeiture of the contract without providing the purchaser's mortgagee with notification of the intent to forfeit and an opportunity to protect itself.[186] There is some authority that even where the vendor lacks actual knowledge of the mortgagee's existence, if the mortgage is recorded the vendor is deemed to have constructive notice of the mortgagee's existence.[187] This latter approach imposes a duty on the vendor to examine title to the land prior to a forfeiture declaration in order to ensure that notice is given to any mortgagee of the purchaser's interest. However, there is also significant case law holding that, absent actual knowledge of the mortgagee's existence, the vendor is not obligated to notify the mortgagee of the pending forfeiture.[188] These cases rely on the notion that recording operates as notice only to those acquiring an interest in the land *subsequent* to the recording and not to those whose interest predated it. As a practical matter, in jurisdictions adopting this reasoning, a mortgagee desiring protection must give the vendor actual notice of the existence of the mortgage at the time the mortgagee takes it, a requirement that is not currently imposed on most junior mortgagees in the traditional mortgage law setting.[189]

186. *See* Credit Finance, Inc. v. Bateman, 660 P.2d 869 (Ariz. Ct. App. 1983); Fincher v. Miles Homes, Inc., 549 S.W.2d 848 (Mo. 1977); Yu v. Paperchase Partnership, 845 P.2d 158 (N.M. 1992). *But see* Estate of Brewer v. Iota Delta Chapter, Tau Kappa Epsilon Fraternity, Inc., 692 P.2d 597 (Or. 1984) (explaining vendor not obligated to provide notice to the purchaser's mortgagee even though vendor actually knows of mortgagee's existence) *superseded by* OR. REV. STAT. § 93.935-.945 (1997).

187. *See* Stanard v. Marboe, 198 N.W. 127 (Minn. 1924); *see also* Note, *Mortgages — Notice — Vendor and Purchaser — Vendor Not Charged With Constructive Notice of Subsequent Mortgage of Contract Purchaser's Equity — Mortgagee Required to Notify Vendor to Protect Security Interest*, 45 WASH. L. REV. 645, 646 (1970).

188. *See* Shindledecker v. Savage, 627 P.2d 1241 (N.M. 1981); Dirks v. Cornwell, 754 P.2d 946 (Utah Ct. App. 1988); Kendrick v. Davis, 452 P.2d 222 (Wash. 1969).

189. This approach is criticized in Thomas A. Henzler, Note, *Mortgages–Mortgage of a Vendees Interest in an Installment Land Contract–Mortgagee's Rights Upon Default:* Fincher v. Miles Homes of Missouri, Inc., 43 Mo. L. Rev. 371, 373-74 (1978).

Suppose a purchaser's mortgagee receives notice of a vendor's intent to invoke forfeiture. What are its rights? There has been some suggestion that notification permits the mortgagee to fulfill the purchaser's obligation under the contract.[190] What does this mean? If it means that the mortgagee may take over the purchaser's interest without foreclosure of the mortgage, it clearly is wrong because it would confer on the purchaser's mortgagee greater rights than possessed by a second mortgagee in the normal mortgage context.

Under the *Restatement* a straight mortgage analogy would be applied in the foregoing situation. First, of course, forfeiture would be impermissible—the vendor would be required to foreclose the contract as a mortgage.[191] If the foreclosure is judicial, the purchaser's mortgagee must be made a party-defendant.[192] If power of sale foreclosure is permissible in the jurisdiction, the purchaser's mortgagee would normally be entitled to mailed notice of the foreclosure.[193] What then are the mortgagee's rights? It would be treated as a junior mortgagee in a traditional "senior mortgage-junior mortgage" setting. In this context, when the senior mortgage is in default, the junior mortgagee has two options. First, it may pay off or "redeem" the senior mortgage and stand in the senior's shoes as an assignee of that mortgage.[194] If this option is taken, the second mortgagee would then own two mortgages on the land and must foreclose one or both of them to acquire either money or title to the land. Alternatively, the second mortgagee may foreclose its mortgage and the purchaser at that sale would acquire title to the land subject to the first mortgage.[195] Second mortgagee would acquire title only if it actually purchases at the foreclosure sale.

Of course, as indicated earlier,[196] the *Restatement* does not contemplate that sellers of land will continue to use contracts for deed, albeit subject to mortgage law. That will occur only if a vendor continues to use the contract for deed after his or her

190. *See* Note, *supra* note 187, at 646.
191. *See supra* notes 129-34 and accompanying text.
192. *See* REAL ESTATE FINANCE LAW, *supra* note 1, § 7.12.
193. *See id.* § 7.19.
194. *See* RESTATEMENT, *supra* note 2, § 6.4 cmt. a.
195. *See id.* § 7.1 cmt. b.
196. *See supra* Part VI.C.

jurisdiction adopts the *Restatement* approach. Rather, the *Restatement*'s ultimate purpose is to remove any incentive for vendors to use the contract for deed and thus to ensure that traditional mortgage instruments are used in land finance transactions. If that occurs, the current uncertainties that plague secured lending to contract for deed purchasers will be eliminated. The rights of the parties will be more clearly defined and predictable and this should ultimately enhance the availability of junior mortgage financing.

2. Mortgaging vendor's interest

In order to understand adequately the use of a vendor's contract for deed interest as security for a loan, we must first focus on how a security interest is obtained in its economic equivalent—a promissory note secured by a mortgage. Pledges of notes secured by mortgages occur in a variety of contexts. A seller of real estate sometimes takes back from the purchaser a purchase money note and mortgage for part of the sale price. Later seller may need to borrow money and may pledge the note and mortgage as security for that loan. Similarly, a financial institution such as a bank or thrift institution holding mortgage loans in portfolio may sometimes pledge them as security for repayment for loans made to it by other institutions.

At this point Article 9 of the Uniform Commercial Code enters the picture. It is widely accepted that promissory notes and the mortgages securing them are personal property and that pledges of them are governed by Article 9.[197] What does this mean? With respect to a pledgee's rights in a promissory note, the answer is clear—"the pledgee must follow Article 9's procedures in order to *perfect* his or her rights as against other claimants to the note, such as the pledgor's trustee in bankruptcy or subsequent good faith purchasers or assignees of the pledgor."[198] First, note that a promissory note is an "instrument" for purposes of the Code.[199] As an instrument,

197. *See* REAL ESTATE FINANCE LAW, *supra* note 1, at 343.
198. *Id.*
199. *See* U.C.C. § 9-105 (1)(i) (1997) ("instrument" means "a negotiable instrument . . . or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in

perfection of a security interest in the note can be accomplished by its transfer to the pledgee.[200] However, as to the mortgage, there is some ambiguity, but increasingly less so. The Code does not deal specifically with whether the pledgee must take some further action to perfect rights in the mortgage or whether perfection of a security interest in the note will suffice. There is some suggestion in the Official Comment that this question is to be resolved by non-Code law rather than by the Code itself,[201] and some commentators[202] and a few cases take this position.[203] To the extent that this latter view prevails, a security interest in the mortgage must be perfected under state recording act principles.

The better view, and the one that is receiving growing acceptance, is that the mortgage simply follows the note and therefore that a perfected security interest in the note encompasses the mortgage as well. This approach is endorsed by most commentators[204] and recent cases.[205] It finds support

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ordinary course of business transferred by delivery with any necessary indorsement or assignment.").

200. *See* U.C.C. § 9-304(1) (1997); Rodney v. Arizona Bank, 836 P.2d 434 (Ariz. Ct. App. 1992); *In re* Lendvest Mortgage, 119 B.R. 199 (B.A.P. 9th Cir. 1990); *In re* Nichols, 88 B.R. 871 (Bankr. D. Ill. 1988). Interestingly, under revisions to Article 9 currently under consideration, a lender to a mortgagee will be able to perfect a security interest in a promissory note by filing a financing statement as well as by taking possession of it. *See* U.C.C. §§ 9-310, 311 (Proposed Draft 1997).

201. *See* U.C.C. § 9-102 cmt. 4 (1997):

> This Article is not applicable to the creation of the real estate mortgage. . . . However, when the mortgagee pledges the note to secure his own obligation to X, this Article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage. This Article leaves to other law the question of the effect on rights under the mortgage of delivery or non-delivery of the mortgage or of recording or non-recording of an assignment of the mortgagee's interest.

Id.

202. *See* GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 311 (1965); Comment, *An Article Nine Scope Problem — Mortgages, Leases, and Rents as Collateral*, 47 U. COLO. L. REV. 449, 456-57 (1976).

203. *See In re* Maryville Sav. & Loan Corp., 743 F.2d 413 (6th Cir. 1984); *In Re* Ivy Properties, 109 B.R. 10 (Bankr. D. Mass. 1989).

204. *See, e.g.*, Bowmar, *Real Estate Interests as Security Under the UCC: The Scope of Article Nine*, 12 UCC L.J. 99, 121 (1979); Jan Z. Krasnowiecki et al., *The Kennedy Mortgage Co. Bankruptcy Case: New Light Shed on the Position of Warehousing Banks*, 56 AM. BANKR. L.J. 325 (1982).

205. *See*, e.g., Greiner v. Wilke, 625 F.2d 281 (9th Cir. 1980); Starr v. Bruce Farley Corp., 612 F.2d 1197 (9th Cir. 1980); Jackson County Fed. Sav. & Loan Ass'n

either in the argument that the Code implicitly endorses it or by the assertion that it flows naturally from the common law doctrine that the mortgage automatically follows the note.[206] It avoids the necessity of multiple precautions such as recording a mortgage assignment in the real estate records or the filing of a financing statement to protect the pledgee against other creditors. The transfer of possession of the note affords a simple and efficient mechanism for perfecting a security interest simultaneously in both documents.[207]

On the other hand, the lender who desires effective security in a contract for deed vendor's interest confronts confusion and inefficiency. While it is universally accepted that a vendor's contract for deed interest is mortgageable,[208] this universal consensus quickly unravels once we focus on the *mechanics* of mortgaging this interest. Traditionally, many lenders who lend money on the security of the vendor's contract interest have treated the transaction as if the vendor were mortgaging a fee simple interest in the land.[209] They assume that because the vendor holds legal title to the land described in the contract, the vendor is its "real" owner.[210] As a result, a lender operating on this assumption takes a traditional mortgage and records it in the real estate records.[211] Such a practice presumably protects the lender's priority against both unsecured and subsequent lien creditors of the vendor. Indeed, many courts continue to

v. Maduff Mortgage Corp., 608 F. Supp. 588 (D. Colo. 1985); First Nat'l Bank v. Larson, 17 B.R. 957, 965 (Bankr. D. N.J. 1982); *see also* 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 47 (4th ed. 1995) ("Courts generally . . . conclude that Article 9 governs perfection of a security interest in the note and conclude that no action need be taken with regard to the mortgage, nor any filing done in the real estate records.").

206. *See In re* Staff Mortgage & Inv. Corp., 550 F.2d 1228 (9th Cir. 1977); A.E. Pennebaker Co. v. Fuller, 691 F. Supp. 938 (W.D. N.C. 1988); *In re* Kennedy Mortgage Co., 17 B.R. 957 (Bankr. D. N.J. 1982); Army Nat'l Bank v. Equity Developers, Inc., 774 P.2d 919 (Kan. 1989).

207. *See* REAL ESTATE FINANCE LAW, *supra* note 1, at 345.

208. *See, e.g.*, Cain & Bultman, Inc. v. Miss Sam, Inc., 409 So. 2d 114 (Fla. Dist. Ct. App. 1982); Erickson v. First Nat'l Bank, 697 P.2d 1332 (Mont. 1985); Finch v. Beneficial N.M., Inc., 905 P.2d 198 (N.M. 1995); *In re* Freeborn, 617 P.2d 424 (Wash. 1980).

209. *See* REAL ESTATE FINANCE LAW, *supra* note 1, at 116.

210. *See id.*

211. *See id.*

adhere to the position that the foregoing method is the only acceptable method for mortgaging the vendor's interest.[212]

Other decisions, however, reject the foregoing approach in favor of applying Article 9 of the Uniform Commercial Code. In a leading case, *In re Freeborn*,[213] the Washington Supreme Court held that a lender could obtain a perfected security interest in the vendor's right to receive the contract payments only by complying with Article 9, which the court held treated this payment stream as a "general intangible." The court reasoned that the vendor has both legal title to the land (which is realty) and the right to receive the contract payments (which is personalty). Thus, while taking and recording a mortgage or similar documents in the real estate records protects the lender against subsequent claims to the vendor's legal title, it does not protect the lender against subsequent claims on the vendor's right to receive contract payments. Consequently, because the security interests in *Freeborn* had only been recorded in the real estate records, they were deemed unperfected.

Importantly, the *Freeborn* analysis utilizes a straight mortgage transaction analogy. The court cited the Official Comment to section 9-102(3), considered earlier in this section,[214] which states that although Article 9 is inapplicable to the creation of a real estate mortgage itself, "when the mortgagee pledges the note to secure his own obligation to X, this Article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage."[215] According to the court, the situation described in the comment—the pledge by a mortgagee to secure his own obligation to a third party—was analogous to the case it confronted. "Here, the vendor and holder of legal title assigned the right to receive real estate contract payments in order to secure his obligation to a third party."[216]

212. *See, e.g.*, *In re* Shuster, 784 F.2d 883 (8th Cir. 1986); *In re* Hoeppner, 49 B.R. 124 (Bankr. E.D. Wis. 1985); Anthony v. Reardon, 835 P.2d 811 (N.M. 1992).

213. 617 P.2d 424 (Wash. 1980).

214. *See supra* notes 200-201 and accompanying text.

215. U.C.C. § 9-102(3) cmt. 4 (1997).

216. *Freeborn*, 617 P.2d at 428.

The foregoing approach has been adopted by several other courts.[217] However, even though these decisions hold that Article 9 is applicable to perfecting a security interest in a vendor's interest, they disagree as to the procedure to be followed. *In re Freeborn* itself requires the vendor's lender both to perfect his or her mortgage as a chattel security interest under Article 9 *and* to record it in the real estate records; the latter step presumably is necessary in order for the lender to acquire a perfected right to seize and assert the vendor's interest in the real estate. On the other hand, other decisions hold that perfection under Article 9 alone is sufficient.[218] The *Freeborn* "two-fold" requirement has been criticized on the ground that "[n]o policy is served by forcing everyone to use both belt and suspenders. [Freeborn] . . . should simply have carried the mortgage law analogy to its logical conclusion and held the [UCC] filing sufficient for complete perfection."[219]

Note the dilemma for a lender to a vendor in a jurisdiction where the law has not been clarified. Those who take security interests in a contract vendor's rights "are well advised to record some appropriate instrument . . . in the real estate records, and to file a financing statement as well. The added expense and inconvenience . . . seem a small price to pay for the enhanced protection the vendor's creditor will get as against third party claimants."[220]

Will adoption of the *Restatement* approach improve matters? The commentary to the *Restatement* states that "[t]reatment of the contract for deed as a mortgage will clarify that Article 9 of the Uniform Commercial Code governs the acquisition and perfection of a security interest in a vendor's position. This will

217. *See* Heide v. Mading King County Enters., 915 F.2d 531 (9th Cir. 1990) (stating both realty and Code filing necessary); *In re* Equitable Dev. Corp., 617 F.2d 1152 (5th Cir. 1980) (finding Code filing necessary); *In re* Gold Key Properties, Inc., 119 B.R. 787 (Bankr. D. Or. 1990) (explaining both realty and Code filing necessary); *In re* Northern Acres, Inc., 52 B.R. 641 (Bankr. D. Mich. 1985); S.O.A.W. Enters. v. Castle Rock Indus. Bank, 32 B.R. 279 (Bankr. D. Tex. 1983) (finding Code filing sufficient); *In re* Southworth, 22 B.R. 376 (Bankr. D. Kan. 1982) (finding both realty and Code filing necessary); Security Bank v. Chiapuzio, 747 P.2d 335 (Or. 1987) (stating either type of filing sufficient).

218. *See S.O.A.W. Enters.*, 32 B.R. at 279 (finding Code filing sufficient); *Chiapuzio*, 747 P.2d at 335 (stating either type of filing sufficient).

219. REAL ESTATE FINANCE LAW, *supra* note 1, at 119.

220. *Id.*

eliminate the uncertainty and risk associated with secured lending to a vendor."[221] Note that even though Article 9 will be applicable to a security interest in a vendor's contract rights, this does not mean that its increasingly accepted method of simultaneously perfecting a security interest in a note and mortgage—the transfer of possession of the note to the secured party—will be the appropriate means of perfection. For one thing, a promissory note normally is not contained in the contract for deed nor is one commonly found as a separate document in the transaction. More important, the contract for deed is probably not an "instrument" as the UCC uses that term.[222] Rather, it is correctly understood to be a "general intangible" for purposes of the Code and a security interest in it must be perfected by the filing of a financing statement.[223] Moreover, this will probably be the case even where the contract for deed contains a promissory note.[224]

One may validly argue that requiring two separate means of Article 9 perfection for interests that are economically, if not in form, identical represents at most a minor improvement over the status quo. Again, it is worth emphasizing that adoption of the *Restatement* approach is not aimed ultimately at making the contract for deed a more logical or efficient financing device, but rather at eliminating its *raison d'etre*. In the last analysis, a rational land financing system should include a single land security device—the promissory note and mortgage. When this occurs, delivery of the promissory note will be the efficient and

221. RESTATEMENT, *supra* note 2, § 3.4, cmt d.

222. See U.C.C. § 9-105(i) (1997), which defines an "instrument" as a paper "of a type which is in the ordinary course of business transferred by delivery with any necessary indorsement or assignment." *In re* Holiday Intervals, Inc., 931 F.2d 500 (8th Cir. 1991) (holding contracts for deed are not instruments); *see also* REAL ESTATE FINANCE LAW, *supra* note 1, at 118.

223. *See* U.C.C. § 9-106 (1997); U.C.C. § 9-304 cmt. 1 (1997); White & Summers, *supra* note 205, at 50 ("The courts generally agree that the seller's interest under a land sale contract is a general intangible subject to Article 9. 'Security interests in general intangibles may be perfected by filing a financing statement, but not by possession.' "); s*ee also, e.g., In re* Holiday Intervals, Inc., 931 F.2d 500 (8th Cir. 1991). A security interest in a "general intangible" is perfected only by filing a financing statement.

224. *See Holiday Intervals*, 931 F.2d at 505 ("We therefore hold that under Missouri law, a document containing both a land sale installment contract and a promissory note should be considered as one document, and that such a document is therefore not an instrument, the . . . failure to file a U.C.C. financing statement leaves [the] security interest unperfected.")

only mechanism for perfecting a security interest in a land seller's rights.

VIII. A FINAL ASSESSMENT

This article demonstrates that, with the possible exception of those states that have institutionalized forfeiture,[225] the contract for deed is an unpredictable and unreliable financing device from the perspective of the vendor and purchaser alike. We have seen that courts increasingly use a variety of devices to limit the availability and harshness of the forfeiture remedy. Courts and legislatures are increasingly applying a mortgage law analogy in assessing the rights of contract parties.[226] Moreover, this same uncertainty confronts the vendor who seeks specific performance or other nonforfeiture remedies.[227] On the other hand, forfeitures are sometimes enforced against purchasers with substantial equity in the real estate—the tardy purchaser can never be completely certain when the tender of arrearages or the contract balance will forestall forfeiture.[228] In addition, title problems abound for the vendor and purchaser alike.[229] Also, serious questions concerning the nature of the contract for deed bedevil bankruptcy courts.[230] Equally important, contract for deed use poses substantial problems for third parties. The rights of judgment creditors of the contract parties are often ambiguous and unpredictable and this situation is sometimes made more complicated by judicial invocation of equitable conversion or similar analytical abstractions.[231] More important, potential secured lenders to either the vendor or purchaser face substantial uncertainty about the priority of their security interests and their rights in the event the main contract goes into default.[232] This significantly impedes the marketability of their security interests on the secondary market.

225. *See supra* Part III.
226. *See supra* Part IV.C.
227. *See supra* Part V.
228. *See supra* note 20 and accompanying text.
229. *See supra* Part VII.A-B.
230. *See supra* Part VII.C.
231. *See supra* Part VII.D.
232. *See supra* Part VII.E.

Since relatively few of the foregoing problems exist in a land financing system that uses only mortgages or deeds of trust, one is compelled to ask why the contract for deed continues to find acceptance among land sellers. Several explanations suggest themselves. In a sizeable, albeit decreasing, number of states, mortgages must be foreclosed by a costly and time-consuming judicial action.[233] This helps to explain why the contract for deed is popular in jurisdictions such as Iowa, where a judicial proceeding is the only foreclosure remedy.[234] But why is the contract for deed continuing to be used in the increasing majority of states that now authorize power of sale foreclosure of mortgages and deeds of trust? In some, mortgage law, notwithstanding the availability of nonjudicial foreclosure, is viewed by land sellers as being in other respects too protective of mortgagors. This may in fact be the case, for example, in those power of sale states that afford the mortgagor long postforeclosure redemption rights.[235]

But how does one explain the continued use of the contract for deed in states where power of sale foreclosure is relatively inexpensive and efficient and where postsale redemption rights and other "pro-mortgagor" provisions are minimal? States like Missouri and Utah fall into this category. Several explanations are perhaps plausible. First, in some instances there may simply be information failure. This may be the case in border areas where contracts for deed may "spill over" from jurisdictions where mortgage law "tilts" in favor of mortgagors (and their use may therefore in some measure be sensible) to adjacent states where their use is difficult to understand or may even be dangerous for vendors.[236] Second, many vendors may use contracts for deed in low down payment settings and take their chances that their purchasers will be too unsophisticated to record or otherwise protect their interests.[237] Stated another way, vendors may take the chance that the purchaser will believe that the contract means what it says. Indeed, what Professor Warren asserted several decades ago

233. *See* REAL ESTATE FINANCE LAW, *supra* note 1, at 581.

234. *See, e.g.*, *id.* at 69; Charles F. Becker, Comment, *Remedying the Inequities of Forfeiture in Land Installment Contracts*, 64 IOWA L. REV. 158 (1978).

235. *See generally*, REAL ESTATE FINANCE LAW, *supra* note 1, § 8.4.

236. *See id.* at 108.

237. *See id.*

may still be the case: "[T]he vendor continues to use the [contract for deed] . . . 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."[238] Third, some vendors may simply want the psychological assurance that they will regain their land back in the event the purchaser defaults. I have sometimes heard anecdotal evidence from rural lawyers that sellers of farm land, especially, want the "security" of knowing that they are retaining "title" until the contract is paid off. With a mortgage or deed of trust, of course, the mortgagee will regain the land only if he or she outbids potential third party purchasers at a public foreclosure sale. However, given the uncertainty as to the enforceability of forfeiture clauses in these jurisdictions and the other substantial problems associated with the contract for deed, the prospect of "never really giving up" one's land seems an especially dubious reason for its use.

Advocacy of the judicial adoption of the *Restatement* approach to contracts for deed clearly should not be interpreted as rejecting the idea that it is socially advantageous for the law to provide a relatively quick and inexpensive mechanism for a land seller to realize on his or her security in the event of default by a purchaser. The availability of such a procedure probably encourages the extension of credit to individuals whose credit-worthiness is so poor that institutional or other third party financing would be unavailable. Indeed, the law has traditionally encouraged the extension of credit by the land sellers in other contexts. For example, under the "purchase money mortgage" doctrine, the vendor and other purchase money mortgagees are given lien priority over other liens or interests previously arising through the purchaser-mortgagor.[239] However, the solution to this need for special incentives to land sellers should not be the contract for deed. In most states this device has proved to be unreliable for the vendor and purchaser alike. Instead, the solution lies within the confines of traditional mortgage law. The first step would be judicial adoption of the *Restatement* approach. Legislatures

238. Warren, *supra* note 155, at 633.

239. *See* RESTATEMENT, *supra* note 2, § 7.2; REAL ESTATE FINANCE LAW, *supra* note 1, § 9.1.

may then have to act.[240] In those states that currently permit only foreclosure by judicial action, legislatures should authorize power of sale foreclosure of mortgages and deeds of trust.[241] States that already have nonjudicial foreclosure legislation should amend it to provide special incentives for land seller financing. A dual track foreclosure process could permit quicker foreclosure of a vendor purchase money mortgage where the mortgagor has not satisfied a specified minimum percentage of the original mortgage obligation. Moreover, other mortgagor protections could be modified. For example, in those states that afford mortgagors a statutory redemption period after the foreclosure sale, that redemption right would be unavailable unless the requisite percentage of the mortgage obligation had been satisfied.

The use of contracts for deed in states that have institutionalized the forfeiture remedy by statute pose a more difficult question. In these states, the contract for deed "works"—forfeiture not only is enforced, but it produces a marketable title in the vendor relatively cheaply and efficiently.[242] Why "mess with success?" Why not leave well enough alone? The Minnesota legislation,[243] especially, triggers these questions. It works relatively efficiently. Forfeiture is enforced, but its harshness is ameliorated by giving the purchaser a thirty- or sixty-day period after notice of default to pay arrearages and certain other costs. However, once forfeiture occurs, no post-forfeiture redemption is permitted. This latter feature makes the statute attractive to sellers because a six month redemption period applies to power of sale foreclosure of mortgages.[244] Indeed, my family has experienced both sides of the Minnesota contract for deed system. Not only, as I noted earlier,[245] were my parents purchasers of our first house under this system, my father recently was a contract for

240. For a plea that the New Mexico legislature should adopt the Restatement position, see Provencio, *supra* note 20, at 300.

241. As of 1994 over 30 jurisdictions authorized and used power of sale or similar types of nonjudicial foreclosure. *See* REAL ESTATE FINANCE LAW, *supra* note 1, § 7.19 n.1.

242. *See supra* Part III.

243. *See* MINN. STAT. ANN. § 559.21(2a) (West 1990).

244. *See id*. § 580.23(1).

245. *See supra* Part I.

deed vendor of a small house that he had inherited from my uncle.

While it is true that the Minnesota system and others like it work well with respect to the forfeiture remedy, the "third party" problems with the contract for deed are just as serious and perplexing in these states as they are in states that have not institutionalized the forfeiture process. The rights of third party creditors, secured and unsecured, are just as problematic. This is because the contract for deed conceptually is both a contract and financing device, "fish as well as fowl." These problems would be obviated if all states, including Minnesota, returned to a unitary land finance system, with mortgage law and the power of sale mortgage or deed of trust as its foundation. Of course, in states like Minnesota this process cannot begin with a judicial adoption of the *Restatement* approach. Where the contract for deed is regulated by statute and authorizes forfeiture, absent constitutional deficiencies, courts may not supplant what legislatures have mandated.[246] Rather, the answer in such states lies in the legislature. In Minnesota, for example, the path to a unitary system seems relatively simple. First, the contract for deed termination statute should be repealed. Its substance should be incorporated into that state's power of sale mortgage foreclosure legislation. Thus, land sellers who take back a purchase money mortgage would be able to obtain a nonjudicial foreclosure sale subject to the same notice requirements and the same postdefault grace period now mandated under the current contract for deed termination statute. The same arrearages provisions would be applicable. No postsale redemption would be permitted. Even though the current contract for deed legislation does not distinguish between purchasers who have substantially reduced the contract balance and those who have not, the new "mortgage law" version should make the "fast track" available only when a minimum specified percentage of the mortgage obligation is

246. The *Restatement* recognizes this obvious proposition. *See* RESTATEMENT, *supra* note 2, § 3.4 cmt. d ("[S]tatutes in several states recognize and regulate the contract for deed as a distinct mortgage substitute and authorize forfeiture as a remedy for purchaser breach. To the extent that this section conflicts with such a statutory scheme, it will have no effect on the rights and remedies of the parties to a contract for deed transaction.").

unpaid. In all other situations, the "normal" power of sale requirements would be triggered, including the current six month post-sale redemption period. The only significant change from current Minnesota contract for deed procedure would be that the defaulting purchaser would have the right to a public foreclosure sale of the property. This public sale and valuation of the land could in some instances result in a surplus for the purchaser-mortgagor. The vendor would not automatically regain the land via forfeiture—he or she would be required to purchase at the sale.

IX. CONCLUSION

The *Restatement* approach to the contract for deed should be viewed as being neither "pro-debtor" nor "pro-creditor." Rather, it represents an attempt to instill rationality and efficiency into the nation's land financing system. While today's contract for deed can sometimes prove harsh for the purchaser, it is an equally problematic financing device for the vendor. In many instances it works for the vendor simply because the purchaser fails to assert his or her rights. Its use can cause innumerable title problems for both sides of the transaction. Because of its ambiguous nature and unpredictability, its use discourages secured lending to both purchasers and vendors alike. These problems, in turn, hinder the development of a significant secondary market for the sale of both vendors' interests and junior mortgages and security interests given by contract purchasers. It clearly is time for states to return to a unitary system of land financing within the broad confines of mortgage law and procedure. One hopes that the *Restatement* will provide a major impetus in that direction.