Land Contracts in Ohio--The Need for Reform

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NOTES

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With increasing frequency, the financing arrangement for the conveyance of real estate is being accomplished by the use of the land contract. The nature of the relationship between the land contract vendor and vendee, their respective rights upon the contract’s breach, and the striking similarity between the land contract and the real estate mortgage have caused the courts of Ohio great concern.

Courts have persistently treated the vendee who has defaulted on the land contract severely, notwithstanding their willingness to grant relief to the defaulting mortgagor in a similar position. The anticipated perpetuation of this unwarranted distinction by the courts forms the foundation for urging that the Ohio legislature assume the task, as others have done, of improving the status of the land contract vendee upon his default. In general, no attempt has been made in this paper to analyze the judicial treatment of land contracts in other jurisdictions. Suffice it to say that the variations among the holdings, to a great extent, defy comparative analysis.

Initially, a distinction must be drawn between the two common types of executory contracts for the sale of real estate. In the majority of real estate transactions, which rely upon conventional mortgage financing, the preliminary sales contract is used. Its purpose is to implement an immediate transfer of the vendor’s legal title in the realty upon performance of its conditions. In contrast, we are exclusively concerned with the long-term installment land contract. It is a conveyancing device through which the vendee takes immediate possession of the property. The vendor retains legal title to the property to secure the payment of the purchase price which he receives through deferred installment payments over an extended number of years.

The Variety of Real Estate Transactions That Utilize the Land Contract Instrument

An appreciation of the wide range of real estate transactions which utilize the land contract conveyancing instrument is necessary, as background, for an objective study of the problem.


Farm properties are commonly purchased and sold under a land contract arrangement. Furthermore, to an increasing extent, it is used by builders of large scale, low-cost housing developments. However, the practice which has cast the land contract into a state of justifiable disrepute and has created the urgent need for remedial legislation is one of recent development. Specifically, it is a procedure by which the land contract agreement has been converted into an instrument being used for unbridled overreaching by a large group of unscrupulous speculators. Their victims live within the large, heavily populated, metropolitan areas in which there is taking place a transition from one racial group, usually Caucasian, to another, commonly the Negro.

Briefly, it is the interplay between the very limited financial resources of the potential homeowners being attracted to the neighborhood, the arbitrary refusal of lending institutions to provide mortgage loans for the particular area, and the present owners' anxiety to sell their homes that allows speculators to purchase reasonably sound residential properties at prices far below their true values. Furthermore, it is a combination of an acute shortage of housing plus the use of minimal down payments as bait that creates a strong demand for the properties. This allows the speculators to sell them on "land contract" for an amount greatly in excess of their cost. The vendor buttresses his dominant economic position in the transaction and attempts to guarantee its profitability by inserting various key phrases into the land contract agreement.

As frequently happens, the financial burden of making large monthly installment payments which the vendee has assumed becomes too heavy, thereby causing him to default upon his contractual obligation.

At the opposite end of the spectrum, the land contract is also used to accomplish the sale of real estate in a manner which is beneficial to both the seller and the purchaser. On occasion, the owner of residential real estate, after deciding to sell, finds that he must personally assume a share of the financing burden if he is to realize his property's actual value. Situations inviting this decision commonly arise where the amount of the down payment becomes a competitive factor in the prevailing real estate market. Under these circumstances the owner can of course reduce the sale price. However, the more attractive alternative is to finance the purchase himself for the difference between the sale price and the amount of the available down payment (plus the amount of the existing mortgage indebtedness). When the vendor chooses to

provide a portion of the credit financing, the parties may use the pur-
chase money mortgage or the land contract. The mortgagee-vendor
however stands in a more perilous position, compared to that of a land
contract vendor, upon a default by the purchaser.

Both the purchase money mortgage and the land contract accomplish
a basically identical result, that is, they reserve in the vendor a security
interest in the property to the extent of the vendee's debt.

While these two transactions take different forms, they are used to ac-
complish an identical purpose. In both cases the vendor seeks to
retain an interest in the property he has sold as security for the pay-
ment of the unpaid balance of the price. It is with the realization that
the vendor's interest under an installment [contract] is merely by way of
security, that one must approach the subject.

However, the underlying feature which makes the land contract the more
attractive method is that upon the vendee's default the vendor can nor-
mally recover possession of the property and retain all past installment
payments as liquidated damages, through summary proceedings.

PROVISIONS OF THE STANDARD LAND CONTRACT

By inserting certain "magic phrases" into the land contract instru-
ment, the vendor secures for himself a commanding advantage over the
vendee when the latter defaults upon the land contract. The following
provisions attain this dominant position for the vendor and therefore
appear in the standard long-term installment land contract.

(1) Time is of the essence of the contract.

6. I Glenn, Mortgages § 15 (1943); Levin, Maryland Rule on Forfeiture Under Land
Installment Contracts — A Suggested Reform, 9 Md. L. Rev. 99 (1948).
7. In the purchase money mortgage transaction the grantor transfers a deed to the grantee,
and to secure the amount of the debt owed to the grantor the grantee simultaneously executes
a mortgage to the grantor. The effect is that the grantor retains the legal or equitable title
to the property (depending upon whether he is in a "title state" or a "lien state") as security
for the payment of the purchase price. In the land contract transaction, the grantor retains
the legal title to the property as security for the purchase money. Both instruments are there-
fore security devices in which the purchaser is a debtor while the vendor is a creditor with a
security interest in the property. 2 Glenn, Mortgages § 343 (1943). Howe, Forfeitures in
Maryland Rule on Forfeiture Under Land Installment Contracts — A Suggested Reform, 9
Md. L. Rev. 100 (1948).
9. In the interest of uniformity, all subsequent discussion of the land contract will assume
that these provisions are contained therein, unless otherwise stated.
10. Time can be made the essence of a contract by the express stipulation of the parties.
Kirby v. Harrison, 2 Ohio St. 327 (1853); Woloveck v. Schuler, 19 Ohio App. 210 (1922).
Notwithstanding the absence of an express time of the essence clause in a real estate contract,
one will be implied under proper circumstances. For example, a court implied time to be of
the essence after the vendor served the vendee with notice upon the latter's breach of the con-
tract. Kirby v. Harrison, 2 Ohio St. 327 (1853); Note, Equitable Relief Against Forfeiture
in Land Sales, 32 Yale L.J. 65 (1922). Contra, O'Brien v. Bradulov, 80 N.E.2d 685 (Ohio
(2) Upon the default of the vendee, the vendor reserves the right to declare the contract forfeited, to recover possession of the land, and to retain all past installment payments made on the purchase price and all improvements placed upon the land as liquidated damages.

(3) Upon the vendee's default, the vendor can elect to accelerate all future payments due on the land contract. He shall also have the right to compel continued performance of the contract by the vendee.

(4) Failure by either of the parties to enforce a right granted to them by the contract shall not be treated as a waiver of that right or as creating an estoppel or modification of the contract; but the same shall be considered as a gratuitous forebearance.

(5) After default and notice to vacate the vendee shall henceforth be deemed a mere tenant-at-will under the vendor.

The time of the essence provision allows the vendor's reserved powers to be utilized at the vendee's default. When it is coupled with the forfeiture clause and the acceleration clause the vendor is assured, at least in theory, of a controlling position at the default. Courts, as a general rule, apply the above default provision of the land contract and determine the rights of the vendor and vendee accordingly.

By the great weight of American authority no relief can be afforded against express conditions precedent inflicting forfeiture where the contract makes time of the essence, although the delay may be very slight and although the buyer has paid a large part of the price and has greatly improved the land. The vendor is entitled to the land, with all improvements, fixtures and growing crops, and in addition to the purchase money already paid.

Notwithstanding this statement, it is clear that contemporary courts display a more enlightened attitude in this respect and refuse to enforce the express terms of the land contract where the equities of the case so de-
mand. The equitable results are achieved by declaring the damages clause to be in effect a penalty or a forfeiture provision, thereby denying the vendor the relief sought by him. This attitude, which has generally been adopted by the Ohio courts, is justified when attention is directed toward two additional factors. First, the similarity between the status of the land contract vendee and the mortgagor suggests that the vendee in default be afforded relief similar to that provided the mortgagor in default. Second, the vendee while in possession of the realty or, in the absence of possession, during the executory stages of the land contract, has a vested equitable interest in the property which must be fully recognized. Fundamentally, it is this vested equitable interest that supplies the vendee in default with the power to defend against the enforcement of a forfeiture. An understanding of the true nature of this equitable interest is paramount to a strengthening of the judicial or statutory relief which should be made available to the vendee in default.

THE DOCTRINE OF EQUITABLE CONVERSION

The property interests of the land contract vendor and the vendee are substantially determined through application of the doctrine of equitable conversion. The entire approach to the treatment of the parties' land contract interests is based upon the maxim, "Equity treats as done that which in good conscience ought to be done." In applying this doctrine the courts of Ohio uniformly recognize that the execution of a contract for the sale of realty works a conversion and conveys to the vendee in possession an equitable estate in the land. The vendee's interest is a
vested one, and he is recognized as being the beneficial owner of the property to the extent of the purchase price paid. Upon full payment of this obligation his interest ripens into a complete equity, entitling him to a conveyance of the legal title to the property. From the date of the contract's execution, the vendor retains the legal title to the property as security for the performance of the vendee's obligation to pay the purchase price. In addition to the legal title he also holds a beneficial estate in the lands to the extent of the unpaid purchase price.

Furthermore, by the application of the effects of the doctrine of equitable conversion, and other equitable doctrines, the majority of American courts hold that the vendee's equitable ownership casts upon him the risk of accidental injury or destruction to the property.

Once it is accepted that the vendee has an equitable interest in the reality during the executory stages of the land contract, a closer examination of the fundamental problem, that is, the vendee's default upon the land contract, is in order.

**Default Upon the Land Contract — Relief Granted to the Parties**

**Forfeiture**

Distinguishing Between a Liquidated Damages Clause and a Penalty Clause

Theoretically the enforcement of a forfeiture provision in one case and the refusal to do so in another case is justified by characterizing the damages provision as one for liquidated damages in the former case and

19. An estate is vested in interest when there is a present fixed right of future enjoyment. The estate is contingent when the right of enjoyment is to accrue on an event which is uncertain. First Nat'l Bank v. Logue, 89 Ohio St. 288, 106 N.E. 21 (1914).


22. Butcher v. Kagey Lumber Co., 164 Ohio St. 85, 128 N.E.2d 54 (1955); Oberholtz v. Oberholtz, 79 Ohio App. 540, 547, 74 N.E.2d 574, 579 (1947); Williams v. Johns, 34 Ohio App. 230, 170 N.E. 580 (1930); 1955 Ops. ATTY GEN. (Ohio) 150. See First Nat'l Bank v. Logue, 89 Ohio St. 288, 106 N.E. 21 (1914); 4 Pomeroy, EQUITY JURISPRUDENCE § 1260 (5th ed. 1941). When the title to the property is retained by the vendor as security for the purchase price, the vendor has an interest commonly called a lien.


24. Annot., 27 A.L.R.2d 444 (1953). But see Trapp v. Steubenville Bldg. & Loan Ass'n. 6 Ohio Supp. 211 (36 N.E.2d) (1941). The court decided that the vendor of real estate under a land contract was liable for damages to a party who was injured as a result of a violation of Ohio General Code section 1006 (now Ohio Revised Code section 4107.14), commonly referred to as "the handrail statute." The court held that the vendor was "owner"
as a penalty in the latter case. The reason for distinguishing between liquidated damages and penalties arises out of the universal rule that equity "abhors a forfeiture" and that it will not lend aid to its enforcement, especially one which arises out of the non-payment of money.

It is true, as a recent Ohio appellate court has said, that "the principles of law governing the interpretation of contracts which provide for the payment of liquidated damages for breach of the contract are established by clear pronouncements in decisions by the Supreme Court of the state." However, as a practical matter, it is submitted that the legal tests and factual circumstances examined by the courts to distinguish between a liquidated damage clause and a penalty in general contractual settings are not to be given significant consideration when the identical issue arises in a land contract transaction.

The primary factor that compels this conclusion is that the damages clause in the land contract does not reflect a true liquidation calculation or honest estimate of the actual damages sustained by the vendor upon a default. This result is occasioned by the fact that the amount of "liquidated damages" retained by the vendor upon a default varies in inverse proportion to the loss actually sustained by him. Stated differently, there is no direct relationship between the vendee's continuously increasing equity in the property and any additional damage caused by the vendee's default.

Other practical considerations militate against the application of identical tests in land contracts and normal contractual transactions. For

28. Economy Sav. & Loan Co. v. Holington, 105 Ohio App. 243, 152 N.E.2d 125 (1957). The rules controlling the construction of liquidated damages clauses are generally set forth in Jones v. Stevens, 112 Ohio St. 43, 146 N.E. 894 (1925). The supreme court stated: "Where the parties have agreed to the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof and if (2) the contract as a whole is not manifestly so unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof." See generally Corbin, Contracts §§ 1057-58, 1063-64 (1951); 3 Story, Equity Jurisprudence § 1731 (14th ed. 1918); 5 Williston, Contracts § 783 (3d ed. 1961); Dunbar, Drafting the Liquidated Damages Clause — When and How, 20 Ohio St. L.J. 221 (1959).
example, the assumption relied upon in the general area of contract law to enforce a liquidated damages clause is that the parties were sui juris and dealing on an equal footing during their negotiations. However, in the usual land contract sale it is clear that the vendor holds a dominant economic position and stands in complete control of the terms and conditions of the sale. Moreover, the pre-estimate of damages which the liquidated damages clause is supposed to constitute does not in fact exist at the execution of the land contract. It is doubtful whether the parties during their negotiations manifest any intention concerning the amount that should constitute the correct measure of damages upon a breach of the contract. It is clear that the use of the term "liquidated damages" in a land contract appears purely as a matter of form. It is merely a label borrowed from other contractual transactions and it does not effectively fit the needs of the specialized land contract transaction.

The Qualification Test

The courts are aware of the realities surrounding the usual land contract transaction and generally de-emphasize the principles applied in general contract law (to distinguish between liquidated damages and penalties) and place controlling emphasis upon the "qualification test," as announced by the Ohio Supreme Court in Norpac Realty Company v. Schackne.30

Where it is impossible for a vendor and vendee, contracting for the sale of property, to fix with any degree of certainty what damages may accrue to the seller under the contract, they may agree upon a stipulated amount as liquidated damages. The foregoing principle is subject to the following qualification: if the amount so agreed upon is extravagantly unreasonable or manifestly disproportionate to the actual damages sustained, a court of equity will not enforce the provision for liquidated damages, but will regard it as a penalty. (Emphasis added.)

This test measures the relationship of the vendor's actual damages caused by the vendee's default against the value of the vendee's partial performance. In effect it permits the judiciary to adopt a test which can accurately distinguish between liquidated damages and a penalty in the specialized land contract setting. This test places controlling emphasis upon the circumstances of the transaction as of the time of the default. In comparison, in a normal contractual setting (where a court is called upon to decide the issue of the liquidated damages versus penalty), the emphasis is placed upon the circumstances as they existed at the execution date of the contract. The "qualification test" has found judicial expression in a variety of forms and therefore has supplied the courts with wide latitude in distinguishing between liquidated damages and a penalty.

To summarize, throughout most of the land contract cases on the issue of liquidated damages versus a penalty runs the principle that justice requires that the vendor recover only fair compensation for his injury, rather than that a punishment should be imposed upon the vendee for his default. Therefore as a practical matter success or failure in passing the "qualification test" is conditioned upon the court's decision that the amount to be retained by the vendor is or is not unreasonable in relation to the actual damages sustained by him as a result of the vendee's default. Where the court concludes that there is a reasonable relationship between the two, the amount paid in on the contract is labeled as liquidated damages and the agreement is enforced. On the other hand, if the court concludes that the balance between the vendee's equity in the property and the vendor's injuries weigh in the vendee's favor, they characterize the liquidated damages provision as a penalty and grant the vendee relief. The "qualification test" then assumes the form of an implied condition, appearing in every land contract, through which equity can, at the time of the vendee's default, measure the reasonableness between the damages sustained by the vendor as compared to the value of the vendee's partial performance.

In addition to the application of the foregoing "qualification test" equity has seized upon a variety of other mechanisms to grant relief, under appropriate circumstances, against a forfeiture.

The Doctrine of Waiver

Courts commonly make use of the doctrine of waiver as the instrument by which they avoid the harshness of a forfeiture. The underlying thesis of the doctrine is that the vendor's acquiescence to the vendee's failure to comply with the exact terms of the contract, for example, his acceptance of irregular installments on the purchase price, constitutes a...
waiver of his right subsequently to enforce a forfeiture.\textsuperscript{36} This proposition has been stated as follows:

[T]he receipt of a part or the whole of the purchase money, after the time of payment had elapsed, might be construed into a waiver on the part of a vendor, of any advantage he might have taken in consequence of the default of the vendee. And the same would be the case should the vendor by any other conduct manifest that he did not intend to insist upon a strict and literal performance by the other party.\textsuperscript{37}

It is virtually impossible to set forth, with any degree of accuracy, the factual circumstances under which a vendee in default can safely rely upon this doctrine.\textsuperscript{38} The ease with which the waiver doctrine can be applied to avoid the effectiveness of a forfeiture provision has led many draftsmen to attempt to counteract its operation by inserting appropriate language in the land contract.

\textit{Judicial Determination of a Forfeiture}

In further attempting to ease the oppressive force of a forfeiture, the courts do not permit a forfeiture ipso facto to arise upon the vendee's failure to make an installment payment, notwithstanding the presence of a time of the essence clause and an express contractual provision allowing the vendor to treat the contract as forfeited. The vendor must serve the vendee in default with notice of his intention either to rescind the contract or to accelerate the due date of all future payments, and give the vendee a reasonable time to remedy the default.\textsuperscript{39} This requisite notice is adequately manifested by the filing of a bill to rescind or a petition in forcible entry and detainer.\textsuperscript{40}

\begin{footnotesize}
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\item\textsuperscript{36} 20 \textsc{Ohio Jur. 2d Equi}ty §§ 36, 38 (1956).
\item\textsuperscript{37} Curtis \textit{v. Factory Site Co.}, 12 \textit{Ohio App.} 148, 158 (1919), quoting Rummington \textit{v. Kelley}, 7 \textit{Ohio (pt. 2) 97} (1836).
\item\textsuperscript{38} In Economy Savings & Loan Co. \textit{v. Hollington}, 105 \textit{Ohio App.} 243, 152 \textit{N.E.2d} 125 (1957), the trial court held that the vendor had waived his right to a forfeiture at the vendee's default. This conclusion was reached because the vendor had accepted installment payments at irregular times and had made no demand that the purchaser make payments in accordance with the contract terms. The appellate court, without any additional disclosure of the facts, reversed the lower court. It said: "We do not consider that the doctrine of waiver has any application in determination of the cause now before the court. "It is not reasonable to infer that, by receiving some irregular payments and not demanding a termination of the contract because the purchaser failed to make the payments regularly, as provided in the contract, the vendor intended or should be expected to waive the right to terminate the contract when the purchaser has become insolvent and is now unable to make any further payments according to the terms of the contract." 105 \textit{Ohio App.} at 253, 162 \textit{N.E.2d} at 132.
\item\textsuperscript{39} See Kirby \textit{v. Harrison}, 2 \textit{Ohio St.} 327 (1853). After notice the vendee in default must tender payment within a reasonable time or be barred by the rescission. \textit{State ex rel. Morgan v. Stevenson}, 39 \textit{Ohio App.} 335, 177 \textit{N.E.} 247 (1931); Geil \textit{v. Lehr}, 4 \textit{Ohio N.P. (n.s.)} 638 (C.P. 1906).
\item\textsuperscript{40} Kirby \textit{v. Harrison}, 2 \textit{Ohio St.} 327 (1853); Sternberg \textit{v. Washington}, 177 \textit{N.E.2d} 525 (Ohio Ct. App. 1960).
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It has also been held that in order to render the contract void certain questions of fact must first be judicially determined. For example, the written communication to the vendee that the land contract is now "forfeited and is a dead letter," does not constitute a perfected rescission or forfeiture. This perfected forfeiture or rescission will not arise until a court of competent jurisdiction has decreed it or until the vendor has actually recovered possession. In addition to the requirement of notice the vendor must be able to convey a marketable title, in accordance with the terms of the contract, at the time of the default; otherwise, he will not be permitted to declare a forfeiture.

Additional Remedies Available to the Vendor Upon the Vendee's Default

A variety of remedies, in addition to a forfeiture decree, are available to the vendor upon the vendee's default. However, a study of the case law discloses that both the courts and legal counsel are perplexed over the purposes and relief which these actions serve to accomplish. To some extent, it is felt that the confusion is partially attributable to a loose interchange of legal terminology. The result is that the unfortunate confusion and conflict existing in the case law defy critical analysis. Nevertheless an attempt has been made to crystallize those principles which emerge from the decisions.

The terms of the standard land contract permit the vendor, upon the vendee's default, to bring an action to have the contract cancelled, recover possession of the property, and retain the payments on the purchase price as liquidated damages. In the alternative he can elect to sue on the contract for the balance of the purchase price due.

In disaffirming the contract the vendor can bring an action to quiet his title and have the contract rescinded. Technically speaking however, rescission involves not only the termination of the contract, but also the restoration of the contracting parties substantially to the status quo as of the time the contract was executed. Rescission therefore can be

43. Ibid.
44. See Woloveck v. Scheuler, 19 Ohio App. 210 (1922).
45. Fairlawn Heights Co. v. Theis, 133 Ohio St. 387, 14 N.E.2d 1 (1938). There is some authority that the vendor need not pursue either of the two remedies stipulated in the contract. Rather, unless he is bound by the contract to resort only to those remedies stipulated, he can resort to any other remedial device. Kegerreis v. Citizens Trust Co., 52 Ohio App. 412, 3 N.E.2d 896 (1936).
safely relied upon by the vendor only where the value of the installments paid are reasonably proportionate to the rental value and/or profits produced by the property during the vendee's occupancy. Only under such circumstances can the vendor have the land contract rescinded and still retain these amounts as damages.\textsuperscript{48}

An action in ejectment will also serve to recover possession of realty being held by the vendee after his default and after the vendor has declared a forfeiture pursuant to the terms of the land contract.\textsuperscript{49}

However, a summary statutory procedure more frequently adopted to recover possession after the default is an action in forcible entry and detainer.\textsuperscript{50} Recent case law has held that the forcible entry and detainer action is, under Ohio law, a possessory action only.\textsuperscript{51} That is, it is designed to serve the sole function of determining the right of the plaintiff to the immediate possession of the property, and it does not test the vendor's title in the property.\textsuperscript{52} By statute, municipal courts have jurisdiction over the action,\textsuperscript{53} unless the question of title is introduced into the proceedings.\textsuperscript{54} The municipal court's decision in a forcible entry and detainer action does not serve as a bar to a subsequent suit in common pleas court on the question of the parties' respective equitable interests in the property.\textsuperscript{55}

The alternative election which the vendor can make is to stand on the contract and sue the vendee for the balance due on the purchase


\textsuperscript{49} Woloveck v. Schuler, 19 Ohio App. 210 (1922); Contractors & Builders Supply Co. v. Cresap, 9 Ohio App. 75 (1917).


\textsuperscript{52} Jenkins v. Hamilton County Court, 173 N.E.2d 186 (Ohio Ct. App. 1961).

\textsuperscript{53} \textsc{Ohio Rev. Code} § 1901.18.

\textsuperscript{54} Sternberg v. Washington, 177 N.E.2d 525 (Ohio Ct. App. 1960); Olds v. Morse, 98 Ohio App. 382, 129 N.E.2d 644 (1954). Common pleas courts have no original jurisdiction over these proceedings. \textsc{24 Ohio Jur. 2d Forcible Entry and Detainer} § 28 (1957).

\textsuperscript{55} Ohio Revised Code section 1923.03 states: "Judgments under sections 1923.01 to 1923.14 inclusive, of the Revised Code, either in the county court or in the court of common pleas, are not a bar to a later action brought by either party." This statute is an exception to the general rule relative to res judicata, and leaves open for further consideration disputes between the parties growing out of the identical subject matter. Jenkins v. Hamilton County Court, 173 N.E.2d 186 (Ohio Ct. App. 1961); Heck v. Hlavin, 61 Ohio App. 270, 103 N.E.2d 282 (1951); Swiers v. Smith, 150 N.E.2d 517 (Oberlin Ohio Mun. Ct. 1958).
price.\textsuperscript{56} In affirming the contract upon a default, the vendor can also adopt the usual breach of contract remedy and institute suit for the intermediate installments that are past due.\textsuperscript{57}

Furthermore, essentially identical results can be achieved by instituting an action to compel specific performance of the contract or an action to compel a foreclosure and judicial sale of the property.\textsuperscript{58}

An additional question worthy of mention is whether the vendor can recover the reasonable rental value of the premises from the vendee for his possession after the date of default. Success or failure in this attempt apparently hinges upon whether the land contract contains a provision whereby the vendee becomes a mere tenant at will upon his default.\textsuperscript{69}

On the basis of these decisions the standard land contract now includes this provision to further strengthen the vendor's position. Furthermore, it has been held that the joinder statute, Ohio Revised Code section 2309.05(g), authorizes the joinder of an action to cancel the contract with one to recover for the rental value of the premises.\textsuperscript{60}

\textit{Relief Available to the Vendee Upon His Own Default}

In appropriate circumstances, various relief measures are available to the vendee in default, notwithstanding the fact that he has breached the contract. The problem is, "What equity or combination of equities must the vendee show to overcome this initial advantage in the vendor and obtain the relief he is seeking?"\textsuperscript{61}

\textsuperscript{56.} Fairlawn Heights Co. v. Theis, 133 Ohio St. 387, 14 N.E.2d 1 (1938).

\textsuperscript{57.} Woloveck v. Schueler, 19 Ohio App. 210 (1922).


The difference in the two remedies lies in their emphasis rather than in their results. An action in specific performance recognizes the payment of the purchase price whereas a foreclosure action recognizes the vendor's lien on the realty in the nature of an equitable mortgage through which he can enforce his interests. Theoretically, both actions would ultimately result in a judicial sale of the property and a personal judgment against the vendee for the deficiency.

\textsuperscript{59.} Everson v. Municipal Court of Barberton, 98 Ohio App. 177, 128 N.E.2d 467 (1954). See Sternberg v. Washington, 177 N.E.2d 525 (Ohio Ct. App. 1960). But see Geil v. Lehr, 4 Ohio N.P. (n.s.) 638 (C.P. 1906), which held that a vendee after default and notice to vacate, in the absence of a contractual provision, did not become a tenant at will and therefore liable to the vendor for the reasonable rental value of the property from date of notice.


Specific Performance Decree After Default

Regardless of the trend in other jurisdictions62 and disregarding the holdings of past Ohio decisions,63 it is apparent that a contemporary Ohio court, on one basis or another, will disregard the force of the forfeiture language in the land contract if the vendee tenders payment of the balance due on the purchase price within a reasonable time after default.64 Though no Ohio court has offered a specific explanation for its actions, the reason for this enlightened approach seems clear. It appears to be the court's recognition of this underlying principle: The retention of title by the vendor with its incident right of forfeiture is, in substance, held only as security for the performance of the vendee's pecuniary obligation. Therefore, upon the tender of payment in satisfaction of the vendee's contract debt, there no longer is any need for the vendor to retain title to the property inasmuch as the purpose for which the security interest was created has been fulfilled. It is evident that the granting of a decree of specific performance to the vendee after his default is equivalent to a mortgagor's bill to redeem from the mortgagee after law day.65

As previously discussed, courts often justify their action in granting the vendee a decree for specific performance after his default, by resorting to the doctrine of waiver or estoppel to circumvent the forfeiture language of the contract.66

62. Historically the general rule has been that when the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of law, the court of equity cannot relieve the vendee who has made default. See generally authorities cited Note 13 supra. See also 2 Pomeroy, EQUITY JURISPRUDENCE §§ 448-60 (5th ed. 1941).

63. E.g., Campbell v. Hicks, 19 Ohio St. 433 (1869). The court refused to decree specific performance for the vendee in a case in which he tendered payment twenty-eight days after the last installment was due. The basis of the refusal was that the court found that there had not been a waiver by the vendor.

64. Dependabilt Homes, Inc. v. White, 117 N.E.2d 706 (Ohio Ct. App. 1951); Morris v. George C. Benning, Inc., 77 N.E.2d 372 (Ohio Ct. App. 1947); Kundtz v. Van Deboe Haeger & Co., 24 Ohio C.C.R. (n.s.) 139 (Cir. Ct. 1902), aff'd, 70 Ohio St. 485, 72 N.E. 1166 (1904); Curtis v. Factory Site Co., 12 Ohio App. 148 (1919); Cleland v. Cleland, 152 N.E.2d 914 (C.P. 1958). The liberal attitude presently being displayed by the courts should not however be overstated or misconstrued. To illustrate, a contemporary court would still be correct in holding, as did a prior one, in Kirby v. Harrison, 2 Ohio St. 327 (1853), that a tender of payment by the vendee three years after default and after there has been a substantial increase in the value of the land does not deserve a display of equitable sympathy, and its refusal to grant a decree for specific performance would be proper.

Irrespective of the vendee's right to specific performance, it will not be granted if after the land contract has been executed, title to the property has been conveyed to a bona fide purchaser for value. When such circumstances arise, the vendee's remedy lies in an action for damages against the vendor. See Hegg v. Sigle, 14 Ohio L. Abs. 456 (Ct. App. 1933); Tyler v. Martin, 11 Ohio L. Abs. 660 (Ct. App. 1932).

65. DUFFEE, CASES ON SECURITY 169-70 (1951).

Recovery of Consideration Paid Which Exceeds the Vendor's Damages

The foregoing discussion presupposes that the vendee can raise the balance due on the purchase price within a reasonable time after his default. Needless to say, as a practical matter, this is often an unwarranted supposition. A party who cannot make a single installment payment will normally be unable to raise the total balance due on the purchase price.

This predicament suggests the question: Can the vendee recover from the vendor that amount paid by him which exceeds the damages sustained by the vendor due to the vendee's default? There is a growing trend in some jurisdictions which permits the vendee to recover such excessive amounts in an action for restitution. The vendee can introduce his claim for restitution by suing in assumpsit, counterclaiming in an action by the vendor, or by seeking restitution as an alternative to specific performance. Unfortunately the great weight of authority in the United States denies restitution to the defaulting vendee. However, it has been suggested that the initial strength of this conclusion can be diluted by the realization that in a great many of the cases denying restitution, the vendee was unable to establish a sufficient disparity between his partial performance and the vendor's damages for equity to take cognizance of his plea for restitution. But the fact remains that many courts denying relief do so solely because they feel compelled to enforce the express forfeiture provisions of the contract.

In a fairly recent Ohio appellate case a vendee in default successfully resorted to an action for money had and received. He was granted a recovery of the amount by which his installment payments on the purchase price exceeded the fair rental value of the property during his occupancy. The decision, however, is subject to theoretical criticism and

69. CORBIN, CONTRACTS §§ 1129-30 (1951); 5 WILLISTON, CONTRACTS § 791 (3d ed. 1961).
70. See Corbin, The Right of a Defaulting Vendee to the Restitution of Installments Paid, 40 YALE L.J. 1013 (1931).
71. See Howe, op. cit. supra note 68, at 447.
73. The court reasoned that the land contract had in effect been rescinded and its elimination remanded the vendee to such relief as he would be entitled to if a contract did not exist. Extending this reasoning, it found that the plaintiff-vendee was not suing on his contract, but that "in such a case the law raised an obligation which may be enforced in an action for money had and received." Id. at 139, 108 N.E.2d at 299.
its efficacy is questionable.\textsuperscript{74} But inasmuch as the Ohio courts have displayed a more flexible attitude towards a disregard of the forfeiture provisions, it is felt that a vendee in default, under proper circumstances, would have a reasonable possibility of successfully recovering by proceeding on the restitution theory.

\textbf{Remedies Available to the Vendee Upon the Vendor's Default}

Situations do, of course, arise in which the vendee stands ready, willing, and able to perform the agreement but the vendor defaults on one or more of his obligations under the contract. When the transaction assumes this posture, the vendee can invoke his normal contractual remedies.\textsuperscript{75} He may sue for breach of contract, for specific performance, or seek to have the contract rescinded.\textsuperscript{76} The authorities are not in agreement as to the measure of damages recoverable by the vendee in an action for breach of contract.\textsuperscript{77} It has been recently held in Ohio that the vendee can recover the difference between the amount due on the contract at the date of the vendor's breach and the market value of the property as of that date.\textsuperscript{78}

Restitutionary relief should be made available to the vendee as a method through which he can recover damages.\textsuperscript{79} There are fundamental distinctions between this mode of recovery and an action for breach of contract.

Where the purchaser has paid any part of the purchase money, and the seller does not complete his engagement, so that the contract is totally

\textsuperscript{74} It has been stated that an action for money had and received would not lie where the purchaser had been in possession of the property prior to the rescission. The reason given for this position was that once the vendee had been in possession the parties could no longer be placed in \textit{status quo}. I Sugden, \textit{Vendors} 359 (8th Am. ed. 1873). See Sprouse v. Buchanan, 105 Ohio App. 43, 151 N.E.2d 42 (1956).

See also the cases cited in Brown v. Johnston, 95 Ohio App. 136, 108 N.E.2d 298 (1952), upholding the vendor's refusal to refund the past installments paid by the vendee after the vendee's default.

Furthermore, the one case cited by the \textit{Brown} case as authority for its reasoning is Swee v. Bregenzer, 19 Ohio C.C.R. (n.s.) 563 (Cir. Ct. 1912). This case did not involve a land contract transaction but rather, it was a conventional real estate conveyance in which the vendee treated the contract for the sale as having been rescinded, and elected to sue in an action for money had and received.

Additional doubt is cast upon the propriety of the decision by the fact that no subsequent cases have been found which have adopted or even mentioned this decision. See also Middleport Woolen Mills Co. v. Titus, 35 Ohio St. 253 (1879).


\textsuperscript{76} See Kirby v. Harrison, 2 Ohio St. 327 (1853).

\textsuperscript{77} Sprouse v. Buchanan, 105 Ohio App. 43, 151 N.E.2d 42 (1956), and authorities cited.

\textsuperscript{78} \textit{Ibid.}

unexecuted, the purchaser may **affirm** the agreement by bringing an action for the non-performance of it, or he may **disaffirm** it, and bring an action for money had and received to his use.\(^8\) (Emphasis added.)

**THE NEED FOR REFORM: LEGISLATIVE OR JUDICIAL**

If the land contract is ever to achieve a trusted position through which interests in real estate can be conveyed through the use of low equity financing, the rights and obligations of both the vendor and vendee must be more firmly defined. To gain respectability and reliability equal to the mortgage instrument, the parties must be able to anticipate with a reasonable degree of certainty their exact rights and duties during the preliminary negotiations, the executory stages, and upon default. At present, the defaulting vendee's position is impossible to predict. A corollary to this is that while existing uncertainty as to rights and remedies upon default has been caused, in part, by the vendor's exploitation of his dominant position, the vendor's status has been undermined to the extent that the actual effectiveness of his secured position at default is difficult to evaluate.\(^8\) "The multitude of facts and circumstances considered by the courts in reaching their decisions make it nearly impossible, except in the most extreme cases, to predict whether or not [the] vendor will be successful when he claims the forfeiture."\(^8\)

**Parallel Between the Mortgage and Land Contract**

There is unanimous agreement among legal authorities that the vendee's position under the standard land contract must be improved and that he must receive specific protection from the oppressive enforcement of a forfeiture clause.\(^8\) Most, if not all, of these legal commentators are in accord in their belief that the necessary reform can be accomplished by paralleling the rights of the vendee in default to those of the mortgagor in default. The frequently drawn comparison between these two

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80. I Sugden, Vendors 357 (8th Am. ed. 1873).
82. Howe, op. cit. supra note 75, at 449-50.
83. See Howe, op. cit. supra note 75; 2 Pomeroy, Equity Jurisprudence § 365 (5th ed. 1941); 5 Williston, Contracts § 791 (3d ed. 1961); Ballantine, Forfeiture for Breach of Contract, 5 Minn. L. Rev. 329 (1921); Corbin, The Right of a Defaulting Vendee to the Restitution of Installments Paid, 40 Yale L.J. 1013 (1931); Hancock, Installment Contracts for the Purchase of Land in Nebraska, 38 Neb. L. Rev. 953 (1959); Levin, Maryland Rule on Forfeiture Under Land Installment Contracts — A Suggested Reform, 9 Md. L. Rev. 99 (1948); Pound, Progress of the Law, 1918-1919 — Equity, 33 Harv. L. Rev. 929 (1920); Simpson, Legislative Changes in the Law of Equitable Conversion by Contract, 44 Yale L.J. 754 (1935); Vanneman, Strict Foreclosure on Land Contracts, 14 Minn. L. Rev. 342 (1930); Note, 39 Minn. L. Rev. 93 (1954); Note, 7 Rutgers L. Rev. 396 (1953).
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conveyancing instruments suggests but a single conclusion: Both instruments are essentially intended to preserve a security interest in the property for the benefit of the creditor — the mortgagee or vendor — who has provided the credit financing for the transaction.\textsuperscript{84}

[A] vendor who sells on credit, retaining the title as security for the purchase money, sustains the same relation to the vendee as far as the question of security is concerned, as does the mortgagee to the mortgagor.\textsuperscript{85}

The fundamental identity of purpose served by both the land contract and mortgage instrument suggests that the relief available to the mortgagor in default be drawn into the land contract transaction as the measure of relief of the vendee in default.\textsuperscript{86} A consideration of the specific relief measures that should be made available to the defaulting vendee is deferred to a subsequent section of this discussion.

Unwillingness of the Ohio Courts to Recognize the Parallel

The courts of Ohio through inflexible adherence to precedents established by two old supreme court decisions\textsuperscript{87} have refused to recognize the analogy between the mortgage and the land contract.\textsuperscript{88}

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\textsuperscript{85} 1 Glenn, \textit{Mortgages} § 15.1, at 79 (1943). Professor Williston has stated the same principle by suggesting that where the vendee is in possession "the situation should be dealt with in the same way as a mortgage situation is dealt with." 5 Williston, \textit{Contracts} § 791, at 2227 (3d ed. 1961). He further states that "where the transaction is in its essence a mortgage, agreements for forfeiture and provisions that time is of the essence should be given no more weight than similar provisions in a mortgage." 5 Williston at 2229.

\textsuperscript{86} The historical background of the mortgagor's absolute right to call upon these relief mechanisms is helpful in promoting the adaptation of these same relief measures to the land contract transaction. Equity recognized at an early date that the mortgagee's interest in the property to which he held conditional title was for security purposes only. Notwithstanding the fact that title vested in the mortgagee absolutely, the courts in applying the above principle forced the mortgagee to surrender his title to the property, once the mortgagor tendered performance even after "law day." Kirby v. Harrison, 2 Ohio St. 326 (1853); Rummington v. Kelley, 7 Ohio (pt. 2) 97 (1856).

\textsuperscript{87} See Norpac Realty Co. v. Schackne, 107 Ohio St. 425, 140 N.E. 480 (1923); Economy Sav. & Loan Co. v. Hollington, 105 Ohio App. 243, 152 N.E.2d 125 (1957); Contractors & Builders Supply v. Cresap, 9 Ohio App. 73, (1917). Contra, Woloveck v. Schueler, 19 Ohio App. 210 (1922). In this case the court adopted the enlightened view advocated by current authorities.

"Some courts of equity have held that the provision of forfeiture in land contracts, the relation of the parties being so similar to that of mortgagor and mortgagee, will not be enforced by strict foreclosure, but that in land contracts, as in mortgages, if the defaulting party fails to pay at the time set by the court, instead of cutting off the rights of the vendee under the contract the property will be ordered sold as upon foreclosure. While it cannot be said that the weight of authority sustains this proposition, we believe it to be equitable and sound." 19 Ohio App. at 223-24. Earlier in the opinion the court stated: "[T]he relation of the parties [vendor and vendee under a land contract] has many points of similarity to the relation..."
In the earlier case, *Rummington v. Kelley*, 89 decided in 1836, the vendee presented the argument equating the mortgage to the land contract on the basis that they were fundamentally security devices.90 The court refused to accept his contention and affirmed the lower court's forfeiture decree. In so doing it stated:

There is much ingenuity in the argument of counsel in attempting to assimilate a contract of this kind to a mortgage; but the analogy will not hold. In the case of a mortgage, the only object of the security is the payment of the money. In case of a land contract one great object is a transfer of the estate.91

It is believed that the salient point in this decision is the court's summary refusal to recognize an equitable right in the vendee to tender payment after his default and thereby avoid a forfeiture. However, as previously shown, contemporary Ohio courts assume a contrary position and almost uniformly grant to the vendee a decree of specific performance, that is, a right to redeem, after his default.

The second supreme court decision, *Kirby v. Harrison*, 92 decided in 1853, reached a similar conclusion.

The idea that vendor and vendee stand in the mere relation of mortgagor and mortgagor, so that, in equity, the same time will be given to the vendee to perform, that is given to a mortgagor to redeem, is contrary to reason and the whole current of modern authorities.93 (Emphasis added.)

The most troublesome feature of this decision is that a court as recently as 1957 mechanically reiterated this quotation, including the reference in it to the "attitude of modern authorities," and reversed a lower court which had ordered the property sold through judicial proceedings.94 In essence the court refused to recognize an equitable mortgage in the vendee through which he could compel a judicial sale of the property and a

existing between a mortgagor and a mortgagee of real property. It seems to be quite well settled that where provisions similar to the one in this contract [time of the essence clause and forfeiture provision] have been inserted in mortgages of real estate, courts of equity have refused to enforce them by strict foreclosure . . . ." 19 Ohio App. at 223.

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89. 7 Ohio (pt. 2) 97 (1836).
90. The court paraphrased the vendee's argument as follows: "He stated that one of the modes of conveying in the northern part of the state was by land contract. That this mode was adopted as being more convenient than the circuitous mode of conveying by deed, and then taking back a mortgage to secure the payment of the purchase money. In either case, the object was the same, to secure to the vendor the price for his land; and he contended that the same rule of decision should be adopted. As in the case of a mortgage, the mortgagor, remaining in possession, would be allowed after any length of time to redeem; so the vendee, holding under contract, should be allowed to compel a title upon the payment of the purchase money, although that payment had not been made within the time prescribed." 19 Ohio App. at 98.
recovery of the proceeds, if any, which were in excess of the vendor's claim. It is very obvious that this recent court's conclusion, though perhaps in accord with the "whole current of modern authorities" (as they existed in 1853), strongly contradicts the enlightened position universally advocated by contemporary authorities who have spoken on the subject. Though the court's ultimate conclusion in the case may have been factually justified, its legal reasoning, with all due respect to it, was fallacious.

The above decisions represent the present position of the Ohio law. However, the Ohio courts have, without expressly recognizing the fact, made substantial invasions upon the out-dated doctrines announced in and followed by the above courts. It is clear that contemporary courts in relying upon theories of waiver, estoppel, actions for money had and received, and decrees of specific performance to give the vendee in default relief are indirectly recognizing the similarity between the mortgagor in default and the vendee in default under the land contract. The time is ripe and the need apparent for the law-making bodies of the state to erase the out-dated, tenuous distinctions which were drawn between the mortgage and the land contract.

The Need for Legislative Action

The apparent need for reform existing in the area of land contracts can be accomplished by improved provisions in the land contract instrument, judicial reform, or by legislative action.

By inserting appropriate provisions into the agreement the vendee can minimize the inequality of the present standard land contract. However, the vendor's dominant negotiating position in most land contract transactions prevents accomplishment of the necessary reform by reliance upon piecemeal modification of the terms of the standard land contract.

The courts can assume a commanding role in bringing about the necessary reforms. When the equities of a case so demand, the courts

96. See authorities cited note 83 supra.
97. Examples of how the vendee's position can be improved through contractual provisions are: (1) The agreement could provide for a grace period after a default, during which the vendee could tender past payments due without suffering a forfeiture. (2) The contract could provide for the restitution of the excess values represented by the vendee's partial performance. (3) The risk of forfeiture could be substantially reduced by providing that the vendor deliver a deed to the vendee and refinance the debt by taking back a purchase money mortgage after a specified percentage of the purchase price has been paid. This latter suggestion is a mandatory provision in every Maryland land contract. Md. Ann. Code art. 21, § 112(7) (1957). (4) Further protection for the vendee could be achieved by requiring, as is the practice in some states, that the deed to the property be placed in escrow as of the date of the land contract's execution. See Hancock, Installment Contracts for the Purchase of Land in Nebraska, 38 Neb. L. Rev. 953 (1959).
should unhesitatingly grant to the vendee the right to redeem the property after his default or if he is unable to do so, order a foreclosure by judicial sale.\textsuperscript{98}

Though Ohio courts have displayed a propensity toward granting equitable relief to the vendee, the trend is uncertain and has developed on a sporadic basis. Because of the oscillating path being developed by the judiciary, it is clear that if the necessary reform is to be achieved, the task must be accomplished by the legislature.

The real need is for carefully drafted statutes, the effect of which the courts will be unable to evade, and which will compel them to deal with installment contracts for the sale of land on the same equitable principles which they apply without hesitation in the case of transactions essentially similar in economic substance but set up in the form of a conveyance on credit with a mortgage back as security.\textsuperscript{99}

The dominant purpose which legislation should serve is to supply the vendee in default with equitable relief measures.\textsuperscript{100} However, a warning must be sounded at this point. The draftsmen of such legislation must be careful to avoid the temptation of becoming unduly preoccupied with devising relief measures for the vendee with a resulting imposition of unwarranted hardship upon those vendors who have negotiated the land contract at arm's length with the vendee.\textsuperscript{101}

The fundamental concepts which should be incorporated into legislation to provide the vendee with the needed protection are:

(1) The vendee should be allowed a reasonable time during which to remedy his default by tendering the balance due on the purchase price so as to preserve his economic interests in the property.\textsuperscript{102}

(2) Upon the vendee's failure to redeem within the specified period

\textsuperscript{98} This enlightened attitude has been displayed by the Kansas Supreme Court in a recent holding. In this case the vendee defaulted on the payments due on his land contract. The agreement contained a time of the essence clause, a forfeiture clause, and a liquidated damages clause. However, rather than declare a forfeiture, the court treated the land contract as an equitable mortgage and prescribed a period during which the vendee could redeem. Nelson v. Robinson, 184 Kan. 340, 336 P.2d 415 (1959).


\textsuperscript{100} It is beyond the purpose of this paper to set forth the specific statutory posture in which the legislation must be cast if the needed reforms are to be accomplished. Consideration of this important aspect of the problem has been given thorough treatment in authoritative writings and they should be consulted when confronted with that problem. Instead, the present discussion focuses on a consideration of the substantive features which should be incorporated into the legislation. See generally Howe, \textit{Forfeitures In Land Contracts}, in \textit{Recent Trends in State Legislation 1953-54}, at 415, 453-537 (1954); Levin, \textit{Maryland Rule on Forfeiture Under Land Installment Contracts — A Suggested Reform}, 9 \textit{Md. L. Rev.} 99 (1948).


\textsuperscript{102} 1 \textit{Glenn, Mortgages} § 15.1 (1943).
the court should foreclose this right and order a judicial sale of the property.\textsuperscript{103}

(3) If the proceeds of the sale exceed the vendor's claim, they should be distributed to the vendee.\textsuperscript{104}

The analogy to the mortgagor in default upon the mortgage is obvious. And as in the mortgage transaction, the above remedies should be made available to the vendee in default notwithstanding the presence of the forfeiture provisions in the land contract.\textsuperscript{105}

Statutes in a growing number of jurisdictions reflect the adaptation of these foregoing fundamental relief measures.\textsuperscript{106} A number of them provide that a vendor who seeks to enforce a forfeiture must follow a statutory procedure. These statutes then give the vendee a grace period in which to remedy his default.\textsuperscript{107} Some of these period-of-grace statutes permit non-judicial foreclosure while others authorize only judicial foreclosures.\textsuperscript{108}

Arizona and Maryland have enacted somewhat unusual land contract statutes.\textsuperscript{108} The Arizona statute gives the vendee in default the advantages of an "escalator clause." The grace period during which the vendee can redeem is extended as his equity in the property increases. The Maryland statute expressly restricts its jurisdiction to the sale of residential property to non-corporate purchasers and is applicable only to those transactions in which the sale price of the property does not exceed

\textsuperscript{103} Id. at 84-86; Rudolph, The Installment Land Contract as a Junior Security, 54 Mich. L. Rev. 929 (1956).

\textsuperscript{104} Ibid.

\textsuperscript{105} "The contract may provide that way; but so did the mortgage have a defeasance clause, which, on its face, precluded redemption at a later day, and yet we have seen what happened to that." 1 Glenn, Mortgages § 15.1, at 86 (1943).

\textsuperscript{106} The methods by which equity was able to dissolve the express language of the mortgage instrument and the mortgagee's apparent legal interest were to grant to the mortgagor an equity of redemption after his default. If the mortgagee could not tender payment within the redemption period, his rights would be forever foreclosed (strict foreclosure). However, the modern practice is for the court to order a judicial sale of the property. The proceeds are first distributed to satisfy the mortgagee's claim and the surplus, if any, is paid to the mortgagor. See Note, Equitable Relief Against Forfeitures in Land Sales, 32 Yale L.J. 65 (1922); Howe, Forfeitures in Land Contracts, in CURRENT TRENDS IN STATE LEGISLATION 1953-1954, at 417-26 (1954).


\textsuperscript{108} The length of the grace period allowed the vendee varies from ten days to one year. See statutes cited note 106 supra.
