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THE INSTALLMENT LAND CONTRACT AS A JUNIOR SECURITY

*E. George Rudolph**

THE law of mortgages has developed largely on the twin judicial assumptions that mortgagees as a class are hard-dealing persons of considerable means and, on the other hand, that mortgagors are generally well-meaning but over-optimistic and in some degree incompetent in managing their own affairs. With increasing frequency, and at the persistent urging of legal commentators,[1] the courts have been carrying these assumptions over to cases involving long term installment purchase contracts. Obviously this law will work badly in transactions where the parties do not conform to these judge-made stereotypes. It is the purpose of this paper to explore the problems of one group whose members are increasingly, and more or less as a matter of necessity, finding themselves in the role of mortgagees, or vendors under installment purchase contracts, although they do not fit the assumed pattern. This group consists of persons who own homes subject to existing mortgages and for one reason or another decide to sell. The existing mortgages may be insured by the Federal Housing Administration or by the Veterans Administration or they may be uninsured mortgages held by building and loan associations or other financial institutions, but almost all have one thing in common. They are payable over a long term of from ten to thirty years in equal monthly installments which include both principal and interest.

Ideally a person wishing to sell his mortgaged home should insist that his buyer pay cash or obtain his own loan and so refinance the mortgage indebtedness. This is generally possible since almost all such mortgages permit payment in advance of maturity on more or less liberal terms. This solution is best from the seller's point of view since it gives him the value of his equity in

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1 Ballantine, "Forfeiture for Breach of Contract," 5 MINN. L. REV. 329 (1921); Vanneman, "Strict Foreclosure on Land Contracts," 14 MINN. L. REV. 342 (1930); Bodenheimer, "Forfeitures Under Real Estate Installment Contracts in Utah," 3 UTAH L. REV. 30 (1952); Brantman, "The Forfeiture Clause in Illinois Real Estate Contracts," 1950 ILL. L. FORUM 249; Howe, "Forfeitures in Land Contract," CURRENT TRENDS IN STATE LEGISLATION 417 (1954) (University of Michigan Legislative Research Center).

cash and relieves him from further liability for the mortgage indebtedness. Failing in this, the seller should attempt to receive the value of his equity in cash and have his buyer assume the existing mortgage, which gives him the first of the advantages mentioned above but not the second. Unfortunately many prospective sellers, and these are the ones with whom this paper is concerned, cannot make a sale on either of the above plans. In most communities such a seller will find himself in competition with professional builders and developers who are financing their sales by government insured mortgages. Apart from matters of taste and quality the most important element of this competition concerns the size of the down payment, with ten to twenty percent of the total purchase price being about the most that can be reasonably expected. Since lending agencies and also government agencies which insure home loans are in general very conservative in appraising older homes, our prospective seller is apt to find that the available refinancing is not adequate to make possible a down payment sufficiently low to attract a buyer, unless he reduces the total asking price considerably below what he reasonably believes the property to be worth. Rather than do this, he is apt to decide to finance the buyer himself for the difference between his own asking price and the amount of the available down payment plus the amount of the existing mortgage indebtedness. If he so decides, then he, or more properly his legal adviser, must give serious thought to the problems now to be considered.

These problems can best be illustrated by considering the situation of such a seller who has taken a second mortgage from his buyer for this balance with the buyer assuming the existing first mortgage debt. In the event that the buyer defaults on one or more of the monthly payments becoming due on the first mortgage indebtedness, our seller, now second mortgagee, can follow one of two courses. In the first place, he can do nothing for the time being, which means that sooner or later, if the default continues, the first mortgagee is going to accelerate the maturity of the unpaid balance and institute foreclosure proceedings. At this point the second mortgagee is going to have to take some action or run the risk of losing his security, since there is at least a strong possibility that the first mortgagee will bid the property in at the foreclosure sale for an amount not exceeding the first mortgage indebtedness and costs. In a state having a statute providing for redemption from sale he may be able to defer action until a later time,[2] but the

[2] This will depend on whether or not the lien of the second mortgage will revive in

problem when the time comes will be much the same. In either event he will have to prepare himself to pay out, in cash, the amount of the first mortgage indebtedness, either to bid the property in at the foreclosure sale or to redeem from the sale as the case may be. It is probably safe to assume that very few second mortgagees of the type with whom we are concerned have sufficient resources of their own to do this, and, therefore, the real question is whether or not such a second mortgagee will be able to obtain a new loan for this purpose to be secured by a new first mortgage after the property has been bought in at the foreclosure sale or acquired by redemption. The writer has no information as to whether such financing is generally available, nor as to the terms on which it is available. In any event, it seems a little reckless to rely on the possibility of such refinancing in planning the original sale, since conditions respecting the availability of mortgage money are likely to change in unpredictable ways between then and the date of the default.

If the above is not satisfactory to our seller, who has tentatively assumed the role of second mortgagee, and it certainly does not appear very attractive, there is another course he may pursue when the purchaser defaults on the first mortgage. He can immediately begin paying from his own pocket the monthly payments falling due on the first mortgage indebtedness, accelerate the maturity of the second mortgage indebtedness and institute his own foreclosure proceedings, adding to the second mortgage indebtedness the amount which he has paid for principal and interest on the first mortgage debt and also any amount which he must pay for taxes and insurance. If we assume that the second mortgagee purchases the property at the foreclosure sale subject to the first mortgage for the amount of the second mortgage indebtedness then he is back pretty much in his original position, richer by the amount of the down payment and the amount of principal previously paid on both mortgage debts but poorer by the amount that he has had to pay on the first mortgage debt as well as the amount of his costs and expenses.

The obvious objection to this second alternative, from the point of view of the second mortgagee, is that it requires him to invest new money in property that he neither owns nor desires to

the event the mortgagor, or more probably his assignee, redeems from the sale. If not, then the second mortgagee can hardly take the risk of such redemption. See Durfee and Doddridge, "Redemption From Foreclosure Sale—The Uniform Mortgage Act," 23 MICH. L. REV. 825 at 849-858 (1925).

own. In addition, a second mortgagee of the type with whom we are concerned will probably have considerable difficulty in obtaining the funds necessary to make the monthly payments and may even temporarily have to cut back his standard of living as the price of protecting his security. This brings us to the nub of the whole problem, because what the second mortgagee needs, and to what in justice he seems entitled, is the right to insist that the property itself provide the funds necessary to meet the payments on the first mortgage as they become due. This, of course, will mean ousting the mortgagor because he has already proved to be unable or unwilling to make periodic payments for the privilege of occupying the premises. But it is difficult to discover any equities in favor of permitting the mortgagor to remain in possession rent free, so to speak, at the expense of the second mortgagee. The hardship on the mortgagee in this respect will be particularly acute in those states which have statutes giving the mortgagor the right to redeem from the foreclosure sale and the further right to remain in possession during the redemption period.

In jurisdictions following the title theory of mortgages, it seems clear that the second mortgagee can take possession upon the mortgagor's default, although it is possible to argue that since the second mortgagee does not have legal title, that having previously vested in the first mortgagee, he cannot recover possession from the mortgagor. But the better view would seem to be that, as against the mortgagor, the second mortgagee has the same right of possession as the first mortgagee.[3] In other jurisdictions, although the general rule permits the mortgagor to retain possession as against the mortgagee even after default, it is possible to give the mortgagee an enforceable right to possession by an express provision in the mortgage.[4] But regardless of their legal right to do so, mortgagees as a class are reluctant to take possession, either because it involves a multiplicity of suits or because of the burdens imposed by the obligation to account for rents and profits.[5] How-

[3] Wires & Peck v. Nelson, 26 Vt. 13 (1853), but see Cortleyeu v. Hathaway, 11 N.J. Eq. 39 (1855).

[4] DURFEE, CASES ON SECURITY 53 (1951) lists, as having statutes which expressly provide for this, the following states: Arizona, California, Indiana, Iowa, Kansas, Montana, Nebraska, New Mexico, North Dakota, Oregon and South Dakota.

[5] In Illinois during the depression it was apparently standard procedure for the foreclosing mortgagee to obtain a receiver even though in that state the mortgagee has an undoubted right of possession. See Carey, Brabner-Smith and Sullivan, "Studies in Fore-

ever, in a number of states mortgagees cannot recover possession from the mortgagor after default even though by express provision the mortgage attempts to confer such a right,[6] and in these states the only way our second mortgagee can have the income of the property applied to the installments becoming due on the first mortgage is by a receivership.[7] While it appears doubtful that the income potential of a single family dwelling will often be sufficient to justify the expense of a receivership, no general conclusion is possible on this since there are many reported cases involving receiverships for property of this type.[8] But, for other reasons, a receivership is apt to be unavailable in this kind of case or an unsatisfactory remedy if obtained.[9]

There is reason to believe that most sellers in this position, because of considerations more or less like those set out above, have elected to finance the sale by means of a long term installment contract under which title is to remain in the seller until the purchase price is fully paid. Under the supposedly prevailing view such a contract should serve the purpose of the seller admirably. Assum-

closures in Cook County: II," 27 ILL. L. REV. 595 (1933). In the situations we are considering the rules of accountability should not cause a second mortgagee in possession much concern. At most, they require that he rent the property for not less than its reasonable rental value and that he refrain from making unnecessary repairs or improvements. See 2 GLENN, MORTGAGES §§216, 218 (1943).

6 Hall v. Hall, 41 S.C. 163, 19 S.E. 305 (1894). Orr v. Bennett, 135 Minn. 443, 161 N.W. 165 (1917); Hart v. Bingham, 171 Okla. 429, 43 P. (2d) 447 (1935); State ex rel. Gwinn, Inc. v. Superior Court, 170 Wash. 463, 16 P. (2d) 831 (1932); Nusbaum v. Shapero, 249 Mich. 252, 228 N.W. 785 (1930).

7 In neither Michigan nor Minnesota could a receiver be obtained for this purpose under any circumstances. Nusbaum v. Shapero, 249 Mich. 252, 228 N.W. 785 (1930); Nielsen v. Heald, 151 Minn. 181, 186 N.W. 299 (1922).

8 In Gritz v. Swartz, 10 N.J. Misc. 1028, 162 A. 153 (1932), the court appointed receivers in two foreclosure suits for properties having estimated rental values of $60 and $70 per month respectively, but refused to appoint a receiver in a third suit involving property having a rental value of only $25 per month.

9 In the first place a second mortgagee of this type is not helped much by the rule which permits the appointment of a receiver upon a showing that the security is inadequate. In Nielsen v. Heald, 151 Minn. 181, 186 N.W. 299 (1922), and Baldwin v. Flagg, 4 N.J.L.J. 181 (1881), the courts appointed a receiver on the suit of a second mortgagee because of the failure of the mortgagor to keep up the interest payments on the first mortgage. However, the Minnesota case is too restrictive to be of any help to our second mortgagee since it also required a showing of insolvency and inadequacy of security, and further held that the rents collected by the receiver could only be used to pay interest on the first mortgage and could not be used to pay maturing principal installments on that mortgage.

Furthermore, the court is likely to be reluctant to appoint a receiver when the mortgagor occupies the premises as a home. See cases in annotation, 91 A.L.R. 1236 (1934). And the statutes providing for redemption from sale are apt to give difficulty. See Farm Mortgage Loan Co. v. Pettet, 51 N.D. 491, 200 N.W. 497 (1924), 36 A.L.R. 598 (1925); annotation, 26 A.L.R. 74 (1923).

ing that the contract includes the usual provisions making "time of the essence" and giving the seller the right to forfeit amounts paid as liquidated damages in the event the buyer defaults, then, upon the buyer's breach, the seller is entitled to retake possession and upon repossession all rights of the buyer in the property are terminated, amounts previously paid on the purchase price are forfeited and the seller is reinstated in his original ownership.[10] The principal defect in this, from the seller's point of view, lies in the fact that in most jurisdictions the seller's only remedy to recover possession is an action of ejectment in the event that the buyer refuses to vacate peaceably.[11] As a statistical proposition, the seller's chances of obtaining possession without litigation are probably quite good if his right to possession is clear as a matter of substantive law in the particular jurisdiction, and if there is no dispute concerning the quality of the premises or the fact of the buyer's breach.[12] However, in that event, the seller may have to quiet title against the contract before he can again sell the property since, for some undefined period of time after repossession, there is at least a theoretical possibility that a court might decree specific performance of the contract at the suit of the buyer on the ground that the seller had waived compliance with the provision of the contract making time "of the essence," or by his conduct is estopped from asserting the clause.[13] As a practical matter the neces-

10 This is the hornbook law on the subject. In the absence of a hornbook, the reader is referred to the following among the many articles on the subject appearing in the periodicals: Ballantine, "Forfeiture for Breach of Contract," 5 MINN L. REV. 329 (1921); Vanneman, "Strict Foreclosure on Land Contracts," 14 MINN. L. REV. 342 (1930); Simpson, "Legislative Changes in the Law of Equitable Conversion by Contract: II," 44 YALE L.J. 754 at 773-779 (1935); Bodenheimer, "Forfeitures Under Real Estate Installment Contracts in Utah," 3 UTAH L. REV. 30 (1952); Howe, "Forfeitures in Land Contracts," CURRENT TRENDS IN STATE LEGISLATION 417 (1954) (University of Michigan Legislative Research Center).

11 22 AM. JUR. 911 (1939). This is apparently the majority rule although in a number of states either by statute or otherwise summary proceedings in the nature of forcible entry or detainer are available. See cases collected in 66 C.J., Vendor and Purchaser §§1320 and 1321 (1934). Vendors frequently seek to obtain the advantages of such summary proceedings by providing in the contract that upon default the purchaser shall become a tenant at will. Such an attempt was unsuccessful in Smith v. Keech, 112 N.Y.S. (2d) 803 (1952), but apparently successful in State ex rel. Everson v. Municipal Court of Barberton, 98 Ohio App. 177, 128 N.E. (2d) 467 (1954).

12 The writer's only authority for this statement is a general impression gained from conversations with lawyers and people in the real estate business. In the same vein it is interesting to note that in Wyoming forcible entry or detainer actions are commonly used by vendors to recover possession from defaulting purchasers since, even though the statute [Wyo. Comp. Stat. (1945) §14-1502] does not provide for this, the Supreme Court has never ruled against it. Both propositions seem significant as illustrations of the fact that much of the law in this field cannot be found in the books.

13 The only case of which the writer knows which involved a quiet title suit after a

sity for this quiet title action can probably be eliminated in most cases by withholding the contract from record, and such contracts frequently contain a provision which prohibits the buyer from recording. Whether the seller can properly insist on such a provision being included in the contract is another matter for, while the buyer's possession undoubtedly will be sufficient to protect his interest against subsequent purchasers or creditors of the seller, it may not be sufficient to protect him against a prior conveyance which is recorded after he has made the down payment and taken possession under the contract.[14]

However, our seller is probably not justified in relying on the conventional view of installment land contracts, as summarized above, but must give consideration to the dangers involved in a seeming reform movement which is in progress in this branch of the law. This reform movement is aimed at protecting buyers under such contracts from the much discussed possibilities of unreasonably harsh forfeitures. The forfeiture occurs, of course, when the buyer, because of his default loses his entire interest in property having a value greatly in excess of the amount remaining unpaid under the contract. As an original proposition a court or legislature could afford protection against such forfeitures in a number of ways. The most obvious solution, because of the mortgage analogy, would be to require a public sale in order to make the excess value available to the defaulting buyer in cash. A second possibility is to give the buyer additional time in which to make good his default and preserve his rights under the contract in spite of the "time of the essence" clause. A third possibility is to require the seller to refund the amount of payments previously made by the buyer, less the amount of the seller's damages, at the time of terminating the buyer's rights under the contract. Even though it is conceded that the seller should not be permitted to profit at the expense of the buyer by a strict enforcement of the forfeiture provision, yet some of the means devised to protect against such forfeitures seem likely to work undue hardship on

prior ejectment action is Barnes v. Clement, 8 S.D. 421, 66 N.W. 810 (1896), rehearing 12 S.D. 270, 81 N.W. 301 (1899). The reason for this is discussed hereafter. The articles cited in note 10 supra discuss the waiver problem, generally in terms of the much cited statement from Pound, "The Progress of the Law, 1918-1919, Equity," 33 HARV. L. REV. 929 at 952 (1920), to the effect that "Strict doctrines as to forfeiture inevitably produce loose doctrines as to 'waiver.'" See also annotation, 107 A.L.R. 345 (1937).

[14] See note, 39 MINN. L. REV. 93 at 109 (1954); *contra,* Hawkins v. Stoffers, 40 Wyo. 226, 276 P. 452 (1929), rehearing 40 Wyo. 245, 278 P. 76 (1929).

sellers who have used such a contract to obtain a junior security interest in property subject to a prior mortgage on which installments become due at frequent intervals. As previously noted the peculiar problem of a seller of this kind is to prevent the first mortgage from going into default and the desirable solution, from his point of view, is to retake possession on the buyer's default and then rent the premises so as to provide a source of income from which to pay the monthly installments on the first mortgage.

Unfortunately there is at least some authority for denying the seller an immediate right of possession after default in order to protect the buyer from forfeiture. This proposition has probably been most fully developed in Colorado. The case of *Gold Mines, Inc. v. Gold, Silver and Tungsten, Inc.*[15] involved a lease of certain mining properties and equipment with an option in the lessee to purchase and have amounts theretofore paid as rent credited on the purchase price. The majority of the court construed the contract as a whole to be the equivalent of an installment purchase contract. It included a clause giving the seller the right to re-enter and terminate all rights of the buyer thereunder in the event of default which was very similar to the ordinary forfeiture provision in the usual form of installment purchase contract. The buyer defaulted after paying a considerable part of the total price and expending even larger amounts for permanent improvements. The seller brought ejectment. Previous Colorado cases involving contracts which did not include an express forfeiture provision had held that, after the purchaser had made substantial payments, the only remedy available to the seller was foreclosure by sale.[16] The court in the *Gold Mines, Inc.* case relied on these earlier cases, in spite of the seller's attempts to distinguish them, but ordered a somewhat different type of decree under which the purchaser was given a further period of six months within which to redeem, the implication being that if the purchaser failed to redeem within this period a judgment for possession should be entered for the plaintiff. This, of course, bears a marked resemblance to a decree for strict foreclosure of a mortgage and the relationship is made even more obvious by the following language from the opinion:

"Therefore, since, as we think, payment of money by plaintiff

[15] 104 Colo. 478, 93 P. (2d) 973 (1939). On the Colorado law see comment, 22 ROCKY MT. L. REV. 296 (1950).

[16] Fairview Mining Corp. v. American Mines and Smelting Co., 86 Colo. 77, 278 P. 800 (1929).

in error, and the receipt thereof by defendant in error, was the motivating purpose of the contract, the situation comes within the equitable rule that where a vendee has substantially performed, the contract simply operates as an instrument of security as to the balance to be paid. In such situation there is breathed into what may be termed the severe legal language of a contract, 'an equity superior to its terms.' It follows that one seeking at law to realize on such a contract, may, if his selection of remedy be challenged through interposition of an answer in equity, as here, find himself remitted to an equitable remedy."[17]

This form of decree for a time seemed to have become standard in Colorado with the result of delaying the seller for an additional period of six months in his right to re-enter after default.[18] The six months period was borrowed from the statute on redemption from foreclosure sale and appeared to be inflexible.

The case of *Cavos v. Geihsler*[19] involved an application of the rule to a situation of exactly the type we are considering. Cavos owned a house subject to a mortgage of $3,000 which he sold on a contract to Geihsler, for a total price of $4,500, the latter paying $200 down, assuming the payment of the mortgage and agreeing to pay the remaining $1,300 in specified monthly installments. In addition, Geihsler was to pay the taxes and keep the premises insured. Upon default by Geihsler, Cavos brought an action for possession, the trial court entered a decree ordering foreclosure by sale, and on appeal by Cavos the Supreme Court reversed in part, ordering a decree patterned after that in the *Gold Mines, Inc.* case. Cavos' principal argument was that the rule of *Gold Mines, Inc.* applied only in cases where the buyer had paid a substantial part of the contract price, whereas Geihsler still owed him $1,534.39 or $34.39 more than the original contract price for Cavos' equity, the additional amount above $1,300 resulting from payments made by Cavos for taxes and interest on the mortgage debt. The court, however, held that the *Gold Mines, Inc.* case was applicable because Geihsler had reduced the mortgage debt to $2,200 and to that extent had acquired a substantial equity in the property which would be lost through enforcing the forfeiture provision. It is in-

[17] Gold Mines, Inc. v. Gold, Silver and Tungsten, Inc., 104 Colo. 478 at 499, 93 P. (2d) 973 (1939).

[18] Wiley v. Lininger, 119 Colo. 497, 204 P. (2d) 1083 (1949).

[19] 109 Colo. 163, 123 P. (2d) 822 (1942).

teresting to note that the fairness of this decree was not questioned on the ground that Cavos had previously had to pay taxes and interest on the mortgage to protect his security and, as the court expressly recognized, would probably have to pay further amounts for such purposes and also for principal installments on the mortgage becoming due during the six-month redemption period. The significance of the case on this point is obscured, not only by the failure of the court to discuss it, but also by the fact that a receiver had been appointed on Cavos' application at the time he commenced his action. Such a receivership does not seem appropriate in an ejectment action but is entirely consistent with the court's treatment of the suit as one for foreclosure, and it is possible to argue that Cavos, by his application for the receiver, acquiesced in this treatment. The opinion does not state whether the receiver ousted Geihsler or merely attempted to collect rent from him, but in any event he was apparently not very successful in keeping down the prior burdens on the property.

Later Colorado cases have again unsettled the law in that jurisdiction. Of these the most important is *Self v. Watt*,[20] which was a suit by the vendor to have the purchaser's interest under the contract terminated and for possession. This, in substance, was a suit for strict foreclosure and was certainly in accordance with the theory of the cases discussed above. The purchaser did not bother to appear or defend because his attorney assured him that he would have six months after the decree within which to redeem. The trial court, however, allowed only thirty days for redemption and this was affirmed on appeal, the court saying that the redemption period was a matter within the discretion of the trial court. In addition, two recent cases contain dictum indicating that the court may give literal effect to the "time of the essence" clauses although such clauses appeared to have been invalidated by the *Gold Mines, Inc.* and *Cavos* cases.[21]

The law of Kentucky is similar, on the surface at least, to that of Colorado in denying the seller the remedy of ejectment when necessary to protect the buyer from forfeiture. In the leading case of *Morton v. Dickson*[22] the Kentucky court held that the proper remedy for the seller, on the buyer's default, was a suit for specific

[20] 128 Colo. 61, 259 P. (2d) 1074 (1953).

[21] Newton v. Canty, 119 Colo. 381, 203 P. (2d) 910 (1949); Gerbaz v. Hulsey, (Colo. 1955) 288 P. (2d) 357.

[22] 90 Ky. 572, 14 S.W. 905 (1890).

performance with the decree to provide for the sale of the property in the event that the buyer failed to pay the unpaid balance within a reasonable time. In the alternative the seller could bring suit to foreclose his vendor's lien but that would amount to the same thing in end result. In Kentucky, as in Colorado, each case presents an issue of fact as to whether enforcement of the forfeiture provision will, under the circumstances, operate inequitably to the buyer.[23] In this respect, and for purposes of the present discussion, the case of *Maschinot v. Moore*[24] is encouraging. There the plaintiff had sold a house to defendant for a total price of $2,000. The contract provided for a down payment of $100 and the payment of the balance in monthly installments of $25. The court sustained a judgment in ejectment for the plaintiff on the ground that there was no inequitable forfeiture in view of the nominal down payment and the fact that the monthly payments were less than the fair rental value of the property.[25] There is language in the opinion which indicates that the court believes that long term installment contracts generally should be treated differently from sales contracts providing for a substantial down payment and the payment of the balance in one or two installments within a short period after the execution of the contract. In any event it is submitted that the court has made a realistic analysis of the question of forfeiture as presented by the typical installment purchase contract involving residential property.

The law of Oregon deserves mention at this point, since the court there has apparently been able to approach very closely in practical end results the rule of Colorado without ever challenging the enforceability of the "time of the essence" and forfeiture provisions as an abstract proposition. Probably the key case to an understanding of the Oregon situation is *Swick v. Mueller*.[26] Under the terms of the contract involved in that case the seller could declare a forfeiture after any default had continued for thirty days. The buyer defaulted on a payment becoming due on June 1, and the seller served a notice of forfeiture on the morning

[23] In Harris v. Greenleaf, 117 Ky. 817, 79 S.W. 267 (1904), the court granted equitable relief to a defaulting purchaser who had paid only ten dollars on the contract on the ground that the forfeiture would be unjust because of appreciation in the value of the property subsequent to the sale.

[24] 275 Ky. 36, 120 S.W. (2d) 750 (1938).

[25] This is somewhat confusing since it is not stated if the twenty-five dollars includes interest or is principal only.

[26] 193 Ore. 668, 238 P. (2d) 717 (1951).

of July 1, apparently forgetting that June has only thirty days. Later the seller brought suit to recover possession and for damages for unlawful holding over. The buyer counterclaimed for restitution of amounts paid on the contract and recovered. The court reasoned that the seller breached the contract by declaring the forfeiture prematurely and that this breach gave the buyer the right to rescind the contract and obtain restitution. A similar result will follow if the seller, having waived the "time of the essence" clauses, declares a forfeiture without having first given notice to reinstate the clause.[27] On the other hand, a premature or otherwise wrongful declaration of forfeiture will not preclude the seller from maintaining a suit for strict foreclosure.[28] The writer has no way of knowing the exact effect of these decisions on Oregon practice, but it is a fact that a large majority of the cases involving land contracts which have reached the Supreme Court of Oregon in recent years have been suits for strict foreclosure rather than suits to enforce forfeitures either by ejectment or other means.[29]

When the reform has been accomplished by legislation it has generally taken similar form, the statutes providing for something in the nature of strict foreclosure in place of an abrupt and absolute forfeiture.[30]

Furthermore, there is another factor which could very well contribute to a trend toward strict foreclosure as the prevailing remedy. To develop this it is first necessary to consider a problem

[27] Grider v. Turnbow, 162 Ore. 622, 94 P. (2d) 285 (1939).

[28] Zumstein v. Stockton, 199 Ore. 633, 264 P. (2d) 455 (1953). See also Dorsey v. Tisbey, 192 Ore. 163, 234 P. (2d) 557 (1951), to the effect that a declaration of forfeiture does not so completely terminate the contract as to preclude its subsequent enforcement by strict foreclosure. In general the cases seem to indicate that the courts will be very strict with vendors who seek to enforce a forfeiture, but quite indulgent of those who proceed by suit for strict foreclosure.

[29] This statement is based on an examination of Oregon cases appearing in the General Digest, for approximately the last twenty years under the heading "Vendor and Purchaser," Key Numbers 296 to 300. On strict foreclosure of land contracts generally see annotation, 77 A.L.R. 270 (1932).

[30] For purposes of this statement the term strict foreclosure should be understood to include statutory provisions such as those in Minnesota and Iowa which permit the buyer to make good his default within a specified period after notice of forfeiture. Minn. Stat. (1953) §559.21; Iowa Code (1954) §§656.1 to 656.6. The South Dakota provision, on the other hand, is expressly labelled strict foreclosure and provides for a period of redemption of not less than ten days after the judgment. S.D. Code (1939) §37.3101. The Michigan statute is similar except that the foreclosure is accomplished by a summary action similar to forcible entry or detainer and the redemption period is ninety days. Mich. Comp. Laws (1948) §§630.12, 630.25. For an extended discussion of the various statutory provisions see Howe, "Forfeitures in Land Contracts," CURRENT TRENDS IN STATE LEGISLATION 417 (1954). See also note, 39 MINN. L. REV. 93 (1954).

of res judicata. If the seller, after default, brings an action of ejectment then, even though he is successful in recovering possession, he may find it necessary in the future to bring a suit to quiet title.[31] At least two courts have said, by way of dictum, that under some circumstances the buyer may be able to maintain a suit for specific performance even after the seller has recovered in an ejectment action.[32] Strangely enough, there seems to be a lack of square rulings on the question, but the problem is susceptible to further analysis. Assume, for example, that the buyer in his later suit for specific performance contends that the seller had waived the "time of the essence" clause. This then would raise the question as to whether the matter of waiver had already been determined in the ejectment action, and this in turn would depend on whether the buyer could assert the waiver as a defense in that action. On this question a California court has said that such waiver will constitute a defense only if the buyer tenders the amount necessary to make good his delinquency.[33] If the buyer was unable to make such tender then presumably the seller would prevail in his ejectment action but the buyer might later maintain a suit for specific performance. However, there is at least some hint in the California case that in order to forestall this possiblity the court should grant a reasonable period of time within which the buyer could make good his default and avoid the judgment in ejectment. In substantive effect, then, this would seem to make over the ejectment action into a strict foreclosure suit if the buyer can prove waiver. On the other hand, the Illinois court has said, though not held, that the waiver will be a defense to the ejectment action without tender of the amounts in default.[34] But under

[31] As noted above, quiet title suits following ejectment actions are quite rare. Note 13 supra. However, they are common when the seller has been able to repossess without judicial assistance and later attempts to resell. The cases reaching the appellate courts are those in which the defaulting buyer has sought to take advantage of this opportunity to obtain some sort of equitable relief such as restitution or specific performance. See Lawrence v. Demos, 70 Wyo. 56, 244 P. (2d) 793 (1952), and Asher v. Hull, 207 Okla. 478, 250 P. (2d) 866 (1952).

[32] Hansborough v. Peck, 5 Wall. (72 U.S.) 497 (1866); Holden v. Holden, 24 Ill. App. 106 (1887). Both of these cases were decided before the advent of the modern procedural rule permitting equitable defenses in law actions, but it is doubtful that this is of much significance. See Neil v. Kennedy, 319 Ill. 75, 149 N.E. 775 (1925).

[33] Watkins v. Warren, 122 Cal. App. 617, 10 P. (2d) 500 (1932).

[34] Neil v. Kennedy, 319 Ill. 75, 149 N.E. 775 (1925). This decision reversed a holding in favor of the buyer in the seller's ejectment action because of a rather unsubstantial error in instructions. The seller then apparently abandoned the ejectment action because the buyer later brought suit for specific performance and the seller counterclaimed for quiet title and possession. This eventually resulted in a decree for specific performance

either view the ejectment judgment should be conclusive on the question of waiver.

Most lawyers, however, apparently elect to avoid this problem of res judicata by joining a prayer for quiet title relief with the ejectment action.[35] Such a combination suit bears a strong resemblance to foreclosure, and the courts must frequently feel a strong inclination to grant some opportunity for redemption. An interesting illustration of this is found in a Washington case, *Lampaert v. Marohn.*[36] This was a combination suit of the kind discussed above, and at the conclusion of the trial the judge made findings in favor of the seller, but stated that he would delay entering judgment for a period of about three weeks during which the buyers could pay the amount in default, the implication being that if they did so the suit would be dismissed. The Supreme Court on appeal spoke approvingly of this, but since the buyers did not attempt to redeem during this period, and since the sellers did not appeal, the court was not called upon to determine the propriety of the procedure.[37] Strictly speaking, it was incorrect, since in a suit of this kind the court by its decree does not accomplish the forfeiture but only determines that it has previously occurred.[38] However there is some authority to the effect that when the seller seeks to quiet title against the buyer the court is justified in giving the buyer equitable relief regardless of the seller's legal right to insist on a forfeiture.[39] While the equitable relief afforded to buyers in these cases has been restitution of amounts previously paid, there is no reason why, on the same basis, the buyer could not be given an opportunity to redeem.

It is difficult to assess the significance of a substitution of strict foreclosure for the right of absolute forfeiture from the point of

substantially the same as a decree for strict foreclosure. See Kennedy v. Neil, 333 Ill. 629, 165 N.E. 148 (1929).

[35] No attempt will be made to support this assertion other than to say it rests on an impression gained in making the Digest search referred to in note 28 supra. The joinder of the two seems incongruous since usually ejectment is considered the proper remedy for one out of possession and quiet title the proper remedy for one in possession. However, if ejectment won't adequately settle the title question, then the fact that it is available should not bar quiet title relief. See Holden v. Holden, 24 Ill. App. 106 (1887).

[36] 11 Wash. (2d) 211, 118 P. (2d) 954 (1941).

[37] See also Elley v. Caldwell, 158 Mo. 372, 59 S.W. 111 (1900).

[38] Abbas v. Demont, 152 Neb. 77, 40 N.W. (2d) 265 (1949). This was a simple ejectment action and the court held it was error for the trial court to grant a sixty-day redemption period. See also Owen v. Stark, 175 Kan. 800, 267 P. (2d) 948 (1954).

[39] Taylor v. Rawlins, 86 Fla. 279, 97 S. 714 (1923). See also the Oklahoma cases cited in note 51 infra.

view of a seller of the type we are considering. Since it always seems to be assumed that the buyer is entitled to remain in possession during the period granted for redemption, the seller must sustain the burden of maintaining the payments on the first mortgage during this additional period. But the seriousness of this can be determined only by comparing the time necessary to obtain the strict foreclosure decree plus the redemption period with the time necessary to prosecute an ejectment action to judgment. Depending on local conditions, it is possible that a seller might be subjected to greater delay by the buyer's demand for a jury trial in an ejectment action than by a foreclosure decree providing for a period of redemption. In this respect the strict foreclosure provided by statute in Michigan would seem quite satisfactory to sellers. There the seller is granted a summary remedy similar to forcible entry or detainer, but the buyer is permitted to remain in possession for a period of ninety days following the judgment, during which period he may redeem.[40] Much, of course, depends on the length of the redemption period.[41] The six-month period granted by the original Colorado cases would seem too long for many situations, as that court eventually recognized.[42] Actually the principal protection of the buyer lies in denying the seller the right to effect a forfeiture by notice immediately upon default, and the court can, therefore, with propriety, take into account the time which has elapsed between the default and the entry of the foreclosure decree in setting the redemption period.[43]

In principle there seems to be no reason why the right to possession must be considered as tied inseparably to the right to enforce a forfeiture. In other words, it should be possible to draft a contract giving the seller a right to possession which could be enforced without precluding, or purporting to preclude, the buyer from later redeeming. Such a provision would give the seller rights similar to a mortgagee in a title theory jurisdiction,[44] and

[40] Mich. Comp. Laws (1948) §§630.12, 630.25. See Durfee and Duffy, "Foreclosure of Land Contracts in Michigan," 7 MICH. S.B.J. 166, 221 (1928).

[41] Among the Oregon cases, the court affirmed decrees providing the following periods: Airport Lumber Co. v. Annes, 203 Ore. 294, 279 P. (2d) 1038 (1955) (42 days); Grider v. Turnbow, 162 Ore. 622, 94 P. (2d) 285 (1939) (3 months); Zumstein v. Stockton, 199 Ore. 633, 264 P. (2d) 455 (1953) (1 year). In the last case the long period was justified on the ground that prior to default the buyer had paid $20,000 out of a total price of $36,000.

[42] Self v. Watt, 128 Colo. 61, 259 P. (2d) 1074 (1953).

[43] Airport Lumber Co. v. Annes, 203 Ore. 294, 279 P. (2d) 1038 (1955). Here the court sustained a redemption period of forty-two days on the ground that sixteen months had elapsed between the purchaser's default and the entry of the decree.

[44] In Litel v. Marsh, 33 Wash. (2d) 441, 206 P. (2d) 300 (1949), the vendors took

would remove the principal objection to strict foreclosure from the point of view of the sellers with whom we are here concerned. As a practical matter this involves some diffiiculties. In most jurisdictions the seller's right to possession under such a provision would have to be enforced by an ejectment action. If this had to be followed by a later foreclosure suit there would be an undesirable multiplicity of suits. The only obvious way to avoid the necessity for this subsequent foreclosure suit is to include a provision in the contract for power of sale foreclosure. However, in at least one case the court held that the inclusion of such a provision made the contract in legal effect a mortgage,[45] and as a matter of policy it is doubtful that sellers as a class should do anything to promote foreclosure by sale as a usual remedy for breach of installment land contracts.[46]

From the seller's viewpoint strict foreclosure is by no means as objectionable as the rule which permits the buyer to recover amounts already paid, less the seller's damages, when the seller brings suit to terminate the contract either by ejectment or otherwise.[47] This rule has prevailed for some time in Utah[48] and Georgia[49] and is now apparently the law in California.[50] There is also some authority for this in Oklahoma although the law in that state is by no means clear.[51] The rule has been quite fully de-

possession after the purchasers breached the contract and abandoned the premises but did not give notice of forfeiture. The purchasers claimed that this constituted a rescission of the contract and sued for restitution of their down-payment. The court held there was no rescission inasmuch as the vendors had the right to repossess the property in order to preserve it without either forfeiting the contract or rescinding it. See also Williams v. Baker, 207 Ark. 731, 182 S.W. (2d) 753 (1944).

45 Pope v. Parker, 84 Colo. 535, 271 P. 1118 (1928).

46 This observation is prompted by the thought that if foreclosure by sale became the prevailing remedy the legislatures of some states might be inclined to extend the redemption from sale statutes to cover such foreclosure sale.

47 The Supreme Court of Utah recently sustained a judgment for restitution entered in an unlawful detainer action. Jacobson v. Swan, 3 Utah (2d) 59, 278 P. (2d) 294 (1954). On the right of buyers to restitution generally see annotation, 31 A.L.R. (2d) 8 (1953).

48 The leading Utah case is Malmberg v. Baugh, 62 Utah 331, 218 P. 975 (1923). See Bodenheimer, "Forfeitures Under Real Estate Installment Contracts in Utah," 3 UTAH L. REV. 30 (1952); note, 4 UTAH L. REV. 283 (1954).

49 Lytle v. Scottish American Mortgage Co., 122 Ga. 458, 50 S.E. 402 (1905).

50 Freedman v. The Rector, 37 Cal. (2d) 16, 230 P. (2d) 629 (1951), noted, 25 So. CAL. L. REV. 387 (1952).

51 Lansford v. Gloyd, 89 Okla. 232, 215 P. 198 (1923); Ezzell v. Endsley, 197 Okla. 194, 169 P. (2d) 309 (1946). Other cases indicate that if the vendor confines his action to ejectment and does not seek any equitable relief, then the purchaser will not be entitled to restitution. Sparks v. Trosper, 186 Okla. 289, 97 P. (2d) 81 (1939); Asher v. Hull, 207 Okla. 478, 250 P. (2d) 866 (1952). However, in both of these cases the court found that the rental value of the premises during the defendant's occupancy exceeded the amount

veloped by recent Utah cases and these cases will serve well to illustrate its undesirable features so far as sellers are concerned, especially sellers who have used installment land contracts to finance the sale of mortgaged residential property.

In the first place the rule requires that the seller be in a position to pay out a substantial sum of money as a condition to enforcing his right to recover possession after the buyer's default.[52] As will be shown later, this usually amounts to refunding the down payment to the defaulting buyer. But the sellers we are considering will usually have used the down payments, when received, in the purchase of a new home and will probably be unable to make the required restitution unless some refinancing can be arranged. The problem is well illustrated by the recent Utah case of *Jacobson v. Swan*,[53] although it involved a somewhat different transaction. Swan, the defendant, desired to purchase a home offered for sale by a third person for a total price of $14,000, but was able to pay only $4,000 in cash, which was not sufficient to make the purchase. Therefore, Jacobson, a salesman for the real estate agency which had the listing, made the purchase in his own name, using for that purpose Swan's $4,000, $5,000 of his own funds and $5,000 which he had borrowed, presumably on a mortgage of the property. Jacobson then sold the property to Swan on a contract reciting a down payment of $4,000. When Jacobson sued to recover possession after Swan's default the court required him to repay to Swan the sum of $3,190, being the difference between the amount Swan had paid on the contract and the reasonable rental value of the premises during the time he was in possession. Jacobson argued that this was unfair since Swan's down payment had gone to the original owner and a substantial part of the periodic payments he had received had gone to pay principal and interest on the $5,000 loan. This meant that he had no funds from the contract with which to make restitution and so in effect was being required to make a new investment in the property in

of his payments so that there was in fact no forfeiture. Apparently a combination suit to recover possession and quiet title will be an equitable suit for purposes of the above distinction. Stone v. Ritzinger, 194 Okla. 653, 153 P. (2d) 1006 (1944). See also Taylor v. Rawlins, 86 Fla. 279, 97 S. 714 (1923).

52 This point seems to be generally overlooked when the problem of forfeiture is discussed in terms of the distinction between liquidated damage provisions and penalties. In Corbin, "The Right of a Defaulting Vendee to the Restitution of Installments Paid," 40 YALE L.J. 1013 (1931), the problem is recognized but not dealt with very conclusively.

53 3 Utah (2d) 59, 278 P. (2d) 294 (1954).

order to enforce his security. The court could see nothing wrong with this so long as the rental value of the property was sufficient to pay interest on the whole purchase price. In *Lytle v. Scottish American Mortgage Co.*,[54] the leading Georgia case, the court recognized the possible hardship in requiring the seller to maintain himself in a position of readiness to make restitution but suggested that the seller could avoid the necessity for this by bringing suit to foreclose by sale. This seems to go part way at least toward outlawing the installment land contract by indirection.

Secondly, even though the seller should at the very least be entitled to have the property stay sold, the rule permitting restitution seems in practical operation to give the buyer the right to rescind at will.[55] The most complete statement of the formula for determining the amount of the buyer's recovery is contained in *Perkins v. Spencer*.[56] The general rule is that the buyer is entitled to recover the amount that he has paid less the amount of damages occasioned to the seller by the buyer's breach. The seller's damages include the rental value of the property during the period of the seller's occupancy and any depreciation in value due either to the actions of the buyer or to a decline in the real estate market. As a practical matter it is, of course, somewhat unrealistic to speak of a market value for any particular piece of real estate, and the seller when he repossesses has no assurance that he will be able to make another sale at a price equal to the judicially determined market value.[57] As a matter of fact, in the few cases which have considered the measure of a particular buyer's recovery under the particular facts involved, none have given the seller any credit for a depreciation in value, so the formula used has always been merely the difference between the amount the buyer has paid and the rental value of the property.[58] Since the typical contract

[54] 122 Ga. 458, 50 S.E. 402 (1905).

[55] In Lawrence v. Demos, 70 Wyo. 56, 244 P. (2d) 793 (1952), the court, in denying the buyer's claim for restitution, emphasized the anomaly in permitting the defaulting buyer to rescind on the ground of his own breach. Technically it may be said that the right of restitution does not arise upon the buyer's breach but only upon the seller's election to terminate the contract because of such breach. Corbin, "The Right of a Defaulting Vendee to the Restitution of Installments Paid," 40 YALE L.J. 1013 (1931). This distinction will afford little comfort to the seller who must take steps to protect his interest shortly after the breach occurs.

[56] (Utah 1952) 243 P. (2d) 446.

[57] In the California case, Freedman v. The Rector, 37 Cal. (2d) 16, 230 P. (2d) 629 (1951), the seller had already repossessed and resold at a higher price before the buyer asserted his claim to restitution. Obviously the buyer's case is stronger under such facts.

[58] Jacobson v. Swan, 3 Utah (2d) 59, 278 P. (2d) 294 (1954); Malmberg v. Baugh, 62

provides for monthly payments very nearly equal to the going monthly rental rate for similar property, the buyer's recovery in most cases will closely approximate the original down payment. This in effect converts the installment land contract into a lease with option to purchase.

Lastly, it should be noted that in both Georgia and Utah the courts have indicated that the defaulting buyer is entitled to restitution for the value of improvements which he has added to the property during his occupancy.[59] In a very real sense then it would seem possible for the buyer to improve the seller out of his estate. Again the only answer to the hardship which this will likely impose on the seller is that he can foreclose by sale if he chooses.

A number of the commentators on the subject have stressed the need for legislation and on this the present writer is inclined to agree although, perhaps, for somewhat different reasons.[60] In the first place, no seller can safely contract in reliance on the cases of his jurisdiction enforcing forfeitures since it is possible for the court to abandon these in principle at any time in the interest of protecting buyers as a class. The ease with which this can be done is illustrated by the experience in Colorado and also in California, where the courts had vigorously enforced forfeiture provisions until the recent cases granting restitution.[61] Second, there is apt to be a considerable spread between the law of a jurisdiction, stated as an abstract proposition, and the law in practical operation in that jurisdiction.[62] The Oregon situation discussed above is probably an illustration of this. And third, the courts in many jurisdictions, out of sympathy for buyers, have imposed meaningless technical requirements on the seller's right to enforce forfei-

Utah 331, 218 P. 975 (1923); Lansford v. Gloyd, 89 Okla. 232, 215 P. 198 (1923); Ezzell v. Endsley, 197 Okla. 194, 169 P. (2d) 309 (1946).

59 Lytle v. Scottish American Mortgage Co., 122 Ga. 458, 50 S.E. 402 (1905); Perkins v. Spencer, (Utah 1952) 243 P. (2d) 446.

60 Howe, "Forfeitures in Land Contracts," CURRENT TRENDS IN STATE LEGISLATION 417 (1954); note, 39 MINN. L. REV. 93 (1954).

61 The leading California case for the strict enforcement of forfeitures was Glock v. Howard and Wilson Colony Co., 123 Cal. 1, 55 P. 713 (1898). The leading case for avoiding forfeitures by decreeing restitution is Freedman v. Rector, 37 Cal. (2d) 16, 230 P. (2d) 629 (1951). See also Baffa v. Johnson, 35 Cal. (2d) 36, 216 P. (2d) 13 (1950). The California law is discussed in note, 25 So. CAL. L. REV. 387 (1952); and note, 37 CALIF. L. REV. 704 (1949).

62 See Brantman, "The Forfeiture Clause in Illinois Real Estate Contracts," 1950 ILL. L. FORUM 249 at 257. After reviewing the Illinois cases the writer concludes, ". . . that the forfeiture clause is neither entirely enforceable according to its literal terms nor entirely unenforceable."

tures. These usually take the form of rules with respect to "notice" and "waiver," but may also include procedural distinctions which serve no useful purpose, such as those found in Oklahoma.[63]

Assuming the need, it must be recognized that the drafting of such legislation is a matter involving considerable difficulties. First of all, it is submitted that no satisfactory statutory solution is possible if the draftsmen are exclusively pre-occupied with devising means to protect buyers from the hardships of forfeiture.[64] In addition, the draftsmen of such legislation must recognize that solutions which seem desirable as a matter of abstract logic may prove unworkable in practice, and that, therefore, such legislation must be prepared on the basis of factual data concerning the law in operation. Finally, there are policy questions to be considered in this area that go beyond the hardships of forfeiture.

The policy questions are the most difficult and must be disposed of before any satisfactory approach can be made to the others. The problems under this heading can all be summarized in the inquiry as to why the law should sanction the installment land contract as a separate form at all, since it apparently serves the same function as the purchase money mortgage. No answer to this question can be made in terms of freedom of contract since the whole law of mortgages is largely built on an abridgment of this freedom. The answer generally given to justify the installment land contract is that it permits the purchase of real estate with a smaller down payment than would be acceptable to the seller in a purchase money mortgage transaction.[65] This, of course, raises a further policy question as to the desirability of easy credit terms, but lately that has been considered primarily a question of federal rather than state policy. In the type of transaction we are considering, the sale of residential property for owner occupancy, a partial answer to the question of federal policy is found in the existence of the government mortgage insurance programs. It is possible to argue that liberal credit terms in the purchase of a home should be available only in those instances where both the buyer and the seller have the advantage of the protective features

[63] See cases cited in note 51 supra.

[64] In the writer's opinion the recent Maryland statute is an example of this. Md. Code Ann. (1951) art. 21, §118-123. For an illustration of this statute in action see Hudson v. Maryland State Housing Co., 207 Md. 320, 114 A. (2d) 421 (1955).

[65] Howe, "Forfeiture in Land Contracts," CURRENT TRENDS IN STATE LEGISLATION 417 at 520 and 521 (1954); notes, 39 MINN L. REV. 93 (1954), 52 HARV. L. REV. 129 (1938).

of the government insurance programs, but for the purpose of this discussion it will be assumed that widespread home ownership is desirable as a matter of public policy, and that, in its accomplishment, freedom of contract within reasonable limits should be permitted to compete with federal paternalism. This suggests that a single statute on installment land contracts may not be desirable, but that, on the other hand, differing provisions should perhaps be made for the casual sales of homes by individuals, sales by professional developers, sales of commercial property, and sales of agricultural property.[66] As heretofore, the discussion which follows will be primarily concerned with the casual sale of a home by an individual with particular reference to the situation where that home is encumbered by a pre-existing mortgage.

Any such legislation probably will, and no doubt should, provide some protection against unreasonably harsh forfeitures. But in this connection it is necessary to define the term "forfeiture." A forfeiture occurs only when the seller is able to terminate the buyer's interest in the property by notice immediately after default or within an unreasonably short time thereafter. No forfeiture occurs if the buyer is given a reasonable time within which to reinstate his rights under the contract by making good his prior default. Strict foreclosure, therefore, involves no element of forfeiture in this sense.

Difficulty arises when a broader meaning is attached to the term, and attempts are then made to protect against this expanded concept of forfeiture by devising ways to make available to the defaulting buyer the value of his equity in cash. One way to accomplish this is to require the seller to make restitution of amounts previously paid by the buyer, less the damages occasioned to the seller by the buyer's breach, but this involves such large elements of hardship to the seller, as indicated above, that it does not merit serious consideration by any legislature.[67] The device

[66] Most of the discussions do not make this distinction. An exception is the note, 39 MINN. L. REV. 93 (1954), which is primarily concerned with the use of such contracts in financing the purchase of small farms. Legislation to take care of a particular situation of a different kind was once attempted in Kansas. This provided sellers with a remedy in forcible entry or detainer in the case of residential property located in cities of over 100,000 population. The writer does not know the nature of the local situation which brought forth this legislation, but in any event the court struck it down as violating the uniformity requirement of the state constitution. Stevens v. McDowell, 151 Kan. 316, 98 P. (2d) 410 (1940).

[67] The Ohio statute on conditional sales of chattels does contain such a provision. Ohio Rev. Code Ann. (Baldwin, 1953) §1319.14. A provision of this kind was once pro-

most commonly resorted to for this purpose is foreclosure by sale, but from the limited evidence available to the writer it apparently has not been notably successful in this respect. Everyone is familiar with the mortgage foreclosure experiences during the depression when deficiency judgments became sufficiently oppressive to call forth legislation.[68] Even at present, with generally rising, or at least stable, real estate markets, deficiency judgments are apparently still the rule in foreclosure sales involving homes,[69] and sales which result in surplus proceeds for the mortgagor must certainly be rare exceptions. This is not hard to understand when it is remembered that foreclosure sales are always cash sales whereas prospective buyers today generally require elaborate financing to make a purchase.

None of this would seem to be of much concern to sellers, however serious such considerations may be from the buyer's viewpoint. However, some danger to sellers would be involved in making foreclosure by sale the prevailing remedy under installment land contracts, since in many states the legislatures might be inclined to extend the statutory provisions for redemption from sale to such foreclosures. This, of course, would destroy the principal advantage of the installment contract. In this connection it seems plausible to argue that the very existence of the government insurance programs tends to demonstrate that conventional mortgage law is inadequate to meet present needs in the business of buying and selling homes. Along the same line, and more directly pertinent to our main problem, it may be noted that it is presently almost impossible to obtain money from any financial institution on a second mortgage of a home. Both of these difficulties are

posed for land contracts in New York, but was never adopted. See note, 52 HARV. L. REV. 129 (1938).

68 One example of such legislation is discussed in Gelfert v. Nat. City Bank, 313 U.S. 221, 61 S.Ct. 898 (1941). On foreclosure during the depression, see Carey, Brabner-Smith and Sullivan, "Studies in Foreclosures in Cook County: II," 27 ILL. L. REV. 595 (1933). In footnote 52 at p. 612 the writers make the following observation: "If the mortgagor has in the course of time, by statute or otherwise, permitted the procedure of foreclosure by sale to replace strict foreclosure, in exchange for a redemption period, it has been an unwise bargain. Almost invariably today the sale is a mere formality since the mortgagee purchases the property, so the result is the same as in strict foreclosure except that now there is probably a deficiency judgment outstanding against the mortgagor. And the redemption is rarely exercised, to no small extent because of the heavy costs imposed by the present method of foreclosure."

69 The Veterans Administration recently reported that a majority of recent foreclosures involving mortgages insured by that agency have resulted in deficiency judgments.

probably due in large part to the time and expense involved in foreclosure sales and are especially acute in states having long statutory redemption periods. On the whole, then, it is submitted that the most realistic solution to the problem of forfeiture is to afford the buyer ample time within which to correct his default or, in the alternative, to negotiate a sale of the property and so realize the value of his equity in cash, if in fact there is any realizable value.

Even if it is agreed that reform legislation in this field should provide for strict foreclosure, further consideration must be given to the details of the procedure, for it is unlikely that the legislation will follow the classical equity pattern in all respects. For one thing, it has been the tendency in such statutes to spell out the length of the redemption period in terms of days or months.[70] The last sentence of the preceding paragraph indicates the factors which should be considered in setting this period. Having established a period sufficient for the protection of the legitimate interests of the buyer, the legislature should then provide the seller with a remedy more expeditious and less costly than ejectment. The statutes in Michigan and other states which give the seller a summary remedy in the nature of forcible entry or detainer seem desirable in this respect. However, contrary to the Michigan statute and for reasons heretofore considered at length, it would also seem desirable to afford the seller the right to possession during the redemption period. Since this would not affect the buyer's ultimate right of redemption, it seems no more harsh than the summary eviction of a delinquent tenant. On the other hand, it would give the seller an opportunity to rent the property and so provide a source of funds from which to pay interest and principal on any prior mortgage, and also taxes and insurance as well as the overdue installments on the contract itself. In many cases, sellers would probably not care to avail themselves of this opportunity because of the difficulties in making satisfactory arrangements to rent the property for a relatively short period. This suggests that the statute might very well spell out the extent of the seller's obligation in this respect in the event that he did take possession.

What is suggested above bears a close resemblance to the original title theory of mortgages with strict foreclosure as the

[70] See statutes discussed in note 30 supra.

prevailing remedy,[71] and there may be some incongruity in permitting such a device to exist alongside the modern mortgage. On the whole, however, it seems like a reasonable compromise between freedom of contract—in a field where there is a demonstrable need for such freedom—and the idealistic paternalism which has so long prevailed in the thinking in this area.

[71] Except, of course, that under the original title theory the remedy of strict foreclosure was not available to a junior mortgagee because of the logical difficulty presented by the fact that he did not have title.