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The Decline of the Contract for Deed in Oklahoma

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NOTES AND COMMENTS

THE DECLINE OF THE CONTRACT FOR DEED IN OKLAHOMA

I. INTRODUCTION

In 1976, the Oklahoma legislature enacted a statute[1] which provides for the most sweeping and decisive statutory regulation of the contract for deed[2] in this country.[3] In one paragraph the statute mandates that the contract for deed is to be treated as a mortgage whenever it is used for the purpose of financing the sale of real property and for securing the immediate right to possession.[4] In this instance the contract for deed is "subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages."[5]

When legislation is passed, courts are faced with the question of its applicability to particular situations.[6] A fundamental rule of statutory interpretation requires the courts to follow the intent of the legislature,

1. Act of April 26, 1976, ch. 70, 1976 Okla. Sess. Laws 85 (codified at OKLA. STAT. tit. 16, § 11A (Supp. 1978)). The full text of the act reads:

> All contracts for deed for purchase and sale of real property made for the purpose or with the intention of receiving the payment of money and made for the purpose of establishing an immediate and continuing right of possession of the described real property, whether such instruments be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall to that extent be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations restraints, and forms as are prescribed in relation to mortgages. No foreclosure shall be initiated, nor shall the court allow such proceedings, unless the documents have been filed of record in the county clerk's office, and mortgage tax paid thereon, in the amount required for regular mortgage transactions.

2. The contract for deed is an executory agreement between the vendor and vendee by which the former is required to convey real estate at a future date upon the performance of certain acts or payments by the latter. *See, e.g.*, Blakely v. McCrory, 274 P.2d 1013, 1015 (Okla. 1954); Parks v. Classen Co., 174 Okla. 237, 237, 49 P.2d 1101, 1105 (1935) (syllabus by the court); Stanley v. Velma A. Barnes Real Estate, Inc., 571 P.2d 871, 873 (Okla. Ct. App. 1977). See notes 13-20 *infra* and accompanying text. The contract for deed is also referred to by such terms as "installment land contract," "long term land sale contract," "conditional sales contract," and "agreement for deed."

3. Nelson & Whitman, *The Installment Land Contract—A National Viewpoint*, 1977 B.Y.U.L. REV. 541, 546. This is an excellent treatment of the subject of contracts for deed on a national scale.

4. OKLA. STAT. tit. 16, § 11A (Supp. 1978).

5. *Id. See generally* OKLA. STAT. tit. 46, §§ 1-204 (1971 & Supp. 1978) (mortgages).

6. 2A C. SANDS, SUTHERLAND'S STATUTORY CONSTRUCTION § 45.05, at 15 (4th rev. ed. 1973) [hereinafter cited as 2A SUTHERLAND].

without further inquiry, whenever that intent is "plainly expressed in a statute."[7] Only those statutes which are ambiguous or susceptible of several meanings are subject to the process of statutory interpretation.[8] A statute is ambiguous if reasonably well-informed persons tend to attribute different meanings to it.[9]

A cursory reading of section 11A might lead to the conclusion that the statutory language clearly indicates a legislative intent to abrogate completely the Oklahoma common law concept of contract for deed.[10] With additional scrutiny, however, a plausible alternative and narrower interpretation can be gleaned from the statute. This alternative position suggests that the legislative purpose was only to ameliorate the harsh results of forfeiture after a vendee's default under the typical contract for deed. The legislation appears to accomplish this objective by requiring the contract vendor to pursue the mortgage remedy of foreclosure as the sole method of terminating the vendee's interest in tke real estate.[11]

By focusing on the initial wording of the statute and by combining aspects of the complete abrogation and foreclosure theories, a third interpretation is feasible. This position suggests that the legislative intent was to treat the contract for deed *in toto* as a mortgage only when it is used for the purposes of financing the sale and of granting the contract vendee the immediate right to possession. Under this theory of limited abrogation, the traditional concept of the contract for deed would still apply whenever the vendee is not granted a possessory right to the real estate.[12]

Arguably all three interpretations of legislative intent are reasonable based on the statutory language. Due to the paucity of legislative history in Oklahoma, however, an investigation into the recorded purposes of this statute is impractical. It is the purpose of this comment to suggest that the contract for deed still exists to a limited degree and remains an alternative method for financing the sale of unimproved

7. Estate of Kasishke v. Oklahoma Tax Comm'n, 541 P.2d 848, 851 (Okla. 1975); Johnson v. Ward, 541 P.2d 182, 184-85 (Okla. 1975); Special Indem. Fund v. Harold, 398 P.2d 827, 830 (Okla. 1964); Mid-Continent Pipe Line Co. v. Stephens County, 312 P.2d 883, 885 (Okla. 1957); Woods v. Phillips Petroleum Co., 207 Okla. 490, 492, 251 P.2d 505, 507-08 (1952); Russett School Dist. v. Askew, 193 Okla. 102, 103, 141 P.2d 575, 577 (1943); Miller v. State, 281 P.2d 441, 446 (Okla. Crim. App. 1955).

8. Russett School Dist. v. Askew, 193 Okla. 102, 103-04, 141 P.2d 575, 577 (1943); Miller v. State, 281 P.2d 441, 446 (Okla. Crim. App. 1955).

9. State *ex rel.* Neelen v. Lucas, 24 Wis. 262, —, 128 N.W.2d 425, 428 (1964).

10. See notes 110-18 *infra* and accompanying text.

11. See notes 119-41 *infra* and accompanying text.

12. See notes 142-75 *infra* and accompanying text.

real estate in Oklahoma. This limited abrogation interpretation, it is submitted, is more appropriate than the theories of total abrogation or of foreclosure, especially when viewed in conjunction with the historical deficiencies of the prior law.

II. TRADITIONAL LAW

A. The Contract for Deed

The contract for deed is an executory contract for the sale of real estate.[13] Typically the buyer makes an initial payment towards the purchase price[14] and enters into possession of the property.[15] While in possession, he pays monthly installments of principal and interest.[16] Until the final payment by the purchaser, the seller normally retains legal title to the real estate as his security for the performance of the contract.[17] Only upon receipt of the final payment of the purchase

13. *See generally* Asher v. Hull, 207 Okla. 478, 481, 250 P.2d 866, 870 (1952). *See also* Nelson & Whitman, *supra* note 3, at 543; Comment, *Florida Installment Land Contracts: A Time For Reform*, 28 U. FLA. L. REV. 156, 159 (1975) [hereinafter cited as *Florida Installment Land Contracts*]; note 2 *supra*. The contract for deed should be distinguished from a typical contract for the sale of real estate. The latter is of shorter duration and serves primarily to bind the parties during the interim between the execution of the contract and the closing of the transaction. Further, it necessitates only two payments—an initial down payment at the time of the execution of the contract with the balance paid at the closing. *See* Nelson & Whitman, *supra* note 3, at 541-42.

14. The down payment is usually equivalent to a single monthly installment. This is in contrast to conventional mortgage financing. A buyer financing his purchase through a mortgage transaction may be required to make a down payment of as much as one-third of the purchase price. See Mixon, *Installment Land Contracts: A Study of Law Income Transactions, with Proposals for Reform and a New Program to Provide Home Ownership in the Inner City*, 7 HOUS. L. REV. 523, 525-26 (1970). The liberal credit terms usually found in a contract for deed are attractive to the prospective purchaser who has an unfavorable credit rating. See Warren, *California Installment Land Sales Contracts: A Time for Reform*, 9 U.C.L.A. L. REV. 608, 625 (1962). The contract purchaser may also defer most of the closing costs of the transaction until all of the installment payments are made. A mortgagor, however, does not enjoy this advantage. He must pay all of his closing costs when the mortgage is granted. See Mixon, *supra*, at 531.

15. The contract for deed usually provides that the buyer has the right to possession of the premises during the contract term until he defaults on his contractual obligation. See 3 D. HARVEY, HARVEY'S LAW OF REAL PROPERTY AND TITLE CLOSING 402-03 (expan. & recomp. 1978). *See also* Mixon, *supra* note 14, at 528-29. Under the new statute, the buyer should have the right to remain in possession even after his default. See notes 197-98 *infra* and accompanying text. During the contract term, the purchaser is additionally required to keep the premises in good repair, to pay taxes, to prevent waste, and to maintain insurance. See Nelson & Whitman, *supra* note 3, at 540.

16. The purchase price of the property is usually amortized over a fifteen to twenty year period, although the time may be as short as a year or two. See Nelson & Whitman, *supra* note 3, at 541.

17. See G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES § 20 (2d ed. 1970). This retention of legal title is in contrast to the sale of real estate where the seller finances part of the payment of the purchase price by transferring legal title and taking back a note and mortgage on the property from the buyer. See notes 57-59 *infra* and accompanying text. The buyer, however,

price[18] is the seller required to execute a deed and to convey marketable title to the purchaser.[19] Despite its use as a security and financing device, Oklahoma courts have refused to treat the contract for deed as a constructive mortgage.[20]

1. The Interests of the Vendor and the Vendee

The rights and obligations of the parties to a contract for deed are largely determined by the terms of the instrument.[21] Nevertheless, these rights are still subject to certain legal and equitable doctrines which affect the parties' relationships with each other and with persons outside the transaction. For purposes of this comment, the most important of these doctrines concerns the legal determination of the dependence or independence of the parties' performances[22] and the concept of equitable conversion.[23]

In a typical contract for the sale of real estate[24]—a transaction which is similar to the contract for deed—the parties' obligations are mutually dependent.[25] They are dependent because each party's duty to perform arises only upon the other party's full performance.[26] The seller's obligation to execute a deed and to convey marketable title is dependent on the buyer's payment of the purchase price.[27] Likewise, the buyer's duty to pay the purchase price is dependent on the seller's performance.[28]

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obtains equitable title to the property at the time the last installment is due. See notes 33-38 *infra* and accompanying text.

18. See Mixon, *supra* note 14, at 528.

19. See 3 D. HARVEY, *supra* note 15, at 402-03. The contract for deed, however, could provide that the seller is required only to execute a quitclaim deed of all his interest in the property.

20. *See, e.g.*, Barker v. Hutton, 109 Okla. 197, 198, 235 P. 170, 171 (1925).

21. *See* Nix v. Brogan, 118 Okla. 62, 64-65, 251 P. 753, 755 (1925); Banker's Reserve Life Co. v. Rice, 99 Okla. 184, 186-87, 226 P. 324, 325 (1924); Lee, *The Interests Created by the Installment Land Contract*, 19 U. MIAMI L. REV. 367, 367 (1965) [hereinafter cited as Lee, *The Interests Created*].

22. *See generally* 3A A. CORBIN, CORBIN ON CONTRACTS § 637 (1960 & Supp. 1971).

23. *See generally* 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 1159-1166 (5th ed. 1941).

24. See note 13 *supra*.

25. Kendall v. Hastings, 200 Okla. 643, 645, 198 P.2d 998, 1000 (1948); Graves v. Chambers, 110 Okla. 1, 2, 236 P. 25, 26 (1925).

26. Kendall v. Hastings, 200 Okla. 643, 645, 198 P.2d 998, 1000 (1948); Graves v. Chambers, 110 Okla. 1, 2, 236 P. 25, 26 (1925); Livingston v. Blair, 104 Okla. 238, 238, 231 P. 82, 83 (1924); Baumhoff v. Oklahoma City Elec. & Gas & Power Co., 14 Okla. 127, 136-37, 77 P. 40, 43 (1904). *See generally* 3A A. CORBIN, *supra* note 22, § 637, at 45.

27. *See* Graves v. Chambers, 110 Okla. 1, 2, 236 P. 25, 26 (1925). See 3A A. CORBIN, *supra* note 22, §§ 662-663.

28. *See* Graves v. Chambers, 110 Okla. 1, 2, 236 P. 25, 26 (1925). See 3A A. CORBIN, *supra* note 22, §§ 662-663.

When the parties' obligations under a contract for sale of real estate are mutually dependent, an equitable conversion occurs and equitable title to the property passes to the purchaser.[29] Legal title however, remains in the seller.[30] Under these circumstances, equity treats the vendor as a trustee of the property for the benefit of the vendee and the vendee as a trustee of the purchase money for the benefit of the vendor.[31] The consequence of equitable title's passing to the vendee is that his interest may be further encumbered or subject to claims from his judgment creditors.[32]

Under a contract for deed there is no mutuality of obligation,[33] and thus no equitable conversion, until the last installment is due. The vendee's performance is independent of the vendor's duty to perform.[34]

29. This equitable conversion depends on the right of one contracting party to enforce specifically the contract against the other. Langley v. Norris, 167 S.W.2d 603, 609 (Tex. Ct. App. 1942); Smith v. Jones, 21 Utah 270, —, 60 P. 1104, 1106 (1900). *See generally* 4 J. POMEROY, *supra* note 23, § 1161. A party does not have a right to specific performance until the parties' performances are mutually dependent. Phillips Petroleum Co. v. Buster, 241 F.2d 178, 183-84 (10th Cir.), *cert. denied*, 355 U.S. 816 (1957); Thompson v. Giddings, 276 P.2d 229, 236 (Okla. 1954); Asher v. Hull, 207 Okla. 478, 481, 250 P.2d 866, 870 (1952); Kendall v. Hastings, 200 Okla. 643, 645-46, 198 P.2d 998, 1000 (1948); Melton v. Cherokee Oil & Gas Co., 67 Okla. 247, 250, 170 P. 691, 693-94, *cert. denied*, 247 U.S. 507 (1917). Thus an equitable conversion does not occur unless the parties' performances are mutually dependent.

Equity converts the transaction on the philosophy that equity regards things agreed to be done as actually performed. First Nat'l Bank & Trust Co. v. United States, 462 F.2d 908, 910 (10th Cir. 1972); Reigel v. Wood, 110 Okla. 279, 282, 229 P. 556, 558 (1924); Dunn v. Yakish, 10 Okla. 388, 392, 61 P. 926, 927 (1900).

30. First Nat'l Bank & Trust Co. v. United States, 462 F.2d 908, 910 (10th Cir. 1972); Alfrey v. Richardson, 204 Okla. 473, 478, 231 P.2d 363, 368 (1951); Whale v. Pearson, 201 Okla. 619, 623, 208 P.2d 552, 556 (1949); Leedy v. Ellis County Fair Ass'n, 188 Okla. 348, 350, 110 P.2d 1099, 1101 (1941); Ware v. Hall, 116 Okla. 70, 73, 243 P. 740, 743 (1925); Dunn v. Yakish, 10 Okla. 388, 393, 61 P. 926, 927 (1900).

31. Leedy v. Ellis County Fair Ass'n, 188 Okla. 348, 350, 110 P.2d 1099, 1101 (1940); Ware v. Hall, 116 Okla. 70, 71, 243 P. 740, 742 (1925) (syllabus by the court); Dunn v. Yakish, 10 Okla. 388, 395, 61 P. 926, 927 (1900).

32. Rand v. Garner, 75 Iowa 311, —, 39 N.W. 515, 515 (1888) (subject to attachment by contract vendee's judgment creditor); Whitney v. Foster, 117 Mich. 643, —, 76 N.W. 114, 115 (1898) (encumberance); Hook v. Northwestern Thresher Co., 91 Minn. 482, —, 98 N.W. 463, 463-64 (1904) (subject to attachment by contract vendee's judgment creditor); Standorf v. Shockley, 16 N.D. 73, —, 111 N.W. 622, 623 (1907) (encumberance); Welling v. Mount Si Bowl, Inc., 79 Wash. 2d 485, —, 487 P.2d 620, 623-24 (1971) (subject to attachment by contract vendee's judgment creditor). *Compare* Mutual Bldg. & Loan Ass'n v. Collins, 85 N.M. 706, —, 516 P.2d 677, 678 (1973) (statute providing that judgment is a lien on the real estate of judgment debtor construed to encompass attachment of a debtor-vendee's interest under a contract for the sale of real estate) *with* OKLA. STAT. tit. 12, § 706 (1971) ("Judgments . . . shall be liens on the real estate of the judgment debtor.").

33. See 3A A. CORBIN, *supra* note 22, § 664.

34. Loud v. Pomona Land & Water Co., 153 U.S. 564, 577-81 (1893). When one party must perform or stand ready to perform before the other party is required to perform, the promise of the party who must perform first is said to be independent, and the other party's performance is said to be dependent. Livingston v. Blair, 104 Okla. 238, 238, 231 P. 82, 83 (1924); Baumhoff v. Oklahoma City Elec. & Gas & Power Co., 14 Okla. 127, 136-37, 77 P. 40, 43 (1904).

The buyer must pay substantially all of the purchase price before the seller is obligated to execute a deed and to convey marketable title.[35] It is only when the last installment is payable that the parties' performances become dependent and that equitable title is transferred to the buyer.[36] Absent mutually dependent obligations, however, there is no equitable conversion.[37] Consequently the purchaser has no equitable title in the property during most of the contract term.[38] Rather, he possesses merely a contractual right to purchase the real estate[39]—a right which he cannot encumber.[40]

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35. *See* Loud v. Pomona Land & Water Co., 153 U.S. 564, 577-81 (1893).

36. *See, e.g.*, Blakely v. McCrory, 274 P.2d 1013, 1015 (Okla. 1954); Lansford v. Gloyd, 89 Okla. 232, 236-27, 215 P. 198, 202 (1923); Stanley v. Velma A. Barnes Real Estate, Inc., 571 P.2d 871, 874 (Okla. Ct. App. 1977).

37. Kendall v. Hastings, 200 Okla. 643, 645, 198 P.2d 998, 1000 (1948); Graves v. Chambers, 110 Okla. 1, 2, 236 P. 25, 26 (1925).

38. Blakely v. McCrory, 274 P.2d 1013, 1015 (Okla. 1954); Asher v. Hull, 207 Okla. 478, 481, 250 P.2d 866, 870 (1952); Ezzell v. Endsley, 197 Okla. 194, 195, 169 P.2d 309, 310 (1946); Parks v. Classen Co., 174 Okla. 237, 237, 49 P.2d 1101, 1102 (1935); Bradford v. Jones, 170 Okla. 636, 638, 41 P.2d 857, 859 (1935); Cullins v. Elerick, 110 Okla. 132, 134, 236 P. 886, 887 (1925); Lansford v. Gloyd, 89 Okla. 232, 236-37, 215 P. 198, 202 (1923); Stanley v. Velma A. Barnes Real Estate, Inc., 571 P.2d 871, 873-74 (Okla. Ct. App. 1977).

39. *See* Parks v. Classen Co., 156 Okla. 43, 45-46, 9 P.2d 432, 434 (1932); Stanley v. Velma A. Barnes Real Estate, Inc., 571 P.2d 871, 874 (Okla. Ct. App. 1977). *But see* State Life Ins. Co. v. State *ex rel.* Kehn, 192 Okla. 271, 135 P.2d 965 (1942), where the court noted that "a present right to demand a deed of conveyance is not always a necessary element to an equitable title or beneficial interest in the premises." *Id.* at 274, 135 P.2d at 968. Several commentators have suggested that the vendee to a contract for deed has an equitable interest in the property. *See, e.g.*, 4 J. POMEROY, *supra* note 23, § 1296, where the author states that "an executory agreement creates specific equitable interests in the property . . . ." *See also* Comment, *Installment Land Contracts for the Sale of Land in Missouri*, 24 MO. L. REV. 240, 243 (1959); Note, *Toward Abolishing Installment Land Sale Contracts*, 36 MONT. L. REV. 110, 110 (1975). Oklahoma courts appear to make no distinction between the terms "equitable title" and "equitable interests." *See* Lansford v. Gloyd, 89 Okla. 232, 236-37, 215 P. 198, 202 (1923). *Accord*, Stanley v. Velma A. Barnes Real State, Inc., 571 P.2d 871, 874 (Okla. Ct. App. 1977).

40. *See* Bartlesville Oil & Improvement Co. v. Hill, 30 Okla. 829, 832-34, 121 P. 208, 209-12 (1911); Stanley v. Velma A. Barnes Real Estate, Inc., 571 P.2d 871, 873-74 (Okla. Ct. App. 1977)(no equitable title against which judgment lien could attach).

While the purchaser under a contract for deed has no equitable title which he can encumber, he may assign his rights under the contract for deed to a third party. Morgan v. Griffith Realty Co., 192 F.2d 597, 600 (10th Cir.), *cert. denied*, 343 U.S. 934 (1951); Henry H. Cross Co. v. Texhoma Oil & Gas Ref. Co., 32 F.2d 442, 446-47 (10th Cir. 1929); Landon v. Morehead, 34 Okla. 701, 707, 126 P. 1027, 1029-30 (1912); Harrison v. Osborn, 31 Okla. 103, 106, 114 P. 331, 332 (1911). *See generally* 3 S. WILLISTON, LAW OF CONTRACTS § 404 (3d ed. & Supp. 1977). On the other hand, the contract for deed may contain a clause prohibiting assignment of the contract without the consent of the vendor. Courts have generally upheld these restraints on the basis of "freedom of contract." Hanigan v. Wheeler, 19 Ariz. App. 49, —, 504 P.2d 972, 974-75 (1972); Parkinson v. Caldwell, 126 Cal. App. 2d 548, —, 272 P.2d 934, 937 (1954); Immel v. Travelers Ins. Co., 373 Ill. 256, —, 26 N.E.2d 114, 116 (1940); Andrew v. Meyerdirck, 87 Md. 511, —, 40 A. 173, 175-76 (1898). *Contra* Able v. Gunter, 174 Ala. 389, —, 57 So. 464, 465 (1912). These restraints, however, appear to be in conflict with the basic philosophy of property law that there should be free alienability of all interest in land. For this reason, some courts have strictly construed any clause which prohibits assignment. Hanigan v. Wheeler, 19 Ariz. App. 49, —, 504 P.2d 972, 974-

2. The Vendor's Remedies on Breach

When dealing with vendor's remedies, Oklahoma courts have traditionally ignored the distinct similarity between the contract for deed and the mortgage and instead have focused on the contractual nature of the vendee's interest.[41] In treating the contract for deed as an executory contract,[42] courts have permitted the nonbreaching seller to pursue a multiplicity of legal and equitable remedies in removing the defaulting purchaser from the property and in clearing the title of any defects.[43]

If the contract for deed contained a forfeiture upon default provision,[44] the vendor could retain any payments made under the contract as liquidated damages.[45] Alternatively, the seller could tender back the

75 (1972); Parkinson v. Caldwell, 126 Cal. App. 2d 548, —, 272 P.2d 934, 937 (1954); Detroit Greyhound Emp. Fed. Credit Union v. Aetna Life Ins. Co., 381 Mich. 683, —, 167 N.W.2d 274, 277-78 (1969). Even if the purchaser could delegate the performance of the contract to another, his duty to perform would remain unchanged. Earth Prod. Co. v. Oklahoma City, 441 P.2d 399, 404 (Okla. 1968); Walker v. Mills, 182 Okla. 480, 481-82, 78 P.2d 697, 699 (1938); Sampson v. Beeler & Bennett, 103 Okla. 229, 230-31, 229 P. 777, 778-79 (1924); McFarland v. Mayo, 65 Okla. 28, 30-31, 162 P.753, 755 (1916); Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 27 Okla. 180, 185-93, 111 P. 326, 328-32 (1910). *See generally* 3 S. WILLISTON, *supra*, § 411. A party may not delegate his performance to another if the contract requires that party's special skill, personal trust, or confidence. Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 27 Okla. 180, 185-93, 111 P. 326, 328-32 (1910). Because the vendee's obligation to pay the installments and the vendor's duty to convey title do not involve any of these factors, the parties' performances should be delegable.

41. Courts have developed three distinct approaches to handling the vendor's remedies under the contract for deed: (1) the quasi-mortgage approach; (2) the compelling equities approach; and (3) the contract approach. Lewis & Reeves, *How The Doctrine of Equitable Conversion Affects Land Sale Contract Forfeitures*, 3 R.E.L.J. 249, 254-55 (1974).

42. See note 13 *supra* and accompanying text.

43. If the contract for deed is recorded, it will have the effect of clouding the vendor's title. *See* G. NELSON & D. WHITMAN, CASES AND MATERIALS ON REAL ESTATE FINANCE AND DEVELOPMENT 67 n.1 (1976); Lee, *Remedies For Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550, 558 (1965) [hereinafter cited as Lee, *Remedies for Breach*]; Nelson, *The Use of Installment Land Contracts in Missouri—Courting Clouds on Title*, 33 J. MO. B. 161 (1977). *See generally* OKLA. STAT. tit. 16, ch. 1 app. (1971 & Supp. 1978) (title examination standards).

44. The contract for deed typically contains a forfeiture clause. *See generally* 3 D. HARVEY, *supra* note 15, at 402-03.

45. Sparks v. Trosper, 186 Okla. 289, 97 P.2d 81 (1939); Cornelius v. Keegan, 172 Okla. 235, 45 P.2d 58 (1935); Eldridge v. Vance, 128 Okla. 46, 261 P. 168 (1927); Lansdale v. Reinhard, 74 Okla. 53, 176 P. 924 (1918). For a case where the court allowed retention of payments made as liquidated damages absent a contractual provision, *see* Hill v. Buford, 111 Okla. 148, 239 P. 163 (1925); *but see* Stone v. Ritzinger, 194 Okla. 653, 153 P.2d 1006 (1944); Nicholson v. Roberts, 144 Okla. 116, 289 P. 331 (1929). Oklahoma statutes provide that penalties imposed by a contract are void and that liquidated damages clauses are void except in cases where it would be impractical or extremely difficult to establish actual damages. OKLA. STAT. tit. 15, §§ 213-215 (1971). A liquidated damages clause, therefore, would only be valid if the amount was reasonable and it would be impractical or extremely difficult to fix actual damages. Freeman v. Warrior, 409 F.2d 1101, 1103-04 (10th Cir. 1969); Waggoner v. Johnston, 408 P.2d 761, 769-70 (Okla. 1965); Hudson v. Elliot, 207 Okla. 676, 680, 252 P.2d 482, 485-86 (1951). In *Freeman*, the defendant buyer con-

installments paid by the buyer and sue for damages for breach of contract.[46] In an appreciating real estate market, the seller could elect to rescind the contract,[47] to restore everything of value to the vendee, and to recover possession of the land.[48] Finally, if the contract contained a clause accelerating the balance due of the purchase price, the vendor could bring a suit to compel the vendee to pay that amount.[49]

If the buyer remained on the land following default, the seller could initiate an action in ejectment to regain immediate possession.[50] In conjunction with this suit for possession or in an independent suit, he could bring an equitable action to quiet his title.[51] Finally, in the event the contract for deed was unrecorded and the defaulting buyer had been coerced into vacating the premises, the seller could choose to do nothing.[52]

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tended that the seller was limited in his recovery for breach to the amount of the liquidated damages. The court rejected this argument and concluded that the seller could prove and recover his damages. 409 F.2d at 1103-04.

46. First Nat'l Bank & Trust Co. v. United States, 462 F.2d 908 (10th Cir. 1972); Freeman v. Warrior, 409 F.2d 1101 (10th Cir. 1969); Baldwin v. Chappell, 105 Okla. 38, 231 P. 496 (1924). The measure of the vendor's damages caused by the breach is the excess, if any, of the amount which would have been due under the contract over the market value of the property. OKLA. STAT. tit. 23, § 28 (1971). *See* Freeman v. Warrior, 409 F.2d 1101, 1103-04 (10th Cir. 1969). Typically, the vendor pursued this remedy when the retention of the installment payments made proved inadequate to compensate him for his losses incurred as a result of the vendee's breach.

47. King v. Oakley, 434 P.2d 868 (Okla. 1967); Stone v. Ritzinger, 194 Okla. 653, 153 P.2d 2006 (1944); Nicholson v. Roberts, 144 Okla. 116, 289 P. 331 (1929); Simmons v. Harris, 108 Okla. 189, 235 P. 508 (1924); Hurley v. Anicker, 51 Okla. 97, 151 P. 593 (1915). *See* OKLA. STAT. tit. 15, § 233 (1971) (cases when party may rescind). Oklahoma cases have confused the terms "rescind" and "cancel." In Nicholson v. Roberts, 144 Okla. 116, 289 P. 331 (1929), the court held the terms were synonymous as used in plaintiff's petition. The court in Ezzell v. Endsley, 197 Okla. 194, 169 P.2d 309 (1946), however, concluded that there existed a clear distinction between recission and cancellation. They went on to hold that title 15, § 235 of the Oklahoma Statutes, regarding the duties of a party attempting rescission, did not apply to a suit to cancel a contract for deed and to quiet title to the property. Thus when the term "cancel" is used, the vendor would primarily be bringing on action to quiet the title of his property. *See* Continental Oil Co. v. Bean, 171 Okla. 66, 41 P.2d 678 (1935).

48. OKLA. STAT. tit. 15, § 235 (1971) (duty of party attempting rescission). *See* cases note 47 *supra*.

49. *See* Kouri v. Toma, 198 Okla. 111, 175 P.2d 975 (1947). *See* Lee, *The Interests Created, supra* note 21, at 369-70. In the absence of an option to accelerate the remaining purchase price upon the buyer's default, a seller could not specifically enforce the contract to compel the buyer to pay the entire balance owing. Vanderhoff v. Crosby, 11 N.J. Misc. 389, 390, 166 A. 337, 337 (Sup. Ct. 1933); Robert C. v. Aladdin Knit Mills, Inc., 8 N.C. App. 612, —, 175 S.E.2d 289, 295 (1970).

50. Crowell v. Whitmire, 548 P.2d 221 (Okla. 1976); Asher v. Hull, 207 Okla. 478, 250 P.2d 866 (1953); Ezzell v. Endsley, 197 Okla. 194, 169 P.2d 309 (1946); Stone v. Ritzinger, 194 Okla. 633, 153 P.2d 1006 (1944); Cornelius v. Keegan, 172 Okla. 235, 45 P.2d 58 (1935); Lonsdale v. Reinhard, 74 Okla. 53, 176 P. 924 (1918).

51. OKLA. STAT. tit. 12, § 1141 (1971) (action to quiet title may be joined with action to recover possession). *See also* King v. Oakley, 434 P.2d 868 (Okla. 1967); Asher v. Hull, 207 Okla. 478, 250 P.2d 866 (1953).

52. *See* Warren, *supra* note 14, at 629 & n.94, 633.

3. The Vendee's Remedies on Breach

When the seller was the breaching party,[53] the nondefaulting buyer had three alternative remedies: (1) he could sue to recover any payments made by rescinding the contract and by restoring everything of value received;[54] (2) he could seek damages for breach;[55] or (3) he could bring an equitable action for specific performance of the contract if it contained an acceleration clause.[56]

B. The Mortgage

For financing the sale of real estate in Oklahoma, the basic alternative to the contract for deed is the mortgage.[57] The typical mortgage transaction involves the seller's transferring legal title to the buyer in return for a substantial down payment, the buyer's giving his personal note for the remainder of the purchase price, and a mortgage on the property.[58] This purchase money mortgage is the seller's security if the purchaser defaults on the note.[59] In Oklahoma the mortgage does not

53. The seller's primary obligation under the contract for deed is to convey a marketable title when all of the installment payments have been made. See notes 18-19 *supra* and accompanying text. The seller can breach this obligation in numerous ways. First, the vendor could transfer title to a bona fide purchaser for value without notice which would extinguish the vendee's contractual right to purchase the property. *See* Pierce v. Duckett, 157 Okla. 20, 21, 10 P.2d 697, 698 (1932); Engelkemeier v. Lillis, 54 Okla. 282, 285, 153 P. 877, 878 (1915); Krauss v. Potts, 38 Okla. 674, 684, 135 P. 362, 366 (1913). Second, he may default on a blanket first mortgage which includes the property under the vendee's contract for deed. Foreclosure by the first mortgagee would prevent the seller from performing. See Mixon, *supra* note 14, at 544-47; Warren, *supra* note 14, at 609-24. Finally, the vendor may be unable or unwilling to convey a title or a marketable title to the property when the vendee has paid all of the purchase price. See Mixon, *supra* note 14, at 545-48; Warren, *supra* note 14, at 611.

54. Hawkins v. Wright, 204 Okla. 55, 226 P.2d 957 (1951); Howerton v. Callaway, Carrey & Foster, 175 Okla. 311, 52 P.2d 845 (1936); Kneeland v. Hetzel, 103 Okla. 3, 229 P. 218 (1924); Abbott v. Independent Torpedo Co., 98 Okla. 239, 224 P. 708 (1924). *See also* OKLA. STAT. tit. 15, § 235 (1971) (duty of party attempting rescission).

55. First Nat'l Bank & Trust Co. v. United States, 462 F.2d 908 (10th Cir. 1972). *See generally* Lee, *Remedies for Breach, supra* note 43, at 567-70. The measure of the damages for the seller's breach would be the amount of the installments paid and any expenses properly incurred in examining the title and preparing the necessary papers, with interest on the entire amount. OKLA. STAT. tit. 23, § 27 (1971).

56. First Nat'l Bank & Trust Co. v. United States, 462 F.2d 908 (10th Cir. 1972). *See generally* Lee, *Remedies for Breach, supra* note 43, at 570-71. *See also* note 49 *supra*. A breaching vendee rarely enjoyed a similar remedy. Only under unusual circumstances might the court grant him specific performance of the contract against the vendor. *See* Palovik v. Absher, 198 Okla. 671, 181 P.2d 989 (1947).

57. Other alternatives to the contract for deed are the deed of trust, OKLA. STAT. tit. 46, §§ 31-39 (1971 & Supp. 1978), and the deed absolute, OKLA. STAT. tit. 46, § 1 (1971).

58. See G. OSBORNE, *supra* note 17, § 213, at 388.

59. Montgomery v. Wade, 195 Okla. 60, 61, 154 P.2d 943, 944 (1945); Clarke v. Clarke, 194 Okla. 455, 457, 152 P.2d 908, 910 (1944); Erwin v. Breese, 188 Okla. 391, 393, 109 P.2d 507, 508-09 (1941); Unger v. Shull, 154 Okla. 277, 279, 7 P.2d 881, 883-84 (1932).

convey any title to the mortgagee,[60] but rather it is merely a lien on the property.[61]

Because the mortgage is only a lien on the title rather than a conveyance, the mortgagor-buyer retains the incidents of legal ownership. Consequently he may encumber his title further[62] or convey it to another subject to the seller's mortgage.[63] Likewise, he has a right to possession of the property until the mortgage is judicially foreclosed.[64]

60. OKLA. STAT. tit. 42, §§ 5, 10 (1971). *See* Coursey v. Fairchild, 436 P.2d 35, 38 (Okla. 1967); *In re* Baxter, 132 Okla. 289, 289-90, 270 P. 565, 566 (1928); *In re* Rolater, 67 Okla. 215, 216, 170 P. 507, 508 (1918); Litz v. Exchange Bank, 15 Okla. 564, 570, 83 P. 790, 792 (1905).

61. *See* OKLA. STAT. tit. 42, §§ 1, 5, 10 (1971); OKLA. STAT. tit. 46, § 3 (1971). *See also* Coursey v. Fairchild, 436 P.2d 35, 38 (Okla. 1967); Abraham v. Mike, 178 Okla. 594, 599, 63 P.2d 743, 746 (1936); Pierce v. Duckett, 157 Okla. 20, 21, 10 P.2d 697, 698 (1932). Other jurisdictions, however, hold that the mortgagee may have certain incidents of the legal title which are greater than a mere lien on the property. *See generally* G. OSBORNE, *supra* note 17, § 14, for a discussion of these title and intermediate theory jurisdictions.

62. *See* Smith v. Varney, 309 A.2d 229, 232 (Me. 1973). *See generally* G. OSBORNE, *supra* note 17, § 249.

63. Coursey v. Fairchild, 436 P.2d 35, 38 (Okla. 1967). *Accord*, Chason v. O'Neal, 158 Ga. 725, —, 124 S.E. 519, 522 (1924); Campbell v. Jones, 230 S.W. 710, 718 (Tex. Ct. App. 1921). *See generally* Cunningham & Tischler, *Transfer of the Real Estate Mortgagor's Interest*, 27 RUTGERS L. REV. 24 (1973). Typically, the mortgagee may try to restrict the mortgagor's ability to transfer the mortgaged property without the mortgagor's written consent. A common device used is the "due on sale" clause. It provides that a conveyance of the mortgaged premises without the written consent of the mortgagee shall entitle the mortgagee, at his option, to declare the entire indebtedness as due and to foreclose the mortgage if the balance is not paid immediately. *See* Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013 (Okla. 1977). For a discussion of the validity of these "due on sale" clauses in Oklahoma, *see generally* Vyhnal, *Continental Federal Savings and Loan Association v. Fetter, The "Due on Sale" Clause: The Need to Divide and Articulate Its Dual Functions in the Mortgage Contract*, 49 OKLA. B.A.J. 898 (1978). The mortgagor may transfer the property "subject" to the mortgage. In this case, the transferee does not become personally liable for the underlying obligations. Instead, the debt is to be satisfied out of the land with the transferor being only secondarily liable. Continental Life Ins. Co. v. Phillips, 170 Okla. 34, 35, 38 P.2d 564, 565 (1935); Dean v. McMichael, 168 Okla. 536, 538, 33 P.2d 1086, 1087 (1934); Johnson v. Davis, 146 Okla. 170, 172, 293 P. 197, 198 (1930); Beckett v. Harris, 115 Okla. 219, 221-22, 242 P. 561, 563 (1925); Snaderson v. Turner, 73 Okla. 105, —, 174 P. 763, 763-64 (1918). *See generally* G. OSBORNE, *supra* note 17, § 252. Alternatively, the mortgagor may sell the mortgaged property where the buyer expressly or impliedly agrees to become personally liable on the debt secured by the mortgage. U.S.I.F. Norman Corp. v. Oklahoma Tax Comm'n, 534 P.2d 1298, 1300 (1974); State *ex rel.* Comm'rs of Land Office v. Pitts, 197 Okla. 644, 646, 173 P.2d 923, 925 (1946); Strange v. Maloney, 178 Okla. 65, 67, 61 P.2d 725, 727 (1936). *See generally* G. OSBORNE, *supra* note 17, § 253. As between the mortgagor and the purchaser, the purchaser becomes the principal debtor, while original mortgagor occupies the position of a surety. Stalcup v. Easterly, 351 P.2d 735, 738 (Okla. 1960); Harden v. American First Nat'l Bank, 154 Okla. 11, 13, 6 P.2d 1060, 1062 (1932); Sawyer v. Bahnsen, 102 Okla. 41, 44, 226 P. 344, 345 (1924); Scott v. Norris, 62 Okla. 292, 294, 162 P. 1085, 1087 (1917). *See generally* G. OSBORNE, *supra* note 17, § 259. If the purchaser assumes the mortgage, the mortgagee may sue personally either the original mortgagor or the assuming purchaser or both on the underlying obligation. McBirney v. Bader, 181 Okla. 237, 240, 73 P.2d 156, 159 (1937); Page v. Hinchee, 174 Okla. 537, 540, 51 P.2d 487, 489-90 (1935).

64. Morgan v. Atkinson, 203 Okla. 111, 112, 218 P.2d 1049, 1051 (1950); Yingling v. Redwine, 12 Okla. 64, 67-78, 69 P. 810, 811 (1902). Judicial foreclosure is the sole method of terminating the defaulting mortgagor's interest in the property. OKLA. STAT. tit. 12, § 686 (1971). The mortgagor has a right to any profits and rents from the property until there is a judicial

If the mortgagor-buyer defaults on his obligation, the mortgagee-seller typically has the option of accelerating the payment of the entire indebtedness.[65] The mortgagee-seller may then either sue the mortgagor-buyer personally on the note[66] or sue to foreclose his mortgage[67] or both.[68]

Under a judicial foreclosure, the realty must be sold at a public auction.[69] The net proceeds of this public sale are applied first to the

foreclosure. Tiger v. Sellers, 145 F.2d 920, 923 (10th Cir. 1945); Mart v. Bingman, 171 Okla. 429, 433, 43 P.2d 447, 451 (1935) (per curiam). Moreover, any provision in the mortgage giving the mortgagee the right to possession, profits, or rents upon default is contrary to public policy and is, therefore, invalid. *Id.* at 432, 43 P.2d at 449. If the mortgagee wishes to protect his security interest from any deterioration in the hands of the defaulting vendee during the pendency of the foreclosure action, he may petition the court for the appointment of a receiver. OKLA. STAT. tit. 12, § 1551 (1971). *See* Home Owners' Loan Corp. v. Rusch, 183 Okla. 145, 80 P.2d 639 (1938); Hart v. Bingham, 171 Okla. 429, 43 P.2d 447 (1935); Exchange Trust Co. v. Oklahoma State Bank, 126 Okla. 193, 259 P. 589 (1927). Appointment of a receiver, however, is within the discretion of the court. Anthony v. Smoot, 183 Okla. 85, 87, 80 P.2d 259, 260 (1938); Stephens v. Mortgage Bond Co., 170 Okla. 111, 113, 38 P.2d 930, 932 (1935); Western & S. Life Ins. Co. v. Crook, 144 Okla. 105, 110, 289 P. 728, 730 (1930). The mortgagee must establish to the satisfaction of the court that the property mortgaged is insufficient in its value to satisfy the debt, Zenith Limestone Co. v. Exchange Trust Co., 169 Okla. 215, 216, 36 P.2d 725, 726 (1934); Jacobs v. Real Estate Mortgage Trust Co., 122 Okla. 1, 3, 249 P. 930, 932 (1926); or that the mortgagor is committing waste on the property. Harding v. Garber, 20 Okla. 11, 21, 93 P. 539, 543 (1907).

If the mortgagee actually enters into possession of the premises with the consent of the mortgagor, Underhill v. Miller, 197 Okla. 657, 658, 174 P.2d 249, 250-51 (1946), without his permission, but peacefully, Higgs v. Renfrow, 195 Okla. 545, 548, 159 P. 2d 749, 751 (1945), he becomes a mortgagee-in-possession and he may remain until the obligation is paid, Underhill v. Miller, 197 Okla. 657, 658, 174 P. 2d 249, 250-51 (1946), or the mortgagor's equity of redemption is foreclosed. Morgan v. Atkinson, 203 Okla. 111, 112, 218 P.2d 1049, 1051 (1950).

The mortgagor's right to possession until foreclosure, despite a default on the underlying obligation, should be contrasted with the vendee's right to possession under a contract for deed. Absent a contractual provision, the vendee has no right to possession of the property until he has paid all of the purchase price and the vendor has executed and delivered a deed. *See* Wilson v. Sanchez, 116 Cal. App. 2d 670, —, 254 P.2d 594, 597 (1955); Nuquist v. Bauscher, 71 Idaho 89, —, 227 P.2d 83, 86 (1951); Duff v. United States Trust Co., 327 Mass. 17, —, 97 N.E.2d 189, 192 (1951); Pitcher v. Lauritzen, 18 Utah 2d 368, —, 423 P.2d 491, 494 (1967); Litel v. Marsh, 33 Wash. 2d 441, —, 206 P.2d 300, 303 (1949). Moreover, the vendor would be entitled to possession, profits, and rents upon the vendee's default. *See* Pitcher v. Lauritzen, 18 Utah 2d 368, —, 423 P.2d 491, 494 (1967).

65. *See* Luke v. Patterson, 192 Okla. 631, 634, 139 P.2d 175, 178 (1943); Bollenbach v. Ludlum, 84 Okla. 14, 15, 201 P. 982, 983 (1921); Jones v. Hubbard, 37 Okla. 592, 592, 132 P. 1082, 1082 (1913); Flesher v. Hubbard, 37 Okla. 587, 591, 132 P. 1080, 1082 (1913).

66. OKLA. STAT. tit. 12, § 686 (1971). *See* Irwin v. Sands, 265 P.2d 1097, 1100 (Okla. 1954); First Nat'l Bank v. Colonial Trust Co., 66 Okla. 106, 109, 167 P. 985, 987-88 (1917); Echols v. Reeburgh, 62 Okla. 67, 69, 161 P. 1065, 1067 (1916).

67. OKLA. STAT. tit. 12, § 686 (1971). *See* Irwin v. Sands, 265 P.2d 1097, 1100 (Okla. 1954); First Nat'l Bank v. Colonial Trust Co., 66 Okla. 106, 109, 167 P. 985, 987-88 (1917); Echols v. Reeburgh, 62 Okla. 67, 69, 161 P. 1065, 1067 (1916).

68. OKLA. STAT. tit. 12, § 686 (1971). *See* Irwin v. Sands, 65 P.2d 1097, 1100 (Okla. 1954); First Nat'l Bank v. Colonial Trust Co., 66 Okla. 106, 109, 167 P. 985, 987-988 (1917); Echols v. Reeburgh, 62 Okla. 67, 69, 161 P. 1065, 1067 (1916).

69. OKLA. STAT. tit. 12, § 686 (1971). *See* Berke v. Home Owners' Loan Corp., 192 Okla. 124, 125, 134 P.2d 346, 347 (1943).

payment of the remaining debt secured by the mortgage.[70] Any surplus is then distributed to subordinate lien holders, according to their priorities,[71] and to the mortgagor-buyer[72] respectively. If the sale does not yield an amount sufficient to satisfy the obligation due, the mortgagee-seller can obtain a personal judgment against the mortgagor-buyer for any deficiency.[73]

An inherent part of every mortgage is the mortgagor-buyer's statutorily-created right of redemption.[74] This right exists in the mortgagor-buyer from the instant the mortgage is created until the mortgage is discharged or foreclosed.[75] Moreover, it entitles the defaulting mortgagor-buyer to redeem the property from the mortgage by paying the amount owing on the note at any time prior to foreclosure.[76]

C. The Harsh Realities of the Contract for Deed

The purchase money mortgage and the contract for deed have pro-

70. *See* United States v. Rahar's Inn, Inc., 243 F. Supp. 459, 461 (D. Mass. 1965); *In re* Carter, 56 F. Supp. 385, 388 (W.D. Va. 1944); Tolzman v. Gwynn, 267 Md. 92, —, 296 A.2d 594, 97 (1972).

71. Dockrey v. Gray, 172 Cal. App. 2d 388, —, 341 P.2d 746, 748-49 (1959); Great S. Land Co. v. Valley Sec. Co., 162 Miss. 120, —, 137 So. 510, 514 (1931); O'Brien v. Slefkin, 88 R.I. 264, —, 147 A.2d 183, 185 (1959); Kaplan v. Ruffin, 213 Va. 551, —, 193 S.E.2d 689, 692 (1973).

72. *In re* Evergreen Memorial Park Ass'n, 308 F.2d 65, 67 (3d Cir. 1962); Northwestern Nat'l Ins. Co. v. Mildenberger, 359 S.W.2d 380, 384-85 (Mo. Ct. App. 1962); Manchester Fed. Sav. & Loan Ass'n v. Emery Waterhouse Co., 102 N.H. 288, —, 153 A.2d 918, 920 (1959).

73. OKLA. STAT. tit. 12, § 686 (1971). *See* R.F.C. v. Breeding, 211 F.2d 385, 390-91 (10th Cir. 1954); Van Eman v. Mosing, 36 Okla. 555, 557, 129 P. 2, 3 (1912).

74. OKLA. STAT. tit. 42, § 18 (1971). *See* Coursey v. Fairchild, 436 P.2d 35, 38 (Okla. 1967). *See generally* G. OSBORNE, *supra* note 17, §§ 302-306.

Three related concepts should be distinguished: a mortgagor's equity of redemption; a mortgagor's statutorily-created right to redeem; and a right of statutory redemption. A mortgagor's equity of redemption was the outgrowth of the excesses and harshness of the common law mortgage. Early English courts of equity intervened to aid the mortgagor who had failed to pay promptly the mortgage debt. A mortgagor could redeem his property from the mortgagee if he tendered the principal and interest within a reasonable time after default. This equity of redemption eventually was recognized as an equitable estate in land. See G. OSBORNE, *supra* note 17, §§ 6-7. Because Oklahoma follows a "lien" theory of mortgages, the mortgagor is deemed to hold both legal and equitable title to the property. See notes 60-63 *supra* and accompanying text. It is, therefore, conceptually incorrect to classify the mortgagor's interest as an equity of redemption. Thus, in lieu of an equity of redemption, Oklahoma has a statutorily-created mortgagor's right to redeem. OKLA. STAT. tit. 42, § 18 (1971). The equity of redemption and a statutorily-created right to redeem exist only until foreclosure. Some states by statute allow redemption by the mortgagor for a certain period of time after the foreclosure sale. This is commonly known as the right of statutory redemption. *See* G. NELSON & D. WHITMAN, CASES AND MATERIALS ON REAL ESTATE FINANCE AND DEVELOPMENT 5 (1976); G. OSBORNE, *supra* note 17, § 8.

75. OKLA. STAT. tit. 42, § 18 (1971). *See* Coursey v. Fairchild, 436 P.2d 35, 38 (Okla. 1967). *See generally* G. OSBORNE, *supra* note 17, §§ 302-306.

76. The effect of redemption is to restore to the mortgagor his entire estate to the extent which he would have had if the mortgage transaction had never occurred. Coursey v. Fairchild, 436 P.2d 35, 38 (Okla. 1967).

vided the same economic function—the financing of the unpaid portion of the purchase price by the seller.[77] Both instruments have served as security devices for the vendor.[78] Despite there being no major functional difference between these two forms of land financing, Oklahoma courts have continued to ignore the substantive similarities and to perpetuate a formalistic distinction, presumably on the basis of the freedom to contract.[79]

Because Oklahoma courts have seemed to emphasize form over substance, the contract for deed has been an attractive financing alternative for the vendor, especially since the substantive mortgage law has been weighted heavily in favor of the mortgagor-purchaser.[80] The basic attraction for the vendor has been the relative simplicity and economy of terminating the vendee's interest in the event of his default.[81] Additionally, the contract for deed has provided the vendor with an effective means of mass-merchandising both undeveloped land and low-income housing on liberal credit terms to individuals who have virtually no credit ratings.[82] Likewise, from the perspective of the potential purchaser, the contract for deed may have been the only realistic method of entering into the housing market without first making the sizable down payment commonly associated with conventional mortgage financing.[83]

Despite its apparent utility as a tool for increasing the availability of real estate financing, the contract for deed raised many inherent title problems for the purchaser. Because the contract for deed usually did not meet the statutory requirements for recordation,[84] the vendee lost

77. *See* Nelson & Whitman, *supra* note 3, at 541.

78. *See generally* Power, *Land Contracts as Security Devices*, 12 WAYNE L. REV. 391 (1965-1966); *Florida Installment Land Contracts, supra* note 13, at 157; Note, *Forfeiture and the Iowa Installment Land Contract*, 46 IOWA L. REV. 786, 786 (1960-1961).

79. *See* G. OSBORNE, *supra* note 17, § 20, at 29; Nelson & Whitman, *supra* note 3, at 543; *Florida Installment Land Contracts, supra* note 13, at 176.

80. *See, e.g.*, OKLA. STAT. tit. 12, § 686 (1971); OKLA. STAT. tit. 42, § 11 (1971).

81. *See* Lee, *Defaulting Purchaser's Right to Restitution Under the Installment Land Contract*, 20 U. MIAMI L. REV. 1, 19 (1965). *See generally* G. OSBORNE, *supra* note 17, § 20.

82. Warren, *supra* note 14, at 625.

83. *See generally* Comment, *Reforming the Vendor's Remedies for Breach of Installment Land Sale Contracts*, 47 S. CAL. L. REV. 191, 193-98 (1973-1974). *See also* Mixon, *supra* note 14.

84. Oklahoma law requires that before an instrument affecting real estate can be recorded, it must be executed and acknowledged. OKLA. STAT. tit. 16, §§ 26, 33 (1971); OKLA. STAT. tit. 49, § 107 (Supp. 1978). Generally a contract for deed is not acknowledged by the seller. *See* Mixon, *supra* note 14, at 545, 547; Warren, *supra* note 14, at 613, 629. *But see* Nelson & Whitman, *supra* note 3, at 571, where the authors suggest that the execution and recording by the vendee of an affidavit containing the terms of the contract, or the use of a "straw man" and subsequent reassignment back to the vendee, would effectively circumvent this problem.

all his rights and investment in the property if the vendor subsequently sold the land to a bona fide purchaser for value.[85] If the vendor became bankrupt during the term of the contract, the trustee in bankruptcy had the power to cancel the contract because of its executory nature.[86] A similar result occurred when the vendor merely defaulted on a first mortgage which covered the property subject to the vendee's contract for deed. In this instance foreclosure by the vendor's mortgagee terminated the vendee's rights or claims to the property.[87] Thus the vendee, despite faithful performance of his obligation to pay the installments, was subject to having his interest completely terminated due to circumstances beyond his control.

More likely, however, was the situation where the vendee, after full performance, took title to the land subject to various liens which the vendor had failed to remove by the time he was obligated to convey. This was possible under a contract for deed because the vendor typically agreed to convey marketable title only when the purchaser had made all the payments.[88] Absent fraud or misrepresentation,[89] there was no requirement that the vendor have title or marketable title at the time the contract for deed was created.[90] Concomitantly, the vendor had no duty to clear his title of defects until final payment was made.[91] Thus the vendee was placed in the precarious position of having to continue to perform without any real assurance that the vendor would be able to convey marketable title.[92] Consequently the vendee

85. This assumes that the bona fide purchaser had no actual or constructive notice of the vendee's contractual interest in the property. Absent recordation or some other indicia of ownership such as open and notorious possession, the bona fide purchaser would take good title to the property free of the contract vendee's rights. Metzger v. Mueller, 205 Okla. 490, 491, 438 P.2d 802, 803-04 (1951); Alfrey v. Richardson, 204 Okla. 473, 478, 231 P.2d 363, 367 (1951). *See generally* Warren, *supra* note 14, at 614.

86. 11 U.S.C. § 110(b) (1976). *See e.g., In re* New York Investors Mutual Group, Inc., 143 F. Supp. 51 (S.D.N.Y. 1956). *Accord,* Gulf Petroleum, S.A. v. Collazo, 316 F.2d 257 (1st Cir. 1963); *In re* Philadelphia Penn Worsted Co., 278 F.2d 666 (3d Cir. 1960). *See generally* Lacy, *Land Sale Contracts in Bankruptcy,* 21 U.C.L.A. L. Rev. 477 (1974); Lynn, *Bankruptcy and the Land Sales Contract: The Rights of the Vendee Vis-A-Vis the Vendor's Bankruptcy Trustee,* 5 TEX. TECH. L. REV. 677 (1974); Nelson & Whitman, *supra* note 3, at 567-68; *Florida Installment Land Contracts, supra* note 13, at 180.

87. *See* Mixon, *supra* note 14, at 546-47; Power, *Land Contracts as Security Devices,* 12 WAYNE L. REV. 391, 414-15 (1965-1966); Warren, *supra* note 14, at 610-11. *See generally* Randolph, *The Installment Land Contract as a Junior Lien Security,* 54 MICH. L. REV. 929 (1956).

88. *See* Lee, *The Interests Created, supra* note 21, at 368.

89. *Id.* For an Oklahoma case dealing with fraud, *see generally* Mazey v. Anthis, 49 OKLA. B.A.J. 998 (1978).

90. *See* Lee, *The Interests Created, supra* note 21, at 368.

91. *See* Luette v. Bank of Italy, 42 F.2d 9, 10 (9th Cir.), *cert. denied,* 282 U.S. 884 (1930).

92. *See* Lee, *The Interests Created, supra* note 21, at 368; Mixon, *supra* note 14, at 547-48; Warren, *supra* note 14, at 611.

often found that his interest, despite full performance on his part, was inferior to interests held by third parties.[93]

Perhaps the most inequitable aspect of the contract for deed was the forfeiture provisions[94] that were customarily enforced in favor of the vendor against a breaching vendee.[95] Unlike the mortgagor, the breaching vendee had no right of redemption. Instead of pursuing the costly and time-consuming foreclosure procedures required of a mortgagee, the vendor merely retained the installments paid and terminated the vendee's interest.[96] The inequity of a forefeiture was magnified when the purchaser had already made numerous installments. Forfeiture in this situation resulted in a substantial loss to the buyer and a windfall gain to the seller. The anomaly of the situation was that the closer the vendee came to full payment of the purchase price, the less need the seller had for security—and yet the greater the impact of forfeiture on the vendee. Therefore, as the contract term neared completion, the results of forfeiture were not only harsh but were also unreasonable.[97]

Presumably, when it passed the statute, the Oklahoma legislature was cognizant both of the inherent deficiences of the contract for deed and of its use by vendors to avoid the substantive law of mortgages, including the exclusive remedy of judicial foreclosure.[98] Thus it is appropriate to analyze the statutory language in light of the setting in which the contract for deed was traditionally used.[99]

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93. Generally, the contract vendee's unrecorded interest was inferior to claims of the vendor's judgment creditors, mechanics' liens, and subsequent encumberances by the seller. See Warren, *supra* note 14, at 611-24. The vendee's interest may also be inferior to federal tax liens. *Id.* *See* Leipert v. R.C. Williams & Co., 161 F. Supp. 355 (S.D.N.Y. 1957); 26 U.S.C. §§ 6321, 6323 (1976). *But see* Nelson & Whitman, *supra* note 3, at 568-70.

94. See note 44 *supra* and accompanying text.

95. Nelson & Whitman, *supra* note 3, at 543.

96. Lee, *Remedies for Breach, supra* note 43, at 561; Comment, *Forfeiture: The Anomaly of the Land Sale Contract*, 41 ALB. L. REV. 71, 74 (1977); *Florida Installment Land Contracts, supra* note 13, at 157-58, 175; Note, *Installment Land Contract—Mortgage or Contract?*, 26 U. MIAMI L. REV. 855, 859 (1972).

97. Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973), where the Indiana Supreme Court held that forfeiture of over half af the contract price would be "clearly excessive" and "unreasonable" and would result in "substantial injustice" if permitted. *Id.* at —, 301 N.E.2d at 645-46.

98. In enacting statutes the legislature is presumed to be aware of the local conditions and to have acted with sufficient knowledge of the needs of the people. Gates v. Easter, 354 P.2d 438, 441 (Okla. 1960).

99. "A statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which . . . [the legislature] sought to correct and prevent." United States v. Champlin Ref. Co., 341 U.S. 290, 297 (1951).

III. INTERPRETATION OF THE NEW LEGISLATION

A. Methodology

The primary goal in interpreting a statute is to ascertain and to effectuate the true intent and meaning of the legislature.[100] Initially this task must be accomplished by looking to the actual language of the whole statute.[101] If the statutory language is plain and unambiguous and clearly expresses the legislative intent, then no occasion exists for judicial construction,[102] and the language must be followed without additional inquiry.[103] If, however, the language is susceptible of several meanings, then the rules of interpretation[104] may be used to resolve the doubt and ambiguity.[105]

Undoubtedly the statute[106] clearly evinces an intent to make a change in the existing law relating to contracts for deed.[107] Likewise, it is beyond question that the statute plainly manifests a desire to have mortgage law apply to the contract for deed. It is difficult to suggest with the same degree of certainty, however, that when mortgage law applies to the contract for deed it does so to the utmost degree. It is at this point that the plain meaning of the statute disappears, for there are several possible interpretations of the statutory language, each provid-

100. *See, e.g.*, Tannehill v. Special Indem. Fund, 538 P.2d 590, 592 (Okla. 1975); Buckness v. State Indus. Court, 512 P.2d 1180, 1183 (Okla. 1973); Special Indem. Fund v. Harold, 398 P.2d 827, 830 (Okla. 1964); Oliver v. Oklahoma Alcoholic Beverage Control Bd., 359 P.2d 183, 187 (Okla. 1961); Mid-Continent Pipe Line Co. v. Stephens County, 312 P.2d 883, 885 (Okla. 1957).

101. *See, e.g.*, Special Indem. Fund v. Harold, 398 P.2d 827, 830 (Okla. 1964); *In re* Oklahoma Turnpike Auth., 365 P.2d 345, 355 (Okla. 1961); Mid-Continent Pipe Line Co. v. Stephens County, 312 P.2d 883, 885 (Okla. 1957); Russett School Dist. v. Askew, 193 Okla. 102, 103, 141 P.2d 575, 577 (1943).

102. *See, e.g.*, United States v. Ray, 488 F.2d 15, 18 (10th Cir. 1973); Oldham v. Drummond Bd. of Educ., 542 P.2d 1309, 1311 (Okla. 1975); Lancaster v. State *ex rel.* Harrod, 426 P.2d 714, 716 (Okla. 1967); *In re* Guardianship of Campbell, 450 P.2d 203, 205 (Okla. 1966); Abshire v. State, 551 P.2d 273, 274 (Okla. Crim. App. 1976).

103. Estate of Kasishke v. Oklahoma Tax Comm'n, 541 P.2d 848, 851 (Okla. 1975); Johnson v. Ward, 541 P.2d 182, 184-85 (Okla. 1975); Special Indem. Fund v. Harold, 398 P.2d 827, 830 (Okla. 1964).

104. While there are courts and commentators who distinguish the terms interpretation and construction, for purposes of this comment the terms will be used interchangeably. *See generally* 2A SUTHERLAND, *supra* note 6, § 45.04.

105. Price v. Shell Oil Co., 199 Okla. 193, 195, 185 P.2d 211, 212 (1947); Russett School Dist. v. Askew, 193 Okla. 102, 103, 141 P.2d 575, 577 (1943); *Ex parte* Higgs, 97 Okla. Crim. 334, 341, 263 P.2d 752, 756 (1954). *See generally* 2A SUTHERLAND, *supra* note 6, § 45.02. One commentator suggests that the judicial invocation of the plain meaning rule, in reality, indicates "that the court has already considered and construed" the statute. *Id.*

106. See note 1 *supra*.

107. *Cf.* Irwin v. Irwin, 433 P.2d 931, 934 (Okla. 1965) (amendment to a statute which had a judicially settled meaning may reasonably indicate legislative intent to alter the law). *Accord*, Gordon v. Browning, 572 P.2d 603, 605 (Okla. Ct. App. 1977).

ing an answer to the question of the extent to which substantive mortgage law will apply to the contract for deed.

One construction suggests that the traditional concept of the contract for deed in Oklahoma is completely abrogated by the new statute. Another, more restrictive interpretation provides that the contract for deed is subject to the mortgage rules relating to foreclosure only. Finally, an intermediate approach between these two interpretations treats the contract for deed as identical to a mortgage only when it is used as a means of financing the real state transaction and when the vendee is given the immediate right to possession. Under this limited abrogation theory, the absence either of the financing element or of the possession factor will result in the continuing viability of common law concepts governing the contract for deed.

Because the language of the new legislation lends itself to these three plausible constructions, Oklahoma courts will have to resort to rules of statutory construction to resolve the ambiguity and to discover the intent of the legislature.[108] The next section of this comment will apply interpretive aids[109] to determine the viability of each of these three theories. It will conclude that the limited abrogation theory is the most reasonable and sensible interpretation of the legislative intent.

B. Application of the Rules of Statutory Construction

1. Complete Abrogation Theory

Under a complete abrogation theory, the contract for deed would no longer exist in any common law form. This is the approach taken by several commentators[110] who contend that the import of the new legislation is to render obsolete the concept of contract for deed in Oklahoma.[111]

This interpretation, however, is not only logically inconsistent, but it also conflicts with a canon of statutory construction. Oklahoma courts generally have preferred a statutory construction that gives effect to the entire act by rendering every word, phrase, and clause opera-

108. *See* 2A SUTHERLAND, *supra* note 6, § 45.02.

109. Interpretative aids for statutory construction are generally divided into two categories: intrinsic aids and extrinsic aids. Intrinsic aids derive the statute's meaning from an examination of the internal structure of the text. *See* 2A SUTHERLAND, *supra* note 6, §§ 45.14, 47.01-.38. Extrinsic aids, on the other hand, consist of background information about circumstances which led to the statute's enactment, events surrounding its enactment, legislative history, and developments pertaining to its subsequent operation. *Id.* §§ 45.14, 48.01-.20.

110. Nelson & Whitman, *supra* note 3, at 547.

111. *Id.*

tive.[112] Application of this rule, moreover, forces a result that is contrary to the complete abrogation model. The beginning phrase of the new legislation indicates that the statute only applies when the contract for deed is used "for the purpose or with the intention of receiving the payment of money and made for the purpose of establishing an immediate and continuing right of possession of the described real property."[113] Thus, absent these conditions the statute is inapplicable, and traditional concepts relating to the contract for deed should continue to govern. Clearly the introductory phrase of the new statute serves the purpose of delimiting the statute's applicability to contracts for deed.[114]

Notwithstanding the rules of construction which militate against a complete abrogation approach, a more persuasive argument can be made based on the lack of simplicity in this interpretation of the statutory language. Had the legislature intended to abolish the common law doctrine of contract for deed, it easily could have stated that intention in a more succinct manner. The legislative elimination of the deed absolute[115] as an alternative method of financing real estate sales in Oklahoma is an example of the use of plain, simple language to achieve a certain objective. There the statutory language provided that whenever the parties to a transaction intended the deed absolute "to be defeasible or as security for the payment of money, [it] shall be deemed a mortgage and must be recorded and foreclosed as such."[116] Because the legislative intention was clearly exposed, courts have had little trouble in applying the statute.[117] A similarly worded statement would have been sufficient to terminate the contract for deed had the legisla-

112. General Motors Corp. v. Cook, 528 P.2d 1110, 1114 (Okla. 1974); Hamrick v. George, 378 P.2d 324, 327 (Okla. 1963); Matthews v. Rucker, 67 Okla. 218, 219, 170 P. 492, 493 (1918). Such a construction is preferable to one rendering some words nugatory. Street v. Bethany Firemen's Relief & Pension Fund Bd., 555 P.2d 1295, 1298 (Okla. 1976); City of Tulsa v. Goins, 437 P.2d 257, 259 (Okla. 1967); Spurrier v. Mallouf, 184 Okla. 251, 252, 86 P.2d 995, 997 (1939).

113. OKLA. STAT. tit. 16, § 11A (Supp. 1978). See note 1 *supra*.

114. There is a presumption that each phrase in a statute is designed and intended by the legislature to have some useful purpose. Whiteis v. Yamaha Int'l Corp., 531 F.2d 968, 973 (10th Cir.), *cert. denied*, 429 U.S. 858 (1976); Hunt v. Washington Fire & Marine Ins. Co., 381 P.2d 844, 847 (Okla. 1963); Oklahoma Natural Gas Co. v. State *ex rel.* Vassar, 187 Okla. 164, 166, 101 P.2d 793, 796, (1940).

115. Under a deed absolute transaction, the debtor-grantor executes an absolute deed of conveyance to his creditor-grantee who orally or expressly agrees to hold title to the property as security only and to reconvey it to the debtor-grantor when the obligation is paid. *See generally* G. NELSON & D. WHITMAN, CASES AND MATERIALS ON REAL ESTATE FINANCE AND DEVELOPMENT 20-23 (1976).

116. OKLA. STAT. tit. 46, § 1 (1971).

117. *See, e.g.*, Edmundson v. State *ex rel.* Johnson, 181 Okla. 150, 153, 73 P.2d 150, 153-54 (1937).

ture so desired. Thus it can be confidently suggested that the complete abrogation theory was not the approach envisioned by the legislature.[118]

2. Foreclosure Theory

The foreclosure model suggests that the legislature intended to subject the contract for deed to the rules regarding mortgage foreclosure only. This approach, a more restrictive construction of the statutory language, derives strong support from the canons of statutory construction. Nevertheless, this theory is deficient in that it fails to resolve all the significant problems that were inherent in the traditional law governing contracts for deed and that were presumably in the minds of the legislators at the time the statute was enacted.[119]

Ejusdem generis, a rule of statutory construction, requires that general words which follow specific words in a statutory scheme be given a construction that is limited by the interpretation ascribed to the specific words.[120] Likewise, where the general terms precede the specific terms, the rule of *ejusdem generis* is equally applicable and restricts the tenor of the general terms to the aim of the specific terms.[121]

A pertinent part of the new legislation states: "All contracts for deed . . . shall . . . be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints, and forms as are prescribed in relation to mortgages." [122] Application of the rule of *ejusdem generis* requires the conclusion that the specific phrase, "subject to the same rules of foreclosure," restricts the meaning of both the preceding and succeeding general phrases.[123]

118. An unreasonable result produced by one possible interpretation of an act should be rejected in favor of another interpretation which would produce a reasonable result. Becknell v. State Indus. Court, 512 P.2d 1180, 1183 (Okla. 1973); *In re* Kyle's Autopsy, 309 P.2d 1070, 1073 (Okla. 1957); State *ex rel.* Williamson v. Longmire, 281 P.2d 949, 955 (Okla. 1955); Brown v. State ElectionBd., 197 Okla. 169, 171, 170 P.2d 200, 202 (1946).

119. See note 98 *supra*.

120. Nucholls v. Board of Adjustment, 560 P.2d 556, 558-59 (Okla. 1976); Board of Comm'rs v. Grimes, 75 Okla. 219, 220, 182 P. 897, 897 (1919); Smith v. State, 79 Okla. Crim. 1, 24-25, 151 P.2d 74, 85-86 (1944). *See generally* 2A SUTHERLAND, *supra* note 6, § 47.17, at 103-04 & n.3.

121. *In re* Cent. Airlines, 199 Okla. 300, 303-04, 185 P.2d 919, 923-24 (1947); *In re* Spartan Airlines, 199 Okla. 305, 305-06, 185 P.2d 925, 926 (1947). *See generally* 2A SUTHERLAND, *supra* note 6, § 47.17, at 103-04 & n.4.

122. OKLA. STAT. tit. 16, § 11A (Supp. 1978). See note 1 *supra* for the text of the statute.

123. The legislators are presumed, not only to know the rules of statutory construction, but also to expect the courts to rely on them in construing legislation. *See* Wimberly v. Deacon, 195 Okla. 561, 563, 144 P.2d 447, 450 (1944). *See also* Note, *Statutory Construction—Doctrine of Ejusdem Generis*, 17 VA. L. REV. 511, 513 (1930-31) [hereinafter cited as *Doctrine of Ejusdem Generis*].

Therefore, when the statute is applicable,[124] the contract for deed is subject only to mortgage foreclosure concepts and to no other aspect of mortgage law.

Further support for this position can be gleaned from a comparison of the pertinent terms. Without a doubt, the "regulations, restraints, and forms" of mortgages clearly encompass the "rules of foreclosure." Arguably, had the legislature intended to apply all aspects of mortgage law to the contract for deed, there was no need to mention specifically the term foreclosure. Moreover, if the specific words relating to foreclosure are given full effect,[125] the general words are partially redundant. The doctrine of *ejusdem generis* resolves this apparent conflict by giving effect to both the specific and the general words. The rule accomplishes this task "by treating the particular words as indicating a class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words."[126] Thus, by applying the rule, the presumption against superfluous and redundant statutory language can be satisfied.[127]

While *ejusdem generis* is a well established and useful rule,[128]

> it is, like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive. To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate canons of statutory construction, of which the rule of ejusdem generis is only one.[129]

Modern commentators have also criticized the rule in that the intent of

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124. See notes 113-14 *supra* and accompanying text.

125. See note 112 *supra* and accompanying text.

126. National Bank of Commerce v. Estate of Ripley, 161 Mo. 126, 131, 61 S.W. 587, 588 (1901). *See generally Doctrine of Ejusdem Generis, supra* note 123, at 513-16.

127. Courts presume that the legislature did not use superfluous or redundant words in the statute. *See* Cromer v. J.W. Jones Const. Co., 79 N.M. 179, —, 441 P.2d 219, 244 (Ct. App. 1968); Lynch v. Owen J. Roberts School Dist., 430 Pa. 461, —, 244 A.2d 1, 5 (1968); Associated Hosp. Serv., Inc. v. City of Milwaukee, 13 Wis. 2d 447, —, 109 N.W.2d 271, 279 (1961). *See generally* 2A SUTHERLAND, *supra* note 6, § 47.17.

128. One court noted that the doctrine is supported by decisions in almost every state. Brent v. Commonwealth, 194 Ky. 504, —, 240 S.W. 45, 48 (1922). Commentators have suggested that the rule is "universally accepted." *See, e.g., Doctrine of Ejusdem Generis, supra* note 123, at 513.

129. Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 89 (1934). In Oklahoma, the doctrine of *ejusdem generis* is not one of mandatory application. *See* Stokes v. State, 366 P.2d 425, 429 (Okla. Crim. App. 1961). *See also* Baccus v. Pankratz, 200 Okla. 390, 390, 194 P.2d 880, 881 (1948) (syllabus by the court); Baccus v. Banks, 199 Okla. 647, 650-51, 192 P.2d 683, 687, *appeal dismissed sub nom.*, Reeder v. Banks, 333 U.S. 858 (1948). For the general limitations on the doctrine, *see generally* 2A SUTHERLAND, *supra* note 6, §§ 47.20-.22.

the legislature is often contrary to the construction achieved by the use of the rule.[130] They argue that the legislative intent is generally to enumerate specific conditions that are on the legislator's minds, but not to limit the operation of the statute to the specific conditions listed.[131] Others have suggested that, because the rule of *ejusdem generis* requires strict construction of the statutory language, rigid adherence to the rule is inappropriate where a statute is remedial in nature.[132] This approach is consistent with the legislative mandate that statutes in derogation of common law concepts are to be given liberal construction.[133] Clearly the new statute is remedial since it provides relief not available at common law for the defaulting vendee. Concomitantly, the statute, under any theory, restricts common law rights. Therefore, the application of the rule *ejusdem generis*, which requires a strict approach to interpretation of the statutory language, is not only inconsistent with the general remedial flavor of the statute, but it is also contrary to an express legislative mandate.

In resolving the ambiguity of a statute, courts often analyze and evaluate the background information concerning the circumstances which led to a statute's enactment.[134] This method of analysis generally necessitates consideration of the law, along with its deficiencies, prior to the passage of the legislation.[135] Additionally, the legislators are presumed to have been aware not only of the prior law but also of the circumstances existing at the time of the statute's passage.[136] Moreover, they are presumed to have acted with regard to these conditions.[137] Thus it is reasonable to assume that the legislature knew of

130. See 2A SUTHERLAND'S, *supra* note 6, § 47.18, at 111.

131. *Id.*

132. See *Doctrine of Ejusdem Generis*, *supra* note 123, at 515.

133. OKLA. STAT. tit. 25, § 29 (1971); OKLA. STAT. tit. 12, § 2 (1971). These provisions reject the common law notion that statutes in derogation of the common law are to be strictly construed. *In re* Captain's Estate, 191 Okla. 463, 464, 130 P.2d 1002, 1004 (1942). Oklahoma courts, however, have ignored this statutory mandate several times. *See, e.g., In re* Graves, 481 P.2d 136, 138 (Okla. 1971); Fenton v. Young Chevrolet Co., 191 Okla. 161, 163, 127 P.2d 813, 814 (1942).

134. Home-Stake Prod. Co. v. Board of Equalization, 416 P.2d 917, 926 (Okla. 1966); Atlantic Ref. Co. v. Oklahoma Tax Comm'n, 360 P.2d 826, 830-31 (Okla. 1959); *In re* Martin's Estate, 183 Okla. 177, 179, 80 P.2d 561, 563 (1938); De Hasque v. Atchison, T. & S.F. Ry., 68 Okla. 183, 185-86, 173 P. 73, 75 (1918). *See generally* 2A SUTHERLAND, *supra* note 6, §§ 45.14, 48.01-.20.

135. Airview v. Industrial Comm'n, 415 Ill. 522, —, 114 N.E.2d 698, 700 (1953). Home-Stake Prod. Co. v. Board of Equalization, 416 P.2d 917, 926 (Okla. 1966). *Accord*, Baggett v. Webb, 46 Ala. App. 666, —, 248 So. 2d 275, 279 (1971); State v. Neal, 187, Neb. 413, —, 191 N.W.2d 458, 460 (1971); Russett School Dist. v. Askew, 193 Okla. 102, 104, 141 P.2d 575, 577 (1943).

136. *See, e.g.*, Gates v. Easter, 354 P.2d 438, 441 (Okla. 1960).

137. *Id. See also* Sheridan Oil Co. v. Superior Court, 183 Okla. 372, 374, 82 P.2d 832, 834 (1938).

the inherent title and forfeiture deficiencies of the prior law[138] and that it passed the statute with these deficiencies in mind.

Under the foreclosure theory, the statute remedies the harsh consequences of forfeiture existing under the prior law. It does not, however, mitigate any of the problems commonly associated with title to real estate during the contract term. Consequently, under the foreclosure theory the statute does not receive a construction which tends to remove all of the defects of the prior law.[139] Instead, the more restrictive interpretation of the foreclosure model tends to perpetuate confusion concerning the exact nature of the vendor's and vendee's interests under the contract for deed.[140] It is this deficiency coupled with the statutory mandate of liberal construction of legislation that is in derogation of common law[141] that requires the foreclosure model to give way to a theory which remedies all of the inequities of the prior law.

3. Limited Abrogation Theory

The limited abrogation theory is an intermediate construction between the most liberal interpretation, the complete abrogation approach,[142] and the most restrictive interpretation, the foreclosure theory.[143] This theory treats the contract for deed totally as a mortgage when it is used to finance the sale of real estate and to give the buyer the immediate right to possession. In the instances where these conditions are not met, the statute is inapplicable and common law concepts will control.[144]

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138. See notes 84-97 *supra* and accompanying text.

139. Oklahoma courts have held that a statute should receive a construction that tends to remove the defects of the prior law rather than one that perpetuates them. Tinker v. Modern Bhd. of America, 12 F.2d 130, 132 (8th Cir. 1926); Harper v. Victor, 212 F. 903, 906 (8th Cir. 1914); State *ex rel.* State Bd. of Agriculture v. Warren, 331 P.2d 405, 408 (Okla. 1958); Carlile v. National Oil & Dev. Co., 83 Okla. 217, 231, 201 P. 377, 391 (1921).

140. Under the common law concept of the contract for deed, the seller held legal and equitable title, while the buyer had only a contractual right to purchase the real estate. See notes 33-40 *supra* and accompanying text. Presumably, under the foreclosure theory, the seller must foreclose the defaulting buyer's interest in the property. One can only speculate, therefore, on whether the nature of the buyer's interest is contractual, legal, or equitable.

141. See note 133 *supra* and accompanying text.

142. See notes 110-18 *supra* and accompanying text.

143. See notes 119-41 *supra* and accompanying text.

144. Typically this may occur in the sale of an unimproved parcel of reality purchased for investment purposes. See Warren, *supra* note 14, at 615. Many land developers often retain possessory rights until final payment is made. See *Florida Installment Land Contracts, supra* note 13, at 175.

In Graves v. Chambers, 110 Okla. 1, 236 P. 25 (1924), the contract for deed did not provide the vendee with possession. *Id.* at 3, 236 P. at 27. Nevertheless the vendee possessed the premises with the knowledge of the vendor. The *Graves* court was unwilling to assume that a possessory

This model is primarily supported by two factors: (1) the title of the statute and (2) a strikingly similar statute previously enacted in Florida that has received a judicial construction identical to the limited abrogation approach. The theory is further buttressed in a negative way by the weak aspects of the other theories. These considerations, coupled with the statutory mandate of liberal construction[145] and the judicial tendency to construe a remedial statute in a way that removes all of the defects of the prior law,[146] forcibly suggest that the limited abrogation theory is the most reasonable and sensible interpretation of legislative intent.[147]

When interpreting an ambiguous statute, the title of the act is often a valuable aid in ascertaining the intent of the legislature.[148] The value of this interpretive technique is enhanced because of the Oklahoma constitutional requirement that the subject of every act must be clearly expressed in its title.[149] Oklahoma courts have construed this constitutional provision to require "that the *purpose* of an act be clearly expressed in its title."[150] Thus the subject of the act, as expressed in the title, will define and delimit the scope of the legislation.[151]

The statutory short title of the new act is "Constructive Mortgage." The long title states that the statute is "[a]n act . . . providing that con-

interest was part of the parties' agreement when the contract did not provide for it. *Id.* at 3, 236 P. at 27. It is unclear whether the new statute would apply in this situation since the contract for deed did not provide specifically for the right to possession. Equally unclear is the situation where the contract for deed allows for possession by the vendee, but only after a certain number of payments have been made. Because the statute is applicable only when the contract for deed is "made for the purpose of establishing the *immediate* and continuing right of possession," OKLA. STAT. tit. 16, § 11A (Supp. 1978) (emphasis added), the situation arguably is governed by common law rules and not by the statute.

145. See note 133 *supra* and accompanying text.

146. See note 139 *supra*.

147. A statute should be given a reasonable and sensible construction in order to accomplish the object and purpose intended by the legislature. AMF Tubescope Co. v. Hatchel, 547 P.2d 374, 379 (Okla. 1976); State *ex rel.* Often v. Mayhue, 476 P.2d 317, 321-22 (1970); Dowell v. Board of Educ., 185 Okla. 342, 344, 91 P.2d 771, 774 (1939).

148. Irwin v. Irwin, 433 P.2d 931, 934 (Okla. 1965); State *ex rel.* Bd. of Educ. v. Morley, 168 Okla. 259, 263, 34 P.2d 258, 263 (1934); Taylor v. State, 377 P.2d 508, 510 (Okla. Crim. App. 1962); Brown v. State, 266 P.2d 988, 990 (Okla. Crim. App. 1954). *See generally* 2A SUTHERLAND, *supra* note 6, § 47.03.

149. OKLA. CONST. art. 5, § 57.

150. Irwin v. Irwin, 433 P.2d 931, 934 (Okla. 1965) (emphasis added). *See, e.g.*, Oklahoma Gas & Elec. Co. v. Oklahoma Tax Comm'n, 177 Okla. 179, 180, 58 P.2d 124, 126 (1936); State *ex rel.* Bd. of Educ. v. Morley, 168 Okla. 259, 263, 34 P.2d 258, 263 (1934); State v. Horner, 48 Okla. Crim. 141, 144, 290 P. 197, 199 (1930).

151. *See, e.g.*, Oklahoma City v. Prieto, 482 P.2d 919, 924 (Okla. 1971); Oklahoma City v. Brient, 189 Okla. 163, 165, 114 P.2d 459, 460 (1941).

tracts for real property shall be treated as mortgages."[152] It is important to note that there is no language in the title which limits the application of the statute to mortgage foreclosure concepts. This is especially significant because the purpose of the statute, as gleaned from the title, will be derived without reference to the text of the act.[153] Thus it is clear that the title of the act supports the conclusion that the contract for deed is subject to all mortgage concepts and not just to foreclosure rules.[154]

An alternative source of guidance in ascertaining legislative intent is another state's previously existing statute which is identical in language to the statute being construed.[155] Oklahoma courts have presumed that a legislative body which adopts verbatim a statute from another state also adopts the existing judicial construction placed upon that statute by the highest court of the state from which the statute is taken.[156] Even when the statutory language is merely patterned after[157]

152. OKLA. STAT. tit. 16, § 11A (Supp. 1978).

153. Oklahoma courts have stated that the title of an act "must be construed with reference to the language used in it alone and not in the light of what the body of the act contains." Oklahoma City v. Prieto, 482 P.2d 919, 924 (Okla. 1971). *Accord*, Caywood v. Caywood, 541 P.2d 188, 190 (Okla. 1975).

154. The interpretation given to the title will not, however, control the plain, unambiguous words of the statute. *See* Territory *ex rel.* Jones v. Hopkins, 9 Okla. 133, 154, 59 P. 976, 982 (1899); O. & G. Ry. v. Alexander, 7 Okla. 579, 583, 52 P. 944, 945 (1897), *aff'd*, 7 Okla. 591, 54 P. 421 (1898). *See also* Pike v. United States, 340 F.2d 487, 489 (9th Cir. 1965); Algonquin Gas Transmission Co. v. Zoning Bd. of Appeals, 162 Conn. 50, —, 291 A.2d 204, 206 (1971); Bankhead v. McEwan, 387 Mich. 610, —, 198 N.W.2d 414, 415-16 (1972); American Smelting & Ref. Co. v. State Tax Comm'n, 16 Utah 2d 147, —, 397 P.2d 67, 70 (1964). Therefore the statute is only applicable when the financing factor and the possession element are satisfied. In the absence of either of these two conditions, traditional law will govern.

155. *See* Baker v. Knott, 494 P.2d 302, 304 (Okla. 1972). *See generally* 2A SUTHERLAND, *supra* note 6, § 52.01-.02.

156. Baker v. Knott, 494 P.2d 302, 304 (Okla. 1972); Brook v. James A. Cullimore & Co., 436 P.2d 32, 34 (Okla. 1967); *In re* Fletcher's Estate, 308 P.2d 304, 311 (Okla. 1957). *See also* 2A SUTHERLAND, *supra* note 6, § 52.02. In Oklahoma it appears that the sister state's prior judicial construction of the adopted statute is given binding effect. *See In re* Fletcher's Estate, 308 P.2d 304, 311-12 (Okla. 1957). *See also* Chesmore v. Chesmore, 484 P.2d 516, 518 (Okla. 1971) (Kansas decisions are "well-nigh conclusive on the interpretation of early Oklahoma statutes adopted from the laws of Kansas."); Given v. Owen, 73 Okla. 146, 146-47, 175 P. 345, 346 (1918). Other jurisdictions do not give the sister state decisions conclusive weight, but merely consider them persuasive. *See, e.g.*, In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 225 (6th Cir. 1972); Pennsylvania v. Brown, 260 F. Supp. 323, 352 (E.D. Pa. 1966); Hoffman v. Schroeder, 38 Ill. App. 2d 20, —, 186 N.E.2d, 381, 386 (1962); Cassady v. Wheeler, 224 N.W.2d 649, 652 (Iowa 1974); State *ex rel.* Dep't of Highways v. Hy-Grade Auto. Court, 546 P.2d 1050, 1052 (Mont. 1976). Nevertheless, subsequent judicial constructions of the statute by the highest court of the state of the statute's origin or decisions by intermediate appellate courts of the foreign state are not controlling in Oklahoma. Given v. Owen, 73 Okla. 146, 146-47, 175 P. 345, 346 (1918).

157. Hoffman v. Schroeder, 38 Ill. App. 2d 20, —, 186 N.E. 2d 381, 386 (1962).

or is similar to[158] the language of the other state's statute, the original state's existing judicial constructions are still considered persuasive.[159]

Oklahoma's contract for deed statute is strikingly similar, but not identical, to section 697.01 of the Florida Code. The pertinent part of the Florida provision states:

> All conveyances . . . or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money . . . *shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.*[160]

Although the Oklahoma legislature did not indicate that it derived the language of the new statute from section 697.01, the substantial similarity of the two statutes is too strong a coincidence to be ignored. In fact, the coincidence should be persuasive evidence of a legislative adoption of the Florida statute and of the judicial construction given to it by the Florida Supreme Court.[161]

The scope of the Florida statute, unlike its Oklahoma counterpart, is not limited to contracts for deed. It applies to any conveyance of real or personal property which is made for the purpose of securing the payment of money.[162] Therefore, in ascertaining the construction given by the Florida Supreme Court to that part of the Florida statute which is identical to the Oklahoma provision, an Oklahoma court will not be restricted to cases involving only contracts for deed. Rather, it may also consider Florida Supreme Court cases dealing with other forms of real estate transactions made for the purpose of securing the payment

158. *See* State *ex rel.* Dep't of Highways v. Hy-Grade Auto. Court, 546 P.2d 1050, 1052 (Mont. 1976).

159. *See* In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 225 (6th Cir. 1972) (great weight given to "comparable legislation"); Pennsylvania v. Brown, 260 F. Supp. 323, 352 (E.D. Pa. 1966) (general rule applied when New Jersey statute was "substantially the same" or "virtually identical" to Pennsylvania provision). Of course "the strength of the presumption in favor of the foreign construction varies in relation to the degree of similarity between the foreign act and the domestic one being construed." 2A SUTHERLAND, *supra* note 6, § 52.02, at 329. Where there has been a change in phraseology from the original act, a presumption arises that the legislature intended a change in the meaning. Irwin v. Irwin, 433 P.2d 931, 934 (Okla. 1965). There are, however, no reported Oklahoma decisions where this presumption has been raised to help interpret a statute which has been partially adopted from another state.

160. FLA. STAT. ANN. § 697.01 (West 1969) (emphasis added). For the text of the similar Oklahoma provision, OKLA. STAT. tit. 16, § 11A (Supp. 1978), see note 1 *supra*.

161. *See* Mann v. State Treasurer, 74 N.H. 345, 68 A. 130 (1907), where the New Hampshire Supreme Court found a similar coincidence "persuasive evidence of a practical re-enactment . . . of the foreign statute." *Id.* at —, 63 A. at 131.

162. FLA. STAT. ANN. § 697.01 (West 1969). See note 160 *supra* and accompanying text.

of money. This latitude in discoverying the interpretation given to the Florida act is particularly significant because of the paucity of Florida Supreme Court decisions involving both the statute and the contract for deed.

Notwithstanding the dearth of contract for deed cases, the Florida Supreme Court has construed the statute in relation to other types of real estate transfers which are made for the purpose of securing the payment of money. In the instances where the supreme court has found the statute applicable, it has unhesitatingly applied mortgage concepts. For example, in *Elliott v. Connor*,[163] after determining that a deed absolute[164] was intended by the parties only to secure the payment of money, the Florida Supreme Court held that under the statute the transaction was merely a mortgage and thus only a lien on the grantor's interest.[165] Moreover the *Elliott* court suggested that the only appropriate method of terminating the grantor-mortgagor's interest in the real estate was through foreclosure, but only before the grantor-mortgagor had exercised his right to redeem.[166] The holding of *Elliott*, along with subsequent decisions,[167] indicates a consistent construction of the Florida statute. By employing mortgage concepts without exception, the Florida Supreme Court has clearly evinced an interpretation which is supportive of the limited abrogation model.

Appellate decisions involving the application of the Florida statute to the contract for deed have also resulted in an identical construction of the Florida statute.[168] In *Mid-State Investment Corp. v.*

163. 63 Fla. 408, 58 So. 241 (1912).

164. See note 115 *supra*.

165. 63 Fla. at —, 58 So. at 242, 244-245. Florida follows the lien theory of mortgages. FLA. STAT. ANN. § 697.02 (West 1969). *See generally* G. OSBORNE, *supra* note 17, § 15.

166. 63 Fla. at —, 58 So. at 242. The Florida court also noted that the grantor-mortgagor also had the right to possession of the property until foreclosure. *Id.* at —, 58 So. at 244.

167. *See, e.g.*, Four Star Aviation v. United States, 409 F.2d 292, 293 n.6 (5th Cir. 1969) (chattel mortgagor entitled to possession of the chattel until foreclosure); Crawford v. Crawford, 129 Fla. 746, —, 176 So. 838, 840-41 (1937) (purchaser of land at partition sale took title as trustee-mortgagee and could not prevent co-owner-mortgagors' redemption); Rawlerson *ex rel.* Rush v. Green, 124 Fla. 181, —, 167 So. 825, 826-27 (1936) (grantor-mortgagor under deed absolute entitled to possession of the property until foreclosure); Home Bldg. & Loan Co. v. Rivers, 108 Fla. 23, —, 145 So. 873, 876 (1933) (written instrument given to secure the payment of money subject to foreclosure upon default); Stovall v. Stokes, 94 Fla. 717, —, 115 So. 828, 836-38 (1927) (following decision in Elliot v. Connor, 63 Fla. 408, —, 58 So. 241, 242 (1912), held deed given in lieu of mortgage was a mortgage); Pittman v. Milton 69 Fla. 304, —, 68 So. 658, 663 (1915) (assignee of life insurance policy held to have a mortgage lien only).

168. The decision in Given v. Owen, 73 Okla. 146, 175 P. 345 (1918), indicates that the Oklahoma Supreme Court will not consider itself bound by the appellate decisions of the state of the statute's origin. *Id.* at 146-47, 175 P. at 346. This is not to say, however, that these appellate decisions will be totally ignored. *Cf.* Peoples Gas Light & Coke Co. v. Ames, 359 Ill. 152, —, 194

O'Steen,[169] an appellate court concluded that the Florida statute prevented a vendor from unilaterally repossessing the real estate after the vendee's default despite a contractual provision to the contrary.[170] Additionally it suggested that any attempted conveyance of title by the vendor to a third party would be legal nullity in the absence of a proper foreclosure of the vendee's property interest.[171] Likewise in *Hoffman v. Semet*[172] the court held that the contract vendee's interest was subject to levy and execution by his judgment creditors since he held the same property interest under the statute as a mortgagor under a mortgage.[173] Similar reasoning led the court in *Torcise v. Perez*[174] to conclude that, because the statute placed the vendor in a position identical to that of a mortgagee, he had no right to the possession or use of the property sold to the vendee when the contract was silent on the issue.[175] Undoubtedly the combined results of these Florida appellate decisions favor the conclusion that the contract for deed, when used for securing the payment of money, is subject to all the rules relating to mortgages, and not just those relating to mortgage foreclosure.

The distinct similarity of the Florida and Oklahoma statutes, along with the Florida Supreme Court decisions construing the statute in relation to other forms of real estate financing, is convincing evidence of how the Oklahoma legislation is to be interpreted. The Oklahoma act, however, is not identical to the Florida provision. Consequently, Florida's judicial construction of the similar language will not be controlling in Oklahoma. Yet, due to the apparent legislative adoption of a major portion of the Florida statute, Florida Supreme Court decisions should be given persuasive weight when the Oklahoma courts attempt to ascertain the legislative intent behind the Oklahoma provision. The Florida appellate court cases dealing specifically with the contract for deed also support the persuasive nature of the Florida Supreme Court decisions. Therefore, the Florida construction, combined with the mandate of the Oklahoma statute's title, justifies an interpretation which treats the contract for deed entirely as a mortgage

N.E. 260, 264 (1934) (attorney general's opinion entitled to little weight when it is not shown that the legislature knew of its existence). *See generally* 2A SUTHERLAND, *supra* note 6, § 52.02, at 330.

169. 133 So. 2d 455 (Fla. Dist. Ct. App. 1961).

170. *Id.* at 457. *See also* H & L Land Co. v. Warner, 258 So. 2d 293 (Fla. Dist. Ct. App. 1972).

171. 133 So. 2d at 458.

172. 316 So. 2d 649 (Fla. Dist. Ct. App. 1975).

173. *Id.* at 652.

174. 319 So. 2d 41 (Fla. Dist. Ct. App. 1975).

175. *Id.* at 42.

when it is used to finance the sale of the property and to give the buyer the immediate right to possession.

Among the three constructions presented, the limited abrogation theory is the most reasonable and sensible construction of the Oklahoma act. This model, unlike the foreclosure model, fosters the dual statutory purpose of remedying the inequities of forfeiture and of ameliorating the problems relating to title under the contract for deed. Further, it does not perpetuate or create confusion about the interests of the parties under the contract for deed or about the nature of the defaulting purchaser's interest in the property that is being foreclosed. The limited abrogation theory, instead, applies mortgage concepts totally when the contract for deed is used to finance the sale and to give to buyer the immediate right to possession. The remainder of this section explains how the model applies to three aspects of the contract for deed: (1) the interests of the vendor and the vendee; (2) the vendor's remedies upon default; and (3) the vendee's rights upon default.

a. The Interests of the Vendor and the Vendee

Under the limited abrogation theory, the contract for deed, like its mortgage counterpart, is merely a lien on the real estate.[176] The vendor upon execution of the contract for deed is divested of legal title to the realty and is recognized as a lienor only.[177] The vendee, on the other hand, holds legal title to the property[178] which he can encumber.[179] Thus, once the contract for deed is recorded, a conveyance by the seller

176. See notes 61-62 *supra* and accompanying text.

177. *Id.* This result is analogous to the Oklahoma courts' treatment of the grantee's status under a deed absolute on its face intended as a mortgage. See note 115 *supra*. Under this form of real estate financing, courts have concluded that the creditor-grantee possesses only a mortgage lien on the property, although he is the record title holder. *In re* Baxter, 132 Okla. 289, 289-90, 270 P. 565, 566 (1928); Williams v. Purcell, 45 Okla. 489, 504, 145 P. 1151, 1156 (1914). *Accord*, Shirey v. All Night & Day Bank, 166 Cal. 50, —, 134 P. 1001, 1003 (1913); Hulsman v. Deal, 90 Kan. 716, —, 136 P. 220, 220 (1913); Pratt v. Pratt, 121 Wash. 298, —, 209 P. 535, 536 (1922). *Contra*, Shumate v. McLendon, 120 Fla. 396, —, 48 S.E. 10, 11-12 (1904); Northwestern State Bank v. Hanks, 122 Neb. 262, —, 240 N.W. 281, 284 (1932). George Osborne submits that if a jurisdiction, like Oklahoma, follows a lien theory of mortgages, it is preferable to hold that the creditor-grantee under a deed absolute intended as a mortgage gets only a lien with the debtor-grantor retaining title. G. OSBORNE, *supra* note 17, § 78, at 116.

Presumably, under the new legislation, the seller continues to be obligated under the contract for deed to perform by conveying a marketable title of record to the buyer at the time the last installment is paid. See notes 18-19 *supra* and accompanying text.

178. See notes 58 & 60 *supra* and accompanying text.

179. See note 62 *supra* and accompanying text. A judgment lien, likewise, can attach to the vendee's interest in the property under the contract for deed. See OKLA. STAT. tit. 12, § 706 (Supp. 1978); White House Lumber Co. v. Howard, 142 Okla. 163, 286 P. 327 (1930) (lien attaches to judgment debtor's interest in the property). *Contra*, Stanley v. Velma A. Barnes Real Estate, Inc., 571 P.2d 871 (Okla. Ct. App. 1977). In *Stanley*, the court of appeals held that under a contract for

after the contract's execution transfers no legal title to the third party purchaser.[180] Likewise, subsequent lienors through the vendor with notice of the vendee's interest do not acquire a lien against the property.[181]

b. The Vendor's Remedies Upon Default

When the buyer defaults under the contract for deed, the seller has three available remedies. First, the vendor may judicially foreclose the defaulting vendee's interest in the property in order to receive the remaining balance of the purchase price. Second, he may accept a deed from the defaulting purchaser in lieu of the foreclosure action. Third, under limited circumstances, he may wish to do nothing.

If the seller elects to foreclose the buyer's interest in the property,[182] there is a public sale of the property.[183] This foreclosure sale has three basic results. First, the net sale proceeds are applied to the balance due on the contract price.[184] Any excess is then used to satisfy the claims of junior lienors through the vendee, according to their priorities.[185] Any remaining funds are credited to the vendee's account.[186]

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deed the vendee has no equitable title in the realty against which a judgment lien can attach. *Stanley*, however, is not controlling since the new statute was inapplicable.

180. *Accord*, Mid-State Inv. Corp. v. O'Steen, 133 So. 2d 455, 458 (Fla. Dist. Ct. App. 1961).

181. *Accord*, Hull v. Maryland Cas. Co., 79 So. 2d 519, 520-21 (Fla. 1954).

182. Judicial foreclosure, however, may create some problems for the seller under a contract for deed that were not present under prior law. Typically, the contract for deed does not meet the statutory requirements for recordation and, thus, it is not recorded. See OKLA. STAT. tit. 16, § 26 (1971) (an instrument affecting real estate must be executed and acknowledged before it will be recorded); OKLA. STAT. tit. 46, § 6 (1971). The new legislation states that no foreclosure may be initiated nor may the court allow this proceeding unless the contract for deed has been recorded and the mortgage tax paid. See note 1 *supra*. The vendor who cannot record his contract for deed, therefore, may be unable to foreclose the defaulting vendee's interest.

Moreover, because the seller is required to foreclose a defaulting vendee's interest in the land, he may not have received an adequate amount of the purchase price to defray the costs of a foreclosure sale in the event of the buyer's premature default. He may also face a loss of revenues during the pendency of the equitable action, because the buyer remains in possession of the property. See note 197 *infra* and accompanying text. If the foreclosure sale does not bring a purchase price sufficient to discharge the remaining contract price, the seller may find little comfort having obtained a deficiency judgment against an individual with virtually no personal assets. See note 73 *supra* and accompanying text. Finally, a court may refuse to accelerate the balance of the contract price due upon the buyer's default, absent an acceleration clause in the contract for deed. *Accord*, Adkinson v. Nyberg, 344 So. 2d 614 (Fla. Dist. Ct. App. 1977).

183. See note 69 *supra* and accompanying text.

184. See note 70 *supra* and accompanying text.

185. See note 71 *supra* and accompanying text.

186. See note 72 *supra* and accompanying text. Unlike traditional law, the foreclosure allows the defaulting vendee to regain all or most of his cash investment in the premises. The vendee might also recover the fair market value of any improvements and any application in the property value during the contract term. This assumes, however, that the proceeds of the judicial sale are

Second, the foreclosure sale terminates the defaulting purchaser's interest in the real estate.[187] Finally, the successful bidder at the public auction acquires title to the property as it existed just prior to the time the parties entered into the contract for deed.[188]

An alternative to this foreclosure by judicial sale is a deed in lieu of foreclosure.[189] Under this remedial method, the seller convinces the

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adequate to pay the balance of the purchase price and the claims of any junior lienors through the vendee.

187. *See* Century Enterprises, Inc. v. Butler, 526 P.2d 1350, 1352 (Colo. Ct. App. 1974). This is analogous to the termination of the mortgagor's equity of redemption in a foreclosure action on a mortgage. Jelks v. Aetna Life Ins. Co., 134 F.2d 870 (10th Cir. 1943); Stephenson v. Clement, 171 Okla. 333, 43 P.2d 430 (1935).

188. *See* Settles v. Atchinson, T. & S.F. Ry., 318 P.2d 867 (Okla. 1957); Dusbabek v. Local Bldg. & Loan Ass'n, 178 Okla. 592, 63 P.2d 756 (1936). The purchaser at the sale takes title to the property subject to any outstanding interest holder in the realty not made a party defendant. These continuing interests may include an encumbrance on the seller's title existing prior to the execution of the contract for deed foreclosed, *see* Sherman v. Gens & Barall Inv. Co., 172 Okla. 618, 46 P.2d 491 (1935); Streeter v. Ponca State Bank, 49 Okla. 609, 153 P. 632 (1915), or the claims of any omitted junior lienors through the vendee. *See* Viersen v. Boettcher, 387 P.2d 133 (Okla. 1963); State *ex rel.* Comm'rs of Land Office v. Loose, 204 Okla. 88, 227 P.2d 402 (1951); Harding v. Gillett, 25 Okla. 199, 107 P. 665 (1909). *See generally* G. OSBORNE, *supra* note 17, § 328. Along with this conveyance of title, the purchaser receives the right to possession and a writ of assistance, if necessary. OKLA. STAT. tit. 12, § 686 (1971).

189. *See* Williams v. Church, 200 Okla. 646, 198 P.2d 995 (1948). *Accord*, Brinkerhoff v. Home Trust & Sav. Bank, 111 Kan. 1, 204 P. 779 (1921); Brockington v. Lynch, 119 S.C. 273, 12 S.E. 94 (1922). *See generally* 3 R. POWELL, THE LAW OF REAL PROPERTY ¶ 469.1 (P. Rohan rev. 1977 & Supp. 1977). A deed in lieu of foreclosure is a means for terminating the buyer's remaining contractual obligation and any resultant personal liability. *See generally* 3 R. POWELL, *supra*, ¶ 469.1[1]. Often this will be appealing to a defaulting purchaser who is presented with the prospect of saving a deficiency judgment granted in favor of the seller following the foreclosure sale. See note 73 *supra* and accompanying text. A vendee, however, with a substantial investment will not choose this alternative, because typically the seller will not compensate him for the value of any payments made, appreciation in the value of the real estate, and improvements made. *See* Williams v. Church, 200 Okla. 646, 649, 198 P.2d 995, 997 (1948). Rather, the only consideration is the seller's promise to forebear from suing the vendee personally on the contract for deed or foreclosing against the property. *Id. See generally* 3 R. POWELL, *supra*, ¶ 469.1[1]. From the vendor's perspective, a deed in lieu of foreclosure is an inexpensive and expeditious alternative to a foreclosure action. Instead of initiating a foreclosure proceedings, the seller obtains the vendee's conveyance and resells the real estate privately to a third party. This is not to say, however, that there are not some risks to the vendor. First, the seller-grantee takes the property subject to any interests or encumbrances created between the time of the contract for the deed's execution and the buyer's subsequent conveyance. *See generally* 3 R. POWELL, *supra*, ¶ 469.1[2]. In contrast, if the seller is the successful bidder at the foreclosure sale, he takes title to the realty free of the defaulting purchaser's interests and junior lienors through the vendee joined in the foreclosure action. See note 188 *supra* and accompanying text. Second, if the consideration paid by the seller is disproportionately less than the buyer's cash investment or if nothing is paid where the purchaser's interest has some value, the entire conveyance can be construed as unfair and unconscionable. *See* Fisk v. Kundert, 440 P.2d 690, 694 (Okla. 1968); Williams v. Church, 200 Okla. 646, 198 P.2d 995 (1948). In these circumstances, to avoid having the court set aside the conveyance, it is incumbent on the vendor to demonstrate that the parties' transaction was open and fair and that the consideration paid was adequate. *See* Moore v. Beverlin, 186 Okla. 620, 99 P.2d 886 (1939); Wagg v. Herbert, 19 Okla. 525, 92 P. 250 (1907), *aff'd.*, 215 U.S. 546 (1910). *See also* Williams v. Church, 200 Okla. 646, 648-49, 198 P.2d 995, 996-97 (1948).

defaulting purchaser to cancel the contract for deed, to relinquish his possession of the realty, and to execute a deed showing record title in the seller unencumbered by the contract for deed.[190] In return, the seller agrees to forebear from suing the purchaser personally for the remaining purchase price.[191]

Finally, when the contract for deed is unrecorded, a seller may decide to do nothing.[192] In selecting this option, he relies on two assumptions: (1) the defaulting buyer can be persuaded or threatened into leaving the property without judicial coercion and (2) the seller's superior economic and legal position will not be challenged.[193]

c. The Vendee's Rights Upon Default

After the default, the purchaser has a statutorily-created right to redeem the property from the contract for deed by tendering the remaining balance of the purchase price at any time prior to foreclosure.[194] Redemption causes the title to the realty to remain in the vendee free of the vendor's lien.[195] In conjunction with this redemption, the buyer can compel the seller to execute a deed to evidence record title to the property in the buyer.[196] Additionally, the vendee has the right to possess the property before his interest is foreclosed.[197] This right exists even though the vendee has defaulted under the terms of the contract for deed and the contract contains a specific provision giving the vendor this right upon the vendee's default.[198] The default-

190. *See* 3 R. POWELL, *supra* note 189, ¶ 469.1[1].
191. *Id.*
192. *See* Warren, *supra* note 14, at 633.
193. *Id.*
194. See notes 74-76 *supra* and accompanying text.
195. See note 76 *supra.*
196. This result is analogous to the circumstance where the mortgagor, upon full payment of the debt, exacts a release of the mortgage from the mortgagee to clear up the record title. *See* G. OSBORNE, *supra* note 17, § 294, at 600. If the vendor refuses to execute a deed after a request by the vendee, he may be subject to statutory penalties. *See* OKLA. STAT. tit. 46, § 15 (1971) (mortgages).
197. See note 64 *supra* and accompanying text. The policy reasons for allowing the vendee to remain in possession after default are presumably the same as those historically advanced for the mortgagor's continued possession until foreclosure. First, possession is of little value to the vendor as a remedy. The substance of his right is realization of the balance due on the purchase price through foreclosure. Second, possession by the vendee is essential in order for him to have a real opportunity to redeem. *See generally* G. OSBORNE, *supra* note 17, § 125, at 204. The defaulting buyer is also entitled to any profits and rents from the property until foreclosure. See note 64 *supra.* Likewise, the rules governing the appointment of a receiver and the mortgagee-in-possession relating to mortgages apply equally to contracts for deed. See note 64 *supra.*
198. See note 64 *supra.*

ing vendee, therefore, has the dual right of redemption and of possession prior to foreclosure.

IV. CONCLUSION

Traditionally, Oklahoma courts have ignored the substantive similarities between the contract for deed and the mortgage. Instead, the courts have focused on the contractual nature of the contract for deed. This treatment of the contract for deed as an executory contract for the sale of real estate led to the emergence of two defects in the common law. First, in the event of a default, the nonbreaching seller was permitted to declare an inequitable forfeiture of the buyer's rights and his investment in the property. Second, because the vendor retained the title to the property as his security during the contract term, title problems frequently arose at the time of execution, during the contract term, and at the time when the seller was obligated to convey title to the buyer. It is with these deficiencies in mind that the Oklahoma legislature enacted section 11A.

Although the new legislation clearly evinces an intent to make a change in the existing law and to apply substantive mortgage law to the contract for deed, the statutory language does not plainly express the extent to which mortgage concepts will be applied to the contract for deed. It is this ambiguity in the act's wording that suggests three plausible constructions of the statute. One interpretation provides that he new legislation completely abrogates the traditional concept of the contract for deed in Oklahoma. A second, more restrictive construction suggests that the contract for deed is subject to the mortgage rules relating to foreclosure only. Finally, an intermediate construction between these two interpretations treats the contract for deed as identical to a mortgage only when it is used to finance the sale and to give the purchaser the immediate right to possession.

Of the three interpretations, the limited abrogation theory is the most reasonable and sensible. This theory remedies the deficiencies of the prior law by ameliorating the harsh consequences of forfeiture for the defaulting vendee and by mitigating the problems commonly associated with the title to the property during the contract term. Further, the model of limited abrogation takes a more simplistic approach than the foreclosure theory to the interests of the vendor and the vendee under the contract for deed by recognizing that the parties to the contract hold interests identical to a mortgagee and mortgagor.

In view of the Oklahoma legislation, the contract for deed should become an increasingly unattractive method for financing the sale of real estate in Oklahoma. This legislation serves the admirable role of protecting low income purchasers—those persons least able to bear the harsh results of traditional law. The statute, however, is inapplicable to individuals who utilize the contract for deed without obtaining the immediate right to possession—typically the investment purchaser. This implicit exception in the statutory language permits the contract for deed to continue as a viable financing option in Oklahoma under circumstances where the consequences of a default will not be devastating to the purchaser.

G. Booker Schmidt