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Forfeiture of Residential Land Contracts in Ohio: The Need for Further Reform of a Reform Statute

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FORFEITURE OF RESIDENTIAL LAND CONTRACTS IN OHIO: THE NEED FOR FURTHER REFORM OF A REFORM STATUTE

by

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I. INTRODUCTION

IN THE LAST SEVERAL YEARS, the use of long-term installment land contracts for the sale of residential real property in Ohio has increased greatly.[1] This trend can be viewed as either positive or negative depending on one's view of the importance or desirability of the use of land contracts. In either case, it is troubling that Ohio's unique statute, which specifically defines the rights of a vendor upon breach of a land contract by the vendee when the real property is improved by a dwelling,[2] is potentially unfair to the vendee.

In providing remedies for a vendor of a residential land contract when the vendee is in default, the Ohio statute divides residential land contracts into two groups: those which have been in effect for less than five years *and* on which less than 20% of the purchase price has been paid,[3] and those which have been in effect for five years or more *or* on which 20% or more of the purchase price has been paid.[4] In the former situation the vendor may obtain forfeiture and damages by bringing one or more actions against the vendee.[5] In the latter situation the vendor must foreclose the vendee's interest using the statutory procedure for judicial foreclosure of a mortgage.[6] Remedies for vendors of land contracts concerning property not improved by a dwelling are left to case law, and forfeiture may or may not be allowed.[7] While one may ques-

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[1] *See infra* text accompanying notes 75-96.

[2] OHIO REV. CODE ANN. §§ 5313.01-.10 (Page 1981). [Chapter 5313]

[3] OHIO REV. CODE ANN. §§ 5313.06, 5313.08 (Page 1981).

[4] OHIO REV. CODE ANN. § 5313.07 (Page 1981).

[5] OHIO REV. CODE ANN. §§ 5313.06, 5313.08 (Page 1981). While it would appear that the doctrine of *res judicata* requires a vendor to bring one action for both forfeiture and damages if he sought both remedies, an Ohio appellate court has held that a vendor may seek forfeiture in one action and later sue for damages in another action. Marvin v. Stemen, 68 Ohio App. 2d 26, 426 N.E.2d 205 (Lucas Co. 1980).

[6] OHIO REV. CODE ANN. § 5313.07 (Page 1981).

[7] *See infra* text accompanying notes 188-225.

tion whether it is equitable to allow forfeiture in any instance,[8] current economic realities make the distinction drawn by the Ohio statute inequitable; there is, therefore, clear need for either legislative amendment of Ohio's current law or broad use by trial courts of their equitable power to fashion appropriate remedies in land contract default cases.

Perhaps it could be argued that in 1969 when Chapter 5313, Installment Land Contracts (the "Act"), was enacted,[9] a vendee who had paid less than 20% on a land contract or whose land contract had been in effect less than five years[10] had so small an interest that forfeiture was an equitable remedy. This argument would have been strengthened by the fact that the Act, when originally passed, was limited to situations where the purchase price was less than $30,000.[11] Such a view would have been very much in accord with the long-time scholarly perception that land contracts are primarily used by low-income buyers.[12] If it were true in 1969, it is clearly not the case today. The $30,000 limitation was removed in 1980,[13] and the economic interests of most Ohio land contract vendees appear to be quite large[14] and worth protecting. In addition it is equally clear that land contracts are being used more and more by middle and upper income buyers and sellers to avoid high mortgage interest rates charged by commercial lenders.[15]

The purpose of this article is to examine the problems created by the Act. In order to do that, the article begins with a background section which more fully describes the type of contractual arrangement under discussion,[16] why people use land contracts,[17] and the economic factors in the current Ohio real estate market which have caused an increase in the use of land contracts and may cause mounting problems with Ohio's land contract statute.[18] The second section describes the common law treatment of land contract defaults and the positions taken by states other than Ohio.[19] The next section discusses Ohio law both before and after passage of the Act, along with the history of the

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[8] *See infra* text accompanying notes 264-75. This article does not deal with the deeper questions of the true fairness of forfeiture and the true efficacy of foreclosure. The focus of the article is on whether and when forfeiture of land contracts should be allowed given the fact that a mortagee must always foreclose in order to realize on his security.

[9] 1969 OHIO LAWS 424, 424-30 (effective Nov. 25, 1969).

[10] This would mean that upon the vendee's default the vendor could avail himself of the forfeiture remedy contained in OHIO REV. CODE ANN. § 5313.06 (Page 1981).

[11] 1969 OHIO LAWS 424, 424-30 (effective Nov. 25 1969) (current version at OHIO REV. CODE ANN. § 5313.01(B) (Page 1981)).

[12] *See infra* text accompanying notes 65-74.

[13] OHIO REV. CODE ANN. § 5313.01(B) (Page 1981) (effective Oct. 6, 1980).

[14] *See infra* text accompanying notes 75-96.

[15] *See infra* text accompanying notes 75-96.

[16] *See infra* text accompanying notes 22-30.

[17] *See infra* text accompanying notes 31-64.

[18] *See infra* text accompanying notes 75-96.

[19] *See infra* text accompanying notes 98-183.

Act.[20] The last section considers the various policies raised in the prior sections and contains proposals for both legislative and judicial action.[21]

II. Land Contracts and Economic Realities

A. *Defining the Scope of "Land Contracts"*

The term "land contract" can mean several different things, depending on the jurisdiction being referred to and the context in which it is used. Perhaps the best way to define what a land contract is in real estate finance law is to say that it is not "the ordinary executory contract for the sale of land, variously known as a 'binder,' a 'marketing contract,' or an 'earnest money' contract."[22] These types of agreements are designed to bind the parties for a short period of time, usually one or two months, while the parties arrange for the closing of the sale of the property.[23] These agreements usually allow for termination of the relationship between the seller and the buyer with the conveyance of title by deed from the seller to the buyer in exchange for the buyer's tender of the entire purchase price.[24] Alternatively, the seller may choose to participate in the buyer's financing of the property either by accepting a mortgage or a deed of trust or by entering into a land contract.[25]

The true "land contract" goes by many names, including installment land contract, contract for deed, and long-term land contract,[26] or the all-inclusive one chosen at the beginning of this article, long-term installment land contract. A "land contract" is all of these and more.

A land contract is "long-term" because the parties usually anticipate a relationship of several years, from one or two years to twenty years or more.[27] It is "installment" because the vendee usually makes periodic payments of interest alone or of the principal and interest to the vendor.[28] Finally, it is a land contract or "contract for deed" because the vendor retains title and is only obligated to convey title to the vendee upon the vendee's full compliance with the terms of the contract, the most important being timely payment of all money due the vendor.[29] Ohio's definition of "land installment contract"

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[20] *See infra* text accompanying notes 184-263.

[21] *See infra* text accompanying notes 264-303.

[22] Nelson & Whitman, *The Installment Land Contract — A National Viewpoint,* 1977 B.Y.U.L. Rev. 541.

[23] *Id.* at 542.

[24] This could be accomplished either by tender of the total purchase price in cash, or by tender of the seller's equity (the difference between the purchase price and the amount owed by the seller to a third party and secured by the property being sold) in cash by the buyer and the buyer's assumption of the seller's existing indebtedness secured by a mortgage of deed of trust on the property.

[25] Nelson & Whitman, *supra* note 22, at 542. In that case, the parties will have two "contracts," a "binder" and a "land contract."

[26] *Id.* at 541.

[27] *Id.*

[28] *Id.*

[29] *Id.* The vendor will probably also be obligated to make payments to any mortgages while the land contract is in force.

includes all of these ideas:

> "Land installment contract" means an executory agreement which by its term is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation. Option contacts for the purchase of real property are not land installment contracts.[30]

B. *Reasons for Using Land Contracts*

A land contract fulfills most of the same functions as a purchase money mortgage[31] given to the seller.[32] The primary differences between the two are the remedies which the vendor/mortgagee has upon default by the vendee/mortgagor.[33] Historically, the remedies were similar. Upon a vendee's default a land contract vendor was traditionally allowed forfeiture, the legally effective declaration by the vendor that the vendee's interest was terminated.[34] Similarly, a common law mortgage deed originally put title in the mortgagee and the mortgagor retained only the opportunity to regain title on the "law day" by repaying the amount loaned; if he failed to repay the loan on the law day, he lost his only chance to regain title to "his" property.[35]

The situation has now changed. The rights of a mortgagee have eroded, first by equitable redemption, then by allowing strict foreclosure and now by the requirement for either judicial or power of sale foreclosure.[36] This equitable requirement of foreclosure is absolute. Today it is fair to say that strict foreclosure is allowed only in very limited situations[37] and that no court will allow a mortgagor, in the mortgage or contemporaneously with its execution, to waive either foreclosure by sale or his ability to redeem his property prior to foreclosure.[38] A mortgagor may relinquish his interest to the mortgagee by deed after default, but even then a court will scrutinize the parties' relation-

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[30]OHIO REV. CODE ANN. § 5313.01(A) (Page 1981).

[31]The terms "mortgage" and "deed of trust" will be used interchangeably in this article.

[32]Nelson & Whitman, *supra* note 22, at 541. The only possible exception is the unrecorded land contract, which may leave the vendor's mortgagee and the general public without knowledge of the sale.

[33]This assumes that the transaction is a legitimate one where the contract is either recorded or the vendor is not trying to take advantage of the vendee. In addition there are problems regarding title and vendee's remedies which this article will not address. *See generally* G. OSBORNE, G. NELSON and D. WHITMAN, REAL ESTATE FINANCE LAW § 3.25 (1979) [hereinafter cited as OSBORNE]; 3 A. CASNER, AMERICAN LAW OF PROPERTY §§ 11.74-75 (1952); Mixon, *Installment Land Contracts: A Study of Low Income Transactions, with Proposals for Reform and a New Program to Provide Home Ownership in the Inner City*, 7 HOUS. L. REV. 523 (1970).

[34]*See* OSBORNE, *supra* note 33, § 3.25; 3 A. CASNER, *supra* note 33, § 11.75.

[35]OSBORNE, *supra* note 33, § 1.2, at 7; 4 A. CASNER, *supra* note 33, § 16.178, at 427.

[36]OSBORNE, *supra* note 33, § 1.4, at 9; 4 A. CASNER, *supra* note 33, §§ 16.184-.185.

[37]OSBORNE, *supra* note 33, § 1.4 at 9.

[38]*Id.*

ship to determine if the transaction was fair to the mortgagor.[39]

This raises the anomaly of forfeiture of land contracts. Although the rights of mortgagees have been severely limited and land contracts and mortgages perform essentially the same basic functions,[40] the concept of forfeiture by a land contract vendor persists almost unchecked in some jurisdictions, is limited by legislative or judicial action in others, and has been buried in a few.[41] As long as forfeiture exists in some form, it serves as an inducement for a seller to finance or assist in financing his buyer's purchase by using a land contract rather than a mortgage.[42]

Beyond the traditional advantage of forfeiture, however, at least three additional modern reasons have arisen for use of land contracts.[43] One important reason for using a land contract is the favorable treatment for capital gains from the sale of real property under federal tax laws contained in section 453 of the Internal Revenue Code, the so-called "Installment Sale" section.[44] Section 453 requires a seller of real property, who does not elect otherwise, to proportionately recognize any gain realized from the sale of an asset in the year or years in which the seller receives part or all of the consideration for the sale.[45]

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[39] *Id.* at § 6.16.

[40] *See infra* note 43.

[41] *See infra* text accompanying notes 98-183.

[42] This seems almost indisputable. Although it is generally agreed that when a person or business entity makes a loan the last thing desired is default and realization on the security, it is obvious that the lender will choose the security device which will most easily allow him to recoup his investment. Since most foreclosure sales of real property result in the mortgagee's buying to protect his investment, if land contract forfeiture is allowed it clearly makes the land contract more desirable as a security device than a mortgage because the lender avoids the delay and cost of a foreclosure sale.

[43] The "reasons" which follow are perhaps more a matter of perception than reality. Each can arguably be accomplished by the seller of real property accepting a mortgage from his buyer, be it a first mortgage, a junior mortgage, or a "wrap-around" mortgage. A wrap-around mortgage most resembles a land contract in that the seller continues to be obligated to make timely payments on any mortgages in existence before the closing of his sale to the buyer, but it is different in that the seller conveys title and the seller's mortgage is junior to any existing mortgages. The wrap-around mortgage is in many ways preferable to the land contract, as title is in the buyer and the deed and mortgage will be recorded. The drawback is that if the buyer defaults, the seller is forced to foreclose his lien as a mortgage rather than use any "simpler" method offered by a jurisdiction's land contract law. In jurisdictions where the procedure for terminating a vendee's interest under a land contract most resembles the foreclosure procedure for a mortgage, the only reason for using a land contract may be that those structuring the transaction either are not aware of what a wrap-around mortgage is or prefer to use a more "familiar" device, the land contract.

[44] I.R.C. § 453 (West Supp. 1982).

[45] I.R.C. § 453(a)-(d) (West Supp. 1982). Until the changes made in 1980 to I.R.C. § 453, a seller of real property had to elect installment treatment if and only if he (1) received less than 30 percent of the sales price in the tax year of sale and (2) received part of the sales price in at least two separate tax years. *See* I.R.C. § 453 (1976 and Supp. II (1978)), *amended* by Installment Sales Revision Act of 1980, Pub. L. No. 96-471, § 2(a), 94 Stat. 2247, 2247-51 (1980) and by Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, Title II, § 202(c), 95 Stat. 172, 221 (1981) (codified at I.R.C. § 453 (West Supp. 1982)). For sales occurring on or after October 20, 1980, the 30 percent rule has been abolished; an installment occurs when the vendor receives any part of the sales price in any year other than the tax year of sale. *See* I.R.C. § 453 (West Supp. 1982) and the Committee Report on Public Law No. 96-471, S. Rep. No. 1000, 96th Cong., 2nd Sess., *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4696. These changes make it much easier to effect an installment sale, with its attendant possibilities for tax savings. Gain realized on the sale of a personal residence may be treated as an installment sale. Rev. Rul. 75, 1953-1 C.B. 83.

This gives the seller a method of saving federal income taxes by using a land contract rather than selling his property for all cash upon closing.[46]

A single example will best illustrate the potential savings. Suppose the sales price for a house is $100,000 but the seller's basis in the house is $60,000, what he paid for it. If the buyer pays cash and if the seller does not purchase a more expensive house within twenty-four months,[47] the seller must recognize in the year of sale, for federal income tax purposes, his realized gain of $40,000, the difference between the sales price and his basis.[48] If, on the other hand, he sells by a land contract with a $30,000 down payment, he will only have to recognize as gain part of the $30,000 received in the year of sale, not the $40,000 gain he has realized in making the sale; his recognition of the remainder of his realized gain will be spread over future years in proportion to the amount of the sales price he receives in those years.[49]

In this example, if we assume that the seller is in the maximum tax bracket, 50%, it will mean that he will receive in the year of sale $30,000 cash and only have to pay $2,400 in federal income taxes.[50] Each year in which the seller receives part of the sales price he will also receive much more cash than the amount he is obligated to pay as federal income taxes.[51] The effect is further enhanced if, by spreading a gain over two or more years, the taxpayer stays

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[46]This is not to imply that a buyer will be able to buy the property without borrowing money. However, if the buyer obtains financing from a third party, for example, a new first mortgage from a bank, or assumes the seller's existing mortgage, the seller will be deemed to have received the entire sales price in the tax year of sale because he will either pay off any existing load or be relieved from the obligation of paying it by the buyer's assuming it. Any realized gain resulting from a sales price in excess of the seller's basis in the property must be recognized.

[47]I.R.C. § 1034(a) (West 1982) allows a seller to postpone any gain on the sale of a personal residence if he buys another personal residence of at least equal value within 24 months. If he purchases a house of lesser value, but one that has a value that is higher than his basis in the house just sold, he must recognize the gain to the extent that the sales price, less selling expenses, exceeds the higher of his basis in the house just sold or the purchase price of the new house. *Id.*

[48]For simplicity, this assumes there were no costs of selling, which of course would be deductible and lower the taxable gain and provide a deduction from ordinary income. I.R.C. § 1034(a) (West 1982) (capital gain deduction) and I.R.C. § 1034(b)(2)(C) (West 1982) (ordinary income deduction). The gain would probably be a capital gain and be reduced to 40% of the full gain. I.R.C. § 1202(a) (West 1982).

[49]The gain that would have to be recognized in any one year is determined by multiplying the total gain (in the example, this would be determined by subtracting basis from sales price, or $100-000 − $60,000 = $40,000) times a percentage derived by dividing the total amount received in one year by the sales price (in the example for the year of sale this would be $30,000 ÷ $100,000 = 30%). In the example this would result in recognition of a capital gain in the year of sale of $40,000 × 30% = $12,000. I.R.C. § 453(c) (West 1982). The seller would therefore receive $30,000 in cash and only have to pay tax on $12,000 at the capital gain rate. With the current federal tax system of progressive taxation and deductions, a taxpayer could obviously benefit from "spreading" a gain over two or more tax years; he may have more deductions in a future tax year, or, perhaps in combination with deductions, it may keep him in a lower tax bracket.

[50]$2,400 in tax is derived by applying the capital gain exclusion of 60% to the $12,000 gain which results in a taxable amount of $4,800 ($12,000 − (60% × 12,000) = $4,800). I.R.C. § 1202(a) (West 1982). Since we are assuming that the seller is being taxed on this income in the 50% bracket, he will pay $2,400 in federal income tax ($4,800 × 50% = $2,400).

[51]Suppose he receives $10,000 in the second year. His tax will be $800. Using the equations from notes 49-50, *supra,* $800 is derived as follows: $40,000 × ($10,000 ÷ 100,000) = $4,000 gain; $4,000 − (60% × $4,000) = $1,600 taxable gain; and applying a 50% bracket, $1,600 × 50% = $800. This goes on until the land contract is fully paid and terminated.

below the 50% bracket.[52] A land contract which qualifies as an installment sale for federal income tax purposes can therefore have a dramatic effect on how much federal income tax is paid by the seller.

The seller usually also gains a financial advantage from a land contract if there is a mortgage on the property. In the last several years interest rates on home mortgages have skyrocketed, ranging as high as 18% in 1981.[53] If the land contract allows the seller to leave an old, low interest rate mortgage encumbering the property during the term of the land contract, the seller will realize on the money he actually has at risk a rate of return greater than the stated interest rate on the land contract.[54]

Most interestingly, the seller may be able to create a very favorable investment for himself while offering a bargain to the buyer. Using the same basic example of a $100,000 sales price, suppose the seller's existing mortgage balance is $40,000 with an 8% per annum interest rate and that the land contract provides for a $30,000 down payment and interest on the $70,000 balance of 12% per annum. Although the stated interest rate on the land contract is 12%, a bargain for the buyer, the effective yield for the seller on his "investment" of $30,000 is 17.3%; the seller gets the "spread" between the 8% he pays the bank for the amount he owes the bank, $40,000, and the 12% the buyer is paying him for the "same" $40,000 in addition to 12% on the seller's $30,000.[55] An interest rate of 17.3% is a solid return on the seller's investment.[56]

Last, but perhaps most important, offering a land contract may help the seller find a buyer because the buyer's cost of buying the house is obviously less if he spends less on financing.[57] In addition, even if the seller has buyers available, he may be able to get a higher price for his house by using a land contract.

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[52] *See supra* note 49.

[53] *Dayton Area Mortgage Rates,* Dayton Daily News, Sept. 27, 1981, at 10-E, col. 1.

[54] "Money he has at risk" means the seller's equity in the property or sales price still unpaid by the vendee less current mortgage balance.

[55] The seller has $30,000 of "his" money at risk, the $70,000 "loaned" to the buyer less the $40,000 the seller has borrowed from the bank. The seller is receiving $8,400 in interest per year, 12% × $70,000. The seller is paying the bank $3,200 in interest per year, 8% × $40,000. He is netting $5,200, or $8,400 − $3,200, on an investment of $30,000 of his money, for an effective interest rate of 17.3%, or $5,200 ÷ $30,000. Note that the less of "his" money the seller has at risk, the higher the effective interest the seller receives. If the down payment in the example is lowered to $20,000, the seller has $40,000 at risk and his effective return is 16%. If the down payment in the example is raised to $40,000, the seller has $20,000 at risk and his effective return is 20%.

[56] The less the seller has at risk the greater his return. *See supra* note 55. If the underlying mortgage is amortized and if the land contract is not amortized, or if the land contract amortizes more slowly than or at the same rate as the underlying mortgage, the seller's money in the transaction increases, i.e., he owes less and is owed the same, or not as much less than he owes. In that case, the effective interest rate will drop over the term of the land contract. On the other hand, in the unlikely event that the underlying mortgage is either unamortized or amortizes more slowly than the land contract, his effective rate will increase. Finally, if they are both unamortized the effective rate remains constant.

[57] *People-to-People Financing Encourages Fresh Starts and Brighter Outlooks,* Real Estate Today, April 1982, at 12, 13.

First, most land contracts have interest rates far below the prevailing commercial interest rates. For example, the median interest rate for land contracts recorded in 1981 in Montgomery County, Ohio (Dayton and its suburbs) was 11%,[58] while commercial interest rates for the same period ranged up to 18%.[59]

In addition, most commercial lenders charge "points,"[60] which can be as much as 4% of the loan amount,[61] as a fee for originating a loan. With a $100,000 sales price, and an $80,000 loan amount, it is fair to say that most buyers and sellers would negotiate for a $3,200 change in a $100,000 purchase price.

Finally, the lower cost of financing has two effects. The buyer's cost of housing is substantially reduced[62] thereby either making the purchase of a home less burdensome or allowing the buyer to purchase a more expensive home.[63] Also, many buyers may not be able to meet a bank's requirements for lending but may satisfy a seller's concerns because the seller may be more concerned about selling the house than about how good the buyer's credit is.[64]

C. *Economics: Scholarly Perception and Ohio Reality*

1. Scholarly Perception — The Land Contract as a Device of Last Resort

The land contract has generally been characterized as a financing device of last resort used by low-income and other purchasers who are unable to obtain conventional financing. Professor Mixon, in his study of land contract transactions in Houston, Texas,[65] took the position that many residential land contracts involve purchase of low-priced houses with little or no down payment by marginally solvent vendees.[66] Professor Mixon concluded from his data that the land contract and the forfeiture remedy well served the purposes of both the vendor and vendee; the vendee was able to purchase a house that he could not finance commercially[67] and the vendor was encouraged to sell the house because if the "risky" vendee defaulted the vendor would be able to both retain the payments made by the vendee and get back unencumbered title to the house.[68]

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[58] *See infra* text accompanying note 88 for origin of this interest rate.

[59] *See supra* note 53.

[60] A "point" is usually a loan charge of 1% of the loan amount. Congress treats points as pre-paid interest. I.R.C. § 461(g) (West 1978). The payment of points incurred in connection with the purchase of the taxpayers' principal residence is generally deductible in the year paid. *Id.*

[61] *Dayton Area Mortgage Rates,* Dayton Daily News, Dec. 27, 1981, at 9-E, col. 4.

[62] *See infra* chart in text accompanying note 90.

[63] The higher the monthly mortgage or land contract payment, the more the buyer needs to earn.

[64] The seller may not require a specific income to payment ratio as a bank would, so the buyer might be able to take on a higher payment on a more expensive house.

[65] Mixon, *supra* note 33.

[66] *Id.* at 554-55.

[67] *Id.* at 555.

[68] *Id.*

Other commentators have also concluded that the land contract and forfeiture remedy have a "saving" function.[69] In the 1950's the Legal Aspects Subcommittee of the North Central Land Tenure Committee of the Farm Foundation, Chicago, Illinois, sponsored studies in several states on "How Young Farmers Get Established in Farming."[70] The articles which resulted focused primarily on how farmers purchased land, which frequently was found to be by land contract.[71] As did Professor Mixon later, some of these commentators concluded that the land contract was necessary for marginal purchasers; they literally feared that but for the land contract and its forfeiture remedy, many farmers would be unable to purchase land.[72]

This view is unrealistic. It seems fair to assume that one sells land because one either wants to or needs to. Certainly there must be some economic advantage to be gained by selling: the seller has purchased the land in order to resell it; he desires to sell land which is no longer useful to him and is therefore not worth the costs of ownership; he has obtained ownership involuntarily and either wants to avoid the costs of ownership or profit by realizing its value in money; or the land is still useful to him but he is unable to bear the costs of ownership. Regardless of the reason, the owner who offers his property for sale wants to sell it and, if he can find a buyer, will do so no matter how the buyer is able to pay the purchase price. Land contracts are therefore neither legally nor economically "necessary."

Two arguments have been made against the view that sales will occur regardless of the availability of land contracts. Both arguments can be overcome. The first argument is that if buyers are unable to obtain other financing, the only way the seller will sell his property is by financing the purchase himself, presumably through a land contract. However, a seller-offered mortgage provides everything a land contract does except the remedy of forfeiture.[73] The second argument is illustrated by Professor Mixon's example of the developer who buys unimproved land by means of a conventional mortgage, intending to subdivide it, build cheap houses on the lots, and sell the houses by land contract to low-income persons.[74] Although, arguably, the developer would be reluctant to go forward with the subdivision without being able to declare a forfeiture, it seems indisputable that since the developer is undertaking the

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[69]*See* Clark, *Installment Land Contracts in South Dakota, Part I,* 6 S.D.L. REV. 248 (1961); Clark & Richards, *Installment Land Contracts in South Dakota, Part II,* 7 S.D.L. REV. 44 (1962); Dolson, *A Comparison of Land Contracts and Other Security Devices in Kentucky,* 32 U. CIN. L. REV. 435 (1963); Dolson & Zile, *Buying Farms on Installment Land Contracts,* 1960 WIS. L. REV. 383; Hines, *Forfeiture of Installment Land Contracts,* 12 U. KAN. L. REV. 475 (1964).

[70]*See* Beuscher, *Buying Farms on Installment Land Contracts — A Preface,* 1960 WIS. L. REV. 379.

[71]Clark, *supra* note 69, at 270; Dolson & Zile, *supra* note 69, at 386; Hines, *supra* note 69, at 477.

[72]Clark, *supra* note 69, at 252; Hines, *supra* note 69, at 492.

[73]*See supra* note 43.

[74]Mixon bases part of his analysis on the situations where a developer has a blanket mortgage on an entire subdivision and then enters into land contracts on the individual lots. Mixon, *supra* note 33, at 546.

subdivision for profit he too will find a way to realize his profit, with or without forfeiture.

The economic reality, as will be illustrated in the next section of the article, is even stronger than the theoretical counterarguments given above. In both of these cases, the sole difference between using a seller-offered mortgage and a land contract is the remedy of forfeiture.[75] The matter then becomes a question of policy. Should we allow sales of property where one of the bases of the sales is the ability of the seller to declare a forfeiture of the buyer's interest? The equity courts, at least in mortgage law,[76] have answered a resounding "No!" That answer may be too absolute, however, particularly if the inquiry is qualified by adding "regardless of whether the buyer's interest is one worth protecting." If we require an evaluation of the buyer's interest, the availability of the drastic remedy of forfeiture is even more important in determining the equity and ultimate utility of land contracts. The final answer must lie in determining what interests are being protected and what interests should be protected.

2. Ohio Reality

The perception that land contracts will be most often used as a low-income financing device is shattered when one considers the economics of the current use of land contracts in Ohio. In order to test that perception the author undertook a study of land contracts recorded in 1981 in Montgomery County, Ohio, designed to determine when Ohio buyers and sellers were using land contracts.[77]

At the outset, the myth that the land contract is a low-income financing device is disproven by the study. The median purchase price for a house sold by land contract in Dayton in 1981 was $46,000.[78] In the inflated housing costs of the 1980's, this may not seem very much, but, for example, it is not that much below the median selling price for houses in Dayton in 1981 of $54,680.[79] However, the study also showed a range of purchase prices from $3,000, clearly low-income, to $500,000, clearly not low-income,[80] with 37% at $60,000 or

[75] *See supra* note 43.

[76] *See supra* text accompanying notes 31-39.

[77] The statistics contained *infra* in the text accompanying notes 74-89 are drawn from a study undertaken by the author and his research assistant, Robin Ames. The study consisted of a review of approximately 10% of the land contracts recorded in Montgomery County, Ohio, in 1981. Dayton is the principal city in Montgomery County and the fourth largest city in Ohio. Montgomery County was chosen because Dayton is a fairly average Ohio city, and the remainder of the county consists of urban, suburban and rual areas.

It was first determined that 2069 land contracts were recorded in Montgomery County in 1981 nand that a 10% sampling would give a fairly accurate representation as to the terms of those contracts. Next it was determined how many contracts were recorded in each month of 1981 and approximately 10% of that number were chosen at random. The following four characteristics were determined as to each contract examined: purchase price, down payment, stated interest rate, and lenght of time the contract would be in effect if not prepaid. Each monthly sample was random. Once a land contract was chosen on an index, which only identified it as a land contract and when it was recorded, that land contract was included in the sample regardless of its terms. The raw data on the 200 land contracts studied is set forth in tabular form as Appendix A at the end of this article.

[78] *See supra* note 77 and *infra* Appendix A.

[79] DAYTON AREA BOARD OF REALTORS, 1981 COMPOSITE COMPARABLE SALES INDEX BOOK (1982).

[80] Appendix A, index numbers 651 D06 and 278 C09, respectively.

higher, 15.5% at $80,000 or higher, and 8.5% at $100,000 or higher.[81]

The study showed, in addition, that labeling Ohio land contracts "long-term" is a misnomer. The median term for the land contracts studied was a mere three and one-half years,[82] hardly long-term when compared to the standard commercial mortgage term of thirty years.[83] Even more striking was that only 15.5% had terms of over five years, only 9% had terms of over ten years, and a mere 3% had terms of thirty years.[84]

The median down payment made on the land contracts studied was also interesting. For all the contracts studied the median down payment was about 14% of the purchase price.[85] No matter how it is broken down, the median down payment stayed below 20%. For instance, if one isolates down payment according to term, those with terms above the three and one-half year median term have a median down payment of 15%, while those with terms below the median term have a median down payment of 16%, and those with no stated terms have a median down payment of 12%.[86] There is some difference if one isolates down payment by purchase price, but the median down payments are still less than 20%; those with purchase prices above the $46,000 median purchase price have a median down payment of 18%, while those with purchase prices below the $46,000 median purchase price have a median down payment of 12%.[87]

One additional factor, interest rate, needs to be added to complete the picture. The median stated interest rate of the land contracts studied is 11%.[88] This is far below the commercial mortgage rate prevailing in the Dayton market in 1981 of 15.5% to 18%.[89]

The best way to understand the importance of owner-financing, especially the land contract, in the market is to look at a concrete example. Take the "median" house, $46,000, and consider how the transaction looked to the 1981 home buyer in two situations: if he borrowed from a bank or if the seller and he entered into a land contract.

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[81]Appendix A.

[82]Appendix A. For purposes of establishing a median term the 37 land contracts which did not state terms were excluded. If one includes those 37 by assigning them terms of zero years, the median term is three years.

[83]In the last several decades mortgage terms have increased from 15 or 20 years to 30 years or longer, with the 30 year mortgage firmly in place for at least the last 30 years.

[84]Appendix A. No land contract studied had a term of over 30 years, the typical length for commercial first mortgages.

[85]Appendix A.

[86]Appendix A. *See supra* note 82 for a dicsussion of how land contracts with no stated term were treated in establishing the three and one-half year median term for the land contracts studied.

[87]Appendix A.

[88]Appendix A.

[89]*See supra* note 53.

Comparison of Bank Mortgage to Amortized and Interest-Only Land Contracts[90]

	Bank Financed (30 year amortized)	Land Contract (30 year amortized, 3.5 year balloon)	Land Contract (Interest only, 3.5 year balloon)
Purchase Price	$46,000	$46,000	$46,000
Down Payment	$ 9,200 (20%)	$ 6,440 (14%)	$ 6,440 (14%)
Balance	$36,800	$39,560	$39,560
Interest Rate	16%	11%	11%
Monthly Payment	$524.73	$376.73	$362.63

There was a tremendous economic incentive for the buyer to prefer a land contract, for he would dramatically reduce his monthly cost of housing and avoid the high initial costs of obtaining a commercial loan, avoiding points, loan fees,[91] and, if he desired, a title insurance premium or the cost of a title abstract. However, the "median" land contract buyer was taking one substantial risk in that within three and one-half years he would have to pay off the land contract in full with his own funds, convince the seller to extend the land contract, obtain commercial financing, sell the house, or be faced with defaulting. No matter what reason a vendee may give for taking such a risk,[92] it is a substantial one,[93] regardless of a vendor's remedy. The vendee's default is serious in any case, but forfeiture can make it catastrophic.

If we assume that default is a possibility, consider where the "median" vendee placed himself. At the end of the three and one-half year term, he will still not have paid 20% of the purchase price, even with a thirty-year amortized land contract with a three and one-half year balloon.[94] The "median" Ohio vendee is therefore beyond the reach of mandatory foreclosure, and the vendor is given the option of seeking forfeiture and damages.[95]

The study shows that the situations of most current Ohio land contract vendees, at all income ranges, fall outside of the requirements for mandatory foreclosure of land contracts contained in the Act. With land contracts being

[90] All figures for the land contracts are derived from medians in the study. The commercial interest rate is a "best guess" average for 1981. Monthly payments are derived from standard amortization charts.

[91] *See supra* note 60.

[92] The reasons a vendee might give include planning to move and sell or refinance commercially when interest rates drop.

[93] Rotbart & Yas, *Record Level of Home Foreclosures is Bringing Grief to Many Families,* Wall St. J., June 15, 1982, at 23, col. 3.

[94] He will have paid 15.6% or $7,159, the original $6,440 down payment plus $719 in principal, in the 42 monthly payments he will have made.

[95] *See* OHIO REV. CODE ANN. § 5313.08 (Page 1981), and *supra* text accompanying notes 3-6.

used as bridges of finite length over a period of high interest rates of potentially infinite duration, it seems safe to predict that some vendees may see their "bridges" collapse and be unable to deal financially with the consequences.[96] Further, the interests of these vendees may be substantial, for example, those 1981 vendees who paid between $46,000 and $500,000 and whose median down payment was 18%.[97] These are clearly interests worth protecting, and Ohio land contract law appears on its face to leave them unprotected.

III. Common Law and Modern Trends

Ohio is not the only jurisdiction to give less than full protection to land contract vendees. Forfeiture is neither a new nor a solely statutory remedy. The purpose of this section is to survey the origins of the forfeiture concept and the approaches currently being taken by states other than Ohio before looking more thoroughly at Ohio law.

A. *Common Law*

Trying to determine what is the "common law" of forfeiture is a difficult task because the concept of forfeiture lacks easily identifiable roots in the common law and contradicts most legal and equitable concepts of both contract and property law.[98] It is difficult to dismiss forfeiture as merely an aberration of the common law because it has persisted for two centuries and, at least as a point of departure for courts, it is still alive and well in many states.[99] Further, it is hard to call a concept an abberation when it has engendered numerous law review articles, notes and comments, and chapters in treatises.[100]

The origin of allowing forfeiture of land contracts is unclear. Although twentieth century commentators uniformly decry forfeiture,[101] earlier courts clearly took a contrary view in initially allowing forfeiture. One commentator lays the blame on the English courts and the policy determination by Lord Eldon that "time might be made the essence of a contract."[102] To this apparent preclusion of equitable considerations, the commentator contends, opportunistic vendors coupled acceleration, which resulted in vendees' having their real property

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[96]*See* Rotbart and Yas, *supra* note 93.

[97]*See* Appendix A, and *supra* text accompanying note 87.

[98]These concepts include, for example, the maxim "equity abhors a forfeiture," and the idea that damages provided at the inception of a contract, so-called liquidated damages, be reasonably calculated to reflect the damage a party will suffer upon breach.

[99]Nelson & Whitman, *supra* note 22, at 544.

[100]In addition to the previously cited article by Professors Nelson and Whitman, *supra* note 22, at least 36 articles, notes and comments have been published since 1921 which deal in detail with forfeiture. In addition, several of the dominant minds in contract law turned their attention to land contract forfeitures in their treatises. *See, e.g.*, 5 A. Corbin, Corbin on Contracts §§ 1075, 1098-1098A (1964); 5 S. Williston, A Treatise on the Law of Contracts §§ 791-792 (3d ed. 1961).

[101]5 A. Corbin, *supra* note 100, § 1098A, at 537; 5 S. Williston, *supra* note 100, § 792, at 776.

[102]Levin, *Maryland Rule on Forfeiture Under Land Installment Contracts . . . A Suggested Reform*, 9 Md. L. Rev. 99, 108 (1948).

interests and credit for payments made taken from them by their failure to make payments in a timely manner.[103] The result is forfeiture.

Perhaps the clearest explanation that can be made for this rather shocking decision of the equity courts to literally construe contract terms allowing forfeiture, thereby greatly benefiting one party to the severe detriment of another, was offered by Professor Simpson in his article on equitable conversion:[104]

> The doctrine that equity will enforce forteiture provisions in land contracts where time is expressly made of the essence developed in this country during the latter half of the nineteenth century,[305] at a time when extreme ideas as to "freedom of contract" were influencing American judicial decisions in every field.[306] It was a time when equity was decadent,[307] when laissez faire was almost an article of judicial faith,[308] and when the courts were thinking in terms of free-willing individuals entirely able to look after themselves rather than in terms either of classical equity or of a socialized law taking a realistic account of inequalities of economic position and bargaining power. The ecclesiastical chancellor who granted relief to a plaintiff who had not taken care to follow the prescribed rules as to covenants because "Deus est procurator fatuorum,"[309] ["God takes care of fools"] the classical chancellor who created the equity of redemption in the face of the strict law[310] and who said that "necessitous men are not . . . free men,"[311] had given place to judges who regarded individual freedom of contract as fundamental in any civilized system of law and enforced the harshest of contract provisions without hesitation or searching of conscience unless constrained by binding precedent to relieve against them. The court of conscience had become a court strictissimi juris[312] ["Of the strictest law"]. In such an atmosphere, it was easy enough to put aside the tradition that equity would not enforce a forteiture except insofar as

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[103] *Id.*

[104] Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II,* 44 YALE L.J. 754, 776-77 (1935). The footnotes are numbered as in the original text. The Latin translations were added by this author. Following are the footnotes from the original text:

[305] Compare Heckard v. Sayre, 34 Ill. 142 (1864) with Edgerton v. Peckham, 11 Paige 352 (N.Y. 1844)

[306] *See* Pound, *Liberty of Contract* (1909) 18 YALE L.J. 454. Cf. Jennings, *Freedom of Contract-Inquiries and Speculations* (1934) 22 CALIF L. REV. 636.

[307] *See* Pound, *The Decadence of Equity* (1905) 5 COL. L. REV. 20.

[308] *See* note 306, *supra.* Cf. Homes, J., dissenting, in Lochner v. New York, 198 U.S. 45, 75 (1905).

[309] George Neville, Bishop of Exeter, L.C., in Y.B. Pasch, 8 EDW. IV, f., pl. 11 (1467); *see* Vinogradoff, *Reason and Conscience in Sixteenth-Century Jurisprudence* (1908) 24 L.Q. REV. 373, 380.

[310] *See* 5 HODSWORTH, op. cit. *supra* note 298, at 330.

[311] Lord Northington, L.C., in Vernon v. Bethell, 2 Eden 110, 113 (Ch. 1762).

[312] Cp. Buckley, J., in In re Telescriptor Syndicate, Ltd., [1903] 2 Ch. 174; 195: "This Court is not a court of conscience." For a very recent example of this tendency, *see* Graf v. Hope Bldg. Corp., 254 N.Y. 1, 171 N.E. 884 (1930); and cf. the comment on that case in (1930) 79 U. OF PA. L. REV. 229, 231.

that tradition had been embalmed in direct precedents, and to develop a line of decisions holding that contracts for the sale of land which expressly made time of the essence and provided for the forfeiture of all payments theretofore made in the event of default would be enforced according to their literal terms,[313] especially where prompt payment of all installments was made an express "condition precedent" to the purchaser's rights under the contract.

Although Professor Simpson was primarily concerned with the concept that some incident of title is equitably converted to a land contract vendee, his thoughts still include an eloquent explanation and damnation of the forfeiture remedy. Simpson's answer to the problem of forfeiture was quite simple; he believed the only remedy was legislation because the equity courts had failed to do their job.[105]

One can lay blame for enforcement of land contract forfeitures on the courts, as most commentators have,[106] but the scholars cannot escape all blame; it was the scholars who furthered the doctrine of freedom of contract which was the theoretical basis for allowing the forfeiture remedy.[107] The courts may be blamed for failing to use equitable considerations in determining whether to grant forfeiture and rigidly adhering to strict forfeiture. Even if a court denied the vendee any further interest under the defaulted-upon land contract by allowing forfeiture, it was not precluded from using a quasi-contract concept, such as quantum meruit, to give relief to the vendee if the vendor had gained an unfair position through forfeiture.[108] Unfortunately, however, the majority of early courts denied the vendee any relief.[109]

An even more objectionable attitude of some courts toward defaulting vendees was that a vendee in default solely because of his failure to pay was entitled to nothing.[110] The greatest abuse in applying forfeiture in this knee-jerk manner was that many courts granted forfeiture upon any default by a vendee whether or not there was a forfeiture clause in the land contract.[111] This carries freedom of contract so far that it psychologically strips the equity court of its equitable power.

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[313]Some of these decisions have resulted in shocking hardship on the purchaser. *See, e.g.,* Iowa Rr. Land Co. v. Mickel, 41 Iowa 402 (1875); Heckard v. Sayre, 34 Ill. 142 (1864); Nelson Real Estate Agency v. Seeman, 147 Minn. 354, 180 N.W. 227 (1920); Brown v. Ulrich, 48 Neb. 409, 67 N.W. 168 (1896); Doctorman v. Schroeder, 92 N.J. Eq. 676, 114 Atl. 810 (1921).

[105]Simpson, *supra* note 104, at 777.

[106]*E.g.,* OSBORNE, *supra* note 33, § 3.26; S. WILLISTON, *supra* note 100, § 791; Ballantine, *Forfeiture for Breach of Contract,* 5 MINN. L. REV. 329, 345 (1921); Levin, *supra* note 102, at 108; Vanneman, *Strict Foreclosure on Land Contracts,* 14 MINN. L. REV. 342, 345-46 (1930).

[107]Simpson, *supra* note 104, at 776.

[108]Bodenheimer, *Forfeiture Under Real Estate Installment Contracts in Utah,* 3 UTAH L. REV. 30, 32 (1952).

[109]*Id.*

[110]*Id.* at 33.

[111]*Id.*

No matter what theoretical basis is used, forfeiture became the black letter law of land contract defaults during the nineteenth century. Perhaps because of the scholarly objection to forfeiture, or its glaring inequity, the black letter law was quickly eroded by exceptions.

B. *Modern Trends*

In evaluating the current law on land contract defaults, the concept of forfeiture "at best serves as a point of departure."[112] There is no way to point to any consistent trend among the states.[113] "Not only does the law vary from jurisdiction to jurisdiction, but within any one state results may vary depending upon the type of action brought, the exact terms of the land contract, and the facts of the particular case."[114] The trend is away from strict forfeiture, however. The states can be divided into three categories based on their treatment of forfeiture: 1. statutory forfeiture with clear requirements for notice and a period for reinstatement by the vendee; 2. statutory abolition of forfeiture, either express or judicially implied, and treatment of land contracts as mortgages; and 3. equitable judicial action allowing the remedies of reinstatement, vendee's recovery of damages, vendee's redemption, or requiring foreclosure as if a mortgage in appropriate cases.[115]

1. Statutory Forfeiture

One legislative response to the inequity of strict forfeiture is to regulate forfeiture, thereby making the vendor give effective notice to the vendee and giving the vendee the ability to cure a default and reinstate the contract.[116] Professors Nelson and Whitman suggest that the Iowa statute is "the best example of this type of legislation."[117]

Section 656.1 of the Code of Iowa prohibits land contract forfeitures unless there has been compliance with the statutory procedure for notice of the right of reinstatement.[118] Section 656.2 of the Code of Iowa provides, in relevant part:[119]

> Such forfeiture and cancellation shall be initiated by the vendor . . . by serving . . . on the vendee . . . a written notice which shall:
>
> 1. Reasonably identify said contract, and accurately describe the real

[112]Nelson & Whitman, *supra* note 22, at 543.

[113]*Id.*

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

[115]Ohio has chosen to follow none of the three courses completely. By allowing forfeiture after only a 10 day period for reinstatement, and without redemption or vendee recovery of damages, for some land contracts and treating others as mortgages, Ohio has chosen both one of the more restrictive and one of the most liberal views possible, depending on the economics of the transaction. *See* OHIO REV. CODE ANN. § 5313.07 (Page 1981).

[116]Nelson & Whitman, *supra* note 22, at 544.

[117]*Id.*

[118]IOWA CODE ANN. § 656.1 (West 1950).

[119]IOWA CODE ANN. § 656.2 (West 1950 and Supp. 1981-82).

estate covered thereby.

2. Specify the terms and conditions of said contract which have not been complied with.
3. Notify said party that said contract will stand forfeited and canceled unless said party within thirty days . . . performs the terms and conditions in default, and, in addition, pays the reasonable costs of serving the notice.

Several other states have similar statutes in which the reinstatement period varies, with the longest being one year in North Dakota.[120] For example, Ohio appears to have one of the shortest periods for reinstatement; the right of the vendee to reinstate is absolute for thirty days after a default, but thirty days after that default occurs the vendor may send a notice to the vendee which limits the further right to reinstate to ten more days.[121]

The statutory reinstatement period obviously lessens the harshness of strict forfeiture; rather than having the draconian result of "miss a payment, out you go," the vendee is given at least some time to pay what is due and regain good standing to continue with the land contract. On the negative side, Professors Nelson and Whitman contend that courts have allowed statutes to formalize the forfeiture concept with many courts in states with statutory forfeiture appearing constrained from using their equitable powers to lessen the harshness of a better, but still drastic, requirement of "pay up after notice or else."[122]

Interestingly, however, the Supreme Court of Iowa has recently stated that although it will usually enforce forfeiture when the vendor strictly complies with the statute, equitable considerations are still appropriate. In *Jensen v. Schreck,*[123] a case involving a joint venture in which real estate was purchased by land contract, the court, in deciding the case, considered as a factor the amount paid on the contract by the vendee.[124] Although the defendants in the forfeiture action, the Schrecks, made a $1,000 down payment on a $56,000 purchase price and had made $1,914.79 in improvements, the court allowed forfeiture by analogizing the amount retained to liquidated damages and deciding that the amount of "liquidated damages" was reasonable.[125] Although the court did grant forfeiture, the court showed that it recognized its obligation to "do equity" even in the face of a "mandatory" statute.

Another interesting point raised by Professors Nelson and Whitman is that

[120]Nelson & Whitman, *supra* note 22, at 544. Note 8 on p. 544 lists three statutes: MINN. STATE. ANN. § 559.21 (West Supp. 1977) (amended 1980, now in West Supp. 1982), N.D. CENT. CODE §§ 32-18-01 to -06 (1976), and S.D. COMP. LAWS ANN. § 21-50-01 to -07 (1967).

[121]OHIO REV. CODE ANN. §§ 5313.05-.06 (Page 1981).

[122]Nelson & Whitman, *supra* note 22, at 545.

[123]275 N.W.2d 374 (Iowa 1979).

[124]*Id.* at 386-87.

[125]*Id.* at 387. The liquidated damages rationale is clearly fallacious, however, as there has been no effort to approximate the vendor's actual damages. *See* 5 S. WILLISTON, *supra* note 100; Simpson, *supra* note 104, at 775.

these statutory schemes closely resemble strict foreclosure in that the vendee in default is, like the mortgagor in default, given one last chance to save his interest in the property.[126] The difference between the two is that the mortgagor has a right of redemption exercisable by paying the entire outstanding balance on the mortgage, thereby discharging it, where the land contract vendee under these statutes merely has to pay all sums previously not paid and is then able to continue paying future installments on the land contract as they come due.[127] The ability to reinstate appears to give the land contract vendee an advantage the mortgagor does not have until one considers that strict foreclosure is rarely allowed; almost all foreclosures are by sale,[128] public or private. Therefore the more accurate comparison is between the mortgagee who has a right to a neutral sale of the property and the land contract vendee who loses the property along with his payments and improvements.

2. Abolition of Forfeiture

Forfeiture has been abolished in several states, both directly and indirectly. The most direct statute abolishing forfeiture appears to be Oklahoma's:

> 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 regulation, restraints and forms as are prescribed in relation to mortgages. . . .[129]

The statute is even more striking because foreclosure in Oklahoma may only be accomplished by judicial action.[130] Maryland takes the same position as Oklahoma in the sale of residential property by land contract to a noncorporate vendee.[131] In all other cases, common law forfeiture presumably is available in Maryland.[132]

Kentucky and Indiana[133] have taken direct judicial approaches. In *Sebastian v. Floyd,*[134] the Supreme Court of Kentucky ruled that foreclosure of a land contract as if it were a mortgage is a vendor's only remedy upon default by the vendee. While being careful to distinguish the long-term installment con-

[126]Nelson & Whitman, *supra* note 22, at 545.

[127]*Id.*

[128]OSBORNE, *supra* note 33, § 1.4.

[129]OKLA. STATE. ANN. tit. 16 § 11A (West Supp. 1981-82).

[130]OKLA. STATE. ANN. tit. 12, § 686 (West 1960).

[131]MD. REAL PROP. CODE ANN. §§ 10-101 to -108 (1981).

[132]Nelson & Whitman, *supra* note 22, at 546.

[133]Sebastian v. Floyd, 585 S.W.2d 381 (Ky. 1979); Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973).

[134]585 S.W.2d 381, 384 (Ky. 1979).

tract before it from an "executory deposit receipt agreement,"[135] the court stated:

> There is no practical distinction between the land sale contract and a purchase money mortgage, in which the seller conveys legal title to the buyer but retains a lien on the property to secure payment. The significant feature of each device is the seller's financing the buyer's purchase of the property, using the property as collateral for the loan . . .
>
> The modern trend is for courts to treat land sales contracts as analogous to conventional mortgages, thus requiring a seller to seek a judicial sale of the property upon the buyer's default.[136]

Sebastian is now clearly the rule of law in Kentucky.[137]

California, in the inimitable way it has in real estate finance matters,[138] has taken a statute that appears to allow forfeiture in some cases and interpreted it as prohibiting forfeiture.[139] Section 3275 of the California Civil Code provides as follows:

> Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in the case of a grossly negligent, willful, or fraudulent breach of duty.[140]

Despite section 3275, the California courts routinely allowed forfeiture of land contracts until 1949 when the California Supreme Court decided *Barkis v. Scott.*[141] In *Barkis,* a case involving sale of a house, the court concluded that at most the vendee's default was the result of simple negligence, rather than gross negligence, fraud, or willfull act, and the vendee was therefore entitled to avoid forfeiture.[142]

Even when confronted with the "wilfull, but repentant vendee" in *MacFadden v. Walker,*[143] the California Supreme Court still refused to allow forfeiture. The vendee, an older woman, had been in default for over two years but was willing to pay the balance of the purchase price after her vendor sought forfeiture. By tying section 3275 to several other Civil Code sections involving

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[135] *Id.* at 383.

[136] *Id.*

[137] *See* Gamble v. Bryant, 599 S.W.2d 472 (Ky. Ct. App. 1980).

[138] *See generally* Honey v. Henry's Franchise Leasing Corp., 64 Cal. 2d 801, 415 P.2d 833, 52 Cal. Rptr. 18, (1966); Wellenkamp v. Bank of America, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).

[139] Hetland, *The California Land Contract,* 48 CAL. L. REV. 729, 733 (1960); Nelson & Whitman, *supra* note 22, at 553.

[140] CAL. CIV. CODE § 3275 (West 1970).

[141] 34 Cal. 2d 116, 208 P.2d 367 (1949). *See also* Hetland, *supra* note 139, at 732; Nelson & Whitman, *supra* note 22, at 553.

[142] 34 Cal. 2d at 123, 208 P.2d at 372.

[143] 5 Cal. 3d 809, 815, 488 P.2d 1353, 1356, 97 Cal. Rptr. 537, 540 (1971).

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punitive damages,[144] liquidated damages,[145] and prohibition of specific performance of a forfeiture,[146] the court concluded that the only fair result was to grant specific performance to the then willing vendee.[147] In so holding, the court rejected Profesor Hetland's strong plea for mandatory foreclosure[148] and left the question of how it would treat forfeiture, if granted, to its prior jumble of holdings, including its rather oblique reference in *Honey v. Henry's Franchise Leasing Corp.*[149] to foreclosure at the choice of either the vendor or the vendee. California appears to have the most elaborately developed law on the rights of land contract vendees and vendors.[150] Forfeiture can be avoided by a vendee by either paying the amount in default or requesting foreclosure.[151]

3. Equitable Judicial Action

Professors Nelson and Whitman suggest four ways in which courts have acted to avoid or mitigate the harshness of forfeiture: 1) waiver by the vendor; 2) redemption by the vendee; 3) restitution; and 4) foreclosure.[152] These four concepts are obviously not exclusive, and they overlap with the two previously discussed topics, statutory forfeiture and abolition of forfeiture. For example, Iowa, a statutory forfeiture state, has indicated a willingness to allow equitable relief from statutory forfeiture.[153] On the other hand, the Kentucky Supreme Court has abolished forfeiture and imposed foreclosure in all cases without any statutory basis.[154] In both Iowa and Kentucky, then, the point of departure is not common law forfeiture. The difference is that the courts which start with common law forfeiture and take a case by case approach may choose to allow forfeiture, or to deny it because the forfeiture clause is unreasonable or the situation is such that it would be unfair to allow forfeiture.[155]

a.. Waiver

Waiver is perhaps the easiest for a court to find. Few vendors have not accepted at least one, and perhaps many, payments after they were due.[156] Ultimately the vendor tires of the late payments and declares the land contract

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[144]CAL. CIV. CODE § 3294 (West 1970) (current version at CAL. CIV. CODE § 3294 (West Supp. 1982)).

[145]CAL. CIV. CODE §§ 1670-1671 (West 1973) (current version at CAL. CIV. CODE § 1671(b), (d) (West Supp. 1982)).

[146]CAL. CIV. CODE § 3369 (West 1970) (current version at CAL. CIV CODE § 3369 (West Supp. 1982)).

[147]5 Cal. 3d at 815, 488 P.2d at 1357, 97 Cal. Rptr. at 541.

[148]*Id.* at 816, 488 P.2d at 1357, 97 Cal. Rptr. at 541 (citing J. HETLAND, CAL. REAL ESTATE SECURED TRANSACTIONS §§ 3.58-.81 (1970)).

[149]64 Cal. 2d 801, 805, 415 P.2d 833, 835, 52 Cal. Rptr. 18, 20 (1966). *See also* Ward v. Union Bond & Trust Co., 243 F.2d 476 (9th Cir. 1957).

[150]Nelson & Whitman, *supra* note 22, at 559.

[151]OSBORNE, *supra* note 33, § 328, at 95.

[152]Nelson & Whitman, *supra* note 22, at 547-62.

[153]*See supra* text accompanying notes 123-25.

[154]*See supra* text accompanaying notes 133-37.

[155]Nelson & Whitman, *supra* note 22, at 547.

[156]*Id.* at 548.

forfeited. In response to the vendor's suit, or in the vendee's suit for specific performance, the vendee may ask for either reinstatement or specific performance,[157] arguing that the vendor has waived his right to forfeiture by not requiring strict compliance with the land contract.

As might be expected when courts apply equitable principles on a case by case basis, cases involving waiver are difficult to reconcile.[158] Two judges given the same facts will, inevitably, come to different conclusions at least some of the time. Given the wide range of views concerning forfeiture,[159] which increases the likelihood of disagreement, there will be inconsistencies. "In some cases rather innocuous forebearances by vendors have been translated into favorable holdings for purchasers, while in others quite substantial leniency has been unavailing."[160]

Professors Nelson and Whitman[161] refer to an interesting Utah case, *Pacific Dev. Co. v. Stewart,*[162] as an example. During the first two years of a land contract the vendee missed some payments and made others after they were due. The vendor demanded that payments on the contract be made current but also said no forefeiture was then being considered. In the vendor's suit for forfeiture the trial court said that strict performance of the contract had been waived. The Utah Supreme Court, however, granted forfeiture because the vendees had had ample time to bring payments current and "[T]hey had not paid the equivalent of the rental value of the property for the time they occupied it."[163] In effect, although there had been waiver, the vendees had not acted to help themselves. As Professors Nelson and Whitman so charitably put it, "The court may have been confusing the waiver concept with the principle of equitable relief from forfeiture."[164]

b. Redemption and Restitution

Redemption by and restitution to the vendee are truly equitable remedies. With these remedies the courts are directly considering the fairness of forfeiture, while with the concept of waiver they are considering the actions or inactions of the parties apart from the ultimate fairness of forfeiture.

We have already seen the California courts allow redemption in *Barkis*

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[157] *Id.* In using the term "specific performance," one could just as easily use "redemption"; after all, what the vendee wants to do is tender the full contract price in exchange for a deed from the vendor. As Professors Nelson and Whitman correctly point out, however, since the claim for redemption is based on waiver, it is clearly different from the situation where the court *offers* the vendee a redemption period after granting the vendor's forfeiture action. *Id.* at 550.

[158] *Id.* at 549.

[159] *See supra* text accompanying notes 104-11; 133-51.

[160] Nelson & Whitman, *supra* note 22, at 549.

[161] *Id.*

[162] 113 Utah 403, 195 P.2d 748 (1948).

[163] *Id.* at 409, 195 P.2d at 751.

[164] Nelson & Whitman, *supra* note 22, at 550 n.28.

v. Scott[165] and *McFadden v. Walker.*[166] Although those cases were obstensibly based on a statute,[167] one could just as easily base the same conclusions on the legal maxim "equity abhors a forfeiture." It seems logical that, almost regardless of the prior activity of the vendee, if the vendee is now willing to pay to the vendor the balance due on the land contract a court should let him. After all, assuming the vendor has not been damaged in a way which cannot be compensated for monetarily, if the vendee is allowed to pay the parties will each get what they should want; the vendor gets all his money and the vendee gets the property.[168]

Restitution is in a somewhat different position as a remedy in that the vendee sues the vendor. Waiver, redemption, and foreclosure are all logically grouped. Waiver is not inconsistent with forfeiture as it is a contract principle and forfeiture is arguably a freedom of contract concept.[169] Redemption is very close because it literally puts the parties where they had decided they wanted to be.[170] Foreclosure puts control in the vendor, the wronged party, for collection of his money.[171] Restitution does not logically fit, as the vendee is able to obtain damages from the vendor and the parties are not put where they bargained to be. However, some courts that do not allow redemption or foreclosure are allowing resitution suits by vendees.[172]

The problem in restitution suits is how to determine what the vendee's damages are. The courts have suggested several different factors that might affect how much, if any, is awarded to the vendee: the fair rental value of the premises,[173] the amount paid to the vendor,[174] and the change in value of the premises between the inception of the contract and default.[175] Professors Nelson and Whitman also quite correctly suggest that the time value of money should affect the amount of damages; however, apparently no court has adopted their position.[176]

Several states, most notably Utah and Florida, have been concerned with determining "unconscionability" before allowing restitution to the vendee.[177]

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[165]*See supra* text accompanying notes 141-44.

[166]*See supra* text accompanying notes 143-49.

[167]CAL. CIV. CODE § 3275 (West 1970). *See supra* text accompanying notes 138-42.

[168]This view obviously rejects the freedom of contract position and looks at the parties independently. After all, what the vendor should want is his money, and if he gets that plus interest and costs of collection, why should the vendee be punished?

[169]*See supra* text accompanying notes 104-05.

[170]*See supra* text accompanying notes 166-68.

[171]This is an obvious contractual inconsistency because it denies the vendor the right to gain possession of the property for his own use unless he buys it at the foreclosure sale.

[172]Nelson & Whitman, *supra* note 22, at 554.

[173]*Id.* at 555.

[174]*Id.*

[175]*Id.* at 557.

[176]*Id.* at 557, n.61.

[177]*See, e.g.*, Strand v. Mayne, 14 Utah 2d 355, 384 P.2d 396 (1963); Sawyer v. Marco Island Dev. Corp.,

This appears to be irrational, both because requiring unconscionability means that some aspect other than the vendee's damages must be unconscionable for the vendee to collect damages and because the presence of damages means that forfeiture is unconscionable. The first is irrational because the vendee's damages are frequently going to be independent of other terms; in fact, the contract and forfeiture of it may be completely fair in that no equities favor the vendee's claim to the property, but for the vendee's damages. The second is tautological.

Although California courts do not consider unconscionability, they have taken the awarding of vendees' damages to a fine art.[178] In *Honey v. Henry's Franchise Leasing Corp.*,[179] the California Supreme Court held that the vendor could choose between two measures of the vendee's damages: 1) the excess of the vendee's payments on the contract over the fair rental value of the premises during the time the vendee is in possession; or 2) the excess of the vendee's payments on the contract over the difference between the contract price and the value of the premises upon default (assuming a drop in value).[180] The court let the vendor choose because to let the vendee choose would be to convert the land contract into a lease option, something a defaulter should not have the option to do.[181] Either way, the vendee cannot lose because if the property has appreciated in value he can sell it and pay off the vendor,[182] and if he cannot sell the property, he may be able to force a foreclosure no matter what the vendor desires.[183]

Although there is no consistent direction being taken by other states, one comment can be made with certainty: courts are reluctant to enforce forfeitures rigidly. This background should provide a sufficient setting for considering Ohio's approach to forfeiture and the policies favoring and opposing forfeiture.

IV. Ohio Residential Land Contract Law

At the outset it is important to note that Ohio's statutory regulation of land contracts covers only Ohio real property "improved by virtue of a dwelling having been erected on the real property."[184] In addition, from 1969-1980 the statute had the following limiting phrase at the end of it: "where the purchase price does not exceed thirty thousand dollars."[185] This affected not only

301 So. 2d 820 (Fla. App. 1974), *cert. denied,* 312 So. 2d 757 (Fla. 1975). *See also* Nelson & Whitman, *supra* note 22, at 555-56.

[178]It is, however, clearly flawed fine art.

[179]64 Cal. 2d 801, 415 P.2d 833, 52 Cal. Rptr. 18 (1966).

[180]*Id.* at 803, 415 P.2d at 834-35, 52 Cal. Rptr. at 19. Professors Nelson and Whitman argue persuasively that the court incorrectly ignores the true value of money in its calculations. Nelson & Whitman, *supra* note 22, at 557, n.61.

[181]64 Cal. 2d at 804, 415 P.2d at 835, 52 Cal. Rptr. at 20.

[182]*See supra* text accompanying notes 138-50.

[183]64 Cal. 2d at 805, 415 P.2d at 835, 52 Cal. Rptr. at 20.

[184]Ohio Rev. Code Ann. § 5313.01(B) (Page 1981). Suffice it to say that no Ohio case has dealt with this vaguely worded statute. The author assumes that this language was intended to refer to a single-family residence.

[185]1969 Ohio Laws 424, 424-30 (effective Nov. 25, 1969) (current version at Ohio Rev. Code Ann. § 5313.01(B) (Page 1981)).

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remedies but the entire land contract statutory scheme.[186] By a 1980 amendment to the statute which removed the $30,000 limitation,[187] however, Ohio land contracts have been neatly divided; the statute governs all land contracts involving property with a dwelling on it and all other land contracts are governed by case law.

A. *Pre-1969 Residential and Current Non-Residential Land Contract Law*

It is probably fair to say that Ohio's general land contract law looks a good deal like that of other states which do not have statutes; the courts acknowledge forfeiture as a possibility but only rarely strictly enforce forfeiture. This was not always the case.

The courts in several early Ohio cases granted forfeiture to the vendors.[188] In *Rummington v. Kelley*[189] and *Scott v. Fields,*[190] two of the earliest Ohio Supreme Court cases on the question, the default of the vendee in each case was unexplained, but after forfeiture was declared each vendee offered to pay the vendor the full amount due under the contract.[191] Even though the court allowed forfeiture in both cases, the decisions were not as strict as first appears because in each case the vendee was in clear default for a lengthy period of time and either had no equity or the vendor had offered to return at least part of the amount paid by the vendee.

In *Scott,* the vendee was obligated to make a total of four payments, on January 13, March 13, and June 13, 1835, and on January 13, 1836. The first and second payments were timely made, but the vendee did not offer to make the third payment until July 29, 1835, 45 days late. Since the vendor had sold the property to another on July 21, 1835, he declined the offered payment and, on both July 29 and August 1, 1835, he offered to return the second payment to the vendee. The vendee declined, and on the date of the final payment, January 13, 1836, he tendered the third and fourth payments along with interest, which the vendor refused.

The court emphasized the contract aspects of the land contract in rejecting the vendee's request for specific performance: "How, then, can it be said that the complainant is entitled to a specific performance when he has been guilty of a violation of his contract — a contract drawn with the most guarded precision and care, and intended to impose terms upon respondent as well as upon himself?"[192] Despite this seemingly strict approach to forfeiture, it is impossi-

[186] OHIO REV. CODE ANN. § 5313.01 is the definitional section for Chapter 5313.

[187] *See supra* text accompanying notes 13-15.

[188] *See, e.g.,* Campbell v. Hicks, 19 Ohio St. 433 (1869); Kirby v. Harrison, 2 Ohio St. 327 (1853); Rummington v. Kelley, 7 Ohio 97 (1836); Scott v. Fields, 7 Ohio 91 (1836).

[189] 7 Ohio 97 (1836).

[190] 7 Ohio 91 (1836).

[191] Interestingly, in each case the plaintiff was the vendee. It appears that the vendors were satisfied with merely declaring forfeiture and it was the vendees who sued for specific performance.

[192] 7 Ohio at 96.

ble to guess the extent to which the court was influenced by the vendor's fulfillment of all terms of the contract and his offer to return the second payment made by the vendee. The court ended its opinion by juxtaposing strictness and equity:

> On the whole, the conclusion to which we are brought is, that the parties have made time of the essence of this contract that the complainant has violated the agreement by failing to pay the third installment, and the bill is therefore dismissed, but with a decree for the payment back of the second installment, since that also was the stipulation of the parties.[193]

In *Rummington* the purchase price was to be paid in four annual installments, the first being due one year after the inception of the contract; there was no down payment. The vendee failed to make the first payment and the vendor, two or three weeks later, informed the vendee that the contract was forfeited. The vendee tendered the first payment eleven months after it was due, and the vendor refused it. The vendee tendered the entire amount due under the contract four years after the inception of the contract on the date the fourth and final installment was to be due and the vendor refused it. In the interim, the vendee made what he termed "lasting and valuable improvements upon the land."[194]

In deciding the case, the court looked to several facts:[195]

1. The vendee never complied with the contract;
2. The vendor had promptly notified the vendee of forfeiture;
3. The property was vacant land; and
4. The improvements were made after the vendor had declared forfeiture and while the vendor was absent from the area where the property was located.

So again, despite the appearance of strict application of forfeiture, the court was dealing with a vendee it termed "to have been guilty of gross and culpable negligence,"[196] who had never tendered a prompt payment or made improvements while, in the court's mind, in rightful possession, and with a vendor who had received nothing and who had promptly declared a forfeiture. As a sidelight, the court in *Rummington* stated that a land contract was not to be treated as a mortgage,[197] a decision that was echoed in later Ohio land contract cases.[198]

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[193] *Id.* at 96-97.

[194] 7 Ohio at 98.

[195] *Id.* at 103-04.

[196] *Id.* at 104.

[197] *Id.*

[198] Contractors & Bldg. Supply Co. v. Cresap, 9 Ohio App. 73 (Hamilton Co. 1917); Economy Sav. & Loan Co. v. Hollington, 105 Ohio App. 243, 152 N.E.2d 125 (Williams Co. 1957); Woloveck v. Schueler, 19 Ohio App. 210 (Summit Co. 1922).

Before the Ohio Supreme Court again directly addressed the question of land contract forfeitures, the Ohio courts of appeals denied forfeiture in two cases. In the 1919 case of *Curtis v. Factory Site Co.*,[199] one court of appeals found that because the vendor had accepted late payments he had waived the right to forfeiture. In the 1922 case of *Woloveck v. Schueler,*[200] another court of appeals denied forfeiture on the ground that the vendor was unable to convey clear title. The court of appeals in *Woloveck* termed the trial court's order to be "unjust, harsh and oppressive" since the vendees had been given six weeks to pay or have their interest forfeited, even though the vendor had already lost a suit with a third party who had established a "substantial interest in the property."[201] The *Woloveck* court was quite willing to allow foreclosure, however, stating:

> Some courts of equity have held that the provision of forfeiture in land contracts, the relation of the parties being so similar to that of mortgagor and mortgagee, will not be enforced by strict foreclosure, but that in land contracts, as in mortgages, if the defaulting party fails to pay at the time set by the court, instead of cutting off the rights of the vendee under the contract the property will be ordered sold as upon foreclosure.
>
> While it cannot be said that the weight of authority sustains this proposition, we believe it to be equitable and sound.[202]

To this modest beginning the Ohio Supreme Court added one more interpretation before the courts of appeals began actively fashioning the case law which controls nonresidential Ohio land contracts today. The most cited Ohio Supreme Court case in this area is the 1923 case of *Norpac Realty Co. v. Schackne,*[203] where the vendee made a $12,500 down payment on a $50,000 purchase price but failed to make further principal payments required by the contract. The court allowed forfeiture, although it recognized that forfeiture might not always be equitable:

> Cases may arise where equity might intervene, as where the agreed or stipulated damages are used as a guise to cover what would otherwise be a penalty, and the amount agreed upon so unconscionably large that a court of equity would not enforce it. This is not such a case.[204]

The court went on to reject foreclosure as a remedy, saying "This was

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[199] 12 Ohio App. 148, 157 (Cuyahoga Co. 1919). This is a fascinating case involving very questionable activity by The Factory Site Co., whose partners were the late Messrs. Squire, Sanders and Dempsey, the founding partners of the huge multi-office law firm based in Cleveland, Ohio, which still bears their names.

[200] 19 Ohio App. 210 (Summit Co. 1922).

[201] *Id.* at 220.

[202] *Id.* at 223-24.

[203] 107 Ohio St. 425, 140 N.E. 480 (1923).

[204] *Id.* at 429, 140 N.E. at 481.

not the contract nor the intention expressed therein."[205] In justifying the $12,500 down payment as liquidated damages, the court acknowledged that the sum was "large, considered in proportion to the agreed price, but it was not so disproportionate, to extravagantly unreasonable, or so manifestly unjust as to require equitable interference with the contract agreed to. The parties could contract for liquidated damages, as they did. . . ."[206] Despite the vagueness of this language, which has been described as the *Norpac* "qualification test,"[207] many courts of appeals cases, both those that have upheld forfeiture[208] and those that have denied it,[209] have cited *Norpac* for this proposition.

Norpac was, to some extent, the zenith of forfeiture in Ohio because the court clearly allowed for relief from forfeiture only if it would leave an "unconscionably large" amount of money in the vendor's hands along with the return of the property; note, however, that the vendee was unwilling to pay the remaining part of the purchase price. Although after *Norpac* at least one court of appeals was willing to deny a vendee the value of improvements he made in good faith,[210] most appellate courts have granted forfeiture only if the vendee has no equities on his side.[211]

Since *Norpac,* more courts of appeals have denied forfeiture than have allowed it. The courts in several decisions have denied forfeiture on the theory of waiver, usually the vendor's acceptance of late payments, or other acquiescence in untimely performance.[212] For example, in the 1933 case of *Hegg v. Sigle,*[213] where the vendor had long accepted payments irregular both in time and amount, the court of appeals said that the vendor had waived his right to forfeiture. The court of appeals went on to say that the vendor would have had a choice among four remedies if he had acted promptly:

> First, to exercise the right under the special provision of the contract upon the first default to exercise their election to forfeit the same and retain the payments made up to that time as liquidated damages; Second, upon a substantial default rescind the contract upon an offer to restore the consideration already received; Third, to have declared the balance of the

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[205] *Id.*

[206] *Id.* at 430, 140 N.E. at 481.

[207] Note, *Land Contracts in Ohio — The Need for Reform,* 13 W. RES. L. REV. 554, 561 (1962).

[208] *E.g.,* Clukey v. Doro Realty Co., 5 Ohio Law Abs. 260 (App. Lucas Co. 1926); Economy Sav. & Loan Co. v. Hollington, 105 Ohio App. 243, 152 N.E.2d 125 (Williams Co. 1957); Miami Inv. Corp. v. Baker, 109 Ohio App. 334, 165 N.E.2d 690 (Montgomery Co. 1959).

[209] *E.g.,* Ardolino v. Baumann, 3 Ohio Law Abs. 374 (App. Lucas Co. 1925).

[210] McGriff v. Hays, 29 Ohio Law Abs. 534 (App. Montgomery Co. 1939).

[211] *See, e.g.,* Clukey v. Doro Realty Co.,5 Ohio Law Abs. (App. Lucas Co. 1926); Almira v. Geren, 29 Ohio Law Abs. 570 (App. Franklin Co. 1939); Economy Sav. & Loan Co. v. Hollington, 105 Ohio App. 243, 152 N.E.2d 125 (Williams Co. 1957); Miami Inv. Corp. v. Baker, 109 Ohio App. 334, 165 N.E.2d 690 (Montgomery Co. 1959).

[212] *E.g.,* Hegg v. Sigle, 14 Ohio Law Abs. 456 (App. Mahoning Co. 1933); Cleland v. Cleland, 152 N.E.2d 914 (C.P. Meigs Co. 1958).

[213] 14 Ohio Law Abs. 456, 458 (App. Mahoning Co. 1933).

contract price due and payable and obtained a personal judgment therefore; Fourth, they might have foreclosed their contract upon obtaining a personal judgment.[214]

While it is humorous to note that the court of appeals in *Hegg* recommends forfeiture upon the first default, but rescission, a much more equitable remedy in that the vendee at least gets his money back, only upon a substantial default, it is important to note two points. First, the court acknowledges the forfeiture remedy but does not mention that it would be limited by the *Norpac* "qualification test." Second, although other courts have rejected the analogy of land contracts to mortgages,[215] the fourth remedy suggested by the court is foreclosure after obtaining a personal judgment, which is much like foreclosure of a mortgage. This 1933 court of appeals, then, acknowledges foreclosure, a remedy previously rejected, and its reference to forfeiture must be tempered by the Ohio Supreme Court's decision in *Norpac.*

Several courts of appeals have denied forfeiture in cases where the vendee was willing and able to pay the entire amount due,[216] and one court has allowed the vendee to pay all past due installments and continue paying on the contract.[217] In each of these cases the courts of appeals appear to be of the opinion that the vendee's interest is too great to be forfeited since the vendee had paid a great deal of the purchase price at the time forfeiture was asserted by the vendor. In the 1963 case of *Blenheim Homes, Inc. v. Matthews,*[218] the court of appeals made it clear that it thought a land conract should be treated as a mortgage. The court of appeals termed its allowing the vendee to tender back payments and be reinstated "redemption,"[219] yet another mortgage law term.

With a paucity of recent cases, *Blenheim* being the most recent, it appears that Ohio's land contract case law is fairly progressive. Forfeiture appears to be appropriate only upon a showing that the vendee has paid little or nothing,[220] has little excuse for not paying,[221] or is unwilling or unable to pay[222] and that the vendor has faithfully complied with the contract[223] and consistently insisted that the vendee comply with the contract.[224] As long as the vendee can raise

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[214] *Id.*

[215] *See supra* note 198 and accompanying text.

[216] Ardolino v. Baumann, 3 Ohio Law Abs. 374 (App. Lucas Co. 1925); Morris v. George C. Banning, Inc. 77 N.E.2d 372 (Ohio Ct. App. 1947); Dependabilt Homes, Inc. v. White, 117 N.E.2d 706 (Ohio Ct. App. 1951).

[217] Blenheim Homes, Inc. v. Matthews, 119 Ohio App. 44, 196 N.E.2d 612 (Franklin Co. 1963).

[218] *Id.* at 48, 196 N.E.2d at 615.

[219] *Id.* at 49, 196 N.E.2d at 615.

[220] *See supra* text accompanying notes 188-97; 203-11.

[221] *See supra* text accompanying notes 188-97; 203-11.

[222] *See supra* text accompanying notes 188-97; 203-11.

[223] *See supra* text accompanying notes 200-02.

[224] *See supra* text accompanying notes 199; 212-15.

some equity on his side, especially if he is willing to tender full performance, it appears he can avoid forfeiture. It is interesting to note, however, that the current practitioner-oriented literature is remarkably vague and contradictory with respect to land contract remedies.[225] With this perspective, the Ohio land contract statute becomes even more curious.

B. *Post-1969 Residential Land Contracts*

The Act was apparently intended to reform and make more equitable Ohio's treatment of residential land contracts. One commentator has stated that the Act was enacted by a "consumer oriented" legislature which was "passing laws to protect those who do not have enough bargaining power to protect themselves."[226] The commentator further characterized the Act as seeking "to prevent the land contract Vendor from taking undue advantage of the typical impecunious, unadvised Vendee."[227] Thus the Ohio Legislature appeared to be attempting to protect low-income vendees from their vendors or at least clarifying their respective rights upon the vendee's default.[228] Although the rights of the parties to land contracts covered by the Act may have been clarified, it is questionable that vendees were protected from their vendors.

In analyzing the Act, the best point of departure is the definitional section which establishes which land contracts the Act covers. The original section 5313.01(B) of the Ohio Revised Code provided: " 'Property' means real property located in this state improved by virtue of a dwelling having been erected on the real property where the purchase price does not exceed thirty thousand dollars."[229] As originally passed, then, the Act only affected land contracts on what were probably even then middle-priced and below single-family homes, with no requirement that the vendee occupy the home.[230] The Legislature changed this by deleting the $30,000 limitation in 1980, thus leaving the Act controlling all land contracts on single-family homes,[231] still, however, regardless of whether they were owner-occupied.

In addition to setting forth the required contents of land contracts[232] and requiring recordation,[233] the Act strictly regulates vendees' and vendors' remedies

[225]Compare 54 O.JUR. 2d *Vendor and Purchaser* §§ 130-138.1 (1962 & Supp. 1982), which seems to say obtaining forfeiture will pose no problem, with 3 WEST'S OHIO PRACTICE §§ 910-44 (1964 & Supp. 1980) and 2 COUSE'S OHIO FORM BOOK 848 (1960 & Supp. 1982), which raise problems, and with MCDERMOTT'S HANDBOOK OF OHIO REAL ESTATE LAW § 29.3 (1972); 3 OHIO REAL PROPERTY LAW AND PRACTICE §§ 28-111 (Supp. 1980), which do not comment at all.

[226]Smith, *Land Installment Contracts (An Analysis of the 1969 Act)*, Ohio State Bar Association Service Letter 1, 1 (Dec. 1969).

[227]*Id.*

[228]*Id.*

[229]1969 Ohio Laws 424, 424-30 (effective Nov. 25, 1969) (current version at OHIO REV. CODE ANN. § 5313.01(B) (Page 1981)).

[230]Smith, *supra* note 226, at 2.

[231]OHIO REV. CODE ANN. § 5313.01(B) (Page 1981).

[232]OHIO REV. CODE ANN. § 5313.02(A) (Page 1981).

[233]OHIO REV. CODE ANN. § 5313.02(C) (Page 1981).

upon breach by the other.[234] The important provisions, of course, are those establishing a vendor's remedies upon breach by the vendee.

In order to being an action for forfeiture or foreclosure on a land contract covered by the Act, a vendor must first allow thirty days to pass after any default by the vendee.[235] During that thirty-day period a vendee may reinstate the contract:

> A vendee in default may, prior to the expiration of the thirty-day period, avoid the forfeiture of his interest under the contract by making all payments currently due under the contract and by paying any fees or charges for which he is liable under the contract. If such payments are made within the thirty-day period, forfeiture of the interest of the vendee shall not be enforced.[236]

This section appears to allow reinstatement, that is, "all payments currently due under the contract" should not be interpreted as providing for operation of an acceleration clause making the entire balance under the land contract immediately due. If one were so to interpret it, section 5313.06, which provides for notice by the vendor and a ten-day waiting period, would be superfluous.

Section 5313.06 of the Ohio Revised Code provides in relevant part:

> Following expiration of the period of time provided in section 5313.05 of the Revised Code, forfeiture of the interst of vendee in default under a land installment contract shall be initiated by the vendor or by his successor in interest, by serving or causing to be served on the vendee or his successor in interest, if known to the vendor or his successor in interest, a written notice which:
>
> (A) Reasonably identifies the contract and describes the property covered by it;
>
> (B) Specifies the terms and conditions of the contract which have not been complied with;
>
> (C) Notifies the vendee that the contract will stand forfeited unless the vendee performs the terms and conditions of the contract within ten days of the completed service of notice and notifies the vendee to leave the premises. . . .[237]

Again, this appears to be a period in which the vendee may reinstate the contract. If not, the language of subsection (B), "Specifies the terms and conditions of the contract which have not been complied with," would be largely superfluous if the terms and conditions were the accelerated entire balance due under the land contract. Note, also, that the notification of "forfeiture" referred

[234] OHIO REV. CODE ANN. §§ 5313.04-.10 (Page 1981).

[235] OHIO REV. CODE ANN. § 5313.05 (Page 1981).

[236] *Id.*

[237] OHIO REV. CODE ANN. § 5313.06 (Page 1981).

to in section 5313.06 is misleading; section 5313.07, the foreclosure section, refers to both section 5313.05 and section 5313.06 for the procedure that must be followed in instituting a foreclosure action.[238]

If a residential land contract has not been in effect five years of more,[239] and less than 20% of the purchase price has been paid,[240] then Section 5313.08 controls. Section 5313.08 provides in relevant part:

> If the contract has been in effect for less than five years, in addition to any other remedies provided by law and after the expiration of the periods prescribed by sections 5313.05 and 5313.06 of the Revised Code, if the vendee is still in default of any payment the vendor may bring an action for forfeiture of the vendee's rights in the land installment contract and for restitution of his property under Chapter 1923. of the Revised Code. . . .[241]

Chapter 1923. of the Ohio Revised Code gives Ohio courts the authority to declare forfeiture. Section 1923.02 states in relevant part:

> (A) Proceedings under Chapter 1923. of the Revised Code, may be had:
>
> . . . .
>
> (7) In cases arising out of Chapter 5313. of the Revised Code. In such cases the court shall have the authority to declare a forfeiture of the vendee's rights under a land installment contract and to grant any other claims arising out of the contract. . . .[242]

Section 1923.02(A)(7) should be read in conjunction with section 1923.09. Section 1923.09 provides in relevant part: "If he [the county court judge] finds the complaint true, he shall render a general judgment against the defendant [vendee] in favor of the plaintiff [vendor], for restitution of the premises and costs of suit."[243]

When one couples section 1923.02 with section 1923.09, one of two conclusions has to be reached: either a trial court must declare a forfeiture when properly requested, a conclusion which results from a literal reading of the statutes, or the statutes strongly favor declaration of forfeiture when the statutory procedure is followed, a conclusion which allows the court to con-

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[238]OHIO REV. CODE ANN. § 5313.07 (Page 1981).

[239]OHIO REV. CODE ANN. § 5313.08 (Page 1981).

[240]There is a conflict between § 5313.07 and § 5313.08. Section 5313.07 requires foreclosure if the land contract has been in effect at least five years or 20% or more of the purchase price has been paid, while § 5313.08 allows forfeiture if the land contract has been in effect less than five years. No commentator or court has discussed this conflict, perhaps because the answer is readily apparent. First, § 5313.07 is mandatory and § 5313.08 is permissive; the mandatory must control. Second, if § 5313.08 controlled, the entire reference to land contracts on which 20% or more of the purchase price has been paid is meaningless; the legislature would not have included a meaningless reference in two simultaneously passed code sections.

[241]OHIO REV. CODE ANN. § 5313.08 (Page 1981).

[242]OHIO REV. CODE ANN. § 1923.02(A)(7) (Page 1983).

[243]OHIO REV. CODE ANN. § 1923.09 (Page 1983).

sider equity. As Professors Nelson and Whitman have stated in referring generally to forfeiture statutes: "[T]o some degree these statutes have institutionalized or formalized the forfeiture concept and, in so doing, may have tended to discourage judicial interference in those situations where the vendor complies with the statutory forfeiture method."[244] That is exactly what the Ohio statutory procedure has done.

Since the Act's passage in 1969, the Ohio Supreme Court has not decided a statutory land contract case and only four published Ohio Courts of Appeals cases have cited it.[245] Even more importantly, only one of the courts of appeals cases has even dealt with the question of statutory forfeiture, the 1980 case of *Marvin v. Stemen.*[246] In *Marvin,* the court of appeals concluded that even after forfeiture had been granted under section 5313.08 through the procedure in Chapter 1923, the vendor could bring another action for damages under section 5313.10.[247] Therefore, in the only case on statutory forfeiture the court of appeals accepted rigid forfeiture and let the vendor bring a separate action for damages, hardly a result evidencing equitable considerations by the court.

Section 5313.07 requires a vendee's interest in a residential land contract to be foreclosed if 20% or more of the purchase price has been paid or if the land contract has been in effect five years or more.[248] Section 5313.07 provides in relevant part:

> If the vendee of a land installment contract has paid in accordance with the terms of the contract for a period of five years or more from the date of the first payment or has paid toward the purchase price a total sum equal to or in excess to twenty percent thereof, the vendor may recover possession of his property only by use of a proceeding for foreclosure and judicial sale of the foreclosed property. . . In such an action, as between the vendor and vendee, the vendor shall be entitled to proceeds of the sale up to and including the unpaid balance due on the land installment contract. . .
>
> Chapter 5313. of the Revised Code does not prevent the vendor or vendee of a land installment contract from commencing a quiet title action to establish the validity of his claim to the property conveyed under a land installment contract nor from bringing an action for unpaid installments. . . .[249]

[244]Nelson & Whitman, *supra* note 22, at 545 (citing Note, *Forfeiture and the Iowa Installment Land Contract,* 46 IOWA L. REV. 786, 797 (1961)).

[245]Marvin v. Stemen, 68 Ohio App. 2d 26, 426 N.E.2d 205 (Lucas Co. 1980); Stratton v. Robey, 70 Ohio App. 2d 4, 433 N.E.2d 938 (Franklin Co. 1980); Stowers v. Baron, 65 Ohio App. 2d 283, 418 N.E.2d 404 (Lucas Co. 1979); Garl v. Mihuta, 50 Ohio App. 2d 142, 361 N.E.2d 1065 (Lorain Co. 1975).

[246]68 Ohio App. 2d 26, 426 N.E.2d 205 (1980).

[247]*Id.* at 29, 426 N.E.2d at 207. Section 5313.10 (Page 1981) allows the vendor to recover damages equal to the difference between the amount paid by the vendee and the fair rental value, plus an amount for deterioration or destruction caused by the vendee's use of the premises. *See infra* text accompanying notes 255-56.

[248]OHIO REV. CODE ANN. § 5313.07 (Page 1981).

[249]*Id.*

Although section 5313.07 prohibits forfeiture, the vendor still has other options.[250] First, the vendor may bring an action to interpret the contract, if there is any dispute over the interests created and retained under the contract, by bringing a quiet title action.[251] Second, the vendor may bring an action for the past due installments.[252] It appears to be possible also to use the statute's language as the basis for a suit for specific performance by the vendee if the land contract contains an acceleration clause and the vendor has declared the contract to be accelerated.[253]

Third, the vendor would be able to seek damages, during or after[254] a foreclosure action, or, for that matter, a forfeiture action, under section 5313.10, which states:

> The election of the vendor to terminate the land installment contract by an action under section 5313.07 or 5313.08 of the Revised Code is an exclusive remedy which bars further action on the contract unless the vendee has paid an amount less than the fair rental value plus deterioration or destruction of the property occasioned by the vendee's use. In such a case the vendor may recover the difference between the amount paid by the vendee on the contract and the fair rental value of the property plus an amount for the deterioration or destruction of the property occasioned by the vendee's use.[255]

Although such an action for damages is dissimilar to a deficiency action as part of foreclosure of a mortgage,[256] it does give the vendor the opportunity to collect some damages. Further, it gives the vendor some leverage in negotiating with the vendee before filing a foreclosure action since it gives the vendor some claim to damages beyond the forfeiture or foreclosure, although the language of sections 5313.07 and 5313.08, coupled with the language of section 5313.10, prohibits a true deficiency action or any action following forfeiture other than an action pursuant to section 5313.10. The probable reason for prohibiting any other actions is that since Ohio limits deficiencies upon mortgage foreclosure of residences,[257] this provision in the Act merely serves as an incentive for the vendor at a foreclosure sales to bid until the bidding level reaches the amount owed. Either he will get his money if someone else bids the amount owed, or if he bids the amount owed he will get the house back. He has no reason to let another buy the house for less than the amount owed; if he does he will

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[250] "[T]he vendor may *recover possession* of his property only by use of a proceeding for foreclosure. . ." *Id.* (emphasis added)

[251] *Id.*

[252] *Id.*

[253] This would be consistent with non-statutory Ohio land contract law.

[254] *See supra* note 5.

[255] OHIO REV. CODE ANN. § 5313.10 (Page 1981).

[256] Deficiency judgments upon foreclosure of owner-occupiers of one- or two-family dwellings are restricted in Ohio. *See* OHIO REV. CODE ANN. § 2329.08 (Page 1981).

[257] *Id.*

not get the house and will only get part of the money owed by the vendee. Section 5313.10 may be an incentive for forfeiture, if available, however. It severely limits a vendor's recovery beyond foreclosure. Thus, getting the house through forfeiture may be the best remedy.

As has already been indicated, however, for those residential land contracts for which foreclosure is not required an action for forfeiture is not required but is allowed.[258] Therefore, it appears that a vendor can also choose among the other remedies traditionally allowed by Ohio courts, rescission, suit for money, and foreclosure,[259] since section 5313.08 forfeiture is permissible and no statutory direction is given as to other available remedies. Section 5313.10 only limits a vendor's remedies if section 5313.07 foreclosure or section 5313.08 forfeiture is pursued.[260]

The more troubling problem is to decide what will happen when the vendor does choose forfeiture as his remedy. If we accept the view that Ohio courts will interpret section 5313.08, when coupled with Chapter 1923, either to require granting forfeiture when requested or to raise a very strong presumption in favor of the forfeiture remedy,[261] then it is likely that a court will grant forfeiture as a matter of law rather than exercise its equitable jurisdiction and consider factors normally used by Ohio courts in non-statutory forfeiture cases such as waiver, the amount paid by the vendee, and the willingness of the vendee to tender the total balance due under the land contract.[262] Forfeiture is, then, truly a cold, pro-vendor remedy which may be used when there has been default even though the equities favor allowing the vendee to reinstate or tender full payment. Unlike defaults on land contracts not covered by the Act, where Ohio courts have clearly been inclined to give vendees equitable relief, the vendee subject to statutory forfeiture may find himself faced with a judge who either feels constrained by the statute from granting equitable relief or takes comfort in the simplicity of the statute and ignores the possibility of equitable action.

This is even more troubling when considered in light of the study on Ohio land contracts previously discussed.[263] As the study demonstrated, there are many land contracts for substantial amounts and short terms which fall outside of the foreclosure requirement of section 5313.07; the danger of forfeiture is neither remote nor limited to low-income transactions. There is a clear need, therefore, either to amend the Act and make it reflect current realities or for

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[258]OHIO REV. CODE ANN. § 5313.08 (Page 1981) states that "the vendor may bring an action for forfeiture . . ." and that "the court may also grant any other claim arising out of the contract." See also *supra* note 240 for a discussion of the effects of the permissive rather than mandatory language of § 5313.08.

[259]*See supra* text accompanying notes 213-15.

[260]OHIO REV. CODE ANN. § 5313.10 (Page 1981).

[261]*See supra* text accompanying notes 241-44.

[262]*See supra* text accompanying notes 188-225.

[263]*See supra* text accompanying notes 77-96.

judges to actively use their inherent equitable powers when dealing with sections 5313.08 forfeitures.

V. PROPOSAL

A. *Considerations*

The current rationale for land contracts is quite straightforward. 1) Sellers need to enter into land contracts and will enter into land contracts only if they can obtain forfeiture upon default by the buyer; and 2) Forfeiture is justifiable because of the increased risk inherent in a land contract as most land contract vendees are low-income persons or "high-risk" persons who cannot, for various reasons, obtain commercial financing. Another rationale, now thoroughly discredited, is that forfeiture is merely recognizing that time is of the essence in land contracts and then allowing the remedy of restitution of the premises to the vendor and treating the vendee's payments to the vendor as liquidated damages. Interestingly, however, "time is of the essence" did drop up in a few twentieth century Ohio land contract cases as the basis for deciding whether to allow forfeiture.[264] To determine how defaults by land contract vendees should be treated, it is not necessary to deal with the "time is of the essence" rationale but it is necessary to know whether the current rationale has merit.

The first part of the rationale, that sellers need to enter into land contracts and will enter into land contracts only if they can obtain forfeiture, is fallacious for several reasons. First, as has been already pointed out, a seller, with rare exception, needs to sell property.[265] The "need" may arise because the seller no longer needs the property, cannot afford to keep the property, desires to make a profit, desires to avoid a loss, or for many other reasons. Suffice it to say, regardless of whether the sale is by absolute deed, with or without a mortgage being taken back by the seller, or by land contract, in most situations a seller will sell, even though some sales may be on less economically advantageous terms than others.

Second, even if we want to encourage sellers by allowing buyers to buy without resort to commercial moneylenders or by giving the buyer a "good deal" on the terms of a loan, land contracts still are not necessary. A wrap-around mortgage performs exactly the same function as a land contract, with the obvious differences being that in the case of the wrap-around mortgage, the buyer gets a deed and the seller's only recourse upon default is traditional foreclosure.[266] All the economic desires of the seller and buyer are fulfilled; the only "loss" to the seller is the forfeiture remedy.[267]

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[264] *See, e.g.*, Norpac Realty Co. v. Schackne, 107 Ohio St. 425, 140 N.E. 480 (1923).

[265] *See supra* text accompanying notes 65-74.

[266] *See supra* note 43.

[267] Since Ohio requires land contracts covered by Chapter 5313 to be recorded, OHIO REV. CODE ANN. § 5313.02 (Page 1981), the effect is identical except for the forfeiture remedy.

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Third, it makes no difference whether one reasons that forfeiture is allowed so that sellers will use land contracts, or that sellers use land contracts because they can get forfeiture. The basis for deciding whether to allow forfeiture must be free from the idea that land contracts have a function, economic or otherwise; it must be founded on whether forfeiture has a function that outweighs its negatives.

One can also rebut the second posited rationale that forfeiture is desirable because of the increased risk inherent in land contracts because of the nature of the vendee. In fact there may be no increased risk. The low down payment made by a low-income person may be as great or greater in relation to his income and net worth as a 20% or greater down payment made by a wealthier person is to his income and net worth. A low-income person's interest to him is as worth protecting as is a wealthier person's interest to him. This argument is quite strong as long as the vendee has *some* interest in the property; either he has made not insubstantial payments or the property has appreciated during the term of his ownership. The fact that the interest of the vendee is trivial to the vendor begs the question because it almost always will be. For example, to a commercial mortgagee the typical mortgagor's interest is trivial. If we take the commercial mortgagee's position in deciding what remedies he might have upon the mortgagor's default, a strong case could be made for strict foreclosure in almost all defaults on mortgages on single-family homes.

In addition, the vendor who must foreclose is not hurt by having to foreclose. He has contracted to sell his property for a sum certain and has received some amount toward that sum.[268] Upon the vendee's default having to foreclose merely means either that the vendor will get his money, if a third party bids at least what is owed to the vendor, or that he will be forced to credit-bid the amount of his lien, thereby buying the property for the amount owed to him and retaining all payments made by the vendee. The end result is the same to the vendor, but there is a great benefit to the vendee in having the value of the property "tested" at a public sale; if it is sold for more than is owed to the vendor, the vendor gets his money and the vendee gets the remainder. Especially since Ohio's foreclosure law does not allow post-foreclosure sale redemption,[269] foreclosure is no more fraught with risk than the forfeiture procedure. The only significant loss to the vendor who is forced to foreclose is time. It is somewhat quicker to obtain forfeiture,[270] if it is granted, than to bring a suit for foreclosure, have the property appraised, and cause it to be sold.

Lastly, and perhaps most importantly, to emphasize the low income trans-

[268]He has received the down payment, if any, and any payments made before default.

[269]OHIO REV. CODE ANN. § 2329.17 (Page 1981) (appraisal); OHIO REV. CODE ANN. § 2329.20 (Page 1981) (sale).

[270]Forfeiture requires bringing an action and obtaining a judgment pursuant to OHIO REV. CODE ANN. § 5313.08 (Page 1981).

action is to risk ignoring the fact that most Ohio land contract transactions are *not* low income.[271] It is fair to assume that few, if any, vendees expect to default. Furthermore, few would argue that the $6,440 down payment which the typical Montgomery County land contract vendee would have made in 1981 on his $46,000 house is trivial, and certainly the much larger interests of most of the vendees who were above the median are not trivial, yet those interests would be subject to forfeiture even if the vendee's default were due to causes beyond his control.[272] The sword of forfeiture is clearly too mightly in such a case.

This is not to say, however, that forfeiture has no place and must be abolished. Equally obvious as the unfairness of forfeiture in the typical 1981 Montgomery County land contract is the absurdity of forcing a vendor to bring a foreclosure action and have the property appraised and sold when the vendee has no equity in the property.[273] Forfeiture is an appropriate remedy when the defaulting vendee has no interest in the property because the vendor is able to quickly regain the property; in effect the vendor will obtain this possession of the property with either forfeiture or foreclosure. The response, of course, can be that it is impossible to predict when the vendee will have no equity in the property and that the burden is more fairly placed on the vendor in requiring foreclosure. This is not to say that foreclosure is the perfect remedy, because it may be possible to put the burden on the vendor, allow forfeiture, and be fair to the vendee.

Lack of fairness is the problem with the current Ohio statute. As suggested before, perhaps the proponents of the Act thought it was fair when it was originally passed and was limited to properties sold for less than $30,000; the argument would have been that equities below $6,000 were not worth protecting.[274] Even accepting that view, the $30,000 limitation was unfair because it did not take into consideration increases in the value of the property by inflation and improvement. By removing the $30,000 limitation in 1980, the Ohio Legislature has left the Act an anomaly, a reform statute which does not reform but makes matters worse by serving as a basis for forfeiture without equitable consideration.[275] The problems occur in applying the Act as written. Therefore, the solution can either be remedial action by the Legislature or equitable action by the courts.

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[271] *See supra* text accompanying notes 78-81.

[272] In the "typical" case, the contract would not have been in existence for five years and the $6,440 down payment is 14% of the $46,000 purchase price. Therefore, under OHIO REV. CODE ANN. §§ 5313.07-.08 (Page 1981), forfeiture is permissible. For the data supporting the 14% and the $46,000 figures, *see supra* text acompanying notes 78-81 and 85-87.

[273] The vendee has no equity in the property when the property is worth an amount equal to or less than the amount owed under the land contract.

[274] $6,000 is 20% of $30,000, the lowest limit for required foreclosure under OHIO REV. CODE ANN. § 5313.07.

[275] *See supra* text accompanying notes 226-28.

B. Legislative Proposals

There are several options available to the Ohio legislature in dealing with the Act. First, most obviously, it could do nothing, happy either to allow the statute to operate as written or to sit back and hope that Ohio's trial and appellate courts will apply the statute with a strong dose of equity. Neither of these options should be particularly palatable to the Legislature.

The legislature should reject application of the statute as written. In 1969 the legislature intended to reform land contract law in Ohio and make it more certain.[276] The 1980 amendment which removed the $30,000 limitation was yet another reform bill, designed to extend the benefits of the Act, and especially the foreclosure requirement of section 5313.07, to all Ohio residential land contract vendees. Both bills did reform land contract law as it applied to some land contracts. Unfortunately the bills also caused land contract law as to other land contracts to worsen with the apparent reinstatement of strict forfeiture.[277] If the interests for which forfeiture was reinstated were trivial, the "reform" might be palatable; as a consequence, however, even significant interests are now subject to forfeiture.[278]

The legislature should also reject sitting back and allowing the courts time to introduce equity into the statutory scheme. Appellate court-made law is inherently uneven; different courts will decide similar cases differently and rarely does a case present enough issues to allow a court to interpret and interrelate an entire statutory scheme. In addition, many cases will be decided at the trial level without benefit of appellate court interpretation; certainly the paucity of cases since 1969 deciding substantive issues under the Act indicates either that few cases have been appealed and resulted in published opinions or that the appellate courts do not consider the issues significant enough to warrant published opinions.[279] Perhaps the best reason for rejecting reliance on equitable judicial action is the significant mistrust most legislators have for appellate court judges, especially ones who "make law."

If the legislature chooses to act, the simplest reform would be to abolish forfeiture.[280] This is the method that the Oklahoma legislature chose and which the Kentucky Supreme Court has chosen for Ohio's southern neighbor.[281] This change could be made simply by repealing section 5313.08 deleting the reference to section 5313.08 in section 5313.10, changing all references to "forfeiture"

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[276] *See supra* text accompanying notes 226-28.

[277] *See supra* text accompanying notes 248-62.

[278] *See supra* text accompanying notes 78-87.

[279] *See* Black, *Hide and Seek Precedent: Phantom Opinions in Ohio,* 50 U. CIN. L. REV. 477 (1981); Black, *Unveiling Ohio's Hidden Court,* 16 AKRON L. REV. 107 (1982).

[280] Obviously, another simple act would be to repeal Chapter 5313 and leave land contracts to case law. It is unlikely, however, for the reasons stated concerning judicial interpretation, that once the legislature has spoken it will consciously allow the subject matter to revert back to the appellate courts.

[281] *See supra* text accompanying notes 129-37.

in sections 5313.05 and 5313.06 to "foreclosure," and amending section 5313.07 to cover all residential land contracts.[282] With this new structure, foreclosure would be the only way that a vendor could regain possession of the property, and land contracts would *de facto* have been converted to mortgages.[283] This would solve the problem of the inequitable distinction currently drawn in sections 5313.07 and 5313.08. It would be fair to vendees, but it would not be fair to vendors in cases in which the vendee has little or no equity.[284]

If the legislature decides to keep the forfeiture-foreclosure split, the question will be how to divide on a basis more equitable than now exists those cases where forfeiture would be allowed from those where foreclosure would be required. The current criteria for dividing contracts required to be foreclosed from those which may be forfeited do not accomplish the purpose of protecting valuable interests. The author therefore proposes four major revisions to the Act: 1) The exclusion, as a factor, of the length of time the contract has been in effect. 2) The reduction of the percentage to 5% for requiring foreclosure with that percentage being based on "true equity" rather than on the amount paid on the purchase price. 3) The requirement for an appraisal to establish the current property value and the vendee's "true equity." 4) The inclusion of an express authorization to trial judges to order foreclosure in any case where equity dictates, even though the statute technically allows forfeiture.

First, any qualifying period for requiring foreclosure should be abolished. The five-year limitation in section 5313.07 is nonsensical; a contract could be in effect for a five year period in which the value of the property, and hence the vendee's equity, dropped or it could be in effect for a two year period where values increased by 10% or more per year.[285] The length of time the land contract has been in effect may affect the sentimental interest of the vendee in his house. However, the interests being protected are inherently economic; time does not necessarily strengthen economic interests.

The second revision, lowering the percentage for required foreclosure to a 5% "true equity,"[286] also should make the statute much more fair. The cur-

[282]Section 5313.07 would then read:

> The vendor of a land installment contract may recover possession of his property only by use of a proceeding for foreclosure and judicial sale of the foreclosed property as provided in section 2323.07 of the Revised Code, and only after expiration of the periods of time prescribed by sections 5313.05 and 5313.06 of the Revised Code. In such an action, the vendor shall be entitled to the proceeds of the sale up to and including the unpaid balance due on the land installment contract.

The second and third paragraphs of current § 5313.07 should then be made the new § 5313.08.

[283]The only differences, of course, are that the vendor would still have legal title and the vendor would be unable to obtain a deficiency judgment, as § 5313.10 would still limit a vendor to damages only if the vendee had paid on the contract less than the fair rental value of the property during the vendee's possession plus any deterioration or destruction of the property caused by the vendee. *See* OHIO REV. CODE ANN. § 5313.10 (Page 1981).

[284]*See supra* text accompanying note 273.

[285]Real estate prices have fallen during many periods in the twentieth century and certainly the late 1970's showed the possibility for rapid increases.

[286]*See infra* text accompanying notes 290-91.

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rent 20% limitation is just too high. Even putting aside the argument that whether an interest is worth protecting should be determined in relation to the vendee and not the vendor of the value of the land,[287] 20% of the median 1981 land contract sales price, $46,000, is still $9,200. A $9,000 down payment is too much to allow to be forfeited, particularly in relation to what that $9,000 means to the typical buyer of a $46,000 house.

The problem is that *any* percentage may be unfair in some situations. Consider the highest sales price uncovered by the study, $500,000. Even 1% would be $5,000, an interest one may feel uncomfortable in allowing to be forfeited. This argument can be rebutted, of course, because even if foreclosure is required, that 1% interest will most likely not be protected; most foreclosure sales are made to mortgagees who bid no more than what they are owed.[288]

Other percentages could be justified, but 5% seems to treat both sides fairly by letting vendors declare forfeiture in cases where the cost of foreclosure and sale and the inevitable lower price a foreclosure sale brings would surely exceed the vendee's equity. There is a fairly large number of cases where the vendee's equity is less than 5%; for example, 14% of the land contracts studied had down payments, or vendees' initial equities, of 4% or less of the purchase price.[289] The vendee would be free from forfeiture unless his true equity was less than 5%; in the land contracts studied, for example, the median land contract vendee would only need to make a down payment, or have a true equity, of $2,700, 5% of $46,000.

The third revision, requiring an appraisal to establish the current value of the property and the vendee's "true equity," involves two changes. The vendee's interest is not measured by the amount he has paid on the land contract but by his "true equity," the amount he has paid adjusted by any change in the value of the property caused by improvements or appreciation or depreciation in value. Second, the relevant property value is not the purchase price but current market value. Determining this value will require an appraisal of the property upon the vendor's institution of a forfeiture action. While requiring an appraisal may seem cumbersome, this is exactly what is currently required in Ohio foreclosure actions.[290] Once an appraisal is completed, it is simple to determine the vendee's percentage interest[291] and whether the vendor's action must be for foreclosure or may be for forfeiture. Two other things are also accomplished by requiring an appraisal to establish current value. If the vendee's equity is 5% or more, and foreclosure is required, the required foreclosure appraisal has already been done, while if the vendee's equity is less than 5%

[287] *See supra* text accompanying note 273.

[288] Nelson & Whitman, *supra* note 22, at 452.

[289] *See* Appendix A.

[290] OHIO REV. CODE ANN. § 2329.17 (Page 1981).

[291] This interest is calculated by subtracting the amount owed from the appraised value and dividing the result by the appraised price: (Appraised price − Current balance) ÷ Appraised Price = Equity.

the court now has an independent basis for deciding on any equitable relief from statutorily allowed forfeiture.

Finally, there should also be explicit authorization to a trial court to grant equitable relief in cases where forfeiture is allowed; without it the proposed 5% limitation, or any percentage limitation, is potentially as inequitable as the current 20%. If 5% is applied to the highest purchase price in the study, $500,000 it results in a minimum protectable initial equity of $25,000, an amount which, in most cases, it would be inequitable to allow to be forfeited. A trial judge should be able to so find and force the vendor to foreclose rather than seek forfeiture.

If the division between forfeiture and foreclosure is maintained, two further problems should be addressed. First, it should be made clear that a vendor may choose foreclosure even if forfeiture is permissible in his case. Although this is arguably the case under section 5313.08,[292] it should be made explicit; there is no reason not to allow a vendor to opt for foreclosure instead of forfeiture.

Second, the vendee should be given the express right to redeem. Once it is decided to allow forfeiture in some case, equity dictates that if the vendee is willing to pay the entire amount due, along with interest and the vendor's costs, he should be allowed to do so. In order to parallel Ohio's mortgage law, which allows redemption by a mortgagor in default up to judicial confirmation of a foreclosure sale,[293] the most practical time to cut off the right of redemption for a vendee in default would be the date of the entry of a final judgment of forfeiture. The vendee would then have the absolute right to give the vendor what the vendor has a right to expect, his money.[294]

The changes to Chapter 5313 necessary to carry out the author's proposal are fairly straightforward. The first sentence in section 5313.07 would be revised to read:

> If the vendee of a land installment contract has an equity of five percent or more in the property, the vendor may recover possession of his property only by use of a proceeding for foreclosure and judicial sale of the foreclosed property as provided in section 2323.07 of the Revised Code.

Section 5313.08 would be revised by changing the opening phrase to state "If the contract is not required to be foreclosed under section 5313.07 of the Revised Code. . . ." The section would be revised further by adding the following sentences at the end:

The vendor may choose to bring a foreclosure action pursuant to section

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[292] *See supra* text accompanying notes 258-59.

[293] OHIO REV. CODE ANN. § 2329.33 (Page 1981).

[294] This continues the analogy of land contracts to mortgages which is appropriate since a land contract is in effect a mortgage with forfeiture as a remedy.

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5313.07. If the vendor chooses to bring a forfeiture action, the court may nonetheless determine that forfeiture would be an inequitable penalty as applied to the vendee and order foreclosure of the contract pursuant to Section 5313.07 of the Revised Code. Where forfeiture is ordered, the vendee shall have the right to redeem the property, up to the date of the entry of final judgment of forfeiture, for the amount due under the installment land contract plus the vendor's costs of suit.

Finally, subsection (F) should be added to section 5313.01 to provide the definition of "equity": "(F) 'Equity' means the difference between the value of the property, as determined by appraisal pursuant to section 2329.17 of the Revised Code, and the amount owed by the vendee to the vendor on the installment land contract."

Although 5% is obviously an arbitrary number, the important parts of the proposal can be carried out regardless of what percentage is chosen. First, any evaluation of the vendee's interest must be based on current value and independent appraisal is the only even near accurate method of determining it. Second, the court must have the ability to deny forfeiture and require foreclosure in cases where the court determines that forfeiture is not equitable. Finally, the vendee must be able to redeem up to the entry of a final judgment. The proposed procedure does all of that and still gives the vendor who seeks a forfeiture judgment, particularly if the vendee defaults in the legal action, a fairly efficient remedy; the only added burden is appraisal, an existing requirement in every Ohio foreclosure.

The last consideration for the Legislature in reforming the Act is whether to extend its coverage to all land contracts. The clear national trend is towards the mortgagization of land contract law.[295] While protecting owners of dwellings is admirable is it not also admirable to protect individuals owning triplexes and living in one unit and owners of small businesses who buy their stores on land contract? Perhaps the answer is that Ohio's fairly progressive judicially created land contract law will protect them.[296] If that were a sufficient answer, however, the Act would be unnecessary. The answer should be that all land contract vendees deserve the small protection of an appraisal and potentially required foreclosure. This could be easily provided by revising section 5313.01(B) to read: "(B) 'Property' means real property in this state." With that additional change, Ohio land contract law would become one of the fairest in the country.

C. *Judicial Proposal*

Simply put, the judicial proposal is encouragement for the courts to refuse to relinquish their equitable powers in the face of the Act. In fact, the courts

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[295] *See supra* text accompanying notes 112-83.

[296] *See supra* text accompanying notes 220-25.

should do so whether or not the Legislature chooses to amend the Act. Three specific suggestions are made.

First, a trial court faced with an action for forfeiture under section 5313.08 should never grant forfeiture without some evidence of the fairness of granting forfeiture. Such evidence could include an independent appraisal, the vendor's or his expert's appraisal, or the vendee's or his expert's appraisal. Certainly if the vendee defaults on the forfeiture action, the court should feel duty-bound at the time the request for default is presented to it to determine in some manner the nature of the vendee's interest, whether by the vendor's testimony or the testimony of a third party.[297] If the court is unconvinced that forfeiture is appropriate, it should refuse to grant it and should require the vendor to resort to other remedies, such as damages, rescission, or foreclosure, as may be provided by statute.[298]

Although it is arguable that a properly requested forfeiture must be granted,[299] a court should look to the permissive language of section 5313.08 that "[t]he vendor may bring an action for forfeiture of the vendee's rights. . . ."[300] To argue that a court is required to grant forfeiture by the terms of section 5313.08 as implemented by section 1923.02 and section 1923.09[301] is to ignore the inherent equity powers of Ohio trial courts. The presence of those powers mandates that a court not take inequitable action in carrying out its functions.

Second, on carrying out its role in forfeiture cases a court should always feel free to find waiver by the vendor in order to avoid a harsh result.[302] If the vendor has allowed the vendee to make late payments or skip payments completely, a court should hold that the vendor has waived his opportunity for forfeiture. In essence, to obtain forfeiture a vendor must have complied with all statutes and the contract and have insisted that the vendee do the same.

Third, and perhaps most important, a court should allow a vendee to redeem up to the entry of final judgment. There is no reason to deny a vendee this right. Even if a vendee has intentionally breached the contract the vendor has no right to expect anything more than that for which he has contracted, full payment under the contract. The vendee should, of course, be required to pay, in addition to the principal balance due, interest and all the vendor's costs in attempting collection on the land contract. Like California,[303] Ohio

[297]Ohio Rules allow a court to make such a finding when a demand for for default judgment has been made. OHIO R. CIV. P. 55(A).

[298]*See supra* text accompanying notes 250-55; 258-59.

[299]*See supra* text accompanying notes 261-62.

[300]OHIO REV. CODE ANN. § 5313.08 (Page 1981) (emphasis added).

[301]*See supra* text accompanying notes 241-44.

[302]Just as courts do in non-statutory forfeiture cases. *See supra* text accompanying notes 212-15.

[303]*See* MacFadden v. Walker, 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971) and text accompanying notes 143-50.

should be comfortable in allowing the parties the true benefit of their bargain and give true meaning to what has become a tired cliche, "equity abhors a forfeiture."

VI. Conclusion

Ohio's current statutory scheme controlling defaults on residential land contracts is a step in the right direction in that it requires foreclosure of many contracts involving a vendee's significant interests which would be protected from forfeiture. The clear national trend is to require foreclosure or other methods of protecting a vendee's valid interests.

The need for change is great because under current economic conditions valid interests lack protection and may need protection in the near future. Unless there is a substantial change in interest rates and the economy in general, many vendees may find themselves unable either to make their monthly payments or refinance their three or five year land contracts at the end of the contracts' terms. The results may be disastrous.

The Ohio legislature has the opportunity to enact a few simple amendments with far-reaching implications to make the statutory scheme a truly meaningful reform. The current basis for requiring foreclosure should be changed to requiring foreclosure if the vendee has a small true equity in the property. The equity should be measured at the time of suit. In addition, the legislature should give trial courts the explicit right to deny forfeiture in appropriate cases which fall within the statutory parameters allowing forfeiture. Finally, the legislature should give the vendee the explicit right to redeem up to the entry of a final judgment of forfeiture if forfeiture is granted.

If the legislature fails to act, the courts should use their inherent equitable powers to lessen the harshness of the statutory scheme. Trial courts should evaluate the equities in each request for forfeiture and deny forfeiture whenever it would be more equitable to force the vendor to choose another remedy such as foreclosure, rescission or damages. In addition, since the vendor is requesting strict performance of contract terms, trial courts should require that the vendor have insisted on strict performance by the vendee; if not, the vendor should be held to have waived his opportunity for forfeiture. If forfeiture is granted, equity dictates that a willing vendee should be allowed to redeem.

If the legislature and the courts treat land contracts more equitably, as recommended, Ohio's land contract law will clearly be one of the most progressive in the country. It will protect the valid interests of vendees while giving vendors the opportunity for forfeiture when the vendor lacks a valid interest. That, of course, should be the goal of all states.

APPENDIX A

LAND CONTRACTS STUDIED

File Number	Term — In Years	Purchase Price	Amount Financed	Interest Rate
January				
2 A01	2	$106,000	$ 90,000	11%
6 B08	2	60,900	50,700	11%
19 D04	0	60,233.54	10,233.54	7%
24 B01	3	260,000	230,000	9%
32 A03	3	43,900	41,900	11%
42 D07	3	30,000	24,000	12%
56 C05	10	33,500	30,000	10%
65 C07	5	85,000	65,000	10.5%
72 A01	3	42,500	34,500	11.5%
80 A12	3	36,000	30,000	11.5%
February				
82 B01	5	57,000	45,000	9.5%
88 A01	5	53,000	50,000	12%
93 C06	4	21,000	15,000	13%
100 A02	1	71,900	64,900	11.75%
109 B06	0	12,000	11,000	6%
111 B01	3	22,000	22,000	9%
116 B03	0	115,000	100,000	10.75%
124 A01	1½	80,000	60,000	13.5%
127 A05	2	48,000	38,000	10.75%
131 A01	3	69,860.19	52,860.19	9.75%
136 E07	3	46,900	40,900	10.5%
144 A09	5	58,000	50,000	12%
146 C06	9	12,000	9,000	11%
149 C06	3	35,000	35,000	10%
152 E01	5	320,000	243,000	11.5%
156 A09	5	33,000	30,000	10.5%
March				
158 E01	0	85,000	73,000	11%
160 C04	1	70,500	50,500	11%
163 B07	3	47,500	34,500	10.5%
168 C03	3	36,500	36,000	7%
172 D05	0	11,500	10,500	13%

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APPENDIX A (continued)

File Number	Term — In Years	Purchase Price	Amount Financed	Interest Rate
177 B08	3	45,000	35,000	0
183 E06	29	70,000	60,000	11%
188 A09	2	64,000	44,000	9.5%
193 B03	0	9,000	8,000	10%
201 C12	3	13,000	10,000	4.667%
206 B03	1	17,000	14,000	14%
212 B06	3	75,400	57,900	13.5%
227 E02	5	38,000	31,500	10%
232 C12	2	78,500	63,500	10.5%
234 E09	5	25,000	23,500	10%
237 C02	0	150,000	120,000	12%
241 A09	3	39,000	35,000	10.5%
249 D08	5	50,000	43,000	11%
April				
253 E05	3	15,000	13,000	10%
256 C07	7½	495,000	380,000	11%
263 E03	5	25,900	23,400	10.75%
270 C09	15	500,000	361,000	9%
278 A12	3	43,000	35,000	10%
285 D02	3	32,000	28,800	12%
293 C08	5	75,000	65,500	10%
298 B10	5	39,000	34,000	9.75%
304 B08	5	39,500	34,000	10%
312 C09	3	38,900	32,900	10%
320 A07	0	25,000	22,500	12%
330 E03	1	49,688	29,688	-0-
341 A05	5	70,000	28,000	10.75%
350 B09	5	40,000	35,000	11%
May				
361 C03	5	84,000	77,000	10.5%
366 C10	6	12,000	11,500	10%
373 C04	5	65,500	50,000	10.25%
375 D03	0	50,500	50,500	13%
381 D06	0	11,900	11,700	10%
386 C01	0	68,500	57,100	10.25%
390 D09	½	46,500	38,130	10%
395 B12	½	34,900	26,175	10%

APPENDIX A (continued)

File Number	Term — In Years	Purchase Price	Amount Financed	Interest Rate
400 D05	3	65,000	55,000	11%
407 C11	0	19,999.61	19,999.61	9.5%
412 A04	0	45,000	30,000	8%
421 A01	4	83,500	65,500	11%
428 A08	½	30,900	25,338	10%
430 D12	0	48,000	34,832.17	9.75%
434 D07	5	78,500	63,500	10%
439 B03	0	29,900	28,000	11%
442 E04	½	49,000	45,000	11%
452 C02	0	9,000	8,000	10%
June				
462 C12	½	63,900	49,600	14%
466 E02	0	21,000	20,000	11%
472 D02	2	48,900	41,000	9%
476 B11	5	55,000	49,500	10%
483 B06	2	42,900	38,700	12%
488 A01	5½	62,500	56,500	12%
495 D07	1	74,751.66	74,727.71	12%
502 D11	5	6,000	6,000	-0-
504 A07	11	100,000	95,000	10%
513 A01	3	37,500	22,500	9%
519 C04	0	76,000	61,000	12%
523 A01	3	80,000	65,000	12%
529 D02	30	140,000	110,000	12%
532 B11	0	15,500	13,500	10%
536 B07	5	32,000	31,700	10%
539 D06	1½	125,000	93,750	10.75%
545 D03	2	15,000	15,000	12%
557 A01	25	56,900	36,900	8.75%
562 D02	5	92,500	67,500	10.5%
570 D12	5	78,900	71,900	9.5%
July				
579 B07	5	38,500	14,500	12.5%
583 B08	3	37,500	32,500	13%
591 B08	0	23,000	22,000	9%
595 E09	5	137,500	120,000	10%
602 A02	5	70,000	58,000	12.5%

APPENDIX A (continued)

File Number	Term — In Years	Purchase Price	Amount Financed	Interest Rate
604 A01	0	90,000	72,000	12%
609 A10	3	65,000	57,500	12%
613 A01	23	49,900	28,600	8.25%
618 D11	0	40,000	28,414	9.75%
622 C03	5	39,900	34,900	11%
627 A07	7	14,000	14,000	12%
631 B12	12	165,000	115,000	9%
635 D12	2	54,500	46,500	12%
640 B01	25	9,000	8,000	12%
646 E04	3	62,000	52,000	11%
651 D06	0	3,000	2,500	3%
657 B03	2	44,900	35,900	14%
660 A01	2	34,000	27,000	12.5%
662 E05	0	3,500	3,300	12%
666 D11	2	28,000	28,000	-0-
673 D04	4½	64,230	49,430	11.4%
677 E07	3	35,000	30,500	11%
August				
680 D02	2	64,900	51,000	12%
684 D02	0	5,000	4,000	-0-
689 E05	20	31,000	30,000	13%
694 C01	24	44,573.99	29,165.13	8.75%
700 D08	4½	94,000	75,200	13%
706 C11	3	16,500	13,500	-0-
711 C06	10	60,500	40,500	12%
716 D06	1	35,000	28,000	10%
723 B11	5	115,000	70,000	12%
726 D10	7	90,000	70,000	9.5%
734 D06	0	27,453.53	20,203.53	11.5%
739 C08	3	71,500	61,500	10.5%
743 B11	1	125,000	60,000	16%
747 A10	10	not given	not given	not given
755 D10	20	35,000	33,950	11%
762 A05	30	60,000	42,000	12%
765 A08	30	61,000	40,000	12%
768 E08	4	65,500	55,500	10%
771 D04	0	25,000	23,500	12%
775 B11	2	82,500	69,500	12%

APPENDIX A (continued)

File Number	Term — In Years	Purchase Price	Amount Financed	Interest Rate
September				
778 A04	4	66,000	58,000	12%
781 A06	5	149,000	134,000	-0-
784 D10	3	25,900	23,400	10%
788 C07	0	150,000	125,000	12%
794 A06	1	55,000	45,000	11%
800 B05	5	40,000	35,100	12.5%
808 D04	5	32,000	32,000	8.2319%
814 A04	4½	12,000	10,800	10%
818 D02	2½	57,900	52,110	10%
824 A01	2	32,000	30,000	13%
827 E08	5	72,000	61,000	12%
832 D08	0	18,000	17,000	14%
838 D05	5	12,900	10,900	11%
843 A01	2	86,000	77,400	10%
848 D03	8	77,000	42,000	12%
852 B10	3	37,000	32,000	11%
859 B12	27	54,000	43,561.61	10.5%
867 E03	4	25,500	23,000	9%
October				
874 B01	3½	59,000	55,400	8%
878 B09	3	85,900	73,000	11.5%
886 A08	2	22,000	20,000	12%
891 C08	5	6,500	6,000	10%
896 D03	4	41,500	38,300	9.5%
903 D10	3	71,000	63,000	11%
909 C02	2½	25,000	24,000	16%
914 D04	10	10,500	8,500	10%
922 B11	5	35,000	34,000	12%
925 C10	2	17,000	15,500	13.5%
931 D05	3½	57,000	53,300	10%
936 D10	12	43,000	20,000	12%
939 D01	0	35,000	25,000	10%
943 C03	5	12,900	11,400	12%
948 A07	5	24,500	21,000	12%
957 C12	2	85,000	70,000	12%

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APPENDIX A (continued)

File Number	Term — In Years	Purchase Price	Amount Financed	Interest Rate
November				
965 A04	30	42,000	33,600	12%
970 C04	1½	63,000	63,000	10%
974 C01	3	61,000	52,400	10.75%
978 C08	3	42,000	42,000	—
984 C08	0	47,200	46,200	13%
988 D04	10	68,900	48,900	11%
996 A05	30	67,000	57,000	12%
1000 C08	3	67,000	55,000	11%
1006 D09	1	57,700	50,169.43	14%
1011 E03	30	40,000	36,000	13%
1014 C02	1	39,000	37,500	12%
1018 E04	5	71,000	55,400	11.5%
1025 A08	2½	100,000	75,000	10.5%
1029 C03	3	49,000	46,000	11%
1032 E09	0	13,000	12,000	7%
1041 E08	0	9,500	9,000	7.5%
December				
1049 C08	2	52,550	52,100	—
1057 A06	3	76,000	58,500	10%
1066 E06	5	12,000	7,000	10%
1075 E07	2	15,000	10,000	12%
1080 D09	5	43,000	33,000	12.5%
1085 A01	5	43,500	38,500	12%
1090 D07	0	11,500	11,500	6%
1101 A05	0	34,524.07	29,500.58	8.5%
1109 E03	10	65,000	58,000	11%
1115 E05	0	5,000	5,000	15%
1121 B09	3	70,000	50,000	10%
1128 E10	0	34,500	13,213.72	10.5%