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INSTALLMENT LAND CONTRACTS IN NORTH CAROLINA

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I. INTRODUCTION

An installment land contract is a fairly simple conveyancing device, somewhat analogous to a conditional sales contract for personal property[1] and is the most commonly used substitute for the purchase money mortgage or deed of trust.[2] The vendor agrees to convey the described premises upon payment by the purchaser of a specified purchase price and upon performance of any other obligations outlined in the contract. The down payment is generally minimal, with the balance of the purchase price to be paid in installments at regular intervals over an extended period. Like a mortgage, installments are applied to principal and interest and the debt may extend over relatively short periods or for periods exceeding twenty years. Commonly, the vendor retains legal title until the final payment is made, at which time the deed is delivered to the purchaser, sometimes under an escrow arrangement made simultaneously with the installment contract. Some land sale contracts call for a deed to the purchaser after a certain percentage of the purchase price has been paid, at which time the purchaser delivers to the vendor a purchase money mortgage or deed of trust to secure payment of the balance. The purchaser usually takes possession at the time the installment contract is executed and assumes responsibility for taxes and upkeep of the property.

An installment land contract, sometimes referred to as a "contract for deed" or "land sale contract," is to be distinguished from an executory contract for the purchase and sale of land, commonly known as an "earnest money contract," which is customarily used to bind a sale until the closing date. An earnest money contract binds the parties to a purchase and sale upon certain conditions which define their rights pending closing. The contract generally provides for a closing to be held thirty to sixty days from the date of execution. Its purpose among other things is to provide time for the seller to vacate and for the buyer to check title and arrange financing. At closing, the seller delivers his deed to the buyer and the buyer pays the seller, either in cash or purchase money notes secured by a purchase money mortgage. In contrast, an installment land contract is a financing device with security characteristics; it governs the rights and liabilities of the vendor and purchaser

1. 5 S. WILLISTON CONTRACTS § 792 (3d ed. 1961).

2. The most recent comprehensive textual treatment is found in G. OSBORNE, G. NELSON, & D. WHITMAN, REAL ESTATE FINANCE LAW, ch. 3 E (1979) [hereinafter cited as OSBORNE, NELSON & WHITMAN].

throughout an extended installment payment period which culminates in the transfer of title from vendor to purchaser.

Installment land contracts generally stipulate[3] that time is of the essence and provide that upon default by the purchaser in making any payment, the vendor may declare a forfeiture. Forfeiture terminates all rights of the purchaser and allows the vendor to retain all payments made on the contract.[4] An acceleration clause is usually included so that upon the purchaser's default the vendor can demand all payments still due and sue for specific performance.[5] The following provision is taken from an installment land contract recently used by a corporation doing business in a North Carolina resort area:

> Time is of the essence of this Purchase Contract and in the event that the purchaser shall not pay any installment under this Purchase Contract required under Plans 2A and 2B above on or before its due date, then after giving 30 days written notice of the default in payment, seller may retain all amounts theretofore paid by Purchaser to Seller. All such installment payments may be retained by Seller as liquidated damages, which shall not be construed as a penalty and this Purchase Contract shall thereafter be without any force and effect. Said written notice shall be

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3. Usual boiler plate provisions include:
(1) Time is of the essence.
(2) Prompt payment of each installment is a condition precedent to the duty of vendor to convey title.
(3) Acceleration clause.
(4) Forfeiture or liquidated damages clause.
(5) Right of reentry and possession by vendor upon purchaser's default.
Clark & Richards, *Installment Land Contracts in South Dakota*, 7 S.D. L. REV. 44, 47-48 (1962). These authors suggest that the purchaser should consider adding the following provisions to the contract:
(1) Prepayment clause.
(2) Shift to mortgage after 50% of purchase price paid.
(3) Vendor to furnish certificate of marketable title early in the contract period.
(4) Payments tied to farm income.
(5) Grace period to pay installments after their due date.

4. Subject to ameliorating judicial doctrines and anti-forfeiture legislation in some states. *See, e.g.*, statutes and theories discussed in Union Bond & Trust Co. v. Blue Creek Redwood Co., 128 F. Supp. 709 (N.D. Cal. 1955).

5. Typical provisions are found in 16 AM. JUR. LEGAL FORMS 2D §§ 219.642, 219.765, 219.766 (1973). Interestingly, 2 R. DOUGLAS, DOUGLAS FORMS 2D, No. 579 (1953) (North Carolina forms), does not provide for forfeiture, but rather for appointment of a trustee upon default and foreclosure by the trustee under power of sale.

considered complete when mailed via first class mail, postage prepaid, to the Purchaser at the address hereinafter set forth.[6]

The similarity between the installment land contract and the purchase money mortgage is readily apparent: the vendor under the land contract is the analogue of the mortgagee in a purchase money mortgage; the purchaser occupies the same relative position as the mortgagor.[7] Unlike the mortgage, the most important incident of which is the mortgagor's equity of redemption, the installment land contract allows forfeiture by the weight of authority upon default by the purchaser.[8] The vendor, by summary proceedings analogous to strict foreclosure, can keep the land, together with any improvements and all installments paid. Forfeiture is the principal incident of the installment land contract, the principal subject of litigation concerning use of the installment land contract and the principal topic of scholarly treatments criticizing unrestrained use of this financing device.

Generally, installment land contracts have not proven to be popular in North Carolina;[9] their recent[10] use in this state has ap-

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6. Watauga County, North Carolina, Register of Deeds, Book 153, Page 846-850.

7. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967); 1 G. GLENN MORTGAGES § 15.1 (1943); Vanneman, *Strict Foreclosure of Land Contracts*, 14 MINN. L. REV. 342, 343 (1930). Throughout this article the term "mortgage" will be used as a generic term embracing deeds of trust.

8. The minority position is that forfeiture will not be enforced when the amount forfeited exceeds the vendor's damages caused by the purchaser's breach and other benefits received by the purchaser at the expense of the vendor, *e.g.*, Freedman v. Rector, Wardens & Vestrymen of St. Matthias Parrish, 37 Cal. 2d 16, 230 P.2d 629 (1951) (Traynor, J.); Pierce v. Staub, 78 Conn. 459, 62 A. 760 (1906); Lytle v. Scottish-Am. Mortgage Co., 122 Ga. 458, 50 S.E. 402 (1905). *See* Annot. 31 A.L.R.2d 8 (1953). The "weight of authority" is represented mostly by cases of mature vintage. Courts and legislatures have made such inroads on the forfeiture doctrine that the general rule allowing it cannot be relied on by vendors anywhere. OSBORNE, NELSON & WHITMAN, at 81.

9. The usual land purchase financing method used in this state is the deed of trust with power of sale. Since Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975) (statutory requirements of newspaper advertising and posting notice of foreclosure not sufficient to meet due process requirements) and the legislative response, 1975 N.C. Sess. Laws ch. 492, foreclosure under power of sale is accomplished by: filing a special proceeding with the clerk of the superior court in the county where the land lies (court costs $15.00); serving notice of foreclosure hearing at least ten days before hearing upon those entitled to notice; posting notice of hearing; hearing on question of foreclosure before clerk of superior court; posting and publishing notice of sale for thirty days unless deed of trust specifies a

parently been limited largely to sales of resort property by land companies.[11] Since late 1979 however, rising interest rates have led to the use of installment land contracts, or variations, in more conventional situations. Interest rates in excess of seventeen percent on long-term mortgage home loans have greatly increased the demand for low equity financing and secondary financing by landowners, especially those selling encumbered property subject to deeds of trust securing notes having relatively low interest rates.

However, not all such deeds of trust can be assumed.[12] In the past few years, North Carolina lending institutions almost uniformly have begun to include, and frequently to enforce, "due on sale" clauses in their deeds of trust.[13] A "due on sale" clause gives

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different time; holding sale and any subsequent re-sales. Unless there is a re-sale, the procedure customarily requires about 45 to 60 days. Re-sale procedure usually requires about 30 days. *See* Note, *Real Property, Changes in North Carolina Foreclosure Law,* 54 N.C. L. REV. 903 (1976).

It should be noted that North Carolina has an anti-deficiency judgment statute which governs purchase money mortgages and deeds of trust. *See infra* note 70.

10. The forfeiture doctrine of the installment land contract evolved during the laissez-faire movement in the nineteenth century when ". . . the classical chancellor who created the equity of redemption in the face of the strict law and who said that 'necessitous men are not . . . free men,' had given place to judges who regarded individual freedom of contract as fundamental in any civilized system of law and enforced the harshest of contract provisions without hesitation or searching of conscience unless constrained by binding precedent to relieve against them." Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II,* 44 YALE L.J. 754, 776 (1935). Use of the installment land contract was not unusual in North Carolina during the nineteenth century and a look at the grantor index in the Register of Deeds office of any county of this state during that period will reveal numerous entries of "Bond for Title."

11. *See* Comment, *Attacking the "Forfeiture As Liquidated Damages" Clause in North Carolina Installment Land Sales Contracts As An Equitable Mortgage, Penalty and Unfair and Deceptive Trade Practice,* 7 N.C. CEN. L.J. 370 (1975).

12. The term "assume" is used here loosely and interchangeably with the term "subject to" although there is a substantial distinction. Where there is an "assumption" the transferee of the mortgaged property becomes personally and primarily liable on the debt; where the property is simply transferred "subject to" the mortgage, the transferee does not become personally liable and the transferor remains primarily liable on the debt. *See* J. WEBSTER, REAL PROPERTY LAW IN NORTH CAROLINA §§ 241, 242 (1971).

13. The FNMA/FHLMC form for North Carolina, 1 to 4 family dwelling, is most typical:

> Transfer of the Property; Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without

the lender the power to accelerate the indebtedness secured by the deed of trust, making it payable in full upon the date of any transfer of the property. The power to accelerate payment prevents the assumption by a potential purchaser of the vendor's deed of trust in conjunction with a sale of the property without the lender's consent. Installment land contracts have been utilized in this situation in an attempt to circumvent the effect of the "due on sale" clause in the seller's deed of trust,[14] on the theory that there is no "sale" because a deed was not delivered and legal title did not pass.

Whether an installment land contract is a legitimate or effective device for circumventing the "due on sale" clause of a deed of

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Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Deed of Trust, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17, and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Deed of Trust and the Note.

If Lender exercises such option to accelerate, Lender shall mail Borrower notice of acceleration in accordance with paragraph 14 hereof. Such notice shall provide a period of not less than 30 days from the date the notice is mailed within which Borrower may pay the sums declared due. If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by paragraph 18 hereof [power of sale].

14. *E.g.*, there are on record in the Cabarrus County Register of Deeds office contracts recorded in late 1979 and early 1980 which provide that an escrow agent will hold an executed deed until the buyers have made all installment payments under an installment contract. These contracts stipulate that there is an existing deed of trust on the property subject to the contract, and that the contract installment payments will be applied by the seller toward satisfaction of that deed of trust. If successful, this arrangement has the advantage for the vendor, not only of protecting his security under an arrangement he understands (if the contract is enforceable as written), but also of allowing a "sale" at a higher price because the unattractive necessity of the purchaser's obtaining new financing at an inflated interest rate is removed.

trust has not been decided in North Carolina.[15] Courts of several other states have held that an installment land contract comes within the meaning of a "due on sale" clause,[16] and North Carolina would probably follow what appears to be the trend toward enforcing a "due on sale" clause in this situation.[17] *Crockett v. First Federal Savings and Loan Association*[18] seems to have established that the Court will not view with disfavor the enforcement of a "due on sale" clause, particularly in the face of a blatant attempt to circumvent the purpose and intent of the clause. Certainly an attorney involved in such a transaction, whether representing the vendor or the purchaser, should advise his client in writing of the potential consequences in the event the vendor attempted to enforce the "due on sale" clause.

Accommodation of the purchaser and a reliance on enforcement of the contract provisions probably constitute the greatest incentives for use of installment land contracts in North Carolina by private individuals as well as by land companies. For the vendor, the principal advantage of an installment land contract is the potential security it provides. He retains legal title and has the

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15. The validity of the due on sale clause for federally chartered associations is established in 12 C.F.R. 545.6-11(f), 556.9 (1976). The federal law preempts regulation by the state in this area as to instruments executed after June 8, 1976, the effective date of the provisions of 12 C.F.R. 545.6-11(f) (1976). Glendale Fed. Sav. & Loan Ass'n. v. Fox, 459 F. Supp. 903 (C.D. Cal. 1978), *subsequent hearing*, 481 F. Supp. 616 (C.D. Cal. 1979). Crockett v. First Fed. Sav. & Loan Ass'n., 289 N.C. 620, 224 S.E.2d 580 (1976), legitimized the due on sale clause in North Carolina. That case involved a commercial loan to sophisticated borrowers and the court, holding due on sale clauses not to be invalid as restraints on alienation absent a showing of fraud or other overreaching, held exercise of the due on sale clause for the sole purpose of obtaining a higher interest rate was valid on the facts of that case. *See* Note, *Mortgages—Use of Due on Sale Clause by a Lender Is not a Restraint on Aleination in North Carolina*, 55 N.C. L. REV. 310 (1977); Note, *Real Property Security—North Carolina Deals Mortgagors a Bad Deal*, 13 W.F. L. REV. 490 (1977).

16. Mutual Fed. Sav. & Loan Ass'n. v. Wis. Wire Works, 71 Wis. 2d 531, 239 N.W.2d 20 (1976); Century Fed. Sav. & Loan Ass'n., v. Van Glahn, 144 N.J. Super. 48, 364 A.2d 558 (1976); Baker v. Leight, 97 Ariz. 112, 370 P.2d 268 (1962); Baker v. Love's Park Sav. & Loan Ass'n., 61 Ill. 2d 119, 333 N.E.2d 1 (1975); *cf.* Tucker v. Lessen Sav. & Loan Ass'n., 12 Cal.3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974) (although the due on sale clause covers an installment land contract, acceleration not allowed because "lender's interest in maintaining its portfolio at current interest rates" held not to justify the restraint imposed by such clauses). *Contra.*, Chopan v. Klinkman, 330 So.2d 154 (Fla. App. 1976).

17. *See* Annot., 69 A.L.R.3d 713 (1976).

18. 289 N.C. 620, 224 S.E.2d 580 (1976).

remedy of forfeiture to afford him prompt realization on his security. Yet the vendor's security is dependent on other considerations which may provide a court sufficient reason to invalidate its principal feature—forfeiture of the purchaser's interest upon default. It has been said that "[I]f the contract is enforceable as written and if title will not be clouded . . . [the installment land] contract gives the vendor a very favorable remedy, much more advantageous than would be available under a purchase money mortgage or deed of trust."[19] That this *caveat* can hardly be over-emphasized is clear from a survey of litigation arising from the use of installment land contracts. Enforcement of forfeiture provisions in installment land contracts is now the exception rather than the rule.[20] Although the North Carolina appellate courts have not recently considered the question, earlier cases indicate that this state will follow the trend away from forfeiture.[21]

Most inherent disadvantages of an installment land contract operate against the purchaser in the form of risk of forfeiture and difficulty of sale or encumbrance. However, the vendor must also weigh the probable disadvantage of accepting a small downpayment against his need for cash from the transaction. The vendor remains personally and primarily liable on his prior encumbrance, if any, which is "assumed" by the purchaser. He must, therefore, personally ensure that installment payments on that indebtedness are promptly made to the lending institution to avoid default. The income tax advantage of an installment sale could just as easily be realized by use of a purchase money deed of trust.[22] Cumbersome

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19. Comment, *Installment Contracts for the Sale of Land in Missouri*, 24 Mo. L. REV. 240, 244 (1959). *See* Dolson, *A Comparison of Land Contracts and Other Security Devices in Kentucky*, 32 U. CIN. L. REV. 435 (1963).

20. *Supra* note 8.

21. *See infra* note 41 and accompanying text.

22. If the vendor receives less than thirty percent of the selling price in the first year, an installment land contract qualifies under I.R.C. § 453 as an installment sale. Treas. Reg. 1.453-5(a) (1967); 2 MERTENS, LAW OF FEDERAL INCOME TAXATION, § 15.08 (1974). [Note: after this article was written Congress amended I.R.C. § 453 to eliminate the 30 percent requirement. 26 U.S.C. § 453 (1980).] Use of an installment sale may be an illusory advantage, however, if there is a very low downpayment. Consider the following example:

> Assumptions: married couple filing jointly; 2 exemptions; no itemized deductions; 1979 tax rates constant; 60% capital gain exclusion for federal income tax; no capital gain exclusion for state income tax; alternative minimum tax not considered; tax basis in property sold = $0.00; balance after first year financed for 15 years at 10% annual interest.

foreclosure procedures which seem to plague other states do not present the same problem in this state.[23]

If the installment land contract gains greater acceptance in North Carolina, litigation concerning the rights of the parties to such a contract will undoubtedly arise. These rights are governed by the common law of this state, much of which developed more

Conventional installment sale		Installment Land Contract
sale price	$100,000	$100,000
first payment	30,000	5,000
interest first yr.	-0-	-0-
FIRST YEAR		
Federal tax	3,591.00	2,161.00
N.C. tax	2,755.00	900.00
	$6,346.00	$3,061.00
SECOND YEAR		
Federal tax	3,969.00	4,944.00
N.C. tax	1,471.62	1,763.31
Total tax	$5,440.62	$6,707.31
THIRD YEAR		
Federal tax	3,829.00	4,736.00
N.C. tax	1,438.96	1,718.98
Total tax	$5,276.96	$6,454.98
Advantage:		
First year		$3,285.00
Second year	$1,266.69	
Third year	$1,187.02	

While there is considerable tax savings realized the first year by use of the installment land contract, the long term savings, in the event there is no prepayment, is in favor of the sale having a down-payment of nearly 30 percent. There is a tax disadvantage in years subsequent to the first year because of the greater proportion of interest which is taxed as ordinary income. The prudent vendor will, of course, weigh any tax considerations against the stability of the transaction.

Upon a default by purchaser and reacquisition by vendor, I.R.C. § 1038 applies to the installment land contract to limit gain and to establish a new basis for the vendor. Treas. Reg. 1.1038-1(a)(2) (1967). Examples are provided in Treas. Reg. 1.1038-1(h) (1967). For the purchaser, a reacquisition by vendor of encumbered property at a loss will be treated as a capital loss to the purchaser, Helvering v. Hammel, 311 U.S. 504 (1941); Burger-Phillips Co. v. Comm'r, 126 F.2d 934 (5th Cir. 1942); *See* Rev. Rul. 78-64, 1978 C.B. 264; Russ v. Comm'r, 68 T.C. 135 (1977), a disadvantage in that capital losses cannot be offset against ordinary income, but only against capital gains. The purchaser should be wary of the likelihood of such a loss, for the purchaser's adjusted basis in the property will usually exceed the amount of the outstanding indebtedness. A gain will be realized by purchaser equivalent to the excess of the amount of the unpaid indebtedness, including accrued interest, if any, over the cost or other basis of the property adjusted for depreciation and improvements. Parker v. Delaney, 186 F.2d 455 (1st Cir. 1950).

23. *Supra* note 9.

than eighty years ago. Despite langauge in a recent leading opinion that "as between the parties, the vendor may be considered a mortgagee and vendee a mortgagor,"[24] the law in this area seems to be founded more on contract than on mortgage principles.[25] At common law, there is no equity of redemption to protect the defaulting vendee under an installment land contract.[26] It is this distinction between installment land contracts and mortgages that has been, and will likely continue to be, primarily responsible for litigation between parties to these contracts, and which will provide the impetus for judicial or legislative reform of installment land contracts.

II. RIGHTS AND REMEDIES OF THE PARTIES UPON A DEFAULT

A. *Rights and Remedies of the Vendor*

Upon the default of the purchaser, the vendor has a number of remedies,[27] but first he must elect whether he will stand on the contract or seek rescission.[28] If the vendor affirms the contract, he can: sue for specific performance; bring an action for installments due; foreclose the purchaser's interest by action or under a power of sale in the contract; or simply remain inactive and keep the installments already paid. If he disaffirms the contract, he can: retain the installments paid and forfeit the contract according to its terms; bring an action for damages for the breach; eject the vendee by action or maintain an action to quiet title; and, if the premises are vacant, retake possession.[29]

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24. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

25. *See* Rothenberg v. Follman, 19 Mich. App. 383, 172 N.W.2d 845 (1969).

26. *Id. See* G. OSBORNE, MORTGAGES §§ 5-7, 20 (2d ed. 1970) (development of the equity of redemption in mortgage law).

27. *Supra* note 24 at 73-4, 155 S.E.2d at 541. 3 AMERICAN LAW OF PROPERTY §§ 11.66-11.77 (A.J. Casner ed. 1952); 8A G. THOMPSON, REAL PROPERTY § 4464 (1963 repl.); C. MCCORMICK, DAMAGES § 186 (1935); Spencer, *Remedies Available Under a Land Sale Contract,* 3 WILLAMETTE L.J. 164 (1965); Lee, *Remedies for Breach of the Installment Land Contract,* 19 U. MIAMI L. REV. 550 (1965); Comment, *Forfeiture: The Anomaly of the Land Sale Contract,* 41 ALBANY L. REV. 71 (1977); 92 C.J.S. *Vendor & Purchaser* § 543 (1955). *See* Note, *Reforming the Vendor's Remedies for Breach of Installment Land Sale Contracts,* 47 So. CAL. L. REV. 191 (1973); Comment, *Remedies of the Vendor and Purchaser under a Contract for the Sale of Realty in Pennsylvania,* 10 VILL. L. REV. 557 (1965).

28. *Supra* note 24.

29. For an excellent analysis of remedies under the installment land contract *see* Comment, *Forfeiture: The Anomoly of the the Land Sale Contract,* 41 ALBANY L. REV. 71 (1977).

The vendor's choice of remedy will probably depend in large part upon the anticipated response of the purchaser, but will also be governed by the economic realities of the situation. For instance, if the land has substantially appreciated and the purchaser has moved away to parts unknown, forfeiture may be a good alternative. If the premises have substantially appreciated and the vendor has liquid cash to refund installments made, the vendor faced with a contentious purchaser may elect to rescind the contract. Foreclosure gives the purchaser the benefit of the appreciated value of the property but allows the vendor the dubious advantage of being able to pursue a deficiency in the event the premises have depreciated.

1. Vendor's Disaffirmance

a. Forfeiture

The doctrine of forfeiture, based on the idea that courts should enforce rather than re-write contracts,[30] is recognized in a majority of American[31] jurisdictions,[32] but courts are quick to de-

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30. *See* Ballantine, *Forfeiture for Breach of Contract,* 5 MINN. L. REV. 329, 341 (1921):

> The law, while looking with righteous abhorrence on forfeitures and washing its hands of their enforcement, after the manner of Pontius Pilate, yet has been reluctant to intervene with affirmative relief or to formulate any consistent principle condemning the validity of cut throat provisions which in their essence involve forfeiture. Although the law will not assist in the vivisection of the victim, it will often permit the creditor to keep his pound of flesh if he can carve it for himself.

But see 1 G. GLENN, MORTGAGES § 15.1 at 86 (1934):

> . . . Upon default under a subsisting contract of purchase, the vendee should be foreclosed, but should be able to redeem meanwhile; and no contractual theory of rescission should allow the vendor to keep the land, and at the same time hold the vendee on his defaulted installments. The contract may provide that way; but so did the mortgage have a defeasance clause, which, on its face, precluded redemption at a latter day, and yet we have seen what happened to that. Thus the question echoes that was put many years ago, "Why then should not the vendee, whose status in equity so nearly approaches that of the mortgagor, be allowed the same equity of redemption?"

31. The English courts do not tolerate forfeiture. Steedman v. Drinkle, 1 A.C. 275 (1915). The authorities are collected in Annot., 31 A.L.R.2d 8, 24-34 (1953).

32. *E.g.,* Improvement Co. v. Guthrie, 116 N.C. 381, 21 S.E. 952 (1895), 2 J. POMEROY, EQUITY JURISPRUDENCE § 455 (5th ed. 1941); Ballentine, *Forfeiture for Breach of Contract,* 5 MINN. L. REV. 329 (1921).

vise methods to circumvent its harsh results.[33] Commentators are unanimous in their criticism of the doctrine, noting the injustice of enforcing a forfeiture upon default of the final payment, thereby allowing the vendor to retain all prior payments together with the land and any improvements thereon, which he can sell again.[34] As the purchaser builds "equity" and the contract approaches completion, or as he adds improvements, his risk of loss upon default becomes increasingly onerous. The vendor's risk, meanwhile, decreases in inverse proportion to his contracted recovery (a forfeiture) in the event of default by the purchaser.

Forfeiture under the terms of an installment land contract seems to be an area of contract law unique in application. It is not analogous to forfeiture of earnest money,[35] and the "earnest money" cases are not valid precedents for extension of the forfeiture doctrine to installment land contracts.[36] Earnest money rarely exceeds ten percent of the purchase price and, indeed, the possibility of its forfeiture is the very reason it is paid. Earnest money is intended as a guarantee of performance.

Likewise, the rationale of liquidated damages is inapplicable to a forfeiture provision. A liquidated damages clause provides for the payment of a sum certain in the event of a future breach, while a forfeiture clause allows the vendor to keep sums already received, which he may have invested or lost. The rule that liquidated damages may not operate as a penalty is readily applied in retrospect

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33. *E.g.*, Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (rescission). Annot., 40 A.L.R. 182 (1926); Annot., 59 A.L.R. 189 (1929); Annot., 102 A.L.R. 852 (1936); Annot., 134 A.L.R. 1064 (1941); Annot., 31 A.L.R.2d 8 (1953); Note, *Equitable Relief Against Forfeitures in Land Sales*, 32 Yale L.J. 65 (1922); Note, *The Forfeiture Clause in Illinois Real Estate Contracts* 1950 U. ILL. L.F. 249. *See* 8A G. THOMPSON, REAL PROPERTY § 4474 (1963 repl.).

34. The classic article is Corbin, *The Right of a Defaulting Vendee to Restitution of Installments Paid*, 40 YALE L.J. 1013 (1931). Professor Corbin admonishes (at 1013):

> In these cases the following questions should be plainly put and definitely answered: Is a plaintiff who has partly performed a contract to be penalized more strongly than one who has not performed at all? Secondly, is a plaintiff who has almost fully performed his contract to be penalized more heavily than one who has performed only a small part of the contract?

35. 5A A. CORBIN, CONTRACTS § 1133 (1964); Lee, *Defaulting Purchaser's Right to Restitution Under the Installment Land Contract*, 20 U. MIAMI L. REV. 1, 2 (1965); Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550, 553 (1965).

36. *See* text *supra* at 30-31.

to a breaching purchaser who has measurably injured the interests of his vendor—the breaching purchaser must pay. To apply the penalty rule to a forfeiture would require the non-breaching vendor, if his injury were less than the installments, to pay over money he might not have readily available.[37]

North Carolina has not expressly denounced forfeiture, either legislatively or judicially.[38] Although there are examples of the court's circumventing what was apparently a real default followed by a legitimate attempt at forfeiture under the terms of the contract,[39] there are nevertheless pronouncements that the contract will be enforced.[40] The courts are slow to assist the vendor in de-

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37. 5A A. CORBIN, CONTRACTS § 1133 (1964):

> It is the difference between an agreement that a vendor shall be privileged to keep what he has already received and an executory promise creating in the vendor a right that money shall be paid to him. It is the difference between the executed and the executory, between possession and the hope to possess, between a bird in the hand and a bird in the bush.

Cf. Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550, 552 (1965); Annot., 6 A.L.R.2d 1401 (1949). *But see, e.g.*, Freedman v. Rector, Wardens & Vestrymen of St. Matthias Parish, 37 Cal. 2d 16, 230 P.2d 629 (1951).

38. Whether forfeiture violates the due process clause of the Fourteenth Amendment under the doctrine of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), has apparently not been decided in any jurisdiction. Whether there is an acceptable waiver of hearing, Fuentes v. Shevin, 407 U.S. 67, *reh. denied*, 409 U.S. 902 (1972), or state action, Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), may have to be decided on a case by case basis initially. That North Carolina has no statute providing for rights and remedies of the parties to an installment land contract and no appellate decisions evidencing a standard judicial remedy in the nature of foreclosure by sale or otherwise, would seem to negate a finding of state action. As to notice, *cf.* Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172 *appeal dismissed*, 288 N.C. 238, 217 S.E.2d 678 (1975) (deed of trust); Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412 *appeal dismissed* 218 N.C. 314, 188 S.E.2d 898, *cert, denied* 409 U.S. 1071 (1972) (deed of trust). *See* OSBORNE, NELSON & WHITMAN § 3.29; Note, *Notice Requirements of the Nonjudicial Foreclosure Sale*, 51 N.C. L. REV. 1110 (1973); Note, *Cancellation of Contracts for Deed: The Constitutionality of the Minnesota Statutory Procedure*, 58 MINN. L. REV. 247 (1973).

39. *E.g.*, Douglas v. Brooks, 242 N.C. 178, 87 S.E.2d 258 (1955).

40. Improvement Co. v. Guthrie, 116 N.C. 381, 21 S.E. 952 (1895); Syme v. Smith, 92 N.C. 338 (1885); Green v. N.C.R.R., 77 N.C. 95 (1877); Foust v. Shoffner, 62 N.C. (Phil. Eq.) 242 (1867). In these cases the plaintiff-purchaser came into court asking for a refund of his payments, which the court would not allow, the defendant-vendor asserting his willingness to convey. The posture of these cases did not place the question of forfeiture squarely before the court.

claring a forfeiture.[41]

In order to assert successfully a forfeiture, the vendor must avoid any basis for a claim of waiver of the contract, either as to time of payment[42] or right to forfeiture.[43] If time of payment is not made "of the essence" by the terms of the contract, he must give the purchaser reasonable notice of his intentions.[44] Even if the contract makes time "of the essence," a mere default does not effect a forfeiture unless the contract contains a forfeiture clause which the court will allow to operate according to its terms.[45] The vendor may, by disregarding the contract, lose his rights thereunder by reselling the premises without preserving the rights of the installment land contract purchaser,[46] or by resuming possession him-

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41. Apparently a case is not to be found in the North Carolina reports in which the court has actually declared the interest of the purchaser forfeited. *But see* Allen v. Taylor, 96 N.C. 37, 1 S.E. 462 (1887); *cf.* Holden v. Purefoy, 108 N.C. 163, 12 S.E. 848 (1891); Francis v. Love, 56 N.C. (3 Jones Eq.) 321 (1857) (six year delay by purchaser deemed abandonment). As in the last case cited, however, few of the North Carolina cases involve either a "time is of the essence" clause or a "forfeiture" clause. In Hicks v. King, 150 N.C. 370, 64 S.E. 125 (1902), the contract did contain a forfeiture clause. There, the court refused to allow forfeiture and ordered a foreclosure sale on the basis of the mortgage analogy.

42. Hairston v. Bescherer, 141 N.C. 205, 53 S.E. 845 (1906) (estoppel).

43. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967); "If the defendant relied upon a renunciation of the contract by the plaintiffs, it was his duty to make it out unmistakably, and that he himself had assented to it." Faw v. Whittington, 72 N.C. 321, 324 (1875).

44. *See* Douglass v. Brooks, 242 N.C. 178, 185, 87 S.E.2d 258, 263 (1955) (" 'mere lapse of time with a contract unperformed does not entitle either party to refuse to complete it' "); Falls v. Carpenter, 21 N.C. (1 Dev. & Bat. Eq.) 237 (1835). Time is not of the essence in an installment land contract unless the contract so provides. Where there is no provision making time of the essence, some action must be taken to effect a forfeiture. Scarlett v. Hunter, 56 N.C. (3 Jones Eq.) 84 (1856).

45. *See* Bateman v. Hopkins, 157 N.C. 470, 475, 73 S.E. 133, 135 (1911) (dictum).

> Where time is essential or of the essence of the contract, the tender and demand must be made on the day named, and a *fortiori* where it is stipulated that if tender and demand are not made by one of the parties at the time specified, the other party may treat the contract as at an end.

Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 716 (1898) (vendor "may remain inactive, yet retain to his own use the moneys paid"); Annot., 31 A.L.R.2d 8, 83 (1953).

46. Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550, 562 (1965). *Cf.* Improvement Co. v. Guthrie, 116 N.C. 381, 21 S.E. 952 (1895).

self.[47] Such an action could prove quite costly because it entitles the purchaser to an action for rescission, and the vendor may be required to reimburse the purchaser for all installments made.[48]

b. Vendor's Action for Damages for Breach

As with any other contract, when injury results from the nonperformance of a party to an installment land contract, the injured party has a cause of action for damages arising from the breach.[49] The last case in North Carolina to consider the measure of the vendor's damages upon breach by the purchaser under an installment land contract was *Garrard v. Dollar*,[50] decided in 1856, wherein the Court adopted the loss of bargain rule.[51] Under that rule, the vendor may recover the difference between the market value and the contract price on the date of the breach or on the date at which he recovers possession. Thus, if the land decreases in value, the vendor recovers, but if the land appreciates, his loss is limited to his special damages. If the purchaser breaches at a time when the sum of installments paid and the value of the property is less than the vendor's damages, whether the vendor has a claim for breach of contract damages in the face of a forfeiture clause in the contract is an open question.[52]

c. Ejectment and Action to Quiet Title

After default, the purchaser's right to possession ceases and the vendor has an absolute right to take possession.[53] The vendor

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47. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967); Hicks v. King, 150 N.C. 370, 64 S.E. 125 (1909) (repossession by vendor entitles purchaser to forclosure sale and the benefit of any surplus).

48. *E.g., cf.* Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967) (recission theory based on vendor's demand that purchaser surrender possession).

49. 11 S. WILLISTON, CONTRACTS § 1399 (3d ed. 1968).

50. 49 N.C. (4 Jones) 175 (1856).

51. This is the general rule. *See* D. DOBBS, REMEDIES § 12.11 (1973). The vendor should also be entitled to special damages, including rental value during the period he did not have possession. North Carolina follows the loss of bargain rule as a measure of purchaser's damages upon vendor's default under an earnest money contract. Johnson v. Insurance Co., 219 N.C. 445, 14 S.E.2d 405 (1941).

52. The general rule is that the forfeiture clause controls. *See* Annot., 97 A.L.R. 1493 (1935).

53. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967). *See* Note, *Measure of Vendor's Damages Where Vendee Wrongfully Remains in Possession after Cancellation of Executory Contract*, 16 MINN. L. REV. 725 (1932).

may then bring an action in ejectment to exercise dominion over the premises.[54] This action terminates the contract, and the purchaser loses possession and forfeits any installments paid. The vendor may also bring an action to quiet title[55] to remove the installment land contract as a cloud on title and to terminate any claim the purchaser may have to the premises.

d. Right of Peaceful Reentry

If he can do so without a breach of the peace, the vendor can retake possession of the premises. The purchaser's default terminates his possessory rights.[56]

2. Vendor's Affirmance of the Contract

a. Suit for Specific Performance

Specific performance is available to the vendor[57] only if all of the unpaid balance is due[58]—hence the necessity of an acceleration clause in the contract. This remedy would be preferable only in the event the property has depreciated and the purchaser is solvent. Regardless of the existence of other adequate remedies at law, the equitable remedy of specific performance remains available.[59] That the vendor may not have a marketable title at the time of the action is no defense, assuming he can cure any title defaults prior to the decree.[60] If the purchaser cannot or will not comply with a decree for specific performance, foreclosure of his equity in the property is proper.[61]

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54. Allen v. Taylor, 96 N.C. 37, 1 S.E. 462 (1887); Jones v. Boyd, 80 N.C. 258 (1879); Carson v. Baker, 15 N.C. (4 Dev.) 220 (1833). A purchaser in possession is not, however, subject to summary ejectment under N.C. GEN. STAT. § 42-26 (1976). Brannock v. Fletcher, 271 N.C. 65, 70, 155 S.E.2d 532, 539 (1967), *citing* McCombs v. Wallace, 66 N.C. 481 (1872).

55. This is a statutory action in North Carolina. N.C. GEN. STAT. § 41-10 (1976).

56. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

57. Springs v. Sanders, 62 N.C. (Phil. Eq.) 67 (1866).

58. Brame v. Swain, 111 N.C. 540, 15 S.E. 938 (1892).

59. *Supra* note 57.

60. Hughes v. McNider, 90 N.C. 248 (1884); *accord,* Battery Park Bank v. Loughran, 122 N.C. 668, 30 S.E. 17 (1898).

61. *See* Council v. Bailey, 154 N.C. 54, 69 S.E. 760 (1910); Hobson v. Buchanan, 96 N.C. 444, 2 S.E. 180 (1887). Because of this similarity to a mortgage as opposed to execution on a money judgment, the proper venue is the county where the land lies. *Id. But see* McPeters v. English, 141 N.C. 491, 54 S.E. 417

b. *Action for Installments Due*

The vendor can bring an action for each installment as it becomes due,[62] or for the total amount due after all installments are due. This remedy is in substance and result the same as a suit for specific performance of the contract.[63] For that reason, some courts have said the action will not lie,[64] but North Carolina has allowed it,[65] and the problem is probably moot since the fusion of law and equity in this State.[66] The vendor should come into court tendering his deed and showing that the tender has remained open.[67] If the vendor recovers a judgment for all or a part of the purchase money and later terminates the contract for default of the purchaser, the court should relieve the purchaser from the judgment.[68] As with specific performance, the practical utility of this action is limited to situations in which foreclosure would not yield equivalent proceeds because of the depreciation of the property, or when repair expenses or costs of repossession exceed the amount which could be realized on a forfeiture.

c. *Foreclosure of the Contract*

A purchaser's interest under an installment land contract can be foreclosed by action in the same manner as that of a mortgagor.[69] An action for foreclosure can only be brought if the final payment is due either by passage of time or by operation of an acceleration clause.[70] Because the vendor's obligation is then con-

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(1906), holding that the interest of a purchaser under an installment land contract cannot be sold under execution on a judgment for the purchase money.

62. Walker v. Burrell, 172 N.C. 386, 90 S.E. 425 (1916); Brame v. Swain, 111 N.C. 540, 15 S.E. 938 (1892).

63. Note, 12 N.C. L. REV. 284 (1934). *See* Ellis v. Hussey, 66 N.C. 501 (1872) (distinguishing the action from action by vendor as for sale as a mortgagee).

64. 3 AMERICA LAW OF PROPERTY § 11.77 (A. J. Casner ed. 1952).

65. Brame v. Swain, 111 N.C. 540, 15 S.E. 938 (1892); Ellis v. Hussey, 66 N.C. 501 (1872); Garrard v. Dollar, 49 N.C. (4 Jones) 175 (1856) (prior to fusion of law and equity by Constitution of 1868).

66. *See* D. DOBBS, REMEDIES, § 12.11 (1973).

67. Hardy v. McKesson, 51 N.C. (6 Jones) 554 (1859). *See* Annot., 35 A.L.R. 108 (1925).

68. *See* Note, 17 MINN. L. REV. 110 (1933). As to deficiency judgment, *infra* note 70.

69. Allen v. Taylor, 96 N.C. 37, 1 S.E. 462 (1887).

70. Brame v. Swain, 111 N.C. 540, 15 S.E. 938 (1892). The vendor should be able, after a foreclosure sale, to recover from the vendee any deficiency. N.C. GEN. STAT. 45-21.38 (1976), the anti-deficiency judgment statute, does not apply to an

current with the purchaser's, the vendor must be able to demonstrate his ability to make the conveyance. A power of sale reserved in an installment land contract operates according to the same rules which govern a power of sale in a mortgage.[71]

3. *North Carolina's Treatment of the Vendor—Plaintiff*

As stated earlier, the installment land contract may be an advantageous conveyancing device only if the contract is enforceable as written. This *caveat* especially commends itself to vendors in North Carolina. Courts of this state have been reluctant to enforce provisions of installment land contracts when the results substantially differ from relief accorded to a mortgagee under a purchase money mortgage.[72] Moreover, in actions by the vendor to terminate the purchaser's interest or to eject him from possession upon default, North Carolina courts have consistently used a mortgage analogy to protect the vendee's "equity of redemption."[73] Even when a purchaser was in arrears for five years before the vendor brought an action to recover the land, the court held that the purchaser's equity could not be destroyed by a forfeiture clause in the contract anymore than could a mortgagor's, and that a sale of the property would be held to pay the balance due.[74]

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installment land contract to prohibit a deficiency judgment. That statute is limited by its terms to foreclosure "sales of real property by mortgagees and/or trustees." The court has not shown a willingness to expand the strict wording of the statute, *see* Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968), and it has held that the provision does not apply to unsecured notes given by the purchaser in addition to cash and a purchase money deed of trust, Brown v. Owens, 251 N.C. 348, 111 S.E.2d 705 (1959). *Cf.* Realty Co. v. Trust Co., 296 N.C. 366, 250 S.E.2d 271 (1979); Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638, *petition for review allowed*, 297 N.C. 698, 259 S.E.2d 295 (1979). Deficiency judgments after foreclosure of installment land contracts were allowed prior to passage of the anti-deficiency judgment statute. 1933 N.C. Sess. Laws, ch. 36. Bank v. Loughran, 122 N.C. 668, 30 S.E. 17 (1898).

71. Bank v. Loughran, 122 N.C. 668, 30 S.E. 17 (1898); McQueen v. Smith, 118 N.C. 569, 24 S.E. 412 (1896).

72. *See* Hairston v. Bescherer, 141 N.C. 205, 53 S.E. 845 (1906) (increase in value from $100 at time of contract to $1000 at time of trial—purchaser allowed to redeem by decree for specific performance). *But cf.* Syme v. Smith, 92 N.C. 338 (1885) ($596 paid on $750 purchase price plus many improvements not recoverable by purchaser where vendor stands on the contract—but no attempt by purchaser to redeem).

73. *E.g.*, Crawford v. Allen, 189 N.C. 434, 127 S.E. 521 (1925).

74. Hicks v. King, 150 N.C. 370, 64 S.E. 125 (1909).

B. Rights and Remedies of the Purchaser

Upon a breach by the vendor the purchaser may: (1) stand upon the contract and sue at law for damages for its breach, or he may seek specific performance in equity; or (2) treat the vendor's breach as an abandonment and abandon the contract—thereby rescinding it—and recover what he has paid.[75] The purchaser most frequently finds himself in a defensive position, however, and because his actions upon the vendor's breach are not too dissimilar from ordinary contract actions, the following material reviews primarily his defensive remedies, including rescission.

The defaulting purchaser has several theories he can assert, defensively or offensively,[76] to recover his installments. When contract principles are relied on and the vendor stands ready to perform, the purchaser must advance some theory which will allow the court to circumvent or avoid the contract.[77] He may claim no contract was actually entered into,[78] or that the contract made is

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75. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967). For remedies of purchasers under installment land contracts *see* Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550 (1965); Spencer, *Remedies Available Under a Land Sale Contract*, 3 WILLAMETTE L.J. 164 (1965); 3 AMERICAN LAW OF PROPERTY § 11.66 *et. seq.* (A.J. Casner ed. 1952); Comment, *Forfeiture: The Anomaly of the Land Sale Contract*, 41 ALBANY L. REV. 71 (1977); Annot., 6 A.L.R.2d 1401 (1949); Annot., 1 A.L.R.3d 542 (1965). As to requirement for election of remedies, *see* Lykes v. Grove, 201 N.C. 254, 159 S.E. 360 (1931). For a suggestion that N.C. GEN. STAT. § 75-1.1 (1975), North Carolina's "Deceptive Trade Practices Act," may be used as a defense to enforcement of forfeiture, *see* Comment, *Attacking the "Forfeiture as Liquidated Damages" Clause in North Carolina Installment Land Sales Contracts as Equitable Mortgages, Penalty and Unfair and Deceptive Trade Practice*, 7 N.C. CENT. L.J. 370 (1976).

76. For treatment of remedies and rights of defaulting purchasers, *see* Lee, *Defaulting Purchaser's Right to Restitution Under the Installment Land Contract*, 20 U. MIAMI L. REV. 1 (1965); Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013 (1931); Note, *Equitable Relief Against Forfeitures in Land Sales*, 32 YALE L.J. 65 (1922); Annot., 31 A.L.R.2d 8 (1953).

77. Generally, a purchaser in default cannot recover money paid on the contract so long as the vendor is not in default and remains ready and willing to perform the contract. *See* Improvement Co. v. Guthrie, 116 N.C. 381, 21 S.E. 952 (1895); 5 A. CORBIN CONTRACTS § 1075 (1964); Annot., 31 A.L.R.2d 8 (1958). *Compare* Ford v. Stroud, 150 N.C. 362, 64 S.E. 1 (1909) (purchaser allowed to recover payments and value of improvements less reasonable rents and profits upon repudiation by vendor of parol contract to convey).

78. *Cf.* Walker v. Weaver, 23 N.C. App. 654, 209 S.E.2d 537 (1974) (plaintiffs alleged the contract became null and void upon failure of a condition).

invalid or unenforceable.[79] He may recover upon proof that the contract has been rescinded,[80] either by mutual consent,[81] by the vendor,[82] or by the purchaser where he has a right to rescind.[83] A purchaser may show that he has not abandoned the contract and attempt to establish a waiver by the vendor.[84] Some courts have used the liquidated damages rule to characterize forfeiture as an illegal penalty;[85] others have refused to enforce a forfeiture on the grounds of simple justice,[86] although the holding was articulated in terms of rescission. Still other courts have held the contract to be an equitable mortgage[87] or a security arrangement which should be treated as a mortgage in order to avoid forfeiture.[88]

When the vendor is also in default,[89] the purchaser may re-

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79. Improvement Co. v. Guthrie, 116 N.C. 381, 21 S.E. 952 (1895) (statute of frauds objection); Garrow v. Brown, 60 N.C. (Win.) 595 (1864) (mental competency of buyer questioned).

80. Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013, 1019-20 (1931); 3 AMERICAN LAW OF PROPERTY § 11.70 (A. J. Casner ed. 1952); Note, *Vendor-Vendee—Rescission of Executory Contract for the Sale of Land, What Constitutes*, 11 WASH. L. REV. 58 (1936).

81. Lewis v. Gay, 151 N.C. 168, 65 S.E. 907 (1909); Smith v. Stewart, 83 N.C. 406 (1880) (vendor entitled to fair rental less value of purchaser's improvements, measured by enhanced value of land.)

82. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

83. *E.g.*, Knight v. Houghtalling, 85 N.C. 17 (1881) (fraud).

84. Douglass v. Brooks, 242 N.C. 178, 87 S.E.2d 258 (1955) (purchaser seeking specific performance); Faw v. Whittington, 72 N.C. 321 (1875). *See* Annot., 68 A.L.R.2d 581 (1959).

85. *E.g.*, Lytle v. Scottish Am. Mortgage Co., 122 Ga. 458, 50 S.E. 402 (1905); Graves v. Cupie, 75 Idaho 451, 272 P.2d 1020 (1954). Cases are collected in Annot., 6 A.L.R.2d 1401 (1949). *Cf.* Annot., 48 A.L.R. 899 (1927).

86. *E.g.*, Pierce v. Staub, 78 Conn. 459, 62 A. 760 (1906) (landmark case); Williams v. DeLay, 395 P.2d 839 (Alas. 1964).

87. *E.g.*, Helmerick v. Simpson, 235 Ark. 280, 359 S.W.2d 447 (1962). *Cf.* Hardy v. Neville, 261 N.C. 454, 135 S.E.2d 48 (1964) (holding a transaction involving contract of purchase and sale to be an equitable mortgage, where the land belonged to the purchaser initially and was deeded to the vendor for an advance of money, with an installment contract for repurchase). *See generally* 59 C.J.S. *Mortgages* § 14(f) (1949); Annot., 77 A.L.R. 270, 272 (1932).

88. *See* H & L Land Co. v. Warner, 258 So. 2d 293 (Fla. Dist. Ct. App. 1972), *noted in* 26 U. MIAMI L. REV. 855 (1972); Nelson v. Robinson, 184 Kan. 340, 336 P.2d 415 (1959); Rothenberg v. Follman, 19 Mich. App. 383, 172 N.W.2d 845 (1969); 1 G. GLENN, MORTGAGES, § 15.1 (1943); Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550, 558 (1965); Annot., 77 A.L.R. 270 (1932).

89. Williston's opinion is that if a defect in title cannot be removed the purchaser has an excuse, but if an encumbrance can be removed, the question is one

cover his payments[90] or sue for specific performance.[91] But when a defaulting purchaser brings an action to recover his payments and the vendor shows that he, the vendor, is still upholding the contract, the North Carolina Supreme Court has refused, without mention of mortgage principles, to allow a return of installments.[92] Such cases appear to be based on the idea that the enforceability of contracts is of overriding importance.[93] Each time, the court has been careful to note that the defendant-vendor was standing on the contract and came into court offering to perform.[94]

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of degree and of probability of prospective failure. 6 S. WILLISTON, CONTRACTS § 879 (3d ed. 1962). *See* Note, *Vendor and Purchaser—Mortgaging of Land by Vendor—Effect on Vendee's Duty to Continue Installment Payments*, 33 MICH. L. REV. 461 (1935); Note, *Vendor-Purchaser —Prospective Inability of Vendor to Convey*, 31 MICH. L. REV. 1002 (1933); Note, *Vendor and Purchaser—Anticipatory Rescission of Land Contract by Vendee*, 6 WIS. L. REV. 255 (1931).

90. Knowles v. Wallace, 210 N.C. 603, 188 S.E. 195 (1936); Adams v. Beasley, 174 N.C. 118, 93 S.E. 454 (1917).

91. North Carolina has decreed specific performance in favor of the purchaser even where the vendor had no title to convey. Love v. Camp, 41 N.C. (6 Ired.) 209 (1849) (defendant did not adequately show what attempt he had made to acquire title). *See* Welborn v. Sechrist, 88 N.C. 287 (1883) ("compel [vendor] to make sufficient efforts to undo what he has done"). But if the vendor, after reasonable efforts to obtain title, cannot do so, he has a defense. Swepson v. Johnson, 84 N.C. 449 (1881), *citing* Love v. Cobb, 63 N.C. 324 (1869) (wherein purchaser knew at time of contract that vendor had no title). If the vendor has only part of the lands contracted to be conveyed, he can be required to convey that portion, with an abatement in the purchase price. Swepson v. Johnson, *supra.; accord*, Goldstein v. Wachovia Bank & Trust Co., 241 N.C. 583, 86 S.E.2d 84 (1955) (earnest money contract); Flowe v. Hartwick, 167 N.C. 448, 83 S.E. 841 (1914) (same). *See* Note, *Vendor and Purchaser: Vendee's Right to Partial Specific Performance With Abatement Upon Failure of Vendor's Title*, 24 OKLA. L. REV. 495 (1971); Note, 40 MINN. L. REV. 85 (1956); Note, *Specific Performance—Failure of Vendor's Title*, 34 MICH. L. REV. 890 (1936); Note, 10 TEX. L. REV. 114 (1932).

92. Improvement Co. v. Guthrie, 116 N.C. 381, 21 S.E. 952 (1895); Syme v. Smith, 92 N.C. 338 (1885); Green v. N.C.R.R., 77 N.C. 95 (1877); Foust v. Shoffner, 62 N.C. (Phil. Eq.) 242 (1867).

93. The contract basis for the court's consideration of the installment land contract was emphasized in Brannock v. Fletcher, 271 N.C. 65, 69, 155 S.E.2d 532, 538 (1967), where the court concluded that, "since plaintiffs brought this action to recover payments they had made, their theory necessarily is that defendants had rescinded the contract." Mortgage principles as applied to installment land contracts were discussed at length but the court made no allusion to the possibility of treating the contract as a mortgage in order to avoid a forfeiture and to allow the plaintiff-purchasers a chance to recover their equity after a foreclosure sale.

94. Of course, refusal to order a return of all or a portion of purchaser's pay-

On the other hand, when the plaintiff-purchaser comes into court after his default asking for specific performance of the contract, rather than for recovery of his payments, the court has no difficulty circumventing the vendor's right to forfeiture under the contract.[95] The vendor may be found to have contributed to the delay[96] or to have failed to take proper steps to meet the requirements for forfeiture.[97] Absent an express provision in the contract making time of the essence,[98] the court generally utilizes the mortgage analogy, stating that equity will not countenance a forfeiture for mere delay.[99] Implicit in the cases as a whole, and expressly discussed in some,[100] is the general rule of equity that the court will consider all the circumstances of the case, particularly the fairness of the agreement and justness of the proposed remedy. Of special significance is that many of these cases discuss mortgage principles and base the results in large part on equitable doctrines drawn from mortgage precedents.[101]

When the vendor exercises any of his remedies for terminating the contract, the purchaser is not entitled to recover reimbursement for the improvements which he may have constructed on the property, under ordinary circumstances.[102] However, if the vendor is unable to perform, the purchaser is entitled to compensation for the improvements made in reliance on the contract to the extent

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ments is not the same as sanctioning a forfeiture of those payments. The posture of these cases has not squarely presented the forfeiture issue. *See, e.g.*, Syme v. Smith, 92 N.C. 338 (1885); Green v. N.C.R.R., 77 N.C. 95 (1877).

95. *E.g.*, Ward v. Union Bond & Trust Co., 243 F.2d 476 (9th Cir. 1957) (wilfully defaulting vendee), *criticized in* Note, *Full Performance For Defaulting Vendee—A Questionable Step in Contract Law*, 10 STANFORD L. REV. 355 (1958); MacFadden v. Walker, 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971) (wilfully defaulting vendee), *noted in* 5 LOYOLA L. REV. 435 (1972).

96. Douglass v. Brooks, 242 N.C. 178, 87 S.E.2d 258 (1955); Faw v. Whittington, 72 N.C. 321 (1875); Falls v. Carpenter, 21 N.C. (1 Dev. & Bat. Eq) 237 (1835). *But see* Holden v. Purefoy, 108 N.C. 163, 12 S.E. 848 (1891); Francis v. Love, 56 N.C. (3 Jones Eq.) 321 (1857).

97. Hairston v. Bescherer, 141 N.C. 205, 53 S.E. 845 (1906); White v. Butcher, 59 N.C. (6 Jones Eq.) 231 (1861); Scarlett v. Hunter, 56 N.C. (3 Jones Eq.) 84 (1856).

98. *See, e.g.*, Douglass v. Brooks, 242 N.C. 178, 37 S.E.2d 258 (1955).

99. *E.g.*, Hairston v. Bescherer, 141 N.C. 205, 53 S.E. 845 (1906).

100. *E.g.*, Douglass v. Brooks, 242 N.C. 178, 87 S.E.2d 258 (1955).

101. *E.g.*, Hairston v. Bescherer, 141 N.C. 205, 53 S.E. 845 (1906); Scarlett v. Hunter, 56 N.C. (3 Jones Eq.) 84 (1856).

102. 3 AMERICAN LAW OF PROPERTY § 11.79 (A.J. Casner ed. 1952).

that they improve the value of the property.[103] Even when the purchaser defaults, a showing by purchaser of his equities might induce the court to make proper allowance for the improvements, either in the form of ordering reimbursement as a prerequisite to a forfeiture, or providing for reimbursement from the proceeds of a foreclosure sale.[104]

III. INCIDENTS OF THE INSTALLMENT LAND CONTRACT

Cases which concern default remedies and those which define incidents of installment land contracts support the proposition that the security relationship of the parties is that of mortgagor-mortgagee. In large part, the rights of the parties to an installment land contract are identical to those of mortgagor and mortgagee.

Many states[105] apply the doctrine of equitable conversion[106] to the vendor-purchaser relationship as a means of achieving an equitable result. Pomeroy described the circumstances giving rise to equitable conversion:

> A contract of sale, if all the terms are agreed upon, also operates as a conversion of the property, the vendor becoming a trustee of the estate for the purchaser, and the purchaser a trustee of the purchase-money for the vendor. In order to work a conversion, the contract must be valid and binding, free from equitable imperfections, and such as a court of equity will specifically enforce against an unwilling purchaser.[107]

Equitable conversion places equitable title to the land in the pur-

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103. Knowles v. Wallace, 210 N.C. 603, 188 S.E. 195 (1936). *See* Carnahan, *The Kentucky Rule of Damages for Breach of Executory Contracts to Convey Realty*, 20 KY. L. REV. 304 (1932).

104. *Supra* note 102.

105. Lewis & Reeves, *How the Doctrine of Equitable Conversion Affects Land Sale Contract Forfeitures*, 3 REAL EST. L.J. 249 (1974).

106. Whether "this heaven of juristic conceptions" is an unnecessary fiction, as has been ably argued in Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369 (1913), or whether it does in fact express an underlying principle in the decisions, it at least furnishes a convenient label to attach to cases of several related groups which, taken together, occupy an important corner in the law of real property.

3 AMERICAN LAW OF PROPERTY § 11.22 (A.J. Casner ed. 1952).

107. 4 J. POMEROY, EQUITY JURISPRUDENCE § 1161 (5th ed. 1941). Why Pomeroy limited enforcement of specific performance as against a purchaser has been questioned. Certainly specific performance against the vendor should give rise to equitable conversion. Lee, *The Interests Created by the Installment Land Contract*, 19 U. MIAMI L. REV. 367, 370 (1965).

chaser and equitable right to the purchase price in the vendor.[108] The similarity to the principles applied to mortgages in a "title theory" state is apparent. Although the vendor-mortgagee may hold legal title to the premises, because of his equitable title the purchaser-mortgagor has certain rights which would customarily accrue to one holding legal title.[109] Absent controlling contract provisions, the doctrine of equitable conversion has been applied to resolve nearly all disputes concerning rights to the property as between vendor and purchaser, and as between vendor, purchaser and third parties. Rarely has North Carolina recognized and applied the doctrine of equitable conversion.[110] Nevertheless, the results in most of the cases dealing with the problems mentioned in this section are consistent with the results reached by courts expressly finding an equitable conversion. A careful consideration of this doctrine's application may prove helpful in many situations.

A. Assignment

Absent restrictive provisions, the interests of both vendor and purchaser in an installment land contract are assignable.[111] As in the mortgage situation, the purchaser's assignee[112] can complete

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108. It has been ably argued that because there is no right to specific performance prior to the payment of the last installment there is no equitable conversion until that time. Pound, *The Progress of the Law, 1918-1919: Equity*, 33 HARV. L. REV. 929, 950 (1920). It has been argued with equal certitude that equitable conversion occurs at the moment the contract is executed. Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II*, 44 YALE L.J. 754, 774 (1935). Langdell evidently approved of the latter view. Langdell, *Equitable Conversion III*, 18 HARV. L. REV. 245, 268-69 (1905). Simpson's view, that there is a mutually specifically enforceable contract from the beginning, subject to a condition of prompt payment of future installments, is preferable. The parties are clothed with equitable rights at the creation of the contract arising from the nature of the transaction, in essence a security arrangement—rights which can be protected by a court of equity even in the face of the "condition precedent" language of the contract.

109. *See* 7 S. WILLISTON, CONTRACTS § 930 (3d ed. 1963); H. MCCLINTOCK, PRINCIPLES OF EQUITY § 106 (2d ed. 1948); D. DOBBS, REMEDIES § 2.3 at 40-41 (1973); 8A G. THOMPSON, REAL PROPERTY §§ 4447, 4448 (1963).

110. *Infra* notes 125 and 126.

111. *See* 3 AMERICAN LAW OF PROPERTY § 11.36 (A.J. Casner ed. 1952); Goddard, *Non-Assignment Provisions in Land Contracts*, 31 MICH. L. REV. 1 (1932).

112. The purchaser would still be bound in such a situation of course, even in the event of an assumption by the assignee. But between the purchaser and the assignee, the former would stand in the shoes of a surety, under the mortgage analogy. Fed. Land Bank of Columbia v. Whitehurst, 203 N.C. 302, 165 S.E. 793

the contract and insist on conveyance to himself,[113] but the vendor cannot compel performance by the purchaser's assignee unless the assignee has "assumed" the obligation.[114] Likewise, the vendor can assign his interest as long as he protects the purchaser's interest,[115] that is, the purchaser will have the right to compel conveyance by the vendor's assignee.[116] An assignment of the note by the vendor should also act as an assignment of the underlying security.[117]

(1932). Where there are subsequent assignments with assumptions and the vendor takes an assignment from the last assignee and releases him, vendor may be precluded by surety principles from an action against an intermediate assignee. McCurdy v. Van Os, 290 Mich. 492, 287 N.W. 890 (1939), *noted in* 8 DUKE BAR A.J. 60 (1940). A third party beneficiary claim might, however, afford a basis for relief.

113. Shaver v. Shoemaker, 62 N.C. (Phil. Eq.) 327 (1868). *See* Anderson v. Am. Suburban Corp., 155 N.C. 13, 71 S.E. 221 (1911).

114. Morrison v. Chambers, 122 N.C. 689, 30 S.E. 141 (1898).

115. *See* Derr v. Dellinger, 75 N.C. (Hargrove) 300 (1876); Taylor v. Kelly, 56 N.C. (3 Jones Eq.) 240 (1857).

116. Whether in this instance the vendor may compel the purchaser to accept a deed from the vendor's assignee or grantee is another question. The covenants of seisin and right to convey are personal and do not run with the land. A grantee can only recover for breach of these covenants from his grantor. Lockhart v. Parker, 189 N.C. 138, 126 S.E. 313 (1925). Therefore, if the purchaser is required to accept a deed from one other than the vendor, the purchaser does not receive what he bargained for. A duty which is the giving of a personal covenant or promise is not delegable and it is therefore to be questioned whether the vendor can by assignment substitute the covenant of the assignee, and his liability, for that of vendor. *See* Clark, *Installment Land Contracts in South Dakota,* 6 S.D. L. REV. 248, 278 (1961).

117. Morrison v. Chambers, 122 N.C. 689, 30 S.E. 141 (1898). Such an assignment also carries with it the security interest or lien of the vendor under the installment land contract. Hadley v. Nash, 69 N.C. 162 (1873). Assignment of the debt (as opposed to the mortgage itself) by a mortgagee carries with it the security of the mortgage. *See* H. J. Weil & Bros. v. Davis, 168 N.C. 298, 84 S.E. 395 (1915), allowing the assignee upon default by the mortgagor to foreclose by action. The assignee of a vendor should have the same right, if the contract provides for foreclosure. Battery Park Bank v. Loughran, 122 N.C. 668, 30 S.E. 17 (1898).

If the contract does not so provide, is there a "lien" which the assignee of vendor's notes can enforce to secure payment? Womble v. Battle, 38 N.C. (3 Ire. Eq.) 182 (1844) established that North Carolina does not recognize a vendor's lien in the absence of a mortgage or deed of trust. But in all of the cases following that holding the vendor had parted with title. Where title is retained that dictum—addressed to the classic equitable vendor's lien and reasserted in Brannock v. Fletcher, 271 N.C. 65, 73, 155 S.E.2d 532 541 (1967)—does not apply. By his reservation of title, the vendor has a lien as security for purchaser's performance, 9 G. THOMPSON, REAL PROPERTY § 4719 (repl. ed. 1958), on the property to the extent of any unpaid balance and his right to foreclose by action the purchaser's equitable title has been recognized and enforced in this state. Ellis v. Hussey, 66

B. Death of Either Party

When a vendor dies intestate during the contract period, title descends to his heirs under the provisions of North Carolina's intestacy statutes.[118] The classification of decedent's interest as real or personal has no effect upon this passing of title. Ordinarily, the persons taking title under the statute would be required to execute the deed, but North Carolina gives the personal representative that authority by statute.[119]

If the vendor-decedent dies testate, however, other problems arise. Whether his interest is classified as real or personal may determine whether it passes under a general devise of real property or whether it passes under the residuary clause and is therefore first liable for debts. If testator makes a specific devise of the property described in the contract, is the devisee entitled to the proceeds from the contract, or is the devise extinguished by ademption and the proceeds available for debts as a part of the residuary estate?[120] If the court determines that an equitable conversion has occurred, the testate's property will be considered personalty, but courts tend to find the devisee under a specific devise entitled to the proceeds, especially when the will was executed after the installment land contract.[121]

Upon the death of the purchaser pending the final payment of the contract, similar problems arise. Again, under North Carolina law, the characterization of the intestate purchaser's interest as real or personal property has no effect upon distribution. But when

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N.C. 501 (1872); Jones v. Boyd, 80 N.C. 258 (1879) (lack of acceleration clause and impediment). *See generally* Annot., 77 A.L.R. 270 (1932); Note, *Forfeiture by Vendor after Assignment of Notes*, 27 Mich. L. Rev. 835 (1929); 3 AMERICAN LAW OF PROPERTY § 11.74 (A.J. CASNER ed. 1952).

118. N.C. GEN. STAT. ch. 29 (1976).

119. N.C. GEN. STAT. 28A-17-9 (1976). *See* Grubb v. Lookabill, 100 N.C. 267, 6 S.E. 390 (1888) (vendor's heirs necessary parties to an action to enforce the contract).

120. *Compare* Chambers v. Kerns, 59 N.C. (6 Jones Eq.) 280 (1862) (specific devise of lands in will held adeemed where land sold under bond for title after execution of will and residuary provided for "money arising from the collection of my bonds, notes and accounts") *with* Rue v. Connell, 148 N.C. 302, 62 S.E. 306 (1908) (where testator's plantation was the subject of contract unsuccessfully contested by a third person during his life, but successfully enforced after his death, there was no ademption and proceeds passed to devisee because testator died in possession believing himself to be the owner). *Cf.* Green v. Green, 231 N.C. 707, 58 S.E.2d 722 (1950).

121. *See* 3 AMERICAN LAW OF PROPERTY § 11.26 (A.J. Casner ed. 1952).

the purchaser dies testate, can his devisee of the property take it,[122] or is the contract right to be treated as personalty which does not pass under a devise of realty? Under equitable conversion principles, the interest of purchaser-testator would be considered realty in order to accomplish the result probably intended by testator—that his interest pass as realty under his will.[123]

If real property is owned by the entireties and the owners contract to sell it but one dies prior to the time for conveyance, two questions arise: (1) is the survivor entitled to the proceeds, and (2) can the survivor alone convey title to the purchaser? No North Carolina authority speaks directly to these questions, but the courts of this state would probably answer both questions negatively. The Supreme Court of North Carolina has applied the doctrine of equitable conversion in executory contract situations involving death[124] and involving entirety property,[125] but never in a situation combining these circumstances. Under the equitable conversion doctrine, the proceeds from an executed sale of entireties property are personalty. North Carolina does not recognize tenancy by the entireties in personal property.[126] Rights of a husband and wife in a purchase money mortgage and the notes secured by it, although securing the sale of property formerly owned by the entireties, are held by husband and wife as tenants in common and are personalty. The survivor is not entitled to the whole when a balance remains due at the death of the other spouse.[127] By a par-

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122. Under N.C. GEN. STAT. 28A-15-3 (1976), the devisee of encumbered property is not entitled to have the encumbrance exonerated by the residuary estate. *See* H. MCCLINTOCK, EQUITY § 108 (2d ed. 1948).

123. *See* 3 AMERICAN LAW OF PROPERTY § 11.27 (A.J. Casner ed. 1952).

124. Scott v. Jordan, 235 N.C. 244, 69 S.E.2d 557 (1952).

125. Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947) (proceeds of sale are personalty and held in common); N.C. State Highway Comm. v. Meyers, 270 N.C. 258, 154 S.E.2d 87 (1967) (proceeds not personalty in condemnation); Perry v. Jolly, 259 N.C. 306, 130 S.E.2d 654 (1963) (same in involuntary sale).

126. Davis v. Bass, 188 N.C. 200, 124 S.E.2d 566 (1924).

127. Turlington v. Lucas, 186 N.C. 282, 119 S.E. 366 (1923). *Cf.* Shores v. Rabon, 251 N.C. 790, 112 S.E.2d 556, (1960); Dozier v. Leary, 196 N.C. 12, 144 S.E. 368 (1928) (not a purchase money mortgage or note). Where husband and wife sold real property owned by them as tenants by the entireties and took back a purchase money note and mortgage, after which husband died, and the widow brought an action to obtain the balance of the proceeds not collected and spent by the husband prior to his death, it was said that the mortgage, being made to both of them, was only to them as trustees of the legal title to secure the debt. Isley v. Sellers, 153 N.C. 374, 69 S.E. 279 (1910). *But cf.* Forsyth County v. Pelmmons, 2 N.C. App. 373, 375 163 S.E.2d 97, 99 (1968) ("The land is still owned by

ity of reasoning the result should be the same for proceeds under an installment land contract, based on either the rationale of equitable conversion[128] or mortgage analogy.[129]

The answer to the second question may be of more consequence because title is involved. The statute allowing a personal representative to execute a deed does not make an exception for the facts in the question posed,[130] nor have any of the cases decided under that statute considered this situation. Logically, the answer to both questions would have to be the same. If the effect of the contract is to sever a tenancy by the entireties, thereby leaving no rights of survivorship in the proceeds, it should also sever the tenancy as to survivorship in the bare legal title.

C. *Dower and Curtesy*

At common law a widow had no dower interest in an equitable estate,[131] although the rule as to curtesy was otherwise.[132] North Carolina, under its statute,[133] did award dower to the purchaser's

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the husband and wife in exactly the same manner as before the fire"—fire insurance proceeds considered personalty and therefore held in common).

128. If the contract is specifically enforceable, the proceeds and the vendor's interest in them, under equitable converison, are personalty. The conversion occurs upon execution of the contract, thereby severing the tenancy by the entirety. Panushka v. Panushka, 221 Or. 145, 349 P.2d 450 (1960) *noted in* 36 N.D. L. REV. 203 (1960). *See* 3 AMERICAN LAW OF PROPERTY § 11.28A (Supp. 1977); Comment, *Equitable Conversion by Contract*, 7 ARK. L. REV. 45, 55 (1952).

129. *See* Comment, *Survivorship After Joint Tenants Execute Contract for Sale of Land*, 24 MO. L. REV. 108 (1959); Note, 41 CORNELL L.Q. 154 (1955); Note, 34 NEB. L. REV. 501 (1955); Note, 55 MICH. L. REV. 1194 (1957); Note, 42 IOWA L. REV. 646 (1957). 4 G. THOMPSON, REAL PROPERTY § 1792 (repl. 1979). No doubt the same result could be reached on the basis of impairment of one or more of the five unities of tenancy by the entirety. *See* 2 W. BLACKSTONE, COMMENTARIES *185.

It hardly needs stating that the result forecast in the text would rarely, if ever, coincide with the intentions or expectations of the parties. Over-extension of the fictions developed to justify the creation of a tenancy by the entirety to rationalize its termination is only one basis for the increasing criticism of the entirety property doctrine in this state. *See* Note, 58 N.C. L. REV. 997 (1980).

130. N.C. GEN. STAT. 28A-17-9 (1976) provides that where a decedent has contracted to convey real property the personal representative may execute and deliver a deed for the property.

131. 1 E. COKE, COMMENTARIES UPON LITTLETON § 31 (1st Am. ed. 1853).

132. Note, *Real Property—Dower in Equitable Interests—Executory Contracts for Purchase of Land*, 38 YALE L.J. 996 (1929). *Cf.* Sentill v. Robeson, 55 N.C. (2 Jones Eq.) 509 (1856).

133. **Dower:** 1827 N.C. Sess. Laws ch. 46 (most recently codified as N.C.

widow to the extent of his interest under an installment land contract,[134] particularly when the purchase price had been paid in full but the deed not yet delivered.[135] Dower and curtesy were abolished in North Carolina in 1959[136] and replaced by the so-called statutory dower substitute statute.[137] The former dower statute expressly referred to "equitable estates in lands" but G.S. 29-30[138] by its terms includes only a share of "all the real estate of which the deceased spouse was seized and possessed of an estate of inheritance." The equitable interest held by a deceased purchaser under an installment land contract is not seisen of an inheritable estate as conceived at common law; nevertheless, the North Carolina Supreme Court has said that ". . . G.S. 29-30 preserves to surviving spouse the benefits of the former rights of dower and curtesy."[139] There is also precedent in this State for exonerating the surviving spouse from the personal estate of the decedent[140] to the extent of the equitable marital interest, and the statutory dower substitute statute does not expressly alter or abolish this exoneration.[141]

At common law and under the old and new marital interest statutes the otherwise entitled surviving spouse of a deceased vendor would be entitled to any unwaived marital interest in the vendor's land subject to an installment land contract.[142]

GEN. STAT. § 30-5 (1950), repealed by 1959 N.C. Sess. Laws ch. 879, § 14). **Curtesy:** 1871-2 N.C. Sess. Laws ch. 193, § 30 (most recently codified as N.C. GEN. STAT. § 52-16 (1950), repealed 1965 N.C. Sess. Laws ch. 878, § 1).

134. Bunting v. Foy, 66 N.C. 193 (1872); Thompson v. Thompson, 46 N.C. (1 Jones) 430 (1854).

135. Howell v. Parker, 136 N.C. 373, 48 S.E. 762 (1904); Love v. McClure, 99 N.C. 290, 6 S.E. 247 (1888). *See* Annot., 66 A.L.R. 65 (1930).

136. 1959 N.C. Sess. Laws ch. 879, § 14.

137. N.C. GEN. STAT. § 29-30 (1976).

138. *Id.*

139. Smith v. Smith, 265 N.C. 18, 30, 143 S.E.2d 300, 308 (1965).

140. Love v. McClure, 99 N.C. 290, 6 S.E. 247 (1888); Caroon v. Cooper, 63 N.C. 386 (1869); Klutts v. Klutts, 58 N.C. (5 Jones Eq.) 80 (1859). The weight of authority is *contra.*, 3 AMERICAN LAW OF PROPERTY § 1128 (A.J. Casner ed. 1952).

141. N.C. GEN. STAT. § 29-30(g) (1976) provides that the life estate taken by election under that section shall not be subject to payments of debts due from the estate of the deceased spouse, except those debts secured by such property by a mortgage or deed of trust.

142. *See* 3 AMERICAN LAW OF PROPERTY § 11.28 (A.J. Casner ed. 1952); Annot., 8 A.L.R.3d 569 (1966).

D. *Possession and Possessory Actions*

Under an installment land contract the land remains the vendor's at law and he has a right to possession and to the rents and profits until the purchase money has been paid.[143] The purchaser's payment of the majority of the purchase price has no effect upon the purchaser's right to possession.[144] However, the purchaser may be given the right to possession prior to the conveyance of title, either by the terms of the contract or by necessary implication.[145] "Like a mortgagor, a vendee who, by agreement with his vendor, is in possession of the property under an executory contract of purchase and sale cannot be deprived thereof as long as he is not in default in the performance of his contract."[146] Both types of contracts allow the party in possession to retain rents and profits absent some other arrangement,[147] and if the mortgagee[148] or vendor[149] goes into possession he will have to account for rents and profits on demand.

Like a mortgagor,[150] one holding equitable title under an executory land contract can maintain either an action in ejectment or some other possessory action.[151] A purchaser in possession may be liable to the vendor for depreciation or destruction[152] caused by the former, or for waste or use which impairs the security.[153] Where the vendor retains possession he may be held liable to the purchaser for waste and repairs.[154]

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143. Allen v. Taylor, 96 N.C. 37, 1 S.E. 462 (1887).

144. Butner v. Chaffin, 61 N.C. (Phil. Law) 497 (1868).

145. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967); Annot. 28 A.L.R. 1069 (1924).

146. Brannock v. Fletcher, 271 N.C. 65, 71, 155 S.E.2d 532, 539 (1967).

147. *Id.*, (land contract); Kistler v. Wilmington Dev. Co., 205 N.C. 755, 172 S.E. 413 (1934) (mortgage).

148. Anderson v. Moore, 233 N.C. 299, 63 S.E.2d 641 (1951).

149. Butner v. Chaffin, 61 N.C. (Phil Law) 497 (1868).

150. Watkins v. Kaolin Mfg. Co., 131 N.C. 536, 42 S.E. 983 (1902).

151. Skinner v. Terry, 134 N.C. 305, 46 S.E. 517 (1904).

152. *Supra* note 146.

153. H. MCCLINTOCK, EQUITY § 112 (2d ed. 1948). The vendor may not be able to enjoin the purchaser's cutting of timber unless it can be shown the vendor's security is thereby impaired. Small v. Slocumb, 112 Ga. 279, 37 S.E. 481 (1900).

154. Crawley v. Timberlake, 37 N.C. (2 Ired. Eq.) 460 (1843); Note, *The Vendor's Liability for Permissive Waste,* 48 HARV. L. REV. 821 (1935). *Compare* Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957) (mortgagee in possession after default charged with repair).

E. Creditor's Rights

Questions of creditor's rights and priorities have been the subject of numerous articles.[155] Courts in various states other than North Carolina have utilized equitable conversion to provide a rational basis for a workable solution to the complex problems arising in this area. Even if the interest of the vendor or purchaser is found subject to judgment liens[156] or other rights, reaching the interest itself for collection presents even more complicated problems.

Although in some states the interest of a vendor is subject to

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155. *E.g.*, Lacy, *Creditors of Land Contract Vendors*, 24 CASE W. RES. L. REV. 645 (1973); Comment, *Are the Interests of Vendor and Purchaser Amenable to Creditors in Illinois*, 1955 U. ILL. L.F. 754; Note, *Rights of a Judgment Creditor Against a Vendor or Vendee Following an Executory Contract for the Sale of Land*, 43 IOWA L. REV. 366 (1958); Annot., 1 A.L.R.2d 727 (1948).

156. N.C. GEN. STAT. § 1-234 (Supp. 1979), provides, in part:

> . . . [A judgment docketed] is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for 10 years from the date of the rendition of the judgment.

Broad dictum statements are to be found to the effect that this statute will be construed to extend to legal and equitable estates, even though the interest held by the judgment debtor cannot be subjected to levy and sale. *See* Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905) (interest of debtor-trustor under deed of trust); Hoppock v. Shober, 69 N.C. 153 (1873); McKeithan v. Walker, 66 N.C. 95 (1872) (interest of debtor-trustor under deed of trust). *But see* Moore v. Byers, 65 N.C. 240 (1871) (the vendor's interest under an installment land contract was not subject to a lien because enforcement of the lien would prevent his conveying legal title to the purchaser, and that therefore the judgment creditors had no priority as to the proceeds of the notes payable under the installment land contract). *See* Hadley v. Nash 69 N.C. 162 (1873). *Compare* Jackson v. Thompson, 214 N.C. 539, 200 S.E. 16 (1938) (no judgment lien against resulting trustee). Whether a docketed judgment becomes a lien on a purchaser's interest under an installment land contract so that the judgment creditor acquires priority is apparently an open question in North Carolina. *Compare* Trimble v. Hunter, 104 N.C. 129, 10 S.E. 291 (1889) (equity of redemption is lienable). *Cf.* Taylor v. Capehart 128 N.C. 292, 38 S.E. 890 (1901) (if judgment against purchaser does constitute a lien, it is not superior to rights of vendor where vendor forecloses the contract under power of sale, and through conveyance from the purchaser at the sale, reacquires the property). Whether the purchaser must begin to make his payments to the vendor's judgment creditor upon docketing of the judgment or upon actual notice or at some other time does not present a problem if the judgment is not a lien. *See* Note, 43 IA. L. REV. 366 (1958).

execution to the extent of the unpaid purchase money,[157] the North Carolina Supreme Court has held that bare legal title is not vendible and if sold at execution carries with it no interest in the purchase money.[158] However, G.S. § 1-315,[159] which enumerates property liable to sale under execution, was amended in 1961[160] to include "choses in action represented by any interest in property, together with the security interest in property."[161] This provision changes the old rule and, to the extent the purchase price remains unpaid, the vendor's interest should now be subject to levy and execution in North Carolina by a levy on the vendor's contract.[162]

Unlike the mortgagor's equity of redemption,[163] the interest of a purchaser under an installment land contract has been held not subject to levy and sale by creditors,[164] at least not until the purchase money is fully paid[165] or the deed executed.[166]

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157. H. McCLINTOCK, EQUITY § 116 (2d ed. 1948); 30 AM. JUR. 2D *Executions* § 166 (1967).

158. Tally v. Reed, 74 N.C. 463 (1876), *affirming on rehearing* Tally v. Reed, 72 N.C. 336 (1875) *overruling* Tomlinson v. Blackburn, 37 N.C. (2 Ired. Eq.) 509 (1843) and Linch v. Gibson, 4 N.C. 676 (1817); Folger v. Bowles, 72 N.C. 603 (1875); Blackmen v. Phillips, 67 N.C. 340 (1872). *Cf.* Willis v. Anderson, 188 N.C. 479, 124 S.E. 834 (1924). *Compare* Stevens v. Turlington, 186 N.C. 191, 119 S.E. 210 (1923) (mortgagee's interest not subject to execution). *See infra* note 159.

159. N.C. GEN. STAT. § 1-315 (1969).

160. 1961 N.C. Sess. Laws, ch. 81. The cases cited in note 157, *supra.* were decided under the Act of 1812, 1812 N.C. Sess. Laws ch. 380, §§ 1, 2.

161. N.C. GEN. STAT. § 1-315(a)(6) (1969).

162. Although the statute is in derogation of the common law which allowed no execution upon choses in action, *see* Grocery Co. v. Newman, 184 N.C. 370, 114 S.E. 535 (1922), even under a strict construction, a chose in action should include the contract, even without promissory notes evidencing the indebtedness. *See* N.C. GEN. STAT. § 1-57 (1969), and the annotations thereto. The "indispensable instruments" requirement was apparently added by N.C. GEN. STAT. §§ 1-315(a) 5, 6 (1969) to preclude executions on choses in action arising on, *e.g.,* a claim for wages and not based upon a writing "indispensable" to the claim. "Instruments", it would seem, should not be restricted to negotiable instruments.

163. N.C. GEN. STAT. § 1-315(a)(3) (1969): "Equitable and legal rights of redemption in real property pledged or mortgaged by him, or transferred to a trustee for security by him" are property of the judgment debtor which may be levied on and sold under execution. Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905).

164. May v. Getty, 140 N.C. 310, 55 S.E. 75 (1905); Ledbetter v. Anderson, 62 N.C. (Phil. Eq.) 323 (1868).

165. Hinsdale v. Thorton, 75 N.C. (Hargrove) 381 (1876) (*semble*). At that time the "trust" relation with the vendor becomes an unmixed trust and is fully satisfied, and the purchaser acquires an "estate in equity" which is subject to execution.

166. Execution on equitable interests was not allowed at the common law,

F. Risk of Loss

Who should bear the risk of loss of the property subject to an installment land contract is a question which has provoked volumes of commentary and appellate decisions. North Carolina became one of the first state to adopt the Uniform Vendor and Purchaser Risk Act[167] which settled such controversies in this state by placing the risk of loss on the one in possession.

When a loss is insured by the vendor-beneficiary, the purchaser's entitlement to any of the insurance money or a credit toward the purchase price for the amount of the recovery is a frequently litigated question.[168] North Carolina answers this question according to the English rule: a contract of insurance is a personal contract of indemnity and the benefit does not pass to the purchaser.[169] This view seems neither to recognize the economic realities of the situation nor to consider the usual expectations of the parties to the installment land contract,[170] and thus represents another area in which the draftsman must exercise care to protect the purchaser's contemplated interest.

Payne v. Hubbard, 4 N.C. (Term) 195 (1815), hence the necessity for the statutory remedy, N.C. GEN. STAT. § 1-315(a)(3) (1969). By its terms, *supra* note 163, the statute does not include a purchaser's interest under an installment land contract and it is not likely to be so broadly construed. *See* Hardware Co. v. Lewis, 173 N.C. 290, 92 S.E. 13 (1917); *cf.* Evins v. Sandefur Julian Co., 81 Ark. 70, 98 S.W. 677 (1906), *citing* Hardy v. Heard, 15 Ark. 184 (1854) (construing a slightly broader statute). *Query* whether the 1961 amendment, 1961 N.C. Sess. Laws § 81, (codified at N.C. GEN. STAT. § 1-315(a) 5, 6 (1969)), changes the rule against execution on a purchaser's interest. That amendment added to property subject to execution "(5) Choses in action represented by instruments which are indispensable to the chose in action. (6) Choses in action represented by indispensable instruments, which are secured by any interest in property, together with the security interest in property."

167. N.C. GEN. STAT. §§ 39-37, -38, -39 (1976) (adopted 1959). For earlier law, *see* Poole v. Scott, 228 N.C. 464, 46 S.E.2d 145 (1948) (earnest money contract); Warehouse Co. v. Warehouse Corp., 185 N.C. 518, 117 S.E. 625 (1923) (same—risk on vendee).

168. Note, 22 ALBANY L. REV. 174 (1958); Annot., 64 A.L.R.2d 1402 (1959).

169. Poole v. Scott, 228 N.C. 464, S.E.2d 145 (1958) (*semble*). *See* Insurance Co. v. Tire Co., 286 N.C. 282, 210 S.E.2d 414 (1974); Green v. Insurance Co., 233 N.C. 321, 64 S.E.2d 162 (1951); Insurance Co. v. Reid, 171 N.C. 513, 88 S.E. 779 (1916). *Compare* Insurance Co. v. Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963).

170. *See* 3 AMERICAN LAW OF PROPERTY § 11.31 (A.J. Casner ed. 1952); R. KEETON, INSURANCE LAW § 4.3(e) (1971); Clark, *Installment Land Contracts in South Dakota*, 6 S.D. L. REV. 248, 288 (1961).

G. *Miscellaneous*

Numerous other areas are certain to be pitfalls for the practicing attorney unfamiliar with the installment land contract.[171] Title problems are of real concern in light of the purchaser's limited protection under this conveyancing device and the extended period of required installment payments before the title is conveyed. A federal tax lien against the vendor may be superior to the purchaser's potential rights.[172] The vendor's trustee in bankruptcy can reject

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171. For example, the status and rights of a mortgagee of the purchaser under an installment land contract have given rise to litigation concerning what notice to vendor is sufficient to require him to notify the mortgagee of pending forfeiture. *See* Kendrick v. Davis, 75 Wash. 2d 470, 452 P.2d 222 (1969) (actual notice, burden on mortgagee) *criticized in* Note, 45 WASH. L. REV. 645 (1970); Davis & Son v. Mulligan, 88 Ala. 523, 6 So. 908 (1898) (recording by mortgagee constitutes notice); Note, *Mortgages—Mortgage of a Vendee's Interest in an Installment Land Contract—Mortgagee's Rights upon Default,* 43 Mo. L. REV. 371 (1978) ("Adoption of the actual notice rule would reward ignorance.")

N.C. GEN. STAT. § 45-21.17 (1976) provides:

> Any person desiring a copy of any notice of default and sale under any security instrument with power of sale upon real property may, at any time subsequent to the recordation of the security instrument and prior to the giving of notice of hearing . . . [for foreclosure], cause to be filed for record in the office of the register of deeds . . . a duly acknowledged request for a copy of such notice of sale.

This statute has apparently functioned well to give notice to subsequent mortgagees by requiring the prior mortgagee to mail notice of hearing 20 days in advance of the hearing. This statute by its wording, "security instrument with power of sale," does not apply to prior installment land contracts, but its principle should be adopted if the legislature should choose to pass legislation governing installment land contracts.

A second and related problem is what actions are open to the purchaser's mortgagee for protection of his interest. The mortgagee should not be able simply to satisfy the amount due under the installment land contract, *cf.* Bank of Greensboro v. Clapps, 76 N.C. 482 (1877), because he would be in the anomalous situation of having greater rights than a second mortgagee in a normal mortgage situation—the right to acquire title without foreclosure. The mortgage analogy should be followed in this situation and the mortgagee allowed to protect himself by acquiring the vendor's interest, as an assignee of the vendor, after which he could pursue vendor's remedies or by foreclosing the purchaser's interest which the mortgagee could then acquire at the sale, subject to the rights of the vendor. Thompson v. Justice, 88 N.C. 269 (1883). OSBORNE, NELSON AND WHITMAN § 3.32; Note, *Mortgages—Mortgage of a Vendee's Interest in an Installment Land Contract—Mortgagee's Rights upon Default,* 43 Mo. L. REV. 371, 374-76 (1978).

172. The Court in Leipert v. Williams & Co., 161 F. Supp. 355 (S.D.N.Y. 1957), interpreted I.R.S. §§ 6321, 6323 as protecting only those purchasers who had acquired legal title to the property prior to the filling of a tax lien by the

the contract, leaving the purchaser in the position of an unsecured creditor.[173] If the vendor should die prior to executing a deed, those upon whom his interest devolves may try to restrain a con-

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government. However, Treas. Reg. § 301.6323(h)-1(f) (1976) now defines a purchaser as one having an interest under a written executory contract to purchase property which is valid under local law against subsequent purchasers without actual notice. Recordation of the contract should therefore protect the purchaser. N.C. GEN. STAT. § 47-18 (1976). *See* Lacy, *The Effect of Federal Priority and Tax Lien Legislation on Creditors of Vendors and Purchasers,* 50 ORE. L. REV. 619 (1971).

173. (A) Bankruptcy: This is one instance where the purchaser's equity has not been recognized as equivalent to that of a mortgagor. Section 70(c) of the former bankruptcy code, 11 U.S.C. § 110(c) (repealed 1979), allowed the trustee in bankruptcy, where the contract was unrecorded, the rights of a lien creditor as of the date of bankruptcy, thus relegating the purchaser to the status of a general creditor. *See* Gottesman, *The Onus of Executory Contracts in Bankruptcy: Focus on Vendors and Lessors,* 4 PRAC. LAW. 65 (Apr. 1965); Levine, *A Recipe for a Due Process Explosion: Installment Land Contracts, Bankruptcy and General Creditors,* 82 COM. L.J. 51 (1977); Lacy, *Land Sale Contracts in Bankruptcy,* 21 U.C.L.A. L. REV. 477 (1974). Under Section 70(b) of the old Act, even where the contract was recorded, 11 U.S.C. § 110(b) (repealed 1979) gave the trustee the power to "assume or reject an executory contract," which included executory land contracts. *In re* Philadelphia Penn Worsted Co., 278 F.2d 661 (3d Cir. 1960). In *In re* New York Investors Group, 143 F. Supp. 51 (S.D.N.Y. 1956), *criticized in* Note, 43 VA. L. REV. 253 (1957), the buyer made a down payment, seller agreeing to convey the land in eighteen months (a binder contract) upon payment of the balance of the purchase price. The seller was adjudged bankrupt after twelve months and the trustee refused to assume the contract, leaving the buyer with only a claim for breach of contract. Rejection set the buyer in the position of an unsecured creditor unless he had a lien for the amount paid. The Bankruptcy Reform Act of 1978 does not entirely alleviate these problems. *See* 11 U.S.C. § 544(a), 365(a) (Supp. II 1978). 11 U.S.C. § 365(i) (Supp. II 1978) does offer some protection to a purchaser in possession who can acquire title under that section. 11 U.S.C. § 365(j) (Supp. II 1978) gives the purchaser under a contract that is rejected or terminated a lien on the property to the extent of his payments.

(B) Receivership: The rights of the purchaser under an executory land contract where the vendor is in state court receivership, N.C. GEN. STAT. §§ 1-501 *et. seq.* (1969), have not been decided in North Carolina. The receiver takes title to all property of the person in receivership under N.C. GEN. STAT. §§ 1-502, 1-507.2 (1969) and is given broad authority. In the event the receiver takes action inconsistent with the contract, the purchaser should be entitled to rescission, Scott v. Roberts, 230 S.W.2d 322 (Tex. Civ. App. 1950), or to sue for damages for the breach, *cf.* Lamson Co. v. Morehead, 199 N.C. 164, 154 S.E. 50 (1930). No court holding property through its receiver can be sued and forced specifically to perform a contract. *See generally* 2 R. CLARK, LAW OF RECEIVERS §§ 423, 428-30 (3d ed. 1959); 75 C.J.S. *Receivers* § 169 (1952); 66 AM. JUR. 2d *Receivers* §§ 223, 224 (1973).

veyance.[174] The vendor may default on a prior mortgage.[175]

In the event of a condemnation proceeding the purchaser may find he is not entitled to any recovery if the vendor can substantially perform. The purchaser would probably have to enforce by litigation whatever rights he may have if the entire premises are condemned.[176] Although an installment land contract may be an effective estate planning tool with which to "freeze" the value of real property, it must be carefully structured; it must be an arm's length arrangement which can withstand the scrutiny usually given such intra-family dealings.[177]

IV. FUTURE USE OF INSTALLMENT LAND CONTRACTS IN NORTH CAROLINA

Although this state has not experienced the abuses in the use of installment land contracts which have prevailed in other states, it is nevertheless apparent that this conveyancing device has the potential to foster overreaching by vendors.

Courts in this and many other states have proceeded on what may be considered a case by case basis, fashioning exceptions to forfeiture on the facts of each case by finding waiver, estoppel, penalty, or other unjust or unconscionable conduct or contract provision. The courts of California, basing their decisions broadly on public policy and only partly on a statute[178] which had been on the books when the famous *Glock v. Howard*[179] case was decided, have denied forfeiture altogether and have given judicial recognition to

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174. If there is not an executed deed held in escrow, N.C. GEN. STAT. § 28A-17-9 (1976) provides that the personal representative "may execute and deliver a deed." The vendor's heirs may have some incentive he would not have had to attempt to avoid the contract. *See, e.g.*, Scott v. Jordan, 235 N.C. 244, 69 S.E.2d 577 (1952).

175. Rudolph, *The Installment Land Contract as a Junior Security*, 54 MICH. L. REV. 929 (1956).

176. N.C. GEN. STAT. § 136-104 (Supp. 1979). *See* 2 NICHOLS ON EMINENT DOMAIN § 5.21[1] (1979); Note, *Effect of Condemnation on Executory Contract to Buy Land*, 39 YALE L.J. 916 (1930); Annot., 27 A.L.R.3d 572 (1969). North Carolina's Uniform Vendor and Purchaser Risk Act, N.C. GEN. STAT. § 39-39 (1976) does not cover loss by condemnation. There are apparently no North Carolina cases on this question.

177. *See* 14 MIAMI INST. ESTATE PLAN. § 1703 (1980).

178. Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367 (1949) (construing CAL. CIV. CODE § 3275 (1872).

179. 123 Cal. 1, 55 P. 713 (1898).

the purchaser's right of redemption[180] as well as to his right to restitution.[181] Courts of other jurisdictions have taken the following approaches: (1) fashioned a judicial grace period and recognized an equity of redemption,[182] (2) found waiver by the vendor,[183] (3) recognized an equity of redemption in the purchaser, treating an installment land contract as a mortgage,[184] (4) acknowledged the purchaser's right to restitution of payments which exceed the vendor's loss,[185] and (5) ordered foreclosure as a mortgage.[186] Undisputedly the trend is toward greater protection of the purchaser. Nowhere can the vendor depend on effecting forfeiture strictly in accordance with his contract in the event of default.[187]

The courts of North Carolina can hardly ignore the equities of the purchaser under an installment land contract. Rather, if a judicial approach[188] to alleviating the inequities of forfeiture is to be adopted in this state, the most stabilizing and least disruptive method would seem to be to recognize the purchaser's equity of redemption to the extent of his payments and improvements if he has equity in the property, and to protect that equity by ordering foreclosure of the contract as a mortgage.[189]

The weight of authority, logic, and equitable notions supports the proposition that installment land contracts are essentially security devices in the nature of purchase money mortgages and that the purchaser's equitable interest, found worthy of the court's pro-

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180. Petersen v. Ridenour, 135 Cal. App.2d 720, 287 P.2d 848 (1955).

181. Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish, 37 Cal. 2d 16, 230 P.2d 629 (1951).

182. *E.g.*, Ward v. Union Bond & Trust Co., 243 F.2d 476 (9th Cir. 1957); Henry Uihlein Realty Co. v. Downtown Dev. Corp., 9 Wis. 2d 620, 101 N.W.2d 775 (1960).

183. *E.g.*, Triplett v. Davis, 238 Ark. 870, 385 S.W.2d 33 (1964); Bradley v. Apel, 531 S.W.2d 678 (Tex. Civ. App. 1975).

184. *E.g.*, Nelson v. Robinson, 184 Kan. 340, 336 P.2d 415 (1959); H & L Land Co. v. Warner, 258 So. 2d 293 (Fla. Dist. Ct. App. 1972).

185. *E.g.*, Lytel v. Scot. Am. Mortgage Co., 122 Ga. 458, 50 S.E. 402 (1905); Walker v. Nunnenkamp, 84 Idaho 485, 373 P.2d 559 (1962).

186. *E.g.*, Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied* 415 U.S. 921, *appeal after remand* 264 Ind. 77, 339 N.E.2d 57 (1975).

187. OSBORNE, NELSON & WHITMAN at 81.

188. It has been argued that such a role is improper for the judiciary. Schwartz, *Seller's Unequal Bargaining Power and the Judicial Process*, 49 IND. L.J. 367 (1974).

189. Notwithstanding the dictum in Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967), that the vendor may forfeit the purchaser's interest, there is ample precedent in this state for recognition of purchaser's equity by foreclosure.

tection in so many respects, should not be sacrificed in the event of an unredeemed default.[190] This is not to say that forfeiture should never be permitted. There are, of course, many situations in which the installments paid may approximate the seller's damages. It is not contended that the distinction between the installment land contract and the purchase money mortgage should be abolished. There is a demand for low equity financing with swift enforcement of security upon default which the installment land contract offers. This arrangement promotes credit transactions and offers advantages to seller and buyer that the mortgage does not provide. But recognizing the desirability of such a summary remedy by the vendor does not mean that it should be granted in every case. When a forfeiture penalizes the defaulting vendee, court supervision is necessary.[191]

Utilization of judicial foreclosure and sale procedures offers not only the most equitable treatment for the parties, but also a relief from the inflexibilities, inconsistencies, and fictions courts have used when applying contract principles to installment land contracts. Hundreds of years of mortgage precedents commend the foreclosure and sale procedure. The vendor should get what he bargained for (except for the penal forfeiture) plus his expenses and the purchaser should take the risk of a decrease in value and have the benefit of any appreciation after expenses of the sale. Use of this procedure is a straightforward recognition of the contract as a security device under which the purchaser's equities are preserved as against admittedly penal provisions of the contract.[192]

The legislatures of a number of states have recognized the problems presented by forfeitures of installment land contracts and have passed statutes attempting to alleviate the plight of the defaulting purchaser. Many of the statutes impose a grace period after default or notice of default during which the purchaser has an opportunity to catch up his late payments.[193] Other states have provided that installment land contracts for residential property

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190. *See* Note, *Florida Installment Land Contracts: A Time for Reform*, 28 U. FLA. L. REV. 156, 159 (1975).

191. Allen v. Taylor, 96 N.C. 37, 40, 1 S.E. 462, 463 (1887).

192. *Compare* N.C. GEN. STAT. §§ 25-9-504 to -506 (1965) (Uniform Commercial Code.)

193. *E.g.*, IOWA CODE ANN. §§ 656.1 -.6 (1950) (thirty days); MINN. STAT. ANN. § 559.21 (Supp. 1980) (up to sixty days depending on the percentage of the contract price purchaser has paid); N.D. CENT. CODE §§ 32-18-01 to -06 (1979) (one year).

will be treated as mortgages,[194] or that after a certain percentage of the purchase price has been paid, mortgage rules will govern,[195] thereby ensuring an equity of redemption. An Oklahoma statute provides that installment land contracts will be "deemed" mortgages and subject to mortgage rules of foreclosure.[196] Numerous thoughtful articles suggest and discuss legislative reforms.[197]

Any statutory relief should be structured not only to provide needed protection for the purchaser, but also to recognize and make provisions for the vendor's vulnerability in the early stages of the contract when the purchaser's payments may not have been adequate to cover the vendor's expenses in the event of default plus a fair rental return from the property. A summary remedy for repossession by the vendor early in the contract period would recognize the legitimate need for this type of financing and would protect the vendor without substantial risk to the purchaser. At the point when the payments of the purchaser and his improvements are sufficient to reimburse the vendor and reduce his risk of loss upon an early termination of the contract, there seems to be no reason not to treat the contract as a mortgage,[198] either by statutory decree or by requiring that the parties restructure their arrangement.[199] Other protections could be included such as allowing

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194. *E.g.*, MD. RULES, RULE W. 79 (Supp. 1978). Montana's statute, R.C.M. § 52-402 (1947), provides for a type of trust indenture to be used in sales of real property of fifteen acres or less. It has an efficient foreclosure method requiring no judicial proceedings and sale after default upon 120 days notice. *See* Note, *Toward Abolishing Installment Land Sale Contracts*, 36 MONT. L. REV. 110 (1975).

195. *E.g.*, OHIO REV. CODE ANN. §§ 5313.01 -.10 (1970).

196. OKLA. STAT. ANN. tit. 16 § 11A (Supp. 1978). *See* Note, *The Decline of the Contract for Deed in Oklahoma*, 14 TULSA L.J. 557 (1979).

197. *E.g.*, Comment, *The Installment Land Contract in Idaho: A Game of Chance*, 15 IDAHO L. REV. 89 (1978); Comment, *Remedying the Inequities of Forfeiture in Land Installment Contracts*, 64 IOWA L. REV. 158 (1978); Lee, *Defaulting Purchaser's Right to Restitution under the Installment Land Contract*, 20 U. MIAMI L. REV. 1 (1965); Note, 13 RUTGERS L. REV. 620 (1959); Rudolph, *The Installment Land Contract as a Junior Security*, 54 MICH. L. REV. 929 (1956).

198. *See* Note, *Florida Installment Land Contracts: A Time for Reform*, 28 U. FLA. L. REV. 156, 179 (1975); Comment, *Remedying the Inequities of Forfeiture in Land Installment Contracts*, 64 IOWA L. REV. 158, 172 (1978) (suggests fifty percent of the contract price).

199. At some point where the purchaser has substantially performed, his equity should have such weight that the freedom of contract should be subordinated to his interest in the nature of an equity of redemption. His investment at this point is large and there is less chance he will default, and if he does the vendor

progressive redemption periods in proportion to the percentage of completion of the contract.[200] Any legislative action should be comprehensive and should attempt to rectify the weaknesses of the installment land contract besides inequitable forfeiture. Recording and priority problems should be addressed, and some procedure should be devised to require the vendor to show either that he has marketable title or that he can with certainty convey marketable title on the day specified in the contract. A statutory requirement that a deed be executed and placed in escrow would prevent many problems.

Any legislative reform should first address itself to the problems presented by forfeiture and the incidents of the installment land contract which go so far beyond the normal expectations of one or both of the contracting parties that the public good requires relief. It is apparent that this device not only has full potential for abuse by forfeiture[201] but also, even when a well drawn contract is used, it holds many pitfalls for the unwary vendor and purchaser. Whether these are practical problems that require legislative action is a matter for that body to study. The appellate reports of this state do not indicate a crying need for legislative action.[202]

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will likely be adequately protected. *See* Note, *Reforming the Vendor's Remedies for Breach of Installment Land Sale Contracts,* 47 S. CAL. L. REV. 191, 220 (1973), suggesting that "equitable doctrines should not operate to vest the vendee with equitable rights until the vendee's equity in the property exceeds the vendor's minimum damages incident to the breach of the installment land contract," and that prior to that time the contract should operate automatically to terminate any interest the vendee has in the property.

200. *E.g.,* ARIZ. REV. STAT. § 33-741 (1974).

201. For an account of an investment scheme which allegedly swindled thousands of investors out of millions of dollars, *see* Note, *Florida Installment Land Contracts: A Time for Reform,* 28 U. FLA. L. REV. 156, 182 (1975). See Dolson & Zile, *Buying Farms on Installment Land Contracts,* 1960 WIS. L. REV. 383 (a field study).

202. It has been observed that, "the legislative changes . . . are collectively significant as one more indication of the shift from equity to legislation as the principal means of legal growth—of the increasing suppression of the judge by the legislator in the shaping of the legal order." Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II,* 44 YALE L.J. 754, 779 (1935). Happily, the North Carolina reports do not contain the examples of "mechanical jurisprudence at its dreariest" which have been the basis for reform efforts in other states.