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I. INTRODUCTION

In 1969 the Ohio legislature enacted Chapter 5313 of the Ohio Revised Code, "Installment Land Contracts" (the "Act").[1] The Act has had a profound effect on all Ohio land contract law despite its being expressly limited to real property "improved by virtue of a dwelling having been erected" thereon.[2] Ohio courts have applied the Act for twenty years, a period interrupted by a single legislative revision of the Act in 1980.[3] Despite this apparent continuity in the law, the cases are inconsistent in their application and interpretation of the Act.

In 1983 I published an article entitled "Forfeiture of Residential Land Contracts in Ohio: The Need for Further Reform of a Reform Statute" in the *Akron Law Review*.[4] That article primarily was concerned with the effect of Ohio's installment land contract legislation on low to moderate income persons who are the vendees of land contracts for their personal residences. In that article I made several proposals for legislative reform and judicial interpretation of the Act. While I had hoped that my proposals would spur legislative action, they did not. On the other hand, the 1983 article has been cited in Ohio cases and research resources,[5] and in nationally oriented publications.[6] None-

1. 1969 Ohio Laws 424, 424–30 (effective Nov. 25, 1969).

2. OHIO REV. CODE ANN. § 5313.01(B) (Anderson 1989).

3. In addition to several minor changes, the legislature removed the Act's original limitation to land contracts on which the principal amount was less than $30,000. For the current version of the statute, see *id.*

4. Durham, *Forfeiture of Residential Land Contracts in Ohio: The Need for Further Reform of a Reform Statute*, 16 AKRON L. REV. 397 (1983).

5. Young v. Hodapp, No. 85-08-094 (Ohio Ct. App., 12th Dist. Dec. 29, 1986)(LEXIS, States library, Ohio file); Akron First Seventh Day Adventist Church v. Smith, No. 11577 (Ohio Ct. App., 9th Dist. Sept. 27, 1984) (LEXIS, States library, Ohio file); OHIO REV. CODE ANN. §§

theless, because the 1983 article was directed toward legislative reform, it apparently has been of little assistance to practitioners who must deal with problems both with the Act and with the way it is being applied by the courts. The purpose of this article is to address land contract problems regularly faced by practicing lawyers both in litigation and in advising clients in real estate transactions.

This article first will address briefly subjects which are discussed at length in the 1983 article, including pre-Act land contract law,[7] the basic provisions of the Act,[8] and problems in applying the Act to residential land contracts.[9] This article then will discuss, by referring to decisions of the Ohio Supreme Court and to both published and unpublished decisions of the Ohio courts of appeals,[10] several problems which are currently of concern to practitioners and their clients both as to land contracts covered by the Act and land contracts not covered by the Act.

II. THE 1983 ARTICLE

The 1983 article utilized the Act's definition of land contract, which also is a good statement of the common law definition of a land contract:

> "Land installment contract" means an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation. Option contracts for the purchase of real property are not land installment contracts.[11]

5313.02, 5313.06, 5313.08 (Anderson 1989).

6. NELSON & WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 300, 309 (1987) [hereinafter NELSON, REAL ESTATE TRANSFER]; NELSON & WHITMAN, REAL ESTATE FINANCE LAW § 3.28, at 91 (1985) [hereinafter NELSON, REAL ESTATE FINANCE]; PENNEY, BROUDE & CUNNINGHAM, LAND FINANCING 553 (1985) [hereinafter PENNEY].

7. *See infra* text accompanying notes 14–38.

8. *See infra* text accompanying notes 40–61.

9. *See infra* text accompanying notes 62–76.

10. The discussion of current problems will be enhanced by a change in the way in which legal research can be done; prior to 1981, most Ohio court of appeals cases were unpublished and a particular decision could not be researched unless the researcher knew of the decision. *See* Black, *Hide and Seek Precedent: Phantom Opinions in Ohio*, 50 U. CIN. L. REV. 477 (1981); Black, *Unveiling Ohio's Hidden Court*, 16 AKRON L. REV. 107 (1982). Since 1981, however, Mead Data Central's Lexis service has indexed and published the officially unpublished opinions of the Ohio courts of appeals. For example, the first unpublished case shown on Lexis in response to the search request "land contract or land installment contract and forfeit! or foreclos!" is Harpest v. Wilson (Ohio Ct. App., Feb. 23, 1981) (LEXIS, States library, Ohio file).

11. OHIO REV. CODE ANN. § 5313.01(A) (Anderson 1989).

The Act's definition includes all of the common law aspects of the land contract—title is retained by the vendor; the vendee makes installment payments over a period of time leading to full payment of the purchase price; and, after full payment of the purchase price, the vendor conveys title to the vendee.

The 1983 article covers a broad range of topics, including discussions of the economic incentives for using land contracts[12] and the frequency of use of land contracts.[13] The following section does not replicate the earlier article, but briefly summarizes the sections of the article important to a discussion of current Ohio land contract law.

A. Common Law

While the 1983 article explored at some length why courts began permitting the forfeiture of land contracts, there are a few points that can be briefly stated. First, forfeiture of land contracts is a relatively new phenomenon which can be traced to 19th century American courts.[14] Although a contractual provision for forfeiture is contrary to equitable concepts and is embodied in the long-stated maxim "equity abhors a forfeiture," the courts began permitting forfeiture in the heyday of the freedom of contract movement. If a contract included a statement that "time is of the essence" and forfeiture was the stated remedy, courts which supported freedom of contract often chose to allow forfeiture.[15]

The modern trend among the states, however, has been to scrutinize forfeiture cases closely. The courts' reluctance to allow forfeiture is perhaps best summed up in the statement by Professors Nelson and Whitman that in evaluating current law forfeiture "at best serves as a point of departure."[16]

> The states can be divided into three categories based on their treatment of forfeiture: 1. statutory forfeiture with clear requirements for notice and a period for reinstatement by the vendee; 2. statutory abolition of forfeiture, either express or judicially implied, and treatment of land contracts as mortgages; and 3. equitable judicial action allowing the remedies of reinstatement, vendee's recovery of damages, vendee's redemption, or requiring foreclosure as if a mortgage in appropriate cases.[17]

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12. Durham, *supra* note 4, at 400–04.
13. *Id.* at 404–09.
14. *Id.* at 409–11.
15. *Id.*
16. Nelson & Whitman, *The Installment Land Contract—A National Viewpoint*, 1977 B.Y.U. L. REV. 541, 543 (1977).
17. Durham, *supra* note 4, at 412.

The ultimate point is that forfeiture is now a remedy disfavored by both legislatures and courts. Together, and apart, the state legislatures and the state courts have sought to restrict the use of forfeiture.[18]

B. *Ohio Common Law Before Enactment of the Act*

Prior to enactment of Chapter 5313 of the Ohio Revised Code, Ohio land contract law looked a great deal like that of other states.[19] Forfeiture usually was granted only when the vendee had few equities in her favor. In two 1836 cases, *Rummington v. Kelley*[20] and *Scott v. Fields*,[21] the Ohio Supreme Court granted forfeiture, but both vendees were in significant default.[22] In both cases the vendees brought suit for specific performance after the contract dates requiring full payment had passed, and after the vendors had declared forfeitures; the vendees' only equity was to offer to pay the balance due on the land contract.[23] As the *Rummington* court pointed out, the vendee never complied with the contract, the vendor gave prompt notice of forfeiture, the land was unimproved, and any improvements by the vendee were made after the vendor declared forfeiture.[24]

From this beginning, two early Ohio court of appeals cases added further doubt about the general availability to vendors of the forfeiture remedy. In a 1919 case, *Curtis v. Factory Site Co.*,[25] the court of appeals found that the vendor waived forfeiture by accepting late payments. In a 1922 case, *Woloveck v. Schueler*,[26] the court of appeals held that forfeiture would be "unjust, harsh and oppressive" because a third party's "substantial interest in the property" deprived the vendor of good title.[27] The *Woloveck* court, however, allowed the vendor to foreclose on the vendee's interest, stating, "[w]hile it cannot be said that the weight of authority sustains this proposition, we believe it to be

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18. There is an extensive discussion in the 1983 article of the responses to forfeiture by many states. *Id.* at 412–19.

19. *Id.* at 420–25.

20. 7 Ohio 97 (1836).

21. 7 Ohio 91 (1836).

22. In *Rummington*, the vendee made none of the four annual installments called for in the contract. *Rummington*, 7 Ohio at 98. In *Scott*, the vendee made the first two of four quarterly payments required by the contract but did not offer to make the third payment until 45 days after it was due. *Scott*, 7 Ohio at 92. The vendor refused the third payment, having already sold the land, and the vendee waited until the due date for the fourth payment before again offering payment. *Id.* at 92.

23. *Id.* at 95; *Rummington*, 7 Ohio at 98–99.

24. *Rummington*, 7 Ohio at 103–04.

25. 12 Ohio App. 148 (1919).

26. 19 Ohio App. 210 (1922).

27. *Id.* at 220.

equitable and sound."[28]

Shortly after *Woloveck*, the Ohio Supreme Court, in *Norpac Realty Co. v. Schackne*,[29] allowed forfeiture against a vendee who had not made any principal payments after making the initial $12,500 down-payment on the $50,000 purchase price.[30] The court, nonetheless, stated that forfeiture is not always appropriate:

> Cases may arise where equity might intervene, as where the agreed or stipulated damages are used as a guise to cover what would otherwise be a penalty, and the amount agreed upon so unconscionably large that a court of equity would not enforce it. This is not such a case.[31]

The court also rejected the vendee's request for foreclosure, stating that "[t]his was not the contract nor the intention expressed therein."[32]

The most important aspect of the *Norpac* decision is the fact that the vendee had paid 25% of the principal.[33] The court stated that the amount was "large, considered in proportion to the agreed price, but it was not so disproportionate, so extravagantly unreasonable, or so manifestly unjust as to require equitable interference with the contract agreed to."[34] One commentator has called this the *Norpac* "qualification test,"[35] and courts of appeals have cited *Norpac* for this vague formulation.[36] Nonetheless, since *Norpac* most courts of appeals have denied forfeiture when faced with the choice of upholding an order for forfeiture or overturning it.[37] The section of the 1983 article on Ohio common law concluded by stating:

> [I]t appears that Ohio's land contract case law is fairly progressive. Forfeiture appears to be appropriate only upon a showing that the vendee has paid little or nothing, has little excuse for not paying, or is unwilling or unable to pay and that the vendor has faithfully complied with the contract and consistently insisted that the vendee comply with the contract.[38]

Since the Act came into effect, however, forfeiture has been granted in several Ohio cases. These cases will be discussed in a later section of

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28. *Id.* at 224.
29. 107 Ohio St. 425, 140 N.E. 480 (1923).
30. *Id.* at 430, 140 N.E. at 481–82.
31. *Id.* at 429, 140 N.E. at 481.
32. *Id.*
33. *Id.* at 425, 140 N.E. at 480.
34. *Id.* at 430, 140 N.E. at 481.
35. Note, *Land Contracts in Ohio—The Need for Reform*, 13 W. RES. L. REV. 554, 561 (1962).
36. *See* Durham, *supra* note 4, at 422–25.
37. *Id.*
38. *Id.* at 424 (footnotes omitted).

this article.[39]

C. *The Act: Statutory "Reform"*

One commentator concluded that it was a "consumer oriented" legislature "passing laws to protect those who do not have enough bargaining power to protect themselves"[40] which passed the installment land contract act. This conclusion was at one time particularly accurate because the Act originally was limited to land contracts with purchase prices of less than $30,000.[41] Now that the $30,000 limitation has been removed, the Act has had a substantial impact on the remedies available to vendors *and* vendees whose land contracts are covered by the Act, and on the courts in considering cases involving land contracts not covered by the Act.

1. Notices

The Act requires that the vendee must be in default for at least thirty days before the vendor may take action against the vendee.[42] The vendor must then give a notice to the vendee which is specific enough to inform the vendee what default is being claimed by the vendor and which gives the vendee ten days to perform "the terms and conditions of the contract."[43] During the thirty day period the vendee may reinstate the contract by paying all past due payments and performing any other obligations required of him under the contract.[44] The 1983 article asserted that the vendee could reinstate during the ten day period,[45] but in a subsequent case,[46] which will be discussed in a later section of

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39. *See infra* text accompanying notes 189–235.

40. Smith, *Land Installment Contracts (An Analysis of the 1969 Act)*, OHIO ST. B. ASSOC. SERV. LETTER 1 (Dec. 1969).

41. *See* Durham, *supra* note 4, at 425; *supra* note 3.

42. OHIO REV. CODE ANN. § 5313.05–.07 (Anderson 1989). Section 5313.05 allows a declaration of forfeiture "only after the expiration of thirty days from the date of the default." Section 5313.06 then requires the vendor to give the vendee notice of a declaration of forfeiture and subsection (C) requires that the notice inform "the vendee that the contract will stand forfeited unless the vendee performs the terms and conditions of the contract within ten days." Finally, section 5313.07 requires foreclosure in some cases and provides that "[s]uch action may be commenced after the expiration of the period of time prescribed by sections 5313.05 and 5313.06 of the Revised Code."

43. OHIO REV. CODE ANN. § 5313.06 (Anderson 1989); *see also supra* note 42.

44. Durham, *supra* note 4, at 426. By stating that "the vendee may reinstate the contract" I mean that by paying all past due and due payments, and performing any other acts required by the contract, the vendee may continue to make periodic payments under the terms of the contract. The vendee therefore will avoid any attempt by the vendor to declare that the due date for the balance of the contract is accelerated or that vendee's interest is forfeited.

45. *Id.* at 426–27.

46. Keene v. Schnetz, 13 Ohio App. 3d 87, 468 N.E.2d 125 (1983).

this article,[47] an Ohio court of appeals held that the vendee's only option during the ten day period is to pay the balance due on the contract, rather than to pay past due installments and reinstate the contract.[48]

2. Forfeiture and Foreclosure

The Act confirms two traditional remedies available to a vendor-forfeiture[49] and foreclosure.[50] If the vendee has paid more than twenty percent of the purchase price on the land contract, or "has paid in accordance with the terms of the contract for a period of five years or more from the date of the first payment," then the vendor may not declare a forfeiture but must instead foreclose.[51] In any other situation the vendor may declare a forfeiture.[52] Several cases have interpreted these provisions and will be discussed in subsequent sections.[53]

Section 5313.08 of the Ohio Revised Code, which sanctions forfeiture, makes reference to Chapter 1923 of the Ohio Revised Code, "Forcible Entry and Detainer."[54] Section 1923.02(A)(7) of the Ohio Revised Code authorizes trial courts in forcible detainer actions "to declare a forfeiture of the vendee's rights under a land installment contract."[55] The 1983 article suggested the possibility that when sections 5313.08 and 1923.02 are read along with O.R.C. section 1923.09,[56] judges either would feel compelled to grant forfeiture in all cases meeting the statutory requirements or would give a strong presumption in favor of granting forfeiture.[57] The effect of these statutes will be discussed in a later section of this article.[58]

3. Other Remedies

Beyond forfeiture and foreclosure, the 1983 article asserted that section 5313.07 of the Ohio Revised Code also extended other remedies to a land contract vendor:

> First, the vendor may bring an action to interpret the contract, if

47. *See infra* text accompanying notes 206–16.
48. *Keene*, 13 Ohio App. 3d 87, 468 N.E.2d 125.
49. *See* OHIO REV. CODE ANN. § 5313.08; Durham, *supra* note 4, at 427–29.
50. OHIO REV. CODE ANN. § 5313.07; *see* Durham, *supra* note 4, at 427–29.
51. OHIO REV. CODE ANN. § 5313.07.
52. *Id.* § 5313.08.
53. *See infra* text accompanying notes 135–188.
54. OHIO REV. CODE ANN. § 1923.01–.15 (Anderson 1989).
55. *Id.* § 1923.02(A)(7).
56. *Id.* § 1923.09 (which states that if a judge "finds the complaint true, he shall render a general judgment against the defendant").
57. Durham, *supra* note 4, at 427–28.
58. *See infra* text accompanying notes 189–235.

there is any dispute over the interests created and retained under the contract, by bringing a quiet title action. Second, the vendor may bring an action for the past due installments. It appears to be possible also to use the statute's language as the basis for a suit for specific performance by the vendee if the land contract contains an acceleration clause and the vendor has declared the contract to be accelerated.

Third, the vendor would be able to seek damages, during or after a foreclosure action, or, for that matter, a forfeiture action, under section 5313.10. . . .[59]

O.R.C. section 5313.10 bars all damage actions except one by the vendor against the vendee when the vendee has paid less than the fair rental value of the premises "plus deterioration or destruction of the property occasioned by the vendee's use."[60] The vendor then may sue for the difference between the amount paid and the aggregate of the fair rental value and the cost of any deterioration or destruction. Statutory damages will be discussed in a later section of this article.[61]

4. Proposed Legislative and Judicial Reform

The 1983 article proposed several legislative reforms to the Act[62] and several judicial interpretations[63] which could give new meaning to the Act. These proposals were based on the premise, which the 1983 article established through the use of data about land contracts[64] and a lengthy discussion about the data and current Ohio law,[65] that there was still some use for the forfeiture remedy.[66]

The 1983 article recommended[67] removing the limitation on forfeiture actions to those contracts in effect for less than five years[68] because the length of time a land contract is in effect may not be determinative of whether the vendee has a significant interest in the property. The property could, on one hand, rapidly increase in value or, on the other hand, slowly decrease in value.[69] Further, because the 20% requirement seemed too high,[70] the 1983 article recommended that the percentage be reduced to a 5% "true equity" in the property,

59. Durham, *supra* note 4, at 429 (footnotes omitted).
60. OHIO REV. CODE ANN. § 5313.10.
61. *See infra* text accompanying notes 236–83.
62. *See* Durham, *supra* note 4, at 434–38.
63. *See id.* at 438–40.
64. *Id.* at 441–46.
65. *Id.* at 399–409.
66. *Id.* at 431–33.
67. *Id.* at 434–38.
68. *Id.* at 435.
69. *Id.*
70. *Id.* at 435–36.

i.e., actual market value as of the date the vendor declares forfeiture.[71] In addition, the 1983 article recommended that the courts be given specific authorization to require foreclosure in any action brought by a vendor against her vendee when the court determines, given the facts of the case, that foreclosure is the more equitable remedy.[72]

The 1983 article also urged the courts to take a lenient approach toward vendees in forfeiture actions.[73] That article urged judges to use their inherent equitable powers in refusing to grant forfeiture unless they are convinced that forfeiture is an equitable remedy in that particular case.[74] The 1983 article also urged courts to find waiver in any case where the vendor accepts late payments or allows the vendee to miss payments.[75] Finally, and most importantly, the 1983 article urged the courts to find that a vendee could redeem, up to the date of the final judgment, by paying the total amount due under the land contract.[76]

III. LAND CONTRACT CASES IN WHICH THE ACT IS CONSIDERED

The purpose of this section is to review and analyze three different types of cases: those which have applied the Act;[77] those which have refused to apply the Act; and, those which have used the Act by analogy in reaching decisions in cases to which the Act did not apply. There have been many land contract cases since the Act was passed, and many more now can be researched.[78] What follows primarily is a review of Ohio law as it is being fashioned by the courts of appeals in unreported cases. Any published court of appeals opinion which is discussed is clearly indicated as such.

A. Cases Determining Whether to Apply the Act

Some Ohio courts of appeals have experienced difficulty in determining whether the Act should apply in certain cases. The following subsections detail cases in which the courts have been confronted with the question of whether the Act should apply and in which courts have

71. *Id.*
72. *Id.* at 437.
73. *Id.* at 438–40.
74. *Id.* at 439.
75. *Id.*
76. *Id.* at 439–440.
77. OHIO REV. CODE ANN. § 5313.01–.10 (Anderson 1989).
78. *See supra* note 10. For example, as of June 1, 1989, Lexis produced 172 cases in response to the search request "land contract or land installment contract and forfeit! or foreclos! and date after 1/1/80." The first unpublished court of appeals opinion is dated February 23, 1981. *Id.* Of the 172 cases, only nine are published opinions of the Ohio Supreme Court. Further, of the 163 court of appeals cases only eighteen were published with the remaining 145 cases being unpublished slip opinions.

assumed the Act is applicable, even though the facts of the case do not warrant the assumption.

1. Retroactivity of O.R.C. Section 5313

The Act does not address the issue of whether it is applicable to land contracts entered into before the effective date of the Act. The issue is significant because the Act prohibits forfeiture if the land contract has been in effect for more than five years or if more than 20% of the purchase price has been paid.[79]

Two Ohio courts of appeals have reached the same result, the Court of Appeals for the Ninth District in *Vukin v. Gerena*,[80] and the Court of Appeals for the Twelfth District in *Kiser v. Coleman*.[81] In *Vukin*, the parties entered into the land contract on February 24, 1969; the Act did not become effective until November 25, 1969.[82] The vendor's assignee filed her foreclosure action on August 10, 1981.[83] The *Vukin* court unanimously held that because the Act was "remedial in nature it *may* be applied retrospectively and should have been so applied in this case."[84]

In *Kiser*, the parties entered into a land contract on July 29, 1965; the notice of forfeiture was served on August 30, 1974. The trial court's order of forfeiture was entered on May 14, 1985.[85] Despite the fact that the land contract had been in effect for over four years before the effective date of the Act, the *Kiser* majority chose to follow the result in *Vukin*.[86] Judge Jones dissented, however, stating that:

> The statutes in question are not solely remedial in nature. They create substantive rights for the parties of a land installment contract, most notably vendees in such contracts. To retrospectively apply these statutes to land installment contracts executed prior to the effective dates of the statutes would alter the contractual rights of the parties established by the land contracts. Such modification of contractual rights without the consent of those parties who had negotiated their terms should not and can not be allowed.[87]

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79. OHIO REV. CODE ANN. § 5313.07; *see also supra* text accompanying notes 135–88.

80. No. 3340 (Ohio Ct. App., 9th Dist. Sept. 15, 1982) (LEXIS, Ohio library, All Cases file).

81. No. C85-06-39 (Ohio Ct. App., 12th Dist. Dec. 30, 1985) (LEXIS, Ohio library, All Cases file).

82. *Vukin*, No. 3340 (Ohio Ct. App., 9th Dist. Sept. 15, 1982) (LEXIS, Ohio library, All Cases file).

83. *Id.*

84. *Id.* (emphasis added).

85. *Kiser*, No. C85-06-39 (Ohio Ct. App., 12th Dist. Dec. 30, 1985) (LEXIS, Ohio library, All Cases file).

86. *Id.*

87. *Id.* (Jones, J., dissenting).

In *Kiser v. Coleman*,[88] the Ohio Supreme Court agreed with Judge Jones' dissent and held that the Act does not apply to land contracts entered into before the effective date of the Act.[89] The Ohio Supreme Court reasoned that "new substantive rights are created by R.C. 5313.07"[90] so that to retrospectively apply the Act "would destroy the vested rights of appellants to foreclosure [sic] according to the terms of their contract, *i.e.* upon default and without judicial process."[91] The *Kiser* court concluded that such a retrospective application of the Act would violate "Section 28, Article II of the Ohio Constitution which prohibits the enactment of retroactive laws or laws impairing the obligation of contracts."[92]

The Ohio Supreme Court confused the very remedies it held could not be changed—contractual forfeiture versus statutory foreclosure. A vendor, however, could not institute foreclosure without bringing a judicial action and the court meant to refer to "forfeiture" as the remedy precluded the vendors in *Kiser* by application of the statute. The court viewed forfeiture as being an important and substantive right.

2. Improvement of the Land by a "Dwelling"

One of the least complex provisions of the Act is that it applies only to "real property located in this state improved by virtue of a dwelling having been erected on the real property."[93] Particularly when the "dwelling" requirement was limited to contracts on which the purchase price was less than $30,000,[94] it was easy to argue that the Act referred to a single dwelling unit. Since the Act was amended in 1980 and the $30,000 limit was removed,[95] however, the courts have not found this provision easy to apply. This subsection discusses cases which have considered the dwelling provision of the Act and have ignored its requirements.

a. Refusal to Apply the Act

In a thoughtful and well-written opinion which touched on several land contract issues, the Court of Appeals for the Ninth District, in

88. 28 Ohio St. 3d 259, 503 N.E.2d 753 (1986).
89. *Id.* at 263, 503 N.E.2d at 756–57.
90. *Id.* at 263, 503 N.E.2d at 756.
91. *Id.*
92. *Id.* at 263, 503 N.E.2d at 757.
93. OHIO REV. CODE ANN. § 5313.01(B). It seemed easy enough to me as I wrote the 1983 article. In the first two paragraphs of the 1983 article I juxtaposed "installment land contracts for the sale of residential real property" and "land contracts concerning property not improved by a dwelling" without explanation. Durham, *supra* note 4, at 397.
94. *See* Durham, *supra* note 4, at 425; *supra* note 3.
95. *See* Durham, *supra* note 4, at 425; *supra* note 3.

Johnson v. Maxwell,[96] upheld the trial court's refusal to apply the Act when there was no evidence that there was a dwelling on the land.[97] The *Johnson* court stated one basis for interpreting the dwelling requirement, "[w]e have previously recognized that the use of the word 'dwelling' in this statute results in a distinction being made between residential and commercial properties."[98] Although the *Johnson* court had little difficulty in interpreting the Act,[99] prior cases created greater difficulty for the courts than that faced by the court in *Johnson*. Those cases are the subject of the remainder of this section.

b. "Residential" Property

At least four Ohio cases have held that land contracts for parcels of land improved by apartment buildings are covered by the Act. In *Shone v. Griffis*,[100] the Court of Appeals for the Second District applied O.R.C. section 5313.10 which limits further actions by vendors, to prohibit a deficiency judgment by the vendor after the trial court ordered foreclosure of an apartment building.[101] The *Shone* court acknowledged the impact which the Act had on its decision, noting that the foreclosure remedy had been given to the vendor by the Act.[102] The court held that the act's limitation on vendor remedies amounted to a "denial of jurisdiction" of the court of common pleas to allow a deficiency action.[103]

The Court of Appeals for the Ninth District held, in *Akron First Seventh Day Adventist Church v. Smith*,[104] that the Act applied to land improved by multi-family buildings.[105] In that case, the church had sold three parcels improved by three buildings with a total of seven dwelling units to Smith and Neidert in exchange for cash and a note, with the note secured by a mortgage on the parcels.[106] Smith and

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96. Nos. 2354 and 2374 (Ohio Ct. App., 9th Dist. Aug. 10, 1988) (LEXIS, Ohio library, All Cases file).

97. *Id.* at 9.

98. *Id.* at 5–6.

99. The court noted "the trial court found that '[t]here is no dispute that no dwelling exists on the land covered by the contract in question. . . .'" *Id.* at 6.

100. No. 8252 (C.P. No. 81-96) (Ohio Ct. App., 2d Dist. Feb. 2, 1984) (LEXIS, Ohio library, All Cases file).

101. *Id.* For a discussion of § 5313.10, see *infra* text accompanying notes 236–83.

102. *Shone*, No. 8252 (C.P. No. 81-96) (Ohio Ct. App., 2d Dist. Feb. 2, 1984) (LEXIS, Ohio library, All Cases file).

103. *Id.*

104. No. 11577 (Ohio Ct. App., 9th Dist. Sept. 27, 1984) (LEXIS, Ohio library, All Cases file).

105. *Id.*

106. *Id.*

Neidert then sold the parcels to Dubravcic by a land contract.[107] The court held that the land contract was covered by the Act, thereby giving Dubravcic an action against Smith and Neidert for violation of provisions of the Act.[108]

In *DiYorio v. Porter*,[109] and in *Tanner v. Fulk*,[110] the Court of Appeals for the Fifth District held that the Act merely distinguishes between commercial and residential uses.[111] In *Tanner*, a case involving both the granting of forfeiture[112] and damages after forfeiture,[113] the court considered the commercial-residential distinction as settled. Without citing any authority, the *Tanner* court stated, "[f]irst and foremost, this is a land contract forfeiture case controlled by R.C. 5313."[114] The court then proceeded to decide the case with no more than a reference to the fact that the apartment building on the property contained eight units.[115]

Finally, another court took the foregoing reasoning one step further. In *Keene v. Schnetz*,[116] a published opinion from the Court of Appeals for the Ninth District, the court applied the Act to land improved by a trailer park. The *Keene* court did not mention what improvements were on the land and did not discuss why the Act was applicable. The only way to determine the nature of the improvements is to review the findings of fact in the Ohio Supreme Court's opinion in a related case with the same caption[117] which begins by stating, "Appellant, Fred Schmitt, a real estate broker, negotiated the sale of a trailer park."[118] The applicability of the Act was not before the Ohio Supreme Court. Nonetheless, it is interesting to note the ease with which the *Keene* court applied the Act to the case.

The aforementioned cases leave the impression that the courts prefer the certainty of the Act's remedies. In each of the cases the court

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107. *Id.*

108. *Id.* For a discussion of the nature of the damage action, see *infra* text accompanying notes 269–83.

109. No. 81 (Ohio Ct. App., 5th Dist. June 24, 1981) (LEXIS, Ohio library, All Cases file).

110. No. 2297 (Ohio Ct. App., 5th Dist. Aug. 1, 1985) (LEXIS, Ohio library, All Cases file).

111. *Id.; DiYorio*, No. 81 (Ohio Ct. App., 5th Dist. June 24, 1981) (LEXIS, Ohio library, All Cases file).

112. For a discussion of the granting of forfeiture in actions brought under the Act, see *infra* text accompanying notes 189–35.

113. For a discussion of the granting of damages to vendors, see *infra* text accompanying notes 269–83.

114. *Tanner*, No. 2297 (Ohio Ct. App., 5th Dist. Aug. 1, 1985) (LEXIS, Ohio library, All Cases file).

115. *Id.*

116. 13 Ohio App. 3d 87, 468 N.E.2d 125 (1983).

117. *See* Keene v. Schnetz, 11 Ohio St. 3d 35, 462 N.E.2d 1381 (1984).

118. *Id.* at 35, 462 N.E.2d at 1382.

was faced with Ohio's uncertain common law; however, by applying the Act the court was able to dispose of the actions with certainty. Once again it can be argued that because O.R.C. section 5313.01(B) requires that property covered by the Act be "improved by virtue of *a* dwelling having been erected on the real property,"[119] the legislature intended for the Act to apply only to land improved by a single dwelling. That argument is further advanced by the fact that the Act originally was limited to land contracts with purchase prices of under $30,000.[120] Some courts, however, have read the Act more broadly and thus have provided a more certain basis for deciding the cases before them.

c. Non-Residential Property

There are four cases which may have applied the Act to non-residential property.[121] "May have" is appropriate because the courts in all of the cases do not make clear what improvements, if any, are on the property. Nonetheless, the courts are applying the Act when possible in order to decide cases under the relatively certain provisions of the Act.

In *Keene,* which is discussed above,[122] the court applied the Act to land improved by a trailer park, but without mentioning the nature of the improvements on the land. Similarly, in *Sours v. Cogar,*[123] the only hint given by the Court of Appeals for the Fifth District is that the land is referred to as "Lot 31 in Salt Fork Estate" and the purchase price in 1977 was only $5,500.[124] In *Young v. Hodapp,*[125] the Court of Appeals for the Twelfth District merely stated that the land is "7.5 acres of a tract of land located in Lemon Township."[126]

The case in which it seems most likely that the court applied the Act to a land contract with non-residential improvements is *Solar Enterprises v. Snyder.*[127] In that case, the Court of Appeals for the Ninth District stated that the property was on Front Street in Cuyahoga Falls, that the vendor was Solar Enterprises, and that the vendee was

119. OHIO REV. CODE ANN. § 5313.01(B) (emphasis added).

120. 1969 Ohio Laws 424, 425 (effective Nov. 25, 1969).

121. Young v. Hodapp, No. 85-08-094 (Ohio Ct. App., 12th Dist. Dec. 29, 1986) (LEXIS, Ohio library, All Cases file); Solar Enters. v. Snyder, No. 12476 (Ohio Ct. App., 9th Dist. Aug. 27, 1986) (LEXIS, Ohio library, All Cases file); *Keene,* 13 Ohio App. 3d at 87, 468 N.E.2d at 125; Sours v. Cogar, No. 657 (Ohio Ct. App., 5th Dist. Dec. 2, 1981) (LEXIS, Ohio library, All Cases file).

122. *See supra* text accompanying notes 116–18.

123. No. 657 (Ohio Ct. App., 5th Dist. Dec. 2, 1981) (LEXIS, Ohio library, All Cases file).

124. *Id.*

125. No. 85-08-094 (Ohio Ct. App., 12th Dist. Dec. 29, 1986) (LEXIS, Ohio library, All Cases file).

126. *Id.*

127. No. 12476 (Ohio Ct. App., 9th Dist. Aug. 27, 1986) (LEXIS, Ohio library, All Cases file).

Linda Snyder.[128] Solar Enterprises named as defendants Snyder, Ronald Wells, and Ronald Wells, dba R & L Auto Service.[129] Despite the indications that the property was being used as a place of business, the court nevertheless applied the provisions of the Act.

There may be nothing to be drawn from these cases other than that they are either aberrant or unclear. There, in fact, may be a "dwelling" on each parcel. A strong argument can be made from all the cases discussed in this section, however, that the Act provides an alluring set of relatively certain rules which the courts are very willing to apply.

B. Foreclosure and Forfeiture Under the Act

Several issues have arisen in cases involving direct enforcement of the primary remedies afforded a vendor by the Act—foreclosure and forfeiture. After determining whether the Act applies, the courts must decide what to make of the various provisions of the Act which direct when a vendor must foreclose rather than when forfeiture is applicable. Normally the vendor will opt for forfeiture if that remedy is available. However, the Court of Appeals for the Fourth District held, in *Clifton v. Malone,*[130] that the Act does not prevent a vendor from obtaining foreclosure in a case where the vendor could obtain forfeiture.[131] The options the vendor and vendee have are addressed in the cases discussed below.

1. 20% Payment Requirement for Foreclosure

Three courts of appeals have interpreted the 20% requirement in similar cases.[132] In one case the trial court denied forfeiture and ordered foreclosure.[133] In the other two cases[134] the trial courts granted forfeiture and the vendees appealed, asserting that the vendors were precluded from obtaining forfeiture and had to foreclose because the vendees had "paid toward the purchase price a total sum equal to or in

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128. *Id.*

129. *Id.*

130. No. 429 (Ohio Ct. App., 4th Dist. Nov. 22, 1989) (LEXIS, Ohio library, All Cases file).

131. *Id.*

132. *See* Smith v. Blackburn, 31 Ohio App. 3d 251, 511 N.E.2d 132 (1987); Burdge v. Welsh, No. 82AP-846 (Ohio Ct. App., 10th Dist. Feb. 22, 1983) (LEXIS, Ohio library, All Cases file); Grilliot v. Hill, No. 7717 (Ohio Ct. App., 2d Dist. Oct. 1, 1982) (LEXIS, Ohio library, All Cases file).

133. *See Smith,* 31 Ohio App. 3d at 251, 511 N.E.2d at 132.

134. *See Burdge,* No. 82AP-846 (Ohio Ct. App., 10th Dist. Feb. 22, 1983) (LEXIS, Ohio library, All Cases file); *Grilliot,* No. 7717 (Ohio Ct. App., 2d Dist. Oct. 1, 1982) (LEXIS, Ohio library, All Cases file).

excess of twenty per cent thereof."[135] Further, in all three cases the vendees argued that the 20% should include interest payments as well as principal payments.[136]

The two forfeiture cases, *Grilliot v. Hill*[137] and *Burdge v. Welsh*,[138] are straightforward. In each case the trial court declared a forfeiture after finding that the vendee had paid less than 20% of the principal but that payments of principal and interest totaled more than 20% of the purchase price.[139] In each case, the court of appeals held that purchase price meant principal, *not* principal *and* interest.[140]

On the other hand, in *Smith v. Blackburn*,[141] a reported opinion by the Court of Appeals for the Ninth District, Blackburn, the vendee, went beyond asserting just that interest she had paid should be added to the principal paid in calculating the 20%. In determining whether she had paid 20% of the $20,000 purchase price, Blackburn asserted that the court also should consider insurance premiums and real estate taxes paid.[142] The trial court accepted Blackburn's argument and ordered foreclosure.[143]

The *Blackburn* court stated that "R.C. 5313.07 is clear and unambiguous on its face."[144] Because the statute does not define purchase price, the court looked at the normal meaning of the term and to the amount stated as the purchase price in the contract.[145] Although the contract did not state the purchase price, the court noted that the 10% down payment of $2,000 was based on $20,000, the monthly payments were based on the remaining $18,000, and the value of the premises for insurance purposes was stated to be $20,000.[146] The court rejected the inclusion of anything other than principal in the calculation of the percentage of the purchase price which had been paid, and stated, "[t]he interest was agreed to, but, as *interest* on the remaining balance of $18,000, not as a part of the purchase price. This distinction must be

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135. OHIO REV. CODE ANN. § 5313.07.

136. *Smith*, 31 Ohio App. 3d at 253, 511 N.E.2d at 133–34; *Burdge*, No. 82AP-846 (Ohio Ct. App., 10th Dist. Feb. 22, 1983) (LEXIS, Ohio library, All Cases file); *Grilliot*, No. 7717 (Ohio Ct. App., 2d Dist. Oct. 1, 1982) (LEXIS, Ohio library, All Cases file).

137. No. 7717 (Ohio Ct. App., 2d Dist. Oct. 1, 1982) (LEXIS, Ohio library, All Cases file).

138. No. 82AP-846 (Ohio Ct. App., 10th Dist. Feb. 22, 1983) (LEXIS, Ohio library, All Cases file).

139. *Id.*; *Grilliot*, No. 7717 (Ohio Ct. App., 2d Dist. Oct. 1, 1982) (LEXIS, Ohio library, All Cases file).

140. *Id.*

141. 31 Ohio App. 3d 251, 511 N.E.2d 132 (1987).

142. *Id.* at 253, 511 N.E.2d at 134.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

made in order to give the statute the remedial effect intended by the legislature."[147] The court calculated that Blackburn had paid $3,746.30 in principal, or just $253.70 short of the $4,000 which constituted 20% of the $20,000 purchase price, and remanded the case for further consideration by the Municipal Court.[148]

The most interesting aspect of *Smith* is not the basic holding of the case. The holding seems to be the only reasonable reading that can be given to the statute. In remanding the case, however, the court did more than just tell the municipal court to find that 20% had not been paid. The court of appeals directed the municipal court to consider the effect of any additional payments made by Blackburn *while the appeal was pending*.[149] Although the *Blackburn* court did state that it was including the recalculation of the 20% in its order because it was the vendor who had chosen to appeal rather than foreclose,[150] the dissenting opinion argued that, "[t]o hold that such payments [while the appeal was pending] should be included in the twenty-percent calculation so as to preclude the statutory remedy of forfeiture would render R.C. 5313.07 nugatory."[151]

The dissent is correct, at least as to the effect the court's holding will have in cases where the vendee has paid close to 20% of the purchase price. No matter how equitable requiring foreclosure might be,[152] or how much the majority wanted to avoid forfeiture because of the amount Blackburn had paid, to allow payments made by the vendee after forfeiture has been declared[153] would allow such a vendee to avoid forfeiture by dragging out the proceedings.

As a final note on the 20% requirement, in *Harpley v. Ahwajee*,[154] the Court of Appeals for the Ninth District allowed the vendor to assert the vendee's waiver of the Act's requirement of foreclosure when more than 20% of the purchase price had been paid.[155] In *Harpley*, to settle a suit by the vendor which claimed that the vendee was in default, the vendee entered into a consent decree which modified the

147. *Id.* (emphasis in original).

148. *Id.*

149. *Id.* at 254, 511 N.E.2d at 134.

150. *Id.*

151. *Id.* at 284, 511 N.E.2d at 135 (Stephenson, J., dissenting).

152. *See* Durham, *supra* note 4, at 431–33.

153. I am assuming that the vendor either has been ordered by the court to accept the payments, or that the payments are being held by the court pending the outcome of the appeal. If the vendor accepts payments after declaring forfeiture there is a good argument that he has waived his right to forfeiture. NELSON, REAL ESTATE FINANCE, *supra* note 6, §3.29, at 93–95.

154. No. 14162 (Ohio Ct. App., 9th Dist. November 29, 1989) (LEXIS, Ohio library, All Cases file).

155. *Id.*

terms of the contract and required the vendee to sign a quit claim deed which was deposited with the vendor's attorney with instructions that it was to be recorded if the vendee defaulted in the future.[156] The vendee later defaulted by submitting a check which was dishonored by the vendee's bank and the vendor's attorney recorded the deed.[157] The vendee brought suit claiming, among other things, that the vendor's only remedy was foreclosure because at the time of the default the vendee had paid more than 20% of the purchase price.[158]

The court of appeals disagreed, stating that "[a] party may waive any right created by contract, statute or constitution."[159] The court then held that the quit claim deed was a waiver of the right to foreclosure, as well as of the right to receive notices required by the Act.[160]

The holding of the court of appeals in *Harpley* is disturbing.[161] While it is undoubtedly correct that a party can waive statutory rights, in a mortgage the mortgagor's right to force foreclosure normally cannot be waived until after a default.[162] Once a vendee has paid more than 20% of the purchase price, the Act places him in exactly the same position as a mortgagor.[163] In *Harpley*, because the parties settled the first suit by the vendor, there was no longer a default. Therefore, the waiver allowed by the court effectively waived the right to foreclosure before the default which allowed the vendor to record the vendee's quit claim deed. This is in direct conflict with established mortgage law.

2. Use of Foreclosure Under the Act

There have been few cases before the Ohio courts of appeals involving a trial court order of foreclosure. With the exception of a dispute over what constitutes payment of 20% of the purchase price under O.R.C. section 5313.07,[164] any other appeal of a case in which foreclosure is ordered likely will involve issues other than the foreclosure remedy itself. On the one hand, if the vendor has been ordered to

156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. NELSON, REAL ESTATE FINANCE, *supra* note 6, § 3.3, at 39–41.
163. O.R.C. section 5313.07 states that if the vendee has paid on the contract for five years or more and has paid at least 20% of the purchase price "the vendor may recover possession of his property only by use of a proceeding for foreclosure and judicial sale of the foreclosed property as provided in section 2323.07 of the Revised Code." OHIO REV. CODE ANN. § 5313.07. Section 2323.07 is entitled "Sale of foreclosed property" and is Ohio's basic mortgage foreclosure procedure. OHIO REV. CODE ANN. § 2323.07 (Anderson 1981).
164. *See supra* text accompanying notes 132–63.

proceed to foreclosure, her only complaint might be that she is entitled to some remedy other than foreclosure. On the other hand, if the vendee has been subjected to foreclosure her only complaint might be that she has some equitable defense to any declaration of default. The latter situation is the subject of three cases considered by the courts of appeals in which the vendees asserted equitable grounds for avoiding foreclosure.[165]

In *Williams v. Shenefield,*[166] Shenefield, the vendee, made a $10,000 down payment on a purchase price of $36,000.[167] There apparently were several promises made by Williams, the vendor, which he breached.[168] The vendor's unkept promises included recording the land contract, supplying water while a new well was drilled, delivery of possession, and the timely issuing of statements of account.[169] On the other hand, Shenefield had difficulty making payments.[170] Williams sued for foreclosure and Shenefield sued for specific performance without tendering payment of the balance of the purchase price.[171] The trial court ordered foreclosure.[172] The court of appeals rejected Shenefield's claim that Williams' breaches equitably prevented Williams from obtaining foreclosure and affirmed the foreclosure order of the trial court.[173]

Keene, a published opinion of the Court of Appeals for the Ninth District, which was discussed earlier,[174] and the decision by the Court of Appeals for the Fifth District in *Albright v. Cochran,*[175] involved decrees of foreclosure even though the land contracts did not contain acceleration clauses.[176] Both courts quoted, but did not further discuss, the language of the land contracts pertaining to default. The default clauses in the two land contracts were identical: "If any installment payment to be made by the Vendee under the terms of this contract is

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165. *See* Williams v. Shenefield, No. 680 (Ohio Ct. App., 5th Dist. July 28, 1988) (LEXIS, Ohio library, All Cases file); Albright v. Cochran, No. 613 (Ohio Ct. App., 5th Dist. March 2, 1984) (LEXIS, Ohio library, All Cases file); *Keene,* 13 Ohio App. 3d at 87, 468 N.E.2d at 125.

166. No. 680 (Ohio Ct. App., 5th Dist. July 28, 1988) (LEXIS, Ohio library, All Cases file).

167. *Id.*

168. *See id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *See supra* text accompanying notes 116–20.

175. No. 613 (Ohio Ct. App., 5th Dist. Mar. 2, 1984) (LEXIS, Ohio library, All Cases file).

176. An "acceleration clause" is defined as, "a provision or clause in a mortgage, note, bond, deed of trust, or other credit agreement, which allows a lender the opportunity to call monies due under the instrument." BLACK'S LAW DICTIONARY 12 (5th ed. 1979).

not paid by the Vendee when due or within thirty (30) days thereafter, the Vendor may initiate forfeiture of the interest of the Vendee in default, as provided by law."[177]

One could argue that this clause is *de facto* an acceleration clause because forfeiture ends the relationship. On the other hand, taken literally and without reference to the statute, the contract clause would allow the vendor to declare forfeiture of the vendee's interest without the vendee having the right either to reinstate the contract or to pay the contract balance and receive a deed. The courts, therefore, turned to the statute in order to determine how to interpret the contract language.

In *Keene,* both the trial court and the court of appeals appear to have confused forfeiture and foreclosure. The action was originally brought seeking forfeiture, but it appears from the facts recited in the case that more than 20% of the purchase price had been paid when the vendees defaulted.[178] The Schnetzes, the vendees, asserted that because there was no acceleration clause in the land contract they could pay any missed payments during the ten day notice period required by O.R.C. section 5313.06 and have the contract reinstated.[179]

The trial court ordered foreclosure by referring to the statutory provisions for forfeiture,[180] and the court of appeals joined in the trial court's confusion. Despite the uncertainty about which provision of the Act controlled, the *Keene* court resolved the issue about the lack of an acceleration clause with the following statement: "An acceleration clause is not a prerequisite to the vendor's enforcement of a forfeiture of a vendee's interest in a land installment contract. R.C. 5313.05 and 5313.06 create a statutory right to forfeiture when certain conditions are met."[181] The *Keene* court missed the point, however, because without an acceleration clause, the only default was on the payments not paid, not on the entire balance. Whether there was a statutory right to

177. *Keene,* 13 Ohio App. 3d at 88, 468 N.E.2d at 126.

178. *Id.* The land contract was executed on May 21, 1977. The purchase price was $175,000 with a $20,000 down payment, and the $155,000 loan balance bore interest at the rate of 7% per annum. The vendees agreed to make payments of $1,200 per month starting on July 5, 1977, and the court states that there was not a default until May 6, 1982. *Id.* Applying each payment to interest first and the balance to principal, and assuming that no payments were made after the February, 1982 payment because the court states that payments were 60 days in default, over $19,000 in principal would have been paid. When added to the $20,000 downpayment, the amount of principal paid totals over $39,000, which is over 22% of the purchase price of $175,000. *Id.*

179. *Id.*

180. *Id.* at 89, 468 N.E.2d at 127; *see also* OHIO REV. CODE ANN. §§ 5313.05, 5313.06 (Anderson 1953). For a discussion of the ten day period, see *supra* text accompanying notes 42–47.

181. *Keene,* 13 Ohio App. 3d at 89, 468 N.E.2d at 127.

forfeiture after the default arguably does not impact on whether the vendor could accelerate and rely upon the Act's foreclosure section.

The majority of the court emphasized that, if during the ten day period required by O.R.C. section 5313.06 the vendee was allowed to make back payments and reinstate the land contract, then the ten day period was a mere extension of the thirty day period for reinstatement required by O.R.C. section 5313.05.[182] The court stated:

> We note that R.C. 5313.05 permits a vendee to avoid forfeiture by making "all payments currently due under the contract" within thirty days of default. By contrast, R.C. 5313.06(C) allows a vendee to prevent forfeiture by performing "the terms and conditions of the contract within ten days of the completed service of notice." Thus, we believe that the statutes give a vendee two opportunities to avoid foreclosure. The vendee may cure his default by making all payments currently due within the thirty days of default. However, if the vendee waits beyond the thirty-day grace period and forces the vendor to initiate proceedings pursuant to R.C. 5313.06, he can avoid forfeiture only by performing the terms of the contract—i.e., satisfying his entire obligation—within ten days of the receipt of the vendor's note. Had the legislature intended to give the vendee the right to avoid forfeiture after receiving the vendor's notice merely by becoming current in his payments, the language found in R.C. 5313.05 would have been repeated in R.C. 5313.06(C).[183]

The dissent in *Keene* cut through the confusion which the majority created by observing that even during the ten day period all the "terms of the contract" require is the fulfillment of obligations which are presently required by the contract.[184] If there is no acceleration clause, the entire principal is not yet due according to the "terms of the contract." The majority undoubtedly is correct that the legislature used different language in the two statutes. The Act, however, is filled with inconsistencies, at least one of which is critical to its interpretation.[185] The difference in language between O.R.C. sections 5313.05 and 5313.06 is not great enough to compel a court to allow acceleration in the absence of an acceleration clause.

The court in *Albright* took a different route to finding that there was acceleration despite the lack of an acceleration clause. After pointing out that the vendor could have brought suit for the delinquent in-

182. *Id.*

183. *Id* at 89–90, 468 N.E.2d at 127–28.

184. *Id.* at 90, 468 N.E.2d at 128.

185. O.R.C. section 5313.07 requires foreclosure if the land contract has been in effect at least five years *or* 20% or more of the purchase price has been paid, while section 5313.08 allows forfeiture if the land contract has been in effect less than five years. The 1983 article asserted that section 5313.07 should control. Durham, *supra* note 4, at 427.

stallment only,[186] a right the vendor had at common law, the court went on to hold that O.R.C. section 5313.07 extends to the vendor the right to foreclose on the entire debt upon any default in the making of monthly payments.[187]

While the result in *Albright* is less draconian than that in *Keene*, where the court stated the vendor has the right to declare a "forfeiture" upon any default, the result in these cases is the same. In each case the vendor did not include an acceleration clause in his contract, but he was allowed to accelerate and obtain foreclosure. The better position is that of the dissent in *Keene*, that, just as in mortgage law, absent an acceleration clause all that is due is any unpaid installment and the court must fashion its remedy based upon that fact.[188]

3. Use of Forfeiture Under the Act

There have been several cases decided by the courts of appeals in which the vendees appealed trial court judgments granting forfeiture, but no such cases have been decided by the Ohio Supreme Court. In addition, there are more forfeiture cases than foreclosure cases, which can be explained in at least two ways: First, as stated above, it seems to be unlikely that a vendee will appeal a foreclosure judgment.[189] On the other hand, it seems much more likely a vendee will appeal a forfeiture judgment because of the greater loss represented by forfeiture. Second, it is possible that the trial courts are granting large numbers of forfeitures, perhaps more than foreclosures, so that the difference in the number of foreclosure and forefeiture cases merely represents roughly the same percentage of different numbers.

There is a persistent theme running through the forfeiture cases to the effect that the forfeiture remedy contained in O.R.C. section 5313.08 is different from the common law forfeiture remedy. This passage from *Shriver v. Grabenstetter*[190] is an instructive example:

> The forfeiture action initiated by the plaintiffs is a purely statutory action, which did not exist at common law, devised to solve problems previously existing in the event of a vendee's default, in restoring to the ven-

186. *Albright*, No. 613 (Ohio Ct. App., 5th Dist. Mar. 2, 1984) (LEXIS, Ohio library, All Cases file). At the time the case was decided there only was one annual installment of $10,000 which was delinquent. The vendees insisted they could pay the $10,000 and be reinstated, and the vendors insisted that they could foreclose unless the vendees paid the entire principal due on the land contract.

187. *Albright*, No. 613 (Ohio Ct. App., 5th Dist. Mar. 2, 1984) (LEXIS, Ohio library, All Cases file).

188. *Keene*, 13 Ohio App. 3d at 89, 468 N.E.2d at 127.

189. *See supra* text accompanying notes 132–63.

190. No. 13-87-13 (Ohio Ct. App., 3d Dist. May 18, 1988) (LEXIS, Ohio library, All Cases file).

> dor the equitable title and right to possession which had passed to the vendee upon the execution of a land installment contract.[191]

Another court of appeals judge was even more strong in his dissent in *Blackburn,* a reported case which was discussed earlier.[192] In rejecting the majority's direction to the trial court to consider on remand any payments made while the appeal was pending in determining whether the vendee had paid 20% of the purchase price, Judge Stephenson ended his dissent by stating, "I would reverse and enter judgment for appellants as a matter of law,"[193] indicating that because the literal statutory requirement had been met, the judge was of the opinion that the vendor had an absolute right to forfeiture.

At least one court of appeals has adopted the rigid view of the Act's requirements for forfeiture and foreclosure stated by the court in *Keene*, which was discussed above.[194] In *Burdge v. Welsh,*[195] a case discussed earlier,[196] the Welshes, the vendees, appealed the trial court's granting of forfeiture on the vendor's motion for summary judgment.[197] The court of appeals upheld the trial court and stated:

> There was no dispute but that defendants were in default of the land contract and that they were provided the proper notices to vacate the premises. There was also no dispute about the purchase price or the payments. . . . [S]ummary judgment is applicable in an appropriate case in a forcible entry and detainer action.[198]

In two other cases, both of which have been discussed previously, *Grilliot v. Hill*[199] and *Tanner v. Fulk,*[200] the trial courts granted forfeiture and the vendee appealed on grounds other than the awarding of forfeiture. In both cases the court of appeals upheld the trial court. Despite the factual differences among the cases, the bottom line in each case was that the vendee's interest was forfeited.

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191. *Id.*

192. 31 Ohio App. 3d at 251, 511 N.E.2d at 132; *see also supra* text accompanying notes 141–53.

193. 31 Ohio App. 3d at 254, 511 N.E.2d at 135.

194. 13 Ohio App. 3d at 87, 468 N.E.2d at 125; *see also supra* text accompanying notes 174–85.

195. No. 82AP-846 (Ohio Ct. App., 10th Dist. Feb. 22, 1983) (LEXIS, Ohio library, All Cases file).

196. *See supra* text accompanying notes 138–40.

197. *Welsh,* No. 82AP-846 (Ohio Ct. App., 10th Dist. Feb. 22; 1983) (LEXIS, Ohio library, All Cases file).

198. *Id.*

199. No. 7715 (Ohio Ct. App., 2d Dist. Oct. 1, 1982) (LEXIS, Ohio library, All Cases file); *see also supra* text accompanying notes 138–40.

200. No. 2297 (Ohio Ct. App., 5th Dist. Aug. 1, 1985) (LEXIS, Ohio library, All Cases file); *see also supra* text accompanying notes 138–40.

Three other courts of appeals have upheld forfeiture in cases in which the vendees' actions likely prejudiced their interests. In *Harpley v. Ahwajee*,[201] the Court of Appeals for the Ninth District allowed forfeiture in a case where the vendee had settled a previous action brought by the vendor by signing a quit claim deed which was deposited with the vendor's attorney.[202] The court treated the deed as a waiver of any statutory rights the vendee might have and enforced the forfeiture.[203]

In *Butler v. Michel*,[204] a published opinion by the Court of Appeals for the Ninth District, the court was presented with appeals by both the vendors and the vendees contesting the trial court's handling of claims for damages by both parties. The vendees undoubtedly destroyed any opportunity they might have had to avoid forfeiture by abandoning the property while the action was pending before the trial court. The vendors' action for forcible entry and detainer was dismissed, and the case became merely an action for damages.[205]

In *Hentosh v. Vrontos*,[206] the Court of Appeals for the Eleventh District was presented with some equities favoring the vendees, but also a great deal of inaction and unwillingness to compromise. The vendees first defaulted and then appeared before a referee and admitted that they were in default on the land contract, that they had received the required notices, and that "the deficiency had not been corrected."[207] While the referee found that the vendees had attempted to correct the deficiencies, the referee also found they still were in default.[208] The referee recommended forfeiture.[209]

In *Hentosh*, the vendor offered three different bases for settling the case: "(1) payment in full for the remaining balance of the land installment contract, (2) or a writ of restitution with cancellation of the land installment contract, or (3) payment of their attorney fees with an order of cancellation should the payments ever be late."[210] The vendees refused to settle and pressed their defense that they had attempted in good faith to bring the land contract current and argued that their efforts were sufficient to avoid forfeiture. The trial court granted

201. No. 14162 (Ohio Ct. App., 9th Dist. Nov. 29, 1989) (LEXIS, Ohio library, All Cases file).
202. *Id.*
203. *Id.*
204. 14 Ohio App. 3d 116, 470 N.E.2d 217 (1984).
205. *Id.* at 117, 470 N.E.2d at 219.
206. No. 3481 (Ohio Ct. App., 11th Dist. Sept. 27, 1985) (LEXIS, Ohio library, All Cases file).
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*

forfeiture.[211]

The *Hentosh* court cited *Keene*[212] for the proposition that a vendee under a land installment contract has two opportunities to avoid forfeiture or foreclosure.[213] The court went on to describe the two opportunities:

> The vendee may cure his default by making all payments currently due within thirty days of the default. However, if the vendee waits beyond the thirty day grace period and forces the vendor to initiate proceedings pursuant to R.C. 5313.06, he can avoid forfeiture only by performing the terms of the contract, i.e., satisfying his entire obligation within ten days of receipt of the vendor's notice.[214]

In response to the vendees' claim that the trial court erred in granting forfeiture on the vendors' motion for summary judgment, the court of appeals responded that it was not error because the vendees had no defense.[215] To the court of appeals, it was enough that the vendors took a firm position and stuck to it. Once the vendees did not perform, their rights were terminated.[216] *Hentosh,* therefore, is an interesting case because the vendees made some effort to bring the land contract current, but they also rejected a reasonable offer by the vendors to reinstate the contract. The court of appeals' language is absolute, and the vendees did little to make their case attractive.

In *Shriver,* a case discussed earlier,[217] the court of appeals seemed quite willing, in general, to uphold a trial court's grant of forfeiture.[218] The interesting aspect of the case is that a willing court of appeals did not uphold the grant of forfeiture because the vendor had also breached the agreement even though the vendee clearly was in default on the land contract. First, the court of appeals stated that the trial court did not abuse its discretion in refusing to deny forfeiture on equitable grounds.[219] Second, the court of appeals held that the trial court erred in failing to consider that the vendor had defaulted in his obligations under the land contract, thereby depriving the vendor of the right to forfeiture despite the fact that the vendee was not current in her pay-

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211. *Id.*

212. *See supra* text accompanying notes 174–85.

213. *Keene,* 13 Ohio App. 3d at 89, 468 N.E.2d at 127–28.

214. *Id.* at 89, 468 N.E.2d at 128.

215. *Hentosh,* No. 3481 (Ohio Ct. App., 11th Dist. Sept. 27, 1985) (LEXIS, Ohio library, All Cases file).

216. *Id.*

217. No. 13-87-13 (Ohio Ct. App., 3d Dist. May 18, 1988) (LEXIS, Ohio library, All Cases file); *see also supra* text accompanying notes 190–91.

218. *Id.*

219. *Id.*

ments required by the land contract.[220]

Finally, there has been at least one case in which a court of appeals has reversed on equitable grounds a trial court's granting of forfeiture in accordance with the clear language of the Act. In *Krivins v. Smyers,*[221] the Court of Appeals for the Ninth District was confronted with a situation in which the vendee had responded to a demand for an overdue payment for the month of April with a check which was dishonored, had defaulted on the May payment, and then had failed to timely make the June payment.[222] The trial court granted the vendor's request for forfeiture, but the court of appeals reversed.[223]

The court of appeals gave three equal reasons for its decision. The court's first reason was based on equities in the vendee's favor. The ten-day notice[224] sent to the vendees was defective for several reasons. The notice stated that all three payments would have to be paid to avoid forfeiture, while only the first two were in default, the third still being within the grace period allowed by the land contract.[225] The court was reading the notice requirement strictly because the notice was accurate in that the June payment was due, but it was inaccurate in that the June payment was not yet in default. Further, the notice was sent on June 1 and stated that all payments were 30 days overdue; the court could have said that the error was obvious and that the notice was sufficient as to the April and May payments.[226] Finally, the court likely was impressed by the fact that the vendees offered a certified check for the April and May payments on June 23rd, which was beyond the ten days but the court likely interpreted as evidence of the vendee's good faith.

The *Krivins* court did not stop with this equitable point, however, but went on to state two more bases for reversing the trial court's decision. The court stated that, since a forfeiture would permit the vendors to retain all the vendees' payments and regain clear title to the land, a penalty would result because the land contract stated that the monthly payments were the fair rental value of the property and the vendors would be able to retain those payments as well as the vendees' $5,000 downpayment.[227] The court cited a 1922 land contract case for the pro-

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220. *Id.*

221. No. 9935 (Ohio Ct. App., 9th Dist. Apr. 22, 1981) (LEXIS, Ohio library, All Cases file).

222. *Id.*

223. *Id.*

224. *Id.* The court was referring to the ten-day notice required by OHIO REV. CODE ANN. § 5313.06 (Anderson 1988).

225. *Krivins,* No. 9935 (Ohio Ct. App., 9th Dist. Apr. 22, 1981) (LEXIS, Ohio library, All Cases file).

226. *Id.*

227. *Id.*

position that "a forfeiture will not be enforced if liquidated damages constitute a penalty."[228]

The *Krivins* court then delved deeply into other pre-Act land contract cases in stating that "forfeitures are highly disfavored by the law."[229] Among other cases, the court cited the 1919 Ohio court of appeals case, *Curtis v. Factory Site Co.*,[230] for the proposition that forfeiture should be denied "unless the failure [to make payments] is intentional or it results in a loss to the vendor which cannot be compensated by interest."[231] In addition, the court cited a 1923 Ohio Supreme Court decision, *Norpac Realty Co. v. Schackne*,[232] for the proposition that "[b]efore the forfeiture clause of a land contract may be enforced, it must appear that the buyer is unable or unwilling to pay the remaining installments."[233]

Krivins is an interesting case because it indicates the willingness of at least one court of appeals to employ equitable principles in deciding land contract cases under the Act. Such a position is exactly what the 1983 article advocated,[234] but there is little evidence that other courts of appeals have been doing it.

The forfeiture cases do offer some guidance for future cases, however, but less guidance than might initially appear. First, there is a clear thread running through the forfeiture cases indicating that most courts of appeals are willing to apply the Act fairly strictly and uphold the granting of forfeiture by trial courts. Second, some courts of appeals are also willing to consider defenses raised by vendees, but only within the context of the Act or common law areas other than land contract law. Finally, at least one court of appeals employed common law equitable bases for avoiding forfeiture under the Act.[235]

C. *Damage Actions Under the Act*

Several sections of the Act refer to remedies available to vendors or vendees, and many of them arguably define the types of damage actions a party to a land contract may bring. The purpose of this sec-

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228. Woloveck v. Schueler, 19 Ohio App. 210 (Summit Co. 1922); *see also* Durham, *supra* note 4, at 422.

229. *Krivins*, No. 9935 (Ohio Ct. App., 9th Dist. Apr. 22, 1981) (LEXIS, Ohio library, All Cases file).

230. 12 Ohio App. 148, 157 (1919); *see also* Durham, *supra* note 4, at 422.

231. *Krivins*, No. 9935 (Ohio Ct. App., 9th Dist. Apr. 22, 1981) (LEXIS, Ohio library, All Cases file).

232. 107 Ohio St. 425, 140 N.E. 480 (1923); *see also* Durham, *supra* note 4, at 422–23.

233. *Krivins*, No. 9935 (Ohio Ct. App., 9th Dist. Apr. 22, 1981) (LEXIS, Ohio library, All Cases file).

234. Durham, *supra* note 4, at 438–40.

235. *Krivins*, No. 9935 (Ohio Ct. App., 9th Dist. Apr. 22, 1981) (LEXIS, Ohio library, All Cases file).

tion is to review the cases which have referred to the Act in determining the type and extent of damages which may be sought by either vendors or vendees.

1. Vendor Damages

O.R.C. section 5313.10 limits the types of damage actions which vendors can bring. That section, which was discussed earlier,[236] restricts damage actions brought by vendors who have obtained forfeiture under O.R.C. section 5313.08 or foreclosure under O.R.C. section 5313.07 to "the difference between the amount paid by the vendee on the contract and the fair rental value of the property plus an amount for the deterioration or destruction of the property occasioned by the vendee's use."[237] O.R.C. section 5313.10 both restricts and expands vendors' rights. On the one hand, vendors' rights to deficiency actions after foreclosure are severely limited; on the other hand, vendors now have the right to damage actions after obtaining forfeiture.

The most litigated question appears to be whether a vendor who forecloses on the vendee's interest in an action under O.R.C. section 5313.07 can also seek a deficiency judgment as part of the foreclosure action or in a later action. The number of cases is not surprising because an Ohio mortgagee who forecloses on the mortgagor's interest may, with some limitations, seek a deficiency.[238] The courts' interpretations of the Act are also not surprising. All Ohio courts of appeals that have decided the issue have held that a vendor may not obtain a deficiency judgment with or after a foreclosure pursuant to section 5313.07 of the Act.[239]

If prohibiting deficiency judgments after statutory foreclosure was the Act's bad news for vendors, the impact of the new prohibition was to some degree lessened by the Act's allowing a new action for dam-

236. *See supra* text accompanying notes 59–61.

237. OHIO REV. CODE ANN. § 5313.10 (Anderson 1989).

238. A deficiency judgment is possible when the property is sold during the foreclosure action for less then the amount owed by the borrower to the lender. OHIO REV. CODE ANN. § 2329.08 (Anderson 1981).

239. There are two published opinions: Good Shepherd Baptist Church v. City of Columbus, 20 Ohio App. 3d 228, 485 N.E.2d 725 (1984), a decision by the Court of Appeals for the Tenth District, which had previously issued an unpublished opinion in Leach v. Douglass, 82AP-205 (Ohio Ct. App., 10th Dist. Feb. 24, 1983) (LEXIS, Ohio library, All Cases file) and Dalton v. Acker, 5 Ohio App. 3d 150, 450 N.E.2d 725 (1984), a decision by the Court of Appeals for the Fifth District. There are also unpublished opinions from four other courts of appeals: Frey v. Hibbard, No. C-880300 (Ohio Ct. App., 1st Dist. May 10, 1989) (LEXIS, Ohio library, All Cases file); Dillon v. Shinnaberry, No. 15-83-14 (Ohio Ct. App., 3d Dist. Jan. 18, 1985) (LEXIS, Ohio library, All Cases file); Kothera v. Stroupe, No. 11693 (Ohio Ct. App., 9th Dist. Sept. 12, 1984) (LEXIS, Ohio library, All Cases file); and Steele v. Johnson, No. 1502 (Ohio Ct. App., 2d Dist. Apr. 22, 1981) (LEXIS, Ohio library, All Cases file).

ages after foreclosure and extending that action to cases where the vendor has obtained statutory forfeiture. O.R.C. section 5313.10 allows the vendor to bring an action for damages against the vendee after either forfeiture or foreclosure.[240]

The Court of Appeals for the Sixth District, in *Marvin v. Stemen,*[241] a published opinion, held that, even after the vendor has prevailed in a forfeiture action, the vendor could institute a new action under section 5313.10.[242] The *Marvin* court acknowledged that its decision departed from the common law rule, which held that obtaining forfeiture was an exclusive election of remedies, but stated that "the specific statutory language of R.C. 5313.10 holds otherwise."[243] Further, the court held that, although the vendor could have joined the O.R.C. section 5313.10 action with the forfeiture action, it was not required.[244] The court, therefore, treated the two actions as independent.

There have been several courts of appeals' cases in which the appellants have raised issues about computation of damages under O.R.C. section 5313.10. In the only published decision on the subject, *Butler,* a decision by the Court of Appeals for the Ninth District,[245] the vendees made a down payment and all the required monthly payments on the land contract, totaling $12,805.80, but failed to make the required balloon principal payment.[246] The vendees vacated the premises before the trial court granted forfeiture, but the trial court awarded the vendors $2,500 for the vendees' holdover after default.[247] The court of appeals reversed the award of rent to the vendor and pointed out that the amount stipulated in the land contract to be the fair rental value of the premises was far greater than what the vendees had paid.[248] The Fifth District Court of Appeals has followed the *Butler* court's strict application of the statute.[249]

In *Frey v. Hibbard,*[250] a case in which the trial court had granted forfeiture, the First District Court of Appeals accepted the trial court's conclusion that fair rental value would be determined by adding the

240. OHIO REV. CODE ANN. § 5313.10 (Anderson 1989).

241. 68 Ohio App. 2d 26, 426 N.E.2d 205 (1980); *see also* Durham, *supra* note 4, at 428.

242. *Id.* at 28, 426 N.E.2d at 207.

243. *Id.* at 28–29, 426 N.E.2d at 207.

244. *Id.* at 29, 426 N.E.2d at 207.

245. *Butler,* 14 Ohio App. 3d at 116, 470 N.E.2d at 217.

246. *Id.* at 118, 470 N.E.2d at 219.

247. *Id.*

248. *Id.* at 117–118, 470 N.E.2d at 219.

249. *Tanner,* No. 2297 (Ohio Ct. App., 5th Dist. Aug. 1, 1985) (LEXIS, Ohio library, All Cases file).

250. No. C-880300 (Ohio Ct. App., 1st Dist. May 10, 1989) (LEXIS, Ohio library, All Cases file).

amount of monthly payments to required payments for taxes, insurance and water. The court of appeals then upheld the trial court's award to the vendor of $2,224.62, which consisted of the six payments due from the time the vendee stopped making payments to the date forfeiture was declared, plus the payments made by the vendor for taxes, insurance and water.[251] The facts stated in the *Frey* decision do not indicate that the vendee made a down payment and, therefore, the only payments made by the vendee and acknowledged by the court were those stipulated in the contract to constitute fair rental value. The more important holding in the case, however, is that fair rental value is to be calculated up to the date of the judicial grant of forfeiture if the vendee is still in possession.

Wright v. Deetz,[252] a decision by the Court of Appeals for the Fifth District, involved the application of a provision in O.R.C. section 5313.10 which allows for damages for "deterioration or destruction of the property occasioned by the vendee's use."[253] In *Wright*, the house improving the land was destroyed by fire. The land contract required the vendee to maintain a fire insurance policy, which she failed to do.[254] After the fire, the vendee ceased paying on the land contract. The trial court in *Wright* awarded the vendor $6,000 in damages which it calculated by subtracting the market value of the property after the fire, $7,000, from the market value before the fire, $13,000.[255] The court did not mention any money paid by vendee on the land contract.

The court of appeals in *Wright* upheld the trial court's decision by noting that the vendee did not contest the values used in making the calculation.[256] The result is troubling because the court of appeals applied the language "deterioration or destruction of the property" independently from "fair rental value" despite the fact that the two are linked by a conjunctive "plus." O.R.C. section 5313.10 is clear in stating that foreclosure and forfeiture are "exclusive" remedies "unless the vendee has paid an amount less than the fair rental value plus deterioration or destruction of property occasioned by the vendee's use.[257] This is one remedy, not two separable remedies, as held by the court in *Wright*. The only way that "deterioration or destruction of property" becomes a factor in granting damages to the vendor is when they are

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251. *Id.*

252. No. 1844 (Ohio Ct. App., 5th Dist. Aug. 7, 1984) (LEXIS, Ohio library, All Cases file).

253. OHIO REV. CODE ANN. § 5313.10 (Anderson 1989).

254. *Wright*, No. 1844 (Ohio Ct. App., 5th Dist. Aug. 7, 1984) (LEXIS, Ohio library, All Cases file).

255. *Id.*

256. *Id.*

257. OHIO REV. CODE ANN. § 5313.10.

added to fair rental value, and they cannot be considered independently.

Finally, the Court of Appeals for the Sixth District has engaged in a strained use of a liquidated damages clause to exclude from the "amount paid by the vendee" the down payment which the vendee made at the inception of the land contract. In *Goodrich v. Sickelbaugh*,[258] the vendees defaulted on a balloon payment at the end of the land contract.[259] The trial court granted forfeiture and considered the vendees' suit for a refund of an excess of payments over fair rental value[260] along with the vendors' suit for damages under section 5313.10. The vendees had paid a total of $10,400, consisting of a $2,000 down payment and 21 monthly payments of $400 each.[261] The trial court in *Goodrich* denied the vendee's request for a refund,[262] but awarded the vendors $1,330.95 for damages to the property and $984.01 in rent from the date of default to the judicial declaration of forfeiture.[263]

The court of appeals in *Goodrich* turned to the liquidated damages clause in the land contract. As the court phrased it, the clause provided, "that upon default all payments made by appellants are to be retained by appellees as fixed and liquidated damages for non-performance by appellants of the agreement and as rent and compensation for the use and occupancy of the premises."[264] The court of appeals upheld the trial court's determination that the vendees were not entitled to have the down payment or payments for property taxes considered in determining whether they had paid the fair rental value plus destruction.[265] Therefore, the court of appeals in *Goodrich* affirmed the trial court's award of damages for rent after default and for deterioration.[266]

The vendees in *Goodrich* argued that the liquidated damages clause expired with the contract and that the vendors were, therefore, limited to damages measured solely by O.R.C. section 5313.10; the result would then have been to deny any damages, since the $2,000 down payment and tax payments exceeded the amount the trial court awarded for rent and destruction. The court of appeals did not explain

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258. No. L-85-194 (Ohio Ct. App., 6th Dist. Mar. 21, 1986) (LEXIS, Ohio library, All Cases file).

259. *Id.*

260. *See infra* text accompanying notes 270–72.

261. *Goodrich*, No. L-85-194 (Ohio Ct. App., 6th Dist. Mar. 21, 1986) (LEXIS, Ohio library, All Cases file).

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

its reasoning, but simply stated:

> The amounts covered by the liquidated damage clause in the land installment contract have already been paid, and as such, may be retained by the appellees. We find, as other courts have, that the bar in R.C. 5313.10 is plainly a bar to actions such as deficiency judgment actions. In view of the foregoing, the trial court was correct in determining that it was bound by the liquidated damage clause and thereby could not permit appellants a set-off against the total damages for the down payment or the real estate taxes paid.[267]

It is difficult to comprehend the logic of the court of appeals in *Goodrich*. Even if there is a liquidated damages clause in the land contract, the statute, which establishes a new remedy for vendors who have obtained forfeiture, clearly states that the amount to be credited to the vendee is "the amount paid by the vendee *on the contract*."[268] The court should have considered all that was paid on the contract, which at least included the $2,000 down payment. As to the property taxes, the court is correct because property taxes are not paid "on the contract," i.e., to service interest or reduce the principal balance, even if the contract requires that the taxes be paid.

The courts of appeals are having difficulty applying section 5313.10 of the Act. This is unfortunate; by interpreting the section, the courts could assist practitioners in advising clients because the section is such a departure from the common law. The difficulty the courts are having in applying the section makes the section's unusual characteristics all the more harsh in their application in cases where the parties expect to be afforded common law remedies.

2. Vendee Damages

Two of the cases discussed above, *Butler*,[269] and *Goodrich*,[270] also involved claims for refunds by the vendees of the amounts they had paid in excess of the fair rental value of the property. In *Butler*, the vendees appealed the trial court's refusal to return the down payment to them.[271] In *Goodrich*, the vendees limited their appeal to the trial court's award of damages to the vendors.[272] In each case, the appellate court appears to have been of the opinion that vendees who have had their contracts declared forfeited are not entitled to damages. Since the

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267. *Id.* (citations omitted).

268. OHIO REV. CODE ANN. § 5313.10 (emphasis added).

269. *See supra* text accompanying notes 245–49.

270. *See supra* text accompanying notes 258–68.

271. *Butler*, 14 Ohio App. 3d at 117, 470 N.E.2d at 218.

272. *Goodrich*, No. 1-85-194 (Ohio Ct. App., 6th Dist. Mar. 21, 1986) (LEXIS, Ohio library, All Cases file).

vendees who have had their contracts declared forfeited are not entitled to damages under Ohio common law,[273] and because the Act did not create any new rights after forfeiture for the vendee, the courts likely are correct.

Another damage claim which some vendees have brought against vendors concerns the vendors' breach of the technical sections of the Act. O.R.C. section 5313.04 allows the vendee to enforce "Chapter 5313" against the vendor and states that "the court shall grant appropriate relief."[274] In *Sours v. Cogar,*[275] the Fifth District Court of Appeals held that section 5313.04 specifically refers to the procedural requirements placed on the vendor in section 5313.03 to issue periodic statements to the vendee of the status of the land contract.[276] While the requirements of section 5313.03 were at issue in *Sours,* and the court's holding concerns only that issue, the court's decision is too narrow. O.R.C. section 5313.04 must refer to all of the vendor's obligations under the Act and not just those contained in section 5313.03. The *Sours* court also held that a vendor's technical violation of the Act's requirements does not deny the vendor the ability to obtain forfeiture of the land contract.[277] Such a statement is another indication that the courts consider statutory forfeiture to be a matter of right for a vendor who has complied with the substantive terms of a land contract.

Two other courts of appeals' cases have dealt with the possible consequences of a vendor's violation of the technical requirements of the Act. In *Akron First Seventh Day Adventist Church v. Smith,*[278] the Ninth District Court of Appeals applied section 5313.04 to violations of section 5313.02,[279] and concluded that the vendee has to prove actual damage in order to be entitled to "appropriate relief.[280] The allegation of a violation of the statute, therefore, does not entitle the vendee to an

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273. NELSON, REAL ESTATE FINANCE, *supra* note 6, at 86–87.

274. OHIO REV. CODE ANN. § 5313.04.

275. No. 657 (Ohio Ct. App., 5th Dist. Dec. 2, 1981) (LEXIS, Ohio library, All Cases file).

276. *Id.* O.R.C. section 5313.03 requires the vendor to issue annually, or up to two times a year at the request of the vendee, a statement of "(A) The amount credited to principal and interest; (B) The balance due." OHIO REV. CODE ANN. § 5313.03.

277. *Sours,* No. 657 (Ohio Ct. App., 5th Dist. Dec. 2, 1981) (LEXIS, Ohio library, All Cases file).

278. No. 11577 (Ohio Ct. App., 9th Dist. Sept. 27, 1984) (LEXIS, Ohio library, All Cases file).

279. O.R.C. section 5313.02 sets forth the minimum requirements for a land contract. It includes a prohibition on the vendor's placing a mortgage on the property for more than the balance due on the land contract, requires the vendor to record the land contract within twenty days of its signing, and states that land contracts shall conform to the statutory formalities for the execution of deeds and mortgages. OHIO REV. CODE ANN. § 5313.02.

280. OHIO REV. CODE ANN. § 5313.04.

award of nominal damages. Finally, in *Young v. Hodapp*,[281] the Twelfth District Court of Appeals was faced with a trial court judgment that a land contract which does not comply with section 5313.02 could not be enforced by the vendee against the vendor.[282] The court of appeals reversed, stating that "a defectively executed land conveyance is valid as between the parties. . . . Moreover, the statute was not designed as a way for sellers to escape from contracts they wished to void."[283]

D. Vendor's Mortgage

One of the inherent risks to the vendee in entering into a land contract is that the vendor, because she holds legal title, may voluntarily create a lien on the land or involuntarily cause a lien to be created on the land. Two cases have applied the act while dealing with this issue. In the first case, the vendor mortgaged the property which was the subject of the land contract in violation of the Act's prohibition on liens against the vendor's interest exceeding the amount due on the land contract. In the second case, the vendor defaulted on the mortgage which existed at the inception of the land contract; the issue before the court was whether the mortgagee had to give notice of the foreclosure to the land contract vendee.

1. Vendor's Mortgage in Violation of the Act

In *Toledo Trust Co. v. Cole*,[284] a published decision of the Court of Appeals for the Third District, the following provision of O.R.C. section 5313.02(B) was applied: "No vendor shall place a mortgage on the property in an amount greater than the balance due on the contract without the consent of the vendee."[285] The land contract in *Toledo Trust* was for an amount equivalent to that due on the note secured by the first mortgage on the property. The vendor then entered into a second mortgage.[286] When the first mortgagee foreclosed, the land contract vendee and the second mortgagee both claimed second priority.[287] The *Toledo Trust* court held that the second mortgage was void because, at the time it was entered into, the vendor had no mortgagable interest in the property.[288]

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281. No. 85-08-094 (Ohio Ct. App., 12th Dist. Dec. 29, 1986) (LEXIS, Ohio library, All Cases file).

282. *Id.*

283. *Id.*

284. 27 Ohio App. 3d 340, 500 N.E.2d 920 (1986).

285. *Id.* at 342, 500 N.E.2d at 922; *see also* OHIO REV. CODE ANN. § 5313.02(B).

286. *Cole*, 27 Ohio App. 3d at 341, 500 N.E.2d at 921.

287. *Id.*

288. *Id.* at 343, 500 N.E.2d at 923–94.

The result in *Toledo Trust* carries out the intent of the Act to protect vendees from unscrupulous vendors. Further, the result is the only one which could carry out the intent of the Act—the land contract was for the same amount as the first mortgage, and the vendor therefore had no equity interest in the property. Unfortunately, however, it is difficult to predict how a court will decide the more difficult case where the amount due on the land contract is more than that due on the first mortgage, hence leaving the vendor with an equity interest in the property, but the second mortgage is for more than the equity interest. A court could affirm the interest of the second mortgagee up to the amount of the difference between the land contract balance and the balance on the first mortgage, *or* the court could void the second mortgage. Either result can be defended. A court could allow the second mortgage to be asserted up to the amount of the vendor's equity on the theory that the vendee is not injured by having to pay the same amount to a different creditor. Alternatively, a court could void the second mortgage on the theory that, because the land contract was recorded, as is required by the Act,[289] the second mortgagee had notice and therefore cannot assert a mortgage which is invalid under the Act.

2. Foreclosure of Vendor's Mortgage

In *First Bank National Association v. 10546 Euclid Avenue, Inc.*,[290] First Bank foreclosed its mortgage on property owned by Fudge.[291] First Bank served notice of the foreclosure on Fudge in September, 1984.[292] Fudge later contended that this notice was improperly served.[293] Fudge, as vendor, entered into a land contract with Brooks, as vendee, on November 30, 1984. The trial court issued an "order" of foreclosure in November, 1985, which was later confirmed.[294] In November, 1986, after the foreclosure sale had been confirmed, Brooks filed a motion for relief from the judgment of the trial court, based at least partially on the claimed improper notice to Fudge.

The Court of Appeals for the Eighth District acknowledged that Brooks, as the vendee, had an interest which entitled him to notice of the foreclosure *if* his interest was of record when Fudge, the mortgagor and vendor, was served. As it turned out, both the trial court and the court of appeals determined that the September, 1984, notice had been

289. OHIO REV. CODE ANN. § 5313.02(C).

290. No. 2674 (Ohio Ct. App., 8th. Dist. June 29, 1989) (LEXIS, Ohio library, All Cases file).

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

properly served on Fudge.[295] Therefore, Brooks was not entitled to receive notice of the foreclosure because he already had constructive notice of the pending foreclosure by application of the doctrine of *lis pendens*.[296]

First Bank is an important case for two reasons. First, the court of appeals recognized that vendees have significant interests which warrant protection. Second, despite the fact that Brooks, the vendee, lost because of the application of the doctrine of *lis pendens*, the court opined that the right to notice was necessary to effectuate rights extended to the vendee by the Act, including the right granted by section 5313.02(A)(13) for the vendee to pay the vendor's mortgage if the vendor defaults on the mortgage.[297]

IV. Common Law Land Contract Cases

There have been very few Ohio Supreme Court or courts of appeals cases concerning land contract defaults outside of the Act since the 1983 article was published. Some of the cases which were decided, however, are significant and add to the fabric of Ohio land contract law. The lack of appellate cases may indicate that judges and practitioners consider Ohio land contract law to be well settled. However, the range of holdings in the cases indicates that there are still very substantial unresolved issues. This section reviews those cases in an attempt to determine the direction in which land contract law outside of the Act is moving.

A. Remedies

This section focuses on the primary remedies discussed in cases decided under the Act, forfeiture and foreclosure. There is a guiding premise—Ohio land contract law is unsettled enough that a court can find support for almost any action it would like to take. These cases, then, are interesting for at least three reasons: (1) they conflict with each other; (2) each opinion includes ample support for the position taken by the court; and, (3) the Ohio Supreme Court has not chosen to accept any cases dealing with non-Act land contract remedy issues.

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295. *Id.*

296. Section 2703.26 of the Ohio Revised Code is entitled "Lis pendens in general" and states: "When summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title." Ohio Rev. Code Ann. § 2703.26 (Anderson 1981). Therefore, once the court in *First Bank* determined that Fudge had been properly served, there was no question that Brooks took his land contract interest subject to the pending foreclosure action by First Bank against Fudge.

297. Ohio Rev. Code Ann. § 5313.02(A)(13).

1. Forfeiture and Foreclosure as Remedies

In *Johnson v. Maxwell,*[298] the Ninth District Court of Appeals went to great lengths to review the vendor remedies of forfeiture and foreclosure and to explain why it concluded that foreclosure is one of the remedies for default on a land contract. The vendees in *Johnson* defaulted on the land contract and the vendors sent them a notice purportedly pursuant to O.R.C. section 5313.06.[299] The vendees made no further payments to the vendors. Almost three months after the notice was sent the vendors brought suit.[300] The trial court found that $93,943.31 was due on the land contract, "cancelled" the land contract, placed the vendors in possession, *but* also ordered foreclosure, i.e., that the property be sold with the proceeds from the sale being applied to any unpaid real estate taxes and the debt owed to the vendors.[301]

The controversy in *Johnson* arose when the sale brought a high bid of only $52,000, which was made by the vendors.[302] The trial court nonetheless confirmed the sale, ordered distribution of the proceeds, and granted the vendors a deficiency judgment of $46,324.17.[303] The vendees' first basis for appeal was that the Act controlled the case. The court of appeals easily dealt with the vendees' contention by pointing out that there was no proof of a dwelling on the property.[304]

The second basis for the appeal in *Johnson* was that the trial court erred in ordering foreclosure and granting a deficiency judgment when the vendors had asserted their right to forfeiture.[305] The court of appeals also had little trouble in dealing with the vendees' desperate argument.[306] The court first repeated the "qualification test"[307] from the 1923 Ohio Supreme Court decision in *Norpac Realty Co. v. Schackne,*[308] that forfeiture clauses are enforcable so long as the benefit to the vendor is not "extravagantly unreasonable or manifestly un-

298. Nos. 2354 and 2374 (Ohio Ct. App., 9th Dist. Aug. 10, 1988) (LEXIS, Ohio library, All Cases file).

299. *Id.*; OHIO REV. CODE ANN. § 5313.06 (Anderson 1989)

300. *Johnson,* Nos. 2354 and 2374 (Ohio Ct. App., 9th Dist. Aug. 10, 1988) (LEXIS, Ohio library, All Cases file).

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. "Desperate" may seem a little strong, but it strikes me as a last-ditch desperation argument for vendees to assert that the trial court erred in not ordering forfeiture of their land contract interest. Usually vendees seek equity, not rigid application of the common law.

307. Note, *supra* note 35, at 561; *see also* Durham, *supra* note 4, at 422–23.

308. 107 Ohio St. 425, 140 N.E. 480 (1923).

just as to require equitable interference with the contract."[309] The court of appeals went on to state, however, that its interpretation of the language from *Norpac* meant that "other remedies are favored and forfeiture clauses are rarely strictly enforced by modern Ohio courts."[310]

The *Johnson* court set forth what those "other" remedies might be with a lengthy quote from the 1922 court of appeals decision in *Woloveck v. Schueler*.[311] The *Woloveck* court stated that, upon default by the vendee, a vendor could sue for past payments or treat the land contract as an equitable mortgage and request foreclosure. The court of appeals in *Johnson* found that the trial court had correctly granted the vendors' request for foreclosure and a deficiency despite the vendees' desire to forfeit their interest in the land contract in order to avoid a deficiency judgment.[312]

To the *Johnson* court of appeals, then, forfeiture is still a remedy, but not the preferred one. The court was willing to uphold a vendor-requested foreclosure and deficiency judgment although the vendees wanted forfeiture. In favor of a future vendee, however, the *Johnson* court indicated that a vendee's request for foreclosure should be entertained by a trial court if the facts favor foreclosure, even if the vendor requests forfeiture.

2. Forfeiture Granted

There are two cases in which Ohio courts of appeals have upheld forfeiture, but in each the facts are such that the vendees had little defense against forfeiture. The first is *Kiser v. Coleman*,[313] which was discussed previously as the case in which the Ohio Supreme Court held that the Act did not apply to land contracts entered into before its effective date.[314] The trial court in *Kiser* had granted forfeiture. The Court of Appeals for the Twelfth District reversed, holding that the Act applied and that, because the land contract had been in effect for more than five years, the vendee's remedy was foreclosure and not forfeiture.[315] The Ohio Supreme Court reversed the court of appeals, thereby reinstating the trial court's order of forfeiture.[316]

While *Kiser* involved retroactive application of the Act, the facts show how little equity the vendees had. The vendees, husband and wife,

309. *Id.* at 430, 140 N.E. at 481.

310. *Johnson*, Nos. 2354 and 2374 (Ohio Ct. App., 9th Dist., Aug. 10, 1988) (LEXIS, Ohio library, All Cases file).

311. *Id.*; *see also* Durham, *supra* note 4, at 422.

312. *Id.*

313. 28 Ohio St. 3d 259, 503 N.E.2d 753 (1986).

314. *Id.* at 262, 503 N.E.2d at 756; *see also supra* text accompanying notes 88–92.

315. *Kiser*, 28 Ohio St. 3d at 262, 503 N.E.2d at 756.

316. *Id.*

had been chronically late in making monthly payments required by the land contract up to the time of the husband's death.[317] After his death, the widow made a few "bulk" payments but was almost two years behind in payments when the vendors notified her of default. She then made a bulk payment equal to almost 14 monthly payments with a check which was dishonored. The vendors notified her that the contract was forfeited and she should vacate. She responded by requesting that her check should be presented for payment again.[318]

The vendee in *Kiser* later mailed to the vendors another check, which she followed with a note that the check should be "held" before being presented for payment.[319] The only equity in the vendee's favor was that she moved out only after the house burned down and the vendors, who apparently had reinsured after the notice of forfeiture, had received an insurance payment roughly equal to the balance due on the land contract. Nonetheless, the vendee had very little equity on her side, and the facts of the case would justify forfeiture as well as any.

In *Johannemann v. Georgeoff*,[320] the Court of Appeals for the Ninth District was confronted with an easier case. The vendees did not execute the land contract and when the vendor brought suit for forfeiture of the vendees' interest, the vendees defended by naming a third party defendant but never bothered to complete service.[321] When the vendor moved for summary judgment, the vendees responded but did not file any affidavits. The trial court granted the vendor's motion for summary judgment; the court of appeals affirmed.[322] Factual issues concerning forfeiture were alleged but no proof was ever offered, and the court of appeals indicated that unless the responding party raised specific facts the trial court was correct in granting the motion for summary judgment.[323]

The foregoing cases offer little help to a vendor who desires forfeiture because they are odd cases, *Kiser* in its facts and procedure and *Johannemann* because the decision is wholly procedural. If the vendee has any equities on her side she should be able to distinguish the two cases. On the other hand, the cases offer little help to a vendee who is trying to avoid forfeiture because the cases do represent the willingness of courts of appeals, and the Ohio Supreme Court, to allow final judg-

317. *Id.* at 260, 503 N.E.2d at 754.

318. *Id.*

319. *Id.*

320. No. 12852 (Ohio Ct. App., 9th Dist. Apr. 1, 1987) (LEXIS, Ohio library, All Cases file).

321. *Id.*

322. *Id.*

323. *Id.*

ments for forfeiture.

3. Foreclosure Granted

Finally, there are two cases in which the courts of appeals have upheld, and in one case expanded on, foreclosure. First, there is *Johnson,* which was discussed at the beginning of this section.[324] Although in *Johnson* foreclosure was ordered over the protest of the vendees, the court opined that forfeiture was not favored as a remedy and that foreclosure could be ordered at the request of either the vendor or the vendee.[325] In that sense, *Johnson* is strong precedent for a vendee who is trying to avoid forfeiture.

In *Barton v. Antonucci,*[326] the Court of Appeals for the Seventh District upheld a trial court order permitting a vendee to reinstate.[327] The vendor sought foreclosure, but the trial court gave the vendee the opportunity to reinstate the land contract by paying the then-due payments, insurance, and taxes within sixty days of the judgment.[328] The vendors' ability to bring a foreclosure action was not questioned, but the court of appeals opined that missing one monthly payment, failing to pay current insurance, and being behind on property taxes taken together did not constitute a material breach. Therefore, the vendors did not have an absolute right to foreclose.[329] As with *Johnson, Barton* indicates the willingness of a court of appeals to uphold equitable remedies ordered by the trial courts.

There do not appear to be any absolutes in land contract defaults, and attorneys for both vendors and vendees must carefully evaluate the facts of their cases in deciding what type of relief a trial court may grant. The trend in land contract cases to which the Act does not apply appears to be away from forfeiture and towards allowing reinstatement or, if necessary, foreclosure. Nonetheless, the ultimate point must be that a vendor or vendee can find case law support for almost any remedy in a case involving default on a non-Act land contract.

B. Due on Sale and Other Non-Assignment Clauses

One of the hot topics in real estate finance law during the 1970's and the early 1980's was the due on sale clause.[330] The issue was con-

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324. *See supra* text accompanying notes 298–310.

325. *Johnson,* Nos. 2354 and 2374 (Ohio Ct. App., 9th Dist. Aug. 10, 1988) (LEXIS, Ohio library, All Cases file).

326. No. 83-C-49 (Ohio Ct. App., 7th Dist. Mar. 18, 1985) (LEXIS, Ohio library, All Cases file).

327. *Id.*

328. *Id.*

329. *Id.*

330. NELSON, REAL ESTATE FINANCE, *supra* note 6, at 323–29.

fronted by the Ohio courts of appeals in land contract cases in two different contexts: (1) whether the execution of the land contract by a vendor would trigger a due on sale clause in the vendor's mortgage with a third party lender; and (2) whether a land contract could require a vendee to obtain the vendor's approval before granting a mortgage on the vendee's interest.

1. Triggering of a Due on Sale Clause

There is no dispute that a due on sale clause is enforceable in Ohio. The issue before the courts of appeals has been whether the language of a particular due on sale clause is enforceable against a vendor who has entered into a land contract. The courts of appeals are split on the issue, with two holding that the due on sale clause is not triggered by the land contract and two others holding that the due on sale clause is triggered by the land contract.

The Court of Appeals for the Twelfth District in *Citizens Federal Savings and Loan Association of Dayton v. Page,*[331] and the Court of Appeals for the Eleventh District in *Peoples Savings and Loan Co. of Ashtabula v. Shaffer,*[332] have both held that the due on sale clause is not triggered by the vendor's execution of a land contract. In *Citizens Federal,* the clause provided:

> If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage, Lender may, at Lender's option, declare all sums secured by this Mortgage to be immediately due and payable.[333]

In *Peoples Savings & Loan,* the clause provided:

> Grantor does hereby agree not to suffer any lien superior to the lien hereby created, . . . and further agrees not to sell or dispose of said premises or any part thereof nor any building or improvement thereon without first obtaining the written consent of the grantee, nor shall any other waste be committed or suffered by the grantor.[334]

Although the court in *Citizens Federal* based its decision on prior Ohio cases[335] and the court in *Peoples Savings & Loan* based its deci-

331. No. 83-03-018 (Ohio Ct. App., 12th Dist. Jan. 9, 1984) (LEXIS, Ohio library, All Cases file).

332. No. 1200 (Ohio Ct. App., 11th Dist. May 17, 1985) (LEXIS, Ohio library, All Cases file).

333. *Citizens Federal,* No. 83-03-018 (Ohio Ct. App., 12th Dist. Jan. 9, 1984) (LEXIS, Ohio library, All Cases file).

334. *Shaffer,* No. 1200 (Ohio Ct. App., 11th Dist. May 17, 1985) (LEXIS, Ohio library, All Cases file).

335. Wayne Bldg. and Loan Co. v. Yarborough, 11 Ohio St. 2d 195 (1967); Butcher v.

sion on O.R.C. section 5313.01(A),[336] which states that the vendor retains title,[337] the bottom line is the same. For each court the creation of an interest in the vendee left the vendor with legal title and created in the vendee no rights superior to those of the mortgagee. Therefore, both courts reasoned that the clauses were not triggered. The court of appeals in *Citizens Federal* went so far as to state that, even though possession would be given to the vendee, the due on sale clause was ambiguous because it did not mention land contracts. The clause, therefore, had to be construed against the lender who supplied the mortgage.[338]

The two cases holding that the vendor's execution of a land contract does trigger a due on sale clause are both published opinions. In *First Federal Savings & Loan Association of Toledo v. Perry's Landing,*[339] the Court of Appeals for the Sixth District was confronted with a due on sale clause which was triggered by a change in ownership.[340] The court of appeals held that the execution of the land contract did trigger the due on sale clause, but reversed and remanded the case to the trial court to make factual determinations on the vendor/mortgagor's claim that the lender was estopped from asserting the due on sale clause under the facts present in the case.[341]

In *Blue Ash Building & Loan Co. v. Hahn,*[342] the Court of Appeals for the First District was faced with a due on sale clause which began "[a]nd further that if there shall be *any change in the ownership of the premises* herein described without the consent of said mortgagee."[343] The court held that the language "any change in the ownership of the premises" encompassed the execution of a land contract because the vendee at least obtained equitable title to the property.[344]

These cases present a difficult problem for attorneys representing both lenders and borrowers/vendors. The court in each case emphasized the language of the particular due on sale clause before it. The courts in both *First Federal* and *Blue Ash Building & Loan* were given the most simple language to apply, that of a "change" of ownership, which the execution of a land contract undoubtedly causes. Further,

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Kagy Lumber Co., 164 Ohio St. 85 (1955).

336. OHIO REV. CODE ANN. § 5313.01 (Anderson 1986).

337. *Id.* § 5313.01(A) (Anderson 1986).

338. *Citizens Federal,* No. 83-03-018 (Ohio Ct. App., 12th Dist. Jan. 9, 1984) (LEXIS, Ohio library, All Cases file).

339. 11 Ohio App. 3d 135, 463 N.E.2d 636 (1983).

340. *Id.* at 136, 463 N.E.2d at 639.

341. *Id.* at 147, 463 N.E.2d at 650.

342. 20 Ohio App. 3d 21, 22, 484 N.E.2d 186, 189 (1984).

343. *Id.* at 22, 484 N.E.2d at 187.

344. *Id.* at 23–24, 484 N.E.2d at 188–89.

the language applied by the courts in *Citizens Federal* and *Peoples Savings & Loan* is not as clear, but at the same time the execution of a land contract does appear in *Citizens Federal* to "transfer" "an interest therein" and in *Peoples Savings & Loan* to "sell or dispose of said premises or any part thereof."

The courts in *Citizens Federal* and *Peoples Savings & Loan* strictly applied the mortgages against the lenders, who likely were responsible for either the drafting of the mortgages or for the selection of the form of the mortgages from some standard forms. Whether the courts are correct in their interpretations of the language in the due on sale clauses, it puts a great strain on attorneys to predict just how strong their clients' positions are. While not addressing the question directly, however, the Ohio Supreme Court may have given some guidance in a recent case on a related question.

2. Vendor's Approval of Vendee's Mortgage

A related but different problem from application of a due on sale clause was confronted by the Ohio Supreme Court in *Security Bank v. Hawk.*[345] *Security Bank* involved the validity of a mortgage granted by the vendees on their land contract interest. The land contract stated that "[i]t is further understood and agreed that the said buyers shall not sell, assign, or transfer this contract, or any interest therein, or in said premises, without the written consent of the sellers being first obtained and endorsed thereon."[346] The vendees granted a mortgage without seeking or obtaining the vendors' approval.[347] The vendees later assigned their interest in the contract to Hawk, but they sought and received approval from the surviving vendor. Finally, Hawk failed to pay the mortgage debt, but remained current on the land contract.[348] One of the issues before the court was whether the vendees' granting of the mortgage without obtaining the vendors' consent was a breach of the non-assignment clause.

Writing for a unanimous court, Justice Wright held that execution of the mortgage without obtaining the vendors' approval violated the non-assignment clause.[349] After repeating the clause, Justice Wright made this simple disposition of the issue: "The facts indicate the sellers did not give consent, written or verbal, to the mortgage. By negotiating a mortgage without the consent of the sellers when the land contract

345. 35 Ohio St. 3d 1, 517 N.E.2d 886 (1988).
346. *Id.* at 3, 517 N.E.2d at 888.
347. *Id.*
348. *Id.*
349. *Id.*

specifically required such, the buyer breached the land contract."[350] It appears, therefore, that the Ohio Supreme Court was uninterested in drawing fine lines as to what constitutes a transfer of an interest in real property.

The holding in *Security Bank* does shed some light on what the Ohio Supreme Court might hold in a case where a mortgagee claims that the execution of a land contract by the mortgagor triggered a due on sale clause. Consider the due on sale clause language from *Citizens Federal Savings and Loan Association of Dayton v. Page,* which began by stating: "If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage."[351] Further, in *Peoples Savings & Loan,* the due on sale clause provided that "Grantor does hereby agree not to suffer any lien superior to the lien hereby created, . . . and further agrees not to sell or dispose of said premises or any part thereof nor any building or improvement thereon . . . ."[352] This language is as clear as the language interpreted by the Ohio Supreme Court in *Security Bank* ("shall not sell, assign, or transfer this contract, or *any interest therein*"). The Ohio Supreme Court did not choose to scrutinize whether "any interest therein" meant a mortgage; on the other hand the court accepted the clause at face value, thus acknowledging that granting a mortgage certainly is the transfer of an interest. Arguably, the Ohio Supreme Court would treat other cases the same and broadly read any prohibition on transfer to cover *any* transfer, including a transfer by execution of a land contract.

C. *Procedural Issues*

Finally, the courts of appeals have dealt with four primarily procedural issues concerning land contracts. These cases are instructive as a group in establishing how the courts of appeals view the respective interests of vendors and vendees in land contracts not subject to the Act.

1. Vendee As a Party in Foreclosure Against Vendor

In *Botnick Building Co. v. Eldred,*[353] the Court of Appeals for the Ninth District was faced with the issue of the interests of a vendee

350. *Id.*

351. *Page,* No. 83-02-018 (Ohio Ct. App., 12th Dist. Jan. 9, 1984) (LEXIS, Ohio library, All Cases file).

352. *Shaffer,* No. 1200 (Ohio Ct. App., 11th Dist. May 17, 1985) (LEXIS, Ohio library, All Cases file).

353. No. 13522 (Ohio Ct. App., 9th Dist. July 27, 1988) (LEXIS, Ohio library, All Cases file).

when the vendor's mortgagee brings a foreclosure action.[354] Botnick sold property to the Cains, taking back a second mortgage, and the Cains as vendors executed a land contract with the Eldreds as vendees.[355] The Eldreds assumed payment of the mortgage from the Cains to Botnick, and when the Eldreds defaulted Botnick brought a foreclosure action naming the Cains and the Eldreds.[356] The Eldreds filed a counterclaim alleging that Botnick "maliciously interfered with their land contract with the Cains."[357] The trial court granted Botnick's motion for summary judgment both on the foreclosure issue and the counterclaim.[358]

In a brief opinion, the court of appeals affirmed the trial court's grant of summary judgment to Botnick.[359] First, it is clear from the fact that the court of appeals affirmed the trial court's decision that the Eldreds were proper parties to Botnick's foreclosure action. This is no surprise because as vendees they had an interest in the property and Botnick, as a foreclosing mortgagee, certainly wanted any interest the Eldreds had to be extinguished as part of the foreclosure action.

Second, although the Eldreds claimed that there were facts requiring a trial on Botnick's foreclosure action, the court of appeals stated simply that there were no facts alleged by the Eldreds "to preclude foreclosure of Cains' interest."[360] The Eldreds might have alleged such facts, but did not. Further, the court of appeals considered it Cains' interest which was being foreclosed. Not surprisingly, the vendees, therefore, were proper parties, but they were defending based on the actions of their vendors. Either the debt was paid or not; since it had not been paid, the vendees lost.

2. Interest of Vendor's Judgment Creditor

In *Myers v. Parsley*,[361] the Court of Appeals for the Fourth District was presented with the issue of what priority, if any, a judgment creditor of the vendor has against the interest of the vendee. In March, 1983, the Runyons sold property to Parsley by a land contract. In Au-

354. *Id.* For discussion of a case in which the court, applying the Act, stated that vendee of a prior recorded land contract is entitled to notice of a foreclosure, see *supra* text accompanying notes 290–97.

355. *Eldred*, No. 13522 (Ohio Ct. App., 9th Dist. July 27, 1988) (LEXIS, Ohio library. All Cases file).

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. No. 85CA9 (Ohio Ct. App., 4th Dist. Mar. 14, 1986) (LEXIS, Ohio library, All Cases file).

gust, 1983, Myers obtained a judgment against the Runyons and filed a certificate of judgment giving him a lien against all real property owned by the Runyons.[362] In April, 1984, Parsley made a balloon payment of the balance due on the land contract.[363] Finally, in January, 1985, Myers filed a foreclosure action against Parsley. The trial court dismissed the complaint after hearing cross motions for summary judgment.[364]

The *Myers* court upheld the trial court's dismissal of the foreclosure action.[365] While the court cited two older cases for the proposition that the vendor retains an interest, "more than naked title,"[366] it also referred to O.R.C. section 5313.02(B) for the proposition that the vendor could enter into a mortgage for up to the amount due the vendor from the vendee.[367] The *Myers* court then stated its formulation of the law which formed the basis for its decision:

> The land contract vendor's interest consists of two parts, a right to payment of a sum of money and an interest in the land which declines in value with each payment. . . . Although a judgment creditor may intercept the payments by attachment or garnishment, only this declining interest in the land is subject to foreclosure on a judgment lien as "lands and tenements" under R.C. 2329.02.[368]

The *Myers* court of appeals then reached one of two possible results—once it is clear that the vendor's creditor has no more interest than does the vendor, then the issue becomes whether the vendee receives credit for payments made *after* the judgment lien arose or if the vendee only receives credit for payments made before the judgment lien arose. The court of appeals held that the vendee should receive credit for all payments made before the vendee has actual notice of the judgment lien. The court balanced the interests of the vendee and the judgment creditor, and the burdens which would result from either holding, and found that it is unreasonable to make the vendee determine if any new liens had been recorded before making each payment. However, the court held it is reasonable to make the judgment creditor give notice to the vendee of the judgment lien.

The holding in *Myers* greatly enhances the value of the vendee's interest because the vendee is permitted to complete the contract and

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362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. OHIO REV. CODE ANN. § 5313.02(B) (Anderson 1989).
368. *Myers*, No. 85CA9 (Ohio Ct. App., 4th Dist. Mar. 14, 1986) (LEXIS, Ohio library, All Cases file).

receive good title unless the vendee has actual notice that there is a new lien against the vendor's title. Although one could quibble about allowing the vendee to make the last payment, particularly a balloon payment, without checking to determine if the vendor has good title to convey,[369] the vendee should not be required to conduct a title search before making every payment. Further, the holding in *Myers* mandates that judgment creditors identify specific parcels to which the judgment lien has attached, rather than taking a wait and see approach with the debtor and any property in which the debtor might have an interest. As the court of appeals in *Myers* stated:

> [The vendee] cannot be held to have constructive notice of the filing of the certificate of lien. Equity should protect his good faith investments. The judgment creditor, on the other hand, only has to check once to discover the contract and identify the purchaser. He should therefore bear the burden of notice.[370]

3. Interest of Vendee's Mechanic's Lien Claimant

In *Clifton v. Malone*,[371] which involved a vendee's mechanic's lien claimant, the Court of Appeals for the Fourth District also considered the vendee's interest in the property as a strong one. Clifton was a contractor who built a swimming pool for Malone and her co-vendee on property they were purchasing on a land contract from the Blankenships. Malone and her co-vendee did not pay either that due the Blankenships on the land contract or that due Clifton on the contract for construction of the swimming pool.[372]

Clifton's suit asserted his mechanic's lien against Malone's vendee's interest in the land contract and asserted that the mechanic's lien should have first priority. Clifton's theory was that if the Blankenships

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369. The parallel in mortgage law is to require the borrower to determine if the lender, or the lender's assignee to whom the borrower has been paying, has the promissory note. If under the Uniform Commercial Code the note is negotiable and the holder of the note is a holder in due course, in order to protect himself the borrower must determine if the holder is in possession of note before making any payment because payment is a personal defense which cannot be asserted against a holder in due course. NELSON, REAL ESTATE FINANCE, *supra* note 6, § 5.33, at 593–94. In addition, Professors Nelson and Whitman go on to state that even though payment to a non-holder of a note can be raised by the borrower as a defense against the holder of the note who is not a holder in due course under the Uniform Commercial Code, "[T]here is some authority that, if a final payment is being made, it is so customary and natural for the debtor to demand surrender of the physical note that his failure to do so is negligence, and hence that his payment will give him no defense against the assignee. *Id.* at 394.

370. *Myers*, No. 85CA9 (Ohio Ct. App., 4th Dist. Mar. 14, 1986) (LEXIS, Ohio library, All Cases file).

371. No. 429 (Ohio Ct. App., 4th Dist. Nov. 22, 1989) (LEXIS, Ohio library, All Cases file).

372. *Id.*

obtained either forfeiture or foreclosure they would be unjustly enriched by the increase in value to the property caused by Clifton's construction of the swimming pool.[373] The Blankenships then sued for foreclosure, which the court allowed even though under the Act they could have sought forfeiture.[374] The Blankenships insisted that, as vendors, they had priority over Clifton on the proceeds of a foreclosure sale.

Both the trial court and the court of appeals agreed with the Blankenships. The court of appeals analogized the situation to one in which a mechanic's lien claimant contracts with a tenant to make improvements on a leasehold. The court of appeals cited *Romito Brothers Electric Construction Co. v. Frank Flannery, Inc.*,[375] an Ohio Supreme Court opinion, for the proposition that the mechanic's lien attaches only to the tenant's interest and not to the landlord's. Such an argument may seem to devalue the vendee's interest in the real estate by comparing it to that of a tenant. However, the *Clifton* court of appeals did hold that the vendee's interest still was assertable in the vendor's forfeiture and foreclosure actions.

While the court of appeals opined that the Blankenships should not be permitted to profit from any increase in value caused by the swimming pool, it did state that affording the Blankenships first priorty was not tantamount to unjust enrichment. The result is that the *Clifton* court treated the vendee's interest in the underlying land contract as if it were a second mortgage and Clifton's lien as if it were being asserted in a foreclosure of a first mortgage but with priority over the second mortgage.

The court of appeals in *Clifton* also considered, in dictum, the result if the Blankenships had sued for forfeiture, rather than foreclosure.[376] The court stated that Ohio recognizes a cause of action "for unjust enrichment under the facts set forth in [Clifton's] complaint."[377] The court further stated that such an action could be based either on quasi-contract or on unjust enrichment. The *Clifton* decision, therefore, affirms the strength of the vendee's interest because the vendee may create a further interest which survives foreclosure and, in a limited form, forfeiture of the vendee's interest.

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373. *Id.*

374. *Id.* The land contract had not been in effect for five years or more nor had the vendees paid more than 20% of the purchase price. *See supra* text accompanying notes 49-58.

375. *Clifton*, No. 429 (Ohio Ct. App., 4th Dist. Nov. 22, 1989) (LEXIS, Ohio library, All Cases file).

376. *Id.*

377. *Malone*, No. 85CA9 (Ohio Ct. App., 4th Dist. Mar. 14, 1986) (LEXIS, Ohio library, All Cases file).

4. Vendee's Suit for Damages After Forfeiture

In *Hervey v. Holmes*,[378] the Court of Appeals for the Fifth District encountered a land contract clause which ultimately provided great benefit to the vendee. The land contract included a default clause which, after providing for forfeiture, stated: "Payments theretofore made by buyer pursuant to this contract shall be credited by Seller to the reasonable rental value of said property, *and any excess of said payments over such reasonable rental value shall be refunded to buyer*."[379] The land contract also extended to the vendor the right to declare the land contract to be accelerated and that the vendor then "may by appropriate action, law or equity proceed to enforce payment thereof."[380]

The vendee in *Hervey* abandoned the land after default; the vendor contended that the forfeiture language, which preceded the quoted clause controlled, but the court of appeals held that the entire forfeiture clause must be read together.[381] Therefore, the court reasoned, because it found that the trial court's determination of "reasonable rental value" was supported by the evidence, the vendee was entitled to a judgment of $8,605.93, the difference between the amount paid by the vendee and the reasonable rental value of the property.[382]

The *Hervey* case is interesting because it recognizes a contractual provision in favor of the vendee which survives forfeiture even after a voluntary abandonment by the vendee. The vendor in *Hervey* undoubtedly felt shortchanged, as was evidenced by the fact that the vendor sued for damages on the theory that the vendee's payments were less than the reasonable rental value. The case, then, is another example of how the Ohio courts are utilizing their equitable powers to reach beyond the rigidity of common law forfeiture.

V. CONCLUSION

Many Ohio land contract law cases were decided during the 1980's. Most of the decisions were not published, with the result that the cases are of limited value as precedent. Nonetheless, a pattern has emerged in the courts of appeals' collective treatment of land contract cases. Several points can be made which, taken together, can form a broad basis for determining the current status of land contract law in

378. No. 88AP070052 (Ohio Ct. App., 5th Dist. Feb. 7, 1989) (LEXIS, Ohio library, All Cases file).

379. *Id.* (emphasis added).

380. *Id.*

381. *Id.*

382. *Id.*

Ohio.

First, the Ohio courts of appeals are liberally using the Act and liberally interpretating the Act. Courts of appeals have applied the Act to cases in which it is difficult to determine if the Act should apply, and in a few cases in which it appears that the Act does not apply. As to interpretation of the Act, the courts of appeals have been quite liberal in that they have rejected hyper-technical arguments and are using certain sections of the Act to decide cases even when a court clearly is not applying the Act as a whole.

On the other hand, the courts of appeals have been permitting forfeiture for vendors who follow the procedures set forth in the Act. Although there are cases in which some courts of appeals have appeared to deny forfeiture on behalf of vendees who can raise equitable arguments, the majority of cases where forfeiture has been granted by the trial courts were upheld by the courts of appeals. Arguably, the courts of appeals are satisfied with applying the Act rather than questioning the impact it has on individual vendees.

That does not mean that vendees always lose. Because forfeiture is a drastic remedy, it can appear that the courts of appeals have become pro-vendor. On the contrary, the courts of appeals are most interested in strictly applying the Act's terms, whether to the benefit of the vendor *or* the vendee. Again, because forfeiture is a drastic remedy, the forfeiture cases stand out and arguably are the cases most likely to be appealed because the stakes are greatest for both parties. Vendees, especially those to whom the Act applies and have paid for more than five years or have paid more than 20% of the purchase price, do win cases and do receive fair consideration by the courts of appeals.

As to land contract cases to which the Act does not apply, the courts of appeals appear to be even more liberal. Non-Act land contract law arguably has become pro-vendee, both because there are few reported cases in which forfeiture is even requested, much less granted, and because in the other land contract cases the courts of appeals appear to balance equities between the vendor and the vendee, rather than strictly apply the terms of land contracts or the common law. While no meaningful summary statement can be made about the courts of appeals in land contract cases outside the Act, it appears that vendees are receiving fair treatment.

It is more difficult to generalize about the state of land contract law before the Ohio Supreme Court. The court has accepted few land contract cases and seems content to let the courts of appeals fashion Ohio land contract law. When the Ohio Supreme Court has stepped in, however, it has literally applied the Act, much like the courts of appeals. It will be interesting to see how some of the current disputes

about land contract law among the courts of appeals will be resolved in the future by the Ohio Supreme Court.

No definitive statement about the state of Ohio land contract law can be made. Land contract law is fluid, especially because most of the cases are not published, and therefore of little precedential value. The practitioner can only evaluate the most recent cases, published and unpublished, and hope for the best. The most that can be said is the courts are literally using the Act as the guidepost of Ohio land contract law and that if one's client has a clear right under the Act it is likely that the client will prevail on that particular issue.