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Ohio Land Contract Law

Cover Page Footnote

The research assistance of Christopher Brooks, University of Dayton School of Law Class of 1994, is gratefully acknowledged.

OHIO LAND CONTRACT LAW*

Robert M. Curry**

James Geoffrey Durham***

I. DEFINING AND DISTINGUISHING AMONG LAND CONTRACTS

A. "Installment Land Contracts" Defined

"Installment land contracts," or "land contracts" as they are usually referred to, normally involve a vendor promising to convey title to a parcel of land at some point in the future in exchange for a vendee's promise to make monthly payments of interest and amortized principal¹ during the intervening period of time.² The land may be unimproved or improved with residential or commercial structures, and the vendee normally has the right to possess the land during the term of the land contract. The vendee normally assumes most of the burdens of ownership, so that the relationship between vendor and vendee is similar to that of mortgagee and mortgagor.

* This Article is taken from Chapter 4, "Installment Land Contracts," of the authors' multi-volume treatise, *OHIO REAL PROPERTY LAW AND PRACTICE* (Michie Co., 5th ed., to be published 1995). This Article appears in substantially the same form as it will appear in the upcoming treatise, however, the footnotes have been altered to conform with *A Uniform System of Citation* (15th ed. 1st printing 1991), copyright by the *Columbia and University of Pennsylvania Law Reviews*, the *Harvard Law Review Association*, and the *Yale Law Journal*.

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1. Any payments made during the term of the contract may be interest only, partially amortized so that the final payment will be a "balloon" consisting of the balance of all principal and interest then due, or fully amortized. For examples of land contract clauses which may be used for any of these three options, see 3 ROBERT M. CURRY, *MCDERMOTT'S OHIO REAL PROPERTY LAW AND PRACTICE*, Form 808 § 2 (Land Installment Contract (Per Residential Statute)), Form 809 § 1 (Land Installment Contract (Alternate Form)) (4th ed. 1989).

2. Section 5313.01(A) of the Ohio Revised Code states the following definition:

"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.

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

B. "Land Contracts" and "Residential Land Contracts" Defined

Until 1969 all Ohio land contracts were subject to the same case law and statutes. In 1969 the Ohio General Assembly passed Revised Code Chapter 5313,³ which regulates the creation, administration, and termination of land contracts for land "improved by virtue of a dwelling having been erected thereon."⁴ This Article will refer to the statutorily designated subclass of land contracts concerning land improved by "a dwelling" as "residential land contracts." All other installment land contracts will be referred to by the designation, "land contracts."

C. Determining What Are Residential Land Contracts

Ohio Revised Code Chapter 5313 applies only to residential land contracts entered into after its effective date, November 25, 1969.⁵ The Ohio Supreme Court reasoned that Chapter 5313 created "new substantive rights,"⁶ and that retroactive application of Chapter 5313 would violate Article II, Section 28 of the Ohio Constitution.⁷

Chapter 5313 applies only to land "improved by virtue of a dwelling having been erected" thereon.⁸ The Court of Appeals for the Sixth District of Ohio held that Chapter 5313 does not apply if the land is vacant when the land contract is entered into and the vendee subsequently builds a dwelling on it.⁹ Furthermore, the literal language of this provision arguably limits the scope of Chapter 5313 to land improved by a single dwelling house. The argument for limited application of Chapter 5313 is bolstered by the fact that section 5313.01(B) originally limited application of Chapter 5313 to land contracts when the purchase price was less than \$30,000. The legislature removed this limitation in 1980.

The Courts of Appeals for the Second, Fifth, Ninth, and Tenth Districts declined to adopt a narrow construction of "a dwelling" and held that a land contract on land improved by an apartment building is covered by Chapter 5313.¹⁰ Courts in other cases also have applied the

3. 1969 Ohio Laws 424, 424-30 (effective Nov. 25, 1969).

4. OHIO REV. CODE ANN. § 5313.01(B).

5. *Kiser v. Coleman*, 503 N.E.2d 753, 756-57 (Ohio 1986).

6. *Id.* at 756.

7. Article II, Section 28 of the Ohio Constitution "prohibits the enactment of retroactive laws or laws impairing the obligation of contract." OHIO CONST. art. II, § 28; *Kiser*, 503 N.E.2d at 757.

8. OHIO REV. CODE ANN. § 5313.01(B).

9. *Walls v. Banchich*, No. 90-OT-012, 1991 Ohio App. LEXIS 4097, at *2-3 (Ohio Ct. App. Aug. 30, 1991).

10. *Taylor v. Nickston Invs.*, No. 92AP-508, 1992 Ohio App. LEXIS 5826 (Ohio Ct. App. Nov. 17, 1992); *Tanner v. Fulk*, No. 2297 (Ohio Ct. App. Aug. 1, 1985); *Akron First Seventh*

chapter to land not improved by a dwelling.¹¹ The Ohio Attorney General opined that Chapter 5313 applies to a trailer park lot as long as a trailer is “parked” on the lot.¹² The Court of Appeals for the Ninth District went one step further and applied Chapter 5313 to land used as a trailer park,¹³ but the Second District Court of Appeals refused to extend the act to cover a common ownership interest in a campground.¹⁴

Options to purchase land are not residential land contracts.¹⁵ On the other hand, a “lease-purchase” agreement in which the “lessor” agrees to sell the land for a stated price after a “lease” term of more than one year may well be a residential land contract, under the statutory definition. To be considered a residential land contract, the agreement must provide that the vendee agree to pay the purchase price in “installment payments.” A lease-purchase agreement would satisfy this requirement if any of the lessee’s “rent” payments are to be applied to the purchase price, or if the lessee is required to make a deposit or down payment before the “lessor” conveys title.

Finally, only land contracts in which the vendee is a natural person arguably constitute residential land contracts. Section 5313.01(C) states that “‘Vendor’ means any individual, partnership, corporation, association, trust, or any other group of individuals however organized making a sale of property by means of a land installment contract.” Section 5313.01(D) states that “‘Vendee’ means *the person* who acquires an interest in property pursuant to a land installment contract, or any legal successor in interest to such person.”¹⁶ On the other hand,

Day Adventist Church v. Smith, No. 11577 (Ohio Ct. App. Sept. 27, 1984); Shone v. Griffis, No. 8252 (Ohio Ct. App. Feb. 2, 1984); DiYorio v. Porter, No. 81 (Ohio Ct. App. June 24, 1981).

11. Jones v. Bonzo, No. 1977, 1991 Ohio App. LEXIS 5228 (Ohio Ct. App. Oct. 30, 1991) (holding Chapter 5313 covers farm land); Papp v. Johnson, No. 7381 (Ohio Ct. App. Feb. 17, 1982) (applying Chapter 5313 to a two-story building with first floor used as a bar and second floor containing four “sleeping rooms” rented to the general public).

12. Op. Att’y Gen. 2-163 (Ohio 1973).

13. Keene v. Schnetz, 468 N.E.2d 125 (Ohio Ct. App. 1983). The opinion of the Ninth District Court of Appeals did not mention whether any improvements had been made to the land. However, the findings of fact in the Ohio Supreme Court opinion in a related case with the same caption states that “Appellant Fred Schmitt, a real estate broker, negotiated the sale of a trailer park” Keene v. Schnetz, 462 N.E.2d 1381, 1382 (Ohio 1984).

14. Simes v. Beaver Valley Resorts, Inc., No. 2925, 1992 Ohio App. LEXIS 5178 (Ohio Ct. App. Oct. 6, 1992).

15. Section 5313.01(A) of the Revised Code ends with this sentence: “Option contracts for the purchase of real property are not land installment contracts.” OHIO REV. CODE ANN. § 5313.01(A) (Anderson 1989).

16. *Id.* § 5313.01(D) (emphasis added).

the Court of Appeals for the Tenth District allowed a vendee which was a partnership to benefit from the act.¹⁷

II. CONTRACT AND TITLE ISSUES

A. *Contract Issues Peculiar to Land Contracts*

Land contracts are subject to the same legal rules on formation as all contracts involving the sale or transfer of land. The difference, however, is that, unlike sales and option contracts which anticipate that the seller will remain in possession until closing in the relatively near future, a land contract anticipates that the vendee will enter into possession and make payments over an extended period of time before the vendor conveys title. Because the land contract creates an ongoing relationship between vendor and vendee, additional care should be taken to ensure that a land contract anticipates problems which may arise over time.

From the vendor's perspective, the land contract should include an acceleration clause,¹⁸ or the vendor's only remedy for a missed payment may be suit for that payment.¹⁹ The land contract also should include a statement of the remedies available to the vendor upon the vendee's default,²⁰ particularly if the vendor desires the option of declaring a forfeiture of the vendee's interest.²¹ In addition, the land contract should include a reservation by the vendor of the right to approve any lease of the land or assignment of the land contract by the vendee.²²

From the vendee's perspective, the land contract should include the vendee's right to make payments that the vendor fails to make on

17. *Taylor v. Nickston Invs.*, No. 92AP-508, 1992 Ohio App. LEXIS 5826, at *11 (Ohio Ct. App. Nov. 17, 1992).

18. See 3 CURRY, *supra* note 1, Form 808 § 13 (Land Installment Contract (Per Residential Statute)), Form 809 § 12 (Land Installment Contract (Alternate Form)).

19. In *Albright v. Cochran*, No. CA-613, slip op. at 6 (Ohio Ct. App. Mar. 2, 1984), a case in which the land contract did not have an acceleration clause, the court noted:

Where a contract for the sale of land provides that the purchase money is to be paid in installments, the vendor, on default in payment, may sue at law for each installment when due. Suit may be maintained for the amount of such installments as are due at the institution of the suit, but not for installments to become due thereafter.

Id. (citations omitted). The *Albright* court applied Ohio Revised Code § 5313.07, however, and allowed forfeiture because § 5313.07 gives the vendor full remedies upon any breach of a residential land contract. *Albright*, slip op. at 7.

20. See *Albright*, slip op. at 4.

21. Some courts have awarded forfeiture to vendors in the absence of a forfeiture clause, but it is much safer to state the right to foreclosure if the vendor intends to demand it rather than rely on a court's willingness to allow forfeiture under common-law principles.

22. See 3 CURRY, *supra* note 1, Form 808 § 7 (Land Installment Contract (Per Residential Statute)), Form 809 § 11 (Land Installment Contract (Alternate Form)).

any mortgage or lien senior to the land contract.²³ The land contract also should include a clear statement as to whether and to what extent the vendor may further encumber title to the land²⁴ and a requirement that the vendor convey clear title when the vendee has completed payment.²⁵ The vendee also should obtain a title examination before entering into the land contract in order to determine the status of title at the inception of the land contract and in order to evaluate whether the vendor will be able to convey marketable title when the vendee completes the land contract.

The land contract should include clauses addressing several other points. The land contract should state to what standards any improvements on the land must be maintained²⁶ and who is: (1) responsible for the payment of utilities, property taxes, and insurance (usually the vendee);²⁷ (2) to be named as an insured (usually the vendee, the vendor, and any senior mortgagee);²⁸ and (3) responsible for maintenance (usually the vendee). The land contract also should state for what purpose(s) the land may be put, and what result will happen if all or part of the land is taken by eminent domain or destroyed by fire or other casualty.²⁹ Finally, the land contract should be executed with the same formalities as a deed or mortgage.

B. Contract Issues Peculiar to Residential Land Contracts

Section 5313.02(A) sets forth a list of provisions required to be included in a residential land contract.³⁰ Section 5313.02(B) limits the

23. See 3 CURRY, *supra* note 1, Form 809 § 8 (Land Installment Contract (Alternate Form)).

24. See 3 CURRY, *supra* note 1, Form 809 § 8 (Land Installment Contract (Per Residential Statute)); Form 809 § 8 (Land Installment Contract (Alternate Form)).

25. See 3 CURRY, *supra* note 1, Form 809 § 3 (Land Installment Contract (Per Residential Statute Alternate Form)), Form 809 § 9 (Land Installment Contract (Alternate Form)).

26. See 3 CURRY, *supra* note 1, Form 809 § 5 (Land Installment Contract (Per Residential Statute)); Form 809 § 6 (Land Installment Contract (Alternate Form)).

27. See 3 CURRY, *supra* note 1, Form 809 §§ 4, 6, 10 (Land Installment Contract (Per Residential Statute)), Form 809 §§ 3, 4, 5 (Land Installment Contract (Alternate Form)).

28. See 3 CURRY, *supra* note 1, Form 809 § 6 (Land Installment Contract (Per Residential Statute)), Form 809 § 5 (Land Installment Contract (Alternate Form)).

29. See 3 CURRY, *supra* note 1, Form 809 § 12 (Land Installment Contract (Per Residential Statute)), Form 809 § 7 (Land Installment Contract (Alternate Form)).

30. Section 5313.02(A) provides:

Every land installment contract shall be executed in duplicate, and a copy of the contract shall be provided to the vendor and the vendee. The contract shall contain at least the following provisions:

(1) The full names and then-current mailing addresses of all the parties to the contract;

(2) The date when the contract was signed by each party;

(3) A legal description of the property conveyed;

(4) The contract price of the property conveyed;

amount of a mortgage the vendor may have on the land at the inception of the land contract and provides, in relevant part, as follows:

(B) No vendor shall hold a mortgage on property sold by a land installment contract in an amount greater than the balance due under the contract, except a mortgage which covers real property in addition to the property which is the subject of the contract where the vendor has made written disclosure to the vendee of the amount of the mortgage and the release price, if any, attributable to the property in question.³¹

Section 5313.02(C) requires the vendor to record the residential land contract within twenty days after the contract has been signed by both the vendor and the vendee.³² Section 5313.02(D) requires residential land contracts to conform to the formalities required by law for the execution of deeds and mortgages.³³

C. Title Issues

1. Nature of Vendor's Title

A vendor who sells real estate on land contract retains the legal title to the property. The vendor is not merely holding title as a "naked trustee" for the vendee; the vendor also has a "beneficial estate in the lands to the extent of the unpaid purchase money."³⁴ This "beneficial estate" distinguishes a land contract vendor from a mortgagee — the

(5) Any charges or fees for services that are includable in the contract separate from the contract price;

(6) The amount of the vendee's down payment;

(7) The principal balance owed which is the sum of the items specified in divisions (A)(4) and (5) of this section less the item specified in division (A)(6) of this section;

(8) The amount and due date of each installment payment;

(9) The interest rate on the unpaid balance and the method of computing the rate;

(10) A statement of any encumbrances against the property;

(11) A statement requiring the vendor to deliver a deed of general warranty on completion of the contract, or another deed that is available when the vendor is legally unable to deliver a deed of general warranty;

(12) A provision that the vendor provide evidence of title in accordance with the prevailing custom in the area where the property is located;

(13) A provision that, if the vendor defaults on any mortgage on the property, the vendee can pay on the mortgage and receive credit on the land installment contract;

(14) A provision that the vendor shall cause a copy of the contract to be recorded;

(15) A requirement that the vendee be responsible for the payment of taxes, assessments, and other charges against the property from the date of the contract, unless agreed to the contrary;

(16) A statement of any pending order of any public agency against the property.

OHIO REV. CODE ANN. § 5313.02(A) (Anderson Supp. 1993).

31. *Id.* § 5313.02(B).

32. *Id.* § 5313.02(C).

33. *Id.* § 5313.02(D).

34. *Jaeger v. Hardy*, 27 N.E. 863, 864 (Ohio 1891); *accord Coggshall v. Marine Bank Co.*,

57 N.E. 1086, 1088 (Ohio 1890).

vendor has an interest in land to which liens of his creditors may attach.

The vendor also is said to have a "vendor's lien" to the extent of the unpaid purchase price.³⁵ In reality, this "vendor's lien" is something of a misnomer. A vendor's lien is appropriate when the vendor has conveyed title and needs to reserve a lien to secure the unpaid purchase price. In a sale on land contract, the vendor already retains the legal title as security;³⁶ the additional vendor's lien is merely duplicative.

Because a vendor holds the legal title, any liens that may attach to the real estate will attach to the vendor's interest. These include, for example, judgment liens,³⁷ mechanics' liens,³⁸ federal tax liens,³⁹ delinquent personal property tax liens,⁴⁰ unemployment compensation liens,⁴¹ workers' compensation liens,⁴² recognizance liens,⁴³ real estate taxes,⁴⁴ environmental liens,⁴⁵ and, of course, voluntary liens such as mortgages.⁴⁶ After the property is sold on land contract, however, any subsequent liens against the vendor's interest will attach only to the extent of the unpaid purchase price.⁴⁷ Under Ohio common law, an exception occurs when the vendee has made payments to the vendor after receiving actual knowledge of the junior liens.⁴⁸

35. See *Miller v. Albright*, 53 N.E. 490, 491 (Ohio 1899).

36. See *Butcher v. Kagey Lumber Co.*, 128 N.E.2d 54, 56 (Ohio 1955).

37. Section 2329.01 states that "lands and tenements, including vested legal interests therein, and permanent leasehold estates" are subject to the payment of debts and to be taken upon execution. OHIO REV. CODE ANN. § 2329.01 (Anderson 1991).

38. Section 1311.03 states that a mechanic's lien attaches to the "lands of the owner, part owner, or lessee, upon which the [improvement] is constructed." *Id.* § 1311.03 (1993).

39. 26 U.S.C. 6321 (1988). The federal statute provides that the lien attaches "to all property and rights to property, whether real or personal" belonging to the debtor. *Id.*

40. OHIO REV. CODE ANN. § 5719.04 (1991). The lien attaches to "lands and tenements, vested legal interests therein, and permanent leasehold estates." *Id.*

41. *Id.* § 4141.23. The lien attaches to "the real and personal property of such employer." *Id.*

42. *Id.* § 4123.76. The lien attaches to "the real property and tangible personal property of the employer." *Id.*

43. *Id.* § 2937.25 (1993). The lien attaches to the "real property" described in the affidavit of lien. *Id.*

44. *Id.* § 323.11 (1992). The lien of taxes attaches to "all real property subject to such taxes." *Id.*

45. *Id.* §§ 3734.122, 3734.20, 3734.22. These subsections provide for liens that attach to the property on which the site or facility is located. *Id.*

46. A mortgage of any "land, tenement or hereditaments" is entitled to recording. *Id.* §§ 317.08(B)(1), 5301.25 (1989).

47. See *infra* text accompanying notes 49-70.

48. See *infra* text accompanying notes 49-57.

2. Nature of Vendee's Title

The vendee under a land contract holds "an equitable estate in the land equal to the amount of the purchase money paid by him, and which, upon full payment, may ripen into a complete equity entitling him to a conveyance of legal title according to the terms of the contract."⁴⁹ Under Ohio common law, the vendee's equitable title has two distinct elements. First, the vendee has a "vendee's lien" to the extent of the purchase price paid.⁵⁰ Second, to the extent that the value of the property increases above the original contract price because of improvements made by the vendee, inflationary factors, or other reasons, the vendee holds additional equity in the property.⁵¹

a. Requirement of Notice

In order for the vendee's interests to be accorded priority, third parties must be placed on notice of the land contract. A vendee may give constructive notice by recording the land contract in the chain of title.⁵² Ohio courts also have held that the vendee's possession of the property constitutes notice to all the world of the vendee's interest.⁵³

b. Vendee's Lien at Common Law

Under Ohio's common law, the vendee has a "vendee's lien" to the extent of payments made toward the purchase price.⁵⁴ This lien is, in some respects, a hidden lien. Creditors of the vendor who search the title may find that the vendor has unencumbered title. However, if the vendor (for example, a builder) entered into a contract to sell the property and accepted a down payment, the purchaser has a vendee's lien

49. *Coggsball v. Marine Bank Co.*, 57 N.E. 1086, 1088 (Ohio 1900) (quoting *Jaeger v. Hardy*, 27 N.E. 863, 864 (Ohio 1891)).

50. *Wayne Building & Loan Co. v. Yarborough*, 228 N.E.2d 841, 845 (Ohio 1967); *Cleveland Trust Co. v. Bouse*, 127 N.E.2d 7, 9 (Ohio 1955); see also *Jaeger*, 27 N.E. at 864. Ohio cases have not drawn a distinction between land contracts and real estate purchase agreements; both arrangements are deemed to create in the vendee an equitable interest that is entitled to certain protection against subsequent creditors of the vendor.

51. When the vendee's interest "ripens" into a complete equity upon full payment of the purchase price, as described in *Coggsball*, 57 N.E. at 1089, the vendee's investment is protected. See also *Basil v. Vincello*, 553 N.E.2d 602, 605-06 (Ohio 1990).

52. OHIO REV. CODE ANN. §§ 5301.25 (Anderson 1989), 317.08(B)(1) (1992).

53. *Coggsball*, 57 N.E. at 1088; *Jaeger*, 27 N.E. at 864; *Ranney v. Hardy*, 1 N.E. 523, 525 (Ohio 1885); *Kelley v. Stanbery*, 13 Ohio 408, 425 (1844); *Standard Oil Co. v. Moon*, 170 N.E. 368, 369 (Ohio Ct. App. 1930); *State Fidelity Fed. Sav. & Loan Ass'n v. Wehrly*, 263 N.E.2d 801, 803 (Ohio Ct. C.P. 1970).

54. *Yarborough*, 228 N.E.2d at 845; *Coggsball*, 57 N.E. at 1087; *Jaeger*, 27 N.E. at 864; *Lefferson v. Dallas*, 20 Ohio St. 68, 75 (1870); *Kelley*, 13 Ohio at 425; *Franklin Fin. Co. v. Bowden*, 172 N.E. 698, 699 (Ohio Ct. App. 1930); *Berwald v. Summit Park Realty Co.*, 7 Ohio L. Abs. 440 (Ct. App. 1929); *Sause v. Ward*, 7 Ohio App. 446, 451 (1917); see also *Moon*, 170 N.E. at 368-69.

for the down payment. The vendee's lien has priority over the mortgage if the mortgagee records the mortgage after receiving actual or constructive notice of the contract of sale.⁵⁵

The "vendee's lien" may lose its priority to the extent that the vendee makes payments on the purchase price with actual knowledge that a lien has been placed against the vendor's interest, even though the lien is subordinate to the land contract.⁵⁶ This places an unusual, and probably unexpected, burden on the vendee. Once the vendee becomes aware of a junior lien, any future payments to the vendor are "at risk," and the vendee must cease making payments to the vendor, or make payments to the vendor's creditors, in order to preserve his priority position. If the junior lienholder consents to the vendee's continued payments to the vendor, however, the priority of the vendee's lien will be preserved.⁵⁷ As discussed below, the vendee's lien and the rules described above may be superseded by the statutes applicable to residential land contracts.⁵⁸

c. Vendee's Equity

Even before the enactment of Chapter 5313, Ohio courts recognized that, upon foreclosure, the vendee was entitled to the equity in the property in excess of the unpaid purchase price.⁵⁹ For residential land contracts, the vendee's equity interest is established by section 5313.07, which states that, upon foreclosure, as between the vendor and the vendee, the vendor is entitled to the proceeds of sale up to the unpaid balance due on the land contract.⁶⁰ The vendee is entitled to the proceeds in excess of the unpaid contract price. The statute makes no reference to the vendee's right to a "vendee's lien"; instead, to the extent that the balance on the land contract is paid down, the vendee's equity simply increases.⁶¹ In this sense, the vendee's equity is no different than that of a homeowner who holds legal title subject to a mortgage. The mortgagee is entitled to the proceeds up to the mortgage balance, with the excess to the mortgagor.

55. See, e.g., *Yarborough*, 228 N.E.2d at 848; see discussion *infra* notes 69-74 and accompanying text.

56. *Yarborough*, 228 N.E.2d at 849; *Jaeger*, 27 N.E. at 864; *Lefferson*, 20 Ohio St. at 75.

57. *Bowden*, 172 N.E. at 699.

58. See *infra* text accompanying notes 71-98.

59. *Coggsall v. Marine Bank Co.*, 57 N.E. 1086, 1088 (Ohio 1900); see also *Standard Oil Co. v. Moon*, 170 N.E. 368, 368-69 (Ohio Ct. App. 1930).

60. OHIO REV. CODE ANN. § 5313.07 (Anderson 1989).

61. *Myers v. Parsley*, No. 85-CA-9 (Ohio Ct. App. Mar. 14, 1986); see discussion *infra*

d. Liens Against Vendee's Equity.

A vendee's equitable interest under a land contract is not considered a legal interest in real estate to which a judgment lien will attach.⁶² Liens that attach to the property itself, regardless of ownership, such as the lien of real estate taxes⁶³ and environmental liens,⁶⁴ attach to the vendee's interest. Liens created by statute that apply not merely to legal interests in real property but also to broader interests in real property, apply to a vendee's interest; examples in this category include federal tax liens⁶⁵ and mechanics' liens.⁶⁶ Although the vendee's equity in real estate is not a legal interest, it is nevertheless an interest in real estate that can be mortgaged.⁶⁷ The remedy of a creditor of a vendee whose lien does not attach to the vendee's equitable title is an action in the nature of a creditor's bill.⁶⁸

3. Priorities in Land Contract Foreclosures

Determining the priorities of the vendor, vendee, and their respective creditors can be extremely complicated in a land contract foreclosure. The complications arise from the peculiar rights of land contract vendees. In addition to the usual claims entitled to priority, the vendee's lien and the vendee's equity must be assigned priority positions.

Under Ohio common law, payments made by the vendee are entitled to their own priority. This can be surprising to the vendor's creditors. Example: A vendor and vendee enter into a land contract with a purchase price of \$100,000. The vendee makes principal payments totalling \$20,000, leaving a balance due of \$80,000. The vendor then decides to mortgage (or refinance) his interest in the property, and places a \$75,000 "first mortgage" on the property. The vendor later defaults, and the vendee, unable to procure her own financing, allows the property to be foreclosed. At the foreclosure sale, the property is sold for

62. *Basil v. Vincello*, 553 N.E.2d 602, 608 (Ohio 1990); *Bank of Ohio v. Lawrence*, 120 N.E.2d 88, 90 (Ohio 1954).

63. OHIO REV. CODE ANN. § 323.11 (1992). The lien of real estate taxes attaches to "all real property subject to such taxes." *Id.*

64. *Id.* §§ 3734.122, 3734.20, 3734.22. These subsections provide for liens that attach to the property on which the site or facility is located. *Id.*

65. 26 U.S.C. § 6321 (1988). The federal statute provides that the lien attaches to "all property and rights to property." *Id.*

66. OHIO REV. CODE ANN. § 1311.03 (1993). Arguably workers' compensation liens, *id.* § 4123.76 (1991) (applicable to "the real property and tangible personal property of the employer"), and unemployment compensation liens, *id.* § 4141.23 (applicable to "the real and personal property of such employer"), also fall into this category and attach to a vendee's equitable interest.

67. A mortgage of any "land, tenement or hereditaments" is entitled to recording. *Id.* §§ 5301.25 (1989), 317.08(B)(1) (1992).

68. *See, e.g., Bank of Ohio v. Lawrence*, 120 N.E.2d 88, 91 (Ohio 1954).

\$85,000. Under case decisions before the enactment of Chapter 5313,⁶⁹ the vendee's lien would have first priority to the extent of \$20,000, the purchase price paid before the mortgage was made and of which the mortgagee had notice. The mortgagee would be entitled to the remaining proceeds of \$65,000.⁷⁰

Section 5313.07 alters this result for residential land contracts. The statute allocates the priorities between the parties by stating that, upon foreclosure, "as between the vendor and the vendee, the vendor shall be entitled to proceeds of the sale up to and including the unpaid balance due on the land installment contract."⁷¹ The vendor's creditors should be entitled to step into the same priority position as the vendor himself.⁷² Accordingly, in the example given above, the mortgagee would receive the first \$75,000 of sale proceeds, the vendor would receive \$5,000 of the sales proceeds, and the vendee would receive the remaining \$5,000 of sales proceeds.

The foreclosure priorities become further complicated if the vendee makes payments to the vendor after receiving actual notice of junior liens filed against the vendor. Cases construing the Ohio common law have held that the vendee's lien is subordinated to the junior liens to the extent of payments made to the vendor after actual notice. At least one Ohio appellate court has held that this rule applies to residential land contracts under Chapter 5313.⁷³ Nevertheless, section 5313.07 limits the right of the vendor and, presumably, the subsequent creditors of the vendor to the unpaid purchase price. The statute makes no distinction between payments made by the vendee before or after notice of

69. See, e.g., *Wayne Building & Loan Co. v. Yarborough*, 228 N.E.2d 841 (Ohio 1967).

70. When a mortgagee proposes to make a loan to the vendor under a pre-existing land contract, the mortgagee is well advised to obtain from the vendee a subordination of the vendee's lien in favor of the new mortgage.

71. OHIO REV. CODE ANN. § 5313.07 (Anderson 1989). Of course, if the vendor placed liens or encumbrances on the property before the land contract was entered into, the creditors would have priority over the land contract and would not be limited to the unpaid purchase price.

72. One may argue that the words "as between the vendor and the vendee" were intended to benefit only the parties themselves, rather than their creditors. There is no apparent reason why the legislature would draw such a distinction, however. The already complicated priority rules would be made even worse if the vendor himself were entitled to a different priority position than his own creditors. A better interpretation is that the statute simply draws a line at the amount of the unpaid purchase price: the vendor (including all claiming through the vendor) is entitled to the proceeds up to the unpaid purchase price, and the vendee (including all claiming through the vendee) is entitled to the balance. Furthermore, there can be little question that § 5313.07 was intended to modify the common-law priorities to some extent. In the *Yarborough* case, for example, the vendee's lien was accorded first priority even though the balance of the purchase price was never paid. *Yarborough*, 228 N.E.2d at 849. Section 5313.07 would alter this result by recognizing the vendor's prior interest to the extent of the unpaid purchase price. OHIO REV. CODE ANN. § 5313.07.

73. *Myers v. Parsley*, No. 85-CA-9 (Ohio Ct. App. Mar. 14, 1986).

subsequent liens. It may be argued, therefore, that section 5313.07 modifies the common-law rule by relieving vendees from the burden of withholding payments in order to protect the rights of junior creditors of whom they have notice. This interpretation seems consistent with the intent of the statute because it provides additional protection to a vendee who is merely complying with the terms of the land contract. This interpretation is also fair in light of the statute's apparent removal of the special priority status previously given to the vendee's lien.

An exception is appropriate, however, if the junior lienholder received an express assignment of the payments due under the land contract and gave the vendee notice that the assignment has been exercised.⁷⁴ This rule is therefore similar to the principles that apply when a lessee becomes aware of creditors of the lessor: the lessee is entitled to continue making payments to the lessor until action is taken by the creditor, through the exercise of assignment of rents, appointment of a receiver, or otherwise to require payment of the rents directly to the creditor.

The vendee's lien is an anomaly of land contract law that is unnecessary in light of the protections afforded to vendees under Chapter 5313. Although it does not do so explicitly, section 5313.07 supersedes the common law and adopts a more logical approach to priorities in land contract foreclosures. Of course, the common law still applies to nonresidential land contracts, which are not covered by section 5313.07. Nevertheless, the same logic that applies to residential land contract priorities should apply to nonresidential land contracts. This is an area in which the common law needs to be updated.

4. Effect of Bankruptcy

In the bankruptcy of either a vendor or vendee, the land contract is treated as an executory contract that may be assumed or rejected, subject to the approval of the bankruptcy court.⁷⁵ Section 365 of the Federal Bankruptcy Code⁷⁶ sets forth the conditions for assumption or rejection of the contract,⁷⁷ the time period within which the election

74. As an alternative, the junior lienholders might bring an action in the nature of a creditor's bill requesting the court to receive and distribute the payments from the vendee. A procedure of this type was permitted in *Standard Oil Co. v. Moon*, 170 N.E. 368, 368-69 (Ohio Ct. App. 1930).

75. 11 U.S.C. § 365(a) (1988).

76. *Id.* § 365 (1988 & Supp. IV 1992).

77. *Id.* § 365(b), (c).

must be made,⁷⁸ the requirements for adequate assurances if the contract is assumed,⁷⁹ and the effect of rejection.⁸⁰

If the vendor is the bankrupt debtor and the land contract is rejected, the vendee in possession may either (a) treat the land contract as terminated,⁸¹ in which case the vendee retains a vendee's lien on the property to the extent of the purchase price paid,⁸² or (b) remain in possession.⁸³ If the vendee elects to remain in possession, the vendee must continue to make the payments due under the contract, but may offset against the payments any damages occurring after the date of rejection due to the vendor's nonperformance.⁸⁴ Except for the right of offset, no other damages may be asserted against the vendor's estate on account of the vendor's nonperformance after the date of rejection.⁸⁵ When the contract is fully performed, the trustee in bankruptcy must deliver title to the vendee in accordance with the contract, but is relieved of all other obligations to perform under the contract.⁸⁶

5. Probate Proceedings

If a vendor dies before the completion of the land contract, his executor or administrator may, with the consent of the vendee, obtain authority to complete the contract.⁸⁷ The representative may obtain this authority by filing an application with the probate court and giving notice to the surviving spouse and the heirs, devisees, and legatees of the decedent having an interest in the contract.⁸⁸ Authority to complete the contract may be given if the court is satisfied that it would be for the best interests of the estate.⁸⁹

If the executor or administrator of the deceased vendor desires authority to alter or cancel the land contract, the executor or administrator may file a petition for alteration or cancellation in the probate court.⁹⁰ The surviving spouse and the heirs, devisees, and legatees of the vendor having interest in the contract must be made parties defendant to the petition.⁹¹ If, upon hearing, the court is satisfied that it is in

78. *Id.* § 365(d).

79. *Id.* § 365(b) (1988).

80. *Id.* § 365(g), (i).

81. *Id.* § 365(i)(1).

82. *Id.* § 365(j).

83. *Id.* § 365(i)(1).

84. *Id.* § 365(i)(2)(A).

85. *Id.* § 365(i)(2)(A).

86. *Id.* § 365(i)(2)(B).

87. OHIO REV. CODE ANN. § 2113.48 (Anderson 1990).

88. *Id.*

89. *Id.*

90. *Id.* § 2113.49.

91. *Id.*

the best interest of the estate, the court may, with the consent of the purchaser, authorize the alteration or cancellation.⁹² Before making the order, the court must cause the consideration of the contract to be secured for the benefit of the estate.⁹³

If the vendee dies before completing the purchase under a land contract, the vendee's surviving spouse, heirs, devisees, or legatees who have an interest in the contract may file an application for authority to complete the contract in the probate court.⁹⁴ If the court is satisfied that it would be in the best interest of the estate, the court may, after giving notice to all parties with an interest in the real estate, holding a hearing, and obtaining the consent of the vendor, authorize the executor or administrator to complete the contract and pay to the vendor the balance due.⁹⁵

In the alternative, if the court determines that the payment out of the estate is not warranted, it may authorize the persons entitled to the vendee's interest under the contract to pay the balance due. In that case, the court will charge the real estate with the debts of the estate to the extent of the equitable interest of the estate in the property.⁹⁶ The executor or administrator, or other parties having an interest in the contract, may also file a petition for the alteration or cancellation of the contract.⁹⁷ The proceeding is similar to that described above for a deceased vendor. A vendor or vendee for whom a court has appointed a guardian may seek probate court approval to complete the land contract in the same manner as that described above with respect to deceased vendors and vendees.⁹⁸

D. Requirements of the Vendor in Residential Land Contracts

Section 5313.02(B) prohibits the vendor from mortgaging the land during the term of the land contract for an amount greater than the balance due on the contract unless the vendee consents.⁹⁹ Section 5313.03 requires the vendor to give the vendee annual or semiannual statements.¹⁰⁰ A land contract passbook issued by the vendor or a fi-

92. *Id.*

93. *Id.*

94. *Id.* § 2113.50.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* § 2111.19.

99. Section 5313.02(B) provides, in relevant part, "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. A mortgage executed in violation of this prohibition is void." *Id.* § 5313.02(B) (Supp. 1993); see *Toledo Trust Co. v. Cole*, 500 N.E.2d 920, 922-23 (Ohio Ct. App. 1986).

100. Section 5313.03 provides, in relevant part, "Every vendor under a land installment contract shall, at least once a year, or on demand of the vendee, but not more than twice a year, <https://ecommons.udayton.edu/udlr/vol19/iss2/6>

nancial institution complies with section 5313.03. Section 5313.04 gives the vendee the ability to obtain "appropriate relief" if the vendor has not complied with the provisions of Chapter 5313.¹⁰¹

III. REMEDIES UPON BREACH

A. Non-Residential Land Contract Vendor's Remedies

A land contract vendor has several options available to him upon breach by the vendee: (1) damages, as for any breach of contract;¹⁰² (2) rescission and restitution, as for any breach of contract;¹⁰³ (3) forfeiture, which means that the vendor regains possession of the land and retains the vendee's payments;¹⁰⁴ and (4) foreclosure, as with a mortgage.¹⁰⁵

Ohio courts have previously granted forfeiture to vendors.¹⁰⁶ The landmark Ohio Supreme Court case is *Norpac Realty Co. v. Schackne*.¹⁰⁷ Although the vendee made a \$12,500 down payment on a \$50,000 purchase price, the court allowed forfeiture,¹⁰⁸ and rejected foreclosure as a remedy.¹⁰⁹ In justifying the \$12,500 down payment as damages and rejecting the vendee's request for foreclosure, the *Norpac* court acknowledged that the sum was "large, considered in proportion

furnish a statement to the vendee showing the following: (A) The amount credited to principal and interest; (B) The balance due." OHIO REV. CODE ANN. § 5313.03 (1989).

101. Section 5313.04 provides:

Upon the failure of any vendor to comply with chapter 5313 of the Revised Code, the vendee may enforce such provisions in a municipal court, county court, or court of common pleas. Upon the determination of the court that the vendor has failed to comply with these provisions, the court shall grant appropriate relief.

Id. § 5313.04.

102. James G. Durham, *Forfeiture of Residential Land Contracts in Ohio: The Need for Further Reform of a Reform Statute*, 16 AKRON L. REV. 397, 423-24 (1983).

103. *Id.*; see *Simes v. Beaver Valley Resorts, Inc.*, No. 2925, 1992 Ohio App. LEXIS (Ohio Ct. App. Oct. 6, 1992), in which the court held that rescission is an appropriate remedy "where the breach renders the agreement of little if any value to the aggrieved party." *Id.* at *4 (citing *Buschmeyer v. Advance Machinery Co.*, 7 Ohio App. 202, 209-10 (1916)).

104. Durham, *supra* note 102, at 423-24.

105. Durham, *supra* note 102, at 423-24.

106. *Scott v. Fields*, 7 Ohio 91 (1836), and *Rummington v. Kelley*, 7 Ohio 97 (1836), are two of the earliest Ohio Supreme Court cases on the question. In each case the vendee defaulted for a lengthy period of time, and either the vendee had no equity or the vendor had offered to return at least part of the amount paid by the vendee. See *Scott*, 7 Ohio at 96; *Rummington*, 7 Ohio at 103-04.

107. 140 N.E. 480 (Ohio 1923).

108. *Id.* at 481. The court recognized that forfeiture might not always be equitable: Cases may arise where equity might intervene, as where the agreed or stipulated damages are used as a guise to cover what would otherwise be a penalty, and the amount agreed upon so unconscionably large that a court of equity would not enforce it. This is not such a case.

Id.

109. *Id.* "This was not the contract nor the intention expressed therein." *Id.*
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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. The parties could contract for liquidated damages, as they did"¹¹⁰ This language has been described as the *Norpac* "qualification test,"¹¹¹ and many courts of appeals, both those that have upheld forfeiture¹¹² and those that have denied it,¹¹³ have cited *Norpac* for this proposition.

After *Norpac* only one Ohio Supreme Court case upheld forfeiture,¹¹⁴ and most appellate courts granted forfeiture only if the vendee had no equities on his side.¹¹⁵ In the 1988 case of *Johnson v. Maxwell*,¹¹⁶ the Court of Appeals for the Ninth District of Ohio stated that its interpretation of the *Norpac* language is that "other remedies are favored and forfeiture clauses are rarely strictly enforced by modern Ohio courts."¹¹⁷ In several decisions Ohio courts denied forfeiture on the theory of waiver, usually because of the vendor's acceptance of late payments.¹¹⁸

Although some courts have followed the *Norpac* court in refusing to allow the vendee to insist on foreclosure, at least two courts specifi-

110. *Id.*

111. Alan B. Soclof, *Land Contracts in Ohio — The Need for Reform*, 13 CASE W. RES. L. REV. 554, 561 (1962).

112. *See, e.g.*, *Miami Inv. Corp. v. Baker*, 165 N.E.2d 690 (Ohio Ct. App. 1959); *Economy Sav. & Loan Co. v. Hollington*, 152 N.E.2d 125 (Ohio Ct. App. 1957); *Clukey v. Doro Realty Co.*, 5 Ohio L. Abs. 260 (Ct. App. 1926).

113. *See, e.g.*, *Ardolino v. Baumann*, 3 Ohio L. Abs. 374 (Ct. App. 1925).

114. *Kiser v. Coleman*, 503 N.E.2d 753 (Ohio 1986) (the vendee was chronically late in making payments and also presented checks for payments which were not honored by the vendee's bank).

115. *See, e.g.*, *Walls v. Banchich*, No. 90-OT-012, 1991 Ohio App. LEXIS (Ohio Ct. App. Aug. 30, 1991); *Johannemann v. Georgeoff*, No. 12852 (Ohio Ct. App. Apr. 1, 1987); *Walker v. Bernstein*, No. 7851 (Ohio Ct. App. Dec. 3, 1975); *Baker*, 165 N.E.2d at 692; *Hollington*, 152 N.E.2d at 134; *Almira v. Geren*, 29 Ohio L. Abs. 570 (Ct. App. 1939); *Clukey*, 5 Ohio L. Abs. at 261. However, at least one court of appeals was willing to deny a vendee the value of improvements he made in good faith. *See McGriff v. Hays*, 29 Ohio L. Abs. 534 (Ct. App. 1939).

116. 554 N.E.2d 1370 (Ohio Ct. App.), *juris. mot. overruled by* 534 N.E.2d 358 (Ohio 1988).

117. *Id.* at 1373.

118. *See, e.g.*, *Hegg v. Sigle*, 14 Ohio L. Abs. 456 (Ct. App. 1933); *Cleland v. Cleland*, 152 N.E.2d 914 (Ohio Ct. C.P. 1958). For example, in *Hegg*, since the vendor had long accepted payments irregular both in time and amount, the court of appeals said that the vendor had waived his right to forfeiture. *Hegg*, 14 Ohio L. Abs. at 458. The court of appeals went on to say that the vendor would have had a choice among four remedies if he had acted promptly:

First, to exercise the right under the special provision of the contract upon the first default to exercise their election to forfeit the same and retain the payments made up to that time as liquidated damages; Second, upon a substantial default rescind the contract upon an offer to restore the consideration already received; Third, to have declared the balance of the contract price due and payable and obtained a personal judgment therefore; Fourth, they might have foreclosed their contract upon obtaining a personal judgment.

cally stated that the vendee is entitled to foreclosure.¹¹⁹ Further, several courts of appeals denied forfeiture in cases where the vendee was willing and able to pay the entire amount due.¹²⁰ Finally, two courts of appeals denied forfeiture and allowed the vendee to pay all past due installments and continue paying on the contract.¹²¹

Forfeiture therefore appears to be appropriate only upon a showing that the vendee paid little or nothing, the vendee has little excuse for not paying or is unwilling or unable to pay, and the vendor faithfully complied with the contract and consistently insisted that the vendee comply with the contract. As long as the vendee can raise some equity on his side, especially if he is willing to tender full performance, he can avoid forfeiture.

B. *Non-Residential Land Contract Vendee's Remedies*

The remedies of land contract vendees at common law are essentially the same as those available to purchasers under real estate purchase contracts: (1) damages, as for any breach of the contract;¹²² (2) rescission, as for any breach of the contract, which means that the vendee must surrender possession of the property to the vendor;¹²³ and (3) specific performance of the contract.¹²⁴

1. Damages

When the vendor breaches a land contract, the vendee is entitled to recover, as damages, compensation for the loss of his bargain.¹²⁵ A court may also award special damages for injury that the parties could have reasonably anticipated to result from the breach.¹²⁶

119. *Id.*; *Johnson v. Maxwell*, 554 N.E.2d 1370 (Ohio Ct. App. 1988).

120. *Dependabil Homes, Inc. v. White*, 117 N.E.2d 706 (Ohio Ct. App. 1951); *Morris v. George C. Banning, Inc.*, 77 N.E.2d 372 (Ohio Ct. App. 1947); *Ardolino v. Baumann*, 3 Ohio L. Abs. 374 (Ct. App. 1925).

121. *Blenheim Homes, Inc. v. Matthews*, 196 N.E.2d 612 (Ohio Ct. App. 1963). In the more recent case of *Barton v. Antonucci*, No. 83-C-49 (Ohio Ct. App. Mar. 18, 1985), the court of appeals allowed the vendee to reinstate the contract after the vendor filed suit, holding that missing one monthly payment, failing to pay current insurance, and being behind on property taxes taken together did not constitute a material breach. *Id.*

122. *See Sprouse v. Buchanan*, 151 N.E.2d 42 (Ohio Ct. App. 1950).

123. *See Guerrero v. Hagco Bldg. Sys., Inc.*, 733 S.W.2d 635 (Tex. Ct. App. 1987).

124. *Schippicasse v. Church*, 9 Ohio C.C. (n.s.) 166 (Cir. Ct. 1906); *see generally* 80 OHIO JUR. 3D *Real Property Sales and Exchanges* § 253 (1988).

125. *McCarty v. Linham*, 146 N.E. 64 (Ohio 1924); *Sprouse*, 151 N.E.2d 42.

126. *Cable v. Crane*, 13 Ohio App. 317 (1920); *Brint v. Doyon*, 7 Ohio L. Abs. 427 (Ct. App. 1929).

2. Rescission

A vendee who is not in default generally may rescind the land contract for the default of the vendor, or for fraud or other equitable grounds, subject to the ordinary rules of equity.¹²⁷ A party may not rescind a contract for the mere failure of the other party to perform.¹²⁸ Notice of the election to rescind must be given to the party in default by some positive act or words.¹²⁹

The right to rescission is subject to the general rule that the other party be placed in its original position to the extent possible.¹³⁰ The purchaser is usually entitled to the return of all payments.¹³¹

3. Specific Performance

Specific performance is the remedy by which courts of equity compel the performance of contracts. The courts' exercise of this remedy is governed by ordinary equitable principles.¹³² Damages are often assumed to be an inadequate remedy, as to either the vendor or the vendee, for the breach of a contract for sale of realty.¹³³

A court will not decree specific performance when the vendor has no title or when the contract is otherwise totally incapable of being performed.¹³⁴ When the vendor is unable to perform in a certain substantial respect, the vendee is entitled to partial performance, usually with a compensatory abatement or reduction of the stipulated purchase price. Equitable principles control this as well as other aspects of the remedy.¹³⁵

127. See, e.g., *Ankeny v. Clark*, 148 U.S. 345 (1893) (vendor's breach); *Hiltpod v. Stern*, 82 A.2d 123 (D.C. 1951); see generally 77 AM. JUR. 2D *Vendor and Purchaser* § 542 (1975).

128. *Marble Co. v. Ripley*, 77 U.S. 339 (1870) (purchaser cannot rescind because contract more burdensome than originally anticipated).

129. *Schenk v. State Line Tel. Co.*, 144 N.E. 592 (N.Y. 1924).

130. See, e.g., *Tompkins v. Sandeen*, 67 N.W.2d 405 (Minn. 1954); *Hopper v. Williams*, 179 P.2d 283 (Wash. 1947).

131. *Guerrero v. Hagco Bldg. Sys., Inc.*, 733 S.W.2d 635 (Tex. Ct. App. 1987); *Ankeny*, 148 U.S. 345.

132. *Quarto Mining Co. v. Litman*, 326 N.E.2d 676, 686 (Ohio), *cert. denied*, 423 U.S. 866 (1975); see also *Commissioners of Muskingum County v. State*, 85 N.E. 562, 567 (Ohio 1908) (specific performance of contract is distinctly equitable remedy).

133. *Link v. Burke*, 5 Ohio L. Abs. 676 (Ct. App. 1926); *Schippicasse v. Church*, 9 Ohio C.C. (n.s.) 166 (Cir. Ct. 1906).

134. See, e.g., *Haberkost v. Scharenberg*, 252 N.E.2d 292 (Ohio Ct. App. 1969) (indefinite description).

135. *Hull v. Bell*, 43 N.E. 584 (Ohio 1896); *Meineke v. Schwepe*, 111 N.E.2d 765 (Ohio Ct. App. 1952).

C. Residential Land Contract Vendors' Remedies

1. Thirty-day Default Cure Period

Section 5313.05 provides that when a vendee "defaults in payment," a vendor may pursue the remedy of forfeiture only after the expiration of thirty days of the date of default.¹³⁶ The vendee may avoid the forfeiture during the thirty-day period by making "all payments currently due" and by paying any fees or charges for which the vendee is liable under the land contract. If the vendee effects the cure during the thirty-day period, a court will not enforce forfeiture of the vendee's interest.

The statute does not state specifically that the thirty-day cure period applies to other types of defaults, such as the failure to pay taxes, obtain insurance, or maintain the structure. In order to enforce a forfeiture, however, a vendor must provide a ten-day notice¹³⁷ "[f]ollowing expiration of the period of time provided in section 5313.05 of the Revised Code."¹³⁸ The reference in the forfeiture enforcement provision to the thirty-day time period is applicable to all forfeitures, and is not limited merely to forfeitures arising from the failure to pay the contract installments. Arguably, then, even if the default is for something other than the failure to pay the installments due on the land contract, the thirty-day cure period must expire before a vendor may give a notice of forfeiture.

The thirty-day cure period is a minimum requirement created by statute. The land contract may also provide that the vendee will not be in default until certain contractual notices are given or grace periods expire.¹³⁹ In the absence of a specific requirement in the contract, however, no notice beyond that provided by statute is required to start the thirty-day period.¹⁴⁰

2. Ten-day Notice of Default

Following expiration of the thirty-day cure period, a vendor may initiate forfeiture proceedings by serving a section 5313.06 notice which:

136. OHIO REV. CODE ANN. § 5313.05 (Anderson 1989).

137. See *infra* text accompanying notes 141-43.

138. OHIO REV. CODE ANN. § 5313.06.

139. *Gilbert v. Allen*, No. 17-91-12, 1991 Ohio App. LEXIS 5744, at *4 (Ohio Ct. App. Dec. 4, 1991).

140. See *Miskimens v. Blickensderfer*, No. 92-CA-12, 1992 Ohio App. LEXIS 5684, at *2 (Ohio Ct. App. Nov. 4, 1992) (vendor's prior acceptance of late payments does not constitute a waiver of vendor's right under § 5313.06 to initiate forfeiture proceedings; no additional notice or right to cure is required beyond those provided by the statute).

(A) reasonably identifies the contract and describes the property covered by it; (B) specifies the terms and conditions of the contract which has not been complied with; (C) notifies the vendee that the contract will stand forfeited unless the vendee performs the terms and conditions of the contract within 10 days of the completed service of notice and notifies the vendee to leave the premises.¹⁴¹

The ten-day notice is an essential prerequisite to a forfeiture proceeding.¹⁴² Notice is served by personal delivery to the vendee, by leaving it at the vendee's usual place of residence or at the property that is the subject of the land contract, or by registered or certified mail addressed to the last known address of the vendee.¹⁴³

During the ten-day notice period, the vendee must "perform the terms and conditions of the contract" or forfeit his interest.¹⁴⁴ Ohio courts have held that this requires payment of the full balance of the land contract,¹⁴⁵ even if the land contract does not contain an acceleration clause.¹⁴⁶

Although the ten-day notice applies specifically to forfeitures (the notice must specify that the contract "will stand forfeited" unless the vendee performs), the vendor must give the ten-day notice if the vendor elects foreclosure rather than forfeiture as its remedy. Section 5313.07 states that a foreclosure action may be commenced only after "expiration of the period of time prescribed by sections 5313.05 and 5313.06."¹⁴⁷ Presumably, this means that the vendee is entitled to the thirty-day cure period under section 5313.05 and the ten-day notice period provided in section 5313.06. Nevertheless, the required notice states that the land contract "will stand forfeited" and directs the vendee to "leave the premises." While this language may not seem entirely appropriate if the vendor is contemplating a foreclosure action, vendors

141. OHIO REV. CODE ANN. § 5313.06.

142. *Jones v. Bonzo*, No. 1977, 1991 Ohio App. LEXIS 5228, at *25 (Ohio Ct. App. Oct. 30, 1991) ("compliance with the notice provisions of R.C. 5313.05 and R.C. 5313.06 is . . . a substantive statutory provision that was a necessary part of . . . [the] claim for forfeiture"); see *Keene v. Schnetz*, 468 N.E.2d 125, 128 (Ohio Ct. App. 1983). *But see Caltrider v. Reitler*, No. CA2208 (Ohio Ct. App. May 21, 1984) (three-day eviction notice allowed to serve as the ten-day notice because suit was not actually filed until thirteen days after the notice was given); *Estate of Chasteen v. Cartee*, No. 1993, 1992 Ohio App. LEXIS 4876, at *10-11 (Ohio Ct. App. Sept. 25, 1992) (seven-day notice was permitted because the forfeiture action was not commenced until several months later); *Williams v. Shenefield*, No. CA-680, 1988 Ohio App. LEXIS 3168, at *7 (Ohio Ct. App. July 28, 1988).

143. OHIO REV. CODE ANN. § 5313.06.

144. *Id.*

145. *Keene*, 468 N.E.2d at 128.

146. *Albright v. Cochran*, No. CA-613 (Ohio Ct. App. Mar. 2, 1984).

147. OHIO REV. CODE ANN. § 5313.07.

should be reluctant to modify the language of the ten-day notice contemplated by section 5313.06.

3. Forfeiture

A key aspect of land contracts that distinguishes them from mortgages and other liens is the availability of the remedy of forfeiture. At common law, forfeiture was the primary remedy for a default under a land contract.¹⁴⁸

Because of the severity of the losses that may be suffered by a vendee whose land contract is forfeited, however, the Ohio legislature limited the availability of the remedy of forfeiture in residential land contracts. Section 5313.07 establishes a five-year/twenty-percent rule: forfeiture will not be permitted

if the vendee of a land installment contract has paid in accordance with the terms of the contract for a period of five years or more from the date of the first payment or has paid toward the purchase price a total sum equal to or in excess of 20% thereof.¹⁴⁹

If the vendee has paid more than twenty percent of the purchase price or the vendee has paid for more than five years,¹⁵⁰ the vendor may recover the property only through foreclosure and judicial sale.

If a vendor is entitled to pursue forfeiture, and the thirty-day cure period and ten-day notice period have expired, the vendor may bring an action in the nature of a forcible entry and detainer proceeding in the municipal court or county court or, if the vendor desires, in the court of common pleas.¹⁵¹ The vendor may not separately pursue forfeiture of the contract in the common pleas court and seek possession through a forcible entry and detainer action in the county or municipal court.¹⁵²

Although the county or municipal court is authorized to "grant any other claim arising out of the contract,"¹⁵³ a county or municipal court may not be able to adjudicate other interests that may have attached to the vendee's title, such as mechanics' liens and federal tax liens. The authority of the court may be limited to restitution, cancellation, and certain damages. A vendor desiring to assure that the cancel-

148. See *supra* text accompanying notes 104-24.

149. OHIO REV. CODE ANN. § 5313.07.

150. The statute requires that the payments be made "in accordance with the terms of the contract" for at least five years. However, when a vendor fails to commence the forfeiture until after five years has elapsed, a court may be reluctant to enforce the forfeiture even though the vendee missed some payments during the five-year period. See, e.g., *Vukin v. Gerena*, No. 3340, slip op. at 3 (Ohio Ct. App. Sept. 15, 1982).

151. OHIO REV. CODE ANN. § 5313.08.

152. *Stratton v. Robey*, 433 N.E.2d 938, 940 (Ohio Ct. App. 1980).

153. OHIO REV. CODE ANN. § 5313.08.

lation of the land contract will remove the interests of third parties should bring the enforcement action in the common pleas court.

A judgment of forfeiture operates to cancel the land contract on the date specified by the court.¹⁵⁴ The clerk of the county or municipal court in which the judgment is rendered is required to transmit a copy of the judgment to the county recorder to be recorded as an instrument of cancellation under section 5301.331 of the Ohio Revised Code.¹⁵⁵ The forfeiture's effect is to permit the vendor to regain possession of the land and to retain all payments previously made by the vendee.¹⁵⁶

Although Chapter 5313 protects land contract vendees against some of the inequitable effects of forfeiture, the statute also serves to make forfeiture easier in those cases in which forfeiture is permissible. At common law, a court of equity would consider all equitable defenses before enforcing a forfeiture. By institutionalizing a classification of statutorily permitted forfeitures and placing the jurisdiction of those cases in municipal and county courts, the statute limits the effectiveness of traditional equitable defenses.¹⁵⁷ Forfeiture, therefore, may be considered a statutory "right" of a vendor.¹⁵⁸

4. Foreclosure

Foreclosure is a proceeding in common pleas court in which the claims of all persons having an interest in or lien upon the property are adjudicated and the property is sold at judicial sale (public sale) for not less than two-thirds of its appraised value.¹⁵⁹ The proceeds of sale are divided among the parties in accordance with their prioritized interests.¹⁶⁰

Foreclosure is the preferred remedy under Chapter 5313. In a foreclosure sale, the vendee has a chance to recover part of his investment if the sale proceeds exceed the balance owed on the land contract. Because the statute prefers foreclosure as a remedy, it follows that a vendor may waive the right to forfeiture. Furthermore, the land contract may provide, by agreement of the parties, that the vendor's sole remedy will be foreclosure. A vendor may elect to pursue foreclosure rather than forfeiture, even when forfeiture is a permissible remedy,

154. *Id.* § 5313.09.

155. *Id.*

156. *Butler v. Michel*, 470 N.E.2d 217, 219 (Ohio Ct. App. 1984).

157. Nevertheless, municipal and county courts appear to have the power to consider equitable defenses and equitable relief sought by the vendee. *Behrle v. Beam*, 451 N.E.2d 237, 238-39 (Ohio 1983).

158. See generally *Durham*, *supra* note 102.

159. OHIO REV. CODE ANN. § 2329.20 (Anderson 1991).

simply because the vendor wants to use the foreclosure sale to determine the interests of all parties and clear the title.¹⁶¹

Under the five-year/twenty-percent rule discussed above,¹⁶² the vendor must pursue the remedy of foreclosure rather than forfeiture if the vendee paid in accordance with the terms of the land contract for five years or more or has paid at least twenty percent of the contract price.¹⁶³ Before a vendor may pursue foreclosure due to the vendee's default, the thirty-day cure period must elapse¹⁶⁴ and the vendor must give the ten-day notice.¹⁶⁵

5. Deficiency Judgment

Forfeiture is an exclusive remedy, which "bars further action on the contract" against the vendee.¹⁶⁶ This provision essentially precludes a deficiency judgment against the vendee. If the vendee has paid an amount less than the fair rental value plus deterioration or destruction of the property occasioned by the vendee's use, however, the vendor may recover the difference between the amount paid by the vendee on the contract and the fair rental value plus the damage caused by the vendee's use.¹⁶⁷

The prohibition on deficiency judgments also applies to foreclosures of residential land contracts.¹⁶⁸ This is a major distinction between the rights of a land contract vendor and a mortgagee. Section 5313.10 permits a foreclosing vendor to recover damages only to the extent that the amounts paid by the vendee are less than the fair rental value plus deterioration or destruction occasioned by the vendee's use.¹⁶⁹ A vendor may pursue the damage claim separately in a later action.¹⁷⁰

6. Other Remedies

Section 5313.07 permits a vendor to pursue a money-only action for damages or installments due.¹⁷¹ The judgment obtained by the ven-

161. Johnson v. Maxwell, 554 N.E.2d 1370, 1373 (Ohio Ct. App. 1988).

162. See *supra* text accompanying notes 149-58.

163. OHIO REV. CODE ANN. § 5313.07 (1989).

164. See *supra* text accompanying notes 136-40.

165. See *supra* text accompanying notes 141-47.

166. OHIO REV. CODE ANN. § 5313.10.

167. *Id.*

168. *Id.*; Castro v. Prokop, No. 89-T-4238, 1991 Ohio App. LEXIS 1061, at *5 (Ohio Ct. App. Mar. 15, 1991); Kothera v. Stroupe, No. CA 11693, slip op. at 4 (Ohio Ct. App. Sept. 12, 1984); Dalton v. Acker, 450 N.E.2d 288, 290 (Ohio Ct. App. 1981).

169. OHIO REV. CODE ANN. § 5313.10; Castro, 1991 Ohio App. LEXIS 1061, at *7; Kothera, slip op. at 4; Dalton, 450 N.E.2d at 290.

170. Marvin v. Stemen, 426 N.E.2d 205, 207-08 (Ohio Ct. App. 1980).

171. OHIO REV. CODE ANN. § 5313.07.

dor may be enforced against other real estate owned by the vendee, but the judgment lien does not attach to the vendee's interest in the property that is the subject of the land contract.¹⁷² A vendor may not use this remedy in a manner that would circumvent the antideficiency provisions of section 5313.10.¹⁷³

D. Residential Land Contract Vendees' Remedies

The remedies available to residential land contract vendees are essentially the same as those available to vendees under non-residential land contracts: damages, rescission, and specific performance. Although Chapter 5313 establishes many requirements that apply to residential land contracts,¹⁷⁴ the chapter provides no specific penalties for the breach of those requirements. Instead, the statute states merely that when a vendor fails to comply with the statutory provisions, the vendee may enforce his rights in municipal court, county court, or a court of common pleas,¹⁷⁵ and that, upon determination that the vendor has failed to comply with these provisions, the court shall grant "appropriate relief."¹⁷⁶ "Appropriate relief" is not defined but may include, in addition to traditional contract remedies, the right to a refund of payments made.¹⁷⁷

172. *Basil v. Vincello*, 553 N.E.2d 602, 608 (Ohio 1990); *Bank of Ohio v. Lawrence*, 120 N.E.2d 88, 90 (Ohio 1954).

173. In *Entingh v. Howard*, No. 13407, 1992 Ohio App. LEXIS 6574 (Ohio Ct. App. Dec. 22, 1992), the Second District Court of Appeals held that a judgment of cancellation (not forfeiture) constituted the election of the exclusive remedy provided in section 5313.08 and therefore operated to prohibit a deficiency judgment as provided in section 5313.10. *Id.* at *4. Similarly, a voluntary abandonment of the property by the vendee may be deemed a forfeiture, but even in those circumstances a deficiency judgment is prohibited by section 5313.10. *Taylor v. Nickston Invs.*, No. 92AP-508, 1992 Ohio App. LEXIS 5836, at *10 (Ohio Ct. App. Nov. 17, 1992). When the vendor obtains a judgment for a portion of the contract sum (e.g., the down payment) and later pursues foreclosure or forfeiture of the land contract, the judgment of foreclosure or forfeiture bars further action on the prior judgment. *Coates v. Navarro*, Nos. 86-CA-11, 86-CA-18 (Ohio Ct. App. Mar. 27, 1987); *Good Shepherd Baptist Church, Inc. v. City of Columbus*, 485 N.E.2d 725, 727 (Ohio Ct. App. 1984).

174. See *supra* notes 30-33 and accompanying text.

175. OHIO REV. CODE ANN. § 5313.04. Although the statute provides that the vendee's rights may be enforced in the municipal court or county court, *id.*, it does not appear to enlarge the jurisdictional limits generally applicable in those courts. The Ohio Supreme Court held, however, that when a vendor brings an action for forcible entry and detainer in municipal court, and the vendee raises equitable issues in a counterclaim, the municipal court has jurisdiction to hear and determine the equitable issues. *Behrle v. Beam*, 451 N.E.2d 237, 239 (Ohio 1983) (upholding judgment requiring vendor to specifically perform land contract).

176. OHIO REV. CODE ANN. § 5313.04.

177. In *Park View Fed. Sav. v. Lion Estate, Inc.*, No. 12498 (Ohio Ct. App. Oct. 8, 1986), a vendee was granted judgment for the return of the vendee's down payment and installment payments made to the vendor. The vendor's statutory violations included having a mortgage on the property in an amount greater than the balance due on the contract and not recording the land contract within 20 days of sale. In a subsequent foreclosure proceeding by the vendor's mortga-

Chapter 5313 also is unclear as to whether a vendee may waive any of the statutory requirements established for the vendee's benefit. Because Chapter 5313 is a consumer protection statute, courts may be reluctant to enforce waivers made by the vendee.¹⁷⁸ This principle is particularly true of the limitations on remedies established by Chapter 5313 — the five-year/twenty-percent rule,¹⁷⁹ the thirty-day cure period, the ten-day default notice, and the antideficiency judgment rule, for example. On the other hand, there is no apparent reason why the vendee should not be permitted to waive some of the requirements pertaining to the contents of the land contract; for example, must the vendor furnish evidence of the vendor's title in the property? It is a mere economic adjustment if the vendee, rather than the vendor, obtains and pays for the title search. Similarly, must the vendor always furnish a general warranty deed? A vendee who has obtained a title search or title insurance may be perfectly satisfied to accept a limited warranty deed or quitclaim deed. Finally, may the vendee with full knowledge of the risks waive the requirement that the land contract be recorded? This is a more difficult question, because clearly the recording of the land contract is important for purposes of protecting the rights of the vendee against third parties. The cases have not yet addressed these questions.

gee, the vendee agreed to surrender the property to the mortgagee. *Id.* at 4. The court found that a vendor's statutory violations damaged the vendee, and that the relief awarded—a return of the payments made by the vendee—was "appropriate." *Id.* at 11.

178. See, e.g., *Hilton v. Tire Tread Dev., Inc.*, No. 92-P-0053, 1993 Ohio App. LEXIS 3356, at *11 (Ohio Ct. App. June 30, 1993) (clauses in land contract that would convert payments to rent, and deprive vendee of equity, and which would remove the vendee's statutory right to cure a default, held unenforceable).

179. The vendee's voluntary abandonment of the property may be accepted as a forfeiture, however, even if the remedy of forfeiture would not otherwise be available. *Taylor v. Nickston Invs.*, No. 92AP-508, 1992 Ohio App. LEXIS 5836, at *10 (Ohio Ct. App. Nov. 17, 1992) (voluntary forfeiture occurred after default; properties involved were apartment complexes). Similarly, when a land contract is modified by a consent decree in a court proceeding to provide that a deed held in escrow may be recorded if the vendee is in default for more than 30 days, the vendee has effectively waived his statutory rights. *Harpley v. Ahwajee*, No. 14162, 1989 Ohio App. LEXIS 4429, at *3-4 (Ohio Ct. App. Nov. 29, 1989); see also *Vaniman v. Brown*, No. 13554, 1993 Ohio App. LEXIS 108, at *5 (Ohio Ct. App. Jan. 14, 1993). The *Taylor* and *Harpley* cases may be somewhat aberrational in their results. In *Taylor*, the vendee was a commercial entity that voluntarily surrendered the control of its properties. 1992 Ohio App. LEXIS 5836, at *2. The consumer protection aspects of Chapter 5313 were not present. *Id.* at *13. In *Harpley*, the deed in escrow procedure had already received a court's approval through a prior consent decree. 1989 Ohio App. LEXIS 4429, at *4. The involvement of the court alleviated any concern that the consumer was not adequately protected. *Id.* Nevertheless, these cases give some indication that courts will enforce waivers of the statutory rights under certain circumstances.