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Installment Land Contracts: Remedies in Nebraska

I. INTRODUCTION

The recent return to a tight money market¹ has caused a resurgence in the use of installment land sales contracts² to finance the purchase of real property.³ With this resurgence, increased litigation of the rights and remedies of the parties to the contracts will most certainly occur. At this time the law varies not only between jurisdictions but even within a state, depending on the type of action brought, the terms of the contract and the facts and circumstances of each case.⁴ Nebraska is not alone in lacking a clearly defined body of law to apply to installment land contracts.⁵ Part of

1. Power, *Land Contracts as Security Devices*, 12 WAYNE L. REV. 391, 395 (1966); Comment, *Remedying the Inequities of Forfeiture in Land Installment Contracts*, 64 IOWA L. REV. 158, 158 (1978). A tight money market is created when the competition is keen for a limited supply of capital, thus enabling lenders to be more selective in the terms on which they are willing to invest their funds. The results are higher interest rates, larger down payments and larger monthly payments. See Lifton, *Real Estate in Trouble; Lender's Remedies Need an Overhaul*, 31 BUS. LAW. 1927 (1976).
2. This financing device is known by many labels: contract for deed, long-term land contract, installment land contract, land installment contract or in some instances just land contract. In this Comment this device will be referred to as the installment land contract.
3. Comment, *supra* note 1, at 163. Since many people derive personal satisfaction and economic benefits from owning property, the demand for property does not fluctuate as significantly as does the supply of money; therefore, alternative means of financing purchases must be secured when the conventional means, *i.e.*, mortgage money, are unavailable. See W. ATTEBERRY, K. PEARSON & M. LITKA, *REAL ESTATE LAW* 303 (1974).
4. Power, *supra* note 1, at 416. "The one thing certain for the vendor of real property . . . is that his position, in regards to the forfeiture clause agreed upon by both parties, is now even more uncertain, albeit all of the dealings were on an equal and fair basis." Comment, *Enforcement of Forfeiture Provisions as a Remedy in Land Sale Contracts*, 14 HASTINGS L.J. 44, 51 (1962).
"Our real quarrel with the state of the law in this area, however, is not so much that it is unjust, but that it is uncertain." Lee, *Defaulting Purchaser's Right to Restitution Under the Installment Land Contract*, 20 U. MIAMI L. REV. 1, 2 (1965).
5. See Peterson, *Purchase Agreements and Installment Contracts for Sale of Real Estate*, 40 NEB. L. REV. 271 (1961).

the deficiency in this area of the law is due to the paucity of litigation in recent years. Additional difficulties occur in attempting to establish a coherent theory in an area of the law which relies heavily on equity for dispute resolution.

In attempting to define the state of the law applicable to installment land contracts, it is important to distinguish those financing devices from both marketing contracts for the sale of land and mortgages. This article will summarize the differences between these three devices and then analyze the advantages and disadvantages of installment land contracts. Next it will discuss the concept of forfeiture and liquidated damages as applied to installment land contracts. It will then set out the remedies available to the vendor under Nebraska law. Finally, the theories available to protect the interests of the defaulting vendee will be discussed.

II. INSTALLMENT LAND CONTRACTS, MARKETING CONTRACTS, AND MORTGAGES

The installment land contract is a form of security transaction between a vendor and a vendee in which the vendor covenants to convey title⁶ to described real property upon the vendee's payment of a specified amount of money and successful performance of the other obligations set forth in the contract. Typically, the required down payment is small,⁷ with the balance to be paid in regular installments over an extended period of time.⁸ The contract usually provides for monthly or annual payments which are often equal to the rental value of the property, and include amounts to be applied toward taxes, insurance, interest, and the unpaid principal balance.⁹ Upon execution of the contract, the vendor retains

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6. The contract between the parties may state specifically that the vendor is to convey marketable title upon the satisfaction of the vendee's obligations. The land contract vendor is required to possess marketable title only at the time he is legally obligated to perform. Hancock, *Installment Contracts for the Purchase of Land in Nebraska*, 38 NEB. L. REV. 953, 953 (1959). See also Lee, *The Interests Created by the Installment Land Contract*, 19 U. MIAMI L. REV. 367, 367 (1965). The vendee may find himself in the unfortunate position of having completed his obligations under the contract and then not receiving a marketable title. The vendee can protect his interests by reviewing the title at the time he signs the contract and then recording the contract and/or requiring the deed to be put in escrow. Hancock, *supra*, at 955. See 1 G. GLENN, GLENN ON MORTGAGES § 15.1 (1943).
 7. Lashkowitz, *Land Purchase Contracts in North Dakota*, 36 N.D.L. REV. 159, 159 (1960); Comment, *supra* note 1, at 161.
 8. For a discussion of the tax advantages of an installment sale, see note 31 & accompanying text *infra*.
 9. Cunningham & Tischler, *Disguised Real Estate Security Transactions as Mortgages in Substance*, 26 RUTGERS L. REV. 1, 7 (1972). With equal frequency the payments may only represent principal and interest payments, leaving the

legal title as a security interest in the land, whereas equitable title vests with the purchaser, who is allowed to be in possession of the property while making payments.¹⁰ The contract usually stipulates that "time is of the essence" and provides that upon the purchaser's default in making payments or in performing any of the other covenants, the seller may declare forfeiture, terminate all rights of the purchaser, and retain all payments made on the contract as liquidated damages.¹¹

The marketing contract¹² is primarily a short-term pre-purchase agreement. It establishes the rights and liabilities of the parties between the date of the bargain and the date of closing.¹³ On the closing date, the contract is executed and the title passes to the purchaser.¹⁴ The purchaser does not acquire a right to possession until he acquires the title. If the purchaser is unable to fully finance the purchase, he is responsible for locating an alternate source of financing. In contrast, the installment land contract purchaser relies on the vendor for financing.

Although both the marketing contract and the installment land contract call for a down payment, this requirement serves a different purpose in each. In the marketing contract the parties agree to an amount that will be paid to the seller upon execution of the buy-sell agreement. This amount establishes, by agreement between the parties, the liquidated damages to which the seller is entitled should the buyer fail to fully execute the contract. In the installment land contract, however, the down payment does not serve this purpose. There the parties contemplate a long-term relationship and the contract is a security device. Thus, the amount of the vendee's down payment does not represent an agreement as to the

responsibility for paying insurance and taxes with the vendee. One commentator criticized this practice as having an onerous effect on the low income vendee who must pay insurance and taxes without having the advantage of the escrow account set up in mortgage transactions. *Mixon, Installment Land Contracts: A Study of Low Income Transactions, With Proposals for Reform and a New Program to Provide Home Ownership in the Inner City*, 7 HOUS. L. REV. 523, 529 (1970).

10. W. ATTEBERRY, K. PEARSON & M. LITKA, *supra* note 3, at 303.

11. Hines, *Forfeiture of Installment Land Contracts*, 12 U. KAN. L. REV. 475, 476 (1964).

12. A contract entered for the sale of property is also known as a buy-sell contract, a binder, an earnest money contract, a deposit receipt, or an exercised option. In this Comment this type of contract will be referred to as a marketing contract. *See generally* J. HETLAND, SECURED REAL ESTATE TRANSACTIONS 4 (1974).

13. *See id.* at 729.

14. Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729, 736-42 (1960). *See generally* Clarkson, Miller & Muris, *Liquidated Damages v. Penalties: Sense or Nonsense*, 1978 WIS. L. REV. 351.

amount of damages suffered by the vendor in the event of the vendee's subsequent default on the contract.

The essential distinction between the marketing contract and the installment land contract lies in their purposes: one is a marketing device, the other is a security contract. This distinction is important in determining the rights and remedies available to the parties. Remedies appropriate for one may not be appropriate for the other,¹⁵ and the courts' failure to make the distinction between the two types of contracts often leads to anomalous results.¹⁶

A mortgage is defined as "any form of instrument whereby a lien is created upon the real estate or whereby title to real estate is reserved or conveyed as security for the payment of a debt or fulfillment of other obligation."¹⁷ In a lien state, such as Nebraska, the property is conveyed only to the extent that the mortgagee is deemed to have a lien on the property as security for a money obligation; the conveyance does not create an estate or title in the mortgagee.¹⁸ Like the installment land contract, the mortgage serves as a security device for the purchase of real estate.¹⁹ However, unlike the installment land contract situation, full title, legal and equitable, is conveyed to the purchaser in a mortgage situation in a lien state²⁰ and a lien interest is created in the mortgagee.²¹ Nevertheless, a court of equity will disregard the location of the title and will find that each party has equitable rights. The mortgagee has a security interest represented by his mortgage lien while the mortgagor has an equity of redemption—a right to purchase the property after default until the time of foreclosure.²² The law of mortgages grew out of the courts of equity, and today in Ne-

15. Because of the interests at stake in an installment land contract, judicial foreclosure may be appropriate. The marketing contract vendor, however, does not need to rely on such a drawn out procedure to return the parties to their original position. Hetland, *supra* note 14, at 738.

16. Hetland, *supra* note 14, at 729.

17. G. GLENN, *supra* note 6, § 1 (quoting from the Model Power of Sale Mortgage Foreclosure Act, § 1(1)).

18. Comment, *supra* note 1, at 159.

19. Power, *supra* note 1, at 395.

20. Generally, a mortgagee's interest is a lien on the mortgaged property. However, in a few states, called title states, the mortgagee holds title to the property and has a continuing right to possession. A few states retain a "hybrid" or "intermediate" theory where the mortgagee is automatically entitled to possession upon default. A. AXELROD, C. BERGER & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE* 157 n.20 (1978).

21. It is this difference that provides support for both sides of the argument as to whether rights and remedies available to the parties in a mortgagee-mortgagor relationship should be available to the vendor and vendee in an installment land contract.

22. Hancock, *supra* note 6, at 977-78.

braska, as in most other states, the rights and remedies of the parties are governed by statute.²³

III. ADVANTAGES AND DISADVANTAGES OF INSTALLMENT LAND CONTRACTS

When purchasers are unable to finance their real estate purchases with cash they resort to credit transactions.²⁴ This inability to finance real estate purchases is the result of many factors: the increased cost of real estate,²⁵ the unavailability of alternate financing,²⁶ and the increased demand caused by the desire of individuals of all socioeconomic classes to own their own homes.²⁷

Various financing devices, including the mortgage, have been used for many years, and each device has enjoyed varying degrees of popularity.²⁸ While not a new financing device,²⁹ the installment land contract has been an attractive alternative to mortgage financing since the second World War.³⁰ The accelerated demand for low-equity financing, the increased secondary financing by landowners selling encumbered property, and the tax advantages resulting to the seller due to payments deferred over a period of years,³¹ all aid in accounting for the current popularity of installment land contracts.³² The installment land contract has not been limited to any one segment of the real estate market, but has been

23. *See id.* "Mortgage foreclosures in Nebraska are governed by statute and a judicial sale is the *exclusive way* by which the mortgagor's equities or rights in the land may be cut off. Any attempt by the mortgagee outside this statutory procedure to sell the land and recover his money is void." *Id.* at 978 (emphasis in original). For the statutory procedures see NEB. REV. STAT. §§ 25-2137 to -2155 (Reissue 1979).

24. Comment, *supra* note 1, at 158.

25. *Id.* at 164.

26. Hines, *supra* note 11, at 475-79; Power, *supra* note 1, at 395-96.

27. Mixon, *supra* note 9, at 523.

28. *See* Hines, *supra* note 11, at 475; Lewis & Reeves, *How the Doctrine of Equitable Conversion Affects Land Sale Contract Forfeitures*, 3 REAL EST. L.J. 249, 249-54 (1974). *See also* Sherman, *The Choice of Instruments as an Initial Election of Remedies*, 3 WILLAMETTE L.J. 153 (1965).

29. *See* McGovern, *Forfeiture, Inequality of Bargaining Power, and the Availability of Credit: An Historical Perspective*, 74 NW. U.L. REV. 141, 154 (1979).

30. Hines, *supra* note 11, at 477; Comment, *Florida Installment Land Contracts: A Time for Reform*, 28 U. FLA. L. REV. 156, 156 (1975).

31. The tax advantages of the installment sale are also available to the mortgagee who takes back a purchase money mortgage. While the payments typically are to be made over a long period of time and are low in amount, receiving the tax benefits of an installment sale requires only one payment beyond the down payment. I.R.C. § 453.

32. Hines, *supra* note 11, at 477.

used in purchases of commercial real estate,³³ farm property,³⁴ and residential housing.³⁵

Historically installment land contracts have provided substantial advantages to both vendors and vendees;³⁶ however, the courts in interpreting these contracts arguably have deprived the parties of their perceived advantageous positions and perhaps rightly so. The installment land contract provides the vendor with a distinct advantage in the "time is of the essence" provision. If the vendee fails to perform his obligations as set forth in the contract, the vendor has the option to declare the contract terminated, to regain possession of the property without legal process, and to retain, as liquidated damages, payments made by the vendee up to the date of default.³⁷ At this point the contract is terminated and both parties are relieved of all further contractual obligations.³⁸ Thus, the efficacy of the procedures for regaining possession of the property render the installment land contract attractive to the seller.³⁹ In contrast, under the traditional mortgage remedy of judicial foreclosure, the vendor must file for a foreclosure sale. If the vendee seeks a stay on foreclosure,⁴⁰ the vendor may find himself in expensive and protracted litigation, during which he is deprived of both possession of his property and the economic benefits of the transaction.⁴¹

The forfeiture clause was initially construed by many courts in favor of the vendor under a strict interpretation of contracts rationale.⁴² Because the vendor was assured of regaining possession of his property in an expeditious and inexpensive manner, he was willing to offer the property for a lower down payment.⁴³ Thus,

33. Power, *supra* note 1, at 406-08.

34. Dolson & Zile, *Buying Farms on Installment Land Contracts*, 1960 Wis. L. REV. 383, 383; Hines, *supra* note 11, at 475; Comment, *supra* note 1, at 164.

35. Mixon, *supra* note 9, at 523; Comment, *supra* note 1, at 164. Note, *Reforming the Vendor's Remedies for Breach of Installment Land Sale Contracts*, 47 S. CAL. L. REV. 191, 191 (1973).

36. See Lee, *supra* note 4, at 19; Comment, *Comparison of California Mortgages, Trust Deeds and Land Sale Contracts*, 7 U.C.L.A. L. REV. 83, 97-102 (1960); Comment, *supra* note 1, at 158.

37. See note 11 & accompanying text *supra*.

38. Nelson & Whitman, *The Installment Land Contract—A National Viewpoint*, 1977 B.Y.U. L. REV. 541, 542; Hines, *supra* note 11, at 476. See Comment, *Forfeiture: The Anomaly of the Land Sale Contract*, 41 ALB. L. REV. 71 (1977).

39. Note, *supra* note 35, at 199; Comment, *supra* note 36, at 97-99.

40. See NEB. REV. STAT. § 25-1506 (Reissue 1979). If the land contract is treated as a mortgage, a stay of execution upon the request of the vendee will be upheld as in the case of a mortgage. *Spencer v. Moyer*, 29 Neb. 305, 309, 45 N.W. 464, 466 (1890).

41. See Note, *Toward Abolishing Installment Land Sale Contracts*, 36 MONT. L. REV. 110 (1975).

42. See, e.g., *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 P. 713 (1898); *Hetland*, *supra* note 14, at 731-32; Note, *supra* note 35, at 199.

43. See Dolson & Zile, *supra* note 34, at 393.

property could be acquired by individuals financially unable to secure the larger down payments required by institutions or individuals providing mortgage money.⁴⁴ Vendors use the installment land contract in high risk transactions, such as low income tract housing developments.⁴⁵ They thus fill a gap left by the unavailability of credit from commercial lenders.⁴⁶ However, while the purchaser receives the advantages of a lower down payment and lower transaction costs (*i.e.*, closing costs), the seller may receive more from the buyer over the life of the contract than he would receive under a similar mortgage arrangement.⁴⁷

Courts since have applied a theory of equitable conversion⁴⁸ to the installment land contract, recognizing it as a security device to which equitable principles should apply. Thus, vendors may not be justified in a continued belief that the forfeiture clause will provide them with the same efficient means of regaining the property.⁴⁹ Furthermore, much of the vendee's risk of loss of his investment under the forfeiture clause has been mitigated by court decisions which allow the vendee to avoid its operation. Where recognized, the vendee's equity of redemption, right to restitution, and right to require a judicial sale have done much to protect the vendee's interests.

Thus, the vendor's low costs in regaining possession may depend on the vendee's acquiescence. "With increasing public awareness of legal remedies, and the greater availability of legal

44. "The installment contract for the purchase of real estate is used primarily in the situation where the purchaser is unable to obtain financing in an amount which, together with the purchaser's equity investment, will pay a construction cost or a purchase price in full." N. PENNEY & R. BROUDE, *LAND FINANCING* 5 (1970).

45. Warren, *California Instalment Land Sale Contracts: A Time for Reform*, 9 U.C.L.A. L. REV. 608, 608 (1962). It is clear that the "gap" in available financing money is not limited to the poor. The financing device is also welcome to purchasers wanting to finance the purchase of farms, condominiums, high-priced residences, and commercial property. Power, *supra* note 1, at 403-08.

46. Power, *supra* note 1, at 433.

47. While research of installment land contract purchases of Wisconsin farms indicated that "[t]he interest rates of installment land contracts compare favorably with those of mortgages," Dolson & Zile, *supra* note 34, at 396, the authors acknowledged that the seller may have added some "interest" in setting a higher contract price. *Id.*

About the only advantage an installment vendee receives over the middle income buyer who uses standard mortgage financing is the low move-in cost. In a market where the seller knows and utilizes available legal and economic power, the installment contract vendee suffers the oft-seen plight of the poor. The buyer pays more and receives less.

Mixon, *supra* note 9, at 530.

48. See, *e.g.*, *Buford v. Dahlke*, 158 Neb. 39, 62 N.W.2d 252 (1954).

49. See *Lewis & Reeves, supra* note 28, at 249.

services for low-income persons, that acquiescence is no longer assured."⁵⁰ The vendor who decides to sell using the installment land contract may do so because he is "willing to gamble that the vendee's rights under this device will never be asserted and his own contractual advantages will not be challenged."⁵¹ Nevertheless, the device may still be used because vendors and real estate brokers do not appreciate the risks of litigation in land contracts; they may feel confident that the carefully drawn terms of their contracts will be enforced.⁵²

Today, different reasons may underlie the vendor's choice of the installment land contract as a financing device. The advantageous tax treatment afforded payments received in an installment sale may provide the impetus for the vendor's willingness to finance the sale himself.⁵³ More importantly, changing economic conditions may compel the use of the installment land contract. A willing seller may not be able to find a willing buyer who qualifies for traditional financing methods. Thus, the seller who wants to sell may be forced to finance the transaction himself, at least until the buyer has built up enough equity to qualify for institutional mortgage financing.⁵⁴ Use of the installment land contract as an interim security device can also benefit the purchaser. By immediately starting to purchase the property, the purchaser can realize appreciation in the market value of his land and at the same time accumulate sufficient equity to qualify for conventional mortgage financing.⁵⁵

Other than the low down payment and the means to finance the purchase of real estate when other alternatives are unavailable, there are few advantages to the vendee. The vendee risks forfeiting his interest in the property by even an inadvertent default; he must rely on the court to protect that interest. Additionally, even if he fully performs the contract, he has no assurance of receiving marketable title to the property. To avert this misfortune he should obtain an abstract of title before executing the contract and then record his contract and require the deed to be held in es-

50. Note, *supra* note 41, at 111.

51. G. OSBORNE, *HANDBOOK ON THE LAW OF MORTGAGES* 23 (2d ed. 1970); Warren, *supra* note 45, at 633.

52. See Warren, *supra* note 45, at 633.

53. J. HETLAND, *supra* note 12, at 45. See Installment Sales Revision Act of 1980, I.R.C. § 453; note 31 & accompanying text *supra*.

54. Thus the contract would provide for installment payments to continue for a period of time, typically three to five years. The balance of the contract would then become due, requiring what is referred to as a balloon payment, usually equal to the balance of the purchase price. At the time of the balloon payment the purchaser would most likely obtain a mortgage. The equity he built up by making installment payments would aid his qualifying for the loan.

55. Power, *supra* note 1, at 433.

crow.⁵⁶ The vendee who has a choice should evaluate his position under both financing devices and will probably prefer the mortgage because of the statutory protections afforded it.

IV. CONCEPT OF FORFEITURE

The forfeiture clause⁵⁷ provides that once a purchaser defaults in making any of his payments or in performing any of the other contract obligations, he forfeits all that he has given under the contract.⁵⁸ Strict application of the forfeiture clause would result in no legal action being required. The buyer's breach leaves title to the property in the seller's possession and unencumbers the land of all contractual obligations.⁵⁹ As a result, the seller would continue to hold title to the property, would have a right to possession, would retain all payments previously made by the purchaser, and would have no further legal obligations to the purchaser. The purchaser would be deprived of possession of the property and would forfeit his equity in the property.

The "time is of the essence" provision intensifies the often devastating results of the forfeiture clause. It allows forfeiture to operate automatically, without further notice from the vendor.⁶⁰ As long as the vendor has not waived the "time is of the essence" clause,⁶¹ the purchaser will be in default immediately after the

56. See Comment, *supra* note 36, at 101. Where the land contract has an escrow provision providing that the deed will be held in escrow until payment of purchase price, the grantor of an instrument held in escrow loses control over it so long as the grantee does not default, even though he retains bare legal title in the land as security for payment of the purchase price. *Pike v. Triska*, 165 Neb. 104, 120, 84 N.W.2d 311, 321 (1957).

57. Black's Law Dictionary defines forfeiture as "a deprivation or destruction of a right in consequence of the non-performance of some obligation or condition." BLACK'S LAW DICTIONARY 778 (4th ed. 1968) (citing *Connellan v. Federal Life & Cas. Co.*, 134 Me. 104, 108, 182 A. 13, 14 (1935)).

58. The following is a sample contract forfeiture clause:

It is mutually understood and agreed that time is of the essence of this agreement and that in the event of any payment, either of principal or interest, remaining unpaid for a space of thirty (30) days after the same shall become due, or in case of failure of the second parties to make due payment of all sums due the [vendors], or any breach of any other covenant herein contained, this Contract shall, at the option of the first parties, be forfeited and determined and the second parties shall forfeit all payments whatsoever made hereunder to the first parties, and the first parties shall have immediate right to re-entry and take possession of the lands and premises aforesaid.

Kirby v. Bergfield, 186 Neb. 242, 244, 182 N.W.2d 205, 207 (1970). See also *Martin v. Baxter*, 198 Neb. 640, 641, 254 N.W.2d 420, 421 (1977); *Industrial Loan & Inv. Co. v. Lowe*, 173 Neb. 624, 627, 114 N.W.2d 393, 396 (1962).

59. Comment, *supra* note 38, at 80-81.

60. See *Kear v. Hausman*, 152 Neb. 512, 41 N.W.2d 850 (1950).

61. See *Walker v. Burtless*, 82 Neb. 211, 117 N.E. 349 (1908).

time the payment was due. He has no grace period within which to correct his default. These provisions are particularly harsh when the purchaser has substantially performed the contract. As the contract nears completion and the purchaser's cash investment becomes increasingly large, forfeiture results in a substantial loss to the purchaser and in a windfall gain to the vendor.⁶² The possibility of this result has often been criticized.⁶³

Automatic forfeiture under a "time is of the essence" provision has been applied to both installment land contracts where there is a long-term relationship between the vendor and vendee and marketing contracts where it is contemplated that the parties will meet on an established date to close the sale.⁶⁴ The policy underlying the use of this clause should be distinguished depending on the type of contract involved.

The vendor who negotiates a marketing contract and fixes a date upon which to tender the deed and receive full payment from the purchaser sets a deadline for consummating the sale. If the purchaser fails to perform at the stated time, the vendor has a strong interest in declaring the contract breached in order to resell the property. With a "time is of the essence" clause, the seller may, without further action, terminate the contractual relationship with the purchaser. In a contract where time has not been made of the essence, the seller may declare the contract at an end only after providing notice of demand and allowing a reasonable time for completion of the agreement.⁶⁵

Under the installment land contract, however, the vendor receives periodic payments over a long period of time and his inter-

62. G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* 81 (1979).

63. See, e.g., Bailey, *Forfeiture of Illinois Real Estate Contracts: Suggested Statutory Procedure*, 57 *ILL. B.J.* 890 (1969); Ballantine, *Forfeiture for Breach of Contract*, 5 *MINN. L. REV.* 329 (1921); Bodenheimer, *Forfeitures Under Real Estate Installment Contracts in Utah*, 3 *UTAH L. REV.* 30 (1952); Corbin, *The Right of a Defaulting Vendee to the Restitution of Instalments Paid*, 40 *YALE L.J.* 1013 (1931); Henson, *Installment Land Contracts in Illinois: A Suggested Approach to "Forfeiture,"* 7 *DE PAUL L. REV.* 1 (1957); Hines, *supra* note 11; McGovern, *supra* note 29; Power, *supra* note 1; Strausbaugh, *Exercising the Forfeiture Clause from Real Estate Conditional Sales Contracts*, 4 *REAL EST. L.J.* 71 (1975); Comment, *supra* note 38; Comment, *supra* note 4; Comment, *supra* note 1; Comment, *supra* note 30; Note, *Forfeiture and the Installment Land Contract*, 35 *BROOKLYN L. REV.* 83 (1968); Note, *supra* note 35; Note, *Recent Utah Developments on Forfeiture in Real Estate Contracts*, 7 *UTAH L. REV.* 95 (1960).

64. The Nebraska Supreme Court does not distinguish the type of contract when it discusses application of the clause. See generally *Riffey v. Schulke*, 193 Neb. 317, 227 N.W.2d 4 (1975); *Kirby v. Bergfield*, 186 Neb. 242, 182 N.W.2d 205 (1970); *Patterson v. Murphy*, 41 Neb. 818, 60 N.W. 1 (1894).

65. *Foster v. Ley*, 32 Neb. 404, 49 N.W. 450 (1891) (bond for deed). See also *Klapka v. Shrauger*, 135 Neb. 354, 281 N.W. 612 (1938).

ests may be different. Often the vendor has periodic obligations he must pay. When he relies on the purchaser's payments to satisfy these obligations, late payments from the purchaser may cause him to default on his own payments. Therefore, the "time is of the essence" clause is to ensure a continuing flow of payments. The clause is not applied consistently in installment land contracts; equitable considerations may enter the analysis, and courts may require notice of default⁶⁶ as well as a reasonable period of time during which the purchaser can cure default.⁶⁷

Under a marketing contract the parties negotiate an amount as a down payment to compensate the vendor for delay in his receiving the balance of the contract price and for any other costs he might incur in preparing to perform the contract. This amount represents the liquidated damages occurring as a consequence of the purchaser's failure to perform. A court is free to refuse to enforce the forfeiture of the down payment if the amount is out of proportion to the damages caused by the breach.⁶⁸ Nevertheless, a court may enforce a liquidated damages provision "if the amount stipulated is either a reasonable estimate of the probable damages or is reasonably proportionate to the actual damages caused by the breach."⁶⁹

In *Bando v. Cole*,⁷⁰ the Nebraska court allowed forfeiture of a \$12,000 down payment. The purchasers had approached the sellers and made an offer with a \$12,000 down payment and the balance to be paid on March 1. The sellers had demanded a fifteen percent down payment because according to the contract they were to give possession on the same day payment was tendered. To perform their contractual obligations, the sellers were required to sell their farm equipment and move. When the purchasers were unable to secure financing, the purchase was not consummated. The purchasers sued for return of the down payment and the court held the payment to be liquidated damages.⁷¹ In addition to their moving expenses, the sellers had difficulty finding a tenant to farm the land and when they did it was late and the crop yield was low.

66. *Contra*, *Kear v. Hausmann*, 152 Neb. 512, 518, 41 N.W.2d 850, 854 (1950).

67. *Patterson v. Mikkelson*, 86 Neb. 512, 515-16, 125 N.W. 1104, 1105 (1910); *Foster v. Ley*, 32 Neb. 404, 410, 49 N.W. 450, 452 (1891). *Contra*, *Abbas v. Demont*, 152 Neb. 77, 82, 40 N.W.2d 265, 267-68 (1949).

68. *See* *Clarkson, Miller & Muris*, *supra* note 14, at 351.

69. For a discussion of the distinction between enforceable liquidated damages and unenforceable penalties, see *Clarkson, Miller & Muris*, *supra* note 14, at 351.

70. 197 Neb. 722, 250 N.W.2d 651 (1977).

71. "Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages." *Id.* at 726, 250 N.W.2d at 653 (citation omitted).

The payments made by the installment land contract vendee prior to default cannot be as easily classified as liquidated damages and thus as forfeitable. The installment payments represent both principal and interest payments. In addition, the vendee may have made tax and insurance payments and invested money in improvements. A forfeiture of all these payments would not necessarily represent liquidated damages, and would most likely penalize the vendee.⁷²

The courts have recognized the inequity wrought by the operation of the forfeiture clause and have attempted to ameliorate the harsh results.⁷³ However, the approaches the jurisdictions have taken in response to the problem, are not susceptible to orderly analysis.⁷⁴ Each case is dealt with pragmatically, with consideration given to the contract provisions, the form of the action brought, and an equitable weighing of the facts of the case.⁷⁵ This individualized approach has made it difficult to predict whether the forfeiture clause will be enforced. "While forfeitures are still occasionally judicially enforced, it nevertheless can be safely stated that in no jurisdiction today will a vendor be able to assume that forfeiture provisions will be *automatically* enforced as written."⁷⁶

Originally the installment land contract forfeiture clause presented the vendor with a quick means of regaining his property. Without expense and prolonged court proceedings, the vendor could cancel the contract with the purchaser and declare forfei-

72. Comment, *supra* note 1, at 169.

73. Professor Ballantine argues for releasing the courts from enforcing harsh contractual provisions that work forfeiture on a purchaser to the point of being a penalty. The parties are not allowed to fashion their own remedies if the remedies unfairly penalize:

The law carefully limits the remedies which the parties may provide for themselves by way of penalty, though called 'liquidated damages.' But an express condition precedent may often involve a loss or a forfeiture, 'as penal in its effects as a promise to pay a penalty.' This is strikingly the case in installment contracts where time is declared to be 'of the essence', and the buyer of land or goods may be subjected to a forfeiture of all the payments he has made. . . .

The courts of law as well as courts of equity are at liberty to disregard express conditions where they are harsh and penal in their effects and provide for a penalty or forfeiture.

Ballantine, *supra* note 63, at 342-43. See *Walker v. Burtless*, 82 Neb. 211, 117 N.W. 329 (1908); *Elsasser v. Wilcox*, 286 Or. 775, 596 P.2d 974 (1979); notes 180-266 & accompanying text *infra*.

74. Nelson & Whitman, *supra* note 38, at 547. Even the courts that seemingly allow the parties' contract to determine their rights and remedies will be open to a determination that the amounts paid and retained constituted a penalty. See, e.g., *Ellis v. Butterfield*, 98 Idaho 644, 570 P.2d 1334 (1977).

75. Nelson & Whitman, *supra* note 38, at 543-44.

76. *Id.* at 544 (emphasis in original).

ture. This is still the best remedy available to the vendor.⁷⁷ The problems arise when the purchaser asserts his equitable interest in the property. The vendor must then resort to judicial remedies.⁷⁸

At one time a majority of courts held that a purchaser in default lost his equitable interest in the land.⁷⁹ Furthermore, he was denied restitution because the contract's express terms made time of the essence. This approach stems from the courts' articulated desire to honor the parties' intent as manifested in their assent to the contract terms as written.⁸⁰ One case illustrative of this theory is *Dorman v. Fisher*,⁸¹ an action for possession in the law division of the New Jersey court. The court noted that it did not have the power of an equity court to relieve the parties from an unconscionable agreement, but that it had to decide whether the vendor's retention of title only as a security device precluded enforcement of the sanctions specified in the agreement.⁸² The court noted that there was no showing of either unfairness or inequitable circumstances, and held that the vendor's retention of title as a security device did not preclude enforcement of the contractual sanctions for the purchaser's default.⁸³ The vendor therefore seems more likely to succeed in a law cause of action with a strict contract interpretation theory⁸⁴ than in an equity proceeding.

Two recent cases illustrate the courts' continued reticence to rewrite the parties' agreement. In *Ellis v. Butterfield*,⁸⁵ the Idaho Supreme Court refused to grant the defaulting vendee either specific performance of a contract or any equitable right to redemption despite of the vendee's willingness to tender the payments due. The contract had provided for default after the payment was delinquent thirty days. The majority, concerned with preserving the installment land sale contract as an alternative financing de-

77. J. HETLAND, *supra* note 12, at 47.

78. The purchaser may assert his equity of redemption which would be difficult for the vendor to discharge without court action. *Id.* at 47-62.

79. *Contra*, *Elsasser v. Wilcox*, 286 Or. 775, 596 P.2d 974 (1979).

80. *See Maloy v. Muir*, 62 Neb. 80, 86 N.W. 916 (1901); *Patterson v. Murphy*, 41 Neb. 818, 60 N.W. 1 (1894).

81. 52 N.J. Super. 70, 144 A.2d 805 (1958), *aff'd*, 31 N.J. 13, 155 A.2d 11 (1959). *See Lewis & Reeves, supra* note 28, at 256.

82. 52 N.J. Super. at 74, 144 A.2d at 807. "The contract approach to the sale of realty is not inherently invidious. On the contrary, it meets a social need especially where a prospective purchaser is unable to make a down payment sufficient to induce an immediate conveyance." *Dorman v. Fisher*, 31 N.J. 13, 15, 155 A.2d 11, 12 (1959).

83. 31 N.J. at 15, 155 A.2d at 12.

84. *See Abbas v. Demont*, 152 Neb. 77, 40 N.W.2d 265 (1949). *Dorman v. Fisher*, like *Abbas v. Demont*, was a law action for possession.

85. 98 Idaho 644, 570 P.2d 1334 (1977).

vice, based its decision on two points. First, the parties chose the installment land contract over other financing methods which, although more expensive to the vendee, would have provided more protection for his interest.⁸⁶ Second, the vendee did not challenge the amount forfeited as exorbitant or a penalty.⁸⁷

The Wyoming Supreme Court, in *Barker v. Johnson*,⁸⁸ also denied the defaulting vendee specific performance of his contract when he tendered the purchase price after the fifteen-day grace period allowed in the contract. The court said that the contract represented a commercial transaction between competent parties in which there was no equitable basis to refuse to enforce the forfeiture term.⁸⁹ The court noted that although forfeitures are not favored, a court of equity is not justified in setting aside a valid contractual obligation of the parties in the absence of some equitable reason. The tender of the full purchase price after default did not qualify as an equitable reason to ignore default and order specific performance.⁹⁰

The *Barker* court left open the possibility of construing the parties' contract as creating an equitable mortgage upon a showing that the parties intended their contract to be an equitable mortgage rather than an installment land contract.⁹¹ The court did not offer guidelines as to what would be held to show sufficient intent.

Many states have established statutory relief from the operation of the forfeiture clause.⁹² Additionally, numerous courts have

86. *Id.* at 646, 570 P.2d at 1336. The dissent in *Ellis* should be noted, as it presents a complete review of case law and law review articles supporting the equity rights of the defaulting vendee.

87. *Id.* at 648, 570 P.2d at 1339. Other courts have enforced the terms of the parties' contract by denying the vendee's right to cure the default. *Younglove v. Graham & Hill*, 526 P.2d 689 (Wyo. 1974). In *Younglove* the vendees, after receiving notice of their 30 day period to cure the default, tendered the required payment 10 days after the end of the grace period. The court held that forfeiture of 29% of the purchase price was not alone sufficient to sustain an equitable defense. Because the vendee had the benefit of the gravel it was extracting, the court could find no equitable basis to disregard failure to perform.

88. 591 P.2d 886 (Wyo. 1979).

89. *Id.* at 889.

90. *Id.*

91. *Id.* at 890.

92. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 33-741 to -742 (1974); CAL. CIV. CODE ANN. §§ 1442, 2889, 3369(1) (West 1970); GA. CODE ANN. § 20-1403 (Harrison 1977); *id.* § 37-216 (Harrison 1979); HAW. REV. STAT. §§ 67-40, 171-99(h) (1976); IOWA CODE §§ 656.1-6 (1980); LA. REV. STAT. ANN. §§ 9:2945 to :2946 (West 1951); ME. REV. STAT. ANN. tit. 14, § 6051(2) (1964); MD. REAL PROP. CODE ANN. §§ 10-101 to -108 (Supp. 1980); MICH. COMP. LAWS §§ 554.301-302, 600.3101 (1968); MINN. STAT. ANN. § 559.21 (Supp. 1981); MONT. REV. CODES ANN. § 28-1-104 (1979); N.D. CENT. CODE §§ 32-18-01 to -06 (Supp. 1979); OHIO REV. CODE ANN. §§ 5313.01-10 (Anderson 1981); OKLA. STAT. ANN. tit. 16, § 11(A) (Supp. 1980);

fashioned theories upon which to base their refusals to enforce forfeiture clauses against defaulting vendees. These theories have been premised on either mortgage or contract principles, or a combination of the two. These theories often are not theoretically precise.⁹³ Theories employed by the Nebraska Supreme Court include: vendor's waiver of strict performance of the contract,⁹⁴ redemption,⁹⁵ restitution,⁹⁶ and the requirement of foreclosure by judicial sale.⁹⁷

V. REMEDIES AVAILABLE TO VENDOR UPON VENDEE'S DEFAULT

Remedies available to the vendor when the vendee defaults include: rescinding the contract, forfeiting the vendee's payments, seeking specific performance, suing for damages for the breach, foreclosing the contract as a mortgage,⁹⁸ and strictly foreclosing, which includes an action for ejectment or for quiet title.

While the vendor's contract seemingly provides him with a remedy upon the vendee's default, when the default occurs the vendor may discover that his contract remedy is empty, indeed. The vendor chose the installment land contract as a financing device over the mortgage or deed of trust because it gave him an easy way to regain possession of the property.⁹⁹ The effectiveness of an installment land contract remedy depends on the vendor's being able to declare a forfeiture and to have the vendee quit possession and not assert any rights that may cloud the vendor's title.¹⁰⁰ However, if a court recognizes the vendee's equity of redemption, this recognition will cloud the vendor's title.¹⁰¹ Therefore the vendor must

PA. STAT. ANN. tit. 68, §§ 901-911 (Purdon 1965); S.D. COMP. LAWS ANN. §§ 21-50-1 to -7 (1979); WIS. STAT. ANN. § 843.01 (West 1977).

93. Nelson & Whitman, *supra* note 38, at 547.

94. For a discussion of waiver see notes 262-66 & accompanying text *infra*.

95. For a discussion of redemption see notes 206-34 & accompanying text *infra*.

96. For a discussion of restitution see notes 235-60 & accompanying text *infra*.

97. For a discussion of the vendee's right to require foreclosure by judicial sale, see notes 181-205 & accompanying text *infra*.

98. Colson v. Johnson's Estate, 111 Neb. 773, 776, 197 N.W. 674, 675 (1924). See also Hancock, *supra* note 6, at 982; Peterson, *supra* note 5, at 271.

99. Nelson & Whitman, *supra* note 38, at 543.

100. The forfeiture clause in an installment contract appears to give the vendor a remedy similar to foreclosure without any need for judicial action. For our purposes, however, it is important to emphasize that if the vendee resists forfeiture the installment land contract is advantageous only if it is enforceable as written and if title will not be clouded.

Id. at 542-43 (emphasis in original). See also Comment, *Installment Contracts for the Sale of Land in Missouri*, 24 MO. L. REV. 240, 244 (1959).

101. See notes 206-34 & accompanying text *infra*.

have a means of shaking off the "clinging equity of the vendee."¹⁰²

A. Strict Foreclosure

Strict foreclosure bars the vendee's equity of redemption and vests title in the vendor without requiring a sale of the property.¹⁰³ While several remedies will eliminate the vendee's equitable interest,¹⁰⁴ strict foreclosure is the least severe to the vendee because it provides him some means of protecting his interest in the property. A court in decreeing strict foreclosure will establish a set time, or grace period, during which the purchaser can complete his payments and receive full title to the property.¹⁰⁵ If the vendee does not take advantage of his right to make payments, strict foreclosure accomplishes the same result as an action to quiet title. Title is confirmed in the hands of the vendor and all color of title held by the vendee will be extinguished.¹⁰⁶

102. G. GLENN, *supra* note 6, § 67.1. The vendee has a lien similar to the vendor's lien.

Where the vendee has paid any part of the purchase money on the faith of the contract of sale before a conveyance has been made to him, equity gives him a lien upon the title of the vendor for the amount so advanced, which has all the characteristics of the vendor's lien, and is enforceable in the same way against the vendor and all his privies who have notice.

C. TIEDMAN, *THE AMERICAN LAW OF REAL PROPERTY* § 220 (3d ed. 1906).

Installment land contracts are most often used in states such as Nebraska, where foreclosure remedies are pro-mortgagor, and judicial foreclosure is the only remedy in the mortgage context. The vendor is more willing to use installment land contracts and to risk some judicial proceedings to regain possession of his property and to clear his title in states where the alternative is lengthy mandatory proceedings which include stay of foreclosure.

103. A decree of strict foreclosure of a mortgage finds the amount due under the mortgage, orders its payment within a certain limited time, and provides that, in default of such payment, the debtor's right and equity of redemption shall be forever barred and foreclosed; its effect is to vest the title of the property absolutely in the mortgagee, on default in payment without any sale of property.

BLACK'S LAW DICTIONARY 775 (4th ed. 1968).

104. Either actions for ejectment or to quiet title will eliminate the vendee's interest in the property. Strict foreclosure will be available to foreclose a land contract where either of these actions lie. T. DYSART, *FORECLOSURES IN NEBRASKA* § 188 (1929). Since Dysart's book was published, Nebraska Supreme Court decisions suggest that in equity, no matter what action is brought, the court will analyze the equities of deeming the vendee's payments forfeited. *See, e.g.,* Ruhl v. Johnson, 154 Neb. 810, 49 N.W.2d 687 (1951) (action in ejectment, court held strict foreclosure not appropriate); Hawkins v. Mullen, 118 Neb. 129, 223 N.W. 670 (1929).

105. T. DYSART, *supra* note 104, § 251. *See* note 132 & accompanying text *infra*.

106. T. DYSART, *supra* note 104, § 188. Strict foreclosure functions not to pass title from the purchaser to the vendor, but merely to confirm the title retained by the vendor. Thus strict foreclosure in Nebraska is available only in installment land contract circumstances where the purchaser does not receive title

The vendor who wants to resort to this remedy should realize that courts hesitate to allow strict foreclosure.¹⁰⁷ Once strict foreclosure is decreed, the vendee is limited to the stated time to tender full payment according to the contract. At the end of that period his equity of redemption is considered foreclosed. Unlike ordinary foreclosure, there is no provision for a stay of foreclosure;¹⁰⁸ thus there is no possibility of a sale to a third party at an amount more than sufficient to pay the vendor's claim.¹⁰⁹ Because any equity the vendee may have established in the property would be forever foreclosed, the Nebraska Supreme Court has followed the majority trend in decreeing strict foreclosure "only under peculiar and special circumstances."¹¹⁰ Such actions will be allowed only when in the sound discretion of the court it would be "inequitable or unjust to refuse them."¹¹¹

Unlike a judicial foreclosure procedure where each party knows his rights and responsibilities in the action, the parties in a strict foreclosure proceeding are subject to the court's discretion as to whether and under what conditions foreclosure will be granted. In Nebraska, the availability of the strict foreclosure remedy does not depend on the type of action filed or on the parties' express contract provision for forfeiture.¹¹² While the Nebraska Supreme Court has applied both contract and mortgage remedies to installment land contracts, the decisions rest on equitable grounds. The vendor should draft his contract carefully, to attempt to provide for forfeiture and foreclosure without requiring or allowing a court to

until he has fulfilled his contractual obligations. Strict foreclosure is not available to foreclose a mortgagor's interest under a mortgage contract. *Id.* §§ 250-252.

107. See Vanneman, *Strict Foreclosure on Land Contracts*, 14 MINN. L. REV. 342 (1929).

108. Mortgage stay of execution does not apply to decrees of strict foreclosure. *Harrington v. Birdsall*, 38 Neb. 176, 186-88, 56 N.W. 961, 964 (1893).

109. *Id.*

110. See, e.g., *Morgan v. Zoucha*, 203 Neb. 119, 277 N.W.2d 564 (1979); *Corn Belt Products Co. v. Mullins*, 172 Neb. 561, 110 N.W.2d 845 (1961); *Ruhl v. Johnson*, 154 Neb. 810, 49 N.W.2d 687 (1951); *Harrington v. Birdsall*, 38 Neb. 176, 56 N.W. 961 (1893).

111. See, e.g., *Morgan v. Zoucha*, 203 Neb. 119, 277 N.W.2d 564 (1979); *Corn Belt Products Co. v. Mullins*, 172 Neb. 561, 110 N.W.2d 845 (1961); *Ruhl v. Johnson*, 154 Neb. 810, 49 N.W.2d 687 (1951); *Harrington v. Birdsall*, 38 Neb. 176, 56 N.W. 961 (1893).

112. *Harrington v. Birdsall*, 38 Neb. 176, 56 N.W. 961 (1893); *Foster v. Ley*, 32 Neb. 404, 49 N.W. 450 (1891). In *Foster* there was no provision for forfeiture upon default in the contract. The purchaser argued that the court could not create a provision of forfeiture so that the contract should be treated as a mortgage and be foreclosed by a judicial sale. The court forfeited the interest of the purchaser, but did say a judicial sale would be enforced if that were the remedy the vendor preferred.

weigh equitable considerations. However, recent decisions indicate that before decreeing strict foreclosure the court will consider the equities of the situation.¹¹³ Alternatively, the vendor may seek to have the contract strictly enforced by bringing an action in equity to quiet title or an action at law for ejectment.¹¹⁴ The court has not established a consistent approach to the possible claims for relief that may be brought. In an equity action the court is not inclined to strictly interpret the terms of the parties' contract if it is unfair or inequitable to the vendee.¹¹⁵

Strict foreclosure is available where the property is of less value than the contract price and would not result in a surplus over price if a sale were ordered.¹¹⁶ The court recognizes the futility of requiring a sale of the property if the amount that would be received from a sale is less than the amount of the debt. On the other hand, strict foreclosure will be denied where the value of the property is "substantially in excess of the amount owed."¹¹⁷ In *Riffey v. Schulke*,¹¹⁸ the plaintiff commenced an action to declare a forfeiture of the contract and to eject the defendant, whereupon

113. See, e.g., *Riffey v. Schulke*, 193 Neb. 317, 227 N.W.2d 4 (1975). One Nebraska commentator stated that the question whether "the parties [can] contract in such a way as to bring about forfeiture or strict foreclosure without a court foreclosure proceeding governed by those equitable considerations that previously guided a court of equity" is undecided. Hancock, *supra* note 6, at 983. This question remains undecided and may depend on the type of action brought by the vendor. See note 114 *infra*.

114. The court has held in an ejectment action that if the contract states that time is of the essence and provides for forfeiture, the vendees will not be granted redemption. *Abbas v. Demont*, 152 Neb. 77, 40 N.W.2d 265 (1949). *But cf. Riffey v. Schulke*, 193 Neb. 317, 227 N.W.2d 4 (1975) (action brought for ejectment, court decreed that strict forfeiture inequitable); *Ruhl v. Johnson*, 154 Neb. 810, 49 N.W.2d 687 (1951) (same). For further discussion see notes 160-72 & accompanying text *infra*. The court seemingly has allowed forfeiture in quiet title actions by looking at the express terms of the contract. *Industrial Loan & Inv. Co. v. Lowe*, 173 Neb. 624, 114 N.W.2d 393 (1962); *Kear v. Hausman*, 152 Neb. 512, 41 N.W.2d 850 (1950); *Gilmore v. Cover*, 134 Neb. 559, 279 N.W. 177 (1938). *Contra*, *Hawkins v. Mullen*, 118 Neb. 129, 223 N.W. 670 (1929). *But see* notes 157-59, 168 & accompanying text *infra*.

115. See, e.g., *Yelkin v. Yelkin*, 193 Neb. 789, 229 N.W.2d 59 (1975).

116. *Swanson v. Madsen*, 145 Neb. 815, 18 N.W.2d 217 (1945).

[A] contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered and where such procedure would not offend against justice and equity.

Id. at 820, 18 N.W.2d at 220; *State Sec. Co. v. Daringer*, 206 Neb. 427, 430, 293 N.W.2d 102, 104 (1980).

117. *Yelkin v. Yelkin*, 193 Neb. 789, 229 N.W.2d 59 (1975); *Riffey v. Schulke*, 193 Neb. 317, 227 N.W.2d 4 (1975). See *Martin v. Baxter*, 198 Neb. 640, 254 N.W.2d 420 (1977).

118. 193 Neb. 317, 227 N.W.2d 4 (1975).

the defendant answered that strict foreclosure would be inequitable.¹¹⁹ The vendee had improved the property and its value had increased to \$125,000 from the \$34,000 contract price. The vendee was to pay \$3,000 a year plus seven percent interest starting in 1970. The vendee took possession and made interest payments until 1972; however, no principal installments were made and the vendee did not make the tax payments required by the contract.¹²⁰ Seemingly ignoring the vendee's default, the court was impressed instead with the facts that an intervenor bank stood ready to pay off the contract and that the land had significantly appreciated in value. Because performance, although late, was tendered according to the amount stated in the contract, the court held that strict foreclosure was unavailable.¹²¹ The court was unmoved by the vendor's objection that he would not be made whole by a lump sum payment because the income tax consequences of the transaction would be less advantageous to him than the installment payments he had contracted to receive.¹²² Pointing to the contract terms which provided for an escalation of all installments upon default,¹²³ the court required the vendor to perform the contract.

Strict foreclosure also will be enforced if the court finds that the payments which the vendee would forfeit equal the rental value of the property for the time he was in possession.¹²⁴ In addition to payments made on the contract, the court will consider payments made by the vendee for improvements, repairs, taxes, and insurance in determining whether the amount forfeited by the vendee exceeds the property's rental value.¹²⁵

The analysis used in installment land contract cases to decide whether to enforce strict foreclosure emphasizes what the vendee has received in return for his payments to the vendor. While there

119. *Id.* at 318, 227 N.W.2d at 5.

120. *Id.*

121. *Id.* at 320-21, 227 N.W.2d at 6-7. See notes 206-34 & accompanying text *infra*. See also *Dowd Grain Co. v. Pflug*, 193 Neb. 483, 227 N.W.2d 610 (1975); *Kirby v. Bergfield*, 186 Neb. 242, 182 N.W.2d 205 (1970). *Contra*, *Barker v. Johnson*, 591 P.2d 886 (Wyo. 1979).

122. 193 Neb. at 321, 227 N.W.2d at 7.

123. One wonders whether a vendor who puts an acceleration clause into his contract is concerned with receiving the purchase price or merely wants a means to declare forfeiture so that he can resell the property on an installment basis. The vendor is interested in favorable tax treatment of installment payments, but the vendee wants his payments to have some protection from default.

124. See *Morgan v. Zoucha*, 203 Neb. 119, 277 N.W.2d 564 (1979); *Swanson v. Madson*, 145 Neb. 815, 18 N.W.2d 217 (1945); *Stroble v. Smith*, 131 Neb. 291, 267 N.W. 526 (1936).

125. See, e.g., *Morgan v. Zoucha*, 203 Neb. 119, 277 N.W.2d 564 (1979); *Yelkin v. Yelkin*, 193 Neb. 789, 229 N.W.2d 59 (1975); *Riffey v. Schulke*, 193 Neb. 317, 227 N.W.2d 4 (1975).

have been no cases where damages (such as the costs of litigation, personal relocation expenses, or lost profits) have been asserted as they were in the executory contract case of *Bando v. Cole*,¹²⁶ arguably these should be part of the court's equitable considerations. The court's analysis should center on whether special circumstances have been shown that make it inequitable to refuse strict foreclosure.¹²⁷

If a vendee has established a significant equity interest in the property, the court will refuse strict foreclosure.¹²⁸ In determining the vendee's equity in the property, the court will consider the vendee's payments to the vendor and the vendee's expenditures for property improvements.¹²⁹ Other relationships between the parties may be considered as well. For example, in *Corn Belt Products Co. v. Mullins*,¹³⁰ the Nebraska Supreme Court granted strict foreclosure of the vendee's interest in the property despite the substantial equity that the vendee had established. The land contract was between an employer-vendor and an employee-vendee. That the employee had converted a considerable amount of the employer's property to his own use without permission influenced the court in finding that the vendee's equity was insufficient to make strict foreclosure inequitable.¹³¹

A court may mitigate the consequences of strict foreclosure on the defaulting vendee by finding he is entitled to a reasonable time to perform his obligations under the contract.¹³² Although the

126. 197 Neb. 722, 250 N.W.2d 651 (1977). For a discussion of the case see notes 70-71 & accompanying text *supra*.

127. The court has approached its equity analysis from both a positive and negative viewpoint. Either way, the outcome apparently is not affected. Whether the court says it will grant "strict foreclosure only under peculiar and special circumstances," see, e.g., *Harrington v. Birdsall*, 38 Neb. 176, 56 N.W. 961 (1893), or attempts to decide whether special circumstances making it inequitable to refuse strict foreclosure have been shown, its analysis is the same. See, e.g., *Morgan v. Zoucha*, 203 Neb. 119, 277 N.W.2d 564 (1979).

128. *Ruhl v. Johnson*, 154 Neb. 810, 49 N.W.2d 687 (1951); *Farmers & Merchants State Bank v. Thornburg*, 54 Neb. 782, 75 N.W. 45 (1898). If the vendor is refused strict foreclosure he must find another remedy. In *Thornburg*, the court said the vendor must go through ordinary foreclosure. See notes 201-05 & accompanying text *infra*.

129. See, e.g., *Ruhl v. Johnson*, 154 Neb. 810, 49 N.W.2d 687 (1951). The "[d]efendants alleged that by virtue of payments made to plaintiffs and expenditures made on the property, they had an equitable title to the property, and that plaintiffs by action of ejectment were undertaking to deny a right to redeem under a judicial foreclosure." *Id.* at 812, 49 N.W.2d at 688.

130. 172 Neb. 561, 110 N.W.2d 845 (1961).

131. *Id.* at 571, 110 N.W.2d at 851. The vendee would have been found to have had equity in the property only if the real estate contract were considered to be a separate matter from other transactions between the parties. "Such a view ignores the true factual situation." *Id.* at 570, 110 N.W.2d at 851.

132. See, e.g., *Morgan v. Zoucha*, 203 Neb. 119, 277 N.W.2d 564 (1979) (vendee given

time period allowed for this right to redeem the property is not as great as in a statutory stay of a judicial foreclosure proceeding,¹³³ the same interest is satisfied.

The vendor has the right to elect his remedy and generally is allowed to do so.¹³⁴ In *Hendrix v. Barker*,¹³⁵ the vendor elected to foreclose the vendee's interest as an ordinary mortgage and then to bring an action for a deficiency judgment.¹³⁶ The vendee was not allowed to limit the vendor to strict foreclosure in an effort to avoid further liability on the contract.¹³⁷

B. Foreclosure by Judicial Sale

"Of the various remedies available to the vendor, foreclosure by judicial sale is the most equitable in that by equating the contract to a mortgage it gives the purchaser the benefit of all of the safeguards that equity has created over the years for the benefit of mortgagors."¹³⁸ Unfortunately the remedy is both expensive and time consuming. "[T]he merit of foreclosure by sale is that it does not work a forfeiture of the purchaser's interest, that it is open and fair, and that it will result in clearing the vendor's title of any claim by the purchaser."¹³⁹ However, the vendor is not always interested in fairness to the vendee and may choose a less cumbersome remedy that is equally effective in clearing his title.¹⁴⁰ If foreclo-

20 days to redeem); *Peckham v. Deans*, 186 Neb. 190, 181 N.W.2d 851 (1970) (vendee given 60 days to redeem by purchasing remaining lots in contract); *Swanson v. Madsen*, 145 Neb. 815, 18 N.W.2d 217 (1945) (vendee given 60 days to redeem); *Stroble v. Smith*, 131 Neb. 291, 267 N.W. 526 (1936) (vendee given 30 days to redeem); *Sponsler v. Max*, 113 Neb. 477, 203 N.W. 566 (1925) (vendee given 60 days to redeem); *Patterson v. Mikkelson*, 86 Neb. 512, 125 N.W. 1104 (1910) (vendee given 90 days to redeem); *Maloy v. Muir*, 62 Neb. 80, 86 N.W. 916 (1901) (vendee given 20 days to perform contract).

133. See NEB. REV. STAT. § 25-1506 (Reissue 1979). Upon application by the mortgagor within 20 days after the decree of foreclosure, the court's decree ordering the sale of the property is stayed for nine months.

134. See *Hendrix v. Barker*, 49 Neb. 369, 68 N.W. 531 (1896). *But see Ruhl v. Johnson*, 154 Neb. 810, 49 N.W.2d 687 (1951). See also T. DYSART, *supra* note 103, § 186.

135. 49 Neb. 369, 68 N.W. 531 (1896).

136. *Id.* at 373, 68 N.W. at 532. A vendor is eligible to file for a deficiency judgment only if he has elected to foreclose the vendee's interest by judicial sale. Hancock, *supra* note 6, at 982.

137. 49 Neb. at 373, 68 N.W. at 533.

138. Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550, 558 (1965).

139. *Id.*

140. In *Foster v. Ley*, the vendees argued that the contract must be treated as a mortgage, and a sale of the property must be ordered to satisfy the vendor, with the remainder of the proceeds from the sale going to the vendee. The court responded: "Undoubtedly this remedy might be enforced if preferred by the vendor, and might be more satisfactory to the vendee in view of a stat-

sure by sale is chosen, the statutory provisions for sale and right of redemption, including the availability of a nine-month stay of execution, must be followed.¹⁴¹ These procedures are required despite provisions in the contract that provide for a different manner of disposition in the event of the vendee's default.

C. Quiet Title

Historically, a vendee's failure to record an installment land contract enabled the vendor to obtain a clear title upon the vendee's default and the vendor's subsequent regaining of possession.¹⁴² Thus, vendors tried to ensure unrecordability by inserting a clause in the contract stating that recording the contract would be held to be a forfeiture or by failing to acknowledge the contract and thus making it unrecordable. The courts do not look favorably upon an anti-recording clause and will find it to be against public policy.¹⁴³

The vendee, even the willfully defaulting vendee, will find it simple to encumber title.¹⁴⁴ The vendee's outstanding equity of redemption does not need to be recorded to cloud the title.¹⁴⁵ The equity of redemption can be asserted by the vendee in the vendor's action for specific performance of the contract breached and the recording of the notice of *lis pendens*.¹⁴⁶ This will block any effective or profitable resale until the vendor has filed and succeeded in an action to foreclose the vendee's equity.

The vendor may bring an action for quiet title to make the forfeiture of the defaulting vendee effective and to confirm title in the vendor.¹⁴⁷ The action is brought to extinguish any liens the vendee might assert against the property and to prevent the vendee's equitable interest from clouding the title. A quiet title action is not used to obtain possession, but rather to determine title. If the defaulting vendee remains in possession, ejectment would be the proper remedy for the vendor to obtain possession.¹⁴⁸

While commentators state that the effect of a successful quiet title proceeding is "equivalent to a modified form of strict foreclosure,"¹⁴⁹ the law in Nebraska is not settled. In an action for quiet

utory stay of execution of nine months after judgment. But we do not find that to be the only remedy." 32 Neb. 404, 409, 49 N.W. 450, 451 (1891).

141. NEB. REV. STAT. § 25-1506 (Reissue 1979).

142. *Id.*

143. Nelson & Whitman, *supra* note 38, at 571.

144. *Id.*

145. J. HETLAND, *supra* note 12, § 2.5.

146. Warren, *supra* note 45, at 632.

147. NEB. REV. STAT. § 25-21,112 (Reissue 1979); T. DYSART, *supra* note 104, § 187.

148. T. DYSART, *supra* note 104, § 187.

149. Note, *supra* note 35, at 206.

title it is unclear whether the court will apply the equitable considerations defined in strict foreclosure cases or strictly construe the forfeiture clause. In an early case, the vendor had filed an action to quiet title, and the court allowed the purchase price to be returned to the vendee, stating that it was doing equity.¹⁵⁰ The court indicated that the vendor chose to come into an equity court, and "he who seeks equity must do equity."¹⁵¹ In a later quiet title action brought by a vendor, the court did not apply an equitable analysis,¹⁵² but stated that "[a] contract of sale and purchase of real estate, in which time in relation to deferred payments of the purchase price is made of the essence of the contract, and a forfeiture provided for non-performance, may be enforced in accordance with the terms of the express stipulation."¹⁵³

In 1962, in *Industrial Loan and Investment Co. v. Lowe*, the court upheld a quiet title action in an installment land contract,¹⁵⁴ and implied that the results of actions brought by a vendor for strict foreclosure are not applicable to actions brought to quiet title or brought at law in ejectment.¹⁵⁵ However, the court made the type of analysis common in strict foreclosure cases, noting that the payments were five months in arrears, the vendee had abandoned the property, the vendee had assumed no obligation under the contract due to the absence of privity between the vendee and the vendor, and the property was in bad repair and depreciating in value. Thus, there were no inequities in the court's enforcement of the forfeiture by granting quiet title.¹⁵⁶ Since *Lowe*, no Nebraska case has involved a quiet title action brought on an installment land contract. Arguably, in an equitable proceeding to quiet title, the court will perform the same analysis as it does in strict foreclosure cases and quiet title will not be granted where forfeiture is inappropriate.¹⁵⁷ According to the quiet title statute, the vendee is

150. *Hawkins v. Mullen*, 118 Neb. 129, 223 N.W. 670 (1929).

151. *Id.* at 135, 223 N.W. at 672.

The court having taken jurisdiction on this issue could retain it to do full justice between the parties. . . . The appellee has brought an action to quiet title by having a quit claim deed canceled as a cloud upon his title. He comes into a court of conscience, and will not be allowed unconscionable relief, nor relief otherwise than under condition that he do equity upon his part.

Id.

152. *Kear v. Hausman*, 152 Neb. 512, 41 N.W.2d 850 (1950). *Accord*, *Johnson v. Norton*, 152 Neb. 714, 42 N.W.2d 622 (1950).

153. 152 Neb. at 518, 41 N.W.2d at 854.

154. 173 Neb. 624, 114 N.W.2d 393 (1962). The quiet title action was brought by the plaintiff "as an assignee by virtue of an assignment of the vendees for security only." *Id.* at 631, 114 N.W.2d at 398.

155. *Id.*

156. *Id.* at 631-32, 114 N.W.2d at 398.

157. "It would seem that in either event [strict foreclosure or action to quiet title]

not given the right to redeem the property;¹⁵⁸ however, because it is an equitable proceeding the court can grant a right to redeem or reinstate the contract on specific conditions, thus giving the quiet title action the same effect as strict foreclosure.¹⁵⁹

D. Action for Ejectment

A vendor may be able to bring an action for ejectment against a defaulting vendee, and thereby avoid the equitable determination which a court makes in an action for strict foreclosure.¹⁶⁰ In *Abbas v. Demont*,¹⁶¹ the vendor was granted relief in an action for ejectment brought under section 25-2124.¹⁶² The vendee had contracted to buy the land for \$8,950 and defaulted after paying \$2,143.80. The contract provided that time was of the essence and that a forfeiture could be declared upon the vendee's default. The court held that ejectment was available against the vendee in possession upon the vendee's default of the contract.¹⁶³ The supreme court reversed the trial court's grant of a sixty day redemption period to the vendee, finding that upon default, the vendor had the right by the terms of the contract to cancel the contract and forfeit the payments made. Since the contract no longer existed, the vendee could claim no rights thereunder, not even a redemption right.¹⁶⁴ Although ejectment is a law action, the court will allow the defendant to plead an equitable defense.¹⁶⁵ The court recognized this in

the vendor was seeking equity and that he should be required to do equity." Lee, *supra* note 138, at 560.

158. NEB. REV. STAT. § 25-21,116 (Reissue 1979).

159. See T. DYSART, *supra* note 104, § 187. A California court stated in *Petersen v. Ridenour*, 135 Cal. App. 2d 720, 728, 287 P.2d 848, 852 (1955):

A quiet title action brought to terminate a contract for the sale of realty is essentially a strict foreclosure. . . . And in 'such case the court finds the amount unpaid, and decrees that it be paid on or before a day stated, and upon failure to make the payment that defendant's equity be foreclosed.'

Id. (quoting *Warner Bros. Co. v. Freud*, 138 Cal. 651, 654, 72 P. 345, 346 (1903)).

160. See *Abbas v. Demont*, 152 Neb. 77, 40 N.W.2d 265 (1949). But see *Riffey v. Schulke*, 193 Neb. 317, 227 N.W.2d 4 (1975); *Ruhl v. Johnson*, 154 Neb. 810, 49 N.W.2d 687 (1951).

161. 152 Neb. 77, 40 N.W.2d 265 (1949).

162. NEB. REV. STAT. § 25-2124 (Reissue 1979) provides:

In an action for the recovery of real property, it shall be sufficient if the plaintiff states in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived.

163. 152 Neb. at 81, 40 N.W.2d at 267.

164. *Id.* at 82, 40 N.W.2d at 267.

165. *Id.* at 80, 40 N.W.2d at 267.

'The defendant was entitled to have this issue submitted to the jury,

Abbas; nevertheless, the court did not apply the tests set forth in strict foreclosure cases.¹⁶⁶ The court instead stated it would hold the vendor strictly to his contract.¹⁶⁷

The vendor seeking court-enforced ejectment must be sure his contract is drafted carefully. To enforce forfeiture by ejectment the vendor should include the following provisions in his contract: "(1) time is of the essence, (2) the seller is entitled to immediate possession in case of default, (3) amounts paid in shall be considered as rents or damages, (4) the entire amount is due and owing on default, and (5) the contract shall be forfeited and at an end at the election of the seller."¹⁶⁸

Additionally, the vendor should ensure he has not waived performance of any of the contract terms. "The law dislikes forfeitures,"¹⁶⁹ and as indicated in *Abbas*, a court will examine the parties' actions to determine whether the vendor has waived performance of any term of the contract.¹⁷⁰

However, in light of a decision rendered after *Abbas*,¹⁷¹ there is

or, if plaintiff's contention that, being an equitable defense, it was for the court to decide, is correct, the record should show affirmatively that the issue was passed upon by the court and a finding made of the facts as in any other case in equity, or that the question was submitted to the jury for an advisory verdict upon special findings.'

Id. (quoting *Tillson v. Holloway*, 90 Neb. 481, 487, 134 N.W. 232, 235 (1912)).

166. Arguably the vendee could assert that the amounts he had paid exceeded fair rental value for the period, that the fair market value of the property greatly exceeded the amount for which he was in default, or that he had established a large amount of equity in the property.
167. 152 Neb. at 81, 40 N.W.2d at 267. The parties in *Abbas* had entered into a supplemental agreement providing that the defendant would pay an additional \$500 within 60 days to reduce the principal. The vendee claimed that the vendor had waived payment of the \$500 while the vendor agreed only that the date of payment had been extended. Evidence was presented that the date for payment of the \$500 was extended for an indefinite period of time. *Id.* The court found that the vendor had waived forfeiture as to the \$500 "until notice is first given sufficient to reinstate the right to forfeit it because of the failure to make this payment." *Id.* For further discussion of the protection the waiver theory affords the defaulting vendee, see notes 260-64 & accompanying text *infra*.
168. *Hancock*, *supra* note 6, at 985. It is not certain that the court would enforce a clause converting payments made into rents if it finds their amount not equal to the fair rental value. If instead the amount forfeited is unconscionable, the court may disregard the label attached and view it as a penalty. See notes 68-71 & accompanying text *supra*.
169. *E.g.*, *Skendzel v. Marshall*, 261 Ind. 226, 231, 301 N.E.2d 641, 644 (1973), *cert. denied*, 415 U.S. 921 (1974); *Abbas v. Demont*, 152 Neb. 77, 79, 40 N.W.2d 265, 267 (1949).
170. 152 Neb. at 81, 40 N.W.2d at 267.
171. *Ruhl v. Johnson*, 154 Neb. 810, 49 N.W.2d 687 (1951). See also *Riffey v. Schulke*, 193 Neb. 317, 227 N.W.2d 4 (1975) where the vendor filed an action for forfeiture and ejectment and the vendee answered that the property had in-

no guarantee that the inequities of forfeiture will not be considered in an action for ejectment. In *Ruhl v. Johnson*,¹⁷² a vendor's action at law for ejectment was transferred to the equity docket upon motion by the defendant. Although the trial court granted strict foreclosure to the vendor, the Nebraska Supreme Court reversed, stating that "[t]here are no peculiar and special circumstances shown that make it inequitable and unjust to refuse strict foreclosure."¹⁷³

In this area of law, jury sympathies likely will be with the vendee. Therefore, the vendor who does not have the equities clearly on his side probably will not want to risk jury trial by filing an action for ejectment. He would prefer to seek the nonjury equity of redemption. It may be some time before the court will be able to decide whether the tests applied to determine whether to grant the equity of redemption to a vendee should be equally applicable in an action for ejectment.¹⁷⁴

E. Specific Performance

Upon the purchaser's default, the vendor may bring a suit for specific performance of the contract.¹⁷⁵ The vendor must either substantially perform or tender substantial performance of the contract before he will be entitled to maintain an action for specific performance or strict foreclosure.¹⁷⁶ To recover full payment from the vendee at the time of default, the vendor must include an acceleration clause in the contract. Because the contract calls only for installment payments, without an acceleration clause the vendor could sue only for amounts currently due and owing under the contract.¹⁷⁷

creased in value so that strict foreclosure was inequitable. The supreme court held that strict foreclosure was inappropriate because the property's value exceeded the balance due on the contract. *Id.* at 320, 227 N.W.2d at 6.

172. 154 Neb. 810, 49 N.W.2d 867 (1951).

173. *Id.* at 815, 49 N.W.2d at 689.

174. A commentator, after discussing *Abbas*, stated, "[t]hus it is apparent that the equity of redemption as it is known in the law of mortgages does not exist in the law of land contracts." Hancock, *supra* note 6, at 985. However, earlier discussion of strict foreclosure clearly shows that the equity of redemption does exist in land contracts and must be foreclosed. The *Abbas* decision makes uncertain whether the equity of redemption can be ignored even if the vendor is willing to comply with all the restrictions of bringing an action for ejectment.

175. *See, e.g.*, *Kobza v. Spath*, 166 Neb. 623, 90 N.W.2d 246 (1958); *Miller v. Ruzicha*, 111 Neb. 815, 198 N.W. 148 (1924).

176. *See* cases cited note 175 *supra*.

177. *See* *Colson v. Johnson's Estate*, 111 Neb. 773, 197 N.W. 674 (1924).

F. Other Remedies

The availability of summary proceedings, notably forcible entry and unlawful detainer, to recover possession from a vendee defaulting on a land contract may not be available in Nebraska.¹⁷⁸ The court in an 1887 case stated that the vendee had an interest in the property which could be protected only in a court of equity.¹⁷⁹ No later Nebraska cases discuss this proposition.

VI. PROTECTIONS AVAILABLE TO THE VENDEE

Based upon the general premise that "equity abhors forfeitures,"¹⁸⁰ courts have avoided forfeitures on various theories. These theories include: (1) granting the vendee the right to require the judicial foreclosure of the installment land contract; (2) recognizing the vendee's equity of redemption; (3) allowing restitution to the vendee of payments made in excess of the vendor's damages; and (4) finding a vendor has waived strict performance of the contract terms.

A. Right to Force a Judicial Sale

The availability of the right to force a judicial sale is often supplemented by the right to restitution in order to protect the vendee's established interest in the property.¹⁸¹ Courts have been reluctant to decree judicial sale as a right available to the vendee due to the expense and time delay caused the vendor and the probability that the buyer's payments will not cover the expense.¹⁸²

Recently courts¹⁸³ and commentators¹⁸⁴ have recognized the

178. *Worthington v. Woods*, 22 Neb. 230, 34 N.W. 368 (1887). See also *Jones v. Schmidt*, 163 Neb. 508, 80 N.W.2d 289 (1957); *Northwestern State Bank v. Hanks*, 118 Neb. 442, 225 N.W. 119 (1929).

179. *Worthington v. Woods*, 22 Neb. at 235, 34 N.W. at 371.

180. *Adler v. Kohn*, 96 Neb. 346, 351, 147 N.W. 1131, 1134 (1914).

181. See generally *Nelson & Whitman*, *supra* note 38, at 559; Comment, *supra* note 38, at 104; Note, *supra* note 35, at 201-05.

182. Comment, *supra* note 38, at 104.

183. See, e.g., *H & L Land Co. v. Warner*, 258 So. 2d 293 (Fla. Dist. Ct. App. 1972); *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974); *Sebastian v. Floyd*, 585 S.W.2d 381 (Ky. 1979). *Contra*, *Glacier Campground v. Wild Rivers, Inc.*, 597 P.2d 689, 698 (Mont. 1979) ("contract for deed and a purchase money mortgage are not one and the same thing with two different names. They are two distinct legal creatures.")

184. As early as 1921, Professor Ballantine recognized the similarities and saw no reason why the relief from forfeitures provided by the judicial foreclosure statutes should be confined to mortgages:

The relation of the vendor and purchaser of land, under a wholly executory contract, has been likened to the relation of mortgagor and

similarities between installment land contracts and mortgages, and some state courts have required installment land contract vendors to proceed according to mortgage foreclosure statutes to regain possession and full title to their property.¹⁸⁵ Other courts have required judicial foreclosure methods only after it has been determined that forfeiture would be inequitable.¹⁸⁶

In *Sebastian v. Floyd*,¹⁸⁷ the Kentucky Supreme Court found the forfeiture clause in an installment land contract to be invalid and required the installment contract vendor to bring judicial foreclosure proceedings against the defaulting vendee. The vendee had made a \$3,900 down payment on a \$10,900 house and lot and had agreed to pay the balance plus the taxes, insurance, and interest in monthly installments of \$120. The forfeiture clause provided that the vendor could terminate the contract and retain all payments previously made as rents and liquidated damages. During the twenty-one months that the contract was in force, the vendee paid a total of \$5,480 rather than the \$6,320 required by the contract.¹⁸⁸ The vendee had accumulated equity of \$4,300 in the property. Quoting cases from only two other jurisdictions,¹⁸⁹ the court nevertheless concluded that "[t]he modern trend is for courts to treat land sale contracts as analogous to conventional mortgages, thus requiring a seller to seek a judicial sale of the property upon the buyer's default."¹⁹⁰ While the court could have fashioned a more restrictive rule relying on the value of the vendee's equitable interest in relation to the vendor's interest, it chose to forbid the operation of the forfeiture clause in all cases.¹⁹¹

mortgagee. The analogy is especially close when the buyer is given possession and enjoyment of the land. The vendor's true remedy is foreclosure, even where time is made of the essence. But the right to relief from forfeiture is not dependent on the exactitude of this analogy, as there is no reason why such relief should be confined to bonds and mortgages.

Ballantine, *supra* note 63, at 347. See, e.g., Nelson & Whitman, *supra* note 38; Note, *supra* note 35; Comment, *supra* note 30.

185. See *H & L Land Co. v. Warner*, 258 So. 2d 293 (Fla. Dist. Ct. App. 1972).

186. See notes 192-200 & accompanying text *infra*.

187. 585 S.W.2d 381 (Ky. 1979). The court explicitly overruled its previous decisions in *Kravitz v. Grimm*, 273 Ky. 18, 115 S.W.2d 368 (1938) and *Miles v. Profit*, 266 S.W.2d 333 (Ky. 1954) to the extent those cases upheld the validity of a forfeiture provision in an installment land contract. 585 S.W.2d at 384.

188. 585 S.W.2d at 384.

189. *H & L Land Co. v. Warner*, 258 So. 2d 293 (Fla. Dist. Ct. App. 1972); *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974).

190. 585 S.W.2d at 383.

191. The court felt that such a rule was the only way to ensure that the interests of both buyer and seller were preserved. Under such a rule the seller recovers the balance due on the contract plus expenses, while at the same time the buyer's equity is protected. *Id.*

The *Sebastian* court relied on *Skendzel v. Marshall*¹⁹² to support its requirement of judicial foreclosure. The *Skendzel* court equated mortgages and installment land contracts by its "piercing of the transparent distinction between a land contract and a mortgage."¹⁹³ Arguing that conceptually "the retention of the title by the vendor is the same as reserving a lien or mortgage,"¹⁹⁴ the court stated that if one did not allow form to control substance, the vendor-vendee relationship could be viewed as a mortgagee-mortgagor relationship.¹⁹⁵ On the facts presented, if the court had enforced the forfeiture clause, the purchaser would have forfeited \$21,000. The court discussed equitable principles often cited in the cases to avoid forfeiture,¹⁹⁶ and concluded that the lien held by an installment land contract vendor could be enforced through foreclosure proceedings. While the case is cited for the rule that installment land contracts may be foreclosed only by judicial foreclosure methods,¹⁹⁷ the decision made clear that judicial foreclosure procedures would not be required in every installment land contract.¹⁹⁸ The court suggested that forfeiture may still be the appropriate remedy "[i]n the case of an abandoning, absconding vendee" or where the vendee has paid in a minimal amount and thus has little or no equity in the property.¹⁹⁹ Later Indiana decisions clarify that *Skendzel* does not establish an absolute rule requiring all installment land contracts to be foreclosed by judicial

192. 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974).

193. *Id.* at 234, 301 N.E.2d at 646.

194. *Id.*

195. *Id.*

196. In reaching its decision, the Indiana Supreme Court began with the basic premise applied by many other state courts, including Nebraska's: "[e]quity abhors forfeitures." *Id.* at 231, 301 N.E.2d at 644. Next it analyzed the effect of enforcing the forfeiture clause and found that forfeiture was "clearly excessive," *id.* at 232, 301 N.E.2d at 645, and would lead to unconscionable results. *Id.* at 241, 301 N.E.2d at 650. It then took the step most courts have not been willing to take and treated the installment land contract as a mortgage: "The court, in effect, views a conditional land contract as a sale with a security interest in the form of a legal title reserved by the vendor. Conceptually, therefore, the retention of the title by the vendor is the same as reserving a lien or mortgage." *Id.* at 234, 301 N.E.2d at 646.

197. *See Sebastian v. Floyd*, 585 S.W.2d 381, 383 (Ky. 1979); Strausbaugh, *supra* note 63, at 71.

198. "[F]orfeiture may only be appropriate under circumstances in which it is found to be consonant with notions of fairness and justice under the law." 261 Ind. at 241, 301 N.E.2d at 650.

The court felt compelled to relieve the vendors who were left without a remedy when the trial court correctly denied their request to obtain possession of the property through enforcement of a forfeiture clause. By denying the vendors the relief they sought, they were denied all remedial relief.

199. 261 Ind. at 240-41, 301 N.E.2d at 650.

sale.²⁰⁰ The Kentucky Supreme Court misplaced its reliance on *Skendzel* to support its absolute rule and did not analyze the facts in its case to determine whether any exception to *Skendzel* made forfeiture without a sale more equitable.

In 1898,²⁰¹ the Nebraska Supreme Court confronted a fact situation similar to *Skendzel* and arrived at a similar conclusion.²⁰² However, the case, *Farmers & Merchants State Bank v. Thorn-*

200. *Miles Homes of Ind., Inc. v. Harrah Plumbing & Heating Serv. Co.*, — Ind. App. —, 408 N.E.2d 597 (1980); *U.S. Aircraft Financing, Inc. v. Jankovich*, — Ind. App. —, 407 N.E.2d 287 (1980); *McLendon v. Safe Realty Corp.*, — Ind. App. —, 401 N.E.2d 80 (1980); *Hawkins v. Marion County Bd.*, — Ind. App. —, 394 N.E.2d 957 (1979); *Donaldson v. Sellmar*, 166 Ind. App. 60, 333 N.E.2d 862 (1975), *overruled*, *Morris v. Weigle*, — Ind. —, 383 N.E.2d 34 (1978); *Tidd v. Stauffer*, 159 Ind. App. 570, 308 N.E.2d 415 (1974); *Goff v. Graham*, 159 Ind. App. 324, 306 N.E.2d 758 (1974).

The analysis of these courts is much the same as the analysis of the Nebraska court in the strict foreclosure cases previously discussed. As one Indiana court stated:

[W]e can find no reason why the Lees' interest cannot be forfeited under the rule of *Skendzel v. Marshall* . . . which examines whether a forfeiture would act as a penalty. Here the Lees have paid no principal towards the contract, and owed more at the time of trial than they did when the contract began.

Miles Homes of Ind., Inc. v. Harrah Plumbing & Heating Serv. Co., — Ind. App. —, 408 N.E.2d at 600 (citations omitted). The Indiana Supreme Court has rendered no decisions interpreting the rule in *Skendzel*.

201. *Farmers & Merchants State Bank v. Thornburg*, 54 Neb. 782, 75 N.W. 45 (1898). *See also* *Hendrix v. Barker*, 49 Neb. 369, 68 N.W. 531 (1896).
202. The court's discussion in *Hendrix* indicates its early recognition of the similarities between installment land contracts and mortgages.

'The vendor of land by an ordinary land contract holds the legal title as security for the unpaid purchase money.' . . . 'We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt and a legal title retained to secure the payment of a debt. . . .'

49 Neb. at 372, 68 N.W. at 532 (quoting *Church v. Smith*, 39 Wis. 492, 492 (1876)).

[I]n an executory contract for the sale of real estate, the vendor, upon default made by the vendee, may treat the contract as an ordinary real estate mortgage, and foreclose it as such. . . . 'A contract for the sale of land conveys to the vendee an equitable title, and the only principle upon which the vendor may sue for his money, and at the same time seek security against the land, is the one which recognizes the analogy to a vendor's lien in cases where the legal title has been conveyed; and the vendee's title can only be divested by a sale. The claim of a vendor in a land contract is but an ordinary money debt secured by the contract, and his proceedings to enforce the lien upon the land should be governed by the analogies of proceedings to enforce other equitable liens and be executed by a sale to satisfy the amount due.'

Id. at 372-73, 68 N.W. at 532 (quoting *Fitzbaugh v. Maxwell*, 34 Mich. 137, 138 (1876)).

burg,²⁰³ has not been cited in subsequent cases to support application of judicial foreclosure procedures to an installment land contract. In *Thornburg*, the vendee defaulted after having paid \$560 on the \$2,000 principal debt plus \$162 interest.²⁰⁴ The contract provided that time was of the essence and that default would work a forfeiture of the vendee's rights. The vendor-assignee brought an action for forfeiture which the court termed strict foreclosure, but after considering the circumstances, the court determined that there were insufficient grounds for a decree of forfeiture or for strict foreclosure.²⁰⁵ The court reversed the trial court decree of strict foreclosure and suggested that under the circumstances, it would be proper for the vendor to request an ordinary foreclosure. For the vendee with considerable equity in the property who is forced to default and is unable to redeem, a judicial sale from which it receives the proceeds in excess of the vendor's damages or alternatively, restitution by the vendor, are the only remedies that will avoid the vendee's forfeiture.

B. Vendee's Equity of Redemption

The purchaser may avoid the harsh effects of a contract provision for forfeiture by being given an opportunity to cure his default.²⁰⁶ "Some courts view this right, analogous to a mortgagor's equity of redemption, as unconditional, while others are inclined to recognize it only if the purchaser's prior payments add up to a substantial investment or 'equity' in the property."²⁰⁷ A court discussing equitable considerations in arriving at a decision as to whether strict foreclosure is appropriate,²⁰⁸ usually will grant a grace period to allow the vendee to reinstate the contract by tendering full performance.²⁰⁹ Nebraska recognizes the vendee's equity of redemption by granting the vendee who has defaulted on his obligations an opportunity to make the payments and avoid the

203. 54 Neb. 782, 75 N.W. 45 (1898).

204. The contract price was \$2,000 with a \$200 down payment and monthly payments of \$15 principal and \$6 interest, or a total monthly payment of \$21. Default occurred after 24 monthly payments. *Id.* at 786, 75 N.W. at 46.

205. The court noted the vendee's plea that his default was unintentional and that he had been in default only a short time. The court did not seem to consider that the property may have depreciated in value and that the vendee had not paid the taxes nor kept the property properly insured. *Id.* at 786, 75 N.W. at 46.

206. Note, *supra* note 35, at 199-200.

207. Nelson & Whitman, *supra* note 33, at 550. See also G. GLENN, *supra* note 6, § 37.1.

208. See Morgan v. Zoucha, 203 Neb. 119, 277 N.W.2d 564 (1979).

209. "Where the buyer's equity is minimal, the grace period should be brief, but as the equity increases so should the time for redemption." Comment, *supra* note 38, at 103.

consequences of default.²¹⁰

Initially the Nebraska Supreme Court decided that the mortgage stay of execution did not apply to decrees of strict foreclosure.²¹¹ However, a short time later the court decided to give the party in default a reasonable time to avoid the bar of foreclosure by performing his obligations under the contract.²¹² Since then the court has allowed purchasers grace periods of varying lengths to cure their defaults.²¹³

Despite its apparent early recognition of the equity of redemption, the court has not been presented with cases which require it to expressly define the parameters of that right. In the typical case, the defaulting vendee tenders the balance of the purchase price and sues the vendor for specific performance.²¹⁴ For example, in *Dowd Grain Co. v. Pflug*,²¹⁵ the vendee sued for specific performance after the vendor declared the contract to be void because the vendee's first installment was one week late. The contract provided for a \$2,000 down payment with the balance to be paid in four annual installments, and did not provide that time was of the essence.²¹⁶ The vendor contended that time was of the essence and that the purchaser was guilty of a material breach thus justifying rescission. To the court, neither the contract nor the parties' be-

210. See *Morgan v. Zoucha*, 203 Neb. 119, 277 N.W.2d 564 (1979), where the trial court gave the defendants twenty days to pay the amount due or their equity of redemption would be forever barred. The supreme court then decreed the defendant's equity of redemption to be barred. *Contra*, *Hancock*, *supra* note 6, at 985, where the author states: "Thus it is apparent that the equity of redemption as it is known in the law of mortgages does not exist in the law of land contracts." *Hancock* relied on *Abbas v. Demont* and *Johnson v. Ruhl* to make this conclusion. As previously discussed, see notes 160-68 & accompanying text *supra*, *Abbas* is an ejectment case. The court's denial of an equity of redemption may depend on the cause of action filed.

The writer argues that *Johnson v. Ruhl* supports the contention that the existence of an equity of redemption is determined by the seller and that the buyer is relegated to the protections available under contract law. Reliance on the *Johnson* case is inappropriate. The issue in that case had nothing to do with an accounting or return of payments paid on the land contract, but was instead an attempt by the vendee to receive damages for rents lost while he was out of possession. Inappropriate pleading by the parties prevented the court from addressing the equitable issues. See *Johnson v. Ruhl*, 162 Neb. 330, 75 N.W.2d 717 (1956).

211. *Harrington v. Birdsall*, 38 Neb. 176, 187-88, 56 N.W. 961, 964 (1893).

212. *Patterson v. Mikkelson*, 86 Neb. 512, 125 N.W. 1104 (1910) (reasonable time not to exceed 90 days after the decree).

213. *E.g.*, *Morgan v. Zoucha*, 203 Neb. 119, 277 N.W.2d 564 (1979) (20 days); *Stroble v. Smith*, 131 Neb. 291, 267 N.W. 326 (1936) (30 days).

214. *E.g.*, *Nigh v. Hickman*, 538 S.W.2d 936 (Mo. App. 1976).

215. 193 Neb. 483, 227 N.W.2d 610 (1975).

216. *Id.* at 485, 227 N.W.2d at 611.

havior indicated that time was of the essence.²¹⁷ While the court did not refer specifically to the vendee's equity of redemption, it stated:

Specific performance should, in general, be granted, as a matter of course, of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship and when the ends of justice will be served thereby.²¹⁸

The court found that time was not of the essence and that the breach was minor, and decreed specific performance. While there was not an express recognition of the vendee's equity of redemption, the effect was the same, and the terms of the contract did not strictly control the parties' rights.

The general rule in contract law is that specific performance will not be granted when the party seeking it has failed to perform.²¹⁹ Courts have applied this rule strictly where the parties expressly provide that time is of the essence²²⁰ or where it can be made so by demand.²²¹ This rule may make sense in the marketing contract context where both parties contemplate full performance on the closing date.²²² However, because of possible overriding equitable considerations, it does not make sense when a continuing contractual agreement exists and the vendee merely is late with his payments or for some reason discontinues payments after a period of time of compliance with the contract.²²³ Some courts have required a showing that the parties intended to create an equitable mortgage before they will grant specific performance to the vendee.²²⁴ The Nebraska Supreme Court, however, apparently recognizes that, in substance, the installment land contract is an equitable mortgage, and that equitable considerations should determine whether a vendee is given the option to cure his default.²²⁵

217. *Id.* at 486, 227 N.W.2d at 611. The vendor had not performed his contractual obligations to get an accurate legal description of the land, to place the warranty deeds in escrow, and to remove a lien on the land. While the vendee's first proffered installment was a week late and was less than the contract called for, the vendee did pay the other installments in full and on time into an escrow held by the district court. *Id.* at 484-86, 227 N.W.2d at 610-11.

218. *Id.* at 486-87, 227 N.W.2d at 612.

219. *See* Neilson v. Leach, 140 Neb. 764, 1 N.W.2d 822 (1942).

220. *See* Menke v. Foote, 199 Neb. 800, 261 N.W.2d 635 (1978); *Kear v. Hausman*, 152 Neb. 512, 41 N.W.2d 850 (1950).

221. *Foster v. Ley*, 32 Neb. 404, 49 N.W. 450 (1891).

222. *Klapka v. Shrauger*, 135 Neb. 354, 281 N.W. 612 (1938); *Shonsey v. Clayton*, 107 Neb. 695, 187 N.W. 113 (1922).

223. *Nigh v. Hickman*, 538 S.W.2d 936 (Mo. App. 1976).

224. *See* *Barker v. Johnson*, 591 P.2d 886 (Wyo. 1979).

225. *See* note 210 & accompanying text *supra* and notes 230-34 & accompanying text *infra*.

The court's recognition of the equity of redemption presents significant problems of time and expense to the vendor who, by signing the contract, anticipates being able to declare a forfeiture upon the vendee's default, regain possession, and resell the property. Even if a vendor is able to regain possession, in the absence of a statute only a court order will cut off an equity of redemption.²²⁶ "In effect, this means that the vendor can be forced to litigate—precisely the thing he hopes to avoid by use of the installment contract."²²⁷ In the contract's early stages, requiring the vendor to provide the vendee a redemption period adversely affects the vendor's interests. However, in later contract stages, the vendee's equity is considerable and should be acknowledged by increasing his time for redemption.²²⁸ The Nebraska Supreme Court has provided no guidance for determining what facts and circumstances will be considered in setting the length of the grace period in which the vendee may exercise his equity of redemption.²²⁹

While the availability of the equity of redemption seems certain, its applicability is unclear. *Patterson v. Mikkelson*,²³⁰ cited as support for the vendee's equity of redemption,²³¹ did not involve a vendee's suit for specific performance. In fact the court recognized that the vendee refused to perform and was seeking merely to cancel the contract and recover the money paid. Nevertheless, the court stated: "[T]he parties are in a court of equity, and we think [the vendee] should be given an opportunity to make deferred payments of principal and accrued interest."²³² The court apparently did not restrict the availability of the equity of redemption to accidentally defaulting vendees.²³³ Thus, while the court seemingly has expanded the equity of redemption's availability, the vendee may find availability dependent on the type of action the vendor files to enforce the contract.²³⁴

226. Nelson & Whitman, *supra* note 38, at 554.

227. *Id.*

228. Comment, *supra* note 38, at 103.

229. While the nine months allowed to a mortgagor seemingly would defeat the vendor's interest in an expedient method for declaring default, the 20 days allowed in *Morgan v. Zoucha* does not seem to be a "reasonable time to avoid the bar of foreclosure."

230. 86 Neb. 512, 125 N.W. 1104 (1910).

231. Cases citing *Patterson* for this proposition include: *Morgan v. Zoucha*, 203 Neb. 119, 122, 277 N.W.2d 564, 566 (1979); *Swanson v. Madson*, 145 Neb. 815, 821, 18 N.W.2d 217, 220 (1945).

232. 86 Neb. at 515, 125 N.W. at 1105.

233. *Cf. Ward v. Union Bond & Trust Co.*, 243 F.2d 476 (9th Cir. 1957) (allowing willfully defaulting vendee's equity of redemption).

234. *See Abbas v. Demont*, 152 Neb. 77, 40 N.W.2d 265 (1949) (equity of redemption denied in an action for ejectment).

C. Restitution

The forfeiture provision in an installment land sale contract contemplates denying the vendee a right to restitution upon his default.²³⁵ "Not infrequently it has been thought sufficient reason for denying restitution that the express terms of the contract made time of the essence and provided that, in case of default, all instalments paid should be 'forfeited' to the vendor or should be 'retained' by him as liquidated damages."²³⁶ This general rule denying recovery of the payments made by the purchaser in default became firmly entrenched in marketing contracts to sell land.²³⁷ The parties to such a contract are likely to have intended the initial payments made by the vendee to represent liquidated damages and not a penalty; therefore, it would not be inequitable to deny restitution.²³⁸ "But when an installment contract is involved, the general rule, denying the purchaser in default recovery of payments made, operates to increase the penalty in inverse proportion to the seriousness of the breach."²³⁹

235. The forfeiture concept is permissible as long as the strict contract approach to installment land contracts is accepted. See Note, *supra* note 35, at 191.

If the vendor can forfeit the purchaser's payments, then obviously the purchaser cannot recover them. But, by the weight of authority, the purchaser in default cannot recover payments made, even though the contract contains no forfeiture clause. Thus, the vendor's right to retain the payments rests, not upon his right to forfeit them, but upon the inability of the purchaser in default to recover them.

Lee, *supra* note 4, at 1.

236. Corbin, *supra* note 63, at 1015.

237. Lee, *supra* note 4, at 2. The Nebraska Supreme Court denied restitution to a defaulting purchaser in *Lowry v. Robinson*, 3 Neb. (Unoff.) 145, 91 N.W. 174 (1902), stating that according to the terms of the contract the parties did not intend or understand that there would be a repayment. The court felt that restitution ought to be refused for the good and sufficient reason that the purchaser is the one guilty of a breach of contract and should never be allowed to have an advantage from his own wrong.

238. *Bando v. Cole*, 197 Neb. 722, 250 N.W.2d 651 (1977); *Patterson v. Murphy*, 41 Neb. 818, 60 N.W. 1 (1894). The vendee is entitled to rescission of the contract and restitution of his payments where: (1) the vendor has made false or fraudulent representations as to the title and quality of the land, *Rushton v. Campbell*, 94 Neb. 141, 142 N.W. 902 (1913), *contra*, *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955) (purchaser delayed in choosing to rescind, held not entitled to rescission); (2) the vendor is unable to perform his obligations under the contract, *Klapka v. Shrauger*, 135 Neb. 354, 281 N.W. 148 (1938); *Miller v. Ruzicha*, 111 Neb. 815, 198 N.W. 148 (1924); *Dent v. Johnson*, 111 Neb. 162, 195 N.W. 938 (1923); or (3) the vendor's questionable conduct has prevented him from performing, *Durland Trust Co. v. Augustyn*, 110 Neb. 800, 195 N.W. 172 (1923).

239. Lee, *supra* note 4, at 1-2. If the vendee contracts to purchase property for a contract price of \$10,000 with \$1,000 down and \$1,000 a year for nine years and if he defaults in the first year, the vendor keeps the \$1,000 and the property. This result is not hard to accept. However, if the vendee pays faithfully for

The Nebraska Supreme Court has decided that where the vendor rescinds the contract after the vendee's default,²⁴⁰ the vendee's entitlement to restitution depends upon whether the parties' contract provides for forfeiture upon default. In *Eaton v. Redick*,²⁴¹ the court held that the vendee's failure to perform his obligations under a contract with no forfeiture clause did not terminate the contract, but gave the vendor the option to adhere to or rescind the contract. The purchasers had made a down payment and had executed notes for the balance but failed to satisfy the notes. The seller, by deciding to sell the property to another person, in effect exercised the rescission option.²⁴² The court held that the vendee should be allowed to recover the amount by which his payment exceeded the vendor's damages.²⁴³

This result was criticized in *Patterson v. Murphy*²⁴⁴ and *Maloy v. Muir*.²⁴⁵ In both cases, unlike *Eaton*, the contracts contained forfeiture clauses. The court in both cases stated that the vendee, by defaulting, had forfeited his rights under the contract and therefore was not entitled to rescission.²⁴⁶ However, *Maloy* is distinguishable from *Eaton* because the vendor had not sold the property and put it out of his power to perform the contract if the vendees made the payment.²⁴⁷ As long as the vendor can perform

eight years and then is late with the ninth and last payment, the vendor has \$9,000 and regains the property which is now most likely worth more than \$10,000, while the vendee has lost his \$9,000 in payments and has only the use of the property for eight years to show for his investment.

240. If the vendor breaches the contract the vendee may use different causes of action to obtain the return of his payments, *e.g.*, breach of contract, restitution.
241. 1 Neb. 305 (1871).
242. *Id.* at 308.
243. *Id.* "When vendor elects to put an end to the contract vendee may recover back the money he paid in part performance with interest from the date of rescission." *Id.* at 308-09.
244. 41 Neb. 818, 60 N.W. 1 (1894).
245. 62 Neb. 80, 86 N.W. 916 (1901).
246. 41 Neb. at 821, 60 N.W. at 2; 62 Neb. at 83, 86 N.W. at 917.
247. *Maloy v. Muir*, 62 Neb. 80, 83, 86 N.W. 916, 917 (1901); *Eaton v. Redick*, 1 Neb. 305, 306 (1871). Hancock said that the rule set out in *Eaton* has never been followed. He stated that the rule adopted in *Maloy* was "that a buyer in default cannot recover his payments from a seller who has rescinded." Hancock, *supra* note 6, at 986. While the *Maloy* court seemingly adopted *Patterson v. Murphy* (that vendee was not entitled to restitution after forfeiture) in rejecting the *Eaton* rule, the facts in *Maloy* were not the same as those in *Eaton*. In *Eaton*, the vendor by selling the property to someone else had terminated the contract. The vendor in *Maloy*, however, still could have performed and the vendee was granted a grace period of 20 days to tender his payment.

the contract the vendee has no right to restitution.²⁴⁸

In *Pester v. Dean*,²⁴⁹ the court made it clear that *Eaton* was still good law. The *Pester* decision discussed the treatment of restitution in the previous cases and concluded that "the decisive point seems to be whether or not the agreement provided for a forfeiture of the advance payment in default of subsequent payments by the purchaser."²⁵⁰

No Nebraska case since 1936, when *Pester* was decided, has interpreted these cases to decide whether restitution is allowable. From these cases it appears that if a forfeiture clause is present, the vendor is not entitled to restitution. This rule is understandable in the marketing contract context as long as the amount denied is reasonable liquidated damages.²⁵¹ The problem comes in installment land contracts where the vendee has paid a substantial amount before he defaults. If the vendor then sells to a third party and receives more than the amount the vendee owed, it is inequitable to permit him to keep the vendee's payments,²⁵² unless the payments were equal to the fair rental value of the property during the vendee's time of possession.

The Nebraska Supreme Court in *Morgan v. Zoucha*²⁵³ considered whether it would be equitable to allow restitution upon the vendee's request. The amount the vendee wanted returned was eleven percent of the contract and the court noted that "the contract clearly provides for its forfeiture in the event of default."²⁵⁴ However, the court then noted that the amount being forfeited compared favorably with the rental value.²⁵⁵ Once the court has determined that forfeiture would be inequitable, restitution is one way to satisfy the parties' interests. The defaulting vendee should be required to show that the amount being retained exceeds the

248. As long as the vendor continues to assert [his right to specific performance and his right as holder of a lien for the purchase price] and to remain ready and willing to make conveyance as agreed, the defaulting vendee has no right of restitution; he cannot recover back money that he has paid if it is money that the vendor could still compel him to pay if as yet unpaid.

Corbin, *supra* note 63, at 1018.

249. 131 Neb. 800, 270 N.W. 112 (1936).

250. *Id.* at 807, 270 N.W. at 116.

251. DOBBS, LAW OF REMEDIES § 12.14 (1973).

252. *Id.*

253. 203 Neb. 119, 277 N.W.2d 564 (1979).

254. *Id.* at 123, 277 N.W.2d at 566.

255. *Id.* The court considered rental value as well as repair expenses paid by the vendee. It can only be assumed that the court's analysis would consider the same factors if the money paid by the vendee and the repair expenses were greater than the benefit derived from possession of the property. It is assumed that if the equities cut the other way the court would have granted restitution.

vendor's damage and thus is unreasonable because it constitutes a windfall to the vendor and a penalty to the vendee.²⁵⁶ As one commentator stated:

Whether the vendor has 'rescinded' for the vendee's breach or not, and whether there is an express provision for forfeiture or not, it is clear that the vendee in default should in no case be given restitution of money paid unless it affirmatively appears that the money so paid is in excess of the injury caused to the vendor by the breach. The vendee sues because he asserts that the retention of the money is unjust enrichment; but there is no injustice if the defendant is retaining no more than the amount of injury caused by the plaintiff's breach. In cases where the plaintiff may have a right of restitution, he should be permitted to show that the defendant's injury is less than the installments paid; but unless he successfully shows this, he should recover nothing.²⁵⁷

The Nebraska Supreme Court has not addressed the issue of whether to allow restitution to the willfully defaulting vendee,²⁵⁸ but the modern approach ignores the defaulter's moral turpitude and instead determines the equities of the situation.²⁵⁹ Because the Nebraska court has recognized the vendee's equity of redemption, it should deny restitution only if one or more of the following grounds exists:

- (1) The defendant [vendor] has not rescinded and remains ready and willing to perform, and still has a right to specific performance by the vendee;
- (2) the plaintiff [vendee] has not shown that the injury caused by his breach is less than the instalments received by the defendant;
- (3) there is an express provision that the money may be retained by the vendor and the facts are such as to make this a genuine provision for liquidated damages, and not one for a penalty or forfeiture.²⁶⁰

D. Waiver

The court is now willing to apply equitable considerations to avoid strict foreclosure when the equities favor the vendee.²⁶¹ Thus, even when the court regards the contract as strictly governing the parties' rights it will try to avoid forfeiture by finding that the vendor has waived performance.²⁶² This enables the court

256. See Note, 35 BROOKLYN L. REV., *supra* note 63, at 87 (citing RESTATEMENT OF CONTRACTS § 357, comment (d) (1932)).

257. Corbin, *supra* note 63, at 1023.

258. Cf. *Freedman v. Rector, Wardens & Vestrymen of St. Matthias Parish*, 37 Cal. 2d 16, 230 P.2d 629 (1951) (allowing restitution to willfully defaulting vendee). California has gone the furthest of any state in upholding the right of the willfully defaulting vendee to receive restitution.

259. McGovern, *Forfeiture, Inequality of Bargaining Power, and the Availability of Credit: An Historical Perspective*, 74 Nw. L. REV. 141, 164 (1979).

260. Corbin, *supra* note 63, at 1032-33.

261. See notes 103-37 & accompanying text *supra*.

262. See *Walker v. Burtless*, 82 Neb. 211, 117 N.W. 349, *vacated*, 82 Neb. 214, 216, 117 N.W. 349 (1908).

to affirm the parties' contract and yet, by finding that the vendor did not perform according to the forfeiture provision, to protect the vendee where enforcement of the forfeiture provision would be inequitable.

The situations which may be deemed a waiver vary. For example, the court may refuse to enforce the forfeiture clause because the vendor has not declared the forfeiture.²⁶³ If the vendor is late with an aspect of his performance, such as providing a marketable title, he will be found to have waived the vendee's performance.²⁶⁴

Waiver of performance under "the time is of the essence" clause typically occurs when a vendor has allowed the vendee to make his payment late. The vendor then is deemed to have waived strict performance under the clause in the future.²⁶⁵ The "time is of the essence" clause can be reinstated with timely "notice to the vendee of the intent to insist on punctuality and allowing a reasonable time for performance."²⁶⁶

VII. CONCLUSION

The lack of case law on the issues involved in providing remedies upon breach of installment land contracts causes uncertainty in this area of Nebraska law. Although many of the principles have been long established, the lack of litigated cases has contributed to the lack of clarity in the application of these principles. Generally the Nebraska Supreme Court has not allowed the forfeiture clause to operate unjustly against the legitimate interests of the vendee. The court has established three criteria in deciding strict foreclosure cases. Thus, if the property's fair market value is greater than the contract price, if the payments the vendee forfeits are greater than the fair rental value of the property, or if the vendee has established significant equity in the land, the court will not decree strict foreclosure of the contract. The vendor will be forced instead to find an alternate remedy which may require judicially foreclosing the contract or providing restitution to the vendee. The exact parameters of the alternate remedies have not been decided.

Currently it is uncertain whether the vendor can determine, by his choice of remedy, whether the above criteria will be applied to

263. *Id.* Time was not of the essence and the vendor never declared the money forfeited. By the terms of the agreement a forfeiture was to be declared. The court held that the forfeiture clause must be construed strictly against the vendor and that she was not entitled to retain the money.

264. *Neilson v. Leach*, 140 Neb. 764, 1 N.W.2d 822 (1942); *Miller v. Ruzicha*, 111 Neb. 815, 198 N.W. 148 (1924); *Adler v. Kohn*, 96 Neb. 346, 147 N.W. 1131 (1914); *Rushton v. Campbell*, 94 Neb. 141, 142 N.W. 902 (1913).

265. *Peckham v. Deans*, 186 Neb. 190, 181 N.W.2d 851 (1970).

266. *Hines*, *supra* note 11, at 490.

a remedy other than strict foreclosure. Apparently if the vendor brings an equitable action the court will engage in the equitable analysis.

Typical installment land contract terms contemplate that the vendor will be restored to possession and retain the payments of the vendee upon the vendee's default. Upon a challenge by the vendee, the courts have provided relief from the harsh effects of the enforcement of the forfeiture provision by the equity of redemption, right to restitution, and right to require a judicial sale. Despite these rights, the installment land contract has continued to be an attractive financing device for vendors because vendees have not asserted their rights. As vendees begin to assert their rights more frequently or legislatures decide to require judicial sales to foreclose the rights, as in the mortgage context, vendors will abandon this financing device.

The Nebraska Supreme Court currently treats installment land contracts as security devices different from mortgages and attempts to fashion equitable solutions upon default. While requiring judicial foreclosure may provide the most equitable remedy, it should not be applied in every default. Installment land contracts should not be equated with mortgages or vendors will be even less willing than they are now to take the risks inherent in this financing device. However, if the courts can balance the interests of both the vendor and vendee by protecting the vendor's interest early in the contract period and the vendee's interest after he has made a significant investment in the property, the installment land contract can continue as a financing option.

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