University of Miami Law Review

Volume 20 | Number 1 Article 3

10-1-1965

Defaulting Purchaser's Right to Restitution Under the Installment Land Contract

Richard H. Lee

UNIVERSITY OF MIAMI LAW REVIEW

VOLUME 20 FALL, 1965 NUMBER 1

DEFAULTING PURCHASER'S RIGHT TO RESTITUTION UNDER THE INSTALLMENT LAND CONTRACT

RICHARD H. LEE*

This is the third in a series of three articles dealing with certain aspects of the installment land contract. The first article[1] dealt with the nature of the contracting parties' interests, primarily with the effect of equitable conversion. The second[2] considered the remedies available to the parties in the event of breach. This final article deals with a defaulting purchaser's right of restitution and proposes a statutory solution to the problems raised by forfeiture.

I. INTRODUCTION

Whatever right a purchaser in default has to recover payments made upon an installment land contract would seem to be the obverse of the right of the vendor to declare a forfeiture. 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.[3] 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.[4] When the purchaser's payment is in the nature of earnest money, there need be no objection to the vendor retaining this money upon the purchaser's breach. That is what the parties intended, and even though it bears no relation to any provable damage to the vendor, it is not so inequitable as to shock the conscience of most courts, and even though it is a penalty, it is usually a reasonable one.[5]

But when an installment land contract is involved, the general rule,

* Professor of Law, University of Miami.

1. 19 U. MIAMI. L. REV. 361 (1965).
2. 19 U. MIAMI L. REV. 550 (1965).
3. Lawrence v. Miller, 86 N.Y. 131 (1881).
4. See Cody v. Wiltse, 130 Iowa 139, 106 N.W. 510 (1906).
5. *But see* Federal Land Bank v. Bridgeforth, 233 Ala. 679, 173 So. 66 (1937), where a 500.00 dollar deposit on a purchase price of 8,000.00 dollars was returned to the purchaser on the ground that it was a penalty.

denying the purchaser in default recovery of payments made, operates to increase the penalty in inverse proportion to the seriousness of the breach. The result could well be shocking. Had a purchase money mortgage been used as the security device instead of an installment land contract, equity would allow the vendor-mortgagee only the balance due on the purchase price. Foreclosure by sale would adequately protect the rights of the purchaser-mortgagor. While some courts have applied general principles of equity to the installment land contract and reached results similar to what might have obtained had there been a mortgage,[6] the same jurisdiction may apply the general rule with sufficient frequency to make the application of equity uncertain to say the least.[7]

The problem is the same whether it arises in a suit by the vendor for strict foreclosure or to quiet title or, more directly, in a suit by the purchaser in default to recover his payments. Is the defaulting purchaser entitled to recover payments made which exceed the damage caused by his breach? The general rule is that he may not. And yet, judicial attitudes towards forfeiture, and, in a few states, legislative attitudes as well, have operated to minimize injustice fairly well. 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.

II. The Majority Rule

At the outset it is well to observe that many of the cases where the general rule is most ruthlessly stated are cases involving forfeiture of earnest money only.[8] These cases are not strong precedents for the extension of the general rule to installment land contracts because earnest money rarely exceeds ten percent of the purchase price and thus the forfeiture is slight. Also, there is nothing shocking in the forfeiture of earnest money because that was the very purpose for which it was paid. It was intended to be forfeited should the purchaser default. This is so not merely because the contract provides for its forfeiture, for that would include forfeiture of all payments, but because it is the common understanding of the parties that earnest money, or a binder as it is sometimes called, is paid to evidence the purchaser's sincerity and that he intends to forfeit it if he does not perform.[9]

When the earnest money cases are eliminated, outright forfeiture is comparatively rare. Even in jurisdictions which adhere to the majority rule allowing forfeiture, equity can prevent this result if it would be manifestly inequitable.[10] The general rule is also frequently avoided in

6. Walker v. Nunnenkamp, 84 Idaho 485, 373 P.2d 559 (1962).
7. Williamson v. Wilson, 56 Idaho 198, 52 P.2d 138 (1935).
8. Beatty v. Flannery, 49 So.2d 81 (Fla. 1950).
9. Schwartz v. Syver, 264 Wis. 526, 59 N.W.2d (1953).
10. Haas v. Crisp Realty Co., 65 So.2d 765 (Fla. 1953).

many states which purport to follow it by a finding that the vendor acquiesced in the purchaser's breach and thus rescinded the contract, allowing the court to order restoration of payments made.[11] A small minority of jurisdictions have renounced the general rule and have taken a position firmly opposed to forfeiture.[12] We shall consider first the factors whereby those courts purporting to follow the majority rule are able to avoid its harsh application.

Faced squarely with the situation where a purchaser is in default and is unable to cure that default, and the vendor not only is not in default, but also stands ready to perform, a court which purports to adhere to the majority position would be hard put to find some excuse to allow the purchaser to recover the excess of his payments over the damage caused by his breach.

But how often is this the case? After the purchaser's continued default there will come a time when the vendor will want to be relieved of his obligation to perform. He may wish to sell to a third person or he may wish to keep the land for his own use. In any event he will have abandoned all thought of performing himself. Can he do this and still retain the purchaser's payments? The majority rule says that he can. But his change of attitude as to his own performance opens avenues of escape from the strict rule of forfeiture should the court desire to make use of them.

A forthright escape from unjust forfeiture is to restrict the application of the majority rule to cases where it works an equitable result. This would permit forfeiture of earnest money[13] and yet would prevent a forfeiture under circumstances that shock the conscience of the court.[14] Unfortunately, unless such a judicial policy is clearly articulated and extended to every area of forfeiture, confusion will be the result. In Florida, where the supreme court has intimated that it has adopted this policy,[15] uncertainty exists as to how great the forfeiture must be before it becomes unenforceable. Apparently forfeiture without judicial intervention is still permitted in Florida.[16] A decision denying forfeiture upon general principles of equity without expressly disavowing the majority rule is apt to be an anomaly.[17]

---

11. *E.g.*, Bohlin v. Jorgensen, 341 Ill. App. 281, 93 N.E.2d 89 (1950).

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

13. Beatty v. Flannery, *supra* note 8.

14. Haas v. Crisp Realty Co., *supra* note 10.

15. *Ibid.*

16. Huguley v. Hall, 141 So.2d 595 (Fla. 1st Dist. 1962), *cert. denied,* 157 So.2d 417 (Fla. 1963).

17. See Ruhl v. Johnson, 154 Neb. 810, 49 N.W.2d 687 (1951). *But see* Abbas v. Demont, 152 Neb. 77, 40 N.W.2d 265 (1949). See also Dooley v. Stillson, 46 R.I. 332, 128 Atl. 217 (1925). *But see* Seekins v. King, 66 R.I. 105, 17 A.2d 869 (1941).

Less forthright, but perhaps more convenient, is a finding by the court that the vendor, who now no longer desires to perform himself, has accepted the purchaser's breach and thus has rescinded the contract. If he has "rescinded" he is obligated to restore the purchaser's payments. But what activity by the vendor will convert a breach by the purchaser into a rescission? Merely resuming possession of the property will not be sufficient if the vendor does no other act inconsistent with the existence of the contract. In *Power v. North*,[18] the purchaser sought to recover his initial payment of 333.33 dollars on a total price of 1,000.00 dollars. The purchaser was clearly in default. The contract contained a provision for rescission in the event that the purchaser failed to perform, but the court held that this provision was for the exclusive use of the vendor and that even he could only exercise it before payment of any part of the purchase price; otherwise he might be able to forfeit the purchaser's payments when "but a shilling remained unpaid." This would indicate that the court was aware of the injustice of forfeiture. However, the purchaser was unsuccessful in his suit for restitution because the contract was considered to be in full force and effect. The action of the vendor in quietly resuming possession was deemed not inconsistent with this result and the court further stated that had the vendor resorted to ejectment, this act still would not have amounted to a rescission.[19] This decision leaves the vendor in a somewhat difficult position. The implication is that once he treats the contract as not binding upon him he will be deemed to have rescinded and will be obligated to make restitution. If he does not rescind, his offer remains open to the purchaser who thus has what amounts to an equity of redemption unlimited in duration.

This problem would be solved to the satisfaction of the vendor if he could somehow forfeit the contract rights of the purchaser. Foreclosure by sale would dispose of the purchaser's right to purchase, but it would not allow the vendor to keep the land and the payments as well. Strict foreclosure would be more to the vendor's liking although there would always be the possibility that the purchaser might cure his default. The ideal solution would be to make time of the essence and to provide for forfeiture of all the purchaser's payments upon a breach. But would the courts permit it? Most would. In fact, the majority rule goes even further and purports to deny restitution to the purchaser in default where there is no forfeiture clause.[20] The requirement implicit in *Power v. North*, that the vendor keep the contract alive in order to resist the purchaser's claim to restitution, has been reduced to a requirement that the vendor must not be in default at the time he elects to abandon performance himself.[21]

18. 15 S. & R. 12 (Pa. 1826).
19. *Id.* at 15.
20. Beatty v. Flannery, 49 So.2d 81 (Fla. 1950) (forfeiture provision invalid).
21. Glenn v. Price, 337 Ill. App. 637, 86 N.E.2d 542 (1949).

Nonetheless, the vendor must act with care or a court may find that he has rescinded or that he is in default himself. A mere default on the part of the purchaser does not work a forfeiture of his rights even when there is a forfeiture clause unless the vendor elects to forfeit. Even if the forfeiture clause were self-operating, it would seem that it was for the vendor's benefit and that he could waive it. Therefore, a proper election must be made to terminate the purchaser's rights or the purchaser may still compel the vendor to perform the contract.[22] If the vendor wrongfully attempts to forfeit the purchaser's interest this puts the vendor in default and the purchaser may recover his purchase money.[23] Also, a resale by the vendor, after the purchaser's default but without any notice of forfeiture having been given, has been held to entitle the purchaser to a refund of his payments.[24]

The absence of a forfeiture clause generally should not prevent a vendor from declaring a forfeiture. Even if time is not made of the essence by the contract, the vendor may make it so by giving reasonable notice. And if the purchaser persists in his default the vendor may forfeit the payments already made even though the forfeiture clause is non-existent or invalid as a penalty.[25] But the vendor must be extremely careful not to waive the time clause or the forfeiture provision. Mere inactivity by the vendor upon the purchaser's breach may be enough to constitute a waiver.[26]

The lack of a forfeiture clause has been given weight in permitting the purchaser in default to recover.[27] In *Howard v. Stillwagon*,[28] the Pennsylvania Supreme Court found a rescission where the vendor, under a contract lacking a forfeiture clause, brought ejectment. The purchaser in default was allowed restitution of his payments. However, in a recent Pennsylvania case, *Kaufman Hotel & Rest. Co. v. Thomas*,[29] where the contract apparently did not provide for forfeiture, the same court refused to allow recovery of installments paid by the purchasers in default despite the fact that the vendors had ejected them. This lack of consistency is not unusual in jurisdictions purporting to follow the general rule. Hard cases are said to make bad law; in this instance they merely make confusion.

In some jurisdictions which adhere to the majority rule, if the court can be induced to dwell upon the penal nature of the forfeiture provision, the very existence of a forfeiture clause may be an aid to the purchaser

22. County of Lincoln v. Fischer, 216 Ore. 421, 339 P.2d 1084 (1959).
23. Bean v. Hallett, 40 Wash. 2d 70, 240 P.2d 931 (1952).
24. Thompson v. Lincoln Nat'l Life Ins. Co., 110 Mont. 521, 105 P.2d 683 (1940).
25. Beatty v. Flannery, *supra* note 20.
26. County of Lincoln v. Fischer, *supra* note 22.
27. Pierce v. Staub, 78 Conn. 459, 62 Atl. 760 (1906).
28. 232 Pa. 625, 81 Atl. 807 (1911).
29. 411 Pa. 87, 190 A.2d 434 (1963).

in default in recovering his payments. In *Biddle v. Biddle*,[30] a case from Michigan, a state which clearly adopts the majority position denying restitution,[31] the court held that the forfeiture of 15,000.00 dollars was so out of the range of actual damages as to render the forfeiture clause void. For this reason the purchaser was enabled to recover the 15,000.00 dollar down payment, made on a total price of 300,000.00 dollars, despite the default. The size of the deposit and the fact that the purchaser was insolvent, thus leaving the general creditors to bear the loss, undoubtedly influenced the decision.

A recent federal case, decided upon principles of Oregon law indicates that the size of the amount forfeited is not necessarily controlling. The contract in *Tovrea v. Alderman*,[32] provided that in the event of the purchaser's default he should forfeit his 50,000.00 dollar deposit and should be further liable for actual damage not exceeding 200,000.00 dollars. In the suit to recover the deposit it was held that in view of the fact that the contract remedy precluded the vendor from specific performance, he need give no notice before declaring a forfeit and might repudiate the contract and retain the deposit. In justifying forfeiture, the size of the forfeit was referred to as less than two percent of the purchase price. Size in percentages is frequently less impressive than the same size expressed in dollars, but, inasmuch as in both *Tovrea* and *Biddle* the percentage was far below the customary ten percent deposit, the cases are difficult to reconcile.

Illustrative of the difficulty in determining the defaulting purchaser's right to refund is another recent case based upon Oregon law. In *Morrison v. Kandler*,[33] both parties were advised by competent attorneys at all phases of their dispute; the case was argued and submitted and one year later was reargued and resubmitted. The final judgment denying restitution was dissented from by the Chief Justice and one other judge. This case concerned the sale of a farm for 51,500.00 dollars payable in installments, wherein the purchaser had made payments totaling 19,735.00 dollars. The suit was brought by the vendors for strict foreclosure; the purchasers counterclaimed for rescission and restitution. Prior to bringing suit, the vendors attempted to retake possession of the property because of certain minor breaches by the purchasers. The purchaser's children resisted the ousting, whereupon the vendor brought the suit to foreclose. The purchasers then cured their defaults, and on the advice of counsel declared a rescission and demanded the return of their money. The vendor reluctantly reassumed possession but did not discontinue his suit, and it was then that the purchasers filed their counter-

30. 202 Mich. 160, 168 N.W. 92 (1918).
31. Henry v. Rouse, 345 Mich. 86, 75 N.W.2d 836 (1956); Nelson v. Hacker, 278 Mich. 383, 270 N.W. 720 (1936); Crenshaw v. Granet, 237 Mich. 367, 211 N.W. 636 (1927).
32. 211 F. Supp. 865 (D. Ore. 1962).
33. 215 Ore. 489, 334 P.2d 459 (1958).

claim. The court, commenting that the purchasers were relying upon the well-established rule that where a vendor wrongfully attempts to forfeit the purchaser may rescind, held that the vendors did not give proper notice to effect a forfeiture and that the purchasers, by ignoring the attempted ouster, by curing their defaults and by remaining in possession, did not accept the ouster as a forfeiture. Furthermore, the suit for strict foreclosure was a nullification of the defective forfeiture and extinguished the purchaser's right to rescind if, in fact, any such right existed. Thus, the court held that when the purchasers attempted to rescind after the commencement of the suit, they did so at their peril. At this point, the court stated that the vendors were not in default, that the purchasers had no right to rescind and that by resuming possession and selling certain personal property which was covered by the contract the vendors had not disabled themselves from performing. The court allowed a strict foreclosure after giving the purchasers six months to redeem.

It is apparent that the so-called majority rule can be so harsh in its application that few, if any, jurisdictions adhering to it are prepared to apply it as a rule of law. Its avoidance has resulted in strained interpretations of the facts and a lack of uniformity in the decisions.[34] It is, in fact, not so much a rule as it is a convenience in those cases where restitution would be unjust to the vendor and an obstacle where the equities are the other way.

III. Minority Positions

Three states are considered as having a firm rule against forfeiture: California, Connecticut, and Utah.[35] Of these three, California, since *Freedman v. Rector, Wardens & Vestrymen of St. Matthias Parish*,[36] is probably the most securely on the side of restitution. Maryland has enacted a statute[37] designed to prevent forfeitures in certain cases and various other states have, from time to time, balked at applying the general rule when the result would be too inequitable.[38]

A. *California Law*

California is particularly interesting in that at one time it adhered to so harsh a concept of forfeiture, one so clearly stated that its eventual overturn was almost inevitable. In 1898, the Supreme Court of California, in *Glock v. Howard & Wilson Colony Co.*,[39] undertook an extended examination of the rights of a purchaser in default for the purpose of clarifying the law. In *Glock* the purchaser, under a typical

34. See Malmberg v. Baugh, 62 Utah 331, 218 Pac. 975 (1923).
35. Annot., 31 A.L.R.2d 8, 19 (1953).
36. 37 Cal. 2d 16, 230 P.2d 629 (1951).
37. Md. Code Ann. art. 21, §§ 110-116 (1964).
38. *E.g.*, Biddle v. Biddle, 202 Mich. 160, 168 N.W. 92 (1918).
39. 123 Cal. 1, 55 Pac. 713 (1898).

installment land contract, was suing for restitution of payments made. The contract provided for the sale of land for a total price of 625.00 dollars, payable in installments of 125.00 each year. The vendor remained in possession and for an additional 375.00 dollars agreed to plant fruit trees and cultivate them; this sum was also payable in installments. In addition, the contract called upon the purchaser to pay all taxes, made full performance by the purchaser a condition precedent to delivery of a deed by the vendor, made time of the essence, and provided that if the purchaser failed to perform, the vendor was released from all further obligation and might retain payments made as liquidated damages. The purchaser paid a total of 382.50 dollars, the first two installments. Thereafter, he did nothing for some three years. But, six months after the date when all the payments should have been paid, the purchaser tendered 1,000.00 dollars, the total amount due, and demanded a deed, or, in the alternative, a return of payments. Upon the vendor's refusal, the purchaser brought suit.

The court listed what it believed to be the pertinent provisions of the California Code. They were: section 3306, setting forth the English rule of damages for a breach by the vendor; section 3307, providing for damages for loss of bargain in the event of the purchaser's breach; sections 1670 and 1671, limiting liquidated damages to cases where actual damage would be extremely difficult to prove; section 3384, providing for specific performance; section 3387, setting forth the presumption that damages for breach of a contract to sell land were inadequate; and section 3389, which provided that a contract which was specifically enforceable was not rendered otherwise by a provision for liquidated damages or a penalty.[40]

Not mentioned by the court were two other provisions of the California Code which seem particularly pertinent. They were:

> Section 3275- Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, excepting in case of a grossly negligent, willful, or fraudulent breach of duty.[41]
> Section 3369.1- Relief not granted to enforce penalty, forfeiture or penal law: 1. Neither specific nor preventive relief can be granted to enforce a penalty or a forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition.[42]

After discussing the remedies of vendor and purchaser in general, the court proceeded to uphold liquidated damage clauses generally in

40. *Id.* at 5-6, 55 Pac. at 714.
41. CAL. CIVIL CODE § 3275.
42. CAL. CIVIL CODE § 3369.1.

land contracts on the ground that, just as specific performance lay because of the inadequacy of damages, land contracts were within the exception of section 1671 as damages were extremely difficult to prove. However, the court went further and said, "if it be said that the clause for stipulated damages is void, still the vendor is entitled to retain the money."[43] The only occasion on which the purchaser was deemed entitled to a return of his payments was in the event that the vendor agreed to a mutual rescission and abandonment of the contract. The action of the vendor in the particular case in merely retaining the land as well as the payments was held not to constitute a rescission, but rather to be an affirmance of the contract. The court relied upon the contract provision making full payment by the purchaser a condition precedent to any obligation by the vendor and held that this relieved the vendor of any duty to make a declaration of forfeiture. Needless to say, the lower court holding, allowing the purchaser restitution, was reversed.

Faced with so harsh a rule, so explicitly set forth, the California courts soon began to adopt the ameliorating devices necessary to undercut the rule but without destroying it. Waiver,[44] estoppel,[45] mistake[46] and the distinction between conditions precedent and subsequent[47] were all used to achieve substantial justice within the rule set forth by *Glock*.[48] During this period, the court recognized the existence of code section 3275, but it was not prepared to make use of it to the fullest extent.[49] It was not until 1949, that the California Supreme Court dispensed with the rule of the *Glock* case and in three decisions over the next two years placed California squarely against forfeiture and on the side of restitution at the suit of a defaulting purchaser.

Barkis v. Scott[50] was a suit by a vendor to quiet title against a purchaser who had made substantial improvements to the property and who, after having made fifty-seven payments on time, issued two monthly installment checks which were dishonored for insufficient funds. The purchaser immediately tried to cure his default upon notice of the forfeiture, but the vendor was adamant. Pointing out that a purchaser who is seeking to keep the contract alive is in a better position to secure relief than one who is seeking to recover his payments, the court found that the default was not grossly negligent, willful, or a fraudulent breach of duty and that thus it was covered by section 3275. This finding was contrary to that of the trial court which had found a willful and grossly

43. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 2, 55 Pac. 713, 714 (1898).
44. Boone v. Templeman, 158 Cal. 290, 110 Pac. 947 (1910).
45. McDonald v. Kingsbury, 16 Cal. App. 244, 116 Pac. 380 (1911).
46. Troughton v. Eakle, 58 Cal. App. 161, 208 Pac. 161 (1922).
47. Ebbert v. Mercantile Trust Co., 213 Cal. 496, 2 P.2d 776 (1931).
48. For a detailed discussion of this development see Howe, *Forfeitures in Land Contracts*, CURRENT TRENDS IN STATE LEGISLATION, 1953-1954, 417, 457-465 (1955).
49. McDonald v. Kingsbury, *supra* note 145.
50. 34 Cal. 2d 116, 208 P.2d 367 (1949).

negligent breach of duty. *Glock* was distinguished, but not overruled, on the ground that in *Glock* the purchaser could not qualify for relief under section 3275 because of the nature of his default.

In *Baffa v. Johnson*,[51] the defaulting purchaser sought to recover a 5,000.00 dollar down payment made under a contract to purchase a motel for 93,000.00 dollars. The purchaser was in willful default and had abandoned the contract. He thus would not have been entitled to relief under section 3275. However, he argued that inasmuch as section 3369 provides that "neither specific nor preventive relief can be granted to enforce a penalty or forteiture in any case"[52] he should be entitled to recover despite the nature of his default. The court found it unnecessary to deal with this argument on the ground that, in any event, the purchaser had failed to prove that the vendor's damages occasioned by the breach were less than the amount of the down payment. Thus, although denying restitution, the court left open the question of the applicability of section 3369 to a case where the money paid was proved to be in excess of the damage suffered.

Finally, in *Freedman v. Rector, Wardens & Vestrymen of St. Matthias Parish*,[53] the question left open in *Baffa* was answered. In this case the purchaser sought specific performance of a contract to purchase land for 18,000.00 dollars upon which he had made a deposit of 2,000.00 dollars. The contract provided for a clear title subject, however, to covenants, conditions, restrictions, reservations, rights, rights of way and easements of record. At the time when the purchaser was called upon to make further performance, he was informed that there was an existing easement held by the water department across the rear five feet of one of the lots. The purchaser thereupon wrote to the vendor repudiating the contract and demanding his money back. The vendor did not pay back the money, but proceeded to sell the property to another purchaser for 20,000.00 dollars, 2,000.00 dollars more than the plaintiff's contract called for. The plaintiff did offer to go through with the purchase prior to the vendor's resale, but only upon condition that the existing easement be abandoned. The court held that the plaintiff's repudiation of the contract was a total breach and that it was not withdrawn until after the vendor had acted upon it by selling to a third party. The plaintiff's offer to comply upon condition of removal of the easement was held to be a counter offer and not a timely withdrawal of the repudiation. Hence, specific performance was denied.

However, the court then proceeded to consider the question of restitution, the question raised, but unanswered, by *Baffa*. Pointing out that because of the willful nature of the default the purchaser would not be

51. 35 Cal. 2d 36, 216 P.2d 13 (1950).
52. CAL. CIV. CODE § 3369.
53. 37 Cal. 2d 16, 230 P.2d 629 (1951).

entitled to relief under section 3275, as applied in *Barkis* and reiterated in *Baffa*, the court nonetheless allowed restitution of the excess of the down payment over the damage caused by the breach. In arriving at this conclusion, the court observed that any other result would be inconsistent with section 3294 which restricts exemplary damages to actions other than upon a contract, and with sections 1670 and 1671 which limit liquidated damages to cases where the damages would be difficult to ascertain. In this case the action arose from contract, and in view of the second sale, it was obvious, so the court held, that no damage was occasioned by the breach. The court further stated that unless restitution were allowed, the anomolous situation would arise wherein a vendor seeking to quiet title would be compelled to make restitution under section 3369, but a purchaser seeking restitution by direct action would be unable to obtain it. Thus, upon identical fact situations, the rights of the parties would turn upon the chance of which party first sought the aid of a court. Allowing the vendor 900.00 dollars paid by him as a broker's commission on the first sale, the court compelled him to repay to the defaulting purchaser the remaining 1,100.00 dollars of the purchaser's deposit. *Glock* was still not disapproved, but distinguished upon the same ground that it had been distinguished in *Barkis*, namely that there the purchaser was unable to prove that the vendor's retention of the payments would result in the imposition of punitive damages.

Freedman, left open but one avenue whereby a vendor might retain a deposit. If the deposit were in fact intended as liquidated damages, and if there had been no subsequent sale and if "it would be impracticable or extremely difficult to fix actual damage,"[54] then a retention of the deposit is presumptively valid.[55] In view of the fact that in *Freedman* the degree of difficulty in ascertaining actual damage was determined not at the time of the making of the contract, but rather was established upon the subsequent sale, it would seem that in any case the purchaser in default could offer evidence of value despite the lack of a subsequent sale and thus stand a good chance of proving that actual damage could be fixed. But the question is still open. In the recent case of *Caplan v. Schroeder*,[56] Justice Traynor, who wrote the majority opinion in *Freedman* again spoke for the majority and, while allowing restitution to the defaulting purchaser, commented at length on the failure of the vendor to attempt to sustain his retention of the payment as a liquidated damage.

California today has reached a position diametrically opposed to that taken in *Glock*. It has done so in characteristic judicial fashion by distinguishing and redefining previous positions. It has relied heavily upon statutes, but the statutes were there from the beginning. The result

54. CAL. CIV. CODE § 1671.

55. Freedman v. Rector, Wardens & Vestrymen of St. Matthias Parish, 37 Cal. 2d 16, 23, 230 P.2d 629, 633 (1951).

56. 56 Cal. 2d 515, 364 P.2d 321 (1961).

of this reform has been to strip the vendor of his most potent weapon, forfeiture. It has been suggested, however, that the advantage gained by the purchaser has not been commensurate with the restriction placed on the vendor.[57] Professor Hetland, in commenting on the effect of the decisions upon this aspect of the vendor-purchaser relationship, has said, "Except as misused, the installment land contract is an obsolete security device in California."[58]

The positions of Connecticut and Utah are also considered as being firmly against forfeiture but are not so clear as that of California.[59]

B. *Connecticut Law*

The installment land contract is apparently rarely used in Connecticut. It has been suggested that the case of *Pierce v. Staub*,[60] places Connecticut firmly against forfeiture.[61] It was the only Connecticut case cited by Corbin in his much cited article "The Right of a Defaulting Vendee to the Restitution of Installments Paid."[62] An examination of Shepard's *Atlantic and Connecticut Citations* and the cases listed therein indicates that *Pierce* has been cited but once in a case involving real property and that did not concern an installment land contract. Connecticut apparently treats forfeitures arising from land contracts in the same fashion that it treats forfeitures generally, not differentiating between sales of goods and sales of land.

Pierce v. Staub, was a suit by the administrator of a deceased purchaser to recover payments made by the purhaser upon an installment land contract. The contract was for the sale of both real and personal property for a total price of 150,000.00 dollars; it contained no forfeiture clause. The purchaser had paid 60,000.00 dollars towards the purchase price at the time of his death and until the last was endeavoring to pay the balance. The vendor granted several extensions of time, but finally gave notice that unless payment was made by a named date he would consider the property as divested of all interest which the purchaser might have. Even after the purchaser's death, the vendor informed his widow that if payment of the balance due was made within thirty days he would convey the property to the purchaser's heirs. No payment was even tendered. The vendor eventually resold the property to a third party. The court in allowing restitution to the purchaser's estate treated the vendor's resale as equivalent to a formal and mutual rescission. Inasmuch as the vendor made no claim to damages for the breach, the court allowed restitution of the entire amount of the payments. It was

57. Hetland, *Land Contracts*, CALIFORNIA LAND SECURITY & DEVELOPMENT, § 2.20 (1960).
58. *Ibid.*
59. *Supra* note 35.
60. 78 Conn. 459, 62 Atl. 760 (1906), cited in 31 A.L.R.2d 8, 19, n.30 (1953).
61. *Supra* note 35.
62. 40 YALE L.J. 1013 (1931).

suggested that the vendor, instead of deciding for himself to work a forfeiture, should have brought the purchaser into court to have their respective rights adjusted.[63]

The *Pierce* case is even more favorable to the purchaser than are the present California decisions. *Baffa v. Johnson*[64] placed the burden upon the defaulting purchaser to prove that the vendor's damages did not exceed the amount of the payments, but *Pierce* would require affirmative action by the vendor to prove his own damage. However, the cases are distinguishable as the *Pierce* contract had no forfeiture or liquidated damage clause, and the payment in *Pierce* was over one third of the price, whereas in *Baffa* it was less than one eighteenth. The court in *Pierce* commented upon the lack of a forfeiture clause[65] but apparently did not base its decision upon it. The Connecticut court cited and relied upon an old Connecticut case, *Hickock v. Hoyt*,[66] which allowed restitution to a purchaser in default because the seller had failed to prove that he had been damaged by the breach. However, *Hickock* was concerned with the sale of wine, not land.

Shortly after the *Pierce* case, a purchaser of an automobile relied upon *Pierce* as a defense to a suit upon a check given in part payment. In *American Auto. Co. v. Perkins*,[67] the Supreme Court of Errors of Connecticut refused to allow the defense despite the fact that the seller apparently was not damaged at all by the purchaser's breach. The court explained the *Pierce* case as allowing restitution only where the seller refused to perform or had disabled himself from performing by a subsequent sale. In this case the seller of the automobile had made no tender of the car but apparently could still deliver if the buyer demanded. The contract price of the car was 4,045.00 dollars upon which the buyer had given his check for 500.00 dollars. The court did not consider how long the seller must remain ready to perform. The effect of the decision was to leave the buyer with the alernative of specifically performing his contract by paying 3,545.00 dollars more, or having his 500.00 dollars forfeited. As thus explained, the Connecticut rule is less favorable to the purchaser in default than is California's where the purchaser is entitled to a return of his deposit in any case where the vendor can be shown to have suffered no damage.[68]

However, in *Remington Arms Union Metallic Cartridge Co. v. Gaynor Mfg. Co.*,[69] the Supreme Court of Errors of Connecticut relied heavily upon *Pierce v. Staub*, in allowing restitution to a defaulting buyer

63. 78 Conn. 459, 466, 62 Atl. 760, 763 (1906).
64. *Supra* note 51.
65. 78 Conn. 459, 466, 62 Atl. 760, 763 (1906).
66. 33 Conn. 553 (1866).
67. 83 Conn. 520, 77 Atl. 954 (1910).
68. Freedman v. Rector, *supra* note 55.
69. 98 Conn. 721, 120 Atl. 572 (1923).

of bullets. Presumably a seller of bullets would be able to fill an order so long as he remained in business, but the court found that the seller had treated the contract as at an end and therefore had rescinded and could not keep the payments made. The case seems indistinguishable from, and in conflict with, *American Auto. Co.*[70]

In *Segal v. Mooney*,[71] a Connecticut common pleas court finally had the opportunity to apply *Pierce v. Staub* to a land contract. The purchasers had paid 500.00 dollars down on a contract to buy land for 24,000.00 dollars and later changed their minds. They brought suit for restitution relying solely upon *Pierce v. Staub*. The vendor who had since sold the property, filed no counterclaim for damages but merely alleged generally that he had been damaged more than the amount of the deposit. The purchasers argued that under *Pierce v. Staub*, the sale worked a mutual rescission and that they were entitled to restitution. The court, after distinguishing *Pierce v. Staub*, on the broad equities, said, "It would seem to be unjust and inequitable to invoke the fiction of a mutual rescission even on the conceded facts."[72] The court justified the vendor's subsequent sale of the property on the ground that it would have been in vain for him to have kept the land in view of the purchaser's refusal to perform. Thus, the act of disabling himself from performing does not give rise to a rescission, and Connecticut would seem to be back where it started from before *Pierce v. Staub*, relying upon the general equities of each particular case, allowing forfeiture in some cases and denying it in others. This is an eminently equitable solution, but one which invites litigation. The result is that in any given case an attorney, being unable to determine his client's rights under an installment land contract, would deem it prudent to make use of some other form of security for the purchase price of land. This may account for the infrequent appearance of the installment land contract in the Connecticut decisions.

C. *Utah Law*

Because of the strong language condemning forfeiture in the leading case of *Malmberg v. Baugh*,[73] Utah is frequently considered as belonging to the minority of jurisdictions which favor restitution and do not permit forfeiture. The *Malmberg* case was quoted from and heavily relied upon by the California Supreme Court in *Freedman*.[74] But despite this case, the Utah decisions seem rather to place Utah with those states which follow the majority rule, but openly disregard it when the equities of the case are such that forfeiture would be shocking to the conscience of the court.[75]

70. *Supra* note 67.
71. 15 Conn. Supp. 41 (C.P. New Haven 1947).
72. *Id.* at 45.
73. 62 Utah 331, 218 Pac. 975 (1923).
74. 37 Cal. 2d 16, 20-21, 230 P.2d 629, 632 (1951).
75. *E.g.*, Haas v. Crisp Realty Co., 65 So.2d 765 (Fla. 1953).

Malmberg was a suit by a vendor to recover the rental value of the premises contracted to be sold for the period after default and service of notice to vacate until the purchaser finally moved out, approximately six months. The purchasers' answer alleged that they were induced to enter the contract by the vendor's fraud, sought affirmative relief to rescind the contract for fraud, and demanded a return of payments made in excess of the rental value of the property. This was a case of first instance in Utah, and the court, after castigating the majority rule as unconscionable, allowed restitution upon the terms demanded by the purchaser. The contract in the *Malmberg* case contained no provision for forfeiture or for liquidated damages. The purchaser had paid almost half of the purchase price at the time of the default, and that, coupled with the circumstance that the vendor was the moving party, would be enough not to make the result exceptional in many jurisdictions following the majority rule.[76] Nonetheless, the reasoning of the opinion in *Malmberg* indicates stern disapproval of forfeiture and recognizes the great potential for injustice existing in the majority rule. The court stated:

> The vital question to be determined is: What is the correct measure of damages in a case of this kind? Shall we apply the rule of compensatory damages, or is it a case in which punitive damages should be allowed? Upon what principle can punitive damages or damages in excess of compensation for the injury done be justified in the case at bar? These are questions that appeal both to the judgment and conscience of the court.[77]
>
> The rule contended for by respondent, carried to its logical sequence, would forfeit every dollar paid by appellant and still leave respondent in possession of the land even if appellants had paid the last installment but one, and then defaulted. In answer to this, it may be said that such is not the case at bar. But where are we going to draw the line?[78]

However, in 1942, the same court, in *Christy v. Guild*,[79] cast some doubt upon the strength of this resolution. *Christy v. Guild* was an unlawful detainer action brought by the vender who had declared a forfeiture under the terms of the contract. The purchase price was 3,200.00 dollars payable in monthly installments. The purchaser, in his answer, alleged that he had paid forty-nine installments totalling 1,645.67 dollars and in addition had made improvements costing 2,000.00 dollars and, on appeal, questioned the propriety of the lower court's affirmation of the forfeiture and summary removal without a consideration of the equities. The purchaser also contended that the clause in

76. *Cf.* Haynes v. Dunstan, 104 S.W.2d 1025 (Mo. App. 1937); Howard v. Stillwagon, 232 Pa. 625, 81 Atl. 807 (1911).

77. Malmberg v. Baugh, 62 Utah 331, 340, 218 Pac. 975, 978 (1923).

78. *Id.* at 345, 218 Pac. at 980.

79. 101 Utah 313, 121 P.2d 401 (1942).

the contract providing for forfeiture of payments made as liquidated damages was, in fact, a penalty provision and hence void. In response to the purchaser's arguments the court stated:

> Assuming that such an issue [consideration of the equities] may properly be raised in an action such as this, we must conclude that the forfeiture provision of the contract is just what it purports to be and not a penalty. The contract provided for no down payment. The monthly installments to be made were 20.00 dollars for the first six months; 25.00 dollars per month for the next six months; and 30.00 dollars per month from then on until the entire sum had been paid. While appellants offered to prove that 2,000.00 dollars worth of improvements had been made on the premises, such proof would not aid their cause since it was admitted that the net monthly income from the premises was 75.00 dollars. Such a monthly income would more than compensate for the improvements made, plus the monthly installments. In view of the use value of the premises as compared to the monthly installment to be made, including improvements also made, we cannot say that the forfeiture provision was such that the trial court should have held it to be a penalty and refused to permit respondents to maintain an action based on the invoking of such provision of the contract.[80]

The judgment of the trial court directing a verdict in favor of the vendor was affirmed.

How deeply involved the Utah courts have become in weighing the equities in forfeiture is illustrated by *Perkins v. Spencer*.[81] The suit was originally brought by the vendor as an unlawful detainer action to recover property allegedly forfeited by the purchaser's default. The purchaser had the action removed to a higher court where he sought cancellation of the contract. The vendor relied upon the forfeiture clause which permitted him to retain payments made as liquidated damages. In overruling the trial court and allowing restitution to the purchaser, the court construed the liquidated damage clause as a penalty because it would result in a forfeiture of 2,725.00 dollars on a total price of 10,500.00 dollars and such a result was deemed unconscionable by the court. *Christy* was distinguished on the equities, although the percentage of purchase price paid in *Christy* was greater than in *Perkins*. Also, there were no improvements in *Perkins* as contrasted with the substantial amount of improvements alleged in *Christy*. The case was remanded to determine the difference between the vendor's damages and the amount of the payments made by the purchaser. *Perkins* stands for the proposition that the validity of a liquidated damage clause shall be determined by hindsight, an equitable proposition, but one which introduces con-

80. *Id.* at 322, 121 P.2d at 405.
81. 121 Utah 468, 243 P.2d 446 (1952).

siderable uncertainty into contractual relations and is an invitation to litigation.

In 1958, the Supreme Court of Utah, the same court which decided *Perkins*, upheld a forfeiture and distinguished *Perkins* on the equities. *Carlson v. Hamilton*,[82] was a straightforward suit by a purchaser to recover payments made under an installment land contract. A total of 6,680.00 dollars had been paid on a price of 22,000.00 dollars. The trial court, after making allowance for damage to the premises and for the two year rental value during the period when the purchasers were in possession, found that the payments exceeded this amount by 2,119.94 dollars. The purchasers were awarded judgment for this amount. The Supreme Court of Utah reversed. Although justifying the forfeiture on the ground that it would only silghtly exceed the real estate commission that would have to be paid on a resale of the property, the supreme court's language is reminiscent of *Glock v. Howard & Wilson Colony Co.*[83] and not in keeping with the spirit of *Malmberg v. Baugh.*[84]

> People should be entitled to contract on their own terms without the indulgence of paternalism by the courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability. We think no such case is presented here.[85]

Such language manifests a degree of irritation with the efforts of defaulting purchasers to recoup their payments and suggests that the trend in Utah may be away from restitution and back towards the majority rule in its strict form. In any event, the standard of a "decent fairminded person" is apt to be uncertain and productive of more litigation.

D. *The Maryland Statute*

In 1951, Maryland enacted a statute[86] to protect certain purchasers from the rigors of the general majority rule, still followed in those cases which do not come within the provisions of the statute.[87] The statute

82. 8 Utah 2d 272, 332 P.2d 989 (1958).
83. *Supra* note 39.
84. *Supra* note 73.
85. Carlson v. Hamilton, 8 Utah 2d 272, 274-275, 332 P.2d 989, 990-991 (1958).
86. MD. CODE ANN. art. 21, §§ 110-116 (1964).
87. Quillen v. Kelley, 216 Md. 396, 140 A.2d 517 (1958); Great United Realty Co. v. Lewis, 203 Md. 442, 101 A.2d 881 (1954); see note, 19 MD. L. REV. 51 (1959).

only applies to contracts where the total purchase price is not over 15,000.00 dollars[88] where the price is to be paid in at least five installments exclusive of the down payment,[89] where the property is to be used as a dwelling house by the purchaser,[90] and where the purchaser is not a corporation.[91] The vendee is given the right to accelerate installment payments[92] and the vendor may not encumber the property nor place any mortgage upon it in an amount greater than the balance due, nor may the payments on any such encumbrance exceed the installment payments.[93] The statute further provides that upon a default by the purchaser during the existence of the contract he must be given a thirty day notice to cure his default,[94] and only upon his failure to do so may the vendor resort to his sole remedy, power of sale.[95]

The heart of the statute is a provision giving an option to the purchaser to demand delivery of a deed upon the giving of a purchase money mortgage once the payments made total forty percent of the purchase price.[96] The curtailment of the vendor's remedies gives him fewer rights during the existence of the contract than he will have if the purchaser elects to take a deed and give back a mortgage when forty percent of the purchase price has been paid. In the latter case, he has all of the remedies of a mortgagee because he is, in fact, a mortgagee, whereas until the contract is executed and while it is still in force, he is restricted to a power of sale under the Maryland statute permitting such sales in the foreclosure of mortgages.[97] However, the Maryland power of sale combines the virtues of extra-judicial sale with the conclusiveness of judicial sale in such fashion that it is probably quite adequate to protect the vendor during the life of the contract. The sale must be confirmed by the court[98] and thus is res judicata as to the validity of the sale.[99]

The greatest weakness of the Maryland Installment Land Sales Statute is that its application is limited to sales of less than 15,000.00 dollars. The threat of forfeiture is not a risk exclusively of the poor, although perhaps the drafters assumed that purchasers of more expensive homes would be advised by attorneys and thus would not need legislative aid. The equation of the installment land contract with the mortgage, which is the effect of the statute, is probably not a deterrent to the use

88. MD. CODE ANN. art. 21, § 110(3) (1964).
89. *Id.* § 110(1).
90. *Id.* § 110(3).
91. *Id.* § 110(5).
92. *Id.* § 112(3).
93. *Id.* § 112(6).
94. *Id.* § 113(1).
95. *Id.* § 115.
96. *Id.* § 112(7).
97. MD. CODE ANN. art. 66, § 5 (1964).
98. *Id.* § 5(b).
99. Bachrach v. Washington United Co-op Inc., 181 Md. 315, 29 A.2d 822 (1943).

of such contracts due to the peculiar efficacy and conclusiveness of the power of sale in Maryland. However, such an approach in other jurisdictions would burden the contract with the delays and costs of foreclosure by court order and would destroy the contract's attractiveness to vendors.

IV. Conclusions and Recommendations

In no jurisdiction is the treatment accorded the parties to a land contract satisfactory. A strict and undeviating application of the majority rule that a party in default cannot recover payments made will result in unconscionable forfeiture.[100] The application of general equitable principles in an effort to avoid forfeiture makes for uncertainty.[101] The use of waiver and rescission as a means of protecting the defaulting purchaser frequently involves straining the facts and almost invariably will cause a lack of uniformity among the decisions of even the same jurisdiction.[102] The results obtained in the so-called minority jurisdictions are equally unsatisfactory. California labored for many years to shake off the majority rule only to adopt a position which has rendered the installment land contract virtually obsolete as a security device in that state.[103] Connecticut and Utah illustrate most of the inconsistencies of those jurisdictions which claim to follow the majority rule.

The advantages of the installment land contract are that it enables the vendor to obtain security without the expense and delay attendant upon the use of a mortgage and permits the purchaser to buy land without the cash outlay required by a mortgage. Its principal disadvantage at the present time is that the potential for abuse, inherent in its form, is so great that courts are reluctant to give uniform enforcement to its provisions. The goal of any reform in the treatment accorded the installment land contract should be to preserve as many of its advantages as are consistent with securing the purchaser against unjust forfeiture, and at the same time permit the contract to operate under a clear and recognized standard so that the effect of the purchaser's breach may be predicted.

It is apparent that any reform will have to be statutory. The common law rules in this area are so deeply embedded that judicial reform is unlikely, and even if it is achieved, as it was in California, the result is apt to destroy the usefulness of the device. Statutory reform along the lines adopted in Maryland which would treat the contract as another

100. *E.g.*, Iowa R.R. Land Co. v. Mickel, 41 Iowa 402 (1875).

101. *E.g.*, *compare* Beatty v. Flannery, 49 So.2d 81 (Fla. 1950), *with* Haas v. Crisp Realty Co., 65 So.2d 765 (Fla. 1953).

102. *E.g.*, *compare* Remington Arms Union Metallic Cartridge Co. v. Gaynor Mfg. Co., 98 Conn. 721, 120 Atl. 572 (1923), *with* American Auto. Co. v. Perkins, 83 Conn. 520, 77 Atl. 954 (1910).

103. See Hetland, *Land Contracts*, California Land Security & Development, § 2.20 (1960).

form of mortgage would seem of little value in most jurisdictions which do not make such intelligent use of the power of sale as does Maryland. What is needed is a statute which will recognize the rights of the purchaser, particularly the right of a purchaser in default to be secure against unjust forfeiture, and at the same time will permit the vendor a simplified, inexpensive and fairly rapid means of foreclosing the purchaser's rights in the event of a default.

Any statute should take into account the specific weaknesses of the common law treatment. As an example, the failure to distinguish between the deposit receipt agreement and the installment land contract is a source of much confusion. The deposit made upon a deposit receipt agreement almost always is made as earnest money and its forfeiture is not only contemplated by the parties but the payment of the deposit is made with the express understanding that the purpose of the deposit is to establish a certain sum that is to be forfeited in the event of the purchaser's breach. This purpose is absent, however, when dealing with the installment land contract where the effect of forfeiture of payments made is to increase the penalty as the seriousness of the breach diminishes.

Any proposed statutory solution also should define reasonableness in a liquidated damage clause so that there would be no question as to its validity. In land contracts, a liquidated damage provision is almost a necessity in view of the difficulty of proving loss of bargain damages. The statute should further provide for a return to the purchaser of all payments made in excess of the liquidated damages and a determination of the distinction between valid liquidated damages and invalid penalties should no longer be left to hindsight.

The statute should further require that the contract be recorded, or at least that it be given to the purchaser in recordable form, so that he may have the protection of the recording acts if he so desires. Various additional protections to the purchaser may be included such as the Maryland provision limiting the amount of the encumbrance which the vendor may place upon the land under contract.[104] It would seem, however, that if the contract be recorded, any subsequent encumbrancer would take subject to the contract regardless of statutory protection.

The statutory provisions for summary foreclosure of the purchaser's rights should be available only to vendors who have used a contract complying with all of the statutory requirements. A failure to qualify for the statutory remedy, however, should not merely leave the contract outside of the statute, as is the case in Maryland. The statute should restrict its benefits to those who comply with its requirements, but, to avoid a total bypassing of the statute, it should require that all other contracts must be foreclosed as mortgages under the mortgage law pre-

104. MD. CODE ANN. art. 21, § 112(6) (1964).

vailing in the jurisdiction. Strict foreclosure should be abolished. The remedies of ejectment and suit to quiet title should not be available outside of the statute or, if available, only upon repayment by the vendor of all payments made. Suits for specific performance and suits for damages for breach of contract still should be available to either party whether the contract is within the statute or not.

V. A Proposed Statutory Solution

A. *Land Contracts*

The interest of every purchaser in default under a contract for the sale of land in this state upon which the purchaser shall have made a payment in money or money's worth shall be free from forfeiture regardless of the provisions of the contract. Nor, upon the failure of any purchaser to cure a default, shall his interest be subject to strict foreclosure by any court other than as provided herein. The only means whereby a vendor may foreclose the rights of a purchaser in default shall be by foreclosure under the laws of this state pertaining to mortgage foreclosure, as though the vendor were a mortgagee and the purchaser a mortgagor. Provided, however, that if the contract for the sale of lands be either a Sales Contract or a Security Contract as herein defined then the vendor may avail himself of the rights contained in the contract and the remedies herein set forth.

A. A Sales Contract is a contract for the sale of land which provides for a transfer of the legal title and for the payment of the total price, or part payment thereof and substitution of some other form of security, within a period of ninety (90) days or less. It must:

1. be acknowledged by the vendor and be in such form as to be capable of being recorded;
2. provide for delivery of a deed after not more than two payments exclusive of any deposit;
3. contain no provision for forfeiture of all payments made nor a provision for the retention, as liquidated damages, of any payments made exceeding ten (10) percent of the purchase price;
4. provide for restitution to the purchaser in default of any payments made in excess of the amount set forth in the liquidated damage clause;
5. provide for delivery of the legal title to the purchaser not more than ninety (90) days after the date of the first payment as provided by the contract;
6. provide that the contract shall be null and void ninety (90) days after the date of the first payment as provided by the contract and that it shall cease to be a cloud upon the vendor's title as of that time.

No procedure shall be required to remove the cloud of such a contract upon the vendor's title, nor shall resort to foreclosure in the event of the purchaser's default be required. Ninety (90) days after the date of the first payment such contract shall be a nullity unless action be commenced by either party for specific performance or for breach of contract within such ninety (90) day period.

B. A Security Contract is a contract for the sale of land which provides that the vendor retain the legal title as security for the payment of the purchase price, or a substantial portion thereof, for a period exceeding ninety (90) days from the date of the first payment made under the contract. It:

1. must be acknowledged by the vendor and be in such form as to be capable of being recorded;
2. need not provide for delivery of the legal title within any specified period of time;
3. need not provide for any specified number of payments;
4. must provide for prepayment of the balance due without penalty at the option of the purchaser upon ninety (90) days written notice to the vendor;
5. must contain no provision for forfeiture of all payments made, nor provision for the retention, as liquidated damages, of any payments made exceeding ten (10) percent of the purchase price;
6. must provide for restitution to the purchaser in default of all payments made in excess of the amount set forth in any liquidated damage clause.

To remove the cloud upon the vendor's title in the event of the purchaser's default in the payment of one or more of his installment payments the following strict foreclosure proceeding is available to the vendor.

1. The contract must be recorded.
2. The vendor must file and record:
   a. proof of notice to the purchaser of his default and of intent to use this statutory procedure;
   b. proof of the giving of a sixty (60) day period of grace after the giving of such notice in which period the purchaser may cure a first default. If the sixty (60) day period of grace shall have been given on a previous default and the default was cured within the period, then only a thirty (30) day period of grace need by given on a second default. After two defaults and two previous grace periods given, the vendor need give no further period of grace to a defaulting purchaser;
   c. proof of restitution to the purchaser in default of all payments made in excess of the liquidated dam-

age clause contained in the contract, or if there be no liquidated damage clause, proof of restitution of all payments made by the purchaser.

All of this proof may be made in a single affidavit. Upon the filing and recording of this affidavit any interest in the land subject to contract which the purchaser may have had is foreclosed.

Nothing in this statute is to be construed as denying to any party to a land contract the right to bring suit for damages for breach, for specific performance, or for restitution of any thing of value which may have been conferred pursuant to or as a result of such contract.

The suggested statute affects all contracts for the sale of land upon which the purchaser has made any payment or given anything of value. If no payment has been made, the statute does not apply and the contract will be dealt with under the common law of the jurisdiction. In other words, it is still an enforceable obligation; equitable conversion and all the rights incident to equitable conversion will remain unaffected. The contract will constitute an encumbrance on the vendor's title, but his removal of such an encumbrance can be accomplished by existing means without danger of injustice to either party.

When payment has been made under a land contract, there exists a danger of unjust forfeiture. This is all that the statute is designed to prevent. Compliance, or lack of it, with the statute does not render any contract less binding nor does it restrict the remedies of either party in furtherance of the contract purpose. Actions for damages by either party may still be maintained. Specific performance will remain available to the purchaser provided he is not in default, and, in the case of the sales contract, provided he commences his action within ninety days from the execution of the contract. Specific performance also will be allowed the vendor, even though it may result in sale of the land by court order and a mere foreclosure of the vendor's lien; this will be by order of chancery where the prevailing results are generally equitable. In the event that the contract is not within the statute or that the vendor refuses to comply with the statutory procedures, the purchaser may have restitution, and unless foreclosed in equity, or unless the vendor resorts to the statute, the contract remains an encumbrance upon the vendor's title. In summary, all that the statute purports to do is to outlaw forfeiture and to give the vendor a choice between foreclosure by judicial sale, as in the case of a mortgage, and summary foreclosure by compliance with the statute.

There is a marked contrast between this proposed statute and the statute proposed by the New York Law Revision Commission in 1937.[105]

105. New York Law Revision Commission Report 351 (1937).

The New York proposal provides for termination by the vendor upon thirty days notice to the vendee of his default. If the vendor elects to terminate and the purchaser does not cure his default within the grace period, then the burden of recovering the excess of payments over the vendor's damage is shifted to the purchaser who is given the right to sue for restitution. By its failure to provide a reasonable provision for liquidated damages, the proposed New York statute would seem to be an invitation to litigation by the purchaser.

The proposed New York statute also permits the vendor to sue for installments, but requires that he have a marketable title at the time of suit. This is aimed at a real weakness of the existing law in that a vendor may, theoretically, compel the purchaser to make all of the payments and yet be unable to perform himself on the payment of the last installment. However, the same end is sought to be achieved in the statute proposed herein by allowing the purchaser to prepay upon ninety day notice and thus place the vendor in default at any time he is insecure as to the state of the vendor's title. Admittedly, this is of small value to a purchaser during the early life of the contract when his equity is so small that he may not be able to secure other financing to enable him to prepay the balance on the contract. But his risk at this time is correspondingly small, and to require a constant marketable title of the vendor seems somewhat unrealistic. The purpose of the statute proposed herein is to recognize the purchaser's interest as being a substantial one and to prevent its destruction without a consideration of the equities of all the parties.