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REMEDIES FOR BREACH OF THE INSTALLMENT LAND CONTRACT

RICHARD H. LEE*

This is the second of a series of three articles dealing with certain aspects of the installment land contract. The first article¹ dealt with the nature of the contracting parties' interests, primarily with the effect of equitable conversion. This article proposes to consider the remedies available, first to the vendor and then to the purchaser, upon breach by the opposite party.

I. REMEDIES OF THE VENDOR

A. *Suit at Law for Damages*

Where there has been a substantial breach of a land contract by the purchaser, and the vendor is not in default, the general rule, in both the United States and England, is that the vendor may recover for the loss of his bargain, the difference between the contract price and the market price.² Of course, allowance must be made for any payments advanced by the purchaser which are retained by the vendor.

The market price of land, however, is not easily established. It would seem that the contract price itself is some evidence of the market price, but the use of such a standard would rule out any recovery at all.³ Where the vendor has resold the property after the purchaser's breach and the sale was a bona fide one, this may be a satisfactory means of determining the market price.⁴ A valid liquidated damage clause may be a solution to the problem and it will generally be given effect.⁵ Testimony of experts as to the value of the land because of its location, area and productiveness is generally admissible to show market value, and in most states evidence of prices paid on sales of similar land in the area is considered relevant if sufficiently close in time to the contract date.⁶

Recovery for injury to the vendor's reliance interest is generally allowed and would include items and expenses reasonably incurred by the vendor in preparation for the purchaser's performance, such as counsel

* Professor of Law, University of Miami.

1. Lee, *Interests Created by the Installment Land Contract*, 19 U. MIAMI L. REV. 367 (1965).

2. *Telfener v. Russ*, 145 U.S. 522 (1892); 3 AMERICAN LAW OF PROPERTY § 11.67(b) (Casner ed. 1952).

3. See *Telfener v. Russ*, *supra* note 2.

4. *Dooley v. Stillson*, 46 R.I. 332, 128 Atl. 217 (1925).

5. *Armstrong v. Irwin*, 26 Ariz. 1, 221 Pac. 222 (1923). See 15 AM. JUR. *Damages* § 240 (1938).

6. See McCORMICK, *DAMAGES* § 46 (1935).

fees in correcting the title and the cost of abstracts or surveys.⁷ Injury occasioned by the construction of improvements upon the land which were contemplated by the parties are compensable.⁸ Of course, there cannot be a recovery for loss of the benefit of the bargain and for the injury to the reliance interest as well, as the expenses incurred in reliance upon the purchaser's performance will have been taken into account in determining the loss of profit.

When the vendor has fully performed his part of the contract and has delivered a conveyance of the legal title to the purchaser he should be and is entitled to bring suit at law for the full purchase price.⁹ Even if the contract was not signed by the purchaser and thus does not satisfy the Statute of Frauds, once there has been a conveyance the vendor should be able to recover.¹⁰ But where the contract is still executory there is a split of authority as to whether a vendor may recover at law for the purchase price.¹¹ The problem is basically one of lack of mutuality arising from supposed limitations upon the power of courts of law to condition a judgment for the purchase price upon the vendor's delivery of a deed conveying a marketable title. The deposit of a deed in court should be adequate, if in fact title is marketable. In a jurisdiction where law and equity are administered by one court as one form of action there should be no difficulty in solving the mutuality question and thus judgment for the full purchase price should be allowed.¹² The weight of authority, however, is to the contrary and considers those cases allowing suit for purchase price at law irregular expedients to give to the law courts the power of equity to award specific performance.¹³

Where the purchaser has delivered a note or series of notes to secure the payment of the purchase price, the vendor, upon the purchaser's default, may sue on either the contract¹⁴ or the notes.¹⁵ In as much as installment payments under an installment land contract are usually independent promises until the last payment is due, the vendor need not tender a deed and marketable title prior to the contract closing date, and lack of mutuality would be no defense to a suit at law.¹⁶ Of course, if the

7. *Biddle v. Biddle*, 202 Mich. 160, 168 N.W. 92 (1918). See McCORMICK, *op. cit. supra* note 6, at 712-13.

8. See *Minsky's Follies of Fla., Inc. v. Sennes*, 206 F.2d 1 (5th Cir. 1953); *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949); *Fuller & Perdue, The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936-37).

9. *Washington v. Soria*, 73 Miss. 865, 19 So. 485 (1896).

10. *Holmstrom v. Barstad*, 147 Minn. 172, 179 N.W. 737 (1920); 49 AM. JUR. *Statute of Frauds* § 552 (1943). *Contra*, *Williams v. Faile*, 118 So.2d 599 (Fla. 1st Dist. 1960).

11. See 3 AMERICAN LAW OF PROPERTY, § 11.77 (Casner ed. 1952).

12. *Bonner v. Finney*, 110 Cal. App. 518, 294 Pac. 466 (1930); *Fairlawn Heights Co. v. Theis*, 133 Ohio St. 387, 14 N.E.2d 1 (1938).

13. *Prichard v. Mulhall*, 127 Iowa 545, 103 N.W. 774 (1905).

14. *Coaling Coal & Coke Co. v. Howard*, 130 Ga. 807, 61 S.E. 987 (1908).

15. *Walker v. Hewitt*, 109 Ore. 366, 220 Pac. 147 (1923).

16. *Ibid.*

vendor rescinds or cancels the contract or asserts a forfeiture, he cannot recover on the notes or in contract for the purchase price.¹⁷ Where there is an acceleration clause and the vendor elects to accelerate, or where the installment payment overdue is the last one, then the vendor must tender a marketable title as this would be a condition precedent to the purchaser's liability.¹⁸

B. Retention of Payments as Liquidated Damage

The distinction in general contract law between liquidated damage and a penalty is that the former bears a reasonable relationship to actual damage occasioned by the breach, is designed to render certain that which is uncertain and difficult of proof, and is essentially compensatory; whereas, the latter is a form of punishment for breach, bears no relation to actual damage and may easily result in unjust enrichment of the party enforcing the provision.¹⁹ There is no general rule for determining whether a stipulation in a contract is enforceable as a bona fide liquidated damage clause, or is a penalty and therefore unenforceable. It depends upon the facts, the intention of the parties, and the construction of the contract. Although it involves an inquiry into the facts, it is usually considered a matter of law to be determined by the court.²⁰ A named sum will be regarded as a penalty where the defaulting party must pay the same amount regardless of the nature of the breach.²¹ Certainly where the contract equates liquidated damage with installments paid and thus increases the forfeiture in inverse proportion to the actual damage suffered, such a provision is a penalty and not a legitimate liquidated damage clause.²² However, the general rule in the United States is to enforce such forfeiture clauses in installment land contracts despite the harsh result.²³ This would seem to put the land contract in a special category, and indeed it does, but the problem is really not one of distinguishing between liquidated damage on the one hand and penalty on the other. Even in the absence of any such clause, regardless of what it is called, by the weight of authority the purchaser in default cannot recover payments made from a vendor not in default.²⁴

17. *Orzechowski v. Kolodziejski*, 281 Mich. 657, 275 N.W. 722 (1937).

18. See *Prichard v. Mulhall*, *supra* note 13; but see *Walker v. Hewitt*, *supra* note 15.

19. *Pembroke v. Caudill*, 160 Fla. 948, 37 So.2d 538 (1948).

20. *Chace v. Johnson*, 98 Fla. 118, 123 So. 519 (1929), holding that a clause allowing forfeiture of payments in an installment land contract was a penalty for the benefit of the vendor and that he could waive it and seek actual damages.

21. *Pembroke v. Caudill*, *supra* note 19; *Poinsettia Dairy Prods., Inc. v. Wessel Co.*, 123 Fla. 120, 166 So. 306 (1936).

22. See *Chace v. Johnson*, *supra* note 20; but see *Beck v. Megli*, 153 Kan. 721, 114 P.2d 305 (1941), where a provision for forfeiture of \$500 and all sums paid under the contract was held to be liquidated damage and not a penalty. The purchaser, however, had made no payments; only \$500 was involved.

23. *Seekins v. King*, 66 R.I. 105, 17 A.2d 869 (1941); *Annot.*, 31 A.L.R.2d 8, 11 (1953).

24. *Sawyer v. Sterling Realty Co.*, 41 Cal. App. 2d 715, 107 P.2d 449 (1940) (After the vendor had quieted title against defaulting purchaser in previous action, the purchaser

The typical Deposit Receipt Agreement, in contrast to the Installment Land Contract, usually provides for a down payment of ten percent or less, and that in the event of the purchaser's breach, such down payment is to be retained by the vendor. Whether designated "liquidated damage" or not, such a provision is fair, within the contemplation of the parties, and should be enforced. Such a payment is in the nature of "earnest money" and is justified because it is made in consideration of the vendor having removed the property from the market and having entered into the contract. The English courts distinguish between earnest money and purchase money and permit forfeiture of the former²⁵ but not of the latter.²⁶ If a rule of thumb is required this is a fairly good one, although its application is more than merely mechanical, as it does involve an interpretation of the contract and an inquiry into the facts.²⁷ It is merely another way of determining what is a reasonable, and thus enforceable, liquidated damage. Any reasonable liquidated damage clause should be given effect, and if, in an installment land contract, there were a formula provision for liquidated damages based upon loss of bargain, operating only on a serious breach and taking into account the value of the purchaser's use and occupancy, improvements made, etc., no one should seriously object to its enforcement, nor should a deposit of ten percent or less be considered unreasonable in most instances.²⁸ But to equate liquidated damages with the forfeiture of installments paid is unjust and wholly out of line with present distinctions between a liquidated damage clause and a penalty.

In *Pembroke v. Caudill*,²⁹ a Florida case, the contract provided for a deposit of \$6,200 on a purchase price of \$67,500, to be deemed liquidated damage in the event of breach by the purchaser. The purchaser signed the contract and gave a check for the deposit. The next day he stopped payment on the check. The vendor brought suit on the contract under the liquidated damage provision. The Supreme Court held the stipulation to be a penalty, on the ground that it bore no relation to any actual damage, and denied recovery. The court refused to speculate on what the result would have been had the payment actually been made.

sought restitution of installments paid, arguing that California statute made liquidated damage clause void. *Held*: the statute did not apply as vendor was entitled to retain purchase money paid whether designated liquidated damage or not). *California, since Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, 37 Cal. 2d 16, 230 P.2d 629 (1951), has become one of the few states firmly opposed to forfeiture. How it did so without expressly overruling its previous position and without enactment of new legislation will be discussed in the third article of this series.

25. *Hall v. Burnell*, [1911] 2 Ch. 551.

26. *Cornwall v. Henson*, [1900] 2 Ch. 298.

27. See *Howe v. Smith*, 27 Ch. D. 89 (1884).

28. *But see Federal Land Bank v. Bridgeforth*, 233 Ala. 679, 173 So. 66 (1937), where a \$500 deposit on a purchase price of \$8,000 was held a penalty. See also *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, *supra* note 24.

29. 160 Fla. 948, 37 So.2d 538 (1948).

The unanswered question was soon answered, however, in *Beatty v. Flannery*,³⁰ when the Florida court refused a defaulting purchaser recovery of a \$3,000 deposit made on a contract price of \$30,000. The *Pembroke* case was distinguished solely on the ground that in that case the vendor was plaintiff. The language of *Beatty* indicates that Florida follows the weight of authority in denying recovery of payments made by a purchaser in default even in the absence of a forfeiture provision.³¹

But in 1952, in *Paradis v. Second Ave. Used Car Co.*,³² the same court relied upon *Pembroke*, ignored *Beatty*, and allowed a purchaser to recover a \$4,000 deposit on an unstated purchase price on the ground that the burden was on the vendor to prove damage and that otherwise the clause constituted a penalty.

In 1953, the same court, in *Haas v. Crisp Realty Co.*,³³ reversed the lower court which had allowed forfeiture of a \$6,050 deposit on a purchase price of \$15,050. The Supreme Court affirmed its adherence to *Beatty* and to "the established rule in practically all American jurisdictions"³⁴ but sent the case back to have it determined whether, when the reasons for the purchaser's breach were known, the forfeiture of a deposit, the size of this one, without a showing of actual damage, might not shock the conscience of the court.

Later cases indicate that the Florida courts have not yet made up their minds.³⁵ They are with the majority and against allowing any recovery to a defaulting purchaser, but if the forfeiture is so great that it shocks the court, they may make an exception to the rule, particularly if the purchaser was not willful in his breach. They will not aid a vendor in obtaining a penalty under the guise of liquidated damage, but they will not prevent him from keeping it if he can get it by himself. And sometimes they become so interested in the penalty aspect of the vendor's retention that they do not consider whether the purchaser was in default or not.³⁶

This confusion represents the effort of the Florida courts to work equity and still be nominally consistent with a rule. The result is apt to be neither consistent nor equitable. In the first place, the rule denying a defaulting purchaser restitution of payments made should not be applied indiscriminately to both earnest money and installment payments. But once the principle is adopted that a party may not recover damages based

30. 49 So.2d 81 (Fla. 1950).

31. *Id.* at 82.

32. 61 So.2d 919 (Fla. 1952).

33. 65 So.2d 765 (Fla. 1953).

34. *Id.* at 768.

35. *Lewis v. Belknap*, 96 So.2d 212 (Fla. 1957) (\$1,500 deposit on \$10,000 price forfeited); *Goldfarb v. Robertson*, 82 So.2d 504 (Fla. 1955) (\$2,500 deposit forfeited); *Lindgren v. Van Fleet*, 112 So.2d 881 (Fla. 3d Dist. 1959) (\$222.75 deposit on \$1,200 price ordered returned to purchaser).

36. See *Paradis v. Second Ave. Used Car Co.*, *supra* note 32.

on his own default, the rest follows logically. The difficulty lies with the principle. It may be proper to refuse damages to a party who has caused his own injury, but our present sophistication in the field of restitution should allow us to recognize that suits for restitution of payments made are based upon unjust enrichment of the vendor, not upon injury to the purchaser.³⁷

C. *Retention of Deposit as an Alternative Performance*

Similar in form to the liquidated damage clause is a provision permitting one or either of the parties to the contract to pay a sum of money in lieu of any other performance. If it is determined that the parties intended the payment of a sum of money or a forfeiture of the deposit by the purchaser to be an alternative to any other performance under the contract, then, of course, the payment of the money or the forfeiture is not liquidated damage, but is performance itself and there has been no breach. Payment of money under such a provision is an option to any other performance contemplated by the contract and where such an option is exercised, of course, no action for specific performance should lie.³⁸ Where the provision is held not to involve an alternative performance, but to be a true liquidated damage clause, it is generally held not to render the remedy at law adequate so as to defeat an action for specific performance.³⁹

D. *Suit for Specific Performance*

Upon the purchaser's default the vendor may bring suit for specific performance of the contract. The vendor's right to bring such a suit in equity depends, not upon any supposed doctrine of affirmative mutuality of remedy,⁴⁰ but upon the inadequacy of his remedy at law.⁴¹ Those jurisdictions which allow a vendor to bring suit at law for the full purchase price upon tender of a marketable title and deposit of a deed in court, are, in effect, permitting the bringing of an equity action at law.⁴² Regardless of the court in which the action is brought, it is equitable in nature and subject to all the requirements of equity.⁴³ One of the difficulties of specific performance, as applied to the installment land contract, is that unless there is an acceleration clause in the contract the vendor has no right to demand full payment by the purchaser because the contract calls only for installments and the only performance he can compel is the one for which

37. See *Schwartz v. Syver*, 264 Wis. 526, 59 N.W.2d 489 (1953).

38. *Davis v. Isenstein*, 257 Ill. 260, 100 N.E. 940 (1913). See *McCORMICK, DAMAGES* § 154 (1935).

39. See *Davis v. Isenstein*, *supra* note 38; *COOK, CASES ON EQUITY* 418 n.8 (4th ed. 1948).

40. *WALSH, EQUITY* § 68 (1930).

41. *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979 (1889).

42. *Fairlawn Heights Co. v. Theis*, 133 Ohio St. 389, 14 N.E.2d 1 (1938).

43. 3 *AMERICAN LAW OF PROPERTY* § 11.77 (Casner ed. 1952).

he contracted. But, assuming that the vendor can call for the full purchase price, his bill for specific performance must still contend with all of the various defenses available either in equity or law. Fraud or misrepresentation,⁴⁴ duress,⁴⁵ mistake,⁴⁶ sharp practice,⁴⁷ hardship,⁴⁸ failure to make a complete disclosure,⁴⁹ and many other defenses stand between the vendor and his decree of specific performance. And, when he finally obtains the decree he seeks, his chances of recovery are still slim. Constitutional⁵⁰ or statutory⁵¹ provisions outlawing imprisonment for debt prevent resort to imprisonment for contempt and thus eliminate one of the principal methods whereby equity enforces its decrees. The usual decree of specific performance will provide that, in the event the purchaser fails to perform, the property be sold and proceeds used to pay the debt.⁵² If the property does not produce enough to satisfy the claim, the vendor may have a deficiency judgment, and in the unlikely event that the property produces more than the contract price, the excess will be paid to the purchaser.⁵³ This is virtually the same result as foreclosure by sale of the vendor's lien, and the purchaser has most of the protection of a mortgagor. In all likelihood specific performance will result in the vendor losing his land and becoming an unsecured creditor of the purchaser for at least a portion of the purchase price.

What then are the advantages to the vendor of suit for specific performance? If the vendor really wishes to be relieved of his obligations in regard to the land and to salvage what he can from the broken contract, the action in equity for specific performance is superior to suit at law for damages or even for the entire purchase price, as it gives the vendor a security for at least part of the price. Also, it has been suggested that specific performance, as contrasted with foreclosure of the vendor's lien, may not result in granting a period of redemption to the vendee.⁵⁴ If this be so, this might be an adequate reason for selecting this particular remedy, although it is difficult to see why the vendor would not prefer "redemption" for the full purchase price rather than sale for a portion of the purchase price coupled with a deficiency judgment. Specific performance would be desirable where its purpose was to establish the marketability of title to the satisfaction of a doubting, but otherwise willing, purchaser.⁵⁵ And where

44. *Allen v. Kirk*, 219 Pa. 574, 69 Atl. 50 (1908).

45. *Collins v. Erdmann*, 122 Conn. 626, 191 Atl. 521 (1937).

46. *Johnson v. Gianacacos*, 356 Ill. 410, 190 N.E. 691 (1934).

47. *Banaghan v. Malaney*, 200 Mass. 46, 85 N.E. 839 (1908).

48. *Koch v. Streuter*, 232 Ill. 594, 83 N.E. 1072 (1908).

49. *Shoop v. Burnside*, 78 Kan. 871, 98 Pac. 202 (1908).

50. *E.g.*, FLA. CONST. DECL. OF RIGHTS § 16.

51. *E.g.*, N.Y. CIVIL RIGHTS LAW § 21.

52. *Strauss v. Bendheim*, 162 N.Y. 469, 56 N.E. 1007 (1900).

53. *Ibid.*

54. *Howe*, *Forfeitures in Land Contracts*, CURRENT TRENDS IN STATE LEGISLATION, 1953-1954, 433 (1955).

55. *But see Lynbrook Gardens, Inc. v. Ullmann*, 291 N.Y. 472, 53 N.E.2d 353 (1943).

there is no question as to the solvency of the defaulting purchaser, specific performance would appear to be a wholly satisfactory remedy. The vendor is freed of the cost of maintaining the land and of his responsibilities in regard to it; he need not assume the burden of proving a loss, as would be the case in an action for damages, and he obtains, as nearly as possible, the full performance promised him by the purchaser. But, when weighed against the other alternatives available to a vendor under an installment land contract, specific performance by the vendor will usually be found wanting. It demands equity of the vendor-plaintiff and accords the defaulting purchaser consideration that need not be shown him if the vendor merely forfeits his rights or forecloses them strictly.

E. *The Vendor's Lien*

During the period while an installment land contract is executory the vendor is frequently said to have a lien upon the property which is the subject of the contract.⁵⁶ This is similar to, but not to be confused with, the vendor's equitable lien which remains in the vendor after he has parted with the legal title. Here he still has the legal title. True, equitable conversion treats his interest as security for the purchase price, but it would be somewhat of a strain even for equitable conversion to reduce his undoubted legal ownership to the status of a mere lien. Once he has transferred legal title he may need the aid of equity in obtaining some sort of security for the purchase price, but so long as title is still in his name, he is possessed of much more than an equity. The true vendor's lien is a creature of equity, revealed as a purely personal right and lost once the purchaser has transferred the legal title to a bona fide purchaser for value.⁵⁷ But a vendor under a contract for sale has legal title superior to all subsequent equities; it is a misnomer to call it a lien because it is actually a legal title retained as security.⁵⁸ Nonetheless, the vendor may treat his interest as a lien and proceed to enforce it as such.

The purpose of the vendor who resorts to his security interest in the land is at least two-fold. He seeks to subject the land to his claim for the purchase price, and to do this, he must foreclose any equity of redemption, or other right arising from the contract which may exist in the purchaser. Several methods are available to accomplish these results. He may bring suit for specific performance, which, as we have already discussed, may result in a judicial sale of the property and an application of the proceeds of sale to the payment of the purchaser's debt. He may elect to treat his security interest in the property as a mortgage and proceed in equity to foreclose the purchaser's equity of redemption and to have the property

56. *Alabama-Florida Co. v. Mays*, 111 Fla. 100, 149 So. 61 (1933).

57. *Beebe Stave Co. v. Austin*, 92 Ark. 248, 122 S.W. 482 (1909).

58. 4 POMEROY, EQUITY § 1260 (5th ed. Symons 1941).

sold at a judicial sale in the same manner as if it were a mortgage.⁵⁹ In some jurisdictions the vendor may obtain a decree which, after giving the defaulting purchaser an extension of time to make good his default, proceeds to foreclose the purchaser's rights in the land under contract should he fail to cure his default.⁶⁰ This is strict foreclosure by judicial order. In a few states statutes permit the vendor to forfeit the defaulting purchaser's interest provided statutory notice is given allowing a limited period of time within which the purchaser may cure his default.⁶¹ This is strict foreclosure by self help with an assist from the statute. Finally, if the vendor need not worry about the contract being a cloud upon his title, as where it is not recorded, he may treat the contract as cancelled upon the purchaser's breach and either retain the land for his own use, or sell to a bona fide purchaser for value, effectively wiping out whatever interest the purchaser may have.⁶²

F. 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. But it is expensive and time consuming. For instance, it has been estimated that foreclosure by sale in Wisconsin costs almost twice as much and takes nearly three times as long as does strict foreclosure by court order.⁶³ The 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. But where other remedies are available, a vendor will usually select some less cumbersome method of realizing on his security. If he had been willing from the beginning to foreclose his lien as a mortgage, he might just as well have transferred the legal title and taken back a purchase money mortgage as his security.

In many cases the choice of remedy will be dictated by the law of the jurisdiction. In Florida, for instance, all mortgages must be foreclosed in chancery⁶⁴ unless otherwise provided by statute. So far as real estate mortgages are concerned, neither sale pursuant to a power contained in the instrument⁶⁵ nor strict foreclosure⁶⁶ are available. The Florida statute defining mortgages is, in its terms, broad enough to include

59. *Barnard v. Huff*, 252 Mich. 258, 233 N.W. 213 (1930). See IOWA CODE § 654.1 (1954).

60. *Los Angeles Auto Tractor Co. v. Superior Ct.*, 94 Cal. App. 433, 271 Pac. 363 (1928).

61. *E.g.*, IOWA CODE ch. 656 (1954).

62. *McCahill v. Travis Co.*, 45 So.2d 191 (Fla. 1950).

63. *Land Contracts in a Real Estate Sales Program*, 7 FED. HOME LOAN BANK REV. 112, 114 (1941) cited in *Beuscher, Buying Farms on Installment Land Contracts—A Preface*, 1960 WIS. L. REV. 379, 381 (1960).

64. FLA. STAT. § 702.01 (1963).

65. *Wylly-Gabbett Co. v. Williams*, 53 Fla. 872, 42 So. 910 (1907); *BOYER, FLORIDA REAL ESTATE TRANSACTIONS* § 32.20 (1961).

66. *Georgia Cas. Co. v. O'Donnell*, 109 Fla. 290, 147 So. 267 (1933).

installment land contracts,⁶⁷ but, except where the contract was used as part of a transaction securing a loan, as distinguished from purchase money, it has not been held to apply to installment land contracts.⁶⁸ In Florida, the judicially prescribed method of realizing on the vendor's retained title security is "strict foreclosure" or suit in equity in the nature of strict foreclosure.⁶⁹ But this is not strict foreclosure in the traditional sense, where the vendor or mortgagee retains his legal title and the equitable interest of the purchaser or mortgagor is foreclosed unless he makes payment within the time allowed. Florida's strict foreclosure results in a judicial sale of the property in the event that the purchaser fails to cure his default within the extension of time given him by the court. In Florida the mortgagor's right to redeem ends upon confirmation of the sale foreclosing his rights.⁷⁰ The so called strict foreclosure of the purchaser's contract rights is, in Florida, subject to the same principles as is foreclosure of a mortgage, and the right to cure the default also ends with the sale.⁷¹ Thus, there is very little difference in Florida between using the statutory procedure applicable to foreclosure of mortgage liens⁷² and resorting to "strict foreclosure" under equitable principles. As a result, a careful attorney will comply with the statute. The implication of *Mid-State Investment Corp. v. O'Steen*,⁷³ is that if the contract had been evidence of a *bona fide* sale, and not security for a debt other than purchase money, the vendor would have been entitled to re-enter pursuant to the terms of the contract and would not have been a trespasser; thus there might be no need to foreclose.⁷⁴ But the contract would still be a cloud upon the seller's title and foreclosure would seem at least as efficacious as a suit to quiet title to relieve the vendor of this uncertainty.

G. *Strict Foreclosure of the Purchaser's Contract Rights*

In some states a vendor may elect either foreclosure by sale or strict foreclosure. In Wisconsin, for instance, foreclosure of a mortgage or installment land contract under the statutory provisions for mortgage foreclosure⁷⁵ allows the mortgagor or purchaser at least a year after the date of judgment before the land may be sold or even advertised for sale.⁷⁶ But, if the vendor so desires, he may seek strict foreclosure. And in Wisconsin, strict foreclosure does not result in a judicial sale as it does

67. FLA. STAT. § 697.01 (1963).

68. See *Mid-State Investment Corp. v. O'Steen*, 133 So.2d 455 (Fla. 1st Dist. 1961).

69. *Barnett v. Dollison*, 125 Fla. 254, 169 So. 665 (1936); *Wordinger v. Wirt*, 112 Fla. 822, 151 So. 47 (1933).

70. *Ross v. Carey*, 174 F.2d 872 (5th Cir. 1949).

71. *Wordinger v. Wirt*, *supra* note 69.

72. FLA. STAT. ch. 702 (1963).

73. *Supra* note 68.

74. See *Lee, Interests Created by the Installment Land Contract*, 19 U. MIAMI L. REV. (1965).

75. WIS. STAT. § 278.01 (1957).

76. WIS. STAT. § 278.10 (1957).

in Florida, but it merely forecloses the purchaser's equity of redemption and entitles the vendor to a writ of assistance to aid him in recovering possession of the property.⁷⁷ If strict foreclosure is obtained there is no statutory period of redemption, but the period is within the discretion of the court.⁷⁸ Judges generally fix redemption periods far shorter than the statutory year which the mortgage foreclosure statute requires.⁷⁹ In as much as strict foreclosure is equally as effective as the statutory mortgage foreclosure procedure in clearing the vendor's title, and may permit him to retain the land and the payments as well,⁸⁰ the vendor's choice would seem clear.

Although from the purchaser's point of view strict foreclosure by judicial order may seem a harsher remedy than foreclosure by sale, it must be remembered that it is, after all, an equitable remedy. A recent Idaho case illustrates the equitable nature of strict foreclosure. In *Walker v. Nunnenkamp*,⁸¹ the purchasers brought suit in equity to rescind an installment land contract for the fraud of the vendor. The vendor counter-claimed for strict foreclosure. On appeal by the purchasers, the court affirmed the finding of no fraud, but remanded the case to determine if the portion of the purchase price paid was disproportionate to the actual damage sustained by the vendors. In denying a petition for recall of the remittitur the court emphasized the equitable nature of the action, and pointed out that equity could require as a condition of awarding foreclosure that the vendors make affirmative proof of their damage to forestall injustice to the purchasers, and that if a judicial sale seemed the fairest way of protecting the interests of both parties the court had power to order one.⁸²

Unfortunately, the attitude of the courts is not uniform in adjuncting the relief to the equities of the particular situation. In *Industrial Loan & Investment Co. v. Lowe*,⁸³ a recent Nebraska case, the court held that where the contract provided that time should be of the essence and that upon the purchaser's default the vendors should be entitled to immediate possession and forfeiture of all payments made, no inquiry need be made into the relationship between payments made and the vendors' actual damage because the suit was one to quiet title rather than one for strict foreclosure.⁸⁴ It would seem that in either event the vendor was seeking equity and that he should be required to do equity.⁸⁵

77. *Diggle v. Baulden*, 48 Wis. 477, 4 N.W. 678 (1880); Wis. Stat. § 281.28 (1957).

78. *Binzel v. Oconomowoc Brewing Co.*, 226 Wis. 498, 277 N.W. 98 (1938).

79. Beuscher, *Buying Farms on Installment Land Contracts—A Preface*, 1960 Wis. L. Rev. 379, 381 (1960).

80. *Diggle v. Baulden*, *supra* note 77.

81. 84 Idaho 485, 373 P.2d 559 (1962).

82. *Id.* at 497, 373 P.2d at 567.

83. 173 Neb. 624, 114 N.W.2d 393 (1962).

84. *Id.* at 631, 114 N.W.2d at 398.

85. See Vanneman, *Strict Foreclosure of Land Contracts*, 14 MINN. L. REV. 342 (1930).

H. Forfeiture of Purchaser's Payments

Where, as is usually the case, the contract provides that time is of the essence and that upon default by the purchaser the vendor may terminate the contract and retain the payments made as liquidated damage, the forfeiture may be effected by the vendor's own act without resort to any court. However, the effectiveness of such unilateral action is debatable. It may be adequate enough when the purchaser is not in possession and the contract is not recorded, but usually resort to some court will have to be made either to recover possession or to clear the vendor's title. However, when the vendor's acts are considered by a court in some subsequent action they are frequently upheld. For instance, in *Thiel v. Miller*,⁸⁶ the contract made time of the essence, and provided that upon the purchaser's default the vendor's obligations under the contract should cease, the rights and payments of the purchaser should be forfeited, and the vendor should be entitled to immediate possession. After paying at least \$7,500 on a contract price of \$30,712.50, the purchaser defaulted. The vendor notified the purchaser of his election to forfeit the purchaser's rights under the contract, and at the time of this suit he had already secured a writ of assistance enabling him to recover the property. In the present suit in equity the vendor apparently sought to clear his title of any claim by the purchaser. The purchaser counterclaimed for rescission based upon mistake. In holding for the vendor on both issues the court said,

Appellants not having any right of rescission of the contract, and it being in full force and effect as to all of its terms, we see no escape from affirming the judgment of the trial court awarding to respondents forfeiture of appellants' rights in the ranch, and also forfeiture, as liquidated damages, of all that portion of the purchase price they have paid to appellants, since it seems to us that the trial court was fully justified by the evidence in concluding that appellants had failed to comply with the terms of the contract as written, in substantial respects, and had been given by respondents fair opportunity to fully comply therewith before they elected to exercise their right of forfeiture and notified appellants accordingly. Indeed, counsel for appellants does not seem to seriously contend but that the conditions of the contract as written have not been timely complied with by them.⁸⁷

In *Kefgen v. Coates*,⁸⁸ the Supreme Court of Michigan recently upheld the right of a vendor to declare a forfeiture under the terms of the contract, and, because the contract dealt with the sale of both land and personalty, the court emphasized the appropriateness of equitable action

86. 122 Wash. 52, 209 Pac. 1081 (1922).

87. *Id.* at 59, 209 Pac. 1081, 1084.

88. 365 Mich. 56, 111 N.W.2d 813 (1961).

to enforce the forfeiture as ejection would be an inadequate remedy to recover the personal property.

Some confusion has been introduced into the decisions by the similarity, in ultimate result, of forfeiture at the election of the vendor and inability of a purchaser in default to obtain restitution. As a practical matter, if the purchaser in default cannot obtain a refund of his payments, and such is the weight of authority,⁸⁹ whether the vendor can declare a forfeiture is moot. But, nonetheless, decisions have turned upon the distinction. If the court regards only the forfeiture provision and finds it invalid as a penalty, as was the case in *Pembroke v. Caudill*,⁹⁰ it may deny the vendor recovery, and yet, the same court may deny the purchaser restitution under the general rule, as did the Florida court in *Beatty v. Flannery*.⁹¹

A few jurisdictions provide for forfeiture of a defaulting purchaser's installment land contract rights by specific statute.⁹² These statutes do little more than give a statutory period of grace to the defaulting purchaser and make the resulting strict foreclosure all the more binding because it has statutory authorization. In Iowa, for instance, the statute provides for forfeiture upon the giving of thirty days notice.⁹³ It has been held that for the vendor to take advantage of the statute the contract must have provided for forfeiture.⁹⁴ But in *Lake v. Bernstein*,⁹⁵ the Iowa court held that despite lack of a forfeiture clause the defaulting purchaser could not recover payments made. The purchaser had paid \$1,200 down on a total price of \$3,500 when he defaulted. The vendor subsequently sold the property to a bona fide purchaser. But the court followed the majority rule in denying restitution, asserting that the purchaser had abandoned the contract voluntarily when he lacked funds to complete his payments.

Dissatisfaction of the courts with the harshness of forfeiture requires that the vendor be astute to avoid acquiescence in the purchaser's default or he may be held to have rescinded the contract and thus be obligated to restore the purchaser to his position before the contract was entered. Consequently, a resale by the vendor who has not declared a forfeiture may be considered a rescission obligating return of the purchaser's payments.⁹⁶ Prolonged inactivity on the purchaser's part may be considered abandonment of the contract entitling the vendor to sell again without making restitution and without declaring a forfeiture;⁹⁷ but, to be safe, the vendor should declare his position unequivocally. Likewise,

89. *Haas v. Crisp Realty Co.*, 65 So.2d 765 (Fla. 1953).

90. 160 Fla. 948, 37 So.2d 538 (1948).

91. 49 So.2d 81 (Fla. 1950).

92. See 3 AMERICAN LAW OF PROPERTY § 11.76 n.8 (Casner ed. 1952).

93. IOWA CODE §§ 656.1, 652.2 (1957).

94. *Schwab v. Roberts*, 220 Iowa 958, 263 N.W. 19 (1935).

95. 215 Iowa 777, 246 N.W. 790 (1933).

96. *Parchen v. Rowley*, 196 Wash. 340, 82 P.2d 857 (1938).

97. *Lutz v. Cunningham*, 240 Iowa 1037, 38 N.W.2d 638 (1949).

indulgence by the vendor of the purchaser's breaches of contract may be interpreted as a waiver of the vendor's rights.⁹⁸

I. *Obtaining Possession and Quieting Title*

Even though the vendor may have a right to declare a forfeiture, if the purchaser is in possession and refuses to quit, resort to some legal action is usually necessary to enable the vendor to recover possession. Sometimes the question of which action lies may so occupy the attention of the court that it fails to give due consideration to the real equities of the case. For instance, in Florida, where the courts have been particularly solicitous of the purchaser's rights and where even strict foreclosure results in a judicial sale,⁹⁹ the First District Court of Appeal in the recent case of *Huguley v. Hall*,¹⁰⁰ "adjudged the contract in suit 'to be null and cancelled and to be foreclosed,' barred the defendant and all parties claiming under him 'from any right, title or interest in said premises,' allowed the defendant ten days in which to deliver up the possession of the premises to the plaintiff, and ordered the clerk to issue a writ of assistance if necessary to enforce the decree."¹⁰¹ The case involved a typical installment land contract and the relief was predicated solely upon the purchaser's default in making his payments. One would expect that some sort of foreclosure action would have been called for, but this is merely a judicial affirmation of the vendor's right to forfeit. A dictum in the Supreme Court opinion which denied certiorari¹⁰² suggests that the petitioner, having failed to assert affirmatively his equity of redemption, is deemed to have abandoned it. Nonetheless, if equity requires that an equity of redemption be foreclosed the court has power to order it regardless of the petitioner's assertion. The vendor is the one seeking equity and he should be compelled to do equity as well. The District Court decision was per curiam and the facts and reasons for the decision must be gleaned from Judge Sturgis's well reasoned dissent. But even the dissent is concerned primarily with the distinctions between ejectment and quiet title. Inasmuch as the purchaser was in possession and the contract was not recorded it would seem that perhaps the legal remedy was adequate and that the suit should have been brought in ejectment.¹⁰³ But, the decision presupposes that the vendor has a right to forfeit without resort to any judicial process and seems inconsistent with the philosophy behind *Pembroke v. Caudill*¹⁰⁴ and *Paradis v. Second Ave. Used Car Co.*,¹⁰⁵ and with those cases which allow strict foreclosure only when coupled with

98. *McBride v. Griffith*, 134 Ind. App. 12, 185 N.E.2d 22 (1962).

99. *Wordinger v. Wirt*, 112 Fla. 822, 151 So. 47 (1933).

100. 141 So.2d 595 (Fla. 1st Dist. 1962), *cert. denied*, 157 So.2d 417 (Fla. 1963). See Lee, *Interests Created by the Installment Land Contract*, 19 U. MIAMI L. REV. 367 (1965).

101. 141 So.2d 595, 597-98.

102. 157 So.2d 417, 418 (Fla. 1963).

103. *Sawyer v. Gustason*, 96 Fla. 6, 118 So. 57 (1928).

104. *Supra* note 19.

105. *Supra* note 32.

judicial sale.¹⁰⁶ The result in *Huguley* seems doubly strange in view of Florida's position with regard to cancellation of contracts generally. Something more than mere breach of contract is required—fraud, mistake, undue influence, or some other independent ground of equity, before a cancellation will be decreed.¹⁰⁷ Nonetheless, *Huguley* is probably a correct reflection of the Florida law. Safeguards are thrown around foreclosure, but forfeiture is still available if the contract permits it.¹⁰⁸

The general rule is that the vendor may seek ejectment or quiet title plus a writ of assistance if the defaulting purchaser refuses to give up possession. This is without any other action to dispose of the purchaser's right to redemption or right to restitution of payments made.¹⁰⁹ In *Abbas v. Demont*,¹¹⁰ for instance, the Nebraska court reversed the trial court's allowance of a sixty day redemption period and allowed immediate ejectment against a defaulting purchaser, commenting, "courts are not authorized to rewrite contracts that the parties themselves made."¹¹¹ The vendor, who had not even complied with his contract by declaring a forfeiture, recovered not only the land, but retained \$2,143.80 paid on the purchase price of \$8,950. This seems a harsh result; however, there was considerable evidence in the case that the purchaser had delayed unnecessarily.

The court, despite its affirmation of the general rule, is usually aware of the equities of the case and can protect them where necessary. This is seen in *Ruhl v. Johnson*,¹¹² also a Nebraska case, where the vendor brought suit in ejectment only to have the trial court convert it into an action for strict foreclosure, and on appeal even that remedy was rejected as being inequitable under the circumstances. The purchaser had paid approximately \$16,000 towards a purchase price of \$38,000 before his default and objected to ejectment on the ground that he had a substantial equity. After transfer to the equity court, the chancellor found the purchaser in default some \$2,000 and ordered strict foreclosure unless the default was cured within sixty days. On appeal, it was held that on these facts even strict foreclosure was inequitable and the case was sent back, apparently for foreclosure by sale.¹¹³ So long as the courts observe the equities there is, perhaps, nothing objectionable in allowing ejectment or writ of assistance without any other action specifically aimed at preserving the purchaser's rights. But it does create some uncertainty, as the language of the courts is frequently at variance with their actions.

106. *Wordinger v. Wirt*, *supra* note 69.

107. *International Realty Associates v. McAdoo*, 87 Fla. 1, 99 So. 117 (1924).

108. *Richards v. Hasty*, 158 Fla. 459, 28 So.2d 876 (1947); *Barnett v. Dollison*, 125 Fla. 254, 169 So. 665 (1936).

109. See *In re De Stuers' Estate*, 99 N.Y.S.2d 739 (N.Y. Surr. Ct. 1950); 55 AM. JUR. *Vendor & Purchaser* § 438 (1946).

110. 152 Neb. 77, 40 N.W.2d 265 (1949).

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

112. 154 Neb. 810, 49 N.W.2d 687 (1951).

113. See *Weaver v. Gilbert*, 214 Ark. 800, 218 S.W.2d 353 (1949); *but cf. Industrial Loan & Inv. Co. v. Lowe*, 173 Neb. 624, 114 N.W.2d 393 (1962).

The choice between quiet title and ejectment as a means of recovering possession would seem to be dictated by the facts. Where the purchaser is in possession there need be no resort to equity merely to oust him. But, if the contract is recorded, or if it constitutes a threat of future injury to the vendor, then suit to quiet title with writ of assistance would seem in order.¹¹⁴ Of course, a writ of assistance is also available where foreclosure is used.¹¹⁵

There is no duty on the part of a vendor to refund payments made by the purchaser in default as a condition of the vendor's obtaining either ejectment or quiet title. In *Pierce & Stevenson v. Jones*,¹¹⁶ a suit to remove a cloud upon the vendor's title wherein the purchaser sought recovery of his down payment of \$7,000 the Florida Supreme Court distinguished between suits for equitable cancellation or rescission and suits merely to remove a cloud. In the former, the vendor is seeking the aid of equity in rescinding the contract and thus, as rescission implies a restoration of the status quo ante, the vendor would be under an obligation to make restitution. But in a suit to quiet title, the vendor seeks merely to remove from record a contract which by its own terms has ceased to exist, and thus the equity the vendor seeks requires no corresponding equity on his part.¹¹⁷ The weakness of this argument is that equities do not depend upon the relief sought, nor upon the label of the particular action, but upon the underlying facts. In *Pierce & Stevenson* the result did not shock the court and thus the decision could conveniently be made to hinge upon the particular relief sought. Had the result been one which shocked the court's conscience, and had the forfeiture been out of proportion to any injury sustained by the vendor, the result might have been different.¹¹⁸ Another argument made in favor of allowing quiet title and forfeiture in the same equity suit is that the vendor in giving notice of forfeiture and in seeking to quiet his title is not repudiating the contract but acting in furtherance of it and, therefore, there is no rescission and thus no need to restore payments made.¹¹⁹ This is merely another way of avoiding an inquiry into the equities. The fact remains that most courts will not require return of payments made as a condition of granting the vendor either ejectment or quiet title.¹²⁰

The availability of summary proceedings, notably forcible entry and unlawful detainer, as a means of recovering possession from a defaulting

114. *Barnett v. Dollison*, *supra* note 108.

115. *Diggle v. Baudlen*, *supra* note 77.

116. 109 Fla. 517, 147 So. 842 (1933).

117. *But see Taylor v. Rawlins*, 86 Fla. 279, 97 So. 714 (1923), where the vendor's forfeiture was termed a rescission and restitution was required as a condition of quieting the vendor's title. See *Parchen v. Rowley*, *supra* note 96.

118. See *Haas v. Crisp Realty Co.* 65 So.2d 765 (Fla. 1953); *Taylor v. Rawlins*, *supra* note 117.

119. *Mintle v. Sylvester*, 202 Iowa 1128, 211 N.W. 367 (1926).

120. *Hinsch v. Mothorn*, 44 Idaho 539, 258 Pac. 540 (1927); *Lawrence v. Demos*, 70 Wyo. 56, 244 P.2d 793 (1952).

purchaser, will vary from jurisdiction to jurisdiction depending upon the scope of the action given by local law. In Colorado, for instance, a statute makes a vendee in default remaining in possession guilty of unlawful detainer.¹²¹ But, in New York, even where the contract provides that upon the purchaser's default the vendor may elect to treat him as a hold-over tenant, the vendor may not resort to summary proceedings which are restricted to landlord and tenant, but must bring ejectment or foreclose the contract.¹²²

In Ohio forcible entry and unlawful detainer are available only to try to issue of possession. In *Swiers v. Smith*,¹²³ a forcible entry and unlawful detainer case brought by the vendor, the court recognized that each of the parties claimed an interest in the land worth more than \$2,000, the jurisdictional limit of the court. But, construing its action as one for possession only, the court retained jurisdiction and relegated the question of title to a subsequent suit in Common Pleas. The jurisdiction to determine possession was said to depend upon the existence of the forfeiture clause.

Michigan permits recovery of possession by a vendor using summary proceedings but by statute delays eviction until 90 days after judgment, and if the purchaser has paid more than 50% of the purchase price, the statute delays eviction for six months. During this period of enforced delay, the purchaser may redeem by curing his default.¹²⁴ Despite the delay, the statutory proceeding is usually more expeditious than the other two available remedies, foreclosure and ejectment.¹²⁵

Iowa has permitted even more liberal use of forcible entry and detainer. In *Spangler v. Misner*,¹²⁶ the court recognized that the result of such an action was to forfeit the purchaser's contract rights as well as to determine rights to possession. This appears more realistic than the position of the Ohio courts, which purport only to try rights of possession by forcible entry, leaving title for courts with greater jurisdiction. However, the Ohio statute making judgments for forcible entry and unlawful detainer no bar to subsequent suits upon the same facts, undoubtedly accounts for Ohio's position.¹²⁷

The Florida statute on unlawful detainer is sufficiently broad to permit its use by a vendor to recover possession from a defaulting pur-

121. COLO. REV. STAT. § 58-1-4(9) (1953). *But see* *White v. Widger*, 144 Colo. 566, 358 P.2d 592 (1960).

122. *Burkhard v. Tucker*, 27 Misc. 724, 59 N.Y. Supp. 711 (1899); see *Smith v. Keech*, 112 N.Y.S.2d 803 (1952).

123. 5 Ohio Op. 2d 139, 150 N.E.2d 517 (Munic. Ct. Oberlin 1958); *accord*, *State ex rel Jenkins v. Hamilton County Court*, 114 Ohio App. 231, 173 N.E.2d 186 (1961); *Gallagher v. Bilmaier*, 6 Ohio Op. 2d 142, 154 N.E.2d 472 (Lucas County Ct. 1958).

124. MICH. COMP. LAWS § 630.25 (Supp. 1956).

125. *Zaino v. North Woodward Const. Co.*, 355 Mich. 425, 95 N.W.2d 33 (1959).

126. 238 Iowa 600, 28 N.W.2d 5 (1947).

127. OHIO REV. CODE § 1923.03 (1958).

chaser.¹²⁸ It purports to try only the right to possession and damages and cannot be used to try title.¹²⁹ Despite the broad language of the statute, however, the practice has not been to use unlawful detainer in the vendor-purchaser situation but to restrict it to landlord and tenant.

II. REMEDIES OF THE PURCHASER

Turning now from the vendor's remedies, let us take a look at the choice of remedy accorded a non-defaulting purchaser against a vendor in default. The right to restitution of a purchaser in default, the counterpart to the vendor's right of forfeiture, will be dealt with separately in the third and final article of this series.

In view of the independence of the covenants and that the purchaser's obligation to pay precedes the vendor's obligation to make conveyance of the legal title, the vendor under an installment land contract usually will not be in default until the final payment is due. However, should the vendor disable himself from performing, declare his refusal to be bound by the contract, or otherwise commit an anticipatory breach, the purchaser has a remedy.¹³⁰ Unfortunately for the purchaser, however, a mere unmarketable title in the vendor prior to the closing day is not a breach and the purchaser must continue to make his payments despite the existence of encumbrances or a defective title in the vendor.¹³¹ The purchaser who has not performed or has only partly performed at the time he learns of the vendor's anticipatory breach is excused from further performance.¹³² It would appear that any breach which would excuse further performance would be a sufficient anticipatory breach to support rescission or an action for damages.¹³³ Where the breach is slight it may not support rescission, although it may be enough to sustain an action for damages, and specific performance may be available to either party with compensation decreed to make up for the defect.¹³⁴

A. *Suit at Law for Damages*

Should the purchaser elect to sue for damages upon the vendor's breach, the measure of damages will vary depending upon the jurisdiction.¹³⁵ Upon a total breach by the seller, two principal rules have been

128. FLA. STAT. § 82.04 (1963).

129. FLA. STAT. § 82.05 (1963).

130. *Huggins v. Green Top Dairy Farms*, 75 Idaho 436, 273 P.2d 399 (1954).

131. *Lurette v. Bank of Italy*, 42 F.2d 9 (9th Cir. 1930); *Werth v. Willer*, 64 N.D. 119, 250 N.W. 543 (1933).

132. *Ross v. Kunkel*, 257 Wis. 197, 43 N.W.2d 26 (1950).

133. *Werth v. Willer*, *supra* note 131; *Ross v. Kunkel*, *supra* note 132.

134. *Tolchester Beach Improvement Co. v. Boyd*, 161 Md. 269, 156 Atl. 795 (1931) (vendor allowed specific performance with abatement); *Smith v. Hornkohl*, 166 Neb. 702, 90 N.W.2d 347 (1958) (purchaser granted specific performance with abatement).

135. See generally McCORMICK, DAMAGES §§ 177-184 (1935).

adopted. The so-called American rule, adopted in many of the states, allows the purchaser the difference between the purchase price and market value plus any payments which the purchaser may have already made.¹³⁶ The English rule, which together with its variations is followed in other American jurisdictions, depends upon the good faith or lack of it of the defaulting vendor.¹³⁷ If the vendor is not guilty of bad faith, the purchaser is entitled to recover payments made, plus interest, together with the cost of investigating title and any profit realized by the vendor on a subsequent sale.¹³⁸ If the vendor acted in bad faith, or if he had no title, even though he hoped to acquire it, the purchaser can recover for the loss of his bargain.¹³⁹

The distinction between the two rules is not, however, so clear cut as some authorities seem to imply.¹⁴⁰ Regardless of the jurisdiction, if all the purchaser seeks, upon the vendor's total breach, is a return of payments made, rescission will usually be allowed.¹⁴¹ So the distinction will appear only in those cases where the purchaser claims loss of his bargain as an item of damage. When it is further considered that, even under the English rule, loss of bargain is a proper claim if the vendor acted in bad faith, it is obvious that regardless of the jurisdiction, under such circumstances, the result will be the same. Only where the vendor did not breach his contract in bad faith and the purchaser is seeking damages for loss of his bargain will the issue make the choice of rule determinative. And even then, variations in the definition of bad faith may cause some blurring of the distinctions.

In Kentucky, for instance, the English rule was long exemplified by *Potts v. Moran's Executors*,¹⁴² which denied recovery for loss of bargain where the vendor was unable to get his wife to join in the conveyance and his inability was not attributable to bad faith. *Kramer v. Mobley*,¹⁴³ a more recent case, apparently evidenced merely a variation of the same rule when it restricted the purchaser to restitution upon the vendor's refusal to remove an incumbrance, where the vendor offered to indemnify the purchaser but insisted upon contesting the validity of the encumbrance. Then, in *Raisor v. Jackson*,¹⁴⁴ the Kentucky court reexamined *Potts* and overruled it, yet distinguished and affirmed *Kramer*. The facts in *Raisor* were substantially the same as those in *Potts*. The vendor was unable to convey because his wife would not join in the conveyance, the jury found no bad faith, and the trial court, following the English rule,

136. *Adams v. Cox*, 54 N.M. 256, 221 P.2d 555 (1950).

137. *Frey v. Nakles*, 380 Pa. 616, 112 A.2d 329 (1955).

138. *Kramer v. Mobley*, 309 Ky. 143, 216 S.W.2d 930 (1949).

139. *Frey v. Nakles*, *supra* note 137.

140. See 3 AMERICAN LAW OF PROPERTY §§ 11.67(a) (Casner ed. 1952).

141. *Adams v. Henderson*, 168 U.S. 573 (1897).

142. 236 Ky. 28, 32 S.W.2d 534 (1930).

143. *Supra* note 138.

144. 311 Ky. 803, 225 S.W.2d 657 (1950).

awarded one dollar nominal damages. On appeal this determination was reversed and the distinction was made between latent and patent defects of title. *Kramer* was distinguished because there the vendor was not aware of the encumbrance until just before the closing, and his good faith was shown by his willingness to indemnify the purchaser. But in *Raisor* the vendor knew he needed his wife's joinder to convey a good title, and therefore he assumed the risk of obtaining it. His good faith, or lack of it, was held to be immaterial.

In New York, however, even where the vendor contracts to convey property which he knew he had no power to convey, the issue of good faith remains, and a summary judgment will be denied where there remains an issue of fact as to whether the purchaser was aware of the vendor's inability at the time the contract was entered into.¹⁴⁵ The determination of this fact will control the measure of damages.

Florida follows the English rule and adopts a position midway between that of Kentucky and that of New York. In a case where the vendor's breach was the result of his wife's refusal to join in the conveyance, the Florida Supreme Court has held that such a breach is the result of bad faith,¹⁴⁶ and that the purchaser is entitled to recover for the loss of his bargain.

The principal justification for the American rule lies in its analogy to the rule in sales of personal property and to the fact that the injury is the same to the purchaser whether the motive of the vendor in refusing to perform be good or bad. The rationale of the English rule is to be found in the even closer analogy to the rule of damages for breach of covenants of title¹⁴⁷ and in the speculative nature of damages which must depend upon a finding of market value.¹⁴⁸ Those jurisdictions which adhere to the American position, however, are prepared to follow it to its logical conclusion. In *County of Lincoln v. Fischer*,¹⁴⁹ in granting specific performance to a purchaser under an installment land contract where the contract price was \$500 and the market value was \$50,000, the Oregon court pointed out that damages at law would be equally harsh as the purchaser would be entitled to the difference between the two. The English rule has much in its favor. It is more flexible and permits adjustment in the light of the equities. Some states have embodied the English rule in a statute¹⁵⁰ which would appear to prevent its development along the lines it has taken in Kentucky. The best solution to the problem of damage for vendor's breach is to deal with it in the contract. Either a reasonable

145. *Diamond Central, Inc. v. Gilbert*, 13 App. Div. 2d 931, 216 N.Y.S.2d 609 (1961).

146. *Key v. Alexander*, 91 Fla. 975, 108 So. 883 (1926).

147. *Taylor v. Wallace*, 20 Colo. 211, 37 Pac. 963 (1894).

148. See McCORMICK, DAMAGES § 180 (1935).

149. 216 Ore. 421, 339 P.2d 1084 (1959).

150. CAL. CIV. CODE § 3306; MONT. REV. CODE § 17-306 (1947).

liquidated damage clause or a clause limiting liability to restitution plus reliance damages should be satisfactory.

B. *Specific Performance at Suit of the Purchaser*

Specific performance at suit of the purchaser is one of the classic equitable remedies. Land is considered unique and the remedy at law is almost uniformly held to be an inadequate substitute for the land itself.¹⁵¹ However, unless the installment land contract permits the purchaser to prepay his installments, he is unable to place the vendor in default until the last payment is due and thus cannot avail himself of specific performance until he himself has fully performed.¹⁵² Even where the vendor has committed an anticipatory breach, the purchaser cannot usually resort to specific performance, not only because the contract places the vendor's performance in the future, but also because most actionable anticipatory breaches are such as to preclude any performance by the vendor at all. If it is still possible for the vendor to perform, but not yet time for him to do so, there is no breach.¹⁵³ And if the vendor's action is such as to prevent his ever performing, for instance, conveyance to a bona fide purchaser, there is an anticipatory breach, but, of course, there can be no specific performance.¹⁵⁴ However, assuming that the purchaser under an installment land contract has a right to tender all of his payments and demand a deed, he will be entitled to specific performance upon the same equitable principles as any other purchaser.

An interesting case and one which illustrates the application of specific performance to installment land contracts is *County of Lincoln v. Fischer*.¹⁵⁵ The county, in 1944, entered into a contract with Fischer to sell a quarter section of land for a total price of \$500, \$110 down and \$39 a year for ten years. The contract further provided for forfeiture at the option of the county upon any breach by the purchaser. Fischer paid the down payment, but neglected to pay any of the installments. In 1945 Fischer sold his rights in the contract to Spalding Pulp and Paper Company. This suit was brought by the county in 1955 to quiet its title to the land; Fischer and Spalding were both defendants. Spalding counterclaimed for specific performance. The land at the time of suit was worth in excess of \$50,000. The trial court quieted title in the county and denied the claim for specific performance. On appeal this decision was reversed. The facts indicated that the county had, in 1947, attempted a statutory cancellation of the contract, but it was a nullity as no notice was given to the purchaser. At no time did the county specifically exercise its right to work a forfeiture according to the terms of the contract. In 1952 Spalding

151. *Kitchen v. Herring*, 42 N.C. 178 (1851).

152. *Luette v. Bank of Italy*, 42 F.2d 9 (9th Cir. 1930).

153. *Ibid.*

154. WALSHE, EQUITY § 87 (1930).

155. *Supra* note 149.

had tendered the full amount due under the contract, but the county rejected it. However, the county retained the down payment until the time of suit, and during all the preceding years the county had accepted payment of taxes from Fischer and later from Spalding. The Supreme Court of Oregon held that the delay of the county in asserting its right of forfeiture and its continued receipt of taxes prevented it from invoking forfeiture at this late date without giving the purchaser an opportunity to cure his default. It was further held that the delay of the purchaser in completing his payments did not constitute laches as the vendor was not in any way prejudiced thereby. To the county's argument that the consideration was inadequate, the court pointed out that at the time the contract was entered into \$500 was a fair price for the land and that although it might seem harsh to compel the county to convey land worth over \$50,000 for \$500, it would be equally harsh to deprive the purchaser of land now worth \$50,000 and which in equity had been his throughout. The court further stated that even if specific performance were to be denied and the purchaser remitted to his action at law, his damages would be the difference between the contract price of \$500 and the market value of \$50,000.

Partial performance with compensation is available to a purchaser in those cases where the vendor cannot give full performance and the purchaser is willing to take less with a reduction of the purchase price to compensate him for the vendor's default.¹⁵⁶ In many of these situations the vendor's default relates to the size or area of the land contracted to be sold, but it may arise from a defect in title as well.¹⁵⁷ When the defect is relatively slight, the vendor may compel the purchaser to specifically perform by tendering partial performance and compensation, but only if the purchaser will receive substantially that for which contracted.¹⁵⁸ However, where the purchaser is the plaintiff, the issue of materiality should seem to be foreclosed. Despite the extent of the default, if it is capable of valuation and if the purchaser is willing to take substantially less than he contracted for, specific performance with compensation should be decreed.¹⁵⁹

C. Restitution of Payments

We have already seen that recovery of payments made may be an item of damage for breach of contract by the vendor. And under the English rule, where the vendor's breach was in good faith, restoration of payments made and expenses incurred in reliance on the vendor's performance are the measure of recovery. But a purchaser need not be restricted to

156. *Smith v. Hornkohl*, 166 Neb. 702, 90 N.W.2d 347 (1958).

157. *Reed v. Phillips*, 191 Ark. 58, 83 S.W.2d 554 (1935).

158. *Van Blarcom v. Hopkins*, 63 N.J. Eq. 466, 52 Atl. 147 (1902).

159. *Reed v. Phillips*, *supra* note 157. See 3 AMERICAN LAW OF PROPERTY § 11.69 (Casner ed. 1952).

damages for breach. He may elect to rescind the contract. In this case, although his recovery may appear the same, it is really not the same. It derives from a different theory and although it may reach the same end, it travels a different route. Recovery of payments as an item of damage for breach is compensation to the plaintiff for his injury. Restitution of payments upon a rescission is a means of preventing the unjust enrichment of the defendant. The amount of recovery in one case will usually be identical with the recovery in the other, but it need not be so.¹⁶⁰

The installment land contract, like any other contract, may be rescinded for fraud, mistake, duress, incompetency, or material breach by either party.¹⁶¹ The essence of rescission is that both parties are relieved of their obligations under the contract and that they are restored to the position they held prior to entering the contract. In other words, rescission is usually coupled with restitution. Restitution of benefits conferred under a contract which is void or voidable may be obtained either in equity or at law.¹⁶² The action at law is usually in general assumpsit, for money had and received. This is quasi contract; the law raises the obligation of the defaulting vendor to make restitution because his retention of the benefits he has received would result in his unjust enrichment.¹⁶³ It is the rescission of the contract that makes the retention unjust. So long as the contract endures it explains the vendor's possession of the payments. But with the contract rescinded there is no reason for the vendor retaining the fruits of the contract. Thus, a prerequisite to bringing an action for restitution at law is that the plaintiff shall have declared a rescission by his own act, and such a declaration requires that he restore, or offer to restore, to the defendant any benefits which he, the plaintiff, shall have received.¹⁶⁴ Upon this unilateral rescission by the plaintiff rests the theoretical structure of the resulting quasi contract action. The extra judicial rescission by the plaintiff ends the contract and makes the defendant's retention of any benefits received under it unjust and inequitable. The law will then, "quasi ex contractu," raise an obligation on the defendant's part to make restitution of the benefits he has received.

The action in equity is an action for rescission, not one based upon a rescission as is the suit at law. Therefore, rescission is not a prerequisite in equity, rather it is a result.¹⁶⁵ Also, a court of equity has power to

160. *Bechard v. Bolton*, 316 Mich. 1, 24 N.W.2d 422 (1946). See *Boomer v. Muir*, 24 P.2d 570 (Cal. App. 1933).

161. 3 AMERICAN LAW OF PROPERTY § 11.70 (Casner ed. 1952).

162. *Roller v. California Pac. Title Ins. Co.*, 92 Cal. App. 2d 149, 206 P.2d 694 (1949).

163. See *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).

164. *Cole v. Atkins*, 69 Ariz. 81, 209 P.2d 859 (1949); *Tisdale v. Buckmore*, 33 Me. 461 (1851). *But see* N.Y. CIVIL PRACTICE ACT § 112(g) adopting the equity rule and eliminating tender as a prerequisite to suit at law as well as in equity.

165. *Allerton v. Allerton*, 50 N.Y. 670 (1872).

condition the rescission of the contract upon the restoration of benefits received by the plaintiff and thus may require an accounting to determine the net benefit which the defendant must disgorge.¹⁶⁶

The distinction between a rescission by mutual assent¹⁶⁷ and a termination of the purchaser's contract rights by forfeiture¹⁶⁸ is a narrow one in fact but a vast one in legal consequence. In the former the purchaser is entitled to restitution of payments made; in the latter his payments are forfeited. As might be expected, the law's abhorrence of forfeitures frequently results in a finding of rescission where the intent of the vendor was clearly to work a forfeiture.¹⁶⁹

Just as the vendor has a security interest in the land under contract which is called a vendor's lien, so does the purchaser have a vendee's lien.¹⁷⁰ The vendee's lien is not inconsistent with rescission of the contract, despite some authority to the contrary,¹⁷¹ as it does not depend upon the existence of the contract, but is created by equity for the purpose of doing justice.¹⁷² And although a purchaser seeking a money judgment to recover his payments will be limited in many jurisdictions to an action at law on the ground that the remedy at law is adequate,¹⁷³ a prayer for a vendee's lien will bring the case into equity.¹⁷⁴

Upon the vendor's default, the purchaser is faced with a problem of election of remedies and its related problems of affirmance or disaffirmance of the contract and waiver of the right to rescind. A suit for damages for fraud of the vendor or for a material breach by the vendor, depending as it does upon the existence of a binding agreement to create those damages, is generally held to be inconsistent with rescission and a bar to a subsequent suit for rescission.¹⁷⁵ A suit for damages is an affirmance of the contract at a time when the purchaser had knowledge of grounds for rescission and thus is similar to the situation arising when a purchaser, with knowledge of the vendor's breach, nonetheless continues to make his payments. This has been held to be a waiver of any cause of action, a waiver of the fraud itself.¹⁷⁶

But if the purchaser, upon the vendor's default, elects to rescind, but is unsuccessful in his suit for rescission, this is no bar to a subsequent

166. *Lang v. Giraud*, 311 Mass. 132, 40 N.E.2d 707 (1942).

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

168. *Tucker v. Beam*, 343 Ill. App. 290, 98 N.E.2d 871 (1951).

169. *Taylor v. Rawlins*, 86 Fla. 279, 97 So. 714 (1933); *Fulton v. Chase*, 240 Iowa 771, 37 N.W.2d 920 (1949); *Guill v. Pugh*, 311 Ky. 90, 223 S.W.2d 574 (1949).

170. *Cole v. Haynes*, 216 Miss. 485, 62 So.2d 779 (1953).

171. *Davis v. William Rosenzweig Realty Operating Co.*, 192 N.Y. 128, 84 N.E. 943 (1908). *But see* N.Y. CIVIL PRACTICE ACT § 112.

172. *Witte v. Hobolth*, 224 Mich. 286, 195 N.W. 82 (1923).

173. *Laubengayer v. Rohde*, 167 Mich. 605, 133 N.W. 535 (1911).

174. *German Bundesheim Soc'y v. Schmidt*, 242 Mich. 139, 218 N.W. 664 (1928).

175. *Donovan v. Curts*, 245 Mich. 348, 222 N.W. 743 (1929).

176. *Monroe v. Hoffman*, 276 Mich. 281, 267 N.W. 836 (1936).

suit for damages in affirmance of the contract.¹⁷⁷ This result is not an exception to the doctrine of election of remedies but arises from the fact that the very lack of success in the suit to rescind indicates an existing contract.

It has been held that the bringing of an action for deceit is not an election when at the time that suit was brought the statute of limitations had already run against it.¹⁷⁸ The ignorance of the plaintiff of the running of the statute at the time he commenced suit prevented him from making an election and his ignorance of the nature of his rights prevented a waiver of them. Where but one remedy exists, there cannot be an election.¹⁷⁹ This argument would seem to destroy the doctrine of election of remedies completely. Whenever the deceit action or other action in affirmance fails of success, its very failure is an indication that no right existed. If no right existed, based upon affirmance of the contract, then the choice of such a remedy would be no choice at all.

177. *Dial Press, Inc. v. Phillips*, 23 N.J. Super. 543, 93 A.2d 195 (1952), *appeal denied*, 12 N.J. 248, 96 A.2d 454 (1953).

178. *Schenck v. State Line Tel. Co.*, 238 N.Y. 308, 144 N.E. 592 (1924).

179. *Ibid.*