Florida Installment Land Contracts: A time for Reform

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abusive collection practices and the courts struggle with questions of procedural due process, the growing body of empirical research concerning the consumer credit market, although no panacea, should be an important factor in the decision-making process. The data considered here indicate that although increased restrictions on collection sanctions tend to increase cost and reduce the availability of credit, the effects are not as great as some have thought[118] and alone are not sufficient justification to block needed reform. Any such reform should recognize the interwoven, yet conflicting, interests of both creditor and debtor.[119] Through a proper accommodation of these interests, an adequate supply of reasonably priced credit may be maintained without sacrificing procedures that comport with traditional concepts of fairness and due process.

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INTRODUCTION

Over the past several years, Florida has experienced marked increases in real estate activity.[1] Although Florida's burgeoning population has been instrumental in creating a demand for commercial, residential and unimproved property, much of the increase can be attributed to the use of long-term, low-equity financing,[2] which has enabled persons of all socio-economic strata[3] and from all over the world[4] to play an active role in the Florida real estate market.

118. The NCCF Study found that of all legal sanctions, prohibition of wage garnishment had the greatest effect on credit availability. Even wage garnishment, however, reduced the supply of credit by only 4%. See text accompanying note 78 *supra.*

119. The NCCF Report, in its introduction to the creditor remedies section, noted: "Recommendations regarding remedies are inextricably interwoven with Commission recommendations on rates and availability. It is imperative that the relationship be realistically assessed." NCCF REPORT, *supra* note 49, at 24.

1. Since 1940, Florida's population has grown from the smallest in the Southeast to the largest, and is now the ninth largest in the nation. J. HOUGHT, FLORIDA BANK HOLDING COMPANIES 1974 REFERENCE MANUAL (First Equity Corp. of Florida, Tampa) 4. According to a study by the U.S. Department of Commerce, "Florida will gain the most new residents of any state in the union in the next 25 years and its residents will enjoy the nation's highest increases in personal income . . . ." Gainesville (Fla.) Sun, Oct. 31, 1974, §D, at 1.

2. The total holdings of mortgage loans in the United States by major lender groups increased 10 percent during 1974, rising from $604.1 billion in 1973 to $661.9 billion at the end of 1974. FLORIDA REALTOR June 1975 at 40. These figures do not include the outstanding secured debt held by private individuals.

3. See Miami (Fla.) Herald, July 5, 1975, §A, at 1, reporting the investments made by so-called blue-collar workers in unimproved property.

4. *See* Sawyer v. Marco Island Dev. Corp., 301 So. 2d 820 (2d D.C.A. Fla. 1974), *cert.*

Real estate financing has traditionally taken several forms, depending upon the laws governing real property secured transactions, the availability of credit, and the disparity of the bargaining positions of the creditor and debtor. In Florida, for example, a creditor-mortgagee whose loan is secured by a real property mortgage must comply with specific statutory notice and redemption requirements when looking to the collateral to satisfy an unpaid obligation.[5] These requirements have been established to protect the debtor's historically sacred interest in the land. However, though the debtor is the main beneficiary of these protective measures, the lender is the party burdened with the expenses of paying for them by way of costly and time-consuming foreclosure proceedings.[6] In order to avoid these expenses (and, at times, to circumvent the high standards of fairness incorporated in mortgage foreclosure proceedings and the usury laws), ingenious lenders have devised various types of security devices that give the lender the right to repossess without judicial process.[7] In the main, however, the courts have been astute enough to look behind the mask of such arrangements and have required compliance with the regulations governing mortgage foreclosures.[8]

Another factor in determining the form of financing is the availability of credit. Where institutional "mortgage money" is not readily available, the parties to a real estate transaction may agree upon alternative sources of financing, chief among which has been the purchase money mortgage executed by the purchaser in favor of the vendor. Under this arrangement, the vendor-creditor assumes the status of a mortgagee and is thus subject to the statutory requirements prescribed for mortgages.[9] This security device is frequently used in transactions involving older multi-unit rental property. Although the property has a high fair market value (reflected in the purchase price), lending institutions nevertheless consider such older property risky security interests and frequently refuse to finance the transaction.

The security device that provides the benefit of dispensing with third-party mortgage financing and allows the vendor to by-pass costly foreclosure proceedings in case of default is the installment land contract. Under this device, the buyer can pay off the purchase money indebtedness in installments over a long

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denied, 312 So. 2d 757 (Fla. 1975), which stated that buyers "from Sweden to Hong Kong" actively purchased unimproved property under installment land contract security devices that usually provided for, at most, a very small down payment. More than one-third of the interstate land sales regulated by the U.S. Department of Housing and Urban Development involve property situated in the state of Florida. Interview with Mr. S. Kristiansen, Chief Investigator for the Florida Division of Land Sales, on July 11, 1975 (hereinafter cited KRISTIANSEN INTERVIEW).

5. See notes 91, 97, 100-101 *infra* and accompanying text.

6. *See* J. HANNA, CASES ON SECURITY 664 (3d ed. 1959).

7. Examples of such security devices are the deed of trust, the conveyance subject to defeasance, the deed absolute with an option to repurchase. *See generally* J. HANNA, *supra* note 6, at 731-38.

8. *See* First Mortg. Corp. v. deGive, 177 So. 2d 741 (2d D.C.A. Fla. 1965), holding that FLA. STAT. §697.01 (1973), the provision defining mortgages, is to be liberally construed, and that an instrument is to be deemed a mortage regardless of its form if it has been given for the purpose of securing payment of money.

9. *See* Cheves v. First Nat'l Bank, 79 Fla. 34, 83 So. 870 (1920).

period of time, an arrangement comparable to the amortization of a purchase money mortgage. In addition,

> [O]ne of the attributes of the installment land sale contract that commends it to a builder or developer is its supposed superiority as a merchandising device. In many instances contract buyers have found it possible to go into possession of subdivision homes under a down payment no larger than one of the monthly payments and with almost no incidental expenses. Of even greater importance is the fact that these astonishingly liberal credit terms are made available to people with virtually no credit rating.[10]

The advantages of using this security device, however, are often eclipsed by the seemingly oppressive credit arrangement involved. The vendor-creditor, relying on his superior bargaining position, withholds title until all of the installment payments have been made. In the event of default, the vendor may avoid judicial process since, in accordance with the terms of a typical contract, the purchaser automatically forfeits his interest in the land and all installments paid (though the parties can provide otherwise in the agreement[11]).

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10. Warren, *California Installment Land Sales Contracts*, 9 U.C.L.A. L. REV. 608, 625 (1962). The installment land contract may also be used to bypass "due on sale" clauses. In order to avoid being locked into longterm loans on property that may pass through several owners, many lenders today usually insert a provision in the mortgage that on transfer by the present owner, the lender may call the loan. This "due on sale" clause, which has been upheld by the courts, permits the lender to pass on the credit standing of the new owner and to adjust the interest rate to reflect the current market. It is a form of variable rate mortgage. Nonetheless, in a recent California case, the court held that under an installment land contract, the seller receives only a small down payment and retains legal title; hence, the vendor has a considerable interest in maintaining the property until paid in full. Unlike the case of a straight sale, the lender cannot claim that the substitution of a new owner impairs its security; instead, it must make an affirmative showing of some additional risk before it can call the loan. *See* Tucker v. Lessen Savings & Loan Ass'n, 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974).

Federal income tax benefits may inure to the vendor under this form of financing if he can qualify for the "installment method" under the INT. REV. CODE OF 1954, §453. See TREAS. REG. §1.453-4. *See generally* NATIONAL ASS'N OF REALTORS, TAXATION AND EXCHANGE TECHNIQUES, 120-25 (1973). If the vendor does not qualify for the installment method, he may succeed on other grounds in lowering his taxable gain on the sale if he is a cash method taxpayer. *See* Warren Jones Co., 60 T.C. 663 (1973); Estate of Coid Hurlburt, 25 T.C. 1286 (1956).

11. *E.g.*, Mannion v. Owen, 121 So. 2d 816 (2d D.C.A. Fla. 1960) (where an installment land contract provided for "foreclosure" in the event of default, vendor limited to the remedy of a foreclosure sale, not a forfeiture of payments made). Under an installment land contract, the only evidence of the purchaser's obligation is the contract. If, in addition, the purchaser gives a promissory note, the contract may be deemed a mortgage. See note 96 *infra*.

In recent years, buyers who have purchased land from subdividers under the installment plan (under "agreements for deed") have argued that the transaction constituted a sale of securities subject to the registration and antifraud provisions of the Securities Act of 1933, 15 U.S.C. §77(a) (1974). *Compare* Happy Investment Group v. Lakeworld Properties, CCH FED. SEC. L. REP. ¶95,284 (Aug. 24, 1975), *with* SEC v. Lake Havasu Estates, 340 F. Supp. 1318 (D. Minn. 1972). *Cf.* Davis v. Rio Rancho Estates, Inc., CCH FED. SEC. L. REP. ¶95,249 (S.D.N.Y. Aug. 6, 1975); Johnson v. Suburban Land Investment Co., CCH FED. SEC. L. REP. ¶94,022 (D.C. Super. 1973).

It is obvious, then, that the installment land contract is subject to abuses, as, in the case where a purchaser had paid 90 percent of the purchase price before going into default. Common sense dictates that the courts or the legislature should either deem the installment contract to be a mortgage or set forth definite guidelines to ensure fairness in the use of this type of security device. Unfortunately, no such action has taken place in either branch. As a result, the legal status of this device is far from clear.

This commentary will attempt to explain the present state of the law concerning installment land contracts. First it will examine the ways in which the courts have struggled with various legal fictions that have become so entrenched in the law as to retard the development of a rational system of adjusting the parties' rights in a default situation. Next, certain statutory formulas will be proposed in an attempt to harmonize the conflicting policies that have been the source of much confusion and uncertainty in the present law. Finally, there will be a discussion of certain related developments that may presage a change in the present law.

THE PRESENT STATUS OF THE LAW

The General Rule

In determining the rights and duties of vendors and purchasers under installment land contracts, Florida has followed the majority position in adopting the general rule that a purchaser in default loses his equitable interest in the land. Furthermore, he is denied restitution by reason of the express terms of a contract in which time is made of the essence and which provides that, in case of default, all installments paid are to be either forfeited to the vendor as a penalty for failing to fully perform or retained by him as liquidated damages.[12] This approach stems from the fact that the courts have generally treated the installment land contract not as a masked security device used either to provide for an alternative source of financing or to frustrate the laws prescribed for mortgages, but rather, as executory contracts for the sale of land.[13]

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12. *E.g.*, Hansbrough v. Peck, 72 U.S. 497 (1867); Williams v. Crouch, 179 So. 2d 117 (1st D.C.A. Fla. 1965), *rev'd*, 186 So. 2d 491 (Fla. 1966) (court below precluded vendor from retaining payments in excess of actual damages; supreme court reversed on grounds that lower court's ruling was in conflict with existing law that a purchaser in default is not entitled to recover any sums paid in part performance of an executory contract); Lawrence v. Miller, 86 N.Y. 131 (1881). See Ballantine, *Forfeiture for Breach of Contract*, 5 MINN. L. REV. 329, 330, 345 (1921), for a survey of the jurisdictions adopting the no-recovery rule.

13. The minority position is represented by those states that will not enforce forfeiture provisions where the amount forfeited exceeds the vendor's damages caused by the purchaser's breach and other benefits received by the purchaser at the expense of the vendor. *See, e.g.*, CAL. CIVIL CODE §§3275, 3369 (West 1970); Freedman v. Rector, Wardens & Vestrymen of St. Matthias Parish, 37 Cal. 2d 16, 230 P.2d 629 (1951) (leading case in which Justice Traynor, speaking for the California court, said that a vendor cannot retain payments made that are in excess of the reasonable damages sustained, notwithstanding the willfulness of the purchaser's breach); Pierce v. Staub, 78 Conn. 459, 62 A. 760 (1906); GA. CODE ANN. §37-216 (1962); Lyttle v. Scottish Am. Mortg. Co., 122 Ga. 458, 50 S.E. 402 (1905); Brown v. Verzani, 181 Iowa 237, 164 N.W. 601 (1917); Horseshoe Mining Co. v. Red Rose Lead & Zinc Mining Co., 104 Okla. 45, 230 P. 492 (1924). *See also* RESTATEMENT OF CONTRACTS §327(d)

> [Historically,] the doctrine that equity will enforce forfeiture provisions in land contracts, where time is expressly made of the essence, developed in this country during the latter half of the nineteenth century, at a time when extreme ideas as to "freedom of contract" were influencing American judicial decisions in every field. It was a time when equity was decadent, when laissez faire was almost an article of judicial faith, and when the courts were thinking in terms of free-willing individuals entirely able to look after themselves rather than in terms either of classical equity or of a socialized law taking a realistic account of inequalities of economic position and bargaining power. . . . In such an atmosphere, it was easy enough to put aside the tradition that equity would not enforce a forfeiture . . . and to develop a line of decisions holding that contracts for the sale of land which expressly made time of the essence and provided for the forfeiture of all payments theretofore made in the event of default would be enforced according to their literal terms, especially where prompt payment of all installments was made an express "condition precedent" to the purchaser's rights under the contract. There has been some slight tendency away from this nineteenth century doctrine in the last few decades, but it has become established law in many American states.[14]

The rule, however, has served more as a point of departure than anything else. By and large the courts have limited the application of the no-recovery rule to two fact situations. The first is one in which only a small deposit or relatively few installments had been paid prior to the purchaser's breach.[15] On these facts, upholding a forfeiture as liquidation of damages is not unreasonable,[16] since the parties probably intended to use this small amount not

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(1932); 5 A. CORBIN, CONTRACTS §§1476, 4137 (rev. ed. 1937). These authorities argue in favor of allowing restitution for payments made except where the purchaser in default has not shown that the injury caused by the breach is less than the amount paid. *Cf.* UNIFORM COMMERCIAL CODE §2-718 limiting the amount the seller of goods may retain to that which is reasonable in light of the actual or anticipated harm caused by the breach.

14. Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II*, 44 YALE L.J. 754, 776-77 (1935). *See, e.g.*, Mannion v. Owen, 121 So. 2d 816, 820 (1st D.C.A. Fla. 1960): "The breach of [an installment land] contract by the vendee, such as failure to pay the [installments] when due, does not ipso facto operate to effect a forfeiture of the contract and a termination of the vendee's rights thereunder, *unless the contract expressly so provides or unless time is expressly made of the essence* . . . ." (emphasis added).

15. *E.g.*, Chubb v. J. Harker Chadwick & Co., 93 Fla. 114, 111 So. 538 (1927).

16. An enforceable liquidated damages clause has two basic requirements. At the time the parties executed the contract, it must have appeared to them impracticable or extremely difficult to fix the actual damages, and the amount selected must be a reasonable estimate of the damages that will result in the event of the purchaser's breach. *Hutchison v. Tompkins*, 259 So. 2d 129 (Fla. 1972) (no-recovery rule applies unless results would be unconscionable). *See also* 5 A. CORBIN, CONTRACTS §§1059-60, 1063 (1964). Yet under a forfeiture provision in an installment contract security device that equates liquidated damages with installments paid, the amount forfeited increases as performance increases because such a fortuitous amount depends upon the time of default, a variable that does not relate to the measure of the vendor's probable damages. It can be argued, therefore, that forfeiture provisions in installment contracts are such poor barometers of estimable damages that they should be deemed *per se* penalty clauses. *Accord*, Chace v. Johnson, 98 Fla. 118, 123 So. 519 (1929). *See* Caplan v. Shroeder, 56 Cal. 2d 515, 15 Cal. Rep. 145 (1961) (liquidated damages clause in installment land contract held "presumptively valid" only if *not* based on retention of the fortuitous

so much as security for the purchaser's continued performance, but rather, as a price for the privilege of nonperformance.[17] In addition, a forfeiture of an insubstantial amount serves as a means of compensating the vendor for possible damages without the expense of litigation.[18]

The second situation in which a forfeiture of the defaulting purchaser's equitable interest and of monies paid will be sustained is where the court finds an abandonment, or "total breach," of the agreement, evidenced by the purchaser's willful delay in tendering performance.[19] Since timely payments go to the essence of the contract, the purchaser must promptly pay all installments as a condition precedent to the vendor's duty to perform, and, hence, to the accruing of the purchaser's rights *under the contract.* If the purchaser has unreasonably delayed in making payments, a situation comparable to that of laches, he will be denied the right of *quasi-contractual* restitution.[20] Accordingly, even the rule granting the party in default relief against forfeiture where he has substantially performed is not applicable:

> [W]here omissions or departures from the contract are *intentional.* . . . The policy of securing full performance of contracts or discouraging

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amount of payments made prior to the time of the purchaser's breach); *see generally* Ballantine, *supra* note 12.

17. In theory, however, a forfeiture clause disguised as liquidated damages does not create a "forfeitable option," unless the contract so provides. To hold otherwise would be to deprive the contract of mutuality and hence would be tantamount to denying a party the right to specific performance as an alternative remedy. *Compare* Slater v. Varon, 162 So. 2d 688 (2d D.C.A. Fla. 1964), *with* Orange City Hills, Inc. v. Florida Realty Bureau, Inc., 119 So. 2d 43 (1st D.C.A. Fla. 1960).

18. An analogy can be made to short-term contracts of sale. *See, e.g.,* Hutchison v. Tompkins, 259 So. 2d 129 (Fla. 1972) (short-term contract of sale; down payment of less than 10% of purchase price forfeited; held, valid liquidated damages clause because there was uncertainty concerning fluctuating land market when contract entered into); Satchell v. Van Brode, 248 So. 2d 245 (Fla. 1967) (forfeiture sustained even though no liquidated damages clause; one percent of purchase price); *cf.* Haas v. Crisp Realty Co., 65 So. 2d 765 (1953) (restitution required where shocking to conscience); Paradise v. Second Ave. Used Car Co., 61 So. 2d 919 (Fla. 1952) (purchaser under short-term contract of sale allowed recovery of $4,000 deposit of unstated purchase price on the ground that the burden was on the vendor to prove damages); *accord,* C. O. Condominiums, Inc. v. Dickenson, 301 So. 2d 106 (2d D.C.A. Fla. 1974) ($3,950 deposit of a $40,500 purchase price under an earnest money or deposit receipt contract held a penalty where the vendor was able to resell the apartments for $47,000, thereby failing to sustain the burden of proving damages).

19. *E.g.,* Realty Securities Corp. v. Johnson, 93 Fla. 46, 11 So. 532 (1927) (purchaser denied restitution where he was deemed to have willfully abandoned the contract by not making payments for over two years); Sawyer v. Marco Island Dev. Corp., 301 So. 2d 820 (2d D.C.A. Fla. 1974); Lake v. Bernstein, 215 Iowa 77, 246 N.W. 790 (1933); *cf.* H & L Land Co. v. Warner, 258 So. 2d 293, 296 (2d D.C.A. Fla. 1972) (purchaser under an installment land contract deemed a purchase money mortgagor *except* where he has willfully failed to perform a material condition of the contract).

20. *But see* Simpson, *supra* note 14, at 779, in which the author contends that under the doctrine of equitable conversion, the purchaser's rights accrue upon signing the agreement, and not upon satisfying a material condition of the contract. Hence, the purchaser's equitable rights cannot be cut off by means of vendor's contractual right of forfeiture, but rather, they can be cut off only by means of the equitable and statutory rules regarding mortgages. *Accord,* Lyttle v. Scottish American Mortg. Co., 122 Ga. 458, 50 S.E. 402 (1905).

> parties from abandoning their engagements or performing them as their interest or caprice may dictate, is felt to forbid a more liberal measure of relief. The severity of the rule . . . is relaxed only in cases of oversight, inadvertence, or excusable mistake, easily susceptible of remedy.[21]

The application of the willful standard to installment land contracts has frequently led to both unconscionable results and confusion as to the parties' rights and duties. If, for instance, the forfeiture provision in such an agreement is enforced, a defaulting purchaser who has substantially performed will be more severely penalized than one who has not performed at all.[22] A rule, then, that denies recovery operates to increase the penalty in inverse proportion to the severity of the breach.

Confusion occurs when the courts, unaided by clearly defined legislative guidelines, feel compelled to remain loyal to the general rule, yet the facts before them summon forth neither of the two situations to which the rule is usually applied. As stated by Power:

> The law is [not] susceptible [to a] succinct synthesis. Not only does the law vary from jurisdiction to jurisdiction, but within any one state results may vary depending upon the type of action brought and the facts of the particular case. The inter-play of these various factors makes it extremely difficult to predict whether the buyer's interest will be forfeited.[23]

A comparison of the cases discussed below will illustrate this point. For example, in *Chace v. Johnson*,[24] where the *purchaser*, who was one year in default, brought suit to recover payments totaling 80 percent of the purchase price, the Florida supreme court ordered the vendor-defendant to return payments made in excess of the damages incurred. Yet in *Sawyer v. Marco Island Development Corp.*,[25] where the *vendor-plaintiff* brought suit to remove from record the interest of a purchaser one year in default who had paid 90 percent of the purchase price, the Second District Court of Appeal held as a matter of law that the vendor may extinguish the purchaser's outstanding interest without returning payments made.

What has emerged from the cases dealing with the determination of the parties' rights and duties under an installment land contract is an attempt by the courts to harmonize the conflicting principles of unjust enrichment and abhorrence of forfeitures on the one hand, and certainty of contract in real estate transactions on the other. In so doing, the courts have fallen back on an *ad hoc* "balancing of the equities" test. The courts have accordingly distorted the law and manipulated the facts in carving out a nebulous array of excep-

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21. Ballantine, *supra* note 12, at 331 (emphasis added).

22. Chace v. Johnson, 98 Fla. 118, 123, 123 So. 519, 521 (1929); Steedman v. Dringle, 1 A.C. 275 (1916). *See generally* Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013 (1931).

23. Power, *Land Contracts as Security Devices*, 12 WAYNE ST. L. REV. 391, 416 (1966).

24. 98 Fla. 118, 123 So. 519 (1929). See text accompanying note 75 *infra*.

25. 301 So. 2d 820 (2d D.C.A. Fla. 1974), *cert. denied*, 312 So. 2d 757 (Fla. 1975). See notes 31-37 *infra* and accompanying text.

tions to the no-recovery rule. In addition to the courts' biases regarding the foregoing conflict in policy, the decisions have usually turned on the following factual considerations: (1) the terms of the contract;[26] (2) the amount the purchaser has paid;[27] (3) the extent of the vendor's damages caused by the default;[28] (4) the circumstances that precipitated the purchaser's default;[29] and (5) the action that the vendor has taken in response to the purchaser's default.[30]

Recent Developments

In the recent Florida case of *Sawyer v. Marco Island Development Corp.*,[31] the Second District Court of Appeal affirmed the trial court's decision granting the vendor summary judgment and held that a vendor may treat an installment land contract as abandoned in accordance with its terms where he has removed his property from the market for several years and the purchasers evidenced their intention to abandon the contract by ceasing to make further payments thereon. In *Sawyer*, vendor-Marco Island brought suit to quiet the title[32] to 36 lots within its subdivision that had been sold to defendant-purchasers under installment contracts.[33] None of the purchasers appeared in court

26. Where the facts so warrant, the courts have found grounds for relief by reason of the express terms of the contract. *E.g.*, Public Indus. Corp. v. Reading Hardware Co., 29 F.2d 975 (3d Cir. 1929) (time and forfeiture provisions); Chubb v. J. Harker Chadwick & Co., 93 Fla. 114, 111 So. 538 (1927) (forfeited sums retained as liquidated damages); Sawyer v. Marco Island Dev. Corp., 301 So. 2d 820 (2d D.C.A. Fla. 1974) (provision relieving purchasers from liability additional indicium that parties intended to allow a forfeiture in lieu of liquidated damages); Dillard Homes, Inc. v. Carrol, 152 So. 2d 738 (3d D.C.A. Fla. 1963) (nonliability provision translated as a waiver of vendor's right to specific performance); Mannion v. Owen, 121 So. 2d 816 (2d D.C.A. Fla. 1960) (contract called for "foreclosure," and not forfeiture, as the agreed remedy in case of default; held that vendor limited solely to remedy of foreclosure sale).

27. *E.g.*, Ruhl v. Johnson, 154 Neb. 810, 49 N.W. 2d 687 (1951) (forfeiture of 48% of purchase price held to be unjust enrichment).

28. *See, e.g.*, Pearce v. Shurtz, 2 Utah 2d 124, 270 P.2d 442 (1954) (the sum of the payments made plus the value of improvements totaled no more than the rental value of the property for the period of the purchaser's occupancy plus damages occasioned by the purchaser's breach).

29. See notes 72-82 *infra* and accompanying text.

30. Mere silence by the vendor upon the purchaser's breach may be sufficient reason for finding a waiver of the time and forfeiture provisions. *See, e.g.*, County of Lincoln v. Fischer, 216 Ore. 421, 339 P.2d 1084 (1959). The nature of the relief sought may also be determinative. *See* Pierce & Stevenson v. Jones, 109 Fla. 517, 147 So. 842 (1933); *accord*, Sawyer v. Marco Island Dev. Corp., 301 So. 2d 820 (2d D.C.A. Fla. 1974). Where the vendor resells the property to a third party without communicating a declaration of forfeiture to the purchaser in default, he may be required to make restitution on the grounds that his acts served as evidence of his intent to *rescind* the contract. Converse v. Elliott, 200 Iowa 1023, 205 N.W. 867 (1925).

31. 301 So. 2d 820 (2d D.C.A. Fla. 1974), *cert. denied*, 312 So. 2d 757 (Fla. 1975).

32. The purchasers had recorded their instruments in accordance with FLA. STAT. §695.01 (1973), thereby preventing the vendor from selling the land to subsequent bona fide purchasers for value.

33. Each of the agreements contained the following provision: "I understand that Mackle Bros. will grant me a 'grace' period of 60 days, without penalty, if I am unable to make any payment (after the first payment) exactly on the due date. I understand that although I am

to defend against the action. Thereupon, a guardian *ad litem* undertook to represent those defendants whom he was unable to locate.[34] Although one of the defendants, who had been located and therefore was not represented by the guardian, had paid over 90 percent of the purchase price, none of the persons so represented had made payments in excess of 25 percent of the purchase price.[35] Furthermore, none of the defendants whose property was involved in the suit had made payments for more than a year. As such, the purchasers clearly fell within the reach of the willful standard of the no-recovery rule. As stated by the court:

> We see a substantial difference between the unjust enrichment which would result if a large deposit were forfeited within a short period of time and a situation where a vendor has removed his property from the market for several years while the vendee abandons the contract by ceasing to make further payments.[36]

The dissent in *Sawyer* argued that the precedential effect of the court's decision will promote the enrichment of land developers at the expense of unwary purchasers. In order to avoid such unconscionable results as were obtained in *Sawyer* (90 percent of purchase price forfeited), the dissent said:

> I do not know where the line should be drawn, but I believe that the payment of a substantial amount of the purchase price imposes upon the seller an obligation to foreclose rather than simply quiet the title as if the buyer's rights were forfeited, [because] foreclosure of these substantial interests may result in the return to these buyers of at least a portion of their investment. . . . I would hope that our Supreme Court . . . adopts a rule for the future which is fair to seller and buyer alike.[37]

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under no personal liability to make any payments on this contract, since Mackle Bros. has taken this property off the real estate market and will be turning away other prospective purchasers as well as incurring development and other expenses in connection with its sale, all prior payments made by me will be retained by Mackle Bros. as agreed upon and liquidated damages in the event that I fail to make any payment on the purchase of this property within 60 days of the due date, and neither party will have any further claim against the other." 301 So. 2d at 821.

34. The guardian was appointed in accordance with §200 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. §520 (1970).

35. Most of the defendant-purchasers had paid well under 10% of the purchase price. This nominal sum usually constituted a mere deposit. The majority did not raise the question of whether the purchasers entered into the agreement, as they do in most deposit receipt contracts calling for a small down payment (see note 18 *supra* and accompanying text), with the intention of allowing this nominal sum to represent liquidated damages. In avoiding this issue, the majority limited its holding to the purchasers represented by the guardian, none of whom paid over 25% of the purchase price. The dissent, however, squarely faced this question by addressing itself to *all* of the purchasers whose property was involved in the suit. With regard to one purchaser who had paid over 90% of the purchase price, the dissent believed that the liquidated damages clause was in substance a penalty provision.

36. 301 So. 2d at 821.

37. *Id.* at 822-23.

The Mortgage Exception

The *Sawyer* decision appears at first blush to be in conflict with a line of authority holding that a purchaser's equitable interest in an installment land contract is analagous to that of a mortgagor's equity of redemption.[38] Though neither the dissent nor the majority in *Sawyer* cited to it, there is such authority in Florida, but it only applies under sharply defined circumstances. That is, the courts have so limited the application of rules governing mortgages to installment contracts that, in effect, they have merely drawn yet another exception to the general rule allowing forfeitures.

The line of Florida cases employing the mortgage analogue commenced with *Mid-State Investment Corp. v. O'Steen.*[39] In *O'Steen,* purchasers had assigned their deed to the vendor-investment corporation, taking back an unrecorded installment land contract.[40] The purchasers had been in possession for over a year and were always two months behind in their monthly payments. The vendor tacitly acquiesced in this constant two-month arrearage by accepting the late payments. Finally, a year after the contract had been entered into, the vendor exercised his contractual right to re-enter the premises upon default by breaking into the house through a window. Later he sold the purchasers' personal property and proceeded to sell the house to a third party. The purchasers then brought suit for trespass to real property and conversion of personal property. In affirming the trial court's decision granting the purchasers relief, the First District Court of Appeal stated:

38. MD. CODE ANN. Real Prop. §10-103(c)(1974) (installment payments to be returned to purchaser after deducting taxes, assessments, and insurance premiums paid by the vendor).

In Walker v. Nunnenkamp, 84 Idaho 485, 373 P.2d 559 (1962), the Idaho supreme court traced the development of the respective rights and duties under a mortgage in setting forth the functional similarities between an installment land contract and a mortgage. The court held that a purchaser in possession who had paid 50% of the purchase price prior to default was vested with the rights of a purchase money mortgage debtor, whose rights and interests under the agreement could be foreclosed only at a judicial sale. *Accord,* Nelson v. Robinson, 184 Kan. 340, 336 P.2d 415 (1959).

Some courts have stated that a purchaser under an installment contract is afforded a right to redeem on being served with notice of the vendor's attempt to "foreclose" the purchaser's interests in the property. The redemption period does not necessarily protect the purchaser's equity, but it does protect against inadvertent default and gives the purchaser an opportunity to come forward with the amount due or refinance with another lender. *E.g.,* Confonte v. Dunmeyer, 209 Cal. App. 2d 41, 25 Cal. Rptr. 504 (Dist. Ct. App. 1962); Brooks v. Siegal, 366 Mich. 308, 115 N.W. 2d 126 (1962); Slipp v. Amato, 231 Ore. 512, 373 P.2d 673 (1962); Henry Uihlein Realty Co. v. Downtown Dev. Corp., 9 Wis. 2d 620, 101 N.W. 2d 775 (1960).

Other courts have refused to label the installment land contract a mortgage *per se,* but they have accorded similar treatment by holding that in the event the purchaser is unable to redeem, the property is to be sold and the purchaser is to be given the excess value of the property over the vendor's damages in cash. Ward v. Union Bond & Trust Co., 243 F.2d 476 (9th Cir. 1957) (California law); Anson v. Grace, 174 Neb. 258, 117 N.W. 2d 529 (1962); Ruhl v. Johnson, 154 Neb. 810, 49 N.W. 2d 687 (1951).

39. 133 So. 2d 455 (1st D.C.A. Fla. 1961).

40. It is well established that a deed absolute on its face is a mortgage when executed to secure the payment of money. *E.g.,* Thomas v. Thomas, 96 So. 2d 771 (Fla. 1957). Thus, the assignment alone should have warranted a finding that the transaction created a mortgage; the court, however, construed the installment contract as a mortgage. See note 41 *infra* and accompanying text.

> In our opinion, the contract before us was clearly intended to secure the payment of money and must be deemed and held to be a mortgage, subject to the same rules of foreclosure . . . and to the same regulations . . . as are prescribed in relation to mortgages.[41]

The court accordingly held that the vendor had no right to repossess the property on the purchasers' default.

The *O'Steen* court, however, could have reached a similar conclusion based upon any one of three different theories of relief. First, the vendor's acceptance of late payments was sufficient to warrant a finding of a waiver of the time clause. As a result, the vendor would also have waived his contractual right to declare a forfeiture and take possession on the purchaser's failure to make timely payments.[42] Second, the court could have held the assignment itself to be a mortgage.[43] Finally, the vendor's acts allowing the default, that is, its reselling of the property without notifying the purchasers, was sufficient to find a so-called unilateral rescission of the agreement.[44] It is long settled in Florida that a vendor must serve notice on a purchaser in default as well as give him a reasonable grace period (what amounts to reasonableness is another area of confusion) during which to redeem before the vendor can extinguish the purchaser's rights in the land.[45] This is necessary both to imbue the vendor's cause with equity and to establish the purchaser's willful abandonment; for, in spite of the general rule, the courts will not allow a vendor to take away by forfeiture a purchaser's beneficial interest in the land without a clear showing that he is no longer willing to perform. Although the *O'Steen* court could have granted relief against forfeiture on the theory of rescission, its use of the mortgage exception was more suitable in view of the unusual facts before it.[46]

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41. 133 So. 2d at 457. The court found the necessary intent to create a mortgage indebtedness required by FLA. STAT. §697.01 (1973).

42. The courts that follow the majority position have developed another exception to the no-recovery rule by finding such a waiver or an estoppel where the purchaser has relied on some act undertaken by the vendor which was indicative of the latter's intent not to enforce the time clause as a condition precedent to the accruing of the purchaser's rights. *E.g.*, Walker v. Burtless, 82 Neb. 211, 214, 117 N.W. 349, 350 (1908), holding: "By the terms of the agreement a forfeiture is to be declared under certain conditions. The forfeiture clause must be construed strictly against the vendor, and if she did not declare a forfeiture, she was not, and is not, entitled to retain said money."; Perlman v. East Annadale Beach Corp., 233 App. Div. 599, 253 N.Y.S. 775 (1931) (purchaser's failure to make timely installment payments will not work a forfeiture when payments were previously paid and accepted at irregular intervals). See notes 61-63 *infra* and accompanying text for a discussion of how the courts have drawn on the waiver doctrine to enforce the defaulting purchaser's "right" to specific performance.

43. See note 40 *supra*.

44. See notes 72-74 *infra* and accompanying text, for a discussion of the concept of "unilateral" rescission.

45. *See, e.g.*, Acosta v. Anderson, 56 Fla. 749, 48 So. 260 (1909) (notwithstanding purchaser's default, contract remains in force until such time as vendor notifies purchaser of intent to declare a forfeiture).

46. The *O'Steen* court probably did not go off on the rescission theory since rescission implies a disaffirmance of the transaction (see text accompanying notes 73-74 *infra*). In *O'Steen* the purchasers sued for damages incurred by reason of the vendor's selling their real and personal property. The court, therefore, employed the mortgage analogy to keep the

In *Huguley v. Hall*, the Florida supreme court, although denying certiorari, acknowledged in dictum the *O'Steen* holding by saying:

> [I]n Florida the purchaser of property pursuant to a contract for deed[47] who defaults is ordinarily entitled to an equity of redemption in said property subject to protection of the courts of equity.[48]

The court, however, tempered its statement by adding that the purchaser must "affirmatively assert" his nascent equity of redemption; otherwise, he is deemed to have waived it.[49] Since the supreme court denied certiorari, the lower court's decision to uphold the plaintiff-vendor's right of forfeiture is still good law. The holding in *Huguley* is particularly significant because the purchaser was in possession and the lower court, in denying the purchaser restitution, issued a writ of assistance to oust him from the premises in order to enforce the court's decree of quiet title.[50]

This "mortgage" line of cases culminated in *H & L Land Co. v. Warner*.[51] In *Warner* the purchaser in possession had made installment payments for approximately five years. A period of four years then elapsed during which the purchaser did not make any payments. During this period the vendor remained silent concerning the purchaser's failure to perform.[52] The purchaser eventually tendered the entire unpaid balance plus interest and demanded a deed, but the vendor refused to convey title to the property.[53] The purchaser then sued for specific performance and the vendor counterclaimed for removal of the contract as a cloud on the vendor's title.[54] The court, granting the decree for specific performance, held:

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transaction in force. Accordingly, the purchasers still had an enforceable property interest that the vendor could not cut off by way of forfeiture, and the latter was duty bound not to sell the purchasers' property without incurring liability for trespass, with which he was ultimately charged.

47. Some writers draw a distinction between "contracts or agreements for deed" and installment land contracts. Whereas the former suggests that the purchaser has taken possession, the latter indicates that actual possession will be taken only upon transfer of title. *See* 1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §4.05 (Supp. 1975).

48. 157 So. 2d 417, 418 (Fla. 1963).

49. *Id.*

50. 141 So. 2d 595 (1st D.C.A. Fla. 1962). The dissent raised an interesting question regarding the propriety of the writ of assistance. It argued that an ejectment action, not a suit to quiet title, is the proper remedy where a court allows a forfeiture of the purchaser's interest and the purchaser is in possession. Professor Boyer suggests that in an action for ejectment, a purchaser cannot raise an equity of redemption. This is so because under the rules of civil procedure, joinder of an ejectment action with any other claim is prohibited. And, as the supreme court indicated in denying certiorari, an assertion of an equity of redemption is an affirmative plea. *See* 1 R. BOYER, *supra* note 47, at 70. *See generally* Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550 (1965).

51. 258 So. 2d 293 (2d D.C.A. Fla. 1972).

52. At the outset of this four-year period of silence, the vendor demanded the delinquent payments, but the purchaser did not respond and communications ceased.

53. The vendor's refusal to convey was based on his contractual right to declare a forfeiture upon the purchaser's default in payment.

54. The contract was recorded. See note 32 *supra*.

> [T]he vendor under a specifically enforceable installment land sale contract, who has received part of the purchase price and has given the vendee possession of the land and the benefits and burdens of ownership, is in essentially the same position as a vendor who has conveyed the legal title and taken back a purchase money mortgage . . . pursuant to Fla. Stat. §697.01.[55]

Unfortunately, the *Warner* court expressly limited its holding to the particular facts of the case. As such, there are three conditions that must be satisfied before a purchaser in default will be afforded the protection of a mortgagor. First, the purchaser must be in possession or have a right to possession. Although not cited by the court, there is authority holding that the purchaser's right to possession is a major factor in establishing the parties' intent to create a mortgage agreement,[56] although the absence of such a right should not be determinative of the issue.[57] Moreover, this requirement removes from judicial protection the large number of buyers who have purchased undeveloped land under installment land contracts in which the right to possession accrues only upon payment of the entire purchase price.[58] It appears that the court succumbed to ancient notions of seisen; as stated by Dean Pound, the purchaser's possession is the "substance of the Common Law conveyance."[59]

The second prerequisite to obtaining the status of a mortgagor is that the contract be specifically enforceable.[60] The *Warner* court looked to the doctrine of equitable conversion in enforcing the defaulting purchaser's right to specific performance, which presumably accrued on his tender of the unpaid balance. Such a requirement necessitates a finding of a waiver of the time clause – an issue the court did not discuss – since the purchaser's specifically enforceable rights could have subsisted only if such a waiver (of a condition precedent to the accruing of the purchaser's rights) had been found. This result comports with the equitable principle of mutuality of remedies under which the party seeking specific performance must perform all conditions required on his part so as to place himself in a position where he too can be compelled to specif-

55. 258 So. 2d at 295.

56. *E.g.*, Cain v. Hunter, 161 Cal. 2d 808, 327 P.2d 583 (1958).

57. The third and fourth districts recently adopted the *Warner* approach in requiring the purchaser's possession as a condition to mortgage treatment. See Torcise v. Perez, 319 So. 2d 41 (3d D.C.A. Fla. 1975) (where installment contract is silent as to possessory rights, the contract will be deemed a mortgage); Hoffman v. Semet, 316 So. 2d 649 (4th D.C.A. Fla. 1975) (vendee has equity of redemption subject to levy in execution upon judgment where he is in possession under an installment contract; and buyer of vendee's interest at sheriff's sale is entitled to the right to satisfy total outstanding indebtedness due vendor under the contract and to receive conveyance of property).

58. In Florida, land developers generally insert clauses in the contract stipulating that "buyers shall have possession of property after all payments are made." See KRISTIANSEN INTERVIEW, *supra* note 4. *See also* State *ex rel.* Four-fifty Two-thirty Corp. v. Dickinson, 322 So. 2d 525 (Fla. 1975). *See generally Some Perils in a Land Sales Contract*, CONSUMER REPORTS, Sept. 1972. This class of purchasers has been subjected to much overreaching by some land developers. *See* FLA. STAT. §478.011-.211, and Interstate Land Sales Act, 15 U.S.C. §1700 (Supp. II, 1972) (legislation designed to curb abuses in land sales under installment contracts).

59. Pound, *Equity: The Progress of the Law*, 33 HARV. L. REV. 929, 939 (1920).

60. 258 So. 2d at 295, 296.

ically perform.[61] An exception to the rule of mutuality is that the party for whose benefit the condition was inserted may forego or waive any rights he has under the provision.[62] The vendor's silence during the four-year period of non-payment was clearly sufficient to warrant a finding that the vendor intended to waive his rights flowing from the time and forfeiture provisions; hence, the contract was still in force and the purchaser still had the right to compel performance.[63] As was noted by Pound: "Strict doctrines as to forfeiture inevitably produce loose doctrines as to waiver."[64]

It is worth noting that this second prerequisite carires the corollary that a defaulting purchaser who brings suit not upon the contract itself (to enforce his right to specific performance), but under a count of unjust enrichment, may be denied relief. As the court pointed out:

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61. *E.g.*, Calumet Co. v. Oil City Corp., 114 Fla. 531, 154 So. 141 (1934) (distinguishing mutuality of remedies from mutuality of obligations); Con-Dev. of Vero Beach, Inv. v. Casano, 272 So. 2d 203 (4th D.C.A. Fla. 1973).

As another exception to the no-recovery rule, some courts will scrutinize the vendor's acts after the purchaser's default, and if a waiver can be found, may enforce the purchaser's right to compel performance. *See, e.g.*, County of Lincoln v. Fischer, 216 Ore. 421, 339 P.2d 1084 (1959) (under facts similar to those in *Warner*, mere inactivity by the vendor upon the purchaser's breach was sufficient to warrant a finding of a waiver of the time and forfeiture provisions. As a result, the purchaser was granted a decree for specific performance); *cf.* Ward v. Union Bond & Trust Co., 243 F.2d 476 (9th Cir. 1957); *accord*, MacFadden v. Walker, 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971) (California policy against forfeitures precluded denying the right to specific performance to a willfully defaulting purchaser where the installment land contract had been substantially performed and no detriment would befall the vendor by the purchaser's continued performance of the contract). *Compare* Simpson, *supra* note 14, at 779 ("while [the purchaser] should be relieved against forfeiture on analogy to the mortgage situation, there seems no compelling reason for allowing him to have specific performance if the seller objects"). See note 42 *supra*, discussing the "waiver" concept as a vehicle for granting a defaulting purchaser restitution.

62. *E.g.*, Mangus v. Porter, 276 So. 2d 250 (3d D.C.A. Fla. 1973); Glave v. Brandlein, 196 So. 2d 780 (2d D.C.A. Fla. 1967). The *Warner* court made it clear that it was speaking in terms of a waiver of a condition precedent (timely payments) to the purchaser's right to specific performance when it distinguished Stoneman v. Peninsula Land Co., 124 So. 2d 760 (2d D.C.A. Fla. 1960). In *Stoneman*, the same court that decided *Warner* held for the vendor in permitting a forfeiture where the vendor brought suit to quiet title and the purchaser counterclaimed for specific performance. As the *Warner* court rationalized: "Nor do we consider that our decision in [*Stoneman*] is controlling here. In *Stoneman*, the buyer sought specific performance but had not performed and did not tender performance of material requirements relating to property improvements that were an important part of the consideration to be received." 258 So. 2d at 296.

63. *See* Forsell v. Carter, 65 Fla. 512, 62 So. 926 (1913) (plaintiff-purchaser in default tendered unpaid balance to vendor; vendor neither gave notice of intent to forfeit purchaser's rights nor conveyed deed. Held: specific performance decreed; vendor must give notice of intent to forfeit or terminate, fixing therein a future time in order that purchaser in default may have an opportunity to redeem, and until such time as notice is given, defaulting purchaser has an enforceable right to compel performance). In *Warner*, the court said: "We cannot determine from the record whether the seller gave the buyer notice of an election to terminate the contract with a reasonable opportunity for the buyer thereafter to cure the default." 258 So. 2d at 295.

64. Pound, *supra* note 59, at 952.

> We are *not* deciding the rights of a defaulting purchaser . . . who is *willing to relinquish his rights in the land,* [for] we do not consider that the issue here is controlled by those cases in which a defaulting buyer did not seek to pay the amounts owed . . . but on the contrary sought to get back amounts already paid.[65]

The *Warner* holding is thus an affirmation of the general rule allowing forfeitures where the purchaser's willful default effects an abandonment of his rights under the agreement.

The third condition that must be met is for the purchaser not only to "assert" his implied right of redemption, as was stated in dictum by the supreme court in *Huguley,* but also to exercise this right by "tendering full performance," that is, by paying the unpaid balance.[66] By so holding, the court is going in circles. If one must tender the unpaid balance as a condition precedent to the vesting of the right of redemption, then one must exercise this right before one is entitled to it — an anomaly, to be sure. Thus, the rights of mortgagors will not be extended to purchasers in default who are either in straitened circumstances or unaware of the right of redemption — the very individuals whom the mortgage statutes were designed to protect.

In sum, it is submitted that the court's theory of relief — that an installment land contract is a mortgage — is mere dictum. By requiring a specifically enforceable contract and a tender of the balance of the purchase money, the court is simply reiterating the elements of specific performance.[67] In fact, the *Warner* requirements are even more restrictive than those found in a suit for specific performance, since the plaintiff's right to possession need not be established in the latter case if an enforceable contract has been executed.[68]

Procedural Variables: Rescission Versus Quiet Title

The most recent case involving installment land contracts, *Sawyer v. Marco Island Development Corp.,*[69] made no mention of the "mortgage" line of cases.[70] Instead, the court reaffirmed the present law by relying on another

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65. 258 So. 2d at 296 (emphasis added), *citing* Williams v. Crouch, 186 So. 2d 491 (Fla. 1966).

66. *Id.*

67. *See, e.g.,* Clements v. Leonard, 70 So. 2d 840 (Fla. 1954); Romines v. Nobles, 55 So. 2d 563 (Fla. 1951).

68. *See* 1 R. Boyer, *supra* note 47, at 72.

69. 301 So. 2d 820 (2d D.C.A. Fla. 1974), *cert. denied,* 312 So. 2d 757 (Fla. 1975). See notes 31-37 *supra.*

70. *Sawyer* was clearly distinguishable from such cases. Since the purchaser in Sawyer whose equity in the property exceeded 90% of the purchase price did not tender the unpaid balance and did not have the right to possession, he did not fall within the scope of *Warner.* Since he was served with notice of the vendor's intent to declare a forfeiture and was given a substantial grace period in which to cure the default, he had no protection under *O'Steen.* Finally, his failure to appear during the proceedings to assert his equity of redemption placed him outside the *Huguley* dictum. Although these distinctions are readily apparent, the dissent in *Sawyer* should have drawn upon these decisions to shore up its argument. See text accompanying note 39 *supra.*

series of cases that, in certain factual settings, have given effect to forfeiture provisions in installment land contracts.

The *Sawyer* court cited *Pierce & Stevenson v. Jones*[71] in support of its holding. In *Pierce & Stevenson,* the supreme court held that where a purchaser or his assignee shows no intention of paying the balance due on a deposit-receipt contract of sale, the vendor may treat the contract as abandoned and thereby have his title quieted without returning the down payment. The rationale for the holding in *Pierce & Stevenson* was that a vendor who brings a quiet title action, as opposed to one of rescission, need not make restitution to the defaulting purchaser as a condition to expunging the purchaser's outstanding interest from record. The court, however, glossed over the factual situations that enter into determining whether the relief sought by the vendor is to quiet his title or to rescind an enforceable agreement. This cursory treatment led the *Sawyer* majority to believe that *Pierce & Stevenson* stands for the proposition that, as a matter of law, a vendor who brings suit to remove a cloud on his title may, without more, retain the installments paid and the title to the land as well. This statement, however, sets forth the conclusion; the import of the *Pierce & Stevenson* rationale is to be found by examining the concepts of rescission and abandonment.

A finding that the vendor has rescinded the contract involves several elements. In general, so long as the vendor remains ready and willing to tender performance, he has a right to specific performance for the balance due, which the purchaser cannot cut off by repudiation. Likewise, though the purchaser may be in default (by being late in payment, for example), the purchaser's enforceable rights continue to subsist where the *bona fides* cut in his favor, namely, where (1) the purchaser has a substantial investment in the land (which may include improvements made as well as payments), and (2) the vendor has not adequately notified the purchaser of his intent to divest the purchaser of his beneficial interest and retain payments made.[72] Under such circumstances, the purchaser's default is not considered an abandonment or "total breach," for the vendor has not made an "effectual termination" of the purchaser's rights.[73] When the court determines that the contract is still in force, the vendor who brings suit to forfeit the purchaser's interest, or who counterclaims for such relief after doing some act that puts conveyance beyond his power (*e.g.*, reselling the land), is seeking the aid of equity in rescinding the contract, a privilege created by virtue of the purchaser's default.[74] Because

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71. 109 Fla. 517, 147 So. 842 (1933).

72. If a vendor has any doubt as to the bona fides, it is best that he bring suit for specific performance or a suit based on his vendor's lien (assuming there is an acceleration clause, without which only the installments due can be recovered). This procedure involves foreclosing the purchaser's interest by a judicial sale, at which the vendor may be able to bid in and retain the payments as well. See note 85 *infra*. If the vendor wishes to avoid judicial process, then plying the purchaser with notice for a few months may be sufficient for a court to treat the purchaser's inactivity as an abandonment.

73. *See, e.g.*, Hillman v. Busselle, 66 Ariz. 139, 185 P.2d 311 (1947); Parchen v. Rowley, 196 Wash. 340, 82 P.2d 857 (1938). See notes 45-46 *supra* and accompanying text.

74. *But see* Huguley v. Hall, 141 So. 2d 595 (1st D.C.A. Fla. 1962), *cert. denied*, 157 So. 2d 417 (Fla. 1963) (vendor's prayer for relief recited "rescission" of the agreement; purchaser

rescission destroys the contract *in toto* and *ab initio* and thus extinguishes both parties' enforceable rights, it caries with it a restoration of the status quo. The vendor is therefore obligated to make restitution for payments made less damages suffered by the vendor and benefits the purchaser received at the vendor's expense. As stated by the supreme court in *Chace v. Johnson,* where the purchaser brought suit one year after default to recover payments totaling 80 percent of the purchase price:

> The [forfeiture] clause, we think, merely secured to the vendor an option to rescind the agreement and take what damage he actually sustained or waive the privilege and bring action upon the unqualified agreement of the purchaser to pay.[75]

On the other hand, where the vendor has served notice of forfeiture on the defaulting purchaser, and where he has set aside an adequate grace period in which the purchaser may cure his default and redeem the property, the vendor has evidenced his intent to maintain, and not rescind or abandon, the contract. If the defaulting purchaser does not respond to such notice within a reasonable time and willfully refuses to perform, the vendor may treat this default as an abandonment. In the interest of facilitating the alienation and beneficial use of land, the vendor now has the right to rely on the purchaser's abandonment and resell the property.[76] If the contract is recorded, then the vendor can invoke the court's equitable jurisdiction in quieting his title without having to return payments made. This is so because the purchaser, having abandoned the contract, no longer has an equitable interest by virtue of, or any enforceable rights issuing from, the contract. As such, all that remains of the transaction is a cloud on the vendor's title. As stated by the supreme court in *Chubb v. Jo. Harker Chadwick & Co.,* where "only two payments aggregating a relatively small portion of the purchase price had been paid" before default:

> This class of cases [rescission] should not be confused with the class brought, not to rescind or cancel a contract which is still operative and in force, but to remove the cloud resulting from the recording on the public record of a contract which has already been forfeited, canceled, or terminated in accordance with its terms. In such cases, some different rules are applicable.[77]

A case in which an "abandonment" situation clearly existed was *Realty Securities Corp. v. Johnson.*[78] In an elaborate opinion, the Supreme Court of

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counterclaimed for a "restoration of the status quo"; held, vendor can forfeit defaulting purchaser's rights and interests in the land in accordance with terms of the agreement).

The Florida courts have been vague on this matter of rescission. Corbin calls it a "unilateral" rescission, since the court is not looking to the purchaser's default, but only to the vendor's actions subsequent to the purchaser's default (*e.g.,* resale of property without notifying purchaser). *See* Corbin, *supra* note 22, at 1037-41. *See also* Ballantine, *supra* note 12, at 348.

75. 98 Fla. 118, 123, 123 So. 519, 521 (1929).

76. *See* Sanders v. Brock, 230 Pa. 609, 79 A. 772 (1911).

77. 93 Fla. 114, 119, 111 So. 538, 541 (1927).

78. 93 Fla. 46, 111 So. 532 (1927).

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Florida properly applied the willful standard of the no-recovery rule in barring the purchaser in default from asserting his right to recover installments paid (seven percent of the purchase price). The court held that the plaintiff-vendor may have his title quieted where he had attempted to give reasonable notice of forfeiture and the purchaser had made no payments for over two years and, by moving to another state, had evinced his unwillingness to make such payments. The gist of the court's opinion was that, "while forfeitures are not favored, either in law or equity, it is equally true that neither law nor equity favors the negligent, nor do they hold out a premium to the careless, or one who shows anything else than a prompt and ready disposition to comply with his undertaking."[79]

By way of contrast, the same court, in *Taylor v. Rawlins*,[80] found a rescission and held that a plaintiff-vendor must return all the payments made (20 percent of the purchase price) as a condition to quieting his title where, after the first default, the vendor gave notice to the purchaser that he had only thirty days in which to pay the unpaid balance or face forfeiture.

> [The vendor] asks the court to relieve him from his contract and the consequences of recordation. He desires, however, to retain all that he acquired by virtue of it, while being relieved of its inconveniences and detriments. He seeks equity, but does not offer to do equity.[81]

It is clear, then, that the weakness of the *Pierce & Stevenson* rationale is that, although the equities may ostensibly depend on the relief sought, they actually depend on the facts. In *Pierce & Stevenson*, the original purchaser assigned his deposit receipt contract to subpurchaser-defendant, without making the vendor a party to the assignment. The vendor waited in vain 21 months for the original purchaser to pay. The subpurchaser, moreover, remained silent during the 21-month period. When the vendor brought suit to remove the contract from record, the subpurchaser finally appeared to set up the assignment in order to recover the down payment. Since the original purchaser was barred by laches from recovering the down payment, his assignee was subject to the same defense and was therefore denied relief. Although reaching a just decision, the court nevertheless relied on a procedural technicality—the quiet title rationale—in its attempt to reconcile fact situations that call on the rescission exception to the no-recovery rule with the particular facts before it. Unfortunately, the court set a precedent that did not go directly to the merits of the case.

79. *Id.* at 58-59, 111 So. at 536. As to the notice element, the court said: "It is unquestionably the law that a vendee may waive the right to notice. . . . [No] notice [is] necessary where the vendee has actually abandoned the contract, or has so acted as to create a reasonable belief on the part of the vendor that the vendee has abandoned the contract and by removal to another state has put it out of the power of the vendor to give notice." *Id.* at 62, 111 So. at 532. Since a large percentage of the land sales transacted in today's mobile society are interstate or international (see note 5 *supra*), it appears that these notice requirements, laid down in 1927, are highly inadequate. *Cf.* Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974) (procedural due process issues that might be raised).

80. 86 Fla. 279, 97 So. 714.

81. *Id.* at 282, 97 So. at 715.

The majority in *Sawyer* erred in relying on the tenuous rationale of *Pierce & Stevenson* in support of its holding, since in the latter case, the decision turned on the subpurchaser's intentional 21-month delay in coming forward with the balance of the purchase money as well as on the fact that the amount forfeited was relatively insubstantial. Furthermore, whereas the instrument in *Pierce & Stevenson* involved a short-term deposit receipt contract of sale, those in *Sawyer* were installment contract security devices, two functionally different types of transactions that should be accorded different legal treatment. The *Sawyer* holding thus reflects the unsettled state of the existing law. The dissent stated:

> My quarrel with the majority lies in their treatment of Pierce & Stevenson v. Jones as a precedent unqualified by equitable considerations. . . . I do not disagree with my brethren that this action should be affirmed as to those who made small initial payments and soon ceased to pay. That is the principle of Pierce & Stevenson v. Jones. As to those buyers who paid conscientiously until substantial portions of the purchase price were paid I think equity imposes upon the plaintiff a duty to do equity or offer to do equity which the defendant's default does not cure.[82]

Yet contrary to the dissent's perception of the majority's position, the purchaser's default per se was not the crucial consideration that was balanced against the purchaser's 90 percent investment in the land. On the vendor-subdivider's side of the scale were the "equities" of attempting to serve notice on the purchaser who had no right to possession and giving him a reasonable grace period in which to cure his default. Furthermore, the vendor could not obtain a deficiency judgment even if he sought foreclosure of his vendor's lien at a judicial sale since the contract provided that the purchaser was not personally liable for the purchase money obligation. Finally, the purchaser supplied the *coup de grace* by not responding to service of process.

Thus, under the present Florida law, even though a purchaser may have invested substantial sums in the land, the principle that "equity abhors a forfeiture" gives way to the attitude that where a purchaser abandons his contractual commitments, complete control over the use of land should be given to the vendor. This is so because:

> The price of lands in this country is fixed with reference to prompt payment; and where they are an article of commerce, it is often of the last importance to a vendor to receive his money promptly to enable him to meet his own engagements.[83]

So long as an installment land contract security device is treated as a contract, and not a mortgage lien, these two policies will remain at loggerheads.

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82. 301 So. 2d at 821-23.
83. Heckerd v. Sayre, 34 Ill. 142 (1864).

A TIME FOR REFORM

Practical Considerations

Gauging the impact of the waiver, rescission, and mortgage exceptions to the no-recovery rule on the present law is, for the most part, an academic exercise. The vendor, because of his superior bargaining position, does not take steps to ensure that the contract is recorded. Thus, absent other indicia of ownership such as possession, no notice exists of the purchaser's interest in the land. Moreover, the purchaser is usually ignorant of, or too impoverished to vindicate, his rights, and so, on default, does not bring suit to recover payments made. The fact that there is no notice to third parties of the existence of the contract means that there is no cloud on the vendor's "legal title." This obviates the necessity of a quiet title proceeding, for the vendor can unilaterally extinguish the purchaser's interest and retain the payments made. In other words, the vendor can avoid the risk of an adjudication based on the merits. It follows, then, that the vendor has both the power (in the absence of notice of the purchaser's interest) and the right (in the absence of the purchaser's challenging the vendor's contractual right to forfeiture) to resell the realty to a subsequent bona fide purchaser for value.

This situation is well understood by Florida land developers, who frequently retain all possessory rights until the final installment payment is made, thus avoiding any need for quiet title or ejectment proceedings. Justice England has stated:

> It is commonly known that agreements for deed are neither recorded nor enforced (in the usual sense of foreclosing on property or commencing legal action in court).... [A] retention of the buyer's prior payments [is] the favorite (if not exclusive) remedy available to land companies....[84]

It is clear, then, that legislative action is necessary to bridge the gaps in the existing law that the courts, left to their own devices, have been incapable of bridging.

The Revival of "Strict Foreclousre"

For all practical purposes, the Florida courts have treated installment land contracts in the same way as mortgages were treated in those title theory jurisdictions that accorded the outmoded remedy of strict foreclosure to mortgagees.[85] The procedure involved quieting the mortgagee's title by fore-

84. State *ex rel.* Four-fifty Two-thirty Corp. v. Dickinson, 322 So. 2d 525, 531 n.4 (Fla. 1975).

85. It is well settled in Florida that a vendor can bring suit either for specific performance, and thereby obtain judgment for the amount due, or for enforcement of his vendor's lien by foreclosing the defaulting purchaser's interest at a judicial sale. The Florida courts have long referred to this latter remedy as "strict foreclosure." This is a misnomer, however, since the proceedings involved in this "strict foreclosure" are tantamount to Florida's equitable and statutory foreclosure sales. See note 91 *infra. See, e.g.,* Wordinger v. Wirt, 112 Fla. 822, 151 So. 47 (1933) (even though installment contract contained no acceleration clause, vendor can "strictly" foreclose purchaser's rights thereunder by taking a decree to sell the property

closing and removing from record the defaulting mortgagor's outstanding interest without requiring either a judicial sale or an inquiry into the mortgagor's right of restitution on his failure to redeem.[86]

Florida's decisional treatment of recorded installment land contracts[87] parallels the strict foreclosure process; a vendor who brings suit to quiet his title or otherwise forfeit the purchaser's rights and interest establishes a prima facie case when he (1) gives reasonable notice of his intent to cut off the purchaser's interest;[88] (2) gives the purchaser in default a reasonable grace period in which to redeem;[89] and (3) shows that the purchaser failed to make payments within this grace period.[90] This position is clearly antithetical to section 697.02 of the Florida Statutes, which provides *inter alia* that the mortgagee's rights in the property constitute merely a lien, which can be enforced only by action and judicial sale and not by strict foreclosure.[91] Nevertheless, to avoid bringing the installment contract within the statutory definition of a mortgage, the courts have steadfastly remained loyal to antiquated notions of freedom of contract by stressing the executory nature of the contract as well as the fact that the vendor, by the terms of the agreement, has legal title and not merely a lien.[92] Thus, when the facts are such that the vendor has complied with the above-mentioned statutory requirements, the courts will apply the no-recovery

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involved in satisfaction of delinquent installments, buyer at sale taking subject to future installments. *Accord*, Jackson v. Granger Lumber Co., 275 So. 2d 555 (1st D.C.A. Fla. 1973). See note 86 *infra* and accompanying text for a discussion of the traditional remedy of strict foreclosure. *Cf.* Marquard v. Fisher, 135 Ore. 256, 205 P. 499 (1931) (vendor entitled to either specific performance or strict foreclosure of defaulting purchaser's interest under installment contracts. The latter remedy involves removing purchaser's outstanding equity from record without a sale though a sale may be ordered if the purchaser's investment is large).

86. See Walker v. Nunnenkamp, 373 P.2d 559, 563 (1962), in which the court sets forth the historical distinctions between the outmoded form of strict foreclosure (*i.e.*, the process by which the mortgagee "barred and foreclosed" [the defaulting mortgagor's] right and equity of redemption [and] the court refused to decree a compulsory sale against the will of the mortgagor), and the "modern" form of strict foreclosure (same procedure except that where substantial payments have been made, the court will not, as a matter of law, decree strict foreclosure, but may instead order a sale). *But see* Vanneman, *Strict Foreclosure of Land Contracts*, 14 MINN. L. REV. 342 (1933), in which the author maintains that statutes authorizing the modern form of strict foreclosure of a defaulting purchaser's rights under an installment land contract are no more effective in providing relief against forfeiture than the "outmoded" version of this remedy. The author, however, overlooks the indispensable attribute of certainty in any set of statutory guidelines.

87. This treatment applies regardless of recordation if the circumstances establish actual or inquiry notice of the purchaser's interest in the land. See note 32 *supra*.

88. See text accompanying notes 79-83 *supra*.

89. *Id.*

90. *Id.* See also note 66 *supra* and accompanying text.

91. *E.g.*, Georgia Casualty Co. v. O'Donnel, 109 Fla. 290, 147 So. 267 (1933) (remedy of strict foreclosure prohibited in Florida; judicial sale mandatory). See note 85 *supra* for a discussion of the vendor's right to "strictly" foreclose the defaulting purchaser's interest by sale.

92. *But see* State of Florida *ex rel.* Four-fifty Two-thirty Corp. v. Dickinson, 322 So. 2d 525 (Fla. 1975), in which the supreme court ruled that for purposes of intangible property tax, an installment land contract is a lien that is security for the purchaser's obligation. See text accompanying notes 118-132 *infra* for a discussion of the potential impact of this case. *See also* note 20 *supra*.

rule on the basis of some principle found in contract law (*e.g.*, a willful default, abandonment, or failure to satisfy a condition precedent) in allowing the vendor to quiet his title without returning payments made. But the courts will find the necessary intent to create a mortgage where the vendor has not complied wth the statutory notice and redemption requirements as to mortgages and the purchaser has tendered the entire unpaid balance plus interest — that is, where he has exercised his equity of redemption, a right accorded all defaulting mortgagors under the remedy of strict foreclosure.

The Need for Legislative Action

From an equitable point of view, the existing law is unfair; from a functional point of view, it is unpredictable. Since the standards of "reasonableness" of notice and grace period vary with the circumstances, neither party is certain of his rights and duties, and consequently sound planning is inhibited. This undesirable situation is a product of the undue emphasis placed by the Florida courts on the form of the transaction — an executory contract — rather than on its substance — a masked security device in lieu of a mortgage. If intent to create a security interest is the test for determining whether a transaction that purports on its face to convey a proprietary interest in property comes within the statutory definition of a mortgage lien,[93] then the courts, as well as the public, need more definite criteria for judging such intent in installment land contract situations.[94] As aptly stated by the court in *H & L Land Co. v. Warner*:

> The issue here is significant, and has been difficult for us to resolve. Appellate decisions involving the question have not been uniform and clear. More certainty and predictability is desirable. Legislative attention may be needed.[95]

Cf. FLA. STAT. §679.102 (1973) (UNIFORM COMMERCIAL CODE §9-102), which embodies the equitable mortgage concept with respect to security interests in personal property. Under the doctrine of equitable mortgages, the courts have afforded mortgage protection to debtors in transactions that in form are not mortgages but are designed to create security interests. The legislature should recognize that installment land contracts have created the same degree of uncertainty and unfairness in adjusting the parties' rights as did conditional sales in pre-UCC personal property secured transactions. In an era when consumerism is growing, the Florida legislature has not been receptive to the needs of consumers in land sales.

93. FLA. STAT. §697.01 (1973) provides that "All . . . instruments [transferred] with the intention of securing the payment of money . . . shall be deemed and held mortgages. . . ." *See also* Torreyson v. Dutton, 145 Fla. 169, 198 So. 796 (Fla. 1940) (FLA. STAT. §697.01 is to be given a liberal construction regardless of the form of the transaction); *accord*, First Mortg. Corp. v. de Give, 177 So. 2d 741 (2d D.C.A. Fla. 1965).

94. See text accompanying notes 41-62 *supra*. *Cf.* Venable v. Harmon, 233 Cal. App. 2d 297, 43 Cal. Rep. 490 (Dist. Ct. App. 1965) (factors instrumental in determining whether an installment land contract is to be construed as a mortgage are the number of installments, whether the price is to be secured by some other device, and whether the purchaser takes possession before paying the price).

95. 258 So. 2d 293, 296 (2d D.C.A. Fla. 1972).

Protecting the Vendor's Interest

By and large, financial convenience is the primary reason for employing the installment contract device, especially during a tight money market. The vendor can avoid the risks and expenses attendant upon mortgage financing and foreclosure, and the purchaser can buy property with little or no cash without assuming personal liability for the purchase price.[96]

The legislature should give effect to these considerations during the early stages of the transaction by not treating the contract as a mortgage. The principal reason for not according mortgage status at this time is that, during the early stages of the transaction, the purchaser's financial investment in the property is usually *de minimus*, a situation similar to that of a short-term deposit receipt contract. The vendor, then, has no security in the land except the legal title. He would be unfairly subjected to unforeseeable risks if his interest in the land were treated as a mortgage lien. He would be required to institute a foreclosure sale in the event of the purchaser's default,[97] at which the fair market value of the property would probably not be realized. This consideration, coupled with the fact that the vendor has received only a small portion of the purchase price by way of installment payments, would leave him with an amount insufficient to both defray the costs of the foreclosure proceedings and apply toward satisfying a deficient sale. If the purchaser is not personally liable for the purchase price, the vendor would have no basis for recovering a deficiency judgment against him. [98] The above considerations must be reckoned with, especially with regard to sellers having little or no liquid capital who convey property encumbered with a first or second mortgage. They may use

96. This is assuming the agreement provides that the purchaser will not be held liable for the balance due in the event of his default. Otherwise, so long as the vendor remains ready and willing to perform, he may sue for specific performance by way of judicial sale, any deficiency from which may warrant recovery of a deficiency decree. Clements v. Leonard, 70 So. 2d 840 (Fla. 1954) (deposit receipt contract). But in Vance v. Roberts, 96 Fla. 379, 118 So. 205 (1928), the court held that where an installment land contract provided that in the event of default a stated sum would be retained by the seller as liquidated damages and that no party would be personally liable on the purchase money obligation, the vendor is deemed to have waived his right to specific performance. His remedy was confined to liquidated damages. *Accord*, Dillard Homes Inc. v. Carrol, 152 So. 2d 738, 739 (3rd D.C.A. Fla. 1963) (deposit receipt contract provided that a stated sum was "to be retained by the seller as liquidated and agreed damages and the parties hereto shall be relieved of all obligations under this instrument" in the event of the purchaser's default). Specific performance may be ordered, however, where the vendor has manifested his intent not to limit his choice of remedy. Slater v. Varon, 162 So. 2d 688 (2d D.C.A. Fla. 1964). Nonliability provisions similar to that in *Carrol*, *supra*, are included in most installment contracts used by Florida land developers. See *Kristiansen Interview*, *supra* note 4.

Compare Miami Bond & Mortg. Co. v. Bell, 101 Fla. 1291, 133 So. 547 (1931) ("[I]t is well settled" that a mortgage is created where the purchaser gives the vendor a negotiable note as evidence of the purchaser's indebtedness under an installment land contract), *with* Guaranty Title and Trust Co. v. Thompson, 93 Fla. 983, 113 So. 117 (1937) (a trust deed that does not secure a debt or obligation is not a mortgage).

97. Such a sale would be required pursuant to FLA. STAT. §§45.031, 702.01 (1973).

98. *See* Brannon v. Makin, 159 So. 2d 483 (2d D.C.A. Fla. 1963) (personal judgment against mortgagor following a deficient sale was improper where no note was executed). *But see* note 96 *supra*. *See generally* FLA. STAT. §702.06 (1973).

the installment contract to avoid the risks of holding a purchase money second or third mortgage.[99]

Protecting the Purchaser's Interest

Under an installment land contract, since the amount paid (and, hence, forfeited in the event of default) is a function of time, there comes a point when the purchaser's equity in the property is so substantial that freedom of contract should yield to the deeply-rooted principles of protecting the debtor's interest in property and affording relief against forfeitures. By virtue of the purchaser's substantial performance, the contractual arrangement, which was originally entered into primarily for convenience, now assumes the characteristics of a transaction that, in effect, operates to secure payment of the balance of the purchase money obligation. At this point it should be "deemed and held" to be a mortgage lien.[100]

At this stage, since the purchaser's investment is large, the vendor can be reasonably secure in the assumption that the purchaser will diligently attempt to protect his equity by making future payments. If the purchaser should default, a deficiency judgment would usually not be necessary, since the proceeds from the sale combined with the substantial installment payments received by the vendor, would adequately cover all costs and would be sufficient to make up the amount of the purchase price. A judicial sale is the most equitable remedy, since:

> [T]he essence of a secured transaction is the debt. A [judicial] sale of the security with a return of any excess over the obligation to the debtor will satisfy the creditor to the extent the security is adequate to do so and will assure the debtor that no one has been unjustly enriched at his expense.[101]

Furthermore, unlike a forfeiture or rescission, a sale would reflect such increments of value as appreciation and improvements made by the purchaser (or,

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99. See Rudolph, *The Installment Land Contract as a Junior Security*, 54 MICH. L. REV. 929 (1956), in which the author argues in favor of traditional strict foreclosure as a compromise between outright forfeiture and judicial sale in order to protect such sellers from the risk of losing their investment by being outbidded by prior lienors.

100. FLA. STAT. §697.01 (1973); *cf.* Thomas v. Thomas, 96 So. 2d 771 (Fla. 1957) (parties' attitude *after* the execution of the transaction may be determinative in finding that the transaction created a mortgage). *See* State *ex rel.* Four-fifty Two-thirty Corp. v. Dickinson, 322 So. 2d 525 (Fla. 1975), holding that for tax purposes an installment land contract creates a lien on real property that operates to secure payment of the indebtedness.

101. J. HETLAND, REAL ESTATE SALES TRANSACTIONS 45 (1966). *Cf.* FLA. STAT. §679.505 (1973) (UNIFORM COMMERCIAL CODE §9-505), which requires a sale of consumer goods within 90 days after the secured party has taken possession if more than 60% of the purchase price or the secured loan has been paid by the debtor in cash, unless the debtor has signed, on default, a statement renouncing or modifying his rights. *But see* UNIFORM CONSUMER CREDIT CODE §5.107(2), which provides that the seller is under no obligation to resell the collateral. The purpose of this provision is to obviate the taking of deficiency judgments against defaulting purchasers of consumer goods. Nevertheless, it is a "no-recovery" rule and as such fails to consider situations in which the buyer has substantially invested in the goods.

from the vendor's vantage point, such decrements as depreciation and waste). The vendor, moreover, could act with both promptness and certitude in enforcing his rights on the purchaser's default, thus promoting the beneficial use of the land. Since the notice and redemption requirements would be clearly spelled out, the vendor would no longer risk a "rescission" if he resells the property too quickly, or a waiver if he waits too long.

If legal title were vested in the purchaser at a specified time during the term of the agreement, the purchaser would not be subject to several additional inequities thrust on him by the present law. Florida is in accord with the prevailing rule that a vendor is not required to have marketable title when the contract is entered into because, under an installment land contract, title need not be conveyed until the purchaser tenders the final installment payment.[102] The purchaser is therefore in a precarious position if, during the pendency of the contract, the vendor fails to acquire marketable title. Because the vendor has not breached, the purchaser cannot rescind,[103] but rather, must continue paying installments or find himself in breach of the contract and risk forfeiture of payments previously made.[104]

The purchaser under an executory installment land contract may encounter difficulties with the Internal Revenue Service and a trustee in bankruptcy. If the vendor fails to pay his federal income tax during the term of the contract, the purchaser may find his equitable interest subject to a superior lien. In *Leipert v. Williams & Co.*,[105] the court interpreted sections 6321 and 6323 of the Internal Revenue Code as protecting only those purchasers who had acquired legal title to the property prior to the government's filing of a tax lien.

If the vendor becomes bankrupt, the purchaser may lose the property and be left to share in the bankrupt vendor's assets as a general creditor. Where the contract is not recorded, the trustee in bankruptcy may acquire an interest in the property superior to that of the purchaser under section 70(c) of the Bankruptcy Act.[106] Even if the contract is recorded, the trustee may be able to acquire an interest in the property since section 70(b) gives the trustee the power to "assume or reject any executory contract."[107]

102. *E.g.*, Normandy Properties Corp. v. Adams, 107 Fla. 583, 145 So. 870 (1932); Peterson v. Howell, 99 Fla. 179, 126 So. 362 (1930).

103. Harper v. Bronson, 104 Fla. 75, 179 So. 203 (1932); Burke v. Wallace, 98 Fla. 604, 124 So. 30 (1929). See text accompanying note 59 *supra*.

104. *But see* Lake Dorr Land Co. v. Parker, 104 Fla. 378, 140 So. 635 (1932), in which the court held that a purchaser may refuse to continue payments if a provision is included in the contract requiring the vendor to furnish, after the first installment is paid, an abstract of title that shows a marketable title. The court stated that, until such time as the vendor produces such an abstract, he is deemed to be in default, and the purchaser need not continue making payments. If the vendor fails to cure his default within a reasonable time, the purchaser may treat the contract as rescinded and recover installments paid.

105. 161 F. Supp. 355 (S.D.N.Y. 1957). *But see* Niagara County Sav. Bank v. Reese, 12 Misc. 2d 489, 179 N.Y.S.2d 453 (1958), in which *Leipert* was not followed.

106. 11 U.S.C. §110(c) (1970). The purchaser would have a claim against the bankrupt vendor for breach of contract, but would only be allowed to share pro rata with other creditors. *See* 4 COLLIER, BANKRUPTCY §70.52(2) (14th ed. 1962).

107. 11 U.S.C. §110(b) (1970). *See In re* New York Investors Mut. Group, Inc., 143 F.

Proposed Guidelines

It is incumbent upon the legislature to establish objective standards for determining the point at which an installment land contract becomes subject to the rules governing purchase money mortgages. These standards should be based primarily on (1) a threshold percentage, determined by the ratio of the purchaser's investment to the total purchase price, which should reflect the amount of the purchaser's investment required to qualify for conventional mortgage financing, thus insuring that the vendor-mortgagee's investment would be adequately protected in the event of a foreclosure sale; and (2) the period of time during which the contract has been in force.[108] This approach represents an attempt to strike a balance between the conflicting policies of preserving the functional utility of installment contracts and frustrating forfeitures, which, when the installments paid by the purchaser exceed the vendor's damages, exact in effect punitive damages for breach of contract.[109]

Since certain types of property are better security than others, allowances should be made for the different purposes for which the land is used. Accordingly, a higher threshold percentage should be required for commercial multifamily residential, and unimproved properties than for single-family residential property. This would also adjust the risk factor, since a vendor subjects himself to a greater likelihood of default when he deals with the former types of property, all of which are purchased essentially for investment or speculative purposes.

Additional provisions should be included to eliminate potential sources of confusion. Provisions governing recordation, restitution, senior encumbrances, deficiency judgments, and the like would clarify the rights and duties of the vendor, purchaser, and third parties, both before and after payment of the threshold percentage.

Supp. 51, 54 (S.D.N.Y. 1956), in which the court allowed the trustee to reject, under §70(b), a deposit receipt contract of sale after the down payment had been made but before title had been conveyed. The court refused to accept the purchaser's argument that his right as equitable owner prevented rejection by the trustee. *See generally* COLLIER, *supra* note 106, at 1350. *See also In re* Philadelphia Penn Worsted Co., 278 F.2d 661 (2d Cir. 1960), defining executory contracts for purposes of §70(b) as contracts where any part of the agreement remains unperformed.

108. *Accord*, CAL. CIV. CODE §2985 (conveyance not required within one year); Walker v. Nunnekamp, 84 Idaho 485, 373 P.2d 559 (1962) (50%; 6 months); MD. CODE ANN. art. 21, §§110-16 (1966) (40%; five or more installments); N.Y. Legis. Doc. No. 65E (1938) (proposed) (more than two payments after the initial payment). The minimum time period would alleviate much of the confusion in determining whether the transaction is in the nature of a security device or whether it looks to a short-term contract of sale (see note 18 *supra* and accompanying text). See note 38 *supra*. *See* Lee, *Defaulting Purchaser's Right to Restitution under the Installment Land Contract*, 20 U. MIAMI L. REV. 1, 21-24 (1965), in which the authors propose detailed guidelines designed to preserve the utility of the installment land contract while at the same time avoid the harsh results that often obtain under the majority viewpoint. *See* Power, *supra* note 23, at 422-33; Simpson, *supra* note 14, at 777.

109. This conflict would not have been so pronounced had Florida adopted the minority position of allowing the recovery of payments made with due allowance for the fair rental value and other benefits received by the purchaser at the expense of the vendor and damages occasioned by the breach. See note 13 *supra*.

Also, a "substance over form" provision, such as that embodied in section 9-102 of the Uniform Commercial Code, would prevent "ingenious counsel from devising new security interests outside the ambit of legislative protection."[110] Absent such a provision, vendor-creditors, because of their superior bargaining position, might be able to circumvent new legislation regulating installment contracts by utilizing such long-term financing arrangements as leases with options to repurchase.[111]

Where a purchaser has defaulted after the threshold percentage has been paid, it is important that the vendor-mortgagee have a right to dispose privately of the collateral in the real estate market. Presently, Florida allows only foreclosure at a forced judicial sale for the enforcement of real estate mortgages. The purpose of limiting the mode of disposition is to insure close judicial supervision over the disposition of the collateral. Yet this goal can also be reached with the private sale, and the benefits of the private sale clearly outweigh the dangers. As stated in an official comment to section 9-504(3) of the Uniform Commercial Code, wherein a secured party is given the right to privately dispose of personal property collateral:

> Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties.[112]

RELATED DEVELOPMENTS

Impetus for legislative action is now coming from several directions. Widespread publicity has recently been given to an investment scheme in which thousands of investors were allegedly swindled out of millions of dollars. Under that scheme, the subdivider-vendor would sell parcels of land under installment contracts to provide cash for making interest payments of up to 14 percent annually on securities sold to "unwitting and unsophisticated" investors.[113] These securities were secured by mortgages on the vendor's interest — the value of the land less the purchaser's equity — which were represented as having first priority. However, there already existed a blanket first mortgage on the entire subdivision held by a commercial lender. This scheme collapsed when the cash flow was cut off by a decline in land sales and defaults in installment payments. Interest payments on the corporate notes could no longer be made and when investors attempted to enforce their rights by foreclosing on their mortgages, they discovered their security was subordinate to a blanket first mortgage and thus insufficient to cover the amount of their investment.[114]

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110. Power, *supra* note 23, at 422.

111. *See* Blomquist-Ford Inc. v. Burke, 149 Conn. 443, 181 A.2d 255 (1962); Payne v. Clarke, 409 Pa. 557, 187 A.2d 769 (1962). *See generally* Note, *A Lease By Any Other Name: Or When Is A Lease A Conditional Sale?* 44 B.U.L. REV. 116 (1964) (personal property); Power, *supra* note 23, at 422-23.

112. UNIFORM COMMERCIAL CODE §9-504(3), Comment 1.

113. Tampa (Fla.) Tribune, July 9, 1975, §B, at 1.

114. *See* Palatka Fed. & Loan Ass'n v. Raczkowski, 263 So. 2d 842 (4th D.C.A. Fla. 1972), in which the court allowed a holder of a blanket mortgage that covered an entire tract of

Although governmental nonfeasance should share the blame for allowing this scheme to be foisted upon the investing public,[115] the main cause of the swindle was refusal by the legislature and the courts to recognize that the use of installment land contracts are frequently attempts to skirt the laws governing mortgages, and that a vendor should not be permitted to violate the law by adjusting the parties' rights under the pretext of "fredom of contract." A few years ago, California had a similar experience involving the vendor's unfettered manipulation of installment land contracts. According to Power:

> The buyer's equity is subject to additional perils where the [installment] land contract is used as a junior lien subject to a mortgage on the seller's interest. The buyer has no assurance that his payments will be remitted to the senior lien holder. If the seller defaults under the senior lien, the holder may institute foreclosure proceedings, ordinarily without even notifying the buyer, and terminate both the seller's and buyer's interest. . . .[116] The seriousness of this problem is illustrated by a number of recent instances in California where subdivider-sellers defaulted on senior liens resulting in wholesale foreclosure of the interests of contract buyers. This problem is compounded if the seller takes advantage of his superior bargaining position and places in the contract a provision which permits him to place further incumbrances on the property superior to the buyer's equity. Subdivider-sellers have attempted to justify such provisions on the grounds that it enables them to realize on the appreciation of the property's value and that the buyer's interest is protected so long as the payments on the senior lien are not greater than the payments due from the contract buyer. However, such clauses permit the seller to place additional liens on the property up to its full value, thereby undermining the buyer's equity. Such provisions are presumably enforceable . . . as the courts have long recognized the right of contracting parties to alter the priority of liens by agreement.[117]

In the recent case of *State ex rel. Four-fifty Two-thirty Corp. v. Dickinson*,[118] the Florida supreme court rejected present law and ruled that an installment land contract, for purposes of intangible personal property taxation, is an instrument creating an interest in the nature of a lien securing payment of the purchase money obligation. As such, it falls within the second "except" clause of section 199.032(1) of the Florida Statutes, which provides:

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land to foreclose on the tract when the vendor-mortgagor failed to make payments, thereby cutting off the innocent defendant-purchaser's interest in two lots and a house situated in the tract.

115. See Tampa (Fla.) Tribune, July 11, 1975, §A, at 1, citing investigators' claims that, although several governmental agencies had knowledge of the scheme, they nevertheless failed to act.

FLA. STAT. §478.221(e) (1973) specifically exempts securities from the Florida Uniform Land Sales Practices Law. The legislature had intended to pass laws that would put such schemes under the Mortgage Broker's Act, but it adjourned before any action was taken.

116. *See* Palatka Fed. Sav. & Loan Ass'n v. Raczkowski, 263 So. 2d 842 (4th D.C.A. Fla. 1972).

117. Power, *supra* note 23, at 414-15, *citing* Warren, *California Installment Land Contracts*, 9 U.C.L.A. L. REV. 608, 618-24 (1962). The Warren article discusses at length the California experience involving "ten percenters."

118. 322 So. 2d 525 (Fla. 1975).

> An annual tax of one mill on the dollar of the just valuation of all intangible personal property except money . . . and except notes, bonds, and other *obligations for payment of money which are secured by* mortgage, deed of trust, or *other lien* upon real property situated in the state.[119]

Previously, a vendor had to pay the tax each year for the term of the agreement, since installment land contracts were treated, not as security devices, but as executory contracts for the sale of land.[120] Now, in accordance with the court's ruling, a vendor need only pay a one-shot, "nonrecurring tax of two mills on the dollar of the just valuation" pursuant to section 199.032(2). The tax is not due until the contract "is recorded or sought to be enforced."[121]

The decision drew a dissent, which took issue with the majority's contention that "the instruments involved create an obligation secured by a lien regardless of the provision contained therein that the buyer is not personally liable upon default."[122] The dissent argued that inasmuch as the vendor reserved the right to possession, no lien could be created under the existing law.[123] Furthermore:

> A lien either assures recovery of possession or enforcement of a debt. Since [the vendor] by contract (1) retained title to the land and all paid installments, and (2) relinquished any contractual right to a default judgment, an enforcement type lien is obviously not involved. . . . Since agreements for deed are [not] enforced in the usual sense of foreclosing on property or commencing legal action in court . . . .[124]

In theory, the majority's position is correct. Under the doctrine of equitable conversion, a lien on the land attaches for the benefit of the vendor so that he may look to the *res* itself, the land, to satisfy the purchase money obligation. This is so whether or not the vendor has reserved the right to possession and whether or not he can proceed against the purchaser *in personam* in a suit for specific performance.[125]

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119. FLA. STAT. §199.032(2) (1973) (emphasis added).

120. *See* State *ex rel.* Weinberg v. Green, 132 So. 2d 761 (Fla. 1961) (documentary stamp tax).

121. FLA. STAT. §199.042(2) (1973).

122. 322 So. 2d 525 (Fla. 1975).

123. In support of this statement, the dissent cited H & L Land Co. v. Warner, 258 So. 2d 293 (2d D.C.A. Fla. 1975). See notes 51-66 *supra.*

124. 322 So. 2d 525, 531 n.4, 533 n.12 (Fla. 1975).

125. The obvious intent of the parties to a contract of sale is performance. Thus, on signing an enforceable contract, "[t]he vendee is treated as the owner of the land; an equitable estate has vested in him commensurate with that provided in the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate he holds it as trustee for the vendee, to whom all beneficial interest has passed, having *a lien on the land, even if in possession of the vendee,* as security for the unpaid portion of the purchase money." 2 J. POMEROY, EQUITY JURISPRUDENCE 21 (5th ed. 1941) (emphasis added); *accord,* Special Tax School District v. Hillman, 131 Fla. 725, 179 So. 805 (1938); Aycock Bros. Lumber Co. v. First Nat'l Bank, 54 Fla. 604, 45 So. 501 (1907); Tingle v. Hornsby, 111 So. 2d 274 (1st D.C.A. Fla. 1959). *See generally* 2 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §34A.23-.24 (Supp. 1975), for an exhaustive treatment of the subject.

The difficulty with using this doctrine to establish the existence of a lien for purposes of section 199.032 is that equitable conversion operates upon *all* enforceable, valid contracts for the sale of realty when the contracts are signed. In avoiding this problem, the majority totally ignored the equitable vendor's lien route, and instead based its decision solely on the nature of the contract itself. The court included in its opinion a sample installment land contract containing such terms as an annual interest rate and monthly installment payments in order to bear out its contention that "the language of the Agreement for Deed clearly sets out an obligation on the part of the buyer to pay a specified purchase price . . . and the effect of the agreement is to create a lien on the property to be deeded."

The majority's holding, coupled with the dissent's excellent, albeit acerbic, analysis of the present law, may in effect be the supreme court's cue to the courts to modify their present attitude toward installment land contracts. Section 697.01 of the Florida Statutes provides that:

> All conveyances, *obligations conditioned* or defeasible . . . or *other instruments* of writing conveying or *selling* property, either real or personal, for the purpose or with the *intention of securing payment of money* . . . shall be deemed and held mortgages, and shall be *subject . . . to the same regulations . . . as are prescribed in relation to mortgages.*[126]

This broad provision was drafted with the intent of subjecting masked security devices to the regulations governing mortgages.[127] In regard to real property secured transactions, section 199.032(2) contains the identical language of section 697.01. Thus, the only reasonable inference that can be drawn is that the legislative purpose of the former provision was to exempt the holder of a section 697.01 real estate security agreement from the burdens of an annual tax. In holding that section 199.032(2) encompasses installment land contracts regardless of the purchaser's right to possession, his personal liability, or his tendering of the unpaid balance,[128] the supreme court has rendered untenable the prevailing judicial view that an installment land contract is not a security device within the purview of section 697.01.

Admittedly, the court placed installment contracts under the "other lien" rubric of section 199.032(2), and not under the category "obligation . . . secured by *mortgage*." Nevertheless, section 199.032(2) is written so that a "mortgage, *deed of trust or other lien* upon real property" is governed by the provision. A deed of trust, when intended to secure payment of an obligation, is a masked security device that has long been deemed within the intendment of section 697.01 and therefore subject to the regulations prescribed for mortgages.[129] It is clear, then, that the legislature intended the phrase "or

126. FLA. STAT. §697.01 (1973) (emphasis added).

127. See notes 7-8 *supra* and accompanying text.

128. Among other things, the absence of any of these three factors would disqualify a purchaser from attaining the status of a mortgagor. See text accompanying notes 60, 96 *supra*.

129. *E.g.*, Guaranty Title and Trust Co. v. Thompson, 93 Fla. 983, 113 So. 117 (1927); Christopher v. Mungen, 61 Fla. 513, 55 So. 273 (1911). *But see* Walker v. Heege, 78 Fla. 667, 83 So. 605 (1920), holding that where the deed of trust secures no obligation, it is not a

other lien upon real property" to apply to the manifold masked security transactions, which, though having numerous formal appellations, are in substance mortgages. Thus, it would have been technically incorrect to classify the installment contract as a mortgage for purposes of section 199.032(2); for, as in the case with the deed of trust, it is not a mortgage on its face. This conclusion must be reached since Florida is a so-called lien-theory state and so, in accordance with section 697.02 of the Florida Statutes, a mortgage is to be treated as a "specific lien" on property. As stated by Professor Boyer, "a mortgage, *whether in the form of a deed of trust or otherwise*, creates only a lien."[130]

The court's holding may have a depressing effect on the state's coffers. Section 199.042(2), the operative provision to section 199.032(2), provides that the tax on the applicable obligations is to be paid "when the instrument is recorded or sought to be enforced." Since the contracts are seldom recorded,[131] the vendor will usually pay the tax when the obligation is "enforced." It has been shown that installment contracts, when not recorded, are usually "enforced" by the vendor's "declaration of forfeiture."[132] Such a declaration is made known to the public only when the defaulting purchaser brings suit to recover payments made, a luxury that an indifferent, naive, or impoversished purchaser often foregoes. If the vendor does not voluntarily pay the tax, it is unlikely that the tax would be paid. Thus, since the land industry is one "which is pervasive in and economically important to Florida," the Revenue Department is now concerned that the state will lose a substantial amount of money because of the supreme court's ruling.[133]

Whether or not the court had this result in mind is not clear. In any event, now that the state's financial interest is in jeopardy, perhaps the legislature will discharge the duty it owes to the public and lay down definitive guidelines for installment land contracts. The legislators should not limit their action to intangible personal property taxes.

CONCLUSION

Under their present approach to installment land contract problems, the courts have created different sets of legal relationships and corresponding legal consequences that vary with the sets of facts presented. Irrespective of the terms of the agreement, neither the vendor nor the purchaser can be reasonably certain of the rights and obligations that flow from an installment land contract. The specter of a waiver, estoppel, or rescission may materialize to frustrate the vendor's reasonable expectations; and the purchaser is confronted with the ever-present prospect of unjust forfeiture since the court may find a technicality to uphold such a forfeiture even though the purchaser may have a sub-

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mortgage. Since it secures no obligation, however, it would clearly not fall within FLA. STAT. §199.032(2) (1973). *See generally* 2 R. BOYER, *supra* note 125 at §32.05.

130. 2 R. BOYER, *supra* note 125, at 1024 (emphasis added).

131. See text accompanying note 84, and note 116 *supra*.

132. See text accompanying note 84 *supra*.

133. Tampa (Fla.) Tribune, July 11, 1975, §A, at 16.