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Ray D. Henson

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## INSTALLMENT LAND CONTRACTS IN ILLINOIS: A SUGGESTED APPROACH TO "FORFEITURE"

RAY D. HENSON

**I** NSTALLMENT land contracts are not new. They have long been a useful and usable means for selling and buying real estate. It may well be their long usage which has brought about the present re-appraisal of their proper scope.

### I

Dean Albert J. Harno once wrote in a letter to the law alumni of the University of Illinois: "Comprehensive thinking is even more vital than specialized thinking, for only through broad conceptions can the product of specialized thinking be utilized."<sup>1</sup>

To look comprehensively at the specialized subject of real estate sales, there are only three means available: an outright transfer for full cash consideration, where the purchaser has the funds; a sale subject to a purchase money mortgage, where the purchaser has perhaps a third or more of the required purchase price; a sale by means of installment land contract, where the purchaser is able to pay very little, if any, money toward the total purchase price. No security problems arise on a cash sale, obviously, and mortgage transactions are so thoroughly regulated by statute that the parties can usually be easily advised of their rights, but where the sale is by means of a land contract in Illinois, the rights and duties of the vendor and purchaser are not always easily learned.

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<sup>1</sup> Quoted in Casner, *What Makes a Law School Great?*, 1956 Ill. L. Forum 270, 273.

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MR. HENSON is Counsel of Continental Assurance Company and Continental Casualty Company, Chicago, Illinois. Educated at Denison, Harvard, Illinois (B.S. 1947, LL.B. 1949), and Balliol College (Oxford); he is a Lecturer at Northwestern University and a member of the Chicago, Illinois State, and American Bar Associations.

It should be clearly borne in mind, in thinking about installment land contracts, that the vendor and the purchaser of land have made the contract voluntarily, that the words have a plain meaning which persons of ordinary intelligence should be able to grasp, that the contract has not been enlarged by statute, and that the contract would never have been made if the purchaser had had enough money to finance the purchase by means of a mortgage. For the last reason alone, if installment land contracts had not been devised long ago, they would have had to be invented. They serve a useful function.

Some courts appear to have lost sight of the land contract's *raison d'être*. In acknowledging the indebtedness of the courts to the law professors, Justice Traynor of the Supreme Court of California recently stated:

The Supreme Court of California was recently called upon to re-examine the purported rule that permitted forfeiture of a defaulting vendee's interest under a contract for the conditional sale of land. As happens not infrequently, what had for years been accepted as good coin proved to be counterfeit. The cases were in confusion, still further confounded by commentaries that assumed the permissibility of forfeitures and preoccupied themselves with the question of when they would be permitted. Professor Corbin undertook the job of matching what the courts had done against the *trompe l'oeil* of what they had said. His painstaking analysis of the land contract cases led him to the conclusion that for the most part they did not even involve forfeiture; that forfeiture was no more justified by precedent than by reason. Our analysis of the California precedents in the light of Professor Corbin's conclusion demonstrated its soundness, and we were able to clarify the state law accordingly.<sup>2</sup>

It seems rather obvious, without undertaking a detailed analysis of California law, that their Supreme court has more than "clarified" the law.<sup>3</sup> While the recent California holdings were based on statutes which do not have counterparts generally in the United States,<sup>4</sup> it

<sup>2</sup> Traynor, *Law and Social Change in a Democratic Society*, 1956 Ill. L. Forum 230, 233. The well-known article by Professor Corbin is, *The Right of a Defaulting Vendee to the Restitution of Instalments Paid*, 40 Yale L.J. 1013 (1931). The clarifying cases referred to by Justice Traynor were *Freedman v. The Rector*, 37 Cal. 2d 16, 230 P. 2d 629 (1951); *Baffa v. Johnson*, 35 Cal. 2d 36, 216 P. 2d 13 (1950); and *Barkis v. Scott*, 34 Cal. 2d 116, 208 P. 2d 367 (1949).

<sup>3</sup> See the dissenting opinion in *Barkis v. Scott*, 34 Cal. 2d 116, 208 P. 2d 367 (1949) and Vanneman, *Strict Foreclosure on Land Contracts*, 14 Minn. L. Rev. 342 at 353 et seq. (1930).

<sup>4</sup> California Civil Code, (1906) § 3307. "The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him." and § 3275, "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his

seems certain that the court was drastically revising its interpretations of those statutes.

Insofar as the suggestion is made that there is a difference between what courts *say* and what courts *do*, the thesis is insupportable. Courts can only act by means of what they say. There is a distinction between dictum and decision, but since not every dispute can be adjudicated by a state supreme court, it would seem that disputants should be justified in settling their problems in reliance on what courts have said by way of dictum as well as by decision, although the one is as easily changed as the other in these days. Such reliance keeps most disputes out of the courts in the first place. If litigants could hope to overturn every rule of law as fast as it is laid down, the courts would be more hopelessly overcrowded than they are now. The bulk of current trial litigation involves questions of fact, not law, and to preserve the American judicial system, that is the way the situation should remain.

The popular conception that lenders are rapacious Legrees from whom improvident borrowers must be protected is out-dated. The view that "forfeitures" and "penalties" are "bad" and "liquidated damages," "good" is a black magic of words which belongs to the Dark Ages. Putting a premium on a label is not a proper approach to current legal problems. Of course, the "forfeiture" of a purchaser's interest under a land contract is not always permitted, but to say that a forfeiture should never be permitted does not distinguish between Forfeiture 1 and Forfeiture 2 and Forfeiture 3, which may involve widely different fact situations.

When Justice Holmes said that "(t)he prophesies of what courts will do in fact, and nothing more pretentious, are what I mean by the law,"<sup>5</sup> he originated a theory of law which has attained great currency and which still possesses vitality. To state the broad propositions of "law" in the installment land contract field in Illinois may not be too difficult; it is the application of the propositions to a given fact situation which presents problems. The universality of this condition led

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failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." The background and earlier California interpretation of the latter section are discussed in Vanneman, *Strict Foreclosure on Land Contracts*, 14 *Minn. L. Rev.* 342 (1930).

<sup>5</sup> Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 461 (1897).

Judge Frank to his theory of fact-scepticism.<sup>6</sup> A realization of the fact-law conflict suggests an approach to installment land contract problems.

## II

A typical installment land contract will contain an undertaking of the vendor to convey title to certain described real property to the purchaser when the purchaser has paid a specified amount of money and performed other covenants. The down payment is nominal and the monthly installments are probably the equivalent of rent for the premises, although the installments represent payments on principal and interest on the unpaid balance of the purchase price, like an amortized mortgage. The purchaser probably covenants to pay the real estate taxes and the insurance premiums, to take good care of the property, and so on. The contract may provide that the vendor may terminate the contract in the event it is recorded, and it undoubtedly will contain a provision stating some means of terminating the purchaser's interest in the event of any default, together with a recitation that time is of the essence. It is the so-called forfeiture clause which has spawned so many problems.

It was the opinion of Professor Corbin in 1931 that cases denying restitution to a defaulting purchaser could be justified on one or more of these grounds:

(1) The defendant (vendor) has not rescinded and remains ready and willing to perform, and still has a right to specific performance by the vendee; (2) the plaintiff (vendee) has not shown that the injury caused by his breach is less than the installments received by the defendant; (3) there is an express provision that the money may be retained by the vendor and the facts are such as to make this a genuine provision for liquidated damages, and not one for a penalty or forfeiture.<sup>7</sup>

Professor Corbin felt that if none of his stated justifications existed, restitution should be made to the purchaser, but he recognized that a determination that a provision was unenforceable (i.e., in word magic

<sup>6</sup> Consult Cahn, *Jerome Frank's Fact-Scepticism and Our Future*, 66 *Yale L.J.* 824 (1957); and Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 *Rutgers L. Rev.* 425, 448-9 (1954): "Lawyers can often (not always) make fairly accurate guesses as to what rules the courts will apply in uncommenced law suits. The difficulty lies in guessing to what facts the courts will apply those rules. . . . For the most part (Holmes' prediction) theory succumbs to what I call 'fact-scepticism.'"

<sup>7</sup> Corbin, *The Right of a Defaulting Vendee to the Restitution of Instalments Paid*, 40 *Yale L. J.* 1013, 1033 (1931).

a "penalty" or a "forfeiture") did not determine the vendor's damages or the vendee's right to restitution, although the purchaser might still be denied restitution on either of grounds (1) or (2).<sup>8</sup> Stated conversely, the purchaser's interest will be forfeited to the vendor in the circumstances listed by Professor Corbin.

### III

It would be possible to analyze land contract cases without using "forfeiture," "penalty," and "liquidated damages." These terms are useful devices; they are not essential terms of art. To say that these words have no meaning in themselves is not to say that they cannot be used meaningfully in legal analysis, for they can be and they are useful terms, but they are really intermediaries between a set of facts and the legal consequences to be drawn therefrom.<sup>9</sup>

We may say that (1) if facts A, B, and C exist, V may declare a forfeiture of P's interest; (2) if there is a forfeiture of P's interest, V may retain the payments P has made; but this is only a means of stating: (3) if facts A, B, and C exist, then V may retain payments P has made.

Fact A may be that V is ready and willing to perform; Fact B, that P has inexcusably failed to perform; and Fact C can represent some factual peculiarity in the particular case which supports the result although it would not be determinative of the outcome in itself. In the analysis above it is clear that we can get from certain facts to the legal relations flowing therefrom without using the word "forfeiture"; but while this is true, the use of the word "forfeiture" invokes a useful analytical concept, so long as we realize that the word itself stands for nothing.

In a sense and quite apart from words which stand for abstractions, no word ever means the same thing twice, and in any case meaning is inextricably interwoven with the experience of the user or hearer. Even the word "chair" can stand for an almost limitless variety of objects, and when it is applied twice to the same object, that object has changed, however imperceptibly, between references; so when we use a word like "forfeiture" which stands for an abstraction, its reference must be entirely subjective.

It is possible to say that (1) if V retains a sum of money which P

<sup>8</sup> *Ibid.*

<sup>9</sup> For a detailed development of the kind of analysis involved here, applied primarily to the term "right," see Ross Tû-Tû, 70 *Harv. L. Rev.* 812 (1957).

has heretofore paid and which (we conclude subjectively) is grossly disproportionate to any damage which the parties could reasonably have foreseen arising from a breach by P at this time, then V is enforcing a penalty; (2) if V is enforcing a penalty, he will be required to make restitution to P although P must pay V his actual damages; but we could say that (3) if V retains a sum of money which P has heretofore paid and which (we conclude subjectively) is grossly disproportionate to any damage which the parties could reasonably have foreseen arising from a breach by P at this time, then V will be required to make restitution to P although P must pay V his actual damages. A similar analysis could be made of "liquidated damages."

If we conclude that "forfeiture," "penalty," and "liquidated damages" are not terms of meaning in themselves, they are, nonetheless, shorthand concepts which are valuable in presenting legal reasoning, so long as their semantic voidness is kept in mind.

#### IV

One of the most famous American installment land contract cases arose in Illinois: *Hansbrough v. Peck*.<sup>10</sup> Here the contract was made in January, 1857, and the purchaser went into possession and made improvements to the extent of \$18,000. The purchase price of \$93,000 was to be paid in 1861, and in the interim semi-annual payments of interest at the rate of 10% per annum were to be made. The purchaser paid interest for two years and then wished to surrender the contract, but finally stayed on and paid interest for another year (1859). In April, 1861, no further payments having been made, the vendor filed a bill in the Illinois courts to prevent the purchaser from removing the improvements and for possession, and the vendor was successful. Subsequently the purchaser brought suit in federal court for recovery of money paid and for the value of the improvements, on the ground that the vendor had rescinded the contract.

This mode of selling real estate in the United States is a very common and favorite one. . . . And no rule in respect to the contract is better settled than this: that the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done.<sup>11</sup>

<sup>10</sup> 72 U.S. 497 (1867).

<sup>11</sup> *Ibid.*, at 523.

The court felt that the vendor had enforced, not rescinded, the contract by his action, and in any event the purchaser was in possession longer than the period for which he had paid interest, so that he had at least received an equivalent for the money he had paid. The interest owing at the time the vendor acquired possession was actually in excess of the cost of the improvements.

The Supreme Court announced that the vendor had three remedies in these cases: (1) to sue on the contract and recover judgment for the purchase price, taking out execution on the lands of the purchaser, including the land subject to the contract; (2) to bring ejectment and recover possession, in which case the purchaser might go into equity and offer the purchase price and so become entitled to performance of the contract; (3) to go into equity, as the vendor had done in this case, and call on the purchaser to pay the purchase price or be forever foreclosed from setting up a claim against the property.

There would seem to be no reasonable ground for disagreement with the result in *Hansbrough v. Peck*, for where the vendor has not rescinded and is ready and willing to perform, on what basis could a defaulting purchaser fairly claim restitution?

Rescission of a bilateral contract would normally seem to require mutual agreement. On excellent authority it may be said that where a bilateral contract is rescinded by mutual consent, the parties may agree to forego further performance and let matters stand where they are or they may agree to forego future performance with restitution for partial performance and "that there is no reason why an agreement to rescind a contract for the sale of land should be subject to any other rule than an agreement to rescind any other contract, and that to allow recovery of such payments on rescission of any contract by an agreement which does not provide for it is unwarrentably adding a term to the agreement of the parties."<sup>12</sup>

There have been occasions on which courts have concluded that the vendor has unilaterally rescinded the contract and thereby entitled the purchaser to restitution.<sup>13</sup> Clearly a "rescission" of this sort is without agreed terms and will only be found where the vendor has been somewhat injudicious in asserting his rights. If the vendor has not attempted to terminate the purchaser's interest in the land and

<sup>12</sup> Williston and Thompson, Selections from Williston on Contracts 881 (1938).

<sup>13</sup> See, generally, Corbin, The Right of a Defaulting Vendee to the Restitution of Instalments Paid, 40 Yale L. J. 1013, 1019-1023 (1931).

still has a right to specific performance, there can be no such rescission.<sup>14</sup>

In *Smith v. Treat*<sup>15</sup> the Illinois court apparently found rescission by the vendor and allowed restitution to the vendee where the vendee was clearly in default for a considerable length of time, but the court seemed to feel that strict performance had been waived and never reinstated by the vendor, so that his sale of the property to a third party was a rescission of his contract with the vendee. Another Illinois case<sup>16</sup> found rescission by the vendor with restitution to the purchaser, where the vendor declared an untimely forfeiture and thereafter sold the property to a third party.

In 1942 the Illinois Supreme Court discussed various problems, including rescission, and while much of the discussion was dictum, it would seem safe to assume, at least in Illinois, that the discussion was intended as a reliable guide to be followed in the settlement of future disputes. The court said that rescission grew out of mutual agreement or out of the conduct of the parties from which mutual agreement could be presumed, so that if one party breached the contract, the other could, in effect, treat this as an offer to rescind which would be accepted by disaffirmance of his obligations, thus giving mutual consent. (Of course this view does not answer the question of what terms the rescission contains.) In this case, the purchaser claimed a right to rescind because he felt the vendor's termination of the contract was unreasonable, but the court did not agree that a defaulting vendee had any such right. In any event the vendee had been in possession for four and a half years without making any payment of any kind, so he did not make a very appealing claimant.<sup>17</sup>

If the vendor is in default and unable to perform while the purchaser remains ready, willing and able, the purchaser is entitled to a return of his money. Where the vendor is unable to give a deed, there is no other way to make the vendee whole, for the vendor's inability to perform is total.<sup>18</sup>

<sup>14</sup> *Ibid.* Tucker v. Beam, 343 Ill. App. 290, 98 N.E. 2d 871 (1951).

<sup>15</sup> 234 Ill. 552, 85 N.E. 289 (1908).

<sup>16</sup> Foreman Trust and Savings Bank v. Bartlett, 324 Ill. 238, 154 N.E. 904 (1927).

<sup>17</sup> Forest Preserve Real Estate Improvement Corporation v. Miller, 379 Ill. 375, 41 N.E. 2d 526 (1942). A purchaser claiming a right to "rescind" would first have to restore the property to the vendor. Sanford v. Emory, 34 Ill. 198 (1864).

<sup>18</sup> Smith v. Lamb, 26 Ill. 397 (1861); Smith v. Treat, 234 Ill. 552, 85 N.E. 289 (1908). See also Nelson v. Smith, 28 Ill. 495 (1862); Eames v. Der Germania, 8 Ill. App. 663 (1881); Davison v. Hill, 1 Ill. App. 70 (1877).

Contrary to the belief of many commentators, litigating vendors appear to be quite lenient in enforcing the terms of their contracts, frequently too lenient for their own good. The cases are replete with examples of vendors who have foreborne to assert their rights for considerable lengths of time only to find that, on the day of reckoning, they had waived their rights and had not effectively reinstated them. The "strict forfeiture-loose waiver" theory may be an explanation,<sup>19</sup> but wherever waiver has been found, the finding has seemed justified. Where the vendor seeks strict enforcement of his rights, it is only fair to require of him a strict adherence to the terms of the contract.

If a vendor has consistently accepted late performance, a court is justified in finding he has waived his right to terminate the purchaser's interest without first giving the purchaser reasonable notice that he intends to require strict performance.<sup>20</sup> If he reinstates the requirements of the contract by reasonable notice, the vendee must thereafter perform or have his interest forfeited.<sup>21</sup>

Thirty days' notice has been held sufficient to reinstate the terms of the contract,<sup>22</sup> and in *Forest Preserve v. Miller*,<sup>23</sup> where the purchaser had been in default for four and a half years, a notice that his default had to be cured in fifteen days was reasonable under the circumstances.<sup>24</sup> The purchaser's failure to cure the default justified the vendor's forfeiture of the purchaser's interest. Even a notice incorrectly stating the amount due is sufficient to reinstate the contract, where the vendee remains in default and tenders nothing.<sup>25</sup>

In the absence of waiver and in the presence of a defaulting purchaser, vendors have been generally successful in declaring forfei-

<sup>19</sup> Pound, *The Progress of the Law, 1918-1919, Equity*, 33 Harv. L. Rev. 929, 952 (1920). "Strict doctrines as to forfeiture inevitably produce loose doctrines as to 'waiver.'"

<sup>20</sup> *Hill v. Alber*, 261 Ill. 124, 103 N.E. 612 (1913); *Fox v. Grange*, 261 Ill. 116, 103 N.E. 576 (1913); *Monson v. Bragdon*, 159 Ill. 61, 42 N.E. 383 (1895). See also *Watson v. White*, 152 Ill. 364, 38 N.E. 902 (1894); *Murphy v. Lockwood*, 21 Ill. 610 (1859).

<sup>21</sup> *Lang v. Hedenberg*, 277 Ill. 368, 115 N.E. 566 (1917). This case discusses forfeiture under an installment land contract, but on its facts it could be treated as an option to purchase with retention of the consideration paid for the option on failure of the buyer to make timely deposits in escrow. Cf. *Watson v. White*, 152 Ill. 364, 38 N.E. 902 (1894).

<sup>22</sup> *Chrisman v. Miller*, 21 Ill. 227 (1859).

<sup>23</sup> 379 Ill. 375, 41 N.E. 2d 526 (1942).

<sup>24</sup> But see the specially concurring opinion, *ibid.*, at 387 and 531.

<sup>25</sup> *Montana Wheat Land Co. v. Northern Pacific Ry. Co.*, 308 Ill. 620, 139 N.E. 876 (1923).

tures, provided the terms of the contract are meticulously adhered to. Where a contract provides that if the vendor declares it "null and void" for the vendee's default, that fact shall be conclusively determined by the filing of a declaration to that effect in the county recorder's office, and that is the only means for declaring the forfeiture. Notice served on the vendee is insufficient without the required recording.<sup>26</sup> Where the contract provides that the sellers "may, at their option, upon the giving of written notice in writing of their intention so to do, declare the interest of the said Zeta Building Corporation . . . forfeited and at an end," notice of forfeiture sent to the purchaser is insufficient because the contract stipulates notice of *intention* to forfeit rather than notice of forfeiture.<sup>27</sup> Where the vendee has abandoned the property and has clearly evidenced an abandonment of rights under the contract, no formal notice of forfeiture is required to be given by the seller,<sup>28</sup> although ordinary prudence would recommend it.

The Forcible Entry and Detainer Act<sup>29</sup> provides a remedy for the vendor in two applicable situations: (1) when a peaceable entry is made and possession is unlawfully withheld, or (2) when a vendee is in possession under an agreement to purchase, has failed to comply with his agreement, and withholds possession after a demand in writing.<sup>30</sup> No demand is required in the first situation, but a demand is required in the second instance and in addition notice must be given thirty days before instituting proceedings.<sup>31</sup> The first provision was held applicable where a vendee in possession refused to vacate although the vendor had returned all the consideration he had received

<sup>26</sup> *Forest Preserve Real Estate and Improvement Corporation v. Miller*, 379 Ill. 375, 41 N.E. 2d 526 (1942).

<sup>27</sup> *Zeta Building Corp. v. Garst*, 408 Ill. 519, 97 N.E. 2d 331 (1951). In *Chrisman v. Miller*, 21 Ill. 226 (1859), where the time of performance had been properly reinstated by adequate notice thusly: "If you do not pay up on or before March 1st next, we shall declare same forfeited, and the land shall be for sale," the court said the forfeiture "might be made ever so secret and if but susceptible of proof, it would be obligatory." *Ibid.*, at 237.

<sup>28</sup> *Whitaker v. Robinson*, 65 Ill. 411 (1872); *Tucker v. Beam*, 343 Ill. App. 290, 98 N.E. 2d 871 (1951); *People v. Union Bank*, 304 Ill. App. 254, 26 N.E. 2d 178 (1940). But where the contract specifies the method for terminating the vendee's interest, that method must be followed. *Forest Preserve Real Estate and Improvement Corporation v. Miller*, 379 Ill. 375, 41 N.E. 2d 526 (1942). See also *Jones v. Dove*, 382 Ill. 445, 47 N.E. 2d 447 (1943).

<sup>29</sup> Ill. Rev. Stat. (1955) c. 57.

<sup>30</sup> *Ibid.*, at § 2. But see *Irwin v. Kreutzer*, 336 Ill. App. 149, 82 N.E. 2d 836 (1948).

<sup>31</sup> *Ibid.*, at § 3. *Given v. Yoften*, 359 Ill. 228, 194 N.E. 512 (1935). See also *In re Tracy*, 80 F. 2d 9 (1935).

because he could not give good title.<sup>32</sup> The default in such a case is on the vendor's side so that the second situation mentioned above would not exist; and presumably a vendor who is himself in default could not maintain an action under the second provision, even though the vendee may also be in default.<sup>33</sup>

It is imprudent of a vendor to ask a court to "forfeit" the purchaser's interest under a land contract, along with a prayer for other relief.<sup>34</sup> That is asking for a spate of maxims, probably beginning with "Equity abhors a forfeiture." The law has more saws than a lumber mill, and there is no point in inviting their blind application. It is the vendor's prerogative to declare a forfeiture and, if this is done, the court may well announce that it is simply recognizing the termination of the contract in accordance with the agreement of the parties.<sup>35</sup>

The vendor may seek specific performance against the purchaser or, failing that, a foreclosure of the purchaser's interest, perhaps with a sale of the property.<sup>36</sup> It would not seem necessary to go so far as to

<sup>32</sup> *Sullivan v. Culp*, 260 Ill. App. 443 (1931).

<sup>33</sup> *Swearingen v. Beyer*, 275 Ill. App. 152, (1934). See also *Monson v. Bragdon*, 159 Ill. 61, 42 N.E. 383 (1895).

<sup>34</sup> See, for example, *Witherstine v. Snyder*, 225 Ill. App. 189 (1922). This is somewhat analogous to asking the court to declare a forfeiture for breach of a condition subsequent in a deed which the Illinois court probably will not do. *Hooper v. Haas*, 332 Ill. 561, 164 N.E. 23 (1928); *Sanitary District v. Chicago Title and Trust Co.*, 278 Ill. 529, 116 N.E. 161 (1917); *Springfield and Northeastern Traction Co. v. Warrick*, 249 Ill. 470, 94 N.E. 933 (1911); *Douglas v. Union Mutual Life Ins. Co.*, 127 Ill. 101, 20 N.E. 51 (1889). As Justice Holmes observed in *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897): "The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds."

<sup>35</sup> *Lang v. Hedenberg*, 277 Ill. 368, 115 N.E. 566 (1917); *Harper v. Tidholm*, 155 Ill. 370, 40 N.E. 575 (1894); *Bucklen v. Hasterlik*, 155 Ill. 423, 40 N.E. 561 (1895). Most contracts purport to forbid recording but if the contract is recorded, the vendor is entitled to have it cancelled of record. *Allen v. Borlin*, 336 Ill. App. 460, 84 N.E. 2d 575 (1949). If the vendee records an affidavit claiming an interest in the property, the vendor may properly ask the court to remove the affidavit as a cloud on title. *Lang v. Hedenberg*, 277 Ill. 368, 115 N.E. 566 (1917). Where the vendee's interest is justifiably terminated, it is not proper for the vendor to obtain a deficiency judgment for the unpaid contract balance. *Derickson v. Chicago South Branch Dock Co.*, 18 Ill. App. 531 (1886).

<sup>36</sup> *Hansbrough v. Peck*, 72 U.S. 497 (1867); *Robinson v. Appleton*, 124 Ill. 276, 15 N.E. 761 (1888). The vendee may also seek specific performance. *Cheney v. Libby*, 134 U.S. 68 (1890); *Nyder v. Champlin*, 401 Ill. 317, 81 N.E. 2d 923 (1948); *Watson v. White*, 152 Ill. 364, 38 N.E. 902 (1894); *Murphy v. Lockwood*, 21 Ill. 610 (1859), but he will not be entitled to it if he is inexcusably in default. *Heckard v. Sayre*, 34 Ill. 142 (1864). The vendee's equitable interest may be reached by a judgment creditor in Illinois, but the creditor's rights are no more extensive than those of the vendee-debtor. Ill. Rev. Stat. (1955) c. 77, § 3. *Hayes v. Carey*, 287 Ill. 274, 122 N.E. 524 (1919); *Wermes v. McCowan*, 286 Ill. App. 381, 3 N.E. 2d 720 (1936).

request a sale. In one instance where the vendor (mistakenly, it would appear) asked the court to declare a forfeiture, the chancellor allowed the purchaser a period of forty-five days to remain in possession as compensation for payments made, with the right to pay the entire balance or part of it with the remainder to be secured by a mortgage, as the contract had originally allowed. The Appellate court reversed because forty-five days' occupancy was not adequate compensation for the amount the purchaser had paid and in any case the court could not make a new contract for the parties. The vendor's bill was dismissed and no relief of any kind was granted,<sup>37</sup> so it is obvious that the purchaser got much more than a mere forty-five days' occupancy free of rent or other charge.

Anyone reading the facts in *Witherstine v. Snyder*<sup>38</sup> would sympathize with the lady purchaser who met economic reverses while maintaining her "landscape artist" husband and their family and trying to operate a rooming house. The purchaser's sad state together with the vendor's request for the court to declare a forfeiture led to an obvious result in the circumstances. The vendor received a substantial down payment, for a land contract case, but he got very little thereafter, and with a decline in property values in the early 1920's it is probable that the vendor lost more than the amount of the down payment by the failure of the purchaser to proceed, and during the period of litigation the purchaser remained in possession, so the property produced no income at all, while the taxes and insurance premiums accrued.

In some jurisdictions land contracts are terminated by a procedure analogous to mortgage foreclosure, with a judicial sale and a period for redemption; sometimes a strict foreclosure procedure is followed; occasionally the seller must make restitution to the purchaser of the sums paid less the seller's damages.<sup>39</sup> Arguments may be made for any procedure which a court chooses to follow or a legislature decides to enact, but in the absence of express legislation courts should bear in mind that all equities are not always on the side of the purchasers.

Justice Scheineman has observed, quite correctly:

<sup>37</sup> *Witherstine v. Snyder*, 225 Ill. App. 189 (1922).

<sup>38</sup> *Ibid.*

<sup>39</sup> In general, see Ballantine, *Forfeiture for Breach of Contract*, 5 Minn. L. Rev. 329 (1921); Vanneman, *Strict Foreclosure on Land Contracts*, 14 Minn. L. Rev. 342 (1930); Rudolph, *The Installment Land Contract as a Junior Security*, 54 Mich. L. Rev. 929 (1956); Van Zile, *Land Contracts: Summary Proceedings for Forfeiture*, 34 Univ. of Det. L. J. 209 (1956).

There is probably no branch of contract law in such a state of confusion as that concerning the rights at law of a defaulting purchaser under a contract for a deed. Although the factual situations differ widely, it remains extremely difficult to state any general principle to be deduced from the cases. About all that can be done is to find a majority view, and concede that some cases are not in conformity.<sup>40</sup>

Installment land contracts in Illinois seem to be enforced according to their terms, as a general rule. When the vendor is ready and willing to perform and has not waived any of his rights and no elements of estoppel are present, the vendor, if he seeks a reasonable remedy, should prevail over a purchaser inexcusably in default. Since the vendor normally draws the contract, it is only reasonable to construe the terms most strictly against him. Clauses making time of the essence are frequently invoked but they do not seem to determine the result and they should not when they are only standard "boiler-plate" in a printed form; the essence comes from the mutual and dependent conditions in the contract. Poor draftsmanship on the part of vendors' attorneys can explain many egregious results.

Contracts should be clear and unambiguous. While obvious, this advice is often ignored. The purchaser's attorney can insist that the contract provide for a deed to be given after a reasonable amount of the consideration has been paid, and the balance can be secured by a mortgage, with the well-known rights flowing therefrom. If the vendor will not agree to this, there is surely no reason why the purchaser must proceed and if he does, caveat emptor.

A great deal of property is sold by means of installment land contracts and much more would be sold that way if it were not for the federal government's recent and current housing ventures.<sup>41</sup>

A lessee, no matter what "improvements" he may have made, realizes that he must move on if he defaults under a lease or if the lease

<sup>40</sup> Tucker v. Beam, 343 Ill. App. 290, 294, 98 N.E. 2d 871, 873 (1951).

<sup>41</sup> The bulk of the outstanding home mortgage indebtedness in the United States is now insured or guaranteed by the FHA or VA. Barron's, June 17, 1957, P. 1. Many of these mortgage loans involve little or no down payments, so that land contracts would have been the only means by which this property could have been sold in other days. Some real estate developers now mortgage the entire tract to an institutional lender and sell the individual lots by means of installment land contracts, and this procedure seems to work satisfactorily although the vendor's need for a summary remedy in this situation is obvious, for if there are many long-continued defaults by purchasers, the mortgage will soon be in default and foreclosure will follow. Under certain circumstances Illinois insurance companies are authorized to invest in the contract seller's "equity" in an amount not to exceed two-thirds of the actual sale price, which is analogous to the mortgage loan limitation. Ill. Rev. Stat. (1955) c. 73, § 737 (1) (e), but it is doubtful that this provision is practicable.

terminates and is not renewed. A land contract can be looked on as a lease with an option to purchase,<sup>42</sup> for the contract down payment is frequently no more than a security deposit required under a lease and the monthly payments are rarely in excess of the rent the premises would bring. Rent is, after all, a return of principal and interest to a lessor, based on his investment, even if it may be considered otherwise, and a purchase by contract need not be thought of differently from a lease with an option to buy.

Much of the confused thinking in the installment land contract field lies in the unfortunate connotations conjured up by certain words. The use of "forfeiture" automatically raises a red flag. By free thought association "penalty" calls up "unenforceable," and "liquidated damages," "enforceable."

In the first place none of these words need be used in analyzing the cases. They are used because their use is sanctioned by years of custom. A provision called "liquidated damages" is not necessarily accepted (enforced) as such without investigation but a provision which is termed a "penalty" is very likely to be accepted as what the parties called it (not enforced). While every land contract may provide for forfeiture in certain circumstances, there is a world of difference between the facts behind Forfeiture 1 and those behind Forfeiture 2 or Forfeiture 3. To assert that a forfeiture is invalid without a factual analysis is very poor semantics indeed.

## V

A new approach in terminology might clear the air of the forfeiture fog. On default by the vendee, let the vendor declare a determination of the contract, not a forfeiture. When the contract is determined (not forfeited), the rights of the parties may be adjudicated. Contracts which are not against public policy should be enforced according to their terms and should be determinant of the rights thereunder. When a vendor, not in default, is seeking to determine a contract as against a defaulting vendee, presumptively the vendor is entitled to specific performance or, at his election, to keep what he has received as damages for breach of contract and to regain possession of his land. When the vendor is in default or unable to perform, the vendee who is not in default and who is willing to perform should be entitled to specific performance or, at his election, restitution of the sums paid.

<sup>42</sup> An instrument called a lease was said to be an installment land contract in *Totsch v. Johnson*, 10 Ill. App. 2d 338, 134 N.E. 2d 352 (1956).

The aggregate amount paid under the contract would, *prima facie*, be the determinate damages, due either party on the default of the other. Intermediate situations should be adjudicated on their own merits without resort to fictitious rescissions and meretricious maxims. It is clear that the eternal verities do not exist in the land contract field as we know it. A case-by-case settlement seems to be inevitable. Recognizing this, we might take a new approach to the problems and clear away the cobwebs of confusion by a terminology which is simple and not hampered by reflexive connotations.

Installment land contracts have fulfilled a need in Illinois. They should be allowed to continue to do so.