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A Comparative Study of Laws Relating to Low-Equity Transfers of Farm Real Estate in the North Central Region

BY
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Agricultural Experiment Stations of Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin, Cooperating.

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Foreword

In the last 15 years farm families in the States of the North Central Region* and Kentucky have been increasing the use of legal instruments that permit them to purchase farm land with a lower down payment than is normally required in conventionally financed transfers. Until recently, little beyond conjecture was known about the reasons for the increase in this method of transferring rights in farm real estate, or whether or not it would accomplish the desired objectives.

Under North Central Regional Cooperative Project NC-15, entitled *How Young Families Get Established in Farming—With Special Reference to Those Without Substantial Family Assistance,* studies of the economic and legal aspects of low-equity transfers of farm land were undertaken. This work was made possible by active cooperation between agricultural economics and law school personnel in the various land grant colleges, the United States Department of Agriculture, the Farm Foundation and a number of practicing lawyers throughout the region. Some results of this cooperative effort are reported in this publication.

The material brings together the research information that was obtained in separate state studies planned and implemented by members of the Legal Aspects of Land Tenure Subcommittee under the general supervision of the North Central Regional Committee for Project NC-15. The purpose is to compare and analyze the laws governing use of low-equity transfer instruments. It is hoped that these comparisons will encourage the use of transfer arrangements that meet more adequately the needs of both buyers and sellers throughout the North Central Region.

Those who advise and consult with farmers need to know more about low-equity transfers of farm land. Agricultural advisors need to know what should and what should not be attempted with the available legal instruments under the rules governing their use. Legal advisors need to know what is economically adequate and acceptable and to be conscious of alternative approaches that will

*Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.

accomplish the desired objectives. In addition, those concerned with codifying and improving the law in this subject area need to have available more complete information on its present content so they can work toward desirable changes.

Presentation of the material contained in this publication represents an attempt to fulfill these needs. It necessarily includes some technical language to insure clarity and accuracy, but an attempt has been made to simplify the text so research personnel and students of agricultural adjustment problems who do not have legal training can see the relationships between the law and the problems of adjusting relations between people in order to utilize resources more efficiently.

The following practising lawyers, law teachers and others with legal training helped to prepare the state studies and reviewed this manuscript:

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Jacob Beuscher, Wisconsin
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Carlyle Richards, South Dakota
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North Central Regional Committee For Project NC-15

This regional committee was established by the directors of the agricultural experiment stations in the North Central Region to study the problems of beginning farmers. The committee has been concerned with the following objectives: (1) To explore the impact of current and emerging problems in the agricultural economy upon beginning farm families; (2) To learn how young farm people and beginning farmers can contribute to and facilitate needed adjustments in American agriculture; and (3) To find more effective ways of getting adequate resources into the hands of young farmers.

The following people were members of the regional committee at the time the research was in progress:

Administrative advisor—Noble Clark, Wisconsin

State Members:

Illinois, Charles L. Stewart
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List of Abbreviations of State Studies Used in Citations

When possible citations of authority are to court decisions that appear to support the propositions of law as stated. When the authors of the separate state studies made interpretations of law or other matters that did not appear to be directly supported by any particular court decision or decisions, but that were, nevertheless, considered worthy of inclusion in this regional publication, the separate state study that included such matters is cited directly as authority. The authors and manuscripts of the separate state studies are set out below, along with the abbreviations used when citing them in the text.

Badger: Badger, et al, *The Installment Land Contract,* unpublished manuscript from Kansas.

Beuscher: Beuscher, J. H., *Buying Farms on Installment Land Contracts,* 1960 Wis. L. Rev. 379.

Dingus: Dingus, Larry, *Mortgages-Redemption after Foreclosure Sale in Missouri,* 25 Mo. L. Rev. 261 (1960).

Dolson: Dolson, William F., *Installment Contracts For the Purchase of Land in Kentucky,* unpublished report prepared as part of Kentucky's contribution to

project NC-15.

Elefson: Elefson, R. Vern, *Financing Farm Transfers with Land Contracts,* preliminary review draft of proposed North Central Regional publication.

Hallock: Hallock, John L., *Some Legal Problems of the Land Contract,* 1959 Ill. B. J. at 102.

Hancock: Hancock, James R., *Installment contracts for the Purchase of Land in Nebraska,* 38 Neb. L. Rev. 953 (1959).

Hill and Fitzgerald: Hill, Elton B., and Fitzgerald, John W., *Buying Farms by Land Contracts,* unpublished manuscript prepared in Department of Agricultural Economics, Michigan State University (July, 1958)

Krausz: Krausz, N.G.P., *Installment Land Contracts for Illinois Farm Land—A Field Study,* AERR-31, Department of Agricultural Economics, University of Illinois (January, 1960).

Installment Land Contracts for Farm Land. Circ. 823, University of Illinois, College of Agriculture (July, 1960).

Lashkowitz: Lashkowitz, Shelley J., *Land Purchase Contracts in North Dakota,* 36 N.D.L. Rev. 159 (1960).

Mann: Mann, Fred L., *Installment Land Contracts in Indiana.* unpublished manuscript prepared in Department of Agricultural Economics, University of Missouri (July, 1960).

Marner: Marner, David L., *Installment Land Purchase Contract Law In Iowa,* Agricultural Law Center, State University of Iowa (Aug., 1958).

Minnesota Note: *Note. Minnesota Land Contract Law In Action,* 39 Minn. L. Rev. 93 (1954).

Porter: Porter, Terrance C., *Land Purchase Contracts in Missouri,* Comments, 24 Mo. L. Rev. 240 (1959).

Richards: Richards, Carlyle, *Installment Contracts For the Purchase of Land in South Dakota,* Agricultural Experiment Station, South Dakota State College (December, 1959)

Roan: Roan, James E., *Installment Land Contracts in Iowa,* report on Project 1319 of the Iowa Agricultural Experiment Station, Agricultural Law Center.

Wisconsin: *The Installment Land Contract as a Farm Purchase Device in Wisconsin,* report from Wisconsin as a part of its contribution to Regional Project NC-15.

Reasons Why Buyers Seek Low-Equity Financing

The significance of laws relating to low-equity transfers of farm real estate to beginning or expanding farmers is apparent from an examination of some of the capital supply problems with which they are faced. During the last several years, agriculture has been experiencing a revolution comparable in some degree to the industrial revolution of the last century. Improved machinery, higher yielding varieties of crops, better livestock, increased use of fertilizer and new methods of weed and insect control have introduced many changes into agriculture.

Widespread use of tractor drawn equipment has made it necessary for the farmer to obtain control of larger acreages of land in order to utilize efficiently his own labor and the labor of other members of his family. Higher prices for land, livestock and equipment and the use of more machinery on farms tripled the value of agricultural assets between 1940 and 1955. The number of commercial farms declined considerably.[1] In 1940, the capital investment per worker in agriculture was about $5,000. In 1953, it was more than $20,000.[2]

Studies in Missouri in 1953 indicated that investments of $60,000 or more were necessary for an adequate family farm business. In 1958, the investment per farm in Kansas and Nebraska averaged over $86,000. The corn belt average was $104,000.[3]

Shortage of capital results in uneconomic use of other agricultural resources and seriously limits the labor incomes of most beginning farm operators. As a result, the rate of capital accumulation is slow. Data obtained from southern Iowa and northern Missouri farmers, who started in business in 1953, showed that the average young man had about $5,200 to invest in a business. Through conventional credit facilities, he can borrow from 40 to 60 percent of the cost of his land and is usually able to borrow about the same amount of capital needed for working and operating purposes.[4] Thus, without family assistance or other help, a beginning farmer in Iowa or Missouri would need from $12,500 to $30,000 accumulated capital before he could enter farming as an owner-operator. An Indiana study indicated that even a beginning tenant farmer must have $4,500 to $5,300 before entering farming.[5]

A 1955 study by F. J. Reiss[6] indicated that farm hands and hired men who were denied Farmers Home Administration loans had been able to add only $404 to their capital in the year before they applied for the loan. Off-farm employment offers somewhat better opportunities for sufficient capital accumulations, but even this route is much less than promising. Professor Reiss indicates that only 20 percent of the men who entered farming in the post World War II period had accumulated sufficient capital to make an entry without recourse to substantial family assistance.

From the results of these studies, it is apparent that accumulating sufficient capital to begin farming as an owner-operator, while relying on conven-

[1]Diesslin, H. G., *Financing Modern Midwest Agriculture*, North Central Regional Extension Publication 3, Purdue University, Extension Bulletin 415 (1956). Even after discounting for inflation, the increase of capital per farm operating unit is considerable.

[2]Sandage, Edgar T., *Inter-Bank Relations in Financing Agriculture*, Banking Journal of American Bankers Ass'n. (July, 1954).

[3]United States Department of Agriculture, Information Bulletin 176, *Farm Costs and Returns*. FERD, ARS (Rev. August, 1959).

[4]*Ibid.* Farmers' Home Administration loans exceed this percentage, but account for only about 2.5 percent of all agricultural real estate loans outstanding. See Mann, F. L., *Secured Farm Credit in the United States. Istituto Di Diritto Agrario Internazionale E Comparato* (April, 1960), p. 4, Table 1.

[5]Arnold, L. L., *Problems of Capital Accumulation in Getting Started in Farming*, unpublished Ph.D. Thesis, Purdue University (August, 1955), p. 58.

[6]Reiss, F. J., *They Did Not Get Loans*, Department of Agricultural Economics, College of Agriculture, University of Illinois, Resources Report 41 (January 1955).

tional credit arrangements for the balance, has become increasingly difficult. Furthermore, the man who is able to obtain "just enough" capital to gain control of sufficient land for an operating unit may find his labor efficiency so reduced because of inadequate working capital that his net returns are insufficient to meet his interest costs and principal payments on borrowed capital or to permit accumulation of additional capital for improving his economic situation. Thus, the aspiring farmer is often relegated to reliance upon other avenues than savings and conventional forms of credit for entry into farming.

Accumulation of the equity capital necessary for farming as a tenant is much nearer to the capabilities of an aspiring farmer than is entry as an owner-operator. However, many disadvantages are associated with this method of farming. Data from one of Indiana's best agricultural counties show that the major limiting factor in getting started in farming through the renting route between 1947 and 1953 was lack of available land for rent.[7] From 1950 to 1953, beginning farmers took over about 1.5 percent of the farms in the county annually. Pressure to enlarge farm units was one factor that kept new entries at this low level. The trend toward larger farms has continued to influence availability of farms for rent.

Another disadvantage to entry into farming as a tenant is the limitation placed upon the operator's management control over rented land. Consolidation of holdings into more efficient operating units and intensification of existing units are hampered by leases and operating agreements.[8] In addition, long range plans for land improvement often are not carried out by tenants because of the uncertainty of their tenure. In the absence of specific compensation clauses in leases, any appreciation in land values resulting from such activities accrues to the landlord and not to the tenant. This situation aggravates the problem of capital accumulation and prolongs the period of time during which many farmers must operate at a low level of efficiency because of inadequate capital.

The data indicate that there is a real need for some means whereby a person can enter farming by the ownership route before he has used the better part of his business life in accumulating sufficient capital for buying land through use of conventional financing. The partnership and corporate business structure are methods of approaching the problem. These methods of finance make it possible to pool resources from more than one individual source in financing a single ownership and management unit. However, many situations arise wherein a beginning farmer cannot find someone to join him on an equal risk basis as a member of a venture into the business of farming. Complexity of organization, dislike of partnerships and corporations, and an independent attitude on the part of many farmers, are foremost among many reasons why such a method of solving the problem of adequate farm business finance may not be available on a widespread basis as a practical matter.

[7]See footnote 5, *Supra.*

[8]Elefson, Don O. and Miller, Frank, *Equity Financing in Agriculture,* Res. Bul. 714, University of Missouri (October, 1959).

Reasons Why Sellers Prefer Low-Equity Financing

Discussed above are the primary reasons for beginning farmers seeking low down payments for installment purchases as methods of obtaining control of farm land. To make such transactions operative, there must exist sufficient reasons to motivate sellers to accept low down payments and long periods of repayment in lieu of the usual arrangements used in transferring title to land. A number of legal and other considerations may influence a seller to accept such an arrangement.

Tax law is a consideration with significant economic consequences. If a seller actually receives more than 30 percent of the sale price in the year of the sale, he must pay tax on the total amount of any capital gains that will be realized from the sale.[9] However, if 30 percent or less of the sale price is received, the capital gain may be reported in installments, i.e., proportionately as collections are made, and tax paid accordingly.[10] Substantial tax savings can be realized in this manner, as illustrated in the following example:

Husband and wife are both over 65 and sell their farm for $35,000. The farm cost them $10,000 and improvements minus depreciation add another $5,000 to costs, giving an adjusted basis of $15,000 for determining $20,000 capital gain on the farm. They have the opportunity of selling either for cash or on an installment plan with 20 percent ($7,000) down and the balance spread over 10 annual payments of $2,800, plus interest. Data in Table I show the tax liability for each alternative and the differences between them, assuming $2000 other adjusted gross income from other sources.

TABLE I

TAX SAVINGS ON A $20,000 CAPITAL GAIN UNDER THE VARIOUS TYPES OF SALES AS DISCUSSED ABOVE. (OTHER ADJUSTED GROSS INCOME IS $2,000)

Type of Sale	Tax on Capital Gain
Cash Payment	$1,836
Installment Payment	480

If the sellers were under 65 and had no dependents, the tax savings realized would be even greater than those shown in the example.

Another advantage of the low down payment to many retiring farm people who sell their land is that the remaining balance due from the sale acts as a built-in investment plan allowing for a decapitalization scheme that can be geared to their living needs. The low down payment and annual installment payments on land transfers in conjunction with a will also can be an initial step

[9]IRC 1954 § 453 (b) (2) (a); 26 CFR 1.453-4.

[10]It should be emphasized that this is true whether the security involved is an installment land contract, a mortgage, or some other instrument, Undoubtedly many sellers take less than 30% down and accept a mortgage as security, rather than using an installment land contract.

towards an estate plan designed to transfer property to the next generation, as well as to reduce estate and inheritance taxes, and still assure adequate security to the planners during their life. Land can be sold to a younger member of the family, or to an outsider, gearing the down payment and installments to the living needs of the sellers and to a non-taxable gift distribution plan that will, within the life expectancy of the sellers, bring the size of the estate down to a level that will not be subject to death taxes.

A large down payment may complicate an estate plan by requiring a separate arrangement coordinated with an investment plan for the capital interest of the seller that is thereby converted. This arrangement may involve additional transactions and expenses. Many complex legal considerations are involved in any estate plan, but are beyond the scope of this disscussion.

Disadvantages of Low-Equity Financing

There are potential disadvantages both to the buyer and to the seller in a sale of land involving a low down payment. Each should weigh the advantages and disadvantages and the alternative legal arrangements available for maximizing the advantages sought and minimizing the potential disadvantages before making a final decision.

Any purchase involving fixed installment payments over a period of years is subject to fluctuations in economic conditions. As economic conditions become less favorable, the owner-operator buyer, in a low down payment sale, may find that the larger interest and principal payments, resulting from the larger proportion of principal remaining, are difficult or impossible to meet from income. Such a buyer is certainly in a more vulnerable position for loss of his equity than is one who makes a more substantial down payment.

Fixed installment payments also may be a disadvantage to the seller who depends upon them for his living expenses. If, during the period of payment of the balance due after the down payment, he incurs medical or other unexpected expenses in excess of his income, or an inflationary trend reduces the purchasing power of his fixed payment income below that which is necessary for maintaining a satisfactory standard of living, he may find that a large down payment or cash sale and investment in a more readily convertible security would have been preferable. Such an arrangement would allow him to obtain the necessary extra funds by converting his capital to cash. Of course, this only means he will use up his capital at a faster rate than planned. It allows flexibiliy in this respect.

If land prices are decreasing at the time of sale or begin to decrease within the first few years after the sale when the balance of the purchase price remaining to be paid is still a relatively high proportion of the total sale price, a seller is apt to find that if he is forced to realize on his security in the land to obtain payment of the money due him, the market value of the land is not sufficient to pay the debt and the costs of realizing on the security. He may, however, still be in a better financial position than if he had never sold the land, if the down payment and annual payments on principal he retains exceed rent for the same period.

From the viewpoint of the buyer, it may become necessary for him to resell the land because of inability to meet the payments. If he does so in a time of increasing land values, he can usually obtain a price sufficient to pay his debt and replace his own investment in the land. However, if he finds it necessary to resell during a period of falling land values, he is more likely to lose money than if he bought and sold during a period of rising land values.

The rediscount rate is a further disadvantage to the seller under an installment land contract. If he desires, or finds it necessary, to assign his interest, he will be forced to accept a larger discount than if he were assigning a mortgage under exactly the same financial terms and conditions.[11]

The above considerations should be kept in mind in evaluating the discussion that follows.

Legal Instruments Used for Transfer of Land With Low Down Payment

A transfer of land with a low down payment can be effected with any of the recognized legal instruments used as security devices for loans on real estate. However, some, more than do others, maximize the advantages and minimize the disadvantages inherent in such a transfer. The degree to which the method of transfer will allow either party to the transaction to realize the advantages he foresees without creating overriding disadvantages ultimately determines whether or not the transfer should be effected by that paricular method.

In a low-equity transfer of farm land, the buyer is usually interested in acquiring such an interest in the land that allows him to operate it as a farm and attempt to derive a profit from the operations. This interest we can call the *beneficial interest* in the land. It may vary in extent, but it usually includes the right to the rents or profits from farming the land and a right to proceed towards full ownership. The seller, or the party financing the transfer of the land, is, on the other hand, usually interested in acquiring an interest that will reasonably assure him of receiving the deferred payments, or repayment of the money he has loaned, along with the interest return to which he is entitled. This we can call the *security interest* in the land. It, too, may vary in extent, but will usually include a right to take the land, or sell it and take the sale money, to satisfy the buyer's obligation in case he fails to meet his payments.

The respective interests of the parties in a low-equity transfer should vary depending upon the proportion of the purchase price that the buyer has paid, in order fairly to distribute risk. If he has paid a relatively large proportion, the buyer's interest should be greater than if he has paid a small portion. By the same token, the holder of the security interest should have a greater proportion of the interests in the land in the first situation and a smaller proportion in the latter. In other words, the division of interests should be made on the basis of the division of risk involved, in order to offset risk with ownership interest.

Most of the conventional farm land financing instruments have been de-

[11]See Elefson, Vern, *The Rediscount Market for Land Contracts*, Land Economics, Vol. 36, No. 4, (Nov. 1960), pp. 391-394.

veloped with the view that the buyer will pay 40 to 60 percent of the purchase price at the time of entering into the transaction. Thus, they are not usually adaptable, in that form, for low-equity financing situations. Some of the incidents of ownership (ownership rights and duties) must be varied to give the seller or financer a greater security interest and yet allow the buyer to acquire a sufficient beneficial interest to operate the farm and proceed towards full ownership.

The principal legal concern involved in a transaction where someone loans money to another and takes an interest in land as security is the claim for money owed to the creditor. The creditor's interest in land, however labeled, is essentially a security interest. The important question is not the name given to the creditor's security interest, but rather the means available to the creditor to enforce it if the buyer defaults. The security interest in land is treated as corrollary to, and inseperable from, the creditors claim for money owed (called, in law, a *chose in action).* For example, if the creditor dies, his interest, being principally a *chose in action,* passes as personal property, with the security interest in land tagging along.[12]

To fully understand the problems of balancing the interests of the parties in a low-equity transfer of farm land, it is necessary first to understand the legal framework in which this balancing process must operate. The law divides the ownership of land into a number of *incidents* or *segments,* the combinations of these incidents and the content of particular incidents being flexible to a certain degree, and yet being sufficiently definable that one usually can determine with a reasonable degree of accuracy just what he receives in the way of an ownership interest when he acquires one of them.

Quite often the law provides for categorical breakdowns of combinations of incidents. For example, one of the largest combination breakdowns short of complete ownership by one individual (the breakdown brought into play in a security transaction) is a 2-way division often called the legal title and the equitable title. Some states use different terminology, but the division is similar. If one individual holds both, he has complete ownership of the land subject to the inherent rights of the state. If legal title is placed in one person and equitable title in another, a division is created that brings into play all of the rules of law applicable to this area of property to determine the relative interests of the parties. This law determines whether equitable title has actually been separated from legal title and what incidents of ownership make up equitable titles. Equitable title can be understood as something carved away from the legal title by the instrument of transfer, and just what has been carved away depends on the terms of that instrument, interpreted in the light of the body of law that comes into play and, in effect, becomes a part of the definitive material explaining the effect of the transaction.

The actual transfer may be of the legal title or of the equitable title. But

[12]See the section on *Effect of Death of a Party, Infra.*

regardless of which interest *moves,* the equitable interest consists of something *carved away from* the legal title, and anything not included in it automatically remains a part of the legal title. Thus, a transaction involving the division of incidents of ownership in order that one party may have the beneficial interests in the property and the other party may have the security interests becomes one of determining how much of the total incidents of ownership will be carved away from the legal title *cradle* and placed in the equitable title *cradle.*

It can readily be seen that if the transfer instrument in a low-equity transaction leaves legal title in the seller, the problem becomes one of carving away from the seller's legal title sufficient incidents of ownership to enable the buyer to receive the beneficial interests to which he is entitled without taking from the seller that which he is entitled to hold as his security interest. On the other hand, if the transfer instrument *moves* legal title to the buyer, the problem reverses itself and becomes one of *keeping back from* the buyer's legal title enough incidents of ownership so the seller will retain a sufficient security interest without denying to the buyer his beneficial interest.

Some of the seller-financing security instruments recognized by the law of the states of the North Central Region move legal title to the buyer or a trustee, while others retain legal title in the seller. The security instruments that retain legal title in the seller are all contracts, basically, with the only effective elements of the instrument transferring the beneficial interest being ordinary contract provisions as interpreted in the light of the law of contracts. But where legal title is to be moved to the buyer or a trustee, the transaction must include a special kind of *convenant,* a grant that transfers legal title to land. When this exists, another body of law springs into play and becomes a part of the transaction. This transaction can also include contract provisions to balance the interests between the parties more precisely.

The term *low-equity transfers* will be used in this discussion to mean those transfers where the buyer pays less than the conventional down payment of over 30 percent. This seems to be the point beyond which commercial lenders are seldom willing to loan money on the conventional types of security instruments used. It is also the point below which the federal tax laws recognize sales as being on the installment basis, allowing apportionment of capital gain.[13]

Seller-retained legal title low-equity transfer instruments are variously called installment land contracts, contracts for deed, bonds for deed, etc., but in the present discussion they will be referred to as installment land contracts. Basically, they create a contractual relationship between the parties to the transaction.

Buyer-acquired legal title low-equity transfer instruments can be some variation of any of the conventional mortgage instruments used, such as the purchase-money mortgage or the deed of trust, but the only one used significantly in any state in the North Central Region is the deed of trust as the basic security device in conjunction with installment notes evidencing the debt or, sometimes, a

[13]See discussion of the provision on pp. 9-10, *Supra.*

supplemental contract. This type of instrument is used extensively in the state of Missouri in preference to the installment land contract for reasons that will become apparent in the discussion that follows. The deed of trust actually involves a transfer of legal title by warranty deed to the buyer and then the retransfer of a limited power of sale by the buyer to a trustee by use of a deed of trust. The power of sale is held by the trustee for the benefit of the seller, or other person who has financed the transaction.

From this point, the discussion and comparison will be confined to the law and practice with regard to the installment land contract as used in all the states of the North Central Region and the deed of trust arrangement as used in Missouri. The discussion will center on the installment land contract with a comparative discussion of the deed of trust where applicable. Although the deed of trust security device is used primarily in Missouri, a discussion of its effectiveness is just as important (or possibly more so, in a study of this type), as is a discussion of the separate states' laws with regard to installment land contracts, since it offers the only significant existing utilization, in the North Central Region, of an otherwise unique method of balancing the ownership interests of the parties to a low-equity farm land transfer arrangement by the use of a legal instrument that places legal title to the land in someone other than the seller.

It will be helpful to have a brief general definition of instruments to be discussed.

The installment land contract is basically an executory contract (one not yet completed) utilized as a security device in the transfer of real property.[14] The relationship of the parties under an installment land contract depends primarily upon the nature of the specific provisions contained in it. The instrument allows a wide choice in the election of terms of relationship created by it. The applicable law in the particular state in which the instrument is used is important in interpreting the provisions utilized in the contract, but the parties can select the legal effect they desire by carefully wording the provisions included in the transfer instrument. For these reasons, it has great flexibility and is, therefore, well adapted to low equity transfer arrangements.

The deed of trust arrangement is a transaction by which a limited power of sale over real property is placed in one or more trustees by deed, to secure the payment of money or the performance of other conditions.[15] The instrument can contain specific contract provisions to balance the interests of the parties in a variety of combinations. Thus, it, too, has sufficient flexibility to make it especially adaptable to low-equity transfer arrangements.[16]

[14] *In re Sherman*, 12 F. Supp. 297, 298, 299 (W.D.C. Va. 1935).

[15] See *Lustenberger v. Hutchinson*, 343 Mo. 51, 119 S.W. 2d 921 (1938); *Butler Building and Investment Co. v. Dunsworth*, 146 Mo. 361, 48 S.W. 449 (1898).

[16] Its preferability in Missouri is enhanced by the power of non-judicial sale of the security upon default after a 20 day notice period, and the absence of a general equity of redemption under Missouri law. See the discussion on pp. 75-78.

Factors Affecting Enforceability

Statute of Frauds. All states of the North Central Region have enacted statutes of frauds applicable to installment land contracts. These statutes, in general, require that contracts for the creation of or transfer of any interest in lands, except for leases for a term not exceeding one year (sometimes for up to three years), to be enforceable, must be in writing and must be signed by the party to be charged. Some states hold that an oral contract that comes within the statute is void,[17] while others only deny the legal remedies by which it might otherwise be enforced,[18] thus making an oral contract for the sale of an interest in land merely unenforceable but not void.

In the latter case, the burden is on the defendant to ask for the application of the statute of frauds. Otherwise the charge of fraud is considered to be waived and the contract will be enforced.[19]

The writing, to be sufficient to take the contract out of the statute, must with reasonable certainty, (1) include an adequate description of the land, (2) identify the buyer and seller, and (3) indicate the terms and conditions of all the promises constituting the contract and by whom the promises are made.[20] The form and extent of the writing, within limits, are immaterial. For example, in most states it may consist of several writings if they are all signed by the party to be charged and their content indicates that they are all related to the same transaction,[21] or, even though only one writing is signed, if it has been physically annexed to the others by the signor[22] or refers to the unsigned writings,[23] or if it appears that the signed writing was signed with reference to the unsigned writings.[24] In South Dakota, although the code expressly requires that the writing be signed by the party to be charged or his duly constituted agent,[25] the State Supreme Court has held that mere acceptance of the instrument may bind a person, although he has not signed it.[26] The Michigan and Wisconsin statutes only require that the seller sign the contract. If only the buyer signs, the contract is not enforceable.[27]

Parol evidence (oral comments) cannot be admitted to supply any of the essential elements required by the statute to be in writing. But if the language

[17]See, for example, *Neb. Rev. Stat.* § 36-105 (reissue 1952).

[18]Iowa Code 22.34 (1954); *McMinimee v. McMinimee*, 238 Iowa 1286 1293, 30 N.W. 2d 106, 109 (1947); *SDC* §10:0605 (1939); Ohio Rev. Code, § 1335.05, *Hamilton Foundry v. Industrial International*, 630 Ohio L. Abs. 417.

[19]*Manchester v. Loomis*, 191 Iowa 554, 181 N.W. 415 (1921); *Young v. Maszaros*, 35 Ohio, App. 139, 172 N.E. 158 (1930).

[20]*Restatement, Contracts*, §§ 207-213 (1932).

[21]*Iowa Mausoleum Co. v. Wright*, 170 Iowa 546, 153 N.W. 94 (1915). *Mc Gilvery V. Shadel*, 87 Ohio App. 345, 95 N.W. 2d 1 (1949).

[22]*Boyd v. Miller*, 210 Iowa 829, 230 N.W. 851 (1930).

[23]*Morris Furniture Co. v. Braverman*, 210 Iowa 946, 230 N.W. 356 (1930).

[24]Footnote 23, *Supra.*

[25]See *Clotfelter v. Telker*, 52 Ohio L. Abs. 268, 83 N.E. 2d 103 (1947).

[26]*Kimm v. Wolters*, 28 S.D. 255, 259, 133 N.W. 277 (1911).

[27]See Beuscher, J. H., *Law and the Farmer*, Springer Publishing Co. New York, (3rd ed. 1960), pp 59-61; M.S.A. 26.671.

of the writing is susceptible of more than one interpretation, parol evidence may be admitted to assist in interpretation of the ambiguous language.[28] Parol evidence usually may not be used to bring out negotiations and stipulations made previous to the execution of the writing, but ambiguities, technical terms[29] local usage, and the meaning of ordinary words may be explained by it, and collateral agreements may also sometimes be annexed by parol evidence.[30]

Part Performance. There are situations in which the courts will enforce a contract for the creation or transfer of an interest in land even though the requirements of the statute of frauds are not met. The courts usually base their refusal to allow the statute of frauds as a defense on the ground that it would thereby aid or protect the perpetration of a fraud.[31] The mere refusal to convey land pursuant to the terms of an oral contract, however, is not sufficient fraud to cause the courts to deny application of the statute.[32] There must be such a change of position by the promisee in reliance upon fraudulent representations, that the promisor would gain an unfair advantage if the statute of frauds were allowed to be pleaded as a bar.[33] In such cases the courts will generally enforce the oral agreement if the defrauded party satisfactorily pleads and proves the fraud.[34]

Satisfactory pleading and proof requires certain essential elements. These elements constitute complete or part performance of the defrauded party's side of the alleged contract. When a buyer performs all of his obligations under an oral contract, some courts will enforce it against a subsequent grantee (later

[28] *Williston on Contracts* 650 et. seq. (Student Ed., 1938). "The memorandum in writing which is required by the statute of frauds is not sufficient unless it contains the essential terms of the agreement expressed with such clearness and certainty that they may be understood from the memorandum itself or some other writing to which it refers, without the necessity of resorting to oral proof." *Kling, Admr. v Bordner*, 65 Ohio St. 86, 61 N.E. 148 (1901). "Therefore, in order that a contract may be enforced by specific performance, we must find within the four corners of the note or memorandum identification of the land in question. We must *apply* the description set forth in the contract and we may not supply any other description." *Schmidt v. Weston*, 150 Ohio St. 293, 300, 82 N.E. 2d 284 (1948).

[29] *SDC* 10.0604 (1939); *Stoefen v. Brooks*, 66 S.D. 587, 591 (1939).

[30] *Williston, Contracts*, §§ 650, 652, 654, 661 (Ref. Ed. 1936).

[31] *Hanson v. Fiesler*, 49, S.D. 442, 452, 207 N.W. 449 (1926); *Halligan v. Frey*, 161 Iowa 185, 141 N.W. 944 (1913); *Garner v. McCrea*, 147 Neb. 541, 23 N.W. 2d 731 (1940); *Hughes v. Oberholtzer*, 162 Ohio St. 330, 123 N.E. 2d 393 (1954).

[32] *Ibid.*

[33] *McCullon v. Mackrell*, 13 S.D. 262, 264, 83 N.W. 255 (1900); *Overlander v. Ware*, 102 Neb. 216, 166 N.W. 611 (1918).

[34] *Halligan v. Frey, Supra.* Ohio apparently proceeds from another basis, but the difference seems more theoretical than practical. "The doctrine of part performance which will take the case out of the operation of the statute of frauds is based upon acts of the parties which are such that it is clearly evident that such acts would not have been done in the absence of a contract and that there is no other explanation for the performance of such acts except a contract containing the provisions contended for by the plaintiff. In other words, the acts done must not only indicate a contract but a contract containing the provisions insisted upon by the plantiff. *Hughes v. Oberholtzer, Supra.* at p. 338. This language is an example of similar language in other Ohio cases indicating that, while the courts do allow part performance to take the case out of the statute in order to escape inequitable results, the basis is not fraud in the active sense as used in the text above. It is rather fraud in the inactive sense similar to the unjust enrichment cases. See notes in the section on *Detrimental Reliance and Change of Position*, p. 17, *infra.*

buyer) or the seller who takes the property interest with notice of the existence of the oral agreement.[35]

The amount of performance necessary to constitute sufficient part performance to take the case out of the operation of the statute is sometimes difficult to determine and often depends upon the circumstances surrounding the facts of the particular case. Some courts have required that the performance relied upon must be such that it is referable solely to the contract sought to be enforced. If it might be referable to a different type of agreement, in that the claimant might have done the acts with a view to performance by him of his part of the other agreement, then it is not sufficient performance on his part to make nonperformance by the other party a fraud upon him and thus take the case out of the operation of the statute.[36] However, most courts now will enforce an oral contract for the transfer of an interest in land against the seller if the buyer has gone into possession, has made permanent improvements on the land and has made substantial part payment of the purchase price.[37] Some states will enforce oral contracts when less than all of the three acts mentioned above have been carried out.[38]

Some states have enacted statutes on the subject. For example, the Nebraska code specifies that the statute of frauds shall not be "construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance."[39] In Iowa, a statute provides that the statute of frauds is not applicable, (1) where the purchase money, or any portion thereof, has been received by the vendor, (2) when the vendee, with actual or implied consent of the vendor, has taken and held possession of the premises under and by virtue of the contract, *or* (3) when there is any other circumstance which by the law heretofore in force would have taken the case out of the statute of frauds.[40] The courts have interpreted this statute to require that a transfer of possession must appear to have been effected with the knowledge of the seller, under the terms of the agreement, and solely referable to it.[41] In addition, the term, *purchase money,* has been construed to mean any form of consideration.[42] Thus, personal services,[43] exchange of property,[44] as well as the payment of pre-

[35] *McCullon v. Mackrell, Supra.* But see Contra, *Horn v. Ludington,* 32 Wis. 73 (1873).

[36] *See Overlander v. Ware, Supra: Hughes v. Oberholtzer, Supra.*

[37] See, for example, *Boekelheide v. Snyder,* 71 S.D. 470, 473, 26 N.W. 2d 74 (1941).

[38] Apparently Illinois and Nebraska require all three; Kansas, Michigan, Missouri, Wisconsin, and South Dakota require only possession plus permanent improvements or part payment; Iowa, Ohio, Minnesota and North Dakota require possession alone (Iowa also enforces on the basis of substantial part payment even without possession); Kentucky apparently does not recognize oral contracts for the sale of land. Later cases indicate that Ohio usually requires a showing of further circumstances, (see *Hughes v. Oberholtzer. Supra.*).

[39] *Neb. Rev. Stat.* § 36-106 (Resissue 1952).

[40] Iowa Code § 622-33 (1954); *Lynch v. Lynch,* 239 Iowa 1245, 34 N.W. 2d 485 (1948); *Carlson v. Carlson,* 233 Iowa 1133, 11 N.W..2d 383 (1943); *Furgason v. Woodbury County,* 212 Iowa 814, 237 N.W. 214 (1931); *Durband v. Nicholson,* 205 Iowa 1264, 216 N.W. 278 (1927).

[41] *Lowrey v. Lowrey,* 117 Iowa 704, 89 N.W. 1118 (1902).

[42] *Daily v. Minnick,* 117 Iowa 563, 91 N.W. 913 (1902).

[43] *Hurst v. Jenkins,* 161 Iowa 414, 143 N.W. 401 (1913).

[44] *Delvin v. Himer,* 29 Iowa 297 (1870).

existing debt,[45] have been held sufficient to take the contract out of the statute of frauds.

The Iowa statute goes much further than the common law of most states in excepting an oral contract for the transfer of an interest in land from the operation of the statute of frauds. However, it has been in operation since 1851 and has apparently swept away much of the controversy in this area of the law as it exists in many other jurisdictions.[46]

It seems then, that under such a statute, in combination with the statute of frauds, less actual fraud would occur, since those frauds sought to be eliminated by the statute are still reached, while fewer cases that do not satisfy the terms of the statute of frauds but, nevertheless, are bona fide agreements, will go unenforced because of the lack of flexibility of the statutory provisions covering the situation.

Detrimental Reliance and Change of Position. In some states, the courts have utilized a doctrine differing somewhat from the part performance doctrine to allow the enforcement of an oral agreement that would otherwise come within the statute of frauds. If the complaining party can show sufficient detrimental reliance and change of position based on the oral agreement, the courts enforce it.

To invoke the rule in South Dakota, (1) existence of an oral agreement must be established; (2) it must be shown that the acts performed were referable to the agreement; and (3) it must be established that enforcement of the statute of frauds in view of the party's changed position would cause unconscionable hardship and loss.[47]

Deed of Trust. The deed of trust is an instrument that makes a present conveyance of an estate or interest in land, and, therefore, must be a written instrument executed by the proper person and acknowledged and recorded as required by statute.[48] In Missouri failure to have the instrument properly certified does not render it ineffective as between the grantee and grantor or those claiming under the grantor with actual notice. However, it is not entitled to be recorded.[49] Nevertheless, if such an instrument is filed with the recorder for one year, it will impart constructive notice just as if it were properly certified and recorded.[50]

[45]*Kerr v. Yager,* 158 Iowa 69, 138 N.W. 905 (1912).

[46]See *Note* 15 Iowa L. Rev. 351 (1930); *3 American Law of Property,* §§ 11.7-11.12 (Casner Ed. 1952).

[47]*Federal Land Bank v. Matson,* 68 S.D. 538, 5 N.W. 2d 314 (1942). Although it involved an agreement to lease, the same arguments are said to obtain in an installment land contract action. See Richards, Carlyle, *Installment Contracts for the Purchase of Land in South Dakota,* South Dakota State College (Dec. 1959). See also *Kelly v. Gram,* 73, S.D. 11, 38 N.W. 2d 460 (1949) . This rule is also followed in Ohio. See *Myers v. Croswell,* 45 Ohio St. 543, 15 N.E. 866 (1898).

[48]RSMo 442.020 (1949).

[49]*Ibid* § 442.400 (1949); *State v. Page,* 332 Mo. 89, 58 S.W. 2d, 293 (1933); see also *Hatcher v. Hall,* 292 S.W. 2d 619 (1956).

[50]See *State v. Page, Supra.* A large body of law, that cannot be appropriately discussed here, exists in Missouri with regard to acknowledgement, recordation, actual and constructive notice, effect of possession on notice, etc.

Other Prerequisites to Enforceability. Assuming a contract for the creation or transfer of an interest in land that is valid under the statute of frauds, there are certain other prerequisites to the enforceability of its performance. If one party to a transaction, with the intent to decieve or defraud the other party, induces him to enter into a transaction by making false statements and representations that he knows to be untrue, and the other party enters into the transaction relying upon the misrepresentations as being true, a fraud has been committed sufficient to make the transaction voidable.[51] The defrauded party can elect to rescind the contract if he acts within a reasonable time after the discovery of the fraud,[52] or he may elect to enforce the contract and sue for damages to the extent that he has been injured.[53] To be allowed the defense of fraud, the injured party must first show that he used reasonable care to be appraised of the true facts prior to entering into the transaction.[54] In North Dakota, if an injured party is induced to sign a contract without reading it, he will not be allowed to avoid the contract later on that ground as fraud.[55]

In most cases, if the purchaser has full opportunity to examine the land in question, there is no indication of an attempt to conceal facts concerning the state of the title, and even though verbal misrepresentations have been made, the purchaser is bound by the rule of *caveat emptor* (buyer beware) and cannot use the defense of fraud as a ground for nonperformance or for rescission.[56]

An honest mutual mistake with regard to important features of the contract,[57] or incapacity to contract either because of incompetency or minority[58] are grounds for voiding the contract. Certain limitations also may still apply in some states where one of the parties is a married woman.[59] However, since these are features of general contract law, they will not be further discussed here.

Tender of Performance. Under an installment land contract, the acts of performance are concurrent and mutually dependent. Thus, before one party can demand performance by the other, he must first tender performance of all his obligations under the contract. This requirement may be excused in some instances. For example, the requirements of tender of performance would not be a condition precedent to compelling performance, if the other party refuses to carry out a part of his obligation that is a condition precedent to further action

[51] *Kramer v. Lee & Son Co.*, 61 N.D. 28, 237 N.W. 166 (1931); *Coral Gables v. Schmieding*, 36 Ohio L. Abs. 327, 68 N.W. 2d 152 (1940).

[52] *Bauer v. National Union Fire Ins. Co.*, 51 N.D. 1, 198 N.W. 546 (1924); *Nimbs v. Potter*, 5 Ohio L. Abs. 372 (1927).

[53] Annot., 26 *A.L.R.* 990 (1922); Subject to Limitations. See 23 *Am. Jur.* 771; *Wolford v. Freeman*, 150 Neb. 537, 35 N.W. 2d 98 (1948); *McMahon v. Spitzer*, 29 Ohio App. 44, 163 N.E. 37 (1928). The scope of this area of the law does not lend to an extensive discussion here.

[54] *Morgan v. Va. Joint Stock Land Bank*, 41 Ohio App. 558, 180 N.E. 202(1).

[55] *Nelson v. Grondahl*, 12 N.D. 130, 96 N.W. 299 (1903). A strong minority opinion, growing rapidly, holds that a purchaser should be able to rely on statements of the seller without making an investigation.

[56] See for example, *Asher v. Jensen*, 43 N.D. 355, 175 N.W. 365 (1919); *Chapman v. Orrachia*, 8 Ohio L. Abs. 250 (1929).

[57] *Groger v. Voecks*, 156 Neb. 696, 57 N.W. 2d 621 (1953).

[58] See, for example, *Marmet v. Marmet*, 160 Neb. 366, 70 N.W. 2d 301 (1955).

[59] *Neb. Rev. Stat.* §25-305, 306 (reissue 1952).

by the complaining party. But when the acts of performance are to be concurrent, neither party is in default until the other tenders performance of his part of the obligation and demands that the other party fulfill his obligation.[60]

Under an installment land contract, a seller may pursue his remedies for failure to make any payment, but the last, without first tendering a deed, because such tender is concurrent only with payment of the last installment.[61]

Marketability of Title. The seller under an installment land contract cannot enforce it against the buyer unless he can offer a merchantable or marketable title to the property or unless the contract specifically provides otherwise.[62] Marketable title is considered to be a title sufficiently free from defect as to make it reasonably certain that no litigation will arise concerning its validity.[63] This means that it must be free of all liens and encumbrances as well as defects and clouds on title, except as agreed in the contract.[64]

The title must be marketable at the time set for the conveyance, and not just when the contract was executed.[65] In fact, even if the buyer knew the seller's title was not marketable at the time of entering into the contract, he is not bound to accept less than a marketable title at the time of the conveyance.[66]

In Iowa, at least, in the absence of an agreement to the contrary, it seems that the marketability of the title must be deducible of record in order that it be considered marketable in the sense required here.[67] Thus, if there is a missing link in the chain of title that can be filled in only by resort to unrecorded documents or parol evidence, it seems that the buyer could not be compelled to take the title.[68]

The uncertainty that might arise in this respect is minimized by including an express provision in the contract specifying the title that the seller is obligated to offer.

Recording of the contract may be a necessary prerequisite to enforcing its performance in some cases. For example, if the seller conveys to a third party land subject to an unrecorded contract, the contract buyer cannot recover the land unless the subsequent grantee had actual notice of the existence of the contract.[69]

[60] *Hardin v. Union Mut. Life Ins. Co.*, 222 Iowa 1283, 271 N.W. 176 (1937); *Braig v. Frye*, 199 Iowa 184, 199 N.W. 977 (1922); *Fairlawn Heights v. Theis*, 133 Ohio St. 387 (1938).

[61] See *Reese v. Westfield*, 56 Wash. 415, 105 Pac. 837 (1909).

[62] *Halligan v. Frey, Supra; McCarty v. Lingham*, 111 Ohio St. 551, 14 N.E. 2d 1 (1924).

[63] *Larson v. Thomas*, 51 S.D. 564, 570, 215 N.W. 927 (1927).

[64] *Kennedy v. Dennstadt* 31 N.D. 422, 154 N.W. 271 (1915); *Frank v. Murphy*, 64 Ohio App. 501, 29 N.E. 2d 41 (1940).

[65] *Sarazin v. Kunz*, 226 Iowa 1309, 286 N.W. 471 (1939).

[66] See *Pratt v. Law*, 9 Cranch 456, 3 L. Ed. 791 (1815).

[67] See Marner. But see also Patton, *Iowa Land Title Examinations*, § 31 (1929). See also *Ohio Standards of Title Examination*. Real Property Law Committee, Ohio State Bar Association; *Hefferson v. Wiest*, 3 Ohio L. Abs. 753 (1925); also *Ohio Rev. Code*, ch. 5301.

[68] *Upton v. Smith*, 183 Iowa 588, 166 N.W. 268 (1918); *Donigan v. Donigan*, 46 Ohio App. 542, 189 N.E. 860 (1933); *Horton v. Matheny*, 72 Ohio App. 187, 51 N.E. 2d 41 (1943); *McCarty v. Lingham*, 111 Ohio St. 551 146 N.E. 64 (1924).

[69] This subject is discussed in greater detail in a later section.

The Doctrine of Equitable Conversion

Much of the substantive law with regard to installment land contracts involves the doctrine of equitable conversion.[70] Behind this doctrine lies the ancient equitable maxim that "equity regards as done those things which in good conscience ought to be done."[71] The doctrine is applied to installment land contracts on the basis of their specific enforceability.[72] Thus, equitable conversion will not apply to any contract which for some reason cannot be specifically enforced.[73]

Essentially, equitable conversion allocates the incidents of ownership (including both benefits and burdens) between the parties to the contract, and as between these parties and the third persons.[74] The allocation is based, in general, upon the fact that the contract does exist between the parties, and, more specifically, upon the terms of the specific provisions in the contract. The buyer is made the beneficial owner of the land and the seller holds bare legal title as security.[75] The position in which the application of the doctrine of equitable conversion places the parties is usually described as follows: The purchaser is regarded in equity as owner of the land and debtor for the purchase price, and the seller is regarded only as a secured creditor for the unpaid portion of the purchase price with an interest similar to that of a mortgagee.[76] The relative positions in which the parties find themselves under the installment land contract depends upon the application of the doctrine of equitable conversion in the light of the specific provisions in the contract.

The doctrine does not operate where the deed of trust arrangement is used since there is nothing that *ought to be done* upon which it can operate. Thus, the law divides the relative interests of the parties, and rules of construction make specific allocations between them on the basis of the particular terms of the instrument under consideraion.

The effect of equitable conversion is reflected in the disposition of each of the recognized incidents of ownership. This effect, in conjunction with the construction of contract provisions, determines the final result that will be reached in allocating the incidents. These incidents are discussed separately below.

Possession. In an installment land contract transaction, the seller typically places the buyer in possession with the buyer having only a small financial investment in the property as compared to the seller. Under such circumstances, the law places limits upon the buyer's possessory rights, for the protection of the creditor. On the other hand, the law erects an implication that the buyer is

[70]See Langdell, *Equitable Conversion*, 18 Harv. L. Rev. 245 (1905); 19 Harv. L. Rev. 321 (1906).
[71]Hallock at p. 103; 4 Pomeroy 472, *Equity Jurisprudence* (5th ed., Symons, 1941).
[72]The remedy of specific performance will be discussed in the section on Remedies, Infra.
[73]*Langdell, Supra.*
[74]See 3 *American Law of Property* 63 (Casner ed. 1952).
[75]See *Summers v. Midland Co.*, 167 Minn. 453, 455, 209 N.W. 323, 324 (1926); *Mackey v. Sherman*, 263 Ill. App. 109 (1931); *Berndt. v. Lusher*, 40 Ohio App. 178, 178 N.E. 14 (1931).
[76]See *Junkin v. McClain*, 221 Iowa 1084, 265 N.W. 362 (1936); *Fechner v. Finseth*, 46 N.D. 348, 179 N.W. 701 (1920); *Williams v. Johns*, 34 Ohio App. 230, 170 N.E. 580 (1930); Lashkowitz at p. 163.

entitled to use the land within reasonable limits in order to realize earnings from it to use in retiring the debt.

The general rule starts from the premise that possession follows legal title. Thus, unless the contract provides otherwise, either expressly or by implication[77] since the seller retains legal title, he also retains the right to possession until the entire purchase price has been paid and title transferred.[78] It, therefore, is important to include a specific provision in the contract delivering possession to the buyer if he is to receive a possessory interest. The possession will usually be turned over either immediately upon entering the contract, at the begining of the next growing season, or as soon as an existing lease of the land to another party has expired, depending upon the circumstances involved.

Under the deed-of-trust arrangement, since legal title is initially placed in the buyer, possession automatically vests in him, thus eliminating the need for a specific provision covering the situation, unless for some reason, the seller is to retain possession.[79]

Risk of Loss and Insurance. The common law rule, based on the doctrine of equitable conversion, is that from the time the contract is entered into the risk of loss is on the buyer, regardless of who is in possession, unless, (1) the contract provides otherwise, (2) the seller did not have good title at the time of the loss, (3) there was a delay in the conveyance due to the seller's fault, or (4) the seller's negligence caused the loss.[80] Many of the North Central states still subscribe to this common law rule.[81] However, a number of them have altered it by statute.

In at least three of the North Central states, the Uniform Vendor Purchaser Risk Act has been enacted.[82] Under this act it is presumed that in the absence of contrary provisions in the contract, the risk of loss shall fall upon the buyer if he has taken possession, or if he holds legal title.[83] Otherwise, the seller must bear the loss and will be unable to enforce the contract, while the buyer may recover any portion of the purchase price paid.[84]

In Minnesota the risk of loss is apparently on the buyer, if he has paid a part of the purchase price and is in possession, but it is unclear as to who would bear the risk of loss when the contract has been signed but there has been no

[77]The courts very readily imply possession. For example, a provision in the contract that the buyer shall pay interest on the unpaid purchase price is sufficient for such an implication. See 1942 Wis. L. Rev. 90.

[78]3 *American Law of Property* § 11.25 (Casner ed. 1952); *In re Boyles Estate,* 154 Iowa 249, 134 N.W. 590, 591 (1912); *Knapp v. Baldwin,* 213 Iowa 24, 238 N.W. 542 (1931); *Junkin v. McClain. Supra.*

[79]*In re Thomasson's Estate,* 350 Mo. 1157, 171 S.W. 2d 553 (1943); *Reynolds v. Stepanek.* 339 Mo. 804, 99 S.W. 2d 65 (1936).

[80]3 *American Law of Property* § 11.30, *Supra; O'Brien v. Paulson,* 192 Iowa 1351, 186 N.W. 440 (1922); *Burge v. Gough,* 153 Iowa 183, 133 N.W. 340 (1911); *Davidson v. Hawkeye Ins. Co.,* 71 Iowa 534 (1887); *Oak Bldg. and Roofing Co. v. Susor,* 32 Ohio App. 66, 166 N.E. 908 (1929); *Note,* 11 Iowa L. Rev. 73 (1925).

[81]Nebraska apparently still adheres to the common law rule. See *O'Brien v. Paulson, Supra;* Hancock at p. 4.

[82]Michigan, South Dakota and Wisconsin have adopted the act. See 9c *Uniform Laws Annotated* 313 (1957).

[83]See *Comment,* 33 Iowa L. Rev. 171 (1947).

[84]*SDC* 37.1807 (1939).

change in possession.[85]

Closely related to the risk of loss question is that of insurance against loss. It is generally considered that both parties under an installment land contract have an insurable interest in the property until the contract is fully performed.[86]

A problem arises when only the seller has insured the property. If there is a loss, who is to receive the benefit of the proceeds of the insurance? Most states hold that the proceeds stand in place of the property, thus reducing the amount of the purchase price outstanding.[87] However, other states hold that the seller is entitled to the proceeds plus the contract balance.[88] But, if the buyer has paid the entire purchase price, even these latter states generally require that the seller hold the proceeds of insurance in trust to rebuild the destroyed property.[89] This is apparently because the seller no longer has a security interest in the property. It seems that consistency would require the seller to be reimbursed for the premiums he has paid, unless he is to be placed in the position of an officious contributor.

Of course, if the buyer pays the insurance premiums, it is generally well settled that proceeds paid for any loss will be paid to the seller up to the amount of his security interest and in reduction of the debt. The buyer is entitled to any excess, either on a theory of trust,[90] or, if he is named in the insurance policy, as an additional insured under the terms of the insurance contract.[91]

The more equitable view seems to be that of requiring the proceeds of insurance to be applied to the purchase price still owing at the time of loss, even though they are paid to the seller. But it also seems that the cost of premiums should be charged to the buyer, regardless of who paid them in the first instance. Such an arrangement would be especially consistent in those states where the risk of loss is placed on the buyer. To hold differently would allow the seller to recover insurance proceeds for a loss, and to recover the entire purchase price, a part of which was intended to pay for the property lost. This, in effect, would allow him to recover for his interest twice and require the buyer to pay for something he did not receive.

In view of the somewhat confused state of the law in some jurisdictions and its inequitable application in others, it is imperative that the parties to an installment land contract handle the matter of risk of loss and insurance by a specific

[85]See *Summers v. Midland Co.*, 167 Minn. 453, 455-456, 209 N.W. 323 324 (1926); *Mark v. Liverpool & London & Globe Ins. Co.*, 159 Minn. 315, 320, 198 N.W. 1003, 1005 (1924). In *Teig v. Linster*, 150 Minn. 111, 184 N.W. 609 (1921); the court said at 113 that there was a confusion of authorities on this point, and did not decide the issue.

[86]2 *Joyce on Insurance* § 977 (1917); *Vance on Insurance* 167 (3rd ed. 1951); *Carpenter v. Carpenter*, 248 Iowa 202, 80 N.W. 2d 323 (1957); Hancock at p. 4; Vanneman, *Risk of Loss in Equity, Between Dates of Contract to Sell Real Estate and Transfer of Title*, 8 Minn. L. Rev. 127, 137 (1924); *Gilbert v. Port*, 28 Ohio St. 276 (1876).

[87]See 3 *Corbin on Contract* § 670 (1951); 3 *American Law of Property* s 11.31 (Casner ed. 1952); *Cetkowski v. Knutson*, 163 Minn. 492, 204 N.W. 528 (1925); *Russell v. Elliott*, 45 S.D. 184, 190, 186 N.W. 824 (1922); *McGinley v. Forrest* 107 Neb. 309, 186 N.W. 74 (1921). *Gilbert v. Port, Supra.*

[88]*Hatch v. Commerce Ins. Co.*, 216 Iowa 860, 249 N.W. 164 (1933).

[89]*Brady v. Welsh*, 200 Iowa 44, 204 N.W. 235 (1925).

[90]*Brady v. Welsh, Supra.*

[91]*Hill and Fitzgerald* at p. 34.

provision therein. This they are free to do.[92]

If the contract provides that the proceeds are to be applied as the interests of the parties shall appear, the courts generally hold that the proceeds are to be used in restoring the property.[93] This result seems to be justified in that it places the parties, as nearly as possible, in the same position they were in prior to the loss, but it, nevertheless, leaves much to be desired with respect to clarity in assuring the position of the parties without resort to court interpretation. Parties to a contract would be well advised to be more specific in their contract provisions and clearly to set out who bears risk of loss, who will pay insurance premiums, and to whom and in what amounts any proceeds for loss shall be paid.[94]

Generally, the beneficial owner appears to be the one to bear the risk of loss, since it is that person who would benefit directly from any appreciation in value. Since the beneficial owner is the buyer under an installment land contract, it seems that the buyer should be required to pay for the cost of eliminating the burden of risk of loss by payment of insurance premiums. Yet, since the seller must rely upon the value of the property as his security, the debt should be reduced by the amount of any depreciation in the property resulting from loss covered by insurance or the loss should be replaced by it. Proper drafting of the contract can require the buyer to take out insurance in sufficient amount to cover the seller's interest in the property, to pay the premiums, and to have proceeds of insurance payable to the seller up to the amount of his security interest in reduction of the buyer's obligation to him with any coverage payable to the buyer.

If it is considered desirable, the contract also can provide that a failure to maintain the insurance as agreed accelerates the entire unpaid purchase balance. Or the contract can provide that in the event the buyer fails to keep insurance premiums paid, the seller can pay them and add their cost to the unpaid balance of the purchase price.

Profits. In general, profits from the land, such as rents and income from crops, belong to the party entitled to possession at the time the profits accrue.[95] Thus, the buyer under an installment land contract acquires the right to profits as soon as he is entitled to possession.[96]

If the rent due date falls on a day after the buyer acquires possession of the property, he is entitled to the entire amount of the rent payable on that day, even though it is in payment for a period of use and enjoyment of the property prior to the date of the buyer's right to possession.[97] The burden, however,

[92]See Marner at p. 22.

[93]*Hatch v. Commerce Ins. Co., Supra.*

[94]*Gilbert v. Port, Supra,* provides an extensive discussion of the various elements used by the courts in determining upon whom the loss falls and who is to receive the benefit of the insurance proceeds. Generally, the rules followed are those outlined in this and the immediately preceding discussion.

[95]*92 C.J.S., Vendor & Purchaser* § 288 (1955); 15 *Am. Jur., Crops* § *11; Bennett v. Kroger,* 192 Iowa 411, 185 N.W. 7 (1921); *Roden v. Williams,* 100 Neb. 46, 158 N.W. 360 (1916); *Note, Minnesota Land Contract Law in Action,* 39 Minn. L. Rev. 93, (Dec. 1954).

[96]See discussion in the section on Possession, p. 24.

[97]See generally, 92 *C.J.S., Supra* § 288 (1955); *Williams v. Martin,* 83 Ohio App. 130 (1948).

seems to be on the buyer to prove by competent evidence that he had the right of possession on the date the rent accrued.[98] If the buyer under the terms of the contract, is entitled to possession on a particular date, and also is required to make a payment under penalty of forfeiture on that date, he is not entitled to possession until the payment is made. If the rent accrual date falls on a day prior to the time the buyer's payment is actually made, even though after the date when it was due, the buyer is not entitled to the rent.[99] If a forfeiture is actually effected as the result of the buyer's failure to meet a payment, he is not entitled to receive any rents accruing subsequent to the due date of the payment.[100]

Rents are considered accrued when they are payable, even though it may be payment in advance. Since the payment is not considered due until midnight of the day on which it is payable, the party receiving the right to possession on the day the rent is payable is entitled to the rent.[101]

If the seller or buyer remains on the land, even though the other party is entitled to possession, the one entitled to possession and not the one in actual possession is entitled to receive accruing rents.[102] If the buyer moves onto the property prior to the date on which he is entitled to possession, he is liable to the seller for rent.[103] It would seem that the buyer also would be entitled to rent from the seller if he holds over actual possession after the date when the buyer is entitled to receive possession.

It is somewhat unclear as to what other *profits* fall within the legal classification of rents when a sale is involved, but it seems that all profits, subject to waste limitations,[104] would be treated the same.

The treatment of government conservation, soil bank and other payments in the law is somewhat uncertain. One Kansas case indicates that these payments should be made to whoever owns the record title to the land.[105] However, it appears to be inconsistent to give rents to the buyer under an installment land contract and deny him the right to government payments because he is not the record title holder. The Kansas case was not squarely faced with this question. In the proper case, a court could treat such payments as rent. The contract should include a specific provision designating the party who is to receive such payments.

Growing crops seem to fall within the same category as rents.[106] Thus, the title to growing crops passes to the buyer when he receives possession of the property.[107]

[98] *Iowa R.R. Land Co. v. Boyle*, 154 Iowa 249, 134 N.W. 590 (1912).

[99] *Bennett v. Kroger, Supra.*

[100] *Johnson v. Siedel*, 178 Iowa 244, 159 N.W. 677 (1916).

[101] 92 *C.J.S., Supra*, § 288.

[102] See *Prouty v. Tupper*, 58 S.D. 400, 236 N.W. 303 (1931).

[103] *Prouty v. Tupper* at 403.

[104] See the section on Waste, p. 30.

[105] *Black v. Huxman*, 158 Kan. 317, 147 P. 2d 710 (1944).

[106] 8 *Thompson on Real Property* § 4581 (1940).

[107] Matured or severed crops, however, are considered to be personalty, and title to them does not pass with a change in possession. For example, baled alfalfa hay in the field would not pass to the buyer under an installment land contract when he received the right of possession. See 92 *C.J.S., Supra* § 287. In Nebraska and certain other states the crops must be actually severed before they are considered to be personalty, See 95

In some cases, the seller may desire to include a provision in the contract that reserves to him title to the crops to be grown during the period of the contract. To be effective against innocent purchasers of the crop, such a clause would need to provide that the land contract buyer in possession must turn the entire crop over to the seller for disposal. If the clause permits the buyer to dispose of the crop, the courts will usually imply an agency authority giving the buyer the power to pass title even without the seller's consent. In states where chattel mortgages on future crops are ineffective, care must be taken that reservation of title to crops in the contract provision does not read like a chattel mortgage.[108]

A further question arises with regard to title to crops growing at the time a buyer defaults on his contract. In general, the buyer is entitled to harvest the crops until the seller actually obtains legal possession of the premises. Thus, if the seller elects to foreclose his lien under a contract,[109] he does not obtain the right to growing crops until he actually acquires title at the sale under foreclosure.[110] If the seller regains possession by exercising his rights under a forfeiture provision in the contract, the buyer gives up any claim to the crops when he relinquishes possession.[111] However, it has been held that in the absence of legal action by the seller to regain possession under a forfeiture, an attornment[112] is void, and a buyer-landlord retains legal possession through his tenant.[113] This exception, however, would not seem to vary the application of the general rule since, in the case mentioned, there was no change of actual possession from the buyer-landlord to the seller.

If the seller retains possession while the buyer is making payments, the seller would be entitled to the crops up to the time of making the conveyance. This result is based on the theory that growing crops are attached to the realty so as to be a part of it.[114]

The problem as to who is entitled to the profits from the land at any particular time during the relationship between the parties can be easily handled by means of specific provisions in the contract. If left to the operation of the law the party entitled to possession on the rent accrual day will receive the entire rent payable. However, it might be more equitable to include in the contract a provision allocating the rent payment between the parties in proportion to the number of days of the rental period that each was entitled to possession.

For example, if rent is payable annually in advance on March 1 and the buyer acquires possession on September 1, he would be entitled to seven-twelfths

A.L.R. 1127 (1935); *Smith v. Hague,* 25 Kan. 171 (1881).

[108]See 1948 Wis. L. Rev. 240.

[109]See section on Remedies, p. 52 for a discussion of remedies of the seller.

[110]See Marner at p. 24.

[111]*Winsler v. Tilke,* 97 Kan. 567, 155 Pac. 946 (1916).

[112]The act of recognition by a tenant in possession of land that he is the tenant of a new landlord. *Black's Law Dictionary* (4th ed. 1951), p. 165.

[113]*Perkins v. Potts,* 52 Neb. 110, 71 N.W. 1017 (1897).

[114]*92 C.J.S. Supra* § 287 (1955); In Kansas, annual crops may be orally reserved to the grantor even though the contract does not mention the reservation. *Dannefer v. Aurand,* 106 Kan. 605 (1920).

of the rent that had been paid the previous March. If rent were payable retrospectively, the buyer would be in possession when a divisible rental payment accrued, and the same type of division would be applicable.

Disposition of growing crops should be expressly covered by the terms of the contract in order that no misunderstanding will arise. This is largely a matter of bargaining between the buyer and seller. It could be handled on an apportionment basis as suggested above for disposition of rents.

Finally, the contract should specify who is entitled to rental payments and crops in case of a default and forfeiture. Again, an apportionment may be the more equitable solution.

Improvements. A buyer is generally considered to be entitled to all of the improvements on the property at the time of entering into the contract if one could reasonably assume that they are a part of the freehold and no contrary intent is evidenced.[115] Thus, where land was sold without any indication to the buyer that the seller's tenant owned a granary, a big shed, a cattle shed, a hog shed, and a privy, all located on the property, the buyer was entitled to recover their value from the seller when the outgoing tenant took them with him.[116]

If the seller makes improvements on the property after the contract is entered into and before he relinquishes possession to the buyer, he is not entitled to additional compensation for them.[117] His action is considered to be officious (gratuitous).

If the buyer makes improvements after he has become entitled to possession, and he later rescinds on the ground of default by the seller for failure of his title, he is entitled to recover compensation for them.[118] But if the contract fails due to default on the part of the buyer such that will not allow him to rescind, he would not be entitled to compensation for improvements.[119]

In Kansas, at least, improvements by the buyer may be so extensive that the court will not enforce a forfeiture clause upon the default of the buyer unless compensation is given for the improvements. The Kansas court apparently takes the position that to allow the seller to forfeit and retain the improvements would be in the nature of a penalty and so inequitable as to cause a court of equity, in its discretion, to refuse to enforce the terms of the forfeiture provision.[120]

The measure of compensation to be paid for completed improvements for which it is recoverable is generally based upon the actual enhanced value of the

[115] *Roden v. Williams,* 100 Neb. 46, 158 N.W. 360 (1916); *Washington v. McGinniss,* 28 Ohio N.P.N.S. 104, 108 (1930); See also *Neb. Rev. Stat.* § 76-104 (Reissue 1958).

[116] *Roden v. Williams. Supra.*

[117] 92 *C.J.S., Supra* § 292 a (1955); *Suburban Real Estate Co. v. Silverton,* 310 Ohio App. 452, 167 N.E. 474 (1929).

[118] *Aurand v. Perry Town Imp. Co.* 178 Iowa 1180, 159 N.W. 779 (1916); *Comment* 3 Iowa L. Rev. 143 (1917); *Tompkins v. Sandeen,* 243 Minn. 256, 67 N.W. 2d 405 (1954).

[119] *Gray v. Western Townsite Co.,* 34 S.D. 422, 427, 148 N.W. 853, (1914); *Music v. De Long,* 209 Iowa 1068, 229 N.W. 673 (1930); Hill & Fitzgerald at p. 34: *Roach v. Waid.* 18 Ky. (2 T.B. Mon.) 142, 143 (1825); *Boeken v. Alderman.* 26 Kan. 738 (1882); In those states with an occupying-claimants act, it is not applicable to the situation where the seller removes a defaulting buyer. See, e.g., Kan. G.S. 1949, § 60-1901; *Boeken v. Alderman, Supra; Shroll v. Klinker,* 15 Ohio 152 (1846).

land at the time of surrender and not on the amount of money expended.[121] This figure is apparently derived from a determination of the change in the fair market value of the property due to the improvement at the time possession is affected.[122] If the improvement has not been completed, the measure of compensation will usually be the amount of money actually expended.[123] Ordinary repairs and maintenance such as painting and papering are not improvements when they serve the purpose of the buyer as much as of the seller. Thus, repairs are not included in valuations of improvements.[124]

Again, the contract should expressly handle the question of improvements erected by the seller between the date of the contract and the date of the buyer's possession, but, also, with regard to improvements of the buyer in case of default on the contract. In addition, the manner of determination of value of the improvements should be set out.

Taxes and Assessments. In the absence of a provision in the contract to the contrary,[125] the general rule is that the seller must pay all taxes and assessments due and payable at the time of entering into the contract. Afterwards, the party who is in possession and receiving the use and profits of the property is obligated to pay the taxes.[126]

In Kentucky, a statutory provision specifies that the buyer is responsible for the payment of real estate taxes in the absence of any provision in the contract to the contrary, if the property is sold less than two months after the assessment date of January 1. If the property is sold more than two months after the assessment date, this section provides that the vendor is obligated to pay the taxes.[127] Another provision specifies that when the purchase contract is in existence on the assessment date, both the seller and the buyer are liable for payment of taxes. But as between themselves, the buyer must list the property and pay the taxes, even though he is not in possession at the time of the payment.[128] In Kansas, by statute, the buyer must pay the taxes, absent an agreement to the contrary, if the conveyance is made after January 1 and before November 1.[129]

In Nebraska, a different rule apparently applies and the parties to the con-

[120] *Drollinger v. Carson,* 97 Kan. 502, 506 (1916).

[121] *Aurand v. Perry, Supra* at p. 265.

[122] *Tompkins v. Sandeen, Supra; Aurand v. Perry, Supra.*

[123] *Aurand v. Perry, Supra.* In some cases special damages may be allowed.

[124] See *Drollinger v. Carson, Supra.*

[125] See *Kimm v. Wolters,* 28 S.D. 255, 258, 133 N.W. 277 (1911); *Tait v. Reid,* 158 Iowa 466, 139 N.W. 1101 (1913); *Everett v. Dilley,* 39 Kan. 73 (1888). But if an owner of property sells it after the assessment date, as between him and the tax authorities, he is still liable for the tax. See, e.g., *Kentucky Nat. Park Ass'n v. Reed,* 250 Ky. 525, 63 S.W. 2d 614 (1933); *Delphos Realty Co. v. Wilson,* 90 Ohio App. 544, 105 N.E. 2d 83 (1951).

[126] 3 *American Law of Property* § 11.35 (Casner ed. 1952); *Cobb v. Bohm,* 11 Ohio Dec. Repr. 844 (1893).

[127] *K.R.S.* 134.060(2) (1960); *Crawford v. Wiedemann,* 154 Ky. 666, 159 S.W. 555 (1913). The term *sold* refers to the date upon which a binding contract is executed, i.e., when the equitable title passes, according to law, to the buyer. See 1957 *Ky. Att. Gen. Op. No.* 49, 951.

[128] *KRS* 134.060 (1) (1960). See also *Hughes v. McCreary,* 27 Ky. L. Rep. 666, 86 S.W. 522 (1905).

[129] The date of entering into possession by the buyer under an installment land contract is the date of the conveyance within the meaning of the statute. See *Gault v. Hurd,* 103 Kan. 51 (1918); *Kington v. Ewart,* 100 Kan. 49 (1917).

tract must pay taxes in proportion to their respective interests, unless the contract provides otherwise.[130] It is not clear how taxes are handled for the year in which the transfer is made.

If the buyer is obligated to pay the taxes, he cannot fail to pay them and then acquire title from the seller by purchasing, either directly or indirectly, at a tax sale resulting from that failure to pay the taxes.[131] If a party to a contract pays the taxes when the other party is legally liable, a lien arises on the land in favor of the payor.[132]

The legal rules with regard to payment of taxes do not seem to be specifically related to an equitable apportionment of benefits and burdens between the parties to an installment land contract. Since the seller has the use and profits of the property up to the time he gives the buyer possession, it would also seem that he should pay the portion of taxes that are assessed for the period he is in possession, even though they do not become payable until after the buyer receives possession. By the same token, the buyer should pay the taxes that cover the period of time he enjoys the use and profits of the land.

These ends are accomplished by apportioning between the buyer and the seller the taxes for the year in which the sale is made. For example, if the seller is in possession and has the use and enjoyment of the property for six months, each party should pay one-half of the taxes levied for that year regardless of when they might become due and payable.

The general rule appears to penalize the buyer in requiring him to pay taxes that cover a period when he does not enjoy the use and profits of the land, unless possession is transferred on the day of the tax levy. The Nebraska view of apportioning taxes in the year of sale would seem to be preferable. However, with regard to payment of taxes for the following years while the buyer is in possession, it seems that the general rule is more equitable. Under an installment land contract, the seller is relegated to the position of a secured creditor, receiving a fixed interest return on this capital investment. The buyer, on the other hand, is the beneficial owner of the property and has the exclusive right of use of the land and of realizing a profit therefrom. Should he not also have the complete burden of the costs of maintaining the property? The Nebraska rule apparently requires the seller to contribute (toward taxes and special assessments), but does not allow him the opportunity to share in the profits resulting from its use.

A contract provision specifying the arrangement preferable to the parties is extremely desirable in order to make it clear how the payment of taxes is to be handled.

[130] *Neb. Rev. Stat.* §77-1401 (Reissue 1950). See 38 Neb. L. Rev. 953, 955 (1959). In Ohio, the lien for taxes attaches on January 1. By local custom, taxes for the year in which the contract is signed are apportioned on the basis of the proportion of the tax year then past. Cut-off date is the date upon which the contract was signed.

[131] *Hunt v. Rowland,* 22 Iowa 53 (1867); *Blotcky v. Silberman,* 225 Iowa 519, 281 N.W. 496 (1938).

[132] *Braley v. Langley,* 28 Kan. 574 (1882).

Waste: Destruction, material alteration or deterioration of all or a material part of the freehold by any person rightfully in possession, but who has neither fee title nor the full estate, constitutes waste.[133] The cause of waste may be deliberate acts of the person in possession or the result of his negligence.[134]

A seller in possession, or his tenant, is liable to the buyer for waste, and the seller may enjoin a buyer in possession from committing waste.[135] The rule seems to be that the seller cannot restrict the buyer in what he does with the property so long as its remaining value does not fall below the amount of the unpaid purchase price.[136]

Improper removal of oil, gas and minerals, cutting of standing timber,[137] negligence with regard to buildings and improvements, and failure to maintain them, are common grounds for waste actions.

If waste is about to be committed, the party concerned can sue to enjoin the act.[138] If the seller commits waste, the buyer can rescind the contract unless compensation is tendered. Or if he desires to go through with the contract, he can do so and then sue to recover damages for the waste.

It is desirable to include in the contract a general clause against waste in order that the parties are appraised of the nature of their obligations. If any specific property such as grown timber might be the subject of waste, a provision should be included specifying just what the party in possession is authorized to do and not to do with regard to it.

Expenses. The question of who pays the expenses incident to closing a transaction presents itself in any sale of land. Stamp taxes, abstract costs, title examination costs, recording and notary fees, and attorney fees are some of the items to be considered. The law will generally place liability on one party or the other, but it may not be in accordance with their original intentions unless the contract clearly spells out these details.

In the absence of an agreement, stamp taxes and recording fees are usually paid by the seller. If the contract makes no mention of an abstract the seller is not required to supply one and the buyer must do so at his own expense if he desires one. In addition, he is required to pay his own title examination costs, and attorney fees must be paid by the party who engaged him.

Including specific provisions on these questions in the contract will go far

[133] *Hayman v. Round,* 82 Neb. 598, 118 N.W. 328 (1908); *Am. Jur. Vendor & Purchaser,* s 390; Kan. Digest 44, *Words and Phrases,* 704 (perm. ed. 1940).

[134] See *Good v. Jarrard,* 93 S.C. 229, 76 S.E. 698 (1912).

[135] See 1 *Tiffany, Real Property* § 307 (3d ed. 1939); 3 *American Law of Property* § 11.32 (Casner ed. 1952). He may also sue for damages. *KRS.* 381.380 (1960). "If a vendor or tenant of land commits any waste thereon, after he has sold his interest in it, but while he remains in possession, he shall be liable to the party injured for damages."

[136] Other courts say "so long as the security of the seller is not or will not be impaired by the act." See *Baldwin v. Pool,* 74 Ill. 97 (1874); *May v. Williams,* 109 Ky. 682, 60 S.W. 525 (1901); *Moses v. Johnson,* 88 Ala. 517, 7 So. 146 (1890). South Dakota, Iowa and Nebraska also apparently follow this view. The purchaser in possession may have unrestricted use of the land up to the extent of his interest, but the seller in possession cannot commit waste at all. *Holmberg v. Johnson,* 45 Kan. 197 (1891).

[137] *Vybiral v. Schildhauer,* 130 Neb. 433, 265 N.W. 241 (1936).

[138] *Vybrial v. Schildhauer, Supra.*

in eliminating later misunderstanding and ill will. A contract will usually provide that the seller pays the stamp tax and notary fees, that he will supply an up-to-date abstract of title and will pay his own attorney fees for closing the transaction. Any costs of correcting or perfecting title should be borne entirely by the seller. The buyer is usually required to pay title examination fees and recording fees, and should also always pay his own attorney fees.

A further question could conceivably arise as to who is liable for expenses preserving, maintaining and managing the property.[139] Although there are no cases directly in point, it seems reasonable that the beneficial owner is obligated to handle these expenses. Under the installment land contract, these expenses would then be the obligation of the buyer.

Recording. All states have had recording statutes for a number of years. In general the recording statutes provide for filing with the county recorder of deeds all instruments affecting title to or interests in real estate.[140]

As between the buyer and the seller, it is not important to record the contract, but where third parties subsequently acquire interests in the land,[141] a failure to record may jeopardize the interests of one of the parties. Recording is designed to impute notice to all persons of the existence of the instrument recorded. If a person, in fact, knows of the existence of such an instrument, it need not be recorded to be valid as against him.

However, other considerations in some states may justify a decision not to record the contract under certain circumstances.[142] In some states, if a land contract is recorded and subsequently the buyer does not complete the contract and obtain a deed to the property, the existence of the land contract on the record may act as a sufficient cloud on the title to make it unmarketable without a quiet title suit or a quit-claim deed from the buyer.[143] Often it may be impossible to obtain a quit-claim deed from the buyer after his default. Thus, the only avenue open to clear title is through a quiet title suit.[144]

In most states, the buyer would be protected from intervening third party claims under or through the seller, if he is in possession. This is notice to the world of the buyer's interest therein. A third party is then charged with con-

[139]See section on *Waste, Supra.*

[140]See, for example, *KRS,* § 382.100 (1955); *Kan. G.S.* 1949, 67-222; and *Wis. Rev. Stat.* § 235-49 (1957); *Ohio Rev. Code.* § 317.08 (1961) provides specifically for recording of "executory installment contracts", but to be recordable, they must be acknowledged.

[141]Discussed in the section on *Rights and Liabilities as to Third Parties, Infra;* see, for example, *KRS,* § 382.100 (1955). However the Ohio statutes do not provide for the recording of executory contracts and it is held that recording does not give constructive notice of the contract, its terms or interests created thereby. *Kessler v. Bowers,* 23 Ohio App. 194, 155 N.E. 402 (1926); *Grant v. Hickok.* 84 Ohio App. 509, 87 N.E. 2d 708 (1948); Ohio Rev. Code, § 5301.25 (1961).

[142]In Iowa, recording is necessary to qualify for the homestead tax exemption.

[143]This is apparently true at least in Missouri and South Dakota. See Richards at p. 18; *Price v. Rausche,* 186 S.W. 968 (Mo. 1916), and the discussion thereon in *Note,* 24 Mo. L. Rev. 240, 256, (1959).

[144]See the section on Escrow Provisions, p. 61, for a discussion of putting the buyer's quit-claim deed in escrow at the time of entering into the contract.

structive notice of those facts that he might have ascertained by inquiry.[145] But other states are not so precise in declaring that possession gives notice of the interests of the possessor.[146]

When the former tenant of the seller is the buyer who simply remains in possession, that possession may not be sufficient notice of the existence of the interests under the installment land contract to one who had actual notice only of the leasing arrangement.[147] Of course, if the buyer does not go into possession, he is protected only by actual notice or by recording the contract.

Apparently, a provision can be included in the contract whereby the buyer is considered to be in default and subject to forfeiture of his rights if he records the transaction.[148] This clause would act to deter the buyer from recording the instrument, but if he did, it would not eliminate the marketable title problem created in those states where the recording of the forfeiture does not clear title of record.

Injuries by Third Parties. If damage to the property is incurred through negligent or willful acts of third persons, an action of trespass will lie.[149] Both the buyer and seller can maintain an action for the resulting injuries. Although it is not clear in many states, it seems that the buyer in possession is primarily entitled to damages,[150] while the seller can sue for injury to his security[151]

The seller's action is apparently limited to recovery of the amount by which his security interest is diminished,[152] and the buyer's to the injury to his possession.[153] In order to be sure that an adjudication is complete and final, both the buyer and seller should be represented in an action for recovery.[154] In Nebraska, the portions recoverable by the buyer and the seller apparently are based on the percentage of the purchase price that has been paid at the time of the injury.[155] In Iowa and other states, it seems that the seller first must serve notice on the buyer to prosecute the action before suing in his own name.[156]

Other. Apparently, the law in most states would hold that the buyer in possession of land under an installment land contract has a freehold estate in the

[145]*Bliss v. Waterbury,* 27 S.D. 429, 433, 131 N.W. 731 (1911); *Millard v. Wegner,* 68 Neb. 574, 94, N.W. 802 (1903: *Lyon v. Gombert.* 63 Neb. 630, 88 N.W. 774 (1902); *B.P. Jones Co. v. Cash,* 190 Ky. 96, 226 S.W. 352 (1920); *McNeil v. Jordan,* 28 Kan. 7, 16 (1882): *Coggshal v. Marine Bank,* 63 Ohio St. 88, 57 N.E. 1086 (1900).

[146]See the Missouri situation, for example, *Shumate v. Reavis,* 49 Mo. 333 (1872).

[147]*Red River, etc. v. Smith,* 7 N.D. 236, 241, 74 N.W. 194 (1898).

[148]See Dunham, *Modern Real Estate Transaction,* 351 (2d ed. 1958). A survey in South Dakota indicated that 61 percent of the attorneys responding recommended that an installment land contract *not* be recorded. See Richards, p. 40.

[149]See 3 *American Law of Property,* § 11.33 (1952); *Gartner v. Chicago, R.I. & P.R. Co.,* 71 Neb. 444, 98 N.W. 1052 (1904).

[150]*Adams v. Boone,* 271 Ky, 729, 113 S.W. 2d 1 (1938); 28 Ky. L.J. 85, 86 (1930), *dictum.*

[151]See Marner at p. 27; *Adams v. Boone, Supra* at 734.

[152]*Matheus v. Silsby,* 198 Iowa 1392, 201 N.W. 94 (1924).

[153]*Gartner v. Chicago, R.I. & P.R. Co., Supra.*

[154]*Matthews v. Silsby, Supra.*

[155]*Hastings & G.I.R. Co. v. Ingalls,* 15 Neb. 123, 16 N.W. 762, (1883).

[156]*Matthews v. Silsby, Supra;* 3 *American Law of Property* § 11.33 (1952).

property, and is, therefore, classified as a freeholder. This means that he has a homestead in the property if such is recognized in his state, he has voting rights in elections such as school elections that limit voting to freeholders,[157] and he is entitled to any condemnation awards with regard to the property since the buyer is the owner, subject only to the seller's security interest.[158] In case of a condemnation award in Iowa, the court can grant it to the seller as a trustee if his security has been impaired by the condemnation.[159]

Rights and Duties as to Third Parties

Subsequent Purchasers. A subsequent purchaser with notice[160] from the seller, after an installment land contract has been executed, takes the property subject to the buyer's interests under the contract. He stands as a trustee of the legal title and can be required to convey the property when the buyer has performed his obligations under the contract.[161]

If a purchaser from the seller is a bona fide purchaser for value without notice,[162] he takes the property free of the interest of the buyer.[163] This may include, (1) a mortgagee,[164] (2) a purchaser at an execution sale, even if he be a creditor,[165] (3) a pledgee,[166] and, (4) a lessee, to the extent of the money he has put into the property.[167] But one who takes a quit claim deed,[168] or a judgement creditor,[169] is not a bona fide purchaser for value without notice.

A purchaser from the buyer of the land stands not in the position of an assignee but as a buyer under a seller-purchaser relationship.[170] Thus, he is entitled to a deed only from his seller and not one from the original seller.[171]

Assignment. An assignment is a signing over of one party's interest in a contract to another person. The seller under an installment land contract can later sell his security interest in the land to a third party by assignment if it does not substantially alter the rights of the buyer under the contract. The assignee who takes under such an arrangement, takes subject to the interest of the

[157]See *Junkin v. McClain,* 221 Iowa 1084, 1090, 265 N.W. 362, 366 (1936).

[158]*Junkin v. McClain, Supra;* see also *Griffeth v. Drainage Dist.,* 182 Iowa 1291, 166 N.W. 570 (1918).

[159]See Footnote 158 above.

[160]See section on *Recording* for discussion of what constitutes notice and the effect of recording on notice.

[161]*Ryan v. Doyle,* 31 Iowa 53 (1871); *Ranney v. Hardy,* Wright (Ohio) 384 (1833).

[162]If the installment land contract has not been recorded, if the purchaser has no actual knowledge of it, and if he does not have sufficient information such as possession by the buyer that would cause him to inquire further. See *Sackett v. Farmers State Bank of Boone,* 209 Iowa 487, 228 N.W. 51(1929); *Standard Oil Co. v. Moon,* 34 Oh. App. 123, 170 N.E. 368 (1930).

[163]*Taylor v. Lindemann,* 211 Iowa 1122, 235 N.W. 310 (1931); *Standard Oil Co. v. Moon, Supra.*

[164]*Brenton Bros. v. Bissell,* 214 Iowa 175, 239 N.W. 14 (1931).
Parsons v. Crocker, 128 Iowa 641, 105 N.W. 162 (1905).

[165]*Bell v. Evans,* 10 Iowa 353 (1860).

[166]*Plummer v. People's Nat. Bank,* 65 Iowa 405, 21 N.W. 699 (1884).

[167]*Egbert v. Duck,* 239 Iowa 646, 32 N.W. 2d 404 (1948).

[168]*First Nat. Bank v. Ramsey,* 200 Iowa 790, 205 N.W. 464 (1925).

[169]*Burns v. Burns,* 233 Iowa 1092, 11 N.W. 2d 461 (1943); *Knapp v. Baldwin,* 213 Iowa 24, 238 N.W. 542 (1931); *Minnis v. Morse, Dodge, & Willey,* 15 Ohio 568 (1846); *Lefferson v. Dallas,* 20 Ohio St. 68 (1870).

[170]See *Forrest v. Otis,* 224 Iowa 63, 276 N.W. 102 (1937).

[171]4 *Williston on Contracts,* § 954 A. (1936).

buyer under the installment land contract. He steps into the seller's shoes and is obligated to carry out the provision of the installment land contract just as though he were the original seller.[172]

When the buyer under an installment land contract receives actual notice of an assignment by his seller, he should make further payments to the assignee rather than to his original seller. If he fails to do so, he may be liable to the assignee for the payment, even though the amount has been paid to the original seller.[173] If the assignee fails to carry out the seller's obligations under the contract, the buyer still has his remedies against the original seller[174] unless there has been a novation.[175]

On rare occasions, the buyer may also give to the seller his negotiable note as additional evidence of his obligation to pay the money due under the contract. In such a case, the buyer must see to it that the payments are made to the holder of the note. If it is endorsed to a *holder in due course*, and the buyer continues to pay the seller, he would be required to pay again if the seller does not forward the money to the endorsee.

If the contract prohibits assignment by the seller, but he assigns anyway, some courts hold the assignment to be valid.[176] In Iowa, assignment in violation of the terms of the contract is apparently considered collateral to the main purpose of the contract, and since there is nothing personal about the contract, the assignment will be valid.[177] The Michigan court, on the other hand, apparently holds that nonassignment clauses are valid and should be upheld, although it tends to construe them strictly and goes far to find a waiver.[178] The South Dakota court also apparently upholds nonassignment clauses.[179]

The buyer may also assign his interest under an installment land contract so long as he does not substantially impair the rights of his seller.[180] His assignee acquires all of his rights and is subject to any defenses available against him under the contract.

The general rule is that the assignee from a buyer does not become personally liable on the contract.[181] However, the Iowa court has held that the as-

[172]*Semmler v. Beulah Coal Co.*, 48 N.D. 1011, 188 N.W. 310 (1922); *Tait v. Reid, Supra.*

[173]*Guynne v. Goldware*, 102 Neb. 260, 166 N.W. 625 (1918).

[174]Marner at p. 34.

[175]The term, *novation*, describes the situation where one of the original parties to the contract has assigned his interest to a third party and the other party has assented to the assignment and released the assignor from further obligation to him under the contract, thus, in effect creating a new contract between different parties. See Black's Law Dictionary (4th Ed., 1951), p. 1212.

[176]For a discussion of the validity of restrictions on assignment, see 3 *American Law of Property* § 11.36 (1952).

[177]See *Bull v. Weisbrod*, 185 Iowa 318, 170 N.W. 536 (1919), citing, *Johnson v. Eklund*, 72 Minn. 195, 75 N.W. 14 (1898); *Iowa Code* § 539.2 (1958).

[178]See *Hull v. Hostettler*, 224 Mich. 365, 194 N.W. 996 (1923).

[179]*J. I. Case Threshing Machine Co. v. Farnsworth*, 28 S.D. 432, 439, 134 N.W. 819 (1912) (the buyer assigned) the same is true of Kansas: *Fakes v. Osborne*, 165 Kan. 176, 193 P. 2d 218 (1948). But in a Kansas case where the buyer had already paid one-fourth of the purchase price, the court had held a nonassignment clause unenforceable as repugnant to the buyer's interest. *Badger Lumber Co. v. Parker*, 85 Kan. 134, 116 Pac. 242 (1911).

[180]See *Evans v. Stratton*, 142 Ky. 615, 134 S.W. 1154 (1911).

[181]*C.J.S. Vendor & Purchaser* § 311 (d) (2) (a) (1955).

signee, by accepting the assignment, becomes a party to the contract and personally liable on it for the unpaid balance due under it.[182] The assignee can, of course, expressly assume the obligations under the contract and thereby become personally liable to the original seller.[183] But the buyer under the contract is not released from obligation merely by assigning his interest in the contract.[184] The seller may have recourse against either the buyer or the assignee unless there is novation, i.e., unless he agrees otherwise.[185]

A nonassignment clause against the buyer is usually treated the same as one running against the seller. However, in Iowa, it has been held that even though such a provision is ineffective because of the Iowa statute, if it purports to mature the entire indebtedness upon an assignment, it will be given effect.[186]

When the buyer has assigned in violation of a nonassignment clause, the assignee may, nevertheless, maintain an action to compel specific performance on the part of the original seller if the contract has been fully performed by the buyer or if a valid tender of performance is made.[187] The courts usually so hold on the ground that the purpose of such a clause is to safeguard performance on the part of the buyer, so when full performance has been rendered or is tendered the provision becomes of no further consequence.[188]

The law, in upholding non-assignment clauses, is being consistent with the rules with regard to rights of possession discussed earlier.[189] Because of the disparity in financial investment as between buyer and seller, the courts allow the seller to protect himself by including a clause in the contract that allows him to determine whether or not the buyer can turn possession over to a third party. This is the justification for the non-assignment clause. In fact, to more completely protect the seller, the non-assignment clause should also forbid leasing, mortgaging, or the carrying out of any other action by the buyer which might result in placing a third person in possession of the land without the consent of the seller.

Creditors. Most states have statutes making a judgment in a court of record a lien upon any interest in real estate of the judgment debtor.[190] Under the doctrine of equitable conversion, creditors of the seller are usually able to reach his security interest, and creditors of the buyer can reach his equitable interest in the land.[191] However, execution on the interest of one party is not allowed to

[182] *Wightman v. Spofford*, 56 Iowa 145, 8 N.W. 680 (1881).
[183] *Coral Gables v. Kleaveland*, 220 Iowa 1280, 263 N.W. 339 (1935).
[184] *Vanderwilt v. Broerman*, 201 Iowa 1107, 206 N.W. 959 (1926).
[185] Marner, at p. 36. See also footnote 177, *Supra.*
[186] *Risser v. Union Securities Co.*, 200 Iowa 987, 205 N.W. 648 (1925).
[187] 138 *A.L.R.* 211.
[188] *Ibid.*
[189] See section on *Possession, supra.*
[190] *Simpson, Legislative Changes in the Law of Equitable Conversion by Contract*, 44 Yale L. J. 559, 577 (1935).
[191] *Reynolds v. Fleming*, 43 Minn. 513, 45 N.W. 1099 (1890); See also *Niantic Bank v. Dennis*, 37 Ill. 381 (1865); *City of Chicago v. Hitt*, 334 Ill. 619,166 N.E. 517, (1929); *Bauermeister v. McDonald*, 124 Neb. 142, 247 N.W. 424 (1932); *Fridley v. Munson*, 46 S.D. 532, 194 N.W. 840 (1923); *Cogshall v. Marine Bank, Supra; Lefferson v. Dallas, Supra.*

impair the rights of the other.[192]

In Iowa, the court holds to the view that a judgment does not attach to the security interest of the seller, even where money is due from the buyer.[193] Thus, the creditor's judgment does not become a lien upon the land.[194] However, it seems that under the Iowa statute the seller's interest under the contract may be levied upon or attached and sold as a *chose in action.*[195]

The question often arises as to whether the buyer under an installment land contract is obligated to make his payments to a judgment creditor of the seller instead of to the seller. If he is allowed to continue to pay to the seller, the judgment creditor's lien interest is reduced each time a payment is made and he cannot effectively realize on it. Thus, many states hold that when the buyer has actual notice of the judgment, he can no longer safely continue to make payments to the seller.[196] This places the burden on the buyer of selecting the proper person to pay.

In Nebraska, there is dictum to the effect that the buyer can continue to pay the seller after actual notice of a judgment, until the creditor brings an action in the nature of a creditor's bill wherein the buyer would be directed by the court to make payments to the judgment creditor.[197]

In Kentucky, a statute provides that:

> Land to which the defendant has a legal or equitable title in fee, for life or for a term whether in possession, reversion or remainder, or in which the defendant has a contingent interest or a contingent remainder or a defeasible fee, may be taken and sold under execution.[198]

This would seem to provide the procedure for reaching the purchaser's interest to have it applied to the seller's debt.[199]

It would seem that the judgment creditor of either the buyer or the seller should be entitled to reach his debtor's equity in the property by some appropriate action. In the case of a judgment creditor of the seller, there seems to be no reason not to allow the buyer to make payments to him and protect him from being liable again to the seller.

Closely aligned with the preceding discussion is the problem of mechanic's

[192]*Reynolds v. Fleming, Supra; Hook v. Northwest Thresher Co.*, 91 Minn. 482, 98 N.W. 463 (1904). In Kentucky, by statute, an antecedent creditor will prevail over any unrecorded interest in property if he obtains an equity in it before the prior instrument is recorded. A subsequent creditor need not secure an equity in the property to be protected. *Mason & Moody v. Scruggs*, 207 Ky. 66, 268 S.W. 833 (1925); *Ky. Rev. Stat.* 382.270 (1955). In Ohio judgment creditors of the seller execute entirely subject to the buyer's interest. See *Spitzer v. Vanwelaw*, 22 Ohio L. Abs. 377 (1936), *Munns v. Morse, Supra.*

[193]*Cumming v. First Nat'l Bank*, 199 Iowa 667, 202 N.W. 556 (1925); *In re Miller's Estate*, 142 Iowa 563, 119 N.W. 977 (1909).

[194]See *Baldwin v. Thompson*, 15 Iowa 504 (1864); *Johnson v. Smith*, 210 Iowa 591, 231 N.W. 470 (1930); *Mueller v. Novelty Dye Works*, 273 Wis. 501, 78 N.W. 2d 881 (1956).

[195]See Marner at p. 39. A *chose in action* is a personal right not reduced to possession but recoverable by a suit at law.

[196]See Hancock at p. 7.

[197]See *Filley v. Duncan*, 1 Neb. 134 (1871); see also *Cooper v. Arnett*, 95 Ky 603, 26 S.W. 811 (1894) in agreement.

[198]*Ky. Rev. Stat.* 426.190 (1955).

[199]See 3 *American Law of Property* § 11.29 (1952); *Carlin's Adm'r. v. Carlin*, 71 Ky. (8 Bush) 141 (1871).

liens. If a person supplies labor and materials at the request of the buyer under an installment land contract, can the seller's fee interest in the property be subjected to a mechanic's lien claim? In Illinois, it apparently cannot, unless the seller has expressly or impliedly consented to, or knowingly permitted, the making of the improvements.[200]

Another question is whether or not the purchaser's interest in the land is such that a mechanic's lien can attach to it. In one Illinois case, this question has been answered in the affirmative.[201] In that case, the court held that the buyer's interest would support a mechanic's lien and that a subsequent forfeiture by the seller would be subject to the lien.[202]

Effect of Death of a Party. The doctrine of equitable conversion affects the devolution of the buyer's or seller's interest under an installment land contract upon his death. The buyer's interest is considered to be realty and passes, on his death, to the devisee of his real property, or, if he dies intestate, to his legal heirs.[203] On the other hand, the seller's interest passes as personalty.[204] This means that the entire interest of the seller passes to the personal representative or next of kin.[205]

Although in most states, personalty and realty now pass the same intestate, classification is still important from the standpoint of payment of debts of the estate.[206]

If a seller makes a will devising land and before his death, it becomes the subject matter of an installment land contract, upon his death his executor can usually enforce the contract for the benefit of the personal

[200]See *Mackey v. Sherman,* 263 Ill. App. 109 (1931).

In Ohio, it is apparent also that the lien does not attach to the seller's interest; however, the statute, Ohio Revised Code, Section 1311.09, provides that the mechanics lienholder has a lien on the buyer's interest and, in the event the buyer forfeits or gives up his interest, the lienholder is subrogated to the rights of the buyer in order to protect his lien. Hence, it is possible to force the seller to give a deed by the lienholder paying off the contract. Interpreted in *Cooper v. Hayman,* 39 Ohio App. 281, 177 N.W. 475 (1930).

[201]See footnote 201, *Supra.*

[202]See footnote 201, *Supra.*

[203]*Chemedlin v. Prince,* 15 Minn. (Gil. 263, 268) 331, 334-335 (1870); 1 Tiffany, *Real Property* § 307 (3d ed. 1939); *Miller v. Corey,* 15 Iowa 166 (1863); *Junklin v. McClain,* 221 Iowa 1084, 265 N.W. 362 (1936); *House v. Dexter,* 9 Mich. 246 (1861); *Morris v. Williams,* 39 Ohio St. 554 (1883); *Cogshall v. Marine Bank,* 63 Ohio St. 88 (1900); *Berndt v. Lusher,* 40 Ohio App. 172, 178 N.E. 14 (1931).

[204]*Mark v. Liverpool & London & Globe Ins. Co.,* 159 Minn. 315, 317, 198 N.W. 1003-1004 (1924); *In re Estate of Miller,* 142 Iowa 563, 119 N.W. 977 (1909); *Ward v. Williams,* 282 Ill. 632 (1918); National Bank of Kentucky v. Louisville Trust Co., 67 F. 2d 97, 100 (C.C.A. 6th 1933); *Oberholtz v. Oberholtz,* 79 Ohio App. 540, 74 N.E. 2d 574 (1947).

[205]*Ward v. Williams, Supra; National Bank of Kentucky v. Louisville Trust Co., Supra; Isham v. Buckeye Stove Co.,* 2 OCCNS 1 (1903), affirmed 72 Ohio St. 660.

[206]See, for example, *Iowa Code* § 636.1 (1958).

In Wisconsin, if there is a surviving spouse and one child, the spouse gets one-third of an inheritance in land, but only one-half if it is personal property. See §§ 237.01, 318.01 *Wis. Rev. Stat.* (1959); *Estate of Bisbee,* 177 Wis. 77, 187 N.W. 653 (1922).

Oh. Rev. Code, § 2105.01, "In intestate succession, there shall be no difference between ancestral and non-ancestral property or between real and personal property." Construed to mean that distinction is abolished. *Seman v. Seman,* 19 Ohio L. Abs. 600. But payment of debts comes first out of personalty, then out of realty. *Oh. Rev. Code,* § 2127.02, *Miller v. Bigelow,* 67 Ohio App. 371, 36 N.E. 2d 860 (1941). Hence,.the distinction recited in notes 191 and 192 remains important.

estate.[207] The person receiving legal title under the will holds it in trust only, as security for the payment, to the executor of the purchase money under the contract.[208]

It has been held that when there is no will, the deceased seller is considered to have held the naked legal title in trust for the benefit of the purchaser, and that beneficial interest is personal property in the hands of the administrator.[209] Legal title is held by the seller's heirs to secure the administrator's claim for the purchase price.[210]

If a specific devise of the land is made by the seller after entering into an installment land contract, most states hold that it is in effect a bequest of the purchase money due on the contract.[211]

Since the buyer's interest passes as realty on his death, the heirs or devisees take the land, and the personal representative becomes liable to pay the purchase money to the seller out of the estate and thus exonerate the land from the seller's lien.[212] A devise may be general or specific and still pass land subject to an installment land contract.[213] A devise also passes land purchased under an installment land contract after the execution of the will.[214]

The exact manner in which completion of payment under an installment land contract will be effected on the death of a buyer depends, to a large extent, upon the administration or probate code of the particular jurisdiction. In Illinois, for example, the personal representative may file a verified petition in court requesting permission of the court to complete payment and for directions as to the manner in which he should proceed. "The court may authorize payment out of the personal estate in the name of the legal representative of the deceased or the persons entitled to the personal estate."[215] Apparently, the court could instruct the heirs to complete the purchase if it would be detrimental to

[207]The devise is considered adeemed (satisfied) but any lien of the seller apparently passes to the devisee. *In re Estate of Keeler,* 225 Iowa 1349, 282 N.W. 362 (1938). But Wisconsin, at least, apparently holds contra, see *Estate of Lefebvre,* 100 Wis. 192, 75 N.W. 971 (1898).

Oh. Rev. Code, §§ 2113.48 and 2113.49, give authority to apply to Probate Court for order to complete contract (2113.48) or to alter or cancel contract (2113.49).

[208]*Ibid; Doty v. Jameson,* 29 Ky. L. Rep. 507, 93 S.W. 638 (1906) *Stang v. Newberger,* 6 Ohio Nisi Prius 60 (1899); *Coggshal v. Marine Bank Co.,* 63 Ohio St. 88, 57 N.E. 1086 (1900).

[209]*Ward v. Williams, Supra.*

[210]See 3 *Iowa L. Rev.* 169 (1917).

[211]See *Covey v. Dinsmoor,* 226 Ill. 438, 80 N.E. 998 (1907). But the devise must be specific. For example, where the seller devised to his grandson all of certain land of which he died seized, it was held that the grandson received no interest in land that was subject to a prior installment land contract since the seller did not die seized of it. See *In re Estate of Miller, Supra.*

[212]See Wills *Estates and Trusts Service,* Prentice-Hall, § 436 (1950); 3 *American Law of Property* § 11.27 (1952); *Brewer v. Vanarsdale's Heirs,* 36 Ky. (6 Dana) 133 (1838), dictum. In Kansas, a statute *(Kan. G.S.* (1949), 59-1304) purports to restrict exoneration to those cases provided for in the will. However, the words "unless otherwise provided for in the will", as used in the statute are so liberally construed that a direction in the will to pay all just debts has been held to provide for exoneration. See *In re Cline,* 170 Kan. 496, 501, 227 P. 2d 157, 161, 162 (1951).

[213]*Raymond v. Butts,* 84 Ohio St. 51, 95 N.E. 387 (1911).

[214]Under the statutes that follow the usual after-acquired estate provisions. See *Iowa Code,* § 633.4 (1958); *Whitney v. Whitney,* 178 Iowa 117, 159 N.W. 657 (1916).

[215]See Hallock at p. 110; *Oh. Rev. Code,* § 2113.50.

the interest of the heirs, creditors, and devisees, to complete the purchase out of the personal estate.[216]

It would seem that the approach of the Illinois legislation is a realistic solution to the problem of settling questions arising when one of the parties to an installment land contract dies without specifying how it is to be handled. It provides flexibility of solution, but requires that decision be made by the court on the basis of judicial interpretation of the circumstances and legal instruments involved. It eliminates the need for the harsh results often realized when an unbending rule is arbitrarily applied without regard to the surrounding circumstances.

Of course, the preferable solution is for the party concerned to cover the situation specifically in his will. But the law in this area must attempt to provide equitable solutions to situations when the parties in interest were something less than complete in providing for the settlement of their affairs.

Rights of the Surviving Spouse. The surviving spouse is entitled to the statutory share[217] of the deceased spouse's property under an installment land contract just as with any other property. The equitable interests of a deceased purchaser are usually subject to a claim of the surviving spouse just as are legal interests in land.[218] The surviving spouse of a deceased seller takes the statutory share of the seller's interest as personalty. However, Wisconsin holds that there is no right of dower in the equitable estate of a land contract purchaser. If the purchaser was occupying the land as a homestead at his death, the surviving spouse is entitled to the home and up to forty acres for life or until remarriage. Otherwise, in the absence of a will, she takes no statutory share.[219]

When the full purchase price has been paid, the surviving spouse of the deceased buyer can apparently demand the full statutory share.[220] But when there is still a portion of the purchase price outstanding at the buyer's death, some states require that the surviving spouse contribute a proportionate share toward performance of the contract before the statutory right can be enforced.[221]

It should be remembered that unless the seller's spouse joins in the execution of the installment land contract, the marital rights are not cut off and the

[216]See Hallock at p. 110.

[217]This share is controlled by the separate state statutes. See, for example, *Oh. Rev. Code,* §§ 2105.06 (Statutory Share) and 2107.39 (Election to take against will).

[218]Accord: *Oh. Rev. Code,* § 2105.06. But changed by statute in many states. See *Buford v. Dahlke,* 158 Neb. 39, 62 N.W. 2d 252 (1954).

[219]See *Olsen v. Ortell,* 264 Wis. 468, 59 N.W. 2d 473 (1953); § 237.02 Wis. Stat. (1959).

[220]See Ohio Statutes noted in 205 and 206 above which give surviving spouse statutory share "when a person dies intestate having title or right to any personal property or to any real estate in inheritance in this state." There seems to be no question that the surviving spouse has a statutory share in any property right, legal or equitable, whether paid in full or not, which the deceased owned.

[221]See *Hart v. Logan,* 49 Mo. 47 (1871); *Greenbaum v. Austrian,* 70 Ill. 591 (1873). In Kentucky, by statute, the surviving spouse is entitled to dower only when the buyer owns the equitable interest at death. See *Ky. Rev. Stat.* 392.040 (2) (1955). Thus, an assignment or forfeiture of the buyer's interest before death apparently would extinguish any dower interest in the other spouse. See *Heed v. Ford,* 55 Ky. (16 B. Mon.) 114 (1855). But see contra for Ohio in footnote 218 above.

purchaser takes the property subject to them.[222] The purchaser can, in some situations, protect himself by retaining a portion of the purchase price equal to the marital share, until a settlement is made.[223]

The buyer and seller cannot usually contract away the buyer's spouse's interest in land purchased under an installment land contract.[224] However, if the buyer defaults and forfeits the land to the seller,[225] the buyer's spouse also loses any marital rights she may have had in the land.[226]

Remedies

If one party to an installment land contract fails substantially to perform those things that he has agreed to perform, the law provides a means whereby the injured party can remedy the situation. The point at which substantial performance ends and nonperformance, such that constitutes a breach, begins is elusive and involves a number of problems beyond the scope of the present discussion. Suffice it to say at this point that the law is designed, where there has been a breach of the contract, to provide a means whereby the injured party can be put in as good a position as if there had been no breach.[227]

The remedies available for breach are of two kinds; those that affirm the contract and those that disaffirm it.[228] In addition, certain of these remedies are available to either the seller or the buyer.[229] Those remedies that are available to either the seller or the buyer are: 1) liquidated damages,[230] 2) specific performance,[231] 3) actual damages,[232] and 4) rescission.[233] The first three remedies, used alone, affirm the contract when they are invoked.[234] The last disaffirms it. This remedy can be used in combination with an action for damages or liquidated damages.[235]

[222]See, for example, *Iowa Code* §636.5 (1958); O.R.S. § 2103.02.

[223]*Bradford v. Smith,* 123 Iowa 41, 98 N.W. 377 (1904).

[224]See, for example, Iowa Code § 636.5 (1954). The situation is unclear in some states. See, for example, *Miller v. Wilson,* 15 Ohio 108 (1846), and *Oh. Rev. Code* § 2103.02.

[225]See the section on *Remedies,* below.

[226]See *Hutchinson v. Olberding,* 136 Iowa 346, 112 N.W. 647 (1907); See also *Heed v. Ford, Supra.*

[227]Williston on Contracts, § 1338 (Stud. Ed. 1938).

[228]See Hallock, *Supra* at p. 112.

[229]See Marner at p. 43.

[230]See *Wilson v. Hoy,* 120 Minn. 451, 139 N.W. 817 (1913) (involved an earnest money contract).

[231]See Marner at p. 45.

[232]*State Bank of Milan v. Sylte,* 162 Minn. 72, 74, 202 N.W. 70 (1925).

[233]See *Hunter v. Holmes,* 60 Minn. 496, 62 N.W. 1131 (1895) (by implication). All four remedies are discussed as available to the seller in *Hugg v. Sigle.* 14 Ohio L. Abs. 45 (1933). Remedies of the buyer are discussed as shown in the text in *Gordon v. Guaranty Title and Trust Co.,* 28 Ohio L. Abs. 249 (1938); *McClymonds v. Kangasser,* 14 Ohio L. Abs. 227 (1933); *Wheeler v. Bittner,* 2 Ohio L. Abs. 693 (1924); *Twin Lakes v. Dohner,* 242 Fed. 399 (1917); *Reed v. McGrew,* 5 Ohio 376 (1832).

[234]*Kravitz v. Grimm,* 273 Ky. 18, 115 S.W. 2d 368 (1938).

[235]*Dunn v. Tate,* 268 S.W. 2d 925, 928 (Ky. 1954); *Jeffers v. Forbes,* 28 Kan. 174 (1882). The Kentucky case stated that: "the failure of the defrauded party to act promptly will result in the loss of the right to rescind, leaving only the right to sue for damages. Stated in another way, a failure to act promptly constitutes an election of the remedy of damages." Although it is not made clear, the purchaser apparently had already obtained a deed.

In addition to the mutual remedies listed above, the seller usually has at least two other remedies available to him under an installment land contract. They are foreclosure and forfeiture (or cancellation). These remedies disaffirm the contract when they are invoked.[236] The defaulting buyer's only remedy against a disaffirmance of the contract by the seller is to tender performance such that will correct the default.[237]

Action for Damages. An injury to either party resulting from nonperformance of the contract by the other party can be remedied by an action at law for damages for the breach.[238] Recovery usually is measured by the loss incurred because of *"loss of the bargain"*, or the difference between the contract price and the market price at the time of breach, plus interest.[239] If the nonperformance resulted in any saving to the complaining party, this must be deducted from the losses.[240]

If the buyer breaches the contract by failure to make an installment payment, the courts usually will allow the seller to sue on the debt. He is entitled to recover a judgment in the amount of the debt and can proceed to collect it by the available legal processes.[241] For the other breaches by the buyer, the seller usually is entitled to recover the difference between the contract price and the market price of the property, less the portion of the purchase money already paid.[242] For example, if the buyer breaches the contract and the market value of property at the date of the breach is $1,000 less than the contract price, the seller can recover $1,000 in damages. It makes no difference whether the reduction in value is the result in a decline in the market, damages inflicted by the buyer or otherwise. If the market value at the date of breach is equal to or exceeds the contract price, the seller can recover no actual damages. Any advance payments made by the buyer must be applied in reduction of damages.[243]

If the contract contains an acceleration clause,[244] the seller can sue for the entire purchase price when only one installment is in default.[245] In the absence of an acceleration clause, successive actions are necessary to recover each unpaid installment, unless the seller is willing to wait until all installments are due before bringing a recovery action. Before the seller can bring an action for damages under an accerleration clause, he must tender title according to the agreement, since the acceleration clause makes recovery and conveyance of title concurrent

[236]See Marner at p. 59, 62.
[237]See Hallock at p. 112.
[238]5 *Williston on Contracts* § 1338 (Rev. Ed. 1936).
[239]*Sullivan v. Esterle,* 268 S.W. 2d 919 (Ky. 1954); *McMurry v. Fletcher,* 28 Kan. 337 (1882); *Stone v. Smith,* 134 Kan. 565 7 P. 2d 100 (1932); *Fairlawn Heights Co. v. Theiss, Supra.*
[240]5 *Williston on Contracts* §§ 1341, 1345, 1363, 1396, 1402 and 1410; however, if a seller acted in good faith, some states use a different measure of damages for his breach. See footnote 249, *Infra.*
[241]See Hill & Fitzgerald at p. 39; *Hugg v. Sigle,* 14 Oh. Law Abs. 45 (1933).
[242]*Waters v. Pearson* 163 Iowa 391, 144 N.W. 1026 (1914).
[243]*Prichard v. Mulhall,* 127 Iowa 545, 103 N.W. 774 (1904).
[244]See discussion of the acceleration clause on p. 60.
[245]See Richards at p. 23.

conditions of performance.[246]

In some states, the seller can sue the buyer at law for the entire purchase price once the entire amount is due. The judgment obtained by the seller takes its place in line if there are previous judgments against the defaulting buyer, and if the buyer owns real estate on which the judgments are liens. When the judgment is paid, the seller must transfer title to the land.[247]

If the seller has breached the contract, the buyer may also recover damages for his loss. The amount of damages recoverable for loss is usually limited to the amount paid on the contract, plus interest, and costs,[248] unless the seller has acted in bad faith.[249] If the seller is unable to give good title, even though he should have known his title was defective, the buyer cannot recover damages for his loss of the bargain in the absence of fraud or misrepresentation. But if the seller refuses to convey, has rendered himself unable to convey, or was guilty of fraud or misrepresentation in entering into a contract to convey land for which he knew he had inadequate title the purchaser can recover the purchase money paid, plus interest and costs, and also the difference between the contract price and the market value of the land at the time the contract should have been performed by the seller.[250]

Liquidated Damages. The damages recoverable for a breach of contract can be fixed by a provision in the contract. Such a provision will be relied upon by the courts as the measure of recovery so long as it does not appear that it acts as, or was intended as, a penalty for nonperformance.[251] But if the court determines that the measure agreed upon in the contract has no relation to the damages incurred, but is, instead, in the nature of a penalty, it will disregard the provision and award damages independently of it.[252]

In Kentucky, the following test has been used to determine whether an agreement provides for *liquidated damages* or a *penalty:*

> Where the damages resulting from the breach of an agreement would be uncertain, and evidence of their amount very difficult to obtain, and the fair import of the agreement is that the amount of the money in it is specified and agreed on, to save expenses and avoid the difficulty of providing actual

[246] *Falde v. Chadwick,* 72 S.D. 563, 566, 37 N.W. 2d 622 (1949). Kansas apparently allows a suit at law to recover the entire purchase price after a default, even without an acceleration clause. See *Dunor v. Mills,* 70 Kan. 656, 79 Pac. 146 (1905). (rehearing denied). 70 Kan. 656, 79 Pac. 502 (1905); *Fairlawn Heights Co. v. Theiss,* 135 Ohio St., 357, 14 N.E. 2d 1 (1938) as to tender of deed; see also *Rowland v. Stout,* 8 Ohio L. Abs. 376 (1930); *Meineke v. Schwepe,* 93 Ohio App. 111, 111 N.E. 2d 765 (1952). These latter two cases support the proposition that the seller cannot recover more than is due at any one installment date in the absence of an acceleration clause.

[247] *Jefferson Gardens v. Terzan,* 216 Wis. 230, 257 N.W. 154 (1934). This is not the same as specific performance against the buyer. See the section on *Specific Performance,* p. 57.

[248] See Marner at p. 44; *Reed v. McGrew,* 5 Oh. 376. (1832).

[249] Emmert v. Jeisman & Holdebrand; Carnahan, *The Kentucky Rule of Damages for Breach of Executory Contracts to Convey Realty,* 20 Ky. L. J. 304 (1932); *Gammon v. Blaisdell,* 45 Kan. 221, 25 Pac. 580 (1891).

[250] Ibid. See also *Sawyer v. Hawthorne,* 178 Iowa 407, 158 N.W. 665 (1916).

[251] *Shelby v. Matson,* 137 Iowa 97, 114 N.W. 609 (1908); *Cook v. Johnson,* 241 Ky. 452, 44 S.W. 2d 547 (1932); *Allison v. Cocke's Exrs,* 106 Ky. 763, 51 S.W. 693 (1899); *Economy Loan Co. v. Hollington,* 105 Ohio App. 243, 152 N.E. 2d 125 (1957).

[252] *Foley v. McKeegan,* 4 Iowa 1 (1856).

damage, and is not out of proportion to the actual damage, it will be regarded as liquidated damages.[253]

Specific Performance. The rule was early established in equity that a contract to convey land was specifically enforceable by either party to the contract.[254] Specific performance is not available as a matter of right but of sound judicial discretion. However, it will be granted for a contract involving the sale of land unless there is some good reason shown for not so doing.[255] Good reason might be inequality and hardship in the contract as against the defaulting party, or if it is apparent that the defaulting party would not have entered into the contract had he understood it.[256]

The buyer cannot have specific performance if he knew when he executed the contract that the seller had inadequate title and had no prospects of obtaining one.[257] In such a situation the *buyer is relegated* to an action at law for damages.[258]

The seller can have specific performance, but only if he can tender a marketable title.[259] Of course, if the seller does not have title and title cannot be perfected in him, the buyer's remedy of specific performance is not available. It should be noted that a seller can seldom get true specific performance against a buyer. The courts refuse to direct the buyer to pay the money or go to jail for contempt of court. Thus, the seller, in effect, obtains only a judgment for the entire purchase price, and this becomes a lien on the buyer's property.[260]

Rescission. An installment land contract may be rescinded by mutual agreement of the parties.[261] Such a rescission can be effected, so long as there is a meeting of the minds, without a formal agreement. Mutual rescission can be shown by any conduct of the parties which indicates that they mutually intend to call the contract at an end.[262] Acquiescence by one party to an express re-

[253] *Commonwealth v. Ginn & Co.*, 111 Ky. 110, 122, 63 S.W. 467, 470 (1901); *Avey v. Leather Prod. Co.*, 73 Ohio App. 245, 55 N.E. 2d 813 (1942).

[254] *Allen v. Adams*, 162 Iowa 300, 143 N.W. 1092 (1913); *Carter v. Bair*, 201 Iowa 788, 208 N.W. 283 (1926). See also Horack, *Specific Performance for the Purchase Price*, 1 Iowa L. Bull. 53 (1915); *McKee v. Beall*, 13 Ky. (3 litt.) 190 (1823); *Rock Island Lumber & Mfg. Co. v. Fairmount Town Co.*, 51 Kan. 394, 32 Pac. 1100 (1893); *Berndt v. Lusher, Supra.*

[255] *Ibid.* See also *Dunlop v. Wever*, 209 Iowa 590, 228 N.W. 562 (1930); *Schmid v. Anderson*, 311 Ky. 1, 3, 222 S.W. 2d 931, 932 (1949); *Stroppell v. Plageman*, 16 Ohio Dec. 273, 3 Ohio Nisi Prius N.S. 501 (1905).

[256] *Ibid.* See also *Smith v. Shepherd*, 36 Iowa 253 (1873). A Kentucky case has stated that, to be entitled to a decree of specific performance, a case must be free from: 1) illegal or inequitable conduct, 2) fraud, and 3) those who request it must have strictly complied with all terms of the contract. *West Ky. Coal Co. v. Nourse*, 320 S.W. 2d 311 (Ky. 1959); *Jones v. Stevens*, 112 Ohio St. 43, 146 N.E. 894 (1925).

[257] *Ormsby v. Graham*, 123 Iowa 202, 98 N.W. 724 (1904); *Cornell v. McClain*, 3 Ohio Dec. Repr. 187 (1859).

[258] *Ormsby v. Graham, Supra.*

[259] *Huwe v. Moulton*, 50 S.D. 588, 589, 211 N.W. 453 (1926); SDC 37. 4610 (1937); *City of Tiffin v. Showhan*, 43 Ohio St. 178 (1885).

[260] See the discussion in the section on *Action for Damages*, pp. 54.

[261] See *Fulton v. Chase*, 240 Iowa 771, 37 N.W. 2d 920 (1949); *SDC* 10.0802 (5) (1939); *Guill v. Pugh*, 311 Ky. 90, 223 S.W. 2d 574 (1949); *Guilfoyle v. Pettigrew*, 40 Oh. L. Abs. 119 (1943).

[262] *McLain v. Smith*, 201 Iowa 89 202 N.W. 239 (1925); *Osborn v. Osborn*, 204 Ky. 144, 263 S.W. 738 (1924); *Rogers v. Simpson*, 11 Oh. Cir. Rep. 561 (1908); *Mowry v. Kirk & Cheever*, 19 Ohio St. 379 (1879); *Rippel v. Rippel*, 52 Ohio L. Abs. 33 (1947).

pudiation by the other is sufficient.[263] Where the buyer served notice of rescission and the seller later entered into another contract of sale of the land to a third party, a mutual rescission had been effected.[264]

In a mutual rescission, it is intended that the parties shall be returned to the status quo at the time of entering into the contract, insofar as that is possible.[265] But the buyer is liable for the value of the use of the property during the time he occupied it.[266]

Rescission may be had by either party without the consent of the other for: 1) fraud,[267] mistake,[268] duress, undue influence or mental incompetency,[269] and 2) default of the other party[270] or failure of consideration.[271]

Foreclosure. A seller may foreclose a defaulting buyer's interest under an installment land contract as though it were a mortgage relationship.[272] There are two primary methods of foreclosure utilized in the North Central Region: 1) strict foreclosure, and 2) foreclosure by sale. Some states allow both methods while other states allow only foreclosure by sale.[273]

Strict Foreclosure. A forfeiture is effected without court action, while strict foreclosure requires court action. In a strict foreclosure action, the court simply terminates the buyer's equities in the land under the contract and places the

[263] *Fulton v. Chase, Supra; Kilpatrick v. Smith,* 236 Iowa 584, 19 N.W. 2d 699 (1945); *Dependabilt Homes v. White,* 66 Ohio L. Abs. 381 (1951); *Morris v. Banning, Inc.,* 49 Ohio L. Abs. 543.

[264] *Fulton v. Chase, Supra.*

[265] *Ibid., Kilpatrick v. Smith, Supra; Thompson v. Hardy,* 19 S.D. 98-103, 102 N.W. 299 (1905); *Rogers v. Simpson,* 11 Oh. Cir. Rep. 561 (1908).

[266] *McLain v. Smith, Supra.*

[267] *Brainard v. Holsaple,* 4 Greene (Iowa) 485 (1854); *Carter v. Scott,* 283 Ky. 269, 140 S.W. 2d 1039 (1940) *dictum;* 3 *American Property* § 11.70 (1952); *Clark v. West,* 111 Kan. 83 (1922); *Nimbs v. Potter,* 5 Ohio L. Abs. 372 (1927); *Crist v. Dice,* 18 Oh. St. 536 (1869).

[268] See *Selby v. Matson,* 137 Iowa 97, 114 N.W. 609 (1908) *Swinney v. Davidson,* 292 Ky. 110, 166 S.W. 2d 41 (1942).

[269] See *SDC* 10.0802 (1) (1939); See 91 *CJS, Vendor & Purchaser,* §§ 129-133a (1955); *Utterback v. Houser,* 184 Ky. 789, 213 S.W. 191 (1919).

[270] *Wayne v. Butterfield,* 50 S.D. 463, 470, 210 N.W. 663 (1926); *Frederick v. Davis,* 133 Iowa 362, 110 N.W. 611 (1907); *Brainard v. Holsople, Supra; Benson v. Cowell* 52 Iowa 137, 2 N.W. 1035 (1879); *Anderson v. Haskell,* 45 Iowa 45 (1876); *Kirby v. Harrison,* 2 Ohio St. 326 (1853); *Glick v. Galier,* 116 Ohio St. 41, 155 N.W. 385 (1927).

[271] 91 *CJS, Vendor & Purchaser,* § 131 (1955); See also *Mann v. Campbell,* 198 Ky. 812, 250 S.W. 110 (1923).

[272] See, for example, *Johnson v. McGrew,* 42 Iowa 555 (1876).

[273] Iowa, for example, allows only foreclosure by judicial sale (see Marner, at p. et. seq.), while Minnesota (see *Denton v. Scully* 26 Minn. 325, 326, 327, 4 N.W. 41, 42-43 (1879); § 559.21 *MSA;* South Dakota (see *State v. Darling,* 39 S.D. 558, 562, 165 N.W. 536 (1917); North Dakota (see *Ryan v. Bremseth,* 48 N.D. 710, 186 N.W. 818 (1922); Nebraska; Wisconsin, (see Vanneman, *Strict Foreclosure of Land Contract,* 14 Minn. L. Rev. 342 (1930); Kansas also allow strict foreclosure under an installment land contract. *(Hillyard v. Banchor,* 85 Kan. 516, 118 Pac. 67 (1911). To the extent that foreclosure is pursued in Ohio, it is foreclosure by sale only. By far the greatest number of contracts are written with forfeiture and liquidated damages clauses. It is so unusual to find a land contract written without the forfeiture clause, that few cases can be found in which the remedy of foreclosure was followed. Without the forfeiture clause, the Ohio courts have a tendency to treat the instrument as a mortgage. In Ohio, any security device may be treated as a mortgage and a foreclosure by judicial sale is required. See *Cottrell v. Long,* 20 Ohio 464 (1851). A procedure which could be called foreclosure by sale occurs where the equity of the purchaser is such that it would be unconscionable to allow the forfeiture and, therefore, the Court orders the property sold and the proceeds applied first to pay the seller the unpaid portion of the price and the balance to be paid to the buyer. *Curtis v. Factory Site Co.,* 12 Ohio App. 148 (1919).

seller in the same legal position as if the contract had never been made. This means that once the seller has obtained the land back through strict foreclosure, that is the end of the matter. He cannot get a deficiency judgment, since he cannot stand on the contract and rescind it also.[274] Under strict foreclosure, there is usually a period of time allowed after the court hears the case in which the buyer can correct his default and reinstate the contract. In some states, this period of time is specified by statute; in others, it is left to the discretion of the court.[275]

In Minnesota, the period allowed for correcting the default after trial is within the discretion of the court, although the buyer is apparently entitled to at least some extra time as a matter of right.[276] In South Dakota, a statute specifies that the court, in a strict foreclosure action, shall have the power to "fix the time within which the party or parties in default must comply with the terms of such contract—which time shall not be less than ten days from the rendition of such judgment. . ."[277]

Wisconsin apparently allows a common law equity action of strict foreclosure and the court is allowed to fix a grace period wherein the buyer can make good on his contract, but after the expiration of which the seller is authorized to keep the purchase money already paid.[278]

In North Daokta, the period allowed for redemption of the contract is also within the discretion of the court.[279] The court has held that anywhere from no redemption period[280] to six months or more[281] can be decreed. It is interesting to note here that the statutory period allowed for reinstating the contract in North Dakota under a forfeiture action[282] is one year after the notice of cancellation.[283]

In Nebraska, a seller can have the remedy of strict foreclosure if the value of the land is less than the amount due under the contract,[284] or if there are some other peculiar or special circumstances to be considered in the sound legal discretion of the court, such that to refuse relief would be inequitable and unjust.[285] Apparently, however, there is no equity of redemption in these cases. Only if the seller elects to treat the contract as a mortgage would there be an

[274] *State v. Darling, Supra.*

[275] See, for example, *Hilyard v. Banchor, Supra.*

[276] 90 days to six months was not uncommon. See *Drew v. Smith* 7 Minn. (Gil. 231) 301, 309-310 (1862) (Six months); *Eberlein v. Randall,* 99 Minn. 528, 109 N.W. 1133 (1906) (90 days); *London & Northwest Am. Mortgage Co. v. McMillian,* 78 Minn. 53, 80 N.W. 841 (1899) (90 days); The procedure is now almost universally controlled by 559.21 *MSA.*

[277] *SDC* 37.310 (1939).

[278] See *Oconto v. Bacon.* 181 Wis. 538, 195 N.W. 412, 415 (1923).

[279] *N.D. Rev. Code.* §§ 32-1801 to 32 1806 (1943).

[280] *Peoples State Bank of Hillsboro v. Steenson.* 49 N.D. 100, 190 N.W. 74 (1922).

[281] *Ryan v. Bremseth* 48 N.D. 710, 186 N.W. 818 (1922).

[282] Discussed in the section on *Forfeiture* pp. 48.

[283] See *N.D. Rev. Code* § 32-1804.

[284] Swanson v. Madsen, 145 Neb. 815, 18 N.W. 2d 217 (1945).

[285] *Harrington v. Birdsall.* 38 Neb. 176, 56 N.W. 961 (1893); *Farmers & Merchants' State Bank v. Thornburg.* 54 Neb. 782, 75 N. W. 45 (1898); *Patterson v. Mikkelson,* 86 Neb. 512, 125 N.W. 1104 (1910).

equity of redemption, and strict foreclosure is not available where a mortgage is involved.[286]

In Kansas, strict foreclosure is allowed if the equity of the buyer is light.[287] If strict foreclosure is found to be grossly inequitable, the court may hold that contract to be an equitable mortgage and require foreclosure by judicial sale.[288] If a strict foreclosure is allowed, the court will usually allow a period to redeem.[289]

The allowance of strict foreclosure seems to be justifiable so long as the court, in its discretion, reaches a determination on the basis of the equities involved. If the buyer's interest is small or if the value of the land is substantially less than the unpaid balance of the contract, there appears to be no reason to require an expensive judicial foreclosure sale in order to terminate the buyer's interests. If the buyer is given a realistic time in which to correct his default, he cannot suffer, and, in fact, may benefit by being forced to terminate what may be a bad deal for him.

Foreclosure by Judicial Sale. Foreclosure of installment land contracts by judicial sale is recognized in all the states and is the only method of foreclosure recognized in certain of them.[290] To foreclose by judicial sale, the contract is treated as a mortgage and the procedure is governed by the law with respect to mortgages.[291] The procedure in Iowa will be outlined for illustrative purposes.

Upon default of the buyer, the seller may petition the court to require the buyer to perform or have his interest in the property foreclosed.[292] No tender of a deed is necessary[293] and the land is proceeded against directly, without first exhausting personal property or averring insolvency.[294]

The action is brought in the county where the property is located[295] and the court renders a judgment for the entire amount found due, directing that the land be sold to satisfy that amount, plus interest and costs.[296] The decree allows a specified time in which the buyer can pay the amount due, and if payment is not made, special execution is issued and the land is sold at public auction.[297] Any deficiency may be sought by issue of a general execution[298] and any overage

[286]See discussion in Hancock at pp. 19-21.

[287]See *Hilyard v. Banchor, Supra.*

[288]Of *Carrol v. Naffziger,* 157 Kan. 482, 142 P. 2d 818 (1943).

[289]See *Nelson v. Robinson,* 184 Kan. 340, 336 P. 2d 415 (1959).

[290]Iowa (See Marner at pp. 59, et. seq.) Kentucky (See *KRS* § 426.005 (1955), *Barnes v. Jackson & Adm'r,* 85 Ky. 407, 3 S.W. 601 (1887), and Ohio, to the extent foreclosure is followed (See Ftnt. 274, *Supra.*)

[291]See *Iowa Code* § 644.12 (1958) *Johnson v. McGrew, Supra; Cotterell v. Long, Supra; Curtis v. Factory Site Co., Supra;* However, even though the courts use mortgage foreclosure procedure for installment land contracts, they usually set the redemption period in their own discretion instead of adopting the minimum mortgage foreclosure redemption period.

[292]*Iowa Code* § 654.11(1954); *Tupple v. Viers,* 14 Iowa 515 (1863).

[293]*Dimon v. Wright,* 206 Iowa 693, 214 N.W. 673 (1927).

[294]*Iowa Code* § 654.12 (1954); *Pierson v. David,* 1 Clarke (Iowa Rep) 23 (1855).

[295]*Iowa Code* § 654.3 (1954); *Johns v. Orcutt,* 9 Iowa 350 (1859).

[296]*Iowa Code* § 654.5 (1958).

[297]*Boynton v. Salinger,* 156 Iowa 529, 137 N.W. 929 (1912).

[298]*Iowa Code* § 654.6 (1958); *Grimmell v. Warner,* 21 Iowa 11 (1866).

is paid to the buyer.[299] The foreclosure sale terminates all rights of both the buyer and seller in the land, and the purchaser at the sale acquires them, except for the right of redemption that remains in the buyer under the installment land contract and a right to possession for one year.[300]

The statutory redemption period in Iowa is one year.[301] In Kansas, if less than one-third of the contract price has been paid, the redemption period is six months; if more than one-third has been paid, it is eighteen months.[302] In Missouri, there is no redemption period unless the person financing the transaction is the purchaser at the sale and a notice of intent to redeem is filed.[303]

Iowa has a statutory moratorium continuance provision that allows the defaulting party in a foreclosure action to answer the seller's petition to foreclose by admitting the indebtedness and breach of contract, but alleging that the default was mainly due to one of several specified causes, including drought, flood, storm and depression. On these grounds the defaulting party can request a continuance of the foreclosure action.[304]

Few states still have statutory moratorium continuance provisions, but such a provision can be included in the contract. It seems that such a provision is well advised when the buyer must depend on income from crops raised on the land to meet his payments. If the seller is willing to enter into the sale knowing the buyer must rely on income from crops raised on the land for making the payments, it does not seem that he should object to a provision that defers payments falling due at a time when the buyer's crop is destroyed or his income substantially impaired by some unexpected event beyond his control, such as drought, flood or storm. A provision deferring payments during economic depression is perhaps more questionable. In all events, it would seem reasonable for a buyer with a low equity to protect his interest through the use of mortgage loan insurance or reserves equal to at least one full year of operating expenses and payments on the obligation, if this is feasible.

The mortgage foreclosure by sale procedures in the other states of the North Central Region are similar to that of Iowa, although there are significant variations in certain items such as the redemption period. However, since the installment land contract owes many of its advantages over other methods of low-

[299] *Iowa Code* § 654.7 (1958).

[300] *Iowa Code* c. 628, § 654.5 (1958); *Poweshiek County v. Dennison, Supra.* In Kentucky, although a Federal court has stated, by way of dictum, a somewhat different proposition, [*National Bank of Kentucky v. Louisville Trust Co.*, 67 F. 2d 97, 101 (C.C.A. 6th 1933], a state court decision holds that all the money must be due under an installment land contract before it can be foreclosed. *Gentry v. Walker,* 93 Ky. 405 (1892). This problem is alleviated, however, by the use of an acceleration clause, *Souders v. Gingell* 174 Ky. 127, 191 S.W. 896 (1917). In Ohio, there is no statutory redemption period as in Missouri. Instead, the debtor can redeem at any time up to the time the entry confirming the sale to the buyer at judicial sale goes on the record. With the requirements of advertising, appraisal, notice of sale, and actual public sale, this period usually runs from 3 months to 6 months from the time the judgment is rendered against the installment land contract buyer. In all other respects the Ohio procedure is similar to Iowa as explained in the text.

[301] *Iowa Code* 628.3 (1954).

[302] *Kan. G.S.* 1949, 60-3428.

[303] §§ 443.410-440, *RSMo.* (1949) (then one year redemption period).

[304] See *Iowa Code* § 645.15 (1958).

equity financing to the fact that other less costly and more expedient remedies are available in case of default, no further discussion of foreclosure will be made.

Forfeiture. The primary remedial advantage of using the installment land contract as a security device, instead of some type of mortgage, is the availability of the remedy of forfeiture, if the proper provisions are included. Such a remedy does not necessitate court action or a sale of the property. It is not available under any type of security device other than the installment land contract.

Forfeiture, or cancellation as it is sometimes called, is controlled by statute in some states. In others, where there is no statute on the subject, the remedy is recognized in varying degrees by the common law. Since the right of forfeiture often is considered by the seller to be the deciding advantage of the installment land contract over other methods of low-equity financing, it will be analyzed from the standpoint of relative advantages and disadvantages.

Basically, the procedure in all of the states of the North Central Region is the same. The contract must contain a forfeiture clause valid under the law of the state; the seller must be able and willing to perform his part of the contract; the terms of the forfeiture provision in the contract, and of any applicable statutory provisions, must be strictly complied with; time for performance usually must be of the essence.[305]

The foundation of the remedy of forfeiture is the forfeiture clause itself. This is a clause in the contract that specifies the loss of all payments made and of all interest in the land, by the buyer, upon default and the declaration of a forfeiture by the seller. The question that most often arose in early development of the law with regard to this provision was: Is this an *enforceable liquidated damages* clause or an *unenforceable penalty?* The ancient equity maxim of, "equity abhors a forfeiture," played an important role in the development of the law in this respect.[306]

A 1922 Illinois case illustrates the reasoning used. In that case, the court refused to allow forfeiture under the provisions of an installment land contract where the buyer had paid $4,000 on an $18,000 purchase price, and was in default on monthly payments because the tenants of the property he was buying were in default on their rent.[307] The court stated that to allow the amount paid as liquidated damages would be in excess of any reasonable rental and greater than any lawful interest due on the entire purchase price.

The court referred to the maxim that forfeitures are not favored in law or equity and held that to recognize the forfeiture would result in giving the seller an unfair advantage.[308]

[305]See Marner at p. 62; *Meineke v. Schwepe*, 93 Ohio App. 111, 111 N.E. 2d 765 (1952). In Ohio the contract must include a clause providing for forfeiture, acceleration of the balance and a right of re-entry by the seller, and liquidated damages, and the seller must tender performance. *State ex rel. Morgan v. Stevenson*, 39 Ohio App. 335, 177 N.E. 247 (1931).

[306]See discussion in Hallock at p. 112.

[307]*Witherstine v. Snyder*, 225 Ill. App. 189 (1922).

[308]Hallock at p. 113, The court was undoubtedly influenced by the economic recession of 1920 and 1921; *Ibid.*

A typical forfeiture clause reads as follows:[309]

> The buyer hereby convenants and agrees that time shall be deemed to be of the essence of this contract and of all of its terms and conditions, and in case the buyer shall fail to make the payments, or any of them, when the same are due, or fails to observe or perform any other conditions herein mentioned, then the seller may, at its option, declare the contract in default and upon thirty days' notice in writing to the buyer, or such other notice as is prescribed by statute, shall have the right to re-enter, and all rights of the buyer under this agreement are cancelled, and the contract and the amounts paid by the buyer hereunder shall be forfeited to the seller and remain its property as rental of said premises and as liquidated damages for the failure to fulfill this agreement completely or, at the option of the seller, the balance thereafter to become due under this contract shall become immediately due and payable.

A variation on the above is:[310]

> Time of performance shall be an essential element of this agreement. If default be made in fulfilling this contract, or any part thereof, by or on behalf of the buyer, this agreement shall, at the option of the seller, be forfeited and determined, and said buyer shall forfeit all payments made by him on the same, and such payments shall be retained by said sellers in full satisfaction and in liquidation of all damages by them sustained and they shall have the right to re-enter and take possession of said premises.

Other clauses, equally as effective, may be used.[311]

Iowa,[312] North Dakota,[313] Minnesota,[314] and Michigan[315] have statutes controlling one phase or another of the remedy of forfeiture. In other states, forfeiture is controlled entirely by rules of the common law.[316]

The courts have used various means of easing the harshness of a forfeiture provision, when the buyer has paid a substantial part of the purchase price, or when other conditions make it inequitable to enforce the strict terms of the forfeiture.

Illinois apparently will set aside a forfeiture unless the buyer has debarred himself from relief by his own conduct. Such conduct must be *willful default.* It is not clear just what this term might include, but two recent cases give an indication.

[309]Derived from clause quoted in Marner at pp. 62-63.
[310]Adopted from clause quoted by Logan.
[311]See, for example, clause quoted in Dolson.
[312]*Iowa Code* §§ 656.1-656.6 (1958).
[313]See *N.D. Rev. Code* §§ 32-1801 et. seq. (1943).
[314]§ 559.21 *M.S.A.*
[315]See Hill & Fitzgerald at p. 49.
[316]Richards at p. 24 (South Dakota); Hancock at p. 21 (Nebraska); *Comment,* Mo. L. Rev., *Supra* at p. 247 (Missouri; Hallock at p. 112 et. seq. (Illinois); Logan (Kansas); Dolson at p. 58-68 (Kentucky); Ohio; and *Oconto v. Bacon, Supra,* (Wisconsin).

In *Rose v. Dolejs,*[317] the buyer had paid $5,000 on a $15,000 purchase price when the default occurred. The seller had assigned his interest and the assignee sought forfeiture. The original seller and buyer had apparently entered into an oral agreement to extend the time of the payment. The buyer had erected a $16,000 residence on the property and had made a *bona fide* tender of the unpaid principal, interest, and taxes.

The court felt that in such a situation, where the agreement was only one for the payment of money, a forfeiture should be set aside. It stated that forfeitures are not favored by courts of equity and parties will be protected against them whenever a wrong would result from the enforcement.

In another Illinois case,[318] a forfeiture was set aside on the following facts:

The buyer had missed two monthly payments and the second installment of the 1950 real estate taxes. Although no payment date was specified in the contract, the buyer made his payments around the 20th of each month. The court found that there had been a waiver of a contract provision making time of the essence and that the buyer had been lulled into a false sense of security when the seller had not insisted on payments being made at a specific time.

The Illinois court has, however, upheld the right to include a forfeiture clause in an installment land contract.[319] The court has stated that the clause will be upheld when the forfeiture was rightly declared. This required, among other things, that the seller show that he did not defraud and did not act in bad faith. The contract also must specify that time is of the essence, and the seller must show that he has not waived the pertinent provisions of the contract.

The Illinois court also, instead of setting aside a forfeiture, has given the buyer an extended period of time in which to correct the default, even though time was stated to be of the essence in the contract.[320] The Kansas court and the Michigan court also have given the buyer an extended period of time in which to correct his default.[321]

Thus, we find the court variously utilizing waiver, and extension of time for correcting the default, as a means whereby the harshness of a forfeiture clause can be eased somewhat in appropriate cases.[322]

In the other states without statutory provisions covering forfeiture as a

[317] *Rose v. Dolejs,* 1 Ill. 2d 280, 116 N.E. 2d 402 (1953).

[318] *Kingsley v. Roeder,* 2 Ill. 2d 131, 117 N.E. 2d 82 (1954). A similar holding is found in *Hugg v. Sigle* 14 Ohio L. Abs. 456 (1933).

[319] McDonald v. Bartlett, 324 Ill. 549, 155 N.E. 477 (1927). Such a right has been reiterated and enforced in Ohio in the (1957) case of *Economy Savings and Loan Co. v. Hollington,* 105 Ohio App. 243, 152 N.E. 2d 125.

[320] *Springfield & N.E. Traction Co. v. Warrick,* 249 Ill. 470, 94 N.E. 933 (1911).

[321] See *Bedford v. Tetzlaff,* 338 Mich. 102, 60 N.W. 2d 60 (1953).

[322] It is noted, however, that in spite of the apparent unsettled state of the law in this respect in Illinois, and the unwillingness of the court automatically to enforce a forfeiture clause, the installment land contract is used extensively in some parts of Illinois as a means of financing farm land sales. See Krausz at p. 1. In Ohio, there seems to be a further unsettling factor in this area. In addition to those factors mentioned in the paragraph text, Ohio courts have sometimes held that forfeitures will not be worked for the buyer's breach unless the breach was intentional or results in a loss to the seller which cannot be compensated with interest. See *Curtis v. Factory Site Co.,* 12 Ohio App. 148 (1919).

remedy under installment land contracts, extension of time for correcting defaults, or *advance notice* as it is sometimes called, has not been allowed by the courts.[323] However, the legislatures of a number of states have enacted statutes specifying a period of time after notice is given in which the buyer can correct the default and reinstate the contract.

The following table lists the states and the notice period specified by the statute in each.

State	Statutory Notice Period
Iowa[324]	30 days from service of notice
Minnesota[325]	30 days from service of notice (90 days if notice is by publication)
North Dakota[326]	1 year from service of notice

The statutes usually specify the manner in which the notice of forfeiture is to be given before the statutory notice period begins to run. The procedure must be strictly followed or the notice will be ineffective.[327]

Under the Iowa code,[328] forfeiture is initiated by the seller serving written notice on the buyer and on the person in possession of the property. The notice must, (1) reasonably identify the contract and accurately describe the property involved, (2) specify the terms and conditions of the contract that the buyer has broken and, (3) state that the contract will stand forfeited and cancelled unless the buyer, within 30 days from the service of notice, performs the terms and conditions in default and pays reasonable costs of the serving of notice.[329] If personal notice cannot be had, notice by publication may be utilized.[330]

When the terms of the statute are complied with, and the purchaser does not perform in the 30-day period, his rights are terminated and the vendor has full title to and right to possession of the land.[331] The seller can record the forfeiture by filing for record in the county recorder's office a copy of the notice with proofs of service attached or endorsed on them. If the notice was by publication, the seller's personal affidavit that personal service could not be made in the state must be filed for record. When the filing and recording is carried out, it is constructive notice of the forfeiture of the contract.[332]

[323] *Taylor v. Martin*, 51 S.D. 536, 539, 215 N.W. 695 (1927) (South Dakota); *Johnson v. Ruhl*, 162 Neb. 330, 75 N.W. 2d 717 (1956). *Kear v. Hausmann*, 152 Neb. 512, 41 N.W. 2d 850 (1950) (Nebraska); *O'Fallon v. Kennerly*, 45 Mo. 124 (1869) (Missouri); Logan at p. 62 (Kansas). In Ohio, there is no *advance notice* recognized by the Courts. Either the forfeiture is enforced as in *Economy Savings & Loan Co. v. Hollington, Supra*, or it is set aside as in *Curtis v. Factory Site Co., Supra.*

[324] *Iowa Code* § 656.2 (1958).

[325] § 559.21 *M.S.A.*

[326] *N.D. Rev. Code* §§ 32-1803 et. seq. 1943.

[327] See *Westercamp v. Smith*, 239 Iowa 705, 31 N.W. 2d 347 (1948).

[328] *Iowa Code* §§ 656.1-656.6 (1958).

[329] *Iowa Code* § 656.2 (1958).

[330] *Iowa Code* § 656.3 (1958).

[331] *Moore v. Elliott*, 213 Iowa 374, 239 N.W. 32 (1931).

[332] *Iowa Code* § 656.5 (1958).

In North Dakota a similar notice procedure is followed, except that, as shown in the table, the termination will not take effect until one year after the date of the service of notice.[333] To record the forfeiture in North Dakota, the seller must record, in addition to the notice and affidavit of service as required in Iowa, a personal affidavit that the default under the terms of the contract was not cured within one year from the date of the service of notice.[334]

A provision in an installment land contract attempting to obviate the statutory requirement of notice is void.[335]

Even in those states without statutory provisions, the declaration of forfeiture cannot be in secret, but must be by notice to the buyer. Apparently, however, a clause declaring the contract as automatically forfeited upon failure of making a payment when due will be upheld by some states where time is of the essence and no grounds for waiver are present.[336] But such a provision should be used with caution. A Kansas case involved a contract including a forfeiture provision that made a failure of the buyer to make a payment on the contract result in the termination of it, the seller being entitled to retain any consideration already paid. The buyer under the contract had paid nothing. Thus, the seller found himself in the position of holding no payments to forfeit and with no cause of action on which to base a suit for damages, since the contract had automatically been forfeited.[337]

The statutory provisions do at least prevent the seller from taking advantage of a harsh contract provision and depriving the buyer of his rights in the property without a definite notice of cancellation.[338] But there are times when the statutory provisions cause harsh decisions because the court is deprived of its discretionary power to adjust the relationship of the parties according to the equities of the situation. The Minnesota court reflected this problem in commenting on their forfeiture statute, as follows:[339]

> We are dealing with an all too inelastic statute. It does not discriminate, as law ought to discriminate, between those who deserve its indulgence and those who have forfeited all right to it. The vendee who in good faith has made substantial payments, amounting possibly to a large portion of the purchase price, and added substantial value to the property by improvements and is in possession, may be cancelled out, and possibly his entire estate forfeited just as summarily as the speculator who has made an insignificant down payment, is not in possession and does not intend further performance unless he can make a profitable deal. The law ought not to be in that condition, but it is, and it is our duty to apply it as we find it.

As has been mentioned, the courts will go a long way to find a waiver in

[333]See footnote 327, above.
[334]*N.D. Rev. Code* § 32-18-05 (1960).
[335]*Williams v. Corey*, 21 N.D. 509, 131 N.W. 457 (1911).
[336]See *Taylor v. Martin, Supra; Bogad v. Wachter*, 365 Mo. 426, 283 S.W. 2d 609 (1955); *Hugg v. Sigle, Supra.*
[337]*McKellar v. Brubaker*, 160 Kan. 451, 163 P. 2d 358 (1945).
[338]See *Matburg v. Ostrand*, 132 Minn. 346, 348, 157 N.W. 589 (1916).
[339]*Follingstad v. Syverson*, 160 Minn. 307, 311, 200 N.W. 90, 92 (1924).

order to ease any harsh result reached under a forfeiture clause in an installment land contract. For example, in a recent Missouri case, the court allowed the buyer to have specific performance on a contract containing a 30-day automatic forfeiture clause, even though the 30-day period had elapsed.[340] The court found that the seller had waived his right to the benefit of the forfeiture provision when he had accepted one of the earlier payments 17 days after expiration of the 30-day grace period.

The tendency of the Illinois court to find waiver has led one author to state that courts are, in effect, trying to provide a "pseudo equity of redemption,"[341] and another to state that "the forfeiture clause occupies an intermediate status between the unenforceable penalty and a valid liquidated damages clause."[342]

The Kansas court has repeatedly declared that equity abhors a forfeiture, but it will assure the equitable fulfillment of contract provisions voluntarily made in which the parties have bound themselves to perform certain definite requirements or lose their rights under the agreement.[343] It has strictly enforced forfeitures in a number of cases[344] and seems to deny it only when its enforcement would be grossly inequitable.[345]

In Kentucky, the court usually will uphold a forfeiture contract if the seller is willing to perform and the amount retained by him approximates reasonable rent for the period the buyer was in possession.[346]

The courts in those states with statutory forfeiture provisions have more difficulty in finding a waiver. The Iowa court, prior to the enactment of the forfeiture statute, followed the rule that acceptance of late or partial payments by a seller constituted a waiver of any right of forfeiture upon a later default.[347] However, under the statute, the court holds that the acceptance of late or partial payments does not waive the right to forfeiture for subsequent default, since the statute requiring a 30-day notice does not allow sufferance to cease so suddenly as to lull the buyer into a false sense of security.[348] The court feels that 30 days is a reasonable period of time in which the buyer can adapt to the new attitude of the seller before being forfeited off the land.[349]

However, the Minnesota court has held that acceptance of the defaulted amount as payment on the contract after the expiration of the 30-day waiting

[340] *Bogad v. Wachter, Supra.*

[341] Hallock at p. 116.

[342] Brantman, *U. of I. Law Forum,* Summer 1950, p. 257.

[343] *Hinshaw v. Smith,* 131 Kan. 351, 291 Pac. 774 (1930).

[344] See *Atchison Savings Bank v. Richards,* 131 Kan. 81, 289 Pac. 975 (1930); *Gregory v. Nelson,* 147 Kan. 682, 78 P. 2d 889 (1938); *Owen v. Stark,* 175 Kan. 800, 267 P. 2d 948 (1954).

[345] For example, forfeiture was denied where buyer had paid $2,400 on $2,600 purchase price, and then was injured in an accident; *DeGood v. Gettle,* 119 Kan. 534, 240 Pac. 960 (1925).

[346] See *Ward Real Estate v. Childers,* 233 Ky. 302, 3 S.W. 2d 601 (1928); *Mercer v. Federal Land Bank,* 300 Ky. 311, 188 S.W. 2d 489 (1945).

[347] Marner at p. 65.

[348] *Cassiday v. Adamson,* 208 Iowa 417, 224 N.W. 508 (1929); *Janes v. Towne,* 201 Iowa 690, 207 N.W. 790 (1926).

[349] *Janes v. Towne, Supra.*

period constituted waiver as a matter of law.[350] It is also held that the acceptance of an overdue payment after notice has been served for breach of a different condition of the contract will not waive the right to the pending forfeiture.[351]

The discussion tends to indicate that when statutory provisions exist for the purpose of protecting the interests of a buyer under an installment land contract, the courts do not go quite so far to find a waiver or otherwise to use equitable discretion in deciding the case as when no statute exists. This may be because they feel the legislature has already determined how far it is reasonable to extend the terms of the contract in protecting the buyer's position.

Once the seller has forfeited the contract interest of the buyer, he cannot later obtain a judgment for installments in arrears.[352] It has also been held that when the contract contained an acceleration clause by which the seller *could* declare the entire balance of the contract due and payable upon default by the buyer, the seller could not require that the entire amount be paid to reinstate the contract.[353] The court stated that it felt the seller could not, by his own act, add to the statutory requirements for reinstating the contract. It stated, "we think that the legislature intended that the contract should not be forfeited if, within the prescribed time, the vendee removed such defaults as were made grounds of forfeiture by the terms of the contract itself."[354]

The language of the court in the above case would indicate, however, that an automatic acceleration clause, as opposed to an elective or optional acceleration clause, would be upheld.[355]

In an interesting Kansas case[356] the court found a forfeiture provision too inequitable, but gave the purchaser 10 days to pay the amount in default under the contract. If this amount were not paid, the contract was strictly foreclosed and the title was to re-vest in the seller, the buyer having six months thereafter to redeem. If the buyer made up the back payments in 10 days, the contract would still be foreclosed, but the vendee would have 18 months to redeem. The rationale for this granting of a strict foreclosure type of decree with the statutory redemption period seems to be that when sitting as a court of equity with all the parties to the action before it, a trial court may determine all rights and render a judgement in accord with the demands of justice. The case is, at least, a good example of judicious exercise of the equity power of the court.

The statutes that provide for recording of notices and affidavits of forfeiture seem to have much to offer. They do not penalize the buyer, since, if the forfeiture is effective, it is effective without recording provisions. But the statute does eliminate any need for an expensive court procedure by the seller to clear his title after a forfeiture. Such a court procedure enriches neither party and

[350] *Jandric v. Skahan*, 235 Minn. 256, 50 N.W. 2d 625 (1951).
[351] *Swanson v. Miller*, 189 Minn. 158, 248 N.W. 727 (1933). The default was on an assumed mortgage.
[352] *Smith v. Dristig*, 176 Minn. 601, 224 N.W. 157 (1929).
[353] *Needles v. Keys*, 149 Minn. 477, 184 N.W. 33 (1921).
[354] *Needles v. Keys*, *Id.* at 480.
[355] See *Note*, 39 Minn. L. Rev. 93, 98 (1954); 2 Pomeroy, *Equity Jurisprudence* (5th ed., Symons, 1941).
[356] *Nelson v. Robinson*, 184 Kan. 340, 336 P. 2d 415 (1959).

takes from the valuable time of the court. The buyer is not benefitted by it, and prospective buyers may be harmed, since a seller might hesitate to enter into a contract he would otherwise accept if he realizes that a later forfeiture under it will put a cloud on his title.

Assuming an effective forfeiture under the forfeiture clause in an installment land contract, in accordance with the common law and any statutory provisions of the state, it may still be necessary to find some means of removing a recalcitrant buyer from possession of the land. In Iowa, the seller may proceed against the buyer, as though he were a tenant illegally holding over, by an action of forcible entry and detainer.[356]

In South Dakota and Nebraska, the action of forcible entry and detainer apparently will not lie where the possession is held under an installment land contract.[358] The court of South Dakota, in relying on a Nebraska decision[359] for its holding, stated:

> The remedy by the action of forcible entry and detainer is only given to those who are in actual possession (at the time of the ouster complained of) and cannot be sustained by merely showing a constructive possession or right to possession.[360]

The South Dakota court later held that this remedy involved only the immediate right of possession and the equitable rights of the parties could not be litigated under it.[361] Thus, the action could not be effective to clear the seller's title and cut off the buyer's interest.[362]

Apparently, in Iowa, the action of forcible entry and detainer is adequate for the removal of a forfeited buyer, since the statutory forfeiture provisions assure that the seller acquires clear title after an effective forfeiture, and gives him an immediate right of possession. But in states such as Nebraska and South Dakota, these questions are left unsettled.

It seems that in Nebraska and Kentucky, the seller can use the action of ejectment to regain possession of land after a forfeiture.[363] In South Dakota, the

[357] *Cassiday v. Adamson,* 208 Iowa 417, 224 N.W. 508 (1929); *Fowler v. Dieleman,* 192 Iowa 563, 185 N.W. 79 (1921); *Spangler v. Misner,* 238 Iowa 600, 28 N.W. 2d 5 (1947). In Ohio, where the contract provides a forfeiture clause; the seller upon proof of default in payment by the buyer can maintain a forcible entry and detainer action for eviction. *State ex rel. Everson v. Municipal Court of Barberton,* 98 Ohio App. 177 (1954). If there is no forfeiture clause, the action will not lie and the contract remains in full force until cancelled in the court of general jurisdiction. *State ex rel. Morgan v. Stevenson,* 39 Ohio App. 335 (1931).

[358] *Worthington v. Woods,* 22 Neb. 230, 34 N.W. 368 (1887); *Torrey v. Berke,* 11 S.D. 155, 76 N.W. 302 (1898).

[359] *Worthington v. Woods, Id.*

[360] *Torrey v. Berke, Supra* at 159.

[361] *Aegerter v. Hayes,* 55 S.D. 337, 342, 226 N.W. 345 (1929).

[362] See Richards at p. 27; the same is apparently true in Kentucky. So also in Ohio. Even if you do obtain eviction of the buyer in forcible entry and detainer, the contract remains effective and title must be cleared by a quiet title action or an outright action to cancel—at least to the extent that the buyer has acquired an interest in the land. And what is this interest without a determination of rights and a decree of the court? See *State ex rel. Morgan v. Stevenson, Supra.*

[363] *Abbas v. Demont,* 152 Neb. 77, 40 N.W. 2d 265 (1949); *Johnson v. Norton,* 152 Neb. 714, 42 N.W. 2d 622 (1950); *Fordson Coal Co. v. Wells,* 245 Ky. 291, 53 S.W. 2d 564 (1932). (See also *Maschinot v. Moore,* 275 Ky. 36, 120 S.W. 2d 750 (1938) where the court held the remedy to be available to the seller when the amount of the payment does not greatly exceed a reasonable rental value of the property. *Ibid.*

statutory equivalent of ejectment, an action to determine adverse claims to real estate, is available for removal of a forfeited buyer.[364] This remedy allows the buyer to raise legal and equitable defenses, possibly requiring a jury trial. If the seller takes judgment by default, the buyer has two years in which to obtain relief if the judgment was taken because of the latter's mistake, inadvertance, surprise, or excusable neglect.[365] The pursuit of this remedy can often be long and expensive.[366]

In states like South Dakota that allow strict foreclosure[367] and where an action to determine adverse claims against real estate or some similar action is often necessary after a forfeiture, either in order to divest the forfeited buyer of possession or to make the seller's title marketable,[368] or both, it may often involve less time and money, and cause less uncertainty, to rely upon a strict foreclosure action in preference to a forfeiture as the seller's remedy, in case of default by the buyer.

A survey in South Dakota[369] has indicated that the court in a strict foreclosure action simply gives the buyer a period of time in which to comply with the terms of the contract (anywhere from the statutory minimum of 10 days[370] up to four months)[371] at the expiration of which, without compliance by the buyer, the decree of foreclosure becomes effective and the buyer's rights are terminated. The remedy requires a minimum of court action and is certain in its determination. No sale is involved and a court has passed on the issues.

Foreclosure by Power of Non-judicial Sale in Deeds of Trust in Missouri.

As has been discussed earlier, the most familiar method of foreclosure in the North Central Region is by petition to a court of equity, either for an order of strict foreclosure or of foreclosure by judicial sale. The use of a power of *non-judicial sale* as a means of foreclosure has developed comparatively recently and is not at all widely accepted.[372] In Missouri, however, it is very generally used without thought that it does not adequately protect the rights of the parties. It has certain advantages over a forfeiture provision in an installment land contract.

The deed of trust with power of non-judicial sale has been firmly established in Missouri for well over a century. In an 1840 case,[373] a dissenting judge said:

Deeds of trust have so commonly obtained in this country as to enable the

[364] *SDC* 37.15 (1939) and *SDC* 37.15 (Supp. 1952); *Burleigh v. Hecht*, 22 SD 301, 306-307, 117 N.W. 367 (1908). There is support for the proposition that in Kentucky the action of forcible entry and detainer cannot be brought against a person who came into possession under an installment land contract. See *Jack v. Carneal*, 9 Ky. (Mar) 519, 520 (1820).

[365] *SDC* 37.1514 (Supp. 1952). But a subsequent purchaser in good faith from the seller is protected.

[366] See Richards at p. 27.

[367] See the discussion in the section on *Strict Foreclosure*, pp. 44-46.

[368] See the discussion in the section on *Marketability of Title*, p. 20.

[369] See Richards at p. 31.

[370] *SDC* 37-3101 (1939).

[371] *Scott v. Hetland*, 51 S.D. 303, 305, 213 N.W. 732 (1927).

[372] I *Glenn on Mortgages* § 98 (1943).

[373] *Carson v. Blakey*, 6 Mo. 273 (1840).

creditor, who is desirous of avoiding the delays of procuring a foreclosure, to attain all the ends of security without resort to a court.[374]

The exercise of a non-judicial sale power foreclosures a mortgagor's interest as surely as does a judicial foreclosure and is recognized by the courts as being a complete foreclosure in itself, without need for a court proceeding.[375]

The statute refers to a non-judicial sale power as an option.[376] However, it cannot be exercised independently of any agreement between the mortgagor and mortgagee. It is a matter of contract between the parties, and without an express provision in the deed of trust, the power does not exist.[377]

The sale under a non-judicial power of sale must be held in the county where the land is situated.[378] If land in two counties is mortgaged under one deed of trust, two sales, one in each county, must be held.[379] The place in the county where the sale is to be held is a matter of contract between the parties.[380]

The statute also provides that not less than 20 days notice of the sale must be given regardless of the provision in the deed of trust.[381] In other words, although the deed of trust may specify the period of notice required, it cannot be less than 20 days. Notice of sale must be given by advertisement, inserted in a daily newspaper for at least twenty times, and continued up to the day of sale, if the county contains a city with a population of 50,000 or more.[382] Otherwise, the notice may be given by inserting an advertisement in a weekly or more frequent newspaper, at least once a week for four successive weeks, the last insertion not to be more than one week from the date of sale.[383] Of course, if the deed of trust calls for a longer or more frequent notice, those provisions must be met.[384]

The trustee's power of sale is a contractual one.[385] However, it is not a power based on the legal title. Legal title does not vest in the trustee at the time the deed of trust is executed.[386] His relationship to the grantor and note holder is one of agency, as it also is to third parties.[387] A statement of default by the trustee binds the principals even though they have not requested foreclosure. By statute, recitals of default in a trustee's deed are *prima facie* evidence of the truth of such statements.[388] Rebuttal of them puts the trustee in a position of breach.[389]

[374] *Ibid* at 276.
[375] *Homan v. Connet*, 348 Mo. 244, 152 S.W. 2d 1053 (1941).
[376] § 443.410, *RSMo.* (1959).
[377] *Adams v. Boyd*, 332 Mo. 484, 58 S.W. 2d 704 (1933).
[378] § 443.310, *RSMo.* (1959).
[379] *Metropolitan Life Insurance Co. v. Coleman*, 99 S.W. 2d 479 (Spr. Ct. App. 1937).
[380] *Stewart v. Brown*, 16 S.W. 389 (Mo. 1891).
[381] § 443.310, *RSMo.* (1959).
[382] *Id.* at § 443.320.
[383] Ibid.
[384] Ibid.
[385] *Adams v. Boyd, Supra.*
[386] *Lustenberger v. Hutchinson*, 343 Mo. 51, 119 S.W. 2d 921 (1938); *Butler Building and Investment Co. v. Dunsworth*, 146 Mo. 361, 48 S.W. 449 (1898).
[387] *Ibid.*
[388] § 443.380, *RSMo.* (1959).
[389] *Hayes v. Delzell*, 21 Mo. App. 679 (1886).

The duties of a trustee are considered to require scrupulous fidelity and must be conducted with the strictest impartiality and integrity.[390] Thus, the courts hold such duties to be nondelegable.[391]

The foreclosure in Missouri under a power of sale in a deed of trust is as effectual to pass title as a foreclosure by action, if properly carried out.[392] Generally, there is no equity of redemption in the grantor of the deed of trust, after the foreclosure sale.[393] However, in certain cases, there is a limited statutory right of redemption at any time within one year from the date of sale where the holder of the note, or someone in his behalf, is the purchaser at the trustee's foreclosure sale.[394] If a grantor intends to redeem, he must give notice and post a bond within a specified time after the sale.

The grantor of a deed of trust also may invoke equitable jurisdiction to set aside a foreclosure sale and to redeem where certain irregularities have occurred in the conduct of the sale. Irregularities include such items as inadequacy of consideration, unusual hour of sale, improper sale in bulk or parcels, lulling the grantor into a false sense of security, chilled bidding at the sale, trustee or note holder as purchaser at sale, unauthorized place of sale, defective notice, improper substitution of trustee or delegation of trustee's duties, failure to adjourn the sale to prevent sacrifice of the property, and trustee's abuse of discretion and violation of duties.[395]

Unless one of the above irregularities occurs, or unless the grantor qualified for the limited statutory right to redeem, the foreclosure sale is absolute. It can be seen that, in Missouri, a power of sale provision in a deed of trust is much more effective than a forfeiture provision in an installment land contract in assuring the seller in a low-equity transfer transaction a clear, economical, and simplified, remedy against a defaulting buyer.

Other Provisions to Consider in an Installment Land Contract

Since the primary reason for the use of the installment land contract is the ability of the parties to include the forfeiture provision that will often induce a seller to accept a lower down payment than he would otherwise be willing to accept, and still allow the buyer to acquire sufficient control over the property to adequately operate it satisfactorily and proceed towards full ownership, a number of alternative items that can be included in the contract, to tailor it more ideally to the needs of the particular parties and situations involved, should be considered.

Payment Terms. Payment terms can vary according to the desires of the parties to the contract. Certain alternatives should be considered. There are at

[390] *Goode v. Comfort*, 39 Mo. 313 (1866).
[391] *Polliham v. Reveley*, 181 Mo. 622, 81 S.W. 182 (1904).
[392] *Wharton v. Farmers Bank*, 119 F. 2d 487 (8th Cir. 1941).
[393] §§ 443.280, 443.290, 443.410, *RSMo.* (1959).
[394] § 443.410-.440, *RSMo.* (1959).
[395] These are discussed in detail in Dingus, L.D., Mortgages—Redemption After Foreclosure Sale in Missouri, 25 Mo. L. Rev. 261 (June, 1960).

least three types of amortization plans available for use in land contracts. The usual amortization plan, *the standard plan,* provides for a fixed arrangement of annual payments of principal and interest which will pay the debt completely when the last payment has been made. If this plan is used, a larger portion of each succeeding payment represents principal and a smaller amount represents interest. Since the interest rate is applied to the unpaid balance, the interest due after each payment becomes less because the outstanding balance is lower each time. Thus, more of each payment will be allocated to principal on each succeeding payment made.

A second amortization plan called *the springfield plan* provides for fixed principal payments with declining interest payments on the outstanding balance. Under this plan, the total payment becomes less each time since principal payments are fixed and the interest payments decrease with each succeeding payment. This plan is well suited to the debtor who is able to pay higher initial installments.

A third amortization plan is called the *increasing payment plan.* It often may better fit the needs of a young buyer since he is more likely to have difficulty in meeting his obligations during the first few years after purchase. Under the increasing payment plan, the total payment of interest and principal increases with each payment made. Interest payments slowly decrease while the principal payments increase. To further assist a young man getting started, all payments on principal might be deferred for three to five years.

All plans have similar adaptability to budgeted living on the part of the seller. The latter plan probably has more to offer than the others to a young buyer who is short on capital.

—Prepayment provision. A prepayment provision is an important consideration to a buyer under an installment land contract. If specific provision is not included in the contract, this privilege is not extended to the buyer. This means that the seller need not accept payments in advance for more than the amount stipulated in the contract. As a result, when the buyer has a high-income year in which he could pay more than the amount called for in the contract, he must continue to pay the interest on the borrowed money.

Default might be less likely if a prepayment provision is included in the contract with terms to the effect that advanced payments are to be applied to subsequent installments and the buyer will not be considered to be in default as to principal unless the total amount of his payments falls below the schedule set out in the contract. The provision could specify that accumulated payments are to be applied to meet both principal and interest payments or principal payments alone.

In some instances, a prepayment clause may be a disadvantage to the seller. This is especially true if a prepayment in any one year would be great enough to put the seller in a higher tax bracket because of the necessity of reporting additional capital gains. In addition, if payments are made, the seller may find it necessary to reinvest his money. However, neither of these disadvantages are

serious to the seller in most instances, and the advantages of the prepayment plan can be very important to the buyer. A provision limiting the prepayment privilege to an amount that would minimize the disadvantages to the seller might be drafted without losing the advantages to the buyer.

—Mortgage-for-deed provision. Closely related to the prepayment plan provisions is the mortgage-for-deed provision. Such a provision calls for the exchange of a deed from the seller to the buyer and a mortgage from the buyer to the seller after a specified amount of the principal has been paid on the contract. Such a provision will increase the security position of the buyer when he has made enough payments on the contract to qualify for conventional financing. Thus, with such a provision in the contract, the buyer need not find himself in a security position worse than that of a buyer with conventional financing.

—Variable payment plans. Variable payment plans should also receive consideration in any installment land contract. Payments may be made in money with the size of the payment being determined by the year's income from the farm, by the type of growing season for that year, or by other matters, such as the health of the buyer, acreage yield, etc.

Payments may be made in kind, that is, with products raised on the farm. Such payments may be a fixed amount of the products each year, or a certain share of the annual production. If a product payment plan is used, it should be specific and complete. It should answer questions such as where delivery will be taken, the acceptable grades, and the method of determining price. On farms such as dairy farms where income is monthly, the payment plan can be set up on a monthly basis.

—Acceleration clause. An acceleration clause provides that if the buyer defaults on the contract all remaining payments fall due at the time of default, or at the end of a specified grace period, if one is included in the contract.[396]

The inclusion of an acceleration clause in the contract has the effect of making a defaulted payment by the buyer much more serious than it otherwise would be. Without the clause, when the buyer defaults in making a payment, the default can be corrected by bringing the payments up to date.[397] With an acceleration clause, the buyer can correct the default only by paying the balance due on the contract. If the buyer does not pay the full amount, the seller can exercise his rights under the forfeiture provision, even though the past due payments are made.[398]

Both the buyer and the seller should seriously consider whether or not an acceleration clause is desirable in their particular circumstances before it is included in the contract.

Grace Period. A grace period should be given serious consideration, especially if an acceleration clause is used. Such a provision usually specifies a period

[396]See the section on *Grace Period,* below.

[397]See the section on *Action for Damages,* p. 41, *Supra.*

[398]Subject to waiver and other equitable protections of the law in favor of the buyer, as discussed in the section on *Forfeiture,* pp. 48-56.

of time after the due date in which the buyer can make up the payment and not be in default. Perhaps, if it is understood by the parties to the contract that payment is to be made out of the income from farm production, the grace period should be in the form of a contract moratorium clause. Such a clause would provide that when certain factors exist, such as flood, extreme drought, illness, and similar factors that might lower the income return to be expected from the farm, the buyer will be excused from payment for that year, either until the end of the contract period, or until the next payment is due. Of course, the interest of the seller must also be taken into account when such a provision is considered.

Escrow Provision. In general, an installment land contract transaction should always include an escrow provision. An escrow provision provides that on the date of the contract, the seller is to deposit with an *escrow agent* a properly executed warranty deed to the farm. If the contract includes a mortgage-for-deed provision, the buyer is required, at the same time, to deposit a properly executed note and mortgage to the seller, and an executed copy of the installment land contract is also deposited with the escrow agent. If the parties expect to record the contract, the buyer should also place a quit-claim deed in escrow so that, in the event of a forfeiture, the escrow agent can turn it over to the seller, thus clearing his title.[399]

A neutral third party such as a bank, trust company or an attorney should usually serve as the escrow agent. The escrow agent holds the documents while the contract is being performed.

Consider the following illustration: The seller has entered into an installment land contract to sell his farm to the buyer for $40,000, with $5,000 down, and $3,000 payable annually until the contract is paid out. In addition, the buyer and seller have agreed in the contract that when one-half of the purchase price has been paid, the seller will give the buyer a warranty deed and take a mortgage in return to secure the balance still owing. The contract contains provisions that allow the seller to declare a forfeiture if the buyer defaults in payment before he receives the deed and gives back the mortgage. The contract further provides that the buyer is to make his payments to the escrow agent who will then handle them as directed by the seller.

When the time comes for the deed to be given and the mortgage to be taken by the seller, the escrow agent will deliver the seller's warranty deed to the buyer and the buyer's mortgage to the seller. If the buyer should default before this transaction takes place, and the seller declares a fortfeiture, the escrow agent will deliver the quit-claim deed to the seller.

Under such an arrangement each party is assured that he will receive the documents to which he is entitled from the other party at the proper time. If one of the parties dies, the ability to deliver the proper document when it is due is not affected.

Arbitration Clause. An arbitration clause should be included in the contract to settle any disputes that might arise between the parties. In addition, it

[399]See the section on *Forfeiture*, pp. 48-56.

will settle any differences or questions that may arise between a party to the contract, and a personal representative, heir or administrator, if one of the parties dies. Such a provision usually calls for the selection of three arbitrators. One can be chosen by the seller, another by the buyer, and the two so chosen can select the third. The three arbitrators are then entitled to pass on any questions submitted to them. Such decision as the arbitrators make can be made binding on the parties by the terms of the arbitration provision. Expenses of arbitration should usually be borne equally by both the buyer and the seller.

CONCLUSION

Many farm families are faced with the problem of how to acquire a farm to operate. Some of these families are willing to rent a farm, but often they find that adequate farms are not available for rent. Others desire to start farming by becoming owners. Many farm families desiring to enter farming on their own do not have a large down payment to apply on a farm purchase. Some method of low-equity financing is their only available method of farm acquisition. Such a credit arrangement makes it possible for a farmer to acquire adequate land with a down payment that allows him more readily to obtain sufficient capital to operate and maintain the farm, and still realize a satisfactory level of living.

The most common type of low-equity financing instrument used in the North Central Region is the installment land contract. The laws controlling the use of the installment land contract are derived primarily from court decisions. Some states also have certain statutory provisions concerning these contracts. The installment land contract gives a buyer and a seller wide range of freedom in entering into an agreement that will fit their own particular circumstances. The rules of interpretation of these contracts are used to determine the rights and duties of the parties to the agreement, the rights of third parties, and the remedies available to either of the parties in case of a violation of the terms of the agreement by the other.

In Missouri, the deed of trust is used as a low-equity financing instrument in preference to the installment land contract because of special statutory foreclosure procedures allowed under that instrument.

The parties to an installment land contract have certain rights and duties given to them by law in the absence of provisions to the contrary in the contract. However, a number of rights and duties that attach to the installment land contract are not clearly defined by law. In either case, the contract should include a specific provision with regard to the particular rights or duties involved in order that mutual understanding by the parties to the terms of the agreement is assured.

The strengths and weaknesses of installment land contracts should be made known to the parties using them. A buyer under such an instrument should realize that the advantage of a low down payment carries with it the disadvantage of forfeiture powers in the seller for default. A seller should realize that the acceptance of a low down payment for tax reasons reduces the amount of his

security interest for the balance due. These matters, as well as many others, must be understood by the parties before they will be able to use the installment land contract in an intelligent manner. They are discussed in detail in the foregoing material.

Improvement of the installment land contract as it is now used can be made by a combination of adequate representation of the parties, education, and certain legislation in some states. Each of these possibilities might be helpful. However, in most instances, a combination is probably preferable. The ultimate goal probably should be to increase the usefulness of the installment land contract as an instrument making low-equity financing possible, without destroying the advantages of flexibility of agreement. The necessity of proper legal counsel for both parties cannot be over-emphasized.