Maryland Rule on Forfeiture Under Land Installment Contracts ... a Suggested Reform

Marshall A. Levin

Follow this and additional works at: http://digitalcommons.law.umd.edu/mlr

Part of the Property Law and Real Estate Commons

Recommended Citation
Marshall A. Levin, Maryland Rule on Forfeiture Under Land Installment Contracts ... a Suggested Reform, 9 Md. L. Rev. 99 (1948)
Available at: http://digitalcommons.law.umd.edu/mlr/vol9/iss2/1

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
MARYLAND RULE ON FORFEITURE UNDER LAND INSTALLMENT CONTRACTS . . .
A SUGGESTED REFORM
By MARSHALL A. LEVIN*

I. NATURE OF THE PROBLEM

This is an attempted reform of a rule that has been often discussed, and a few times corrected, but most often it has been left to work its particularly odious "solution" to the problem presented by a very common set of facts.

It is the problem that arises out of the situation created when a person wants to purchase real property, and not having sufficient money to pay the purchase price, he arranges to finance the sale by a credit arrangement. There are various financial devices: the most common being the purchase money mortgage, the executory contract (including the installment type) and in Baltimore City, the use of a "ground rent" partially to finance the sale.

Although an installment land contract is analytically included within an executory contract,

"the installment contract should be differentiated from the ordinary executory contract for the sale of realty. In the former, portions of the price are payable in installments after the execution of the contract and before the conveyance of title. The latter contemplates a single down payment, normally accompanying the execution of the contract, and then a concurrent conveyance of title and payment of the price. The payment on the 'law day' is often but partially in cash and largely by way of mortgage. Thereafter the rights of the parties are governed by the law of mort-

gages. While these two transactions take different forms, they are used to accomplish an identical purpose. In both cases the vendor seeks to retain an interest in the property he has sold as security for the payment of the unpaid balance of the price. It is with the realization that the vendor's interest under an installment is merely by way of security, that one must approach the subject."

For the purpose of this paper, the use of the ground rent will not be considered, but instead the other methods, particularly the installment contract, will be discussed. Although the system of a ninety-nine year lease renewable forever (popularly known as a ground rent) has been a common form of real estate financing in Baltimore City some of its basic advantages are now gone and its use is said to be on the wane.

In addition, there are many reasons, not only why a ground rent might not be favored in the future, but where it would be inadvisable to use it. The following list is illustrative:

(a) From a vendor's standpoint
1. Speculating vendors
   a. A person who is speculating on the chance of a default by a vendee, will not choose the ground rent because the amount of yearly rent is relatively small and it is comparatively easy for a lessee to scrape up that sum. The payments on an installment contract, however,

3 Before 1884, it was possible to create irredeemable 99 year leases renewable forever, but in that year a Statute (Md. Laws 1884, Ch. 486) was passed which allowed lessees the option in all leases thereafter created for more than 15 years, to redeem them after 15 years at the value of the rent capitalized, at 6%, unless the lease specified some other rate, not exceeding 4%. In 1888, this period was shortened to 10 years (Md. Laws 1888, Ch. 395) and in 1900, it was finally shortened to 5 years (Md. Laws 1900, Ch. 207), the latter two statutes allowing only a 6% redemption. See, Md. Code, Art. 21, Sec. 111 (1939).
4 This is the opinion of Professor Casner, inter alia (Professor of Law, Harvard Law School, former Professor of Law, University of Maryland Law School). His views were expressed in personal discussion at Harvard Law School in the Spring of 1947.
will obviously be much more substantial and the corresponding chance for default will be much greater. Moreover, a vendee under an installment land contract has no period of "grace" after a default; whereas lessees under a ground rent have six months in which to pay before they can be ejected.  

2. Casual vendors (under this heading, persons other than those engaged in the real estate business will be considered. In so doing, the various motives and purposes of a normal vendor will be examined, together with the corresponding devices which would most effectively satisfy these motives).

a. If a person desires to sell a valuable piece of property in an exclusive residential district, wishing to get the purchase price as quickly as possible, he will not lease it via a ground rent, because the potential lessee (if a ground rent were used) might not be inclined to exercise his statutory option to redeem after the five year period, and thus the potential lessor could not get the principal unless he chose to sell the rent. Nowadays good rents can be sold at a premium, but in days not far in the past (and perhaps not too far in the future) many rents sold for less than par. However, he could easily attain his objective by the use of a purchase money mortgage or an installment contract, which methods do contemplate the payment of the principal at the end of the time specified in the agreement, as well as partial payments in the meantime.

If such a vendor were an investor desiring to keep his capital as liquid as possible, this reasoning would become even more obvious. It is true that he would have to look far to find an investment which is as attractive as a ground rent (since it brings a return of 6%) but this advantage may well be overcome by a desire for liquidity. If it is contended that one can sell a ground rent and thus attain the same objective, the answer is that such an investment might not be as readily saleable as a fast moving piece of property, such as a popular security.

---

6 Md. Laws 1872, Ch. 346, codified as Md. Code (1939) Art. 74, Sec. 78.
7 Supra, n. 3.
However, even if a person is only interested in the investment feature of a typical ground rent, he is only sure of 6% for five years, because Maryland has made all ground rents created after 1900 redeemable at the expiration of five years from the date of their creation. (This does not take into account, of course, the small body of irredeemable ground rents that were left intact by Maryland.)

b. If the vendor is dubious about the financial responsibility of the vendee, he can protect himself against default much more effectively by the use of the mortgage and land contract methods, than by the use of a ground rent. A drop in land values which results from a depression or the gradual deterioration of a neighborhood is usually accompanied by a greater number of defaults, and yet, in such case, the owner of the ground rent must allow the lessee a period of six months in which to make the payment good.

It is true that the ground rent owner has received 6% each year and can distrain against the lessee's chattels, as well as recover a judgment in personam against the owner of the leasehold interest (including any mortgage thereof), but under an installment contract, he can keep all prior installments paid and these might be considerably more than that which he has received under a ground rent.

(b) From a vendee's standpoint

1. Under present methods made available by the Federal Government one may arrange an extremely comfortable length of time in which to pay a mortgage, and although the principal is definitely due at the expiration of the specified period, the main advantage possessed by a ground rent lessee (i.e. the right to pay an annual 6% instead of the entire purchase price) is substantially wiped out.

8 Ibid.
2. Moreover, a vendee who desires to obtain a fee simple title as quickly as possible would choose the contract or mortgage method rather than obligate himself to wait out the minimum five year period.

3. The entire amount that a vendee under a land contract (or similarly, a mortgagor) pays may well be less than the entire amount which is ultimately paid by a ground rent lessee and the feeling "that it somehow seems cheaper to many purchasers to be talking in terms of $60 than in terms of $1,000",\(^\text{11}\) can prove a trap for the unwary.

Finally, the notion of ground rents in practice has been confined mainly to Baltimore City and the neighboring counties,\(^\text{12}\) and although this is really a conclusion rather than a reason, this paper is intended to cover the methods used through the State, and hence a consideration of the installment land contract and the mortgage is necessary.

Assuming then, that the system of ground rent financing is not used, let us consider the alternatives. I shall proceed upon the hypothesis that the vendee cannot pay the entire purchase price in cash, or that a credit arrangement is favored. In such event, the parties can, as mentioned previously, use either the executory contract (including the installment contract) or the purchase-money mortgage device.

The growing tendency\(^\text{13}\) is to accomplish this credit objective by the installment contract,\(^\text{14}\) although it is extremely important to remember that the purchase money mortgage and the installment contract are merely different

\(^{11}\) See Kaufman, *The Maryland Ground Rent—Mysterious but Beneficial* (1940) 5 Md. L. Rev. 1, 62.

\(^{12}\) See supra, n. 2.

\(^{13}\) Inasmuch as the utility of the ground rent has become less effective because of the Redemption Statutes, other methods will gradually supplant it. Because of the ground rent's striking similarity to a mortgage, it is necessary to examine both the mortgage and the installment contract, and to ascertain the merits and demerits of both. For reasons hereafter stated, it will be seen that vendors will benefit more from installment contracts than from mortgages and it is predicted that Maryland will see an increasing number of the former in the future. This has been the experience of the other jurisdictions in the United States. See generally, MACCHESNEY, *THE LAW OF REAL ESTATE BROKERAGE* (1938) 106 et seq.

\(^{14}\) REEP, *SECOND MORTGAGES AND LAND CONTRACTS IN REAL ESTATE FINANCING* (1928) 1, and 160.
forms of attaining the same end. Under this arrangement, the vendee usually pays a certain amount "down" and promises to pay the remainder in weekly or monthly installments.

The vendor will commonly be a real estate company, or an individual selling through a real estate company. If the transaction is not handled in this manner, there will ordinarily be an attorney who draws up the contract. By the insertion of certain magic phrases, the vendor can secure himself an inordinate amount of protection and a position that is unique in the law. The following provisions may be put into a contract (in fact, most of them are printed on all contracts of this type), and the vendee will be completely hamstrung.

(1) Time is of the essence of this contract.

(2) In the event of default by the vendee, the vendor shall immediately, upon such default, have the right to declare the contract void and retain whatever may have been paid on said contract, and all improvements that may have been made on said premises and may take immediate possession of the premises and remove the vendee.

(3) Any default shall cause all subsequent payments to become due immediately, and vendor shall have the right to compel the continued performance of the contract by the vendee.

(4) Upon any default by the vendee, the vendor shall have the right to foreclose the contract.

(5) The vendor shall have the right to use any and all of the above-mentioned remedies.

(6) Waiver of any breach of this contract resulting from default on the part of the vendee, shall not be deemed to be a waiver of any other branch.

From a literal application of these provisions, it would appear that if the vendee were to default at any time (even at the time of the last payment) the vendor could recover possession of the land\textsuperscript{15} and keep the installments, no mat-

ter how many, nor how short the delay! This is the evil which is intended to be revealed and a solution proposed by this paper.

Moreover, the vendee, being in possession, is usually liable for all taxes and assessments, and in the event of default, he has, in effect, made an economic gift to the vendor. Even the value of permanent improvements that have been made by the vendee enure to the vendor and although the latter has clearly received income as a result of the default, he is treated very benevolently by the Federal Government as concerns the income tax.

An examination of the legal results that flow from a default reveals astounding protection to the vendor. If the land has gone down in value and the vendor finds that he would have a difficult time selling to another vendee, he can waive his right to eject along with the clause accelerating payments, and can sue at law for the intermediate installments without even tendering title; because the law regards the vendee's promise to pay as being independent of vendor's promise to convey. (Of course, if the judgment were satisfied, the vendor would have to convey title.)

If, upon default, the vendor desires to "cut off the purchaser's rights under the contract", he can resort to foreclosure by sale and unless the contract price has been inordinately inflated, he will probably realize enough

18 III WILLISTON, CONTRACTS (Rev. Ed. 1938) Sec. 791. For an extremely "tough" case, see Doctorman v. Schroeder, 92 N. J. Eq. 676, 114 A. 810 (1921).
17 The weight of authority is in accord, but cf. RESTATEMENT, CONTRACTS (1932) Sec. 357(2).
16 See, 26 U. S. C. A. 22 (b) (11) (1942). Note also Treas. Reg. 22(b) 11-1.
19 Reed v. Chambers, 6 Gill and J. 329 (Md. 1934).
20 Chace v. Johnson, 98 Fla. 118, 123 So. 519 (1929).
22 Supra, n. 1, 17.
23 See Vanneman, Strict Foreclosure on Land Contracts (1930) 14 Minn. L. Rev. 324.
21 As was the usual case in the Florida land boom, for example. For a thorough discussion, see Vanderblue, The Florida Land Boom (reprint from May and Aug. 1927) Journal of Land and Public Utility Economics.
to "make him whole".\textsuperscript{25} In the event that the proceeds of the sale do not have this effect, the vendor can still obtain a deficiency judgment and thus the protection afforded him is seen to be clearly adequate.

Our vendor would avoid rescission like the plague because that would obligate him to return the installments that have been paid. The New York Law Revision Commission, in its excellent study of this problem in 1937, discusses the various remedies available to the vendor and points out: "That vendors realize rescission to be a poor expedient is attested to by the absence of reported cases on point."\textsuperscript{26}

Another remedy available to the vendor is a suit at law for breach of contract. On a superficial examination, the defaulting vendee would seem to be protected from a harsh result inasmuch as the measure of damages in most jurisdictions,\textsuperscript{27} including Maryland,\textsuperscript{28} is the difference between the contract price and the market value at the date of default (thus taking into account any improvements that vendee has made, the latter being reflected in the market value). This amount is decreased by any increase in market value, and the more the vendee has improved the land, the less he will have to pay in damages.

So far, so good. But the catch is that if the vendee has paid more in installments than the amount allowed the vendor by the standard measure of damages, he (the vendee) cannot recover either the amount of such excess (if he seeks restitution) or the amount by which the market value has been increased by the improvements.\textsuperscript{29}

The vendee, it is seen, is in a most insecure position. After default, he cannot sue the vendor at law to recover prior payments on the purchase price, because he has not

\textsuperscript{25} Assume the contract price is $10,000 and the market value at the time of default is $7,000. If vendor has inserted an acceleration clause, the entire amount of remaining payments become due and vendor can collect the deficiency from the vendee, even to the extent of levying execution on other property.

\textsuperscript{26} Supra, n. 1, 22.

\textsuperscript{27} WILLISTON, op. cit., supra, n. 16, sec. 791.

\textsuperscript{28} III SEDGWICK, DAMAGES (9th ed. 1912) Sec. 1018.

\textsuperscript{29} Steinhardt v. Baker, 163 N. Y. 410, 57 N. E. 629 (1900); cf., supra, n. 1.
performed his own part of the contract. Moreover, if the vendor has availed himself of the above mentioned provisions\textsuperscript{80} (and almost every contract contains most of them), the vendee cannot sue in Equity to reinstate the contract because of the express condition therein contained. There is, to be sure, a tendency to find waiver of default\textsuperscript{31} on the part of the vendor, and, if so found, the vendee can have restitution.\textsuperscript{32}

But a vendor who has been rendered insecure is unlikely, in fact, to voluntarily waive contract provisions he has inserted for his protection in just such a situation, and judicial findings that he has done so seem often to constitute a deliberate judicial disregard of the vendor's intent,\textsuperscript{33} inspired by a desire to squirm out of the forfeiture rule.

It is my purpose to examine the origin of this body of doctrine (and its economic basis); to analyze its present-day status to ascertain whether it really will be followed in Maryland; and to draft a statute which will both relieve against some of the common law harshness and bring the law into accord with 20th Century economic reality. In so doing, I shall examine the results of similar statutes in other jurisdictions and seek to prevent some of the conservatism with which they are attended. As Professor Simpson points out,\textsuperscript{44} . . .

"The real need is for carefully drafted statutes, the effect of which the courts will be unable to evade, and which will compel them to deal with installment contracts for the sale of land on the same principles which they apply without hesitation in the case of transactions essentially similar in economic substance, but set up in the form of a conveyance on credit with a mortgage back as security."

\textsuperscript{80} See, \textit{circa}, n. 15, \textit{et seq.}
\textsuperscript{81} Pound, \textit{Progress of the Law—Equity} (1920) 33 Harv. L. Rev. 929, 952. "Strict doctrines as to forfeiture inevitably produce loose doctrines as to ‘waiver.'" As an example, see Walker v. Burtless, 82 Neb. 211, 214, 117 N. W. 349, 350 (1908).
\textsuperscript{82} Spedden v. Sykes, 51 Wash. 297, 98 Pac. 752 (1908).
\textsuperscript{83} Supra, n. 31, 952.
II. STATUS OF THE LAW IN GENERAL

A. Common Law

At one time, it was impossible for contracting parties to make time of the essence in executory contracts for the sale of land, just as Equity denied the mortgagee a decree enforcing strict compliance with a provision concerning time. But Newland pointed out that Lord Eldon later declared that, notwithstanding what was said in the earlier cases, time might be made of the essence of a contract.

The potentiality of this change was not immediately apparent, and, as such, it did not result in any great benefit to vendors. Without such a provision in a contract, a vendor would have to wait a "reasonable time" after default before he could pursue his normal remedies. With the advent of the change, the vendor was enabled to dispense with the necessity for waiting any time at all. The devise was new and it was probable that only the astute availed themselves of this advantage.

However, when the rule governing the time clause was coupled with the forfeiture rule (along with the ever present acceleration clause), vendors soon realized that they possessed a very formidable weapon, in that they could recover all prior payments. The validity of this weapon was quickly upheld by the courts and the way was made clear for the enunciation of the widespread rule that if time is made essential, a vendor of land under an installment contract can keep paid up installments and recover possession of the land in the event of the vendee's default.

35 Williams v. Thompson (1782), stated from MS note in Newland, Treatise on Contracts Within the Jurisdiction of Courts of Equity (1806). Gregson v. Riddle (1784) ibid., 239, 240.
37 Newland, op. cit., supra, n. 35, 240.
38 Gregson v. Riddle, supra, n. 35.
39 Specific performance of the contract; Foreclosure of the contract; Damages for breach of contract; Ejectment; Rescission of the Contract.
40 See item 3 of list of common provisions, circa n. 16.
41 Hipwell v. Knight, 1 Y. and C., Ex. 401 (1885).
42 Williston, op. cit., supra, n. 16, Sec. 791.
The explanation of this change seems to lie in the fact that the 19th Century saw the flowering of the "laissez-faire" doctrine to its fullest extent. This doctrine, with its marked emphasis on freedom of the individual, brought about a corresponding concept of freedom of contract. Thus if the contracting parties chose to make this essential, and to insert a forfeiture clause into their contracts, courts of Equity would follow the dictates of the parties. Hence if the vendee was in default, however minor, he was regarded as having breached his promise and he was not entitled to recover any prior installments.\(^4\) This is now firmly settled law in the majority of American jurisdictions, including (it is submitted) that of Maryland.

### B. The Law Today

While the doctrine of forfeiture still holds sway in most jurisdictions, it has not escaped the condemnation of most, if not all, legal writers,\(^4\) and statutory inroads have been made in a number of jurisdictions in the United States,\(^4\) as well as in Canada.\(^4\) These statutes have had varying degrees of success in the preventing of forfeiture\(^4\) and there is constant movement to expand the statutory field, the latest attempt being in 1938 in New York.\(^4\)

Even without the aid of statute, some Courts reach an equitable result by computing the actual amount of damage that the vendor has suffered, and then preventing

---


\(^4\) Ballantine, *Forfeiture for Breach of Contract* (1921) 5 Minn. L. Rev. 329; Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid* (1931) 40 Yale L. J. 1013; Symons, 11 Pomeroy, *Equity Jurisprudence*, Secs. 365, n. 1, 362, n. 1; Pound, *op. cit.*, supra, n. 31; see *supra* n. 34; see also *supra* n. 23; Williston, *op. cit.*, supra, n. 16; see also, *supra*, n. 17.


\(^4\) The loosely drawn Canadian Statutes are typified by the Alberta Statute, Rev. Stats. of Alberta (1922) Ch. 72, Sec. 35(h). They followed the House of Lords decision of Steedman v. Drinkle (1916) 1 A. C. 275 which allowed a defaulting vendee to recover the excess of paid installments over vendor's actual damage.

\(^4\) *Supra*, n. 23.

\(^4\) An attempt which failed; see *supra*, n. 1, and *infra* n. 87.
the vendor from retaining any excess payment. Moreover, as has been noted, the harshness of the established rule has resulted in an astuteness on the part of the various Courts to find that the vendor has “rescinded” or “waived” the time clause.

Yet the weight of authority still upholds this exaction in the nature of a forfeiture (which Equity “abhors” in every other type of contract). The Civil Law, on the other hand, provides at least a mechanism for producing a just result, thus tacitly recognizing the rigors of the rule adopted by the common law.

III. STATUS OF THE LAW IN MARYLAND

There is no statutory provision in Maryland governing the rights of the contracting parties, as to land contracts, nor is there any mention of forfeiture, as concerns “time is of the essence” clauses in installment contracts for the sale of land.

Therefore the common law is in force and since there is nothing in the Maryland Constitution expressly or by implication to the contrary, the doctrine of forfeiture has been in unquestioned existence since the independence of Maryland as a State.

Judicial decisions stating that when time is of the essence Equity must follow the intention of the parties even to the extent of enforcing a forfeiture, are so legion that the rule has taken on the aspects of a cliché. Thus in Robinson v. Johnson, Judge Thomas, in a representative statement, said:

“The general rule in Equity is that a stipulation as to time of payment of the purchase price is not regarded as a condition which requires strict per-

---

50 See generally Pound, op. cit., supra, n. 31.
51 For example, see the French Code (Civ. Code, Art. 1231) which allows a Court to delay forfeiture. See also, the Swiss Federal Code of Obligations (Art. 163) which allows a Court to reduce penalties which it considers to be excessive.
52 137 Md. 610, 113 A. 121 (1921).
formance to entitle a vendee to have the sale consummated. But this general rule is subject to the qualification that a purpose to make time of the essence of the contract may be disclosed by its terms, or by the circumstances and object of its execution and the conduct of the parties. . . . Unless, therefore, parties are to be denied the right to contract as they please. . . . Equity must allow the vendor to regain possession of the land and keep the installments paid, whether they actually constitute the actual amount of harm suffered by the vendor as a result of the breach or not." 5

Judge Urner, in Acme Building Company v. Mitchell is quoted to the effect that "in every instance it is a question of intention to be determined upon the facts of the particular case."

In the later case of Budacz v. Fradkin, Judge Digges held,

"In agreements for the sale of land, time is not usually held to be of the essence of the contract, but if from the terms of the contract, it is clearly shown that the parties so intended it, or, as in this case, where the parties expressly state such to be the agreement, it is generally given full force and effect. . . . And so where the terms of a contract expressly provide that it shall be completely performed and consummated by a certain date named therein, Courts of Equity are bound to give full force and effect to the terms thereof, unless the failure to perform by the time designated is caused by the act or default of the party against whom specific performance is asked to be decreed whether he be vendor or vendee."

Judge Grason, speaking for the Court of Appeals in 1947, is the latest member of the Maryland Court to approve of the rule and he does so unqualifiedly in Garbis v. Weistock, a decision handed down recently.

He discusses the various cases in the past and distinguishes those which did not contain the magic words with

---

5 Italics supplied.
55 146 Md. 400, 406, 126 A. 220, 222 (1924).
56 51 A. 2d 154 (Md. 1947).
a curt, "Neither of the contracts dealt with in those cases contained a provision that time is of the essence of the contract."

As concerns those which did, he cites Soehnlein v. Pumphrey with approval, and concludes that since time was of the essence in the instant case, the vendee had to show that it was the vendor who caused the delay (about which the dispute revolved) before he could get specific performance. The Chancellor's findings, in the lower Court, denying the vendee's request for specific performance, were made upon full consideration of all the evidence, said the Court of Appeals, and consequently had to be upheld.

It is important to note that in the Garbis and Soehnlein cases, the contract involved was of the executory variety, providing for a certain amount to be paid by the vendee at the time of signing, the balance payable at a later time, which was to be concurrent with delivery of the title deed. Moreover, the issues involved had a significance other than the right of the vendors to keep the payments made by the vendees.

In Abrams v. Eckenrode, there was a time clause in a land contract and the vendee sued for specific performance. He had offered to pay the balance to the vendor three weeks after the expiration of the time allowed by the contract. The Court properly refused to allow this remedy, even though vendee claimed that the vendor waived the clause about the essentiality of time, pointing out that any such modification of the contract must be in writing.

This seems a proper case for allowing the clause to be decisive, inasmuch as it will protect vendors from tardily paying vendees, and as such, can offend no wise legal policy. The forfeiture in this case would not have possessed the objectionable feature which would be involved in the case of an installment contract, on which substantial payments had been made.

---

57 Supra, n. 54. Doering v. Fields, 50 A. (2d) 553 (1947).
58 183 Md. 334, 37 A. 2d 843 (1944).
59 136 Md. 244, 110 A. 468 (1920).
Therefore, the result is clearly right. But the point is that the rule applicable to this set of facts might be wholly inapplicable where an installment contract is involved, and yet the Maryland Courts do not seem to have recognized this distinction in their decisions. Hence there is real danger that they will apply the broad rule to a situation where it would not only be inapplicable, but where it would work hardship.

In *Stern v. Shapiro*, the Court of Appeals went a step further because, although the contract in that case did not expressly mention time to be of the essence, Judge Offutt denied specific performance on the ground that circumstances can be indicative that the parties contemplated it to be essential.

The contract involved was in other respects exactly similar to the one in the *Eckenrode* case, but in this case the vendee claimed that vendor's attorney misled him by representing that vendor would overlook the delay. However the court held that the attorney did not have authority to modify the contract and that if the evidence is not clear that the vendee was in fact misled, the nature of the contract and the surrounding circumstances can (as they did in this case) indicate that both parties must have scrupulous regard for time.

This, it is submitted, is also sound, because it refuses to allow the weapons of Equity to be used to gain advantage from a contract when the party seeking their use has himself breached the contract on its face. Moreover, the policy of not allowing written instruments to be varied by parole agreements is one to which inflexible adherence would seem to be justified.

The law in other jurisdictions concerning the extent to which waiver will be found, has varied time and again in inverse proportion to the harshness of the case. In Maryland, the requirements for waiver also seem to be in a somewhat uncertain state.

Thus, the *Eckenrode* case enunciates the rule that any modification of a written land contract must also be in

---

60 138 Md. 615, 114 A. 587 (1921).
writing and consequently, when vendee sued vendor for specific performance after a delay of three weeks (and there was no written explanation), it was denied. The vendee had alleged that the vendor had extended the time, but the evidence showed that after the expiration of the designated time, the vendor offered to return vendee's deposit and call off the contract. This evidently led the court to construe the rule of waiver strictly.

Moreover, the court went so far as to say that even if a husband (vendor) waived the time of payment, it would be ineffectual unless his wife joined in the written waiver. The potentiality of the latter words for mischief seem boundless. 61

Four years later, however, the case of Cole v. Murphy 62 seemed to relax the requirement by allowing the conduct of the parties to also be determinative. In this case, the vendee claimed (and the evidence was in support) that he was ready at all times to complete the contract within the designated time, but that vendor made no effort to do the same. Hence, when the vendee sued for specific performance, it was allowed, and the Court of Appeals, in affirming, was satisfied that it was vendor's conduct that caused the delay. Judge Stockbridge not only found waiver, but announced the vendor was estopped from taking advantage of any time clauses in the contract.

Budacz v. Fradkin, 62a followed the same rule and granted the vendee specific performance when the evidence indicated that vendor had purported to sell to another purchaser. The vendee made every effort to find the sub-purchaser and clear up title and the Court, emphasizing his good faith, allowed specific performance.

61 For example, a man could wait until vendee has paid a large part of the purchase price and then write (individually) that he would grant a few days delay. Following the words of the case literally, vendor could eject vendee and keep the money on the ground that his wife had not signed the instrument. The vendee would obviously be misled and it is inconceivable that such a result should ensue.

62 144 Md. 369, 125 A. 40 (1924).
62a Supra, n. 55.
However, in *Schindel v. Danzer* a more precise definition of waiver and the subsequent cases seem to require a tighter standard.

"Its elements are 'an existing right, benefit or advantage, a knowledge actual or constructive, of its existence, and an intention to relinquish it' and to be 'operative must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver, must be such as to estop a party from insisting on the performance of a contract'."

Thus in *Spellman v. Dundalk Co.*, vendor, after a delay by vendee in an installment contract, declared the contract to be void and claimed all prior payments as liquidated damages. Although the vendee alleged that "someone" in the vendor's office told him that he would not be penalized if he did not pay on time, that explanation was not acceptable to the Court, which said that the vendee was bound by the written contract and that even if someone in the vendor's office did speak superficially about relaxation of the strictness of the time provision, the consideration did not move from vendee to vendor, nor did the vendee suffer any detriment. Hence, the Court refused to listen to any arguments of waiver or estoppel when vendee sued for prior installments paid and directed a verdict for the vendor.

It is important to note, however, that the vendor had offered to revive the contract, but that vendee sued to recover the money which the vendor retained in spite of this offer. Thus the court's sympathies were directed towards the vendor and he prevailed. The course of the law has not always proceeded logically, and although the Court of Appeals is to be commended for its flexibility when its sympathies are obvious, this analysis (of the law of waiver in Maryland) shows that ultimately the Court is going to run into the case of a land contract drawn in such a way that flexibility will be impossible.

---


64 164 Md. 465, 165 A. 192 (1933).
Finally, in the Garbis case, the Court of Appeals with the aid of a handy rule of evidence, appears to prefer to let the ruling of the Chancellor below be decisive as to whether the facts constitute a waiver. It adopts the “clearly wrong” standard and holds that since the Chancellor saw both parties and had the opportunity to judge their credibility, his decision, in the light of the facts alleged and consequently in the record, did not appear to be clearly wrong.

Although the Dundalk case, could have been used to bulwark its opinion, it was not mentioned, presumably because it was not cited by counsel for either of the opposing parties. Moreover counsel for vendee did not cite the Fradkin case in his brief, even though the vendee in that case was granted specific performance. Nor was it distinguished by counsel for vendor in his brief, although Judge Grason came to his rescue and emphasized the fault aspect of the rule of waiver.

The end result is that there does not seem to be any clean cut set of rules that would serve to guide counsel in giving advice as to what actually constitutes an adequate excuse for delay in the performance of one of the essential terms of a contract. Each case will turn on its own facts, and while it is arguable that this is the most equitable method of dealing with the problem, it does smack somewhat of the “Chancellor’s Foot.”

An examination of cases more directly in point involves a consideration of Spellman v. Dundalk and Christian v. Construction Co. In the former, there was a written contract for the sale of an unimproved lot, made on April 1st, 1926. The purchase price was $1200, of which $120.00 was paid at the time of the signing of the contract, the balance to be paid in installments of $12 a month. Taxes

64a Supra, n. 55.
65 Selden, Table Talk, ed. Pollock (Sold. Soc.) 43 (1927); “... Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is equity. Tis all one as if they should make the Standard for the measure we call a foot, to be the Chancellor’s Foot; what an uncertain measure this would be:... one Chancellor has a long foot, another a short foot, a third an indifferent foot.”
66 Supra, n. 64.
66 161 Md. 87, 155 A. 181 (1931).
and assessments were to be paid by vendee after the date of signing of the contract.

There was a time provision in the contract, plus a clause that if vendee defaulted in any payment, the installments already paid were to be kept by vendor as liquidated damages. Vendee had made approximately 29 payments ($348) by September 1928, but then he defaulted. In May, 1929, he made a payment of $60.00, which was accepted by the vendor, but after fourteen more months of default, vendor declared the contract and said that he intended to keep all the payments ($528).

One incidental point was cleared up by Judge Parke, namely, that although the vendor accepted the $60, that only precluded him from his remedies during the period for which the payments had been made. After that, any further default by vendee would allow vendor to resume his original remedies.

If vendor had desired, he could have ejected the vendee and kept all the prior installments, and this would have been considerably more than the normal amount of damages that would be awarded under the usual measure of damages rule (assuming that the value of the land remained constant.) He would have been able to pocket at least $528, part of which would be due to the insertion of the various protective devices mentioned heretofore; whereas for the breach of any other kind of contract, he would only be able to collect the difference between the contract price ($1200) and the market value at the date of the breach.

Of course, the vendor would be entitled to the fair rental value during the period in which the vendee was in possession, but "... the paucity of reported cases involving suits for breach of contract by vendors under installment land contracts would indicate that seldom are the vendor's damages in excess of the purchaser's payments." In point of fact, the vendee demanded his money back, but this was refused by the vendor who offered to revive the contract instead. Vendee was unwilling and

\[ {\text{Supra, n. 1, p. 21.}} \]
sued for the prior installments that he had paid. A verdict was directed for the vendor in the lower court, and on appeal (based on certain evidentiary rulings) it was affirmed.

In the Christian case there was a similar contract, the purchase price being $3000. A down payment of $10 was agreed upon and the balance was to be paid in monthly installments of $36. Vendee was to pay the taxes and interest until the entire purchase price was paid. The contract provided that if vendee was in default for over thirty days, it would be considered a breach and the whole amount would be due, (the normal acceleration clause) and if that were not paid, the contract would be void (at vendor's option), and he could keep all the payments as rent.

The contract was made on April 1, 1926 and vendee paid faithfully until August 1, 1927 ($576). Thereafter he defaulted and did not resume payment until November 11th, 1928. Vendor then brought suit to recover the unpaid balance, but vendee contested his right to do so on the ground that one of the conditions of the contract had been that the premises would be tenantable and that vendor had failed to live up to that condition. However, the court allowed vendor to recover without tendering title on the ground that the covenant to convey is independent of vendee's promise to pay, and it further stated that the acceleration clause must be given full effect.

Here also, the vendor only chose to pull one of his strings. If he had been a speculator gambling on defaults, he could have simply ejected vendee and retained the full amount of the prior installments. The fact that Maryland has not seen such cases in Court should not be taken as a guarantee that they will not occur. At minimum, it should make a Court much more cautious in applying the common law doctrine.

The outcome of this analysis seems to indicate that although there is no precise holding that vendees cannot recover past installments, the uniform dicta to that effect and the corresponding emphasis on freedom of parties
to contract, lead unwaveringly to the conclusion that such is the law in Maryland today.

However, the broad dictum, when analyzed, really covers many different types of cases. In some, the doctrine would seem to be quite justified, but supportable on other more rational grounds. Thus, as Professor Corbin points out,68 where the vendor still has the right to specific performance, the vendee should not be able to get restitution for prior paid installments, because as long as the vendor is willing to convey, vendee should obviously not be able to repudiate the contract and escape scot-free. This is the proper ground. Moreover, the injury sustained by the vendor might be less than the amount that vendee has already paid, and in this case it is just that vendee should be denied the right to restitution.

However, the danger enters where such facts are not present, and it is precisely in this type of case that the Court might ruthlessly apply the doctrine where it would result in injustice. Where the vendee is not acting in bad faith and when the delay is easily capable of being cured, there is simply no sensible reason to unthinkingly uphold every consequence of a rule which is capable of such flagrant abuse.

IV. DEFECTS OF THE LAW

The unfairness of this rule has not escaped notice of the authorities and they are uniform in its condemnation.69 It obviously departs radically from the normal law of contracts, in that it allows an inordinate measure of damages to be imposed by the parties, whereas the fundamental principle of damages in an ordinary contract is, "... and should be, to give compensation, that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract."70

---

68 Corbin, supra, n. 44, 1017.
69 It is interesting to note that retail installment selling in Maryland has come under the purview of those who feel that its evils warrant some form of regulation. See Maryland Legislative Council, Retail Installment Selling, Research Report No. 6 (Research Div.) which was submitted in Sept., 1940, by Charles Mindel. In this connection, see infra, n. 80.
70 WILLISTON, op. cit., supra, n. 10.
The departure from settled principles of Equity is equally obvious. Thus the statement the "Equity abhors a forfeiture" is so often repeated that it needs no citation, and yet Equity is enforcing a forfeiture when it follows the typical provisions in a land contract. Williston states that "Where the transaction is in its essence, a mortgage, agreements for forfeiture and provisions that time is of the essence should be given no more weight than similar provisions in a mortgage," and Vice-Chancellor Gridley, in a 19th Century New York case said that

"... the proposition maintained by counsel (that a forfeiture could be worked if the vendee had defaulted after paying most of the purchase money and had improved the land ...) is a bold and startling one... It seems to me that this is too monstrous a proposition to be maintained in the nineteenth century... and would require the court of chancery to be the organ and instrument of every Shylock, who chose to insist upon the rigorous exaction of his pound of flesh."

The objection may be made that if the parties are of sufficient age, then why not allow them to make their own contracts? The answer is twofold:

(a) The contracting parties do not have equal bargaining power and therefore the much vaunted freedom of contract is likely to be more of a snare than a blessing. Thus Walker, in a general text chapter of "Forms for listing, Brokerage and other Contracts" inserts 35 form contracts and every one concerning installment contracts contains a time clause, along with a provision for forfeiture.

Thus, also, Reep's book contains a number of "Points to be Considered in Typical Installment Land Contracts".

---

71 Ibid.
73 Walker, Real Estate Agency (2d ed. 1922). In the form entitled "Agreement for the Purchase of Land, with Provision for the Payment of Purchase Money by Installments, the Purchaser becoming tenant of the Vendor" the following is found: "If said party of the second part shall fail to perform this contract—said party of the first part shall immediately, upon such failure, have the right to declare the same void and retain whatever may have been paid on said contract, and all improvements that may have been made on said premises... and may take immediate possession of the premises and remove the party of the second part."
74 Supra, n. 14.
point 18 being "... forfeiture or partial restitution of purchase money and possession on default... time of Essence."

In Maryland, "The Daily Record Company", Baltimore, Maryland, issues a document entitled "Contract of Sale—Form 19", which contains the printed provisions that "time is of the essence of this contract", and this and the forfeiture provision are in practically every contract form used by Maryland realtors.

Yet it is exactly this type of form contract which is unblinkingly classified as constituting intent of the parties. It is submitted that if the parties were asked the meaning of such clauses they would probably not be able to answer the question in a manner which would shed any light on its actual meaning. If this is so, the use of the intent notion to justify the forfeiture doctrine would seem to be a pure, but dangerous fiction.

On the other hand, vendees of realty do not have such coldly impersonal protection. It is true that they can employ attorneys who can eliminate the various cutthroat provisions, but insistence on their deletion might easily create suspicion that the vendee will not be prompt in his payments and, at best, the consequent haggling will constitute an impediment to the alienability of land, an object of which the law has been extremely solicitous. Moreover, a contract for the sale of land is a device to effectuate transfers and not necessarily to provide attorneys with a means of sustenance.

(b) The second answer to the objection that freedom of contract will be abridged is that the law has abridged many freedoms of the individual when it considers such control to be necessary and in accordance with the economic temper of the times. Thus, although it has been mentioned that the basis for this doctrine was laissez-faire economy, no one can seriously controvert the proposition that the 20th Century has seen a great expansion of governmental regulation and a corresponding diminution of individual liberty.
Although speaking of price regulation, Mr. Justice Roberts said:

"The general rule is that both [the use of the property and the making of contracts] shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm."\(^7\)

This limitation was also recognized in *Home Building and Loan Assoc. v. Blaisdell*,\(^6\) where the U. S. Supreme Court held a Minnesota Statute constitutional which authorized local courts to extend the period of redemption, as concerned mortgages past and present, for such time as the court "may deem equitable" in view of the emergency of 1933.

It is submitted that a contention that private rights concerning installment land contracts cannot be regulated in a comparable manner is hardly tenable today.

The anomaly of the rule is nowhere more apparent that when it is compared with basically similar transactions: i.e. mortgage law and the law governing the conditional sale of chattels. In Maryland, Equity will allow a mortgagor, after default, to redeem within a reasonable time, although the mortgagee's estate was absolute at common law.\(^7\) We have seen how essentially similar are the land contract and the mortgage, and therefore, it seems strange for the law to allow mortgagors a reasonable time in which to redeem, while cutting out purchasers under a land contract with no remedy whatsoever.\(^8\)

Although Maryland has not adopted the Uniform Conditional Sales of Goods Act, Professor Arnold states\(^9\) that "... [From *C. I. T. Corporation v. Powell* and *Lincoln v. Quyan,*] ... it is possible to infer that in Maryland, the

---

\(^6\) 290 U. S. 398.
\(^8\) Note that a ground rent lessee has a statutory six months in which to make up any defaults.
seller will be permitted to enforce whatever remedies are stipulated for in the contract except that if it is necessary for him to assert his claims in Equity, the latter Court will not enforce what it may consider to be a forfeiture."

Exactly why a purchaser of a chattel should be accorded the protection of the Maryland Legislature, while a vendee of land is not, is not rationally explainable. The price that is usually paid for such a rigid adherence to the rule, i.e., a distortion of the doctrines of waiver and rescission, hardly seems worthwhile.

V. BUSINESS ATTITUDE

The view of the real estate people ranges from a complete indifference, to an approving awareness of the advantages of the rule. The leading body of American realtors, the National Association of Real Estate Boards, has never done anything about the problem, nor does it plan anything in the future. When asked for an expression of its attitude in answer to a number of specific inquiries on the topic, it replied evasively that,

"The National Association has never taken any action on installment land contracts. However I can assure that from past experience, I am sure our Association would favor regulation and a tightening up of state laws covering such agreements." 81

Its organ, "The National Real Estate and Building Journal" has been silent on the subject since its inception, and the standard real estate texts 82 have been equally non-committal about any reform.

For instance, Samuel Reep, past Chairman, Mortgage and Finance Division of the National Association of Real Estate Boards writes that,

80 However, retail installment selling in Maryland is now regulated by statute. See Md. Code Supp. (1947) Art. 83, Sec. 118. This statute provides that no seller shall receive any instrument from any buyer which provides for repossession of goods or for acceleration of any payments, if the condition is that the seller feels insecure. Secs. 128 and 129 show that a buyer can redeem even if he has defaulted. Sec. 130 contains a provision for foreclosure by sale.

81 Contained in a letter dated May 7, 1947, received from C. M. Jones, Director, Dept. of Information, National Association of Real Estate Boards.

82 See BENSON AND NORTH, REAL ESTATE PRINCIPLES AND PRACTICES (Rev. Ed. 1938); MacChesney, op. cit., supra, n. 13; Reep, op. cit., supra, n. 14.
"... mortgage law and contract law have come to be two distinctive fields of legal specialization. Many statutes have been enacted which apply to the one and not to the other. The central practical business problem of land contracts, in distinction from second mortgages, is in the difference in time required to get title to the property in case of default. This difference in time is the real reason why land contracts are preferred to second mortgages by the vendor."

He admits that "the practical effect of cancellation on the purchaser is therefore, a forfeiture of the amount paid on the contract."8

Mr. MacChesney,84 under the auspices of the National Association of Real Estate Boards, gave a series of lectures for a real estate study course, and made the following comments:

"... Land purchase agreements occur frequently in real estate deals... The land purchase agreement is merely another method of transferring title to land. The parties state the terms on which they are willing that the property change hands. In this way, disputes as to what was intended may be avoided... When time is made of the essence... the payment by the purchaser must be made when stipulated or buyer runs the risk that the seller will declare the contract forfeited. In that event, the purchaser loses the payments that he has made. In the same way, performance by the seller must occur within the time stipulated for it in the contract. A delay on the part of either purchaser or seller may furnish the other party with an excuse for failure to perform his part of the agreement... The strict requirement as to time for making the payment under the contract may be waived by the seller's course of conduct, or there may be an element of estoppel which would work in favor of the buyer. Due to the maxim that Equity abhors a forfeiture, the court may find relief for the party who is technically in default which would not be available in an action at law... Thus it will be seen that the courts are open to those who have been injured by a party to a contract for the sale of land."

8 Supra, n. 14.
84 Supra, n. 13.
The above is a perfectly adequate recital of the function of the "magic words", but one cannot believe that a lecturer on real estate could be so naive as to think that Courts actually would help those who have been injured by a party, (to a land contract) who has used one of the forms which his brother member on the Board, Mr. Reep, has so well prepared. "Cooperation and responsibility" are wanted, but as far as the leaders of the real estate business are concerned, they are singularly silent as to how these indeed worthwhile objectives shall be attained.

However, even Mr. MacChesney is willing to recognize a fait accompli, because of discussing mortgages, he says that

". . . The whole problem of the rights of mortgagee and mortgagor under a mortgage . . . deed and foreclosure in connection therewith has been given greater consideration than ever in connection with the severe depression of real property values. There has resulted not only new legislation . . . , but there has also been a complete reexamination of the cases . . . resulting in many instances in what amounts to new law and the reversal of the old cases."

It is again hard to see why there is acceptance of one form of regulation, while the very evil sought to be corrected is allowed to exist in another form, unless it be a tacit recognition of an adequate loophole.

Another member (Mr. Fisher) however, felt that the courts were too soft on vendees, and he even favored legislation "remedying" the situation! He deprecates the fact that

"In case of default . . ., the owner can secure possession, although the courts have in general been unwilling to allow possession to revert to the seller too easily."86

Perhaps some explanation for his attitude can be gotten from the opinion of the New York Times,87 in regard to

85 Mr. Fisher was Assistant Executive Secretary of National Association of Real Estate Boards in 1924.
86 FISHER, PRINCIPLES OF REAL ESTATE PRACTICE (1924) 116.
the Kleinfeld-Reoux Bill, a New York measure killed in committee, in 1937. It states that

"... some very dangerous legislation, although of meritorious purpose, has been apparently side-tracked this year in regard to installment land contracts. If passed, these would have virtually killed the subdivision business. Recommended by the Law Revision Commission, the Kleinfeld-Reoux bill would force sellers to pay back installments of defaulting purchasers, less damages and take over any improvements made upon the land by the buyer."

VI. STATUTORY REFORM IN OTHER JURISDICTIONS

Sixteen jurisdictions have attempted to deal with the broad problem of forfeiture in general, but these statutes have been much limited by judicial construction. In addition, the Restatement of Contracts enunciates the rule that the vendor shall recover only the value of the actual damage that he has suffered.

The most effective type of statute potentially is that which gives Equity power to grant relief against penalties. The California and South Dakota statutes provide that in the event of forfeiture, one may be relieved by paying the other the full amount of the indebtedness. However the California Courts have held this provision inapplicable to land contracts where time is made of the essence, on the theory that the statute is only declaratory of the common law! The South Dakota courts seem to follow suit. In Montana where the same kind of statutory provision is in effect, the vendee is given relief provided he sues independently to get such relief. North Dakota has not ruled on the effect of its provision, which is basically the same.

---

88 Underlining supplied.
89 Much of the material in the following section was derived from the excellent study published by the New York Law Revision Commission, supra, n. 1, and the analysis in Vanneman's acute article, supra, n. 23.
93 Hickman v. Long, 34 S. D. 639, 150 N. W. 298 (1914).
95 Suburban Homes Co. v. North, 50 Mont. 108, 145 Pac. 2 (1914).
96 N. D. Comp. Laws (1913) Secs. 7138, 7188.
Georgia's Civil Code has been favorably construed and the vendee is protected from forfeiture, provided that he allow the vendor to deduct all damages that result from his (vendee's) breach. On the other hand, the Oklahoma Courts state that since the vendor and vendee are in pari delicto, the vendee cannot recover any prior installments that he has paid. Maine, with the same type of statutory provision does not seem to have ruled on the subject as yet.

Canada has seen the advent of statutory intervention in two of its provinces; Alberta and Saskatchewan. Although both statutes, in effect, merely turn the matter over to Equity, that has not prevented the Courts on those jurisdictions from construing them very liberally and the vendee is accorded a large amount of protection against forfeiture.

England, in a Privy Council decision, held that although the vendee could not get specific performance when he defaulted in payment under an installment land contract (where time was made of the essence and a provision for forfeiture was included in the contract), he could apply to the Court for relief against the stipulated forfeiture. This decision, incidentally, was handed down in absence of any statute.

Another type of statute provides for a period of "grace" in which the defaulting vendee can compensate the vendor and reinstate his rights under the contract. In Arizona, the period of grace depends on the amount that vendee has paid (the length of time varies directly with the amount paid). South Dakota allows vendor to foreclose, but the court is given wide discretion and can prevent the

100 See, supra, n. 46.
102 See generally Vanneman, op. cit., supra, n. 46.
103 Steedman v. Drinkle, op. cit., supra, n. 46.
105 For example, if vendee has paid 20% or less, vendor must wait thirty days before he can enforce the forfeiture; if vendee has paid from 20% to 30%, vendor must wait sixty days; and so on, up to an amount over 50%, for which vendor must wait nine months.
strict letter of the contract from being followed when it will result in undue harshness.

Iowa,\textsuperscript{106} Minnesota,\textsuperscript{107} and North Dakota\textsuperscript{108} evidently feel that their respective Legislatures were not enacting an "I mean it" type of Statute\textsuperscript{109} because the grace provision has been construed to allow vendors an effective remedy against vendees without the necessity for going through foreclosure proceedings.\textsuperscript{110}

The third type of statute is of an emergency nature. Thus, in the depression of 1933, the Legislature of Iowa,\textsuperscript{111} Michigan,\textsuperscript{112} Minnesota,\textsuperscript{113} Nebraska,\textsuperscript{114} Texas,\textsuperscript{115} and Wisconsin\textsuperscript{116} provided that the Courts could grant extraordinary relief in cases where it would be inequitable to deny such relief, regardless of any terms in any contract.

However, such laws were applicable only during the 1933 depression, and have not, for the most part been very effective. In fact, devices were employed to get around any possible softness into which a court might be tempted. For example, attorneys, knowing that a court might be somewhat quick to find waiver, wrote contracts which provided that a waiver of any breach by the vendor should not be deemed to be a waiver of any other breach, thus effectively cutting off another possible avenue of escape for the vendee.

It can be seen, then, that if a statute is capable of any sort of construction, there is a tendency to construe it strictly and to practically undermine the very purpose of such legislation. The Canadian statutes seem much more

\textsuperscript{106} Iowa Code (1935) Secs. 12389-12395.
\textsuperscript{107} Minn. Stat. (1927) Sec. 9576.
\textsuperscript{108} See notes to N. D. Comp. Laws (1913) Secs. 8119-8122, and Secs. 8122 and 8122-a as added by N. D. Comp. Laws (Supp. 1913-1925).
\textsuperscript{109} Vanneman, \textit{op. cit.}, supra, n. 23.
\textsuperscript{110} Vendor must serve written notice of the default on the vendee. This gives the vendee thirty days in which to pay the entire amount. If he does not, vendor may foreclose. In effect, the courts have construed this to mean that the vendee has \textit{only} thirty days and thus vendor has the remedy of strict foreclosure by the simple expedient of writing a letter.
\textsuperscript{111} Supra, n. 106, see specifically Sec. 12394.
\textsuperscript{113} Minn. Stat. Supp. (1938) Secs. 9376-1 and 9576-6, as amended by Ch. 68 (1935).
\textsuperscript{114} Neb. Comp. (Stat. Supp. 1935) Secs. 20-21, 159-20, 159-21, 164.
loosely drawn than the California type and yet the Canadian courts seem much more responsive than the California courts, to the manifest intent of the legislature.

The major defect of even the better drawn statutes are that they do not expressly spell out what they mean by "installment contract", nor do they provide that the statute is to be applied to such contracts, in specific terms. Moreover, the time device is not even mentioned, thus ignoring one of the largest loopholes. Finally, to preclude a common judicial "squirm" there should be at least a notation in the statute itself, that it is not merely declaring the common law, but that it governs all prospective transactions to which the statute is applicable.

APPENDIX

PROPOSED STATUTE OF MARYLAND

"A Bill" Entitled

An Act to Regulate Installment Contracts for the Purchase of Land.

WHEREAS: The present state of the law is inequitable because:

(a) It allows an unconscionable forfeiture to be worked, many times to the detriment of those who can least afford same.

(b) It allows an inordinate amount of damages to be agreed upon by contracting parties, contrary to settled principles of Equity and Contract.

(c) It is not in accord with the law concerning mortgages, in these respects.

(d) It is not consistent with the everyday workings of our economy,

AND

WHEREAS: It seems desirable to eliminate these defects and abuses, and to substitute a more just and workable rule,

117 See Vanneman, op. cit., supra, n. 23.
SECTION I—Be it Enacted by the General Assembly of Maryland that:

Article A—In General

1—Whenever the vendee in an installment land contract defaults in a payment of principal, taxes or assessments, the contract shall not terminate notwithstanding any provision in the contract to the contrary. Instead, the vendor may go into a court which possesses equitable jurisdiction and request that the contract be terminated. This court shall have power to equitably adjust the rights of all the parties thereto, and shall ascertain what is a reasonable time for the vendee to pay the defaulted payment. It shall have power to decree that, at the end of such reasonable time:

a—The vendor may terminate the contract, provided that:

1—If the vendee has paid not less than twenty (20) per cent, nor over fifty (50) per cent of the stipulated purchase price, this time shall be not less than thirty (30) days measured from the date of default.

2—If the vendee has paid over fifty (50) per cent of the purchase price, this time shall not be less than six (6) months measured from the date of default.

b—If the contract is terminated, the vendor shall have the right to sue the vendee in ejectment, or

c—If the contract is terminated, the vendor shall have the right to sue the vendee for breach of contract.

2—The above three remedies shall be the only remedies of the vendor. (But the vendor shall have the right to sue both in ejectment and for breach of contract.)

3—In the event of termination, or ejectment, or a suit for breach of contract, the vendee shall have the right to counterclaim for the amount of the installments of principal that he has paid minus:
a-The damage that the vendor has suffered, and
b-A reasonable rental for the period in which the vendee was in possession.
(Note: The vendee shall not have the right to sue for any taxes, assessments or insurance for which he has paid.)

¶4-If the vendee has made any permanent improvements on the land, which have resulted in an increase of its market value, the vendee may also sue for such increase, provided, however, that he shall not be able to recover more than the cost of such improvements.

Article B—Applicability
¶1—This statute shall apply to all installment contracts for the purchase and sale of land, which are made after the date of this statute, regardless of any provision in any contract to the contrary.

¶2—This Statute is in addition to, and not merely declaratory of, the common law.

Article C—Definitions
¶1—An installment contract is a legally binding executory agreement which (has as its purpose the transfer or) is intended in any way to effect a transfer of an interest in land by the following method:

Whereby the vendee (or any individual, partnership, corporation, agency or any other legal unit which acts for the benefit of the vendee) promises to pay to the vendor (or any individual, partnership, corporation, agency or any other legal unit which acts for the benefit of vendor) an amount of money (or other lawful consideration) at stated periods after the completion of the contract which may be weekly, bi-weekly, monthly, quarterly, semi-annually or annually. (But this statute shall apply even though the payments are not pursued according to the previously referred to periods, as long as the method of payment is essentially in the form of deferred payments numbering more than one, exclusive of any down payments.)
Section II—And be it further Enacted that this Act shall take effect on .........................................................."