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Strict Foreclosure on Land Contracts

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It is very common practice, in contracts for the sale of land where installment payments are to be made and title is to be conveyed at a future date and the vendee is put into possession, for the contracting parties to agree upon some surprisingly severe stipulations which ignore any equality of equities. Usually there is a provision that all payments must be made promptly on the very day they fall due. Not infrequently the hour of the day is fixed. Then the vendor arms himself with certain alternative powers in the event of breach by the vendee; he may declare that the contract will be terminated on notice or that all obligations of the vendor cease, or that he may proceed to terminate the contract, etc. A very large percentage of these contracts contain provisions to the effect that all payments and all improvements made by the vendee on his default and vendor's election, shall be forfeited as liquidated damages, or retained by vendor as rent for the use of the premises.

Obviously the nearer the vendee approaches a complete performance of the terms of the agreement the more serious, from his point of view, is a breach of one of the stipulations. It sometimes happens that a vendee, because of circumstances entirely beyond his control, fails to meet a final and comparatively small payment, in which case the vendor has the contract so framed that he may cut off all the vendee's interests irrespective of the damage the vendor may or may not have suffered.

The severity of these cut-throat provisions and their frequent use suggests at once that the vendor, in contracts of this sort, occupies an advantageous position. The parties are generally considered sui juris and as dealing on an equal footing, but the fact remains that the net result of their bargaining in specific terms of the contract is heavily in favor of the vendor. It seems
hardly possible that vendees, as a class, should trust the future with such sublime confidence while vendors, as a class, should be confirmed pessimists. It is believed that the vendor class is simply taking advantage of its economic position of strength to force upon vendees the type of contract which it desires. The suggestion has been made, which from the facts seems fairly obvious, that in reality the parties to this type of contract are not to be fairly considered as dealing on equal terms, and that the law should protect the vendee against these stipulations for self help. Not infrequently large home building and development corporations, and even individuals subdividing large tracts of land, equipped with form contracts carefully worked out to safeguard their interest, deal with private individuals, often with little or no business experience. The vendor thus arms himself with a power so unusual and capable of unfair exercise that the usual generalizations of legal theory ought not to control where he is driving his hard bargain to its limit within the words of the bargain.

Perhaps it may be reasonable to urge at the outset that the vendor-vendee relationship is one in which the vendee needs some watchful protection on the part of the courts. Quite generally the relation is compared, by analogy, to that of mortgagor-mortgagee. The relations are quite strikingly parallel when the vendee is put into possession. The mortgagor, however, a necessitous person, though sui juris, is not permitted to place clogs upon his equity of redemption by agreement. Should a vendee in his contract be allowed a greater freedom with which to divest himself completely of all his equities?

2(1924) 2 Tex. L. Rev. 496.
3Ballantine, Forfeiture for Breach of Contract. (1921) 5 MINNESOTA LAW REVIEW 329, 352: "Just as the law refuses to individuals the remedy of seeking redress by self help without resort to courts, so it should regulate the remedies which they provide for themselves to enforce their contracts, not only by refusing to enforce them, but also by relieving against unconscionable, oppressive and ruinous exactions in the nature of penalties and forfeitures."
42 Williston, Contracts, sec 791-793. See also Lloyd, (1915) 29 Harv. L. Rev. 117, 121. "Neither law nor equity has dealt adequately with oppressive installment contracts." 156 L. T. 311. There should be some safeguard against a vendor in a position to dictate terms.
52 Williston, Contracts, sec. 791. Some weaknesses in the analogy are pointed out, but it is there admitted that it is almost complete when vendee is in possession. See (1921) 2 Wis. L. Rev. 307 for discussion of the relationship. Ferguson v. Blood, (C.C.A. 9th Cir. 1907) 152 Fed. 98.
6In Kreuscher v. Roth, (1922) 152 Minn. 320, 324, 188 N. W. 996.
While by the decided weight of authority, the vendor is not allowed strict foreclosure of a land contract, in a few jurisdictions this remedy is still available to him. In an early case in Wisconsin, the vendee having defaulted in making certain deferred payments according to his contract and the vendor having brought his action of foreclosure, the trial court directed a sale of the property. On appeal the decree was revised, the court holding that the decree must direct a strict foreclosure. The usual method is for the court to fix a new date on which vendee is given opportunity to perform his contract and, if he fails to comply, thereafter all his interests in the contract terminate and the vendor is restored to possession.

This decision was rendered before the legislature of Wisconsin had abolished strict foreclosures of mortgages and required foreclosure by sale. The remedy manifested surprising vitality, however, when it was held not to be affected by such statute. The court's reason for so holding was given in Church v. Smith. Lyon, J., said:

"It is quite manifest that the statute has reference to ordinary mortgages, which leave the fee of the mortgaged premises in the mortgagors only to be divested by foreclosure sales and not to a security like that in the present case, which, although analogous to a mortgage, vests or leaves the fee in the mortgagee. In the former case a sale may be deemed necessary to divest the mortgagor of his fee, while in the latter case the mortgagor has produced the same result by his own act or contract, and, having nothing but an equitable interest in the land, he may be divested thereof by a decree or judgment of the court and a sale is unnecessary."

...it was strongly urged that the relation was similar to that of mortgagor-mortgagee and that the court will not permit any clogging of the equity of redemption in that case and it should with equal care guard the interest of the vendee by disregarding a provision in the contract forfeiting the vendee's estate if he failed to make payments promptly.

72 Cook, Cases on Equity 594, note 25; Pound, (1920) 33 Harv. L. Rev. 833; 36 Cyc. 792.
8Button v. Schroyer, (1856) 5 Wis. 598. Same view in Todd v. Simonton, (1867) 1 Colo. 54.
9Wis. Laws 1859, ch. 195, sec. 5, Wis. Statutes 1929, sec 278.01.
11(1876) 39 Wis. 492.
12Citing Wood v. Trash, (1858) 7 Wis. 566.
13It is an interesting coincidence that the very year that the
This reason has been characterized as a "palpably fallacious argument." In the court seemed over anxious to preserve this remedial device for use by vendors. The fact that the title to the land is in the vendor should have afforded the court no difficulty if it had thought it wise to require foreclosure by sale as all the parties are before it and it would be a simple matter to direct the vendor to convey to the purchaser at the foreclosure sale.

In *Taft v. Reddy*, the vendor sought specific performance of the contract and requested a sale of the land. The court granted it. Strong equitable reasons support this procedure. As a recent writer said:

"The vendees' rights in the land would be protected because they would be given an opportunity to pay the purchase price and take title, and the vendors' rights under the contract would be preserved, as they would be given a decree for the payment of the full purchase price, with a right to collect it out of the land."

Such argument seems cogent in strict foreclosure cases. While there is some suggestion that the bar in Wisconsin had considered this remedy as having fallen into disuse if not discredit, a recent decision clearly revives it, and the many cases which have reached the supreme court seem to indicate that it is frequently employed. It is believed that foreclosure by sale should be the remedy adopted in all foreclosure of land contract cases just as in mortgages and for precisely similar reasons. Instead, however, the court clearly preserves the strict foreclosure remedy to the vendor.

One of equity's recognized functions is to relieve against forfeiture and penalties, but strangely the courts, in many of these foreclosure cases in denying any relief to the vendee, declare

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Wisconsin court announced this doctrine the supreme court of Michigan, in *Fitzhugh v. Maxwell*, (1876) 34 Mich. 138, declared that there could be no strict foreclosure of land contracts. "To apply the doctrine of strict foreclosure to the vendor's lien, and not to an express mortgage is a direct reversal of all rules and in violation of every equitable principle and analogy."

Dean Pound in (1920) 33 Harv. L. Rev. 833.


*Oconto Co. v. Bacon*, (1923) 181 Wis. 538, 195 N. W. 412, 40 A. L. R. 175.

*First Nat'l Bank v. Agnew*, (1878) 45 Wis. 131; Superior Consolidated Land Co. v. Nichols, (1892) 81 Wis. 656, 51 N. W. 878; Nelson v. Jacobs, (1898) 99 Wis. 547, 75 N. W. 406; Dickson v. Loehr, (1906) 126 Wis. 641, 106 N. W. 793 (Remedies inconsistent and vendor's election discussed); Fox v. Williamson, (1907) 133 Wis. 337, 113 N. W. 669.
that the case has nothing to do with forfeitures. It is explained
that the vendee simply fails to bring himself within the field of
 equitable relief.20 If this position is taken it is simply because the
court chooses so to view it. Where a vendee has made large
payments, perhaps all but the last, and in addition has added
lasting improvements to the land, and the court decrees a strict
foreclosure against such vendee, who, at that time, for reasons
beyond his control is economically helpless, an assertion by the
court that this has nothing to do with forfeitures is a denial of an
obvious fact.

A vendee in default is not, of course, in a strong position to
ask affirmative relief, and a vendor ready and willing to perform
is. It should be remembered, however, that the equity court has
the parties before it, and that it has a large discretion in moulding
its decrees. In fact the courts in refusing to relieve against for-
feitures in such cases are standing on the idea before mentioned
that parties, sui juris, have made the contract and they must stand
by its terms,21 or as is frequently stated, a court of equity cannot

20Oconto Co. v. Bacon, (1923) 181 Wis. 538, 195 N. W. 412, 40
A. L. R. 175. As to the facts in this case the court was obviously
correct in refusing relief as the vendee was in a strikingly weak position.
Ballantine in (1921) 5 MINNESOTA LAW REVIEW 329, 341 says: "The law,
while looking with righteous abhorrence on forfeitures, and washing its
hands of their enforcement, after the manner of Pontius Pilot, yet has
been reluctant to intervene with affirmative relief or to formulate any
consistent principle condemning the validity of cut throat provisions
which in their essence involve forfeiture. Although the law will not
assist in the vivisection of the victim, it will often permit the creditor
to keep his pound of flesh if he can carve it for himself."

21In Benedict v. Lynch, (1815) 1 Johns. Ch. (N. Y.) 370, 376, Chan-
celler Kent said: "The notion that seems too much to prevail that
a party may be utterly regardless of his stipulated payments, and that
a court of chancery will, almost at any time, relieve him from the
penalty of his gross negligence, is very injurious to good morals, to
a lively sense of obligation, to the sanctity of contracts, and to the
character of this court. It would be against all my impressions of the
principles of equity to help those who show no equitable title to relief."
See also Hansborough v. Peck, (1866) 5 Wall. (U.S.) 497, 18 L. Ed.
520. In Oconto Co. v. Bacon, (1923) 181 Wis. 538, 195 N. W. 412,
40 A. L. R. 175; Rosenberry, J. said:
"Parties should have some regard and respect for the terms of
their own contracts and ought to make the terms thereof conform to
their real understanding and not rely wholly or even largely upon a
court of equity for protection from their own acts. In Parsons v.
Smilie, (1893) 97 Cal. 647, 657, 32 Pac. 702 it was said: "A court of
equity cannot undertake to set aside the deliberate contracts or obliga-
tions of parties fairly and freely assumed because time may show that
the obligation was onerous or unprofitable." Also Sorum v. Sorensen,
(1922) 45 S. D. 313, 187 N. W. 423.
make contracts for the parties. The vendor, in instituting a suit for strict foreclosure, however, recognizes the contract as still subsisting only for the purpose of the suit and to get rid of the vendee's equity.

The reason for the default by the vendee is immaterial. It would be agreed that if he failed to perform because of ignorance, surprise, fraud, accident or mistake that he would receive relief, but the fact that he is the victim of an economic depression, or, despite all human effort and best intentions, is simply unable to meet the payment, or that the vendor is anxious for an excuse to declare the forfeiture owing to his advantageous position, the economic forces having worked in his favor, these are all immaterial considerations. Professor Ballantine concludes that:

"By the great weight of American authority no relief can be afforded against express conditions precedent inflicting forfeiture where the contract makes time of the essence, although the delay may be very slight and although the buyer has paid a large part of the price and has greatly improved the land. The vendor is entitled to the land, with all improvements, fixtures and growing crops, and in addition to the purchase money already paid."24

In Nelson Realty Co. v. Seeman,25 although the vendee was killed in France in the war and his administrator pleaded nothing in the estate with which to meet the remaining payments, and the payments made exceeded the vendor's damage, the Minnesota court denied any relief against forfeiture because the contract called for same. The record of the case shows that the vendor actually profited by the breach. The trial court found the vendor's damage was $257, while the amount forfeited was $1000. Thus the vendor made a profit of $743 for which the vendee's estate received nothing.26

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23 McDonald v. Kingsbury, (1911) 16 Cal. App. 244, 116 Pac. 381; Durfee & Durfee, Foreclosure of Land Contracts, (1896) 7 Mich. St. Bar Ass'n J. 166, 169, "Where the purchaser has made large payments and valuable improvements and the vendor has a correspondingly comfortable margin of security and especially where the default of the purchaser is not deliberate but is either due to oversight or to misfortune beyond his control, he deserves and is likely to get, in any court of equity, indulgence by way of specific enforcement of the contract, upon his making good his default."
24 (1921) 5 MINNESOTA LAW REVIEW 345.
25 (1920) 147 Minn. 354, 180 N. W. 227. See comment by Prof. Ballantine, (1921) 5 MINNESOTA LAW REVIEW 329, also (1921) 5 MINNESOTA LAW REVIEW 466.
26 (1921) 5 MINNESOTA LAW REVIEW 466.
Another Minnesota case strikingly illustrates the same doctrine.27 The action was one of specific performance, but the court admitted that as presented it virtually amounted to one for strict foreclosure. The defendant was obligated in a mortgage which plaintiff owned in the sum of $15,000 and could not pay. It was agreed that the plaintiff would foreclose and buy in the land, which he did, paying $16,063.90. The defendant agreed to pay this sum, and, on account, he paid $5,515.90. Time was extended for final payment. The hard times of 1893 and following intervened, and the defendant could not meet the payments even on the new date. The land was worth at the time of this action only $5000, so that a depreciation of several thousand dollars was absorbed by the defendant. The trial court found that there was due the plaintiff $13,344.44 and set a ninety-day period for payment. The defendant failed to comply. The plaintiff by the default of the defendant, thus became the owner of the land by virtue of a strict foreclosure and in addition the court entered a judgment of $8,344.44 against the defendant. The net result was that in addition to the depreciation which the vendee should properly bear, he lost the payment of $5,515.90, the land worth $5000, and is obligated to the plaintiff in a judgment of $8,344.44. If this case were one of strict foreclosure and the court states that "it so treats it," the judgment in addition to forfeiture seems clearly wrong. It would seem the decree of strict foreclosure should terminate the contract.28 Such cases show adherence to the "sanctity of contract."
and should stimulate a "lively sense of obligation," but they seem to carry the contract doctrine to such extreme limits as to work severe hardships and injustice.

The English courts have developed a much more liberal rule respecting the forfeiture of payments made by vendees. The leading case is *Steedman v. Drinkle*. After pointing out that the penalty would become more and more severe as performance approached completion, the true theory is held to be that "the purchase money paid is to be regarded only as security for the true amount of damages which the vendor had suffered by the purchaser's breach." All that the vendor can justly insist upon is an ample margin of security and this the English view preserves for him.

A difference is made in England, however, between a deposit and subsequent payments in this respect. The former is made at the time the contract is entered into and is a guaranty of performance by the vendee. Such deposit is forfeited if vendee defaults even in the absence of an express forfeiture clause. On the whole, if the amount of the deposit is not unreasonably large this seems a fair result because the vendor may have given up the opportunity to sell to others by virtue of his contract with the defendant, and the measure of his damage would be highly

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See footnote 21 for quotation from Kent, C.

It is interesting to contrast with this view the position taken by the Pennsylvania court in Sanders v. Brock, (1911) 230 Pa. St. 609, 79 Atl. 772, 35 L. R. A. (N.S.) 532. The vendee had paid $2,000, and, after default, the vendor sold the land for a higher price than the vendee agreed to pay. The vendor was allowed to keep the payments, although it seems obvious that he gained by the defalcation instead of suffering any damage. See also a like result in Nelson Real Estate Agency v. Seeman, (1920) 147 Minn. 354, 180 N. W. 227.


In Great West Lumber Co. v. Wilkins, (1907) 1 Alberta L. R. 155, the court "unhesitatingly" held with Howe v. Smith, (1884) 27 Ch. Div. 89, that a deposit, although taken as part pav-
It would seem, however, that even a deposit could be so large as to amount to a forfeiture, in which case the usual relief against penalties should be applied. Greedy vendors have not been satisfied with the retention of deposits only and they have stipulated for a sacrifice of payments also. The Steedman Case establishes the rule in England as to such forfeitures. However, the vendee cannot recover any payments made in an action at law.

In some of the Canadian provinces these contracts have received considerable attention and some very interesting results and striking methods of handling the problem have been developed. Strict foreclosure seems never to be allowed to destroy a vendee's interest if a forfeiture will result. In Canadian Pacific v. Meadows the vendee had paid $400 on a price of $960 and then, for some reason not revealed, defaulted and the vendor sought to cut off the vendee's interest, the land having greatly depreciated in value. The court fixed a new day on which vendee should pay the balance. Judge Beck, in the course of an interesting opinion, said: "I am of opinion, in view of the likelihood based on comment, was a guaranty of performance and a vendee in default forfeits it, but that rule applied only to a deposit and not to a payment in installments.

A vendee in default cannot, by the great weight of authority, maintain an action to recover payments made in quasi contract or otherwise. 2 Williston, Contracts, sec. 791 and 3 Williston, Contracts, sec. 1476 and cases cited; (1927) 36 Yale L. J. 580; Woodward, Quasi Contracts 177; 59 A. L. R. 189; Perkins v. Allunt, (1913) 47 Mont. 13, 130 Pac. 1; M'Mames v. Blackmarr, (1891) 47 Minn. 331, 50 N. W. 230; Hansborough v. Peck, (1866) 5 Wall. (U.S.) 97, 18 L. Ed. 520; List v. Moore, (1912) 20 Cal. App. 616, 129 Pac. 962; Edgerton v. Peckham, (1844) 11 Paige Ch. (N.Y.) 352; Glock v. Howard & Wilson Colony Co., (1898) 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; (1921) 5 MINNEOTA LAW REVIEW 466. "It would seem only just that where the amount paid by the vendee is much greater than the actual damage sustained by the vendor, the vendee should be allowed to recover the difference in an action in the nature of quasi contract, where the default is inadvertent and not wilful and not made in bad faith and where the vendee does not repudiate the contract." A striking case refusing vendee relief is Nelson Real Estate Co. v. Seeman, (1920) 147 Minn. 354, 180 N. W. 227.
mon knowledge, that the land in question is worth probably more than twice the original purchase price of $960.00," and that the vendor be confined to his remedy by sale. He continued:

"I think the court ought in every case to consider the interest of all parties who may be affected by its judgment, and, if it can do so without injustice to the plaintiff, it has power and ought to exercise it to refuse a form of relief to which the plaintiff is prima facie entitled and give him another form of relief to which he is also entitled, if by so doing the interests of the other parties will thereby be better conserved." 38

The court was operating under a statute 39 which seems merely declaratory of the equity rule; "Subject to appeal as in other cases the court shall have power to relieve against penalties and forfeitures." The idea that the matter was procedural and not an issue of expressed substantive contractual rights was vigorously dissented from by Stuart, J. After pointing out that vendee's rights are an interest in the land to the extent of the purchase price paid and on payment of the balance a right to specific performance, he declared that he "could not agree that when the court lays its own hands upon the property and orders a sale, calling in a new purchaser and forcing a new agreement, it is thereby merely preserving from destruction the purchaser's rights under the agreement." He said: "By ordering a sale the court gives the purchaser something vastly different from his rights under the agreement." 40

Even more striking, however, is the case of Mortgage Co. of Canada v. Filer 41 where the court went the extreme limit in order to protect a vendee caught in an economic depression with a land contract. It is the more interesting in contrast with the above case, because the lands here had depreciated, a more common factual situation, whereas in the Canadian Pacific Case they had increased in value. The defendant had agreed to pay $328,445 for the land. The value had seemingly depreciated to $271,500 or even less, the valuers not agreeing on the amount. Despite

38 Italics are writer's.

39 Alberta, Statutes 1907, ch. 5, secs. 7 and 8.

40 Even the dissenting judge was willing to go much farther than our American courts which retain strict foreclosure, for he said: "There should be a reference to the clerk to fix the amount due to the plaintiff for principal, interest and costs" and a day for payment be fixed, "and upon non-payment" plaintiff entitled to rescission, "but such order should be accomplished with a reference to the clerk to ascertain the amounts paid to the plaintiff on account of the purchase money and to ascertain the rental value of the premium during the time the defendant has been in possession." Foreclosure by sale seemed to be assumed.

41 (1922) 18 Alberta L. R. 367.
some payments, the vendee, because of interest and taxes, owed $331,000 and he was hopelessly unable to pay. Moreover, there were many sub-purchasers whose interests were involved. The vendor obtained an order "for the determination of the agreement and for a forfeiture of all the rights of the purchaser," virtually a strict foreclosure, as the contract empowered him to do. The court assumed that the usual practice was to put the property up for sale and foreclose the vendee's interests in that method. But it took cognizance of the fact that under the economic conditions then existing the land would not sell for "anything like the amount remaining unpaid," which would be unfair to vendor, in not preserving to him an ample margin of security. Hence the contract must be strictly foreclosed. The court, however, was unwilling to leave the vendee and the sub-purchasers, who had not received title, without some protection and added to the foreclosure decree the following order:

"... reserving liberty to the defendant to apply in this action whenever so advised, to have an inquiry as to the actual damage suffered by the vendor through his default and to be relieved from any mere forfeiture that the plaintiff may be retaining."

The order was explained by the court thus:

"But with the rapid fluctuation of values in farm lands which we know do take place in this country, I think the court ought to contemplate the possibility, that in spite of the present depression, the value of the land may shortly rapidly increase and that the vendor, after being placed as it will be by the order now confirmed in a position to resell as it pleases and to give title, may ultimately realize far more than is now expected out of the lands. I do not think indeed that the vendor should ever be called upon to account for the whole amount that it may realize over and above what was due from the purchaser. That would be placing it in the position of a trustee or receiver. But I think its rights finally to retain as and by way of liquidated damages the amounts received from the purchaser should be subject to revision by the court upon the application of the purchaser. If it should turn out that the vendor realized in full out of resales the whole amount which the defendant agreed to pay, then the vendor would have suffered no damages by the defendant's default and there would have been a forfeiture from which the court might relieve the defendant."

The liberal doctrine of the English court before noted and its equitable result have been approximated in many of our American courts through a rather strained meaning given to rescission

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42 Italic the writer's.
and in others by an easy facility for discovering waivers, but the readiness of some of the Canadian courts to act in relieving against forfeitures either by virtue of an inherent power of equity or by codifying statutory authorization stands in startling contrast to the attitude of a few American courts. Statutes conferring power upon these courts to act have not only not been utilized, but by construction they have been rendered, to a greater or less degree, useless.

The enabling act referred to, which has been adopted in at least four states was first proposed in the David Dudley Field Code in New York. It is as follows:

"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful or fraudulent breach of duty.

Such statutory provision as has been pointed out was badly needed and under it the condition of a vendee even though in default unless "grossly negligent, wilful or fraudulent," should be very considerably improved.

The first case, in California, to construe this statute, while not one of strict foreclosure, is important for our purposes in that it more or less fixed the court's attitude toward the legislation and it has controlled in the foreclosure cases. The plaintiff was developing a large tract of land and, to facilitate prospective customers in their building operations, he was desirous of having a lumber yard in the vicinity. Accordingly, he sold the lot in

167 Mo. App. 553, 152 S. W. 421 (where vendee was allowed directly to recover amount of price paid less damages to vendor); Waters v. Pearson, (1914) 163 Iowa 391, 144 N. W. 1026; Pierce v. Staub, (1906) 78 Conn. 459, 62 Atl. 760; Frink v. Thomas, (1891) 20 Or. 459, 62 Pac. 717; Howard v. Stillwagon, (1911) 232 Pa. St. 625, 81 Atl. 807; See (1924) 2 Tex. L. Rev. 496, (1929) 7 Tex. L. Rev. 294, (1922) 6 Minnesota Law Review 422.

4See 33 Harv. L. Rev. 952 for authorities on waivers.

4aCal. Civ. Code 1906 sec. 3275; Montana, Rev. Code, sec. 6039; N. D. Compiled Code, 1913 sec. 7138; S. D. Rev. Code, 1919, sec. 1958. It is possible that Oklahoma has a similar statute although the writer has not found it. It seems to be referred to in (1922) 32 Yale L. J. 66, note 6 and incidentally in the Oklahoma court's surprising construction thereof to the effect that by inserting the clause in the contract the parties were equally guilty and hence the law would help neither of them to recover either the money or the land. Kershaw v. Hurtt, (1917) 66 Okla. 117, 168 Pac. 202.

4b(1921) 5 Minnesota Law Review 329, 350.

4cParsons v. Smilie, (1893) 97 Cal. 647, 32 Pac. 702.
question to the defendant, who paid $1073.60, a fair price. It was stipulated in the contract of sale that the defendant should operate a lumber yard for five years with express provisions for forfeiture of all payments in case of default. At the time the contract was made a land boom existed which soon subsided and the lumber yard, having become useless, was discontinued after about a year. The plaintiff entered for breach of condition and brought an action to compel a reconveyance of the lot and to quiet his title. The defendant insisted on the return of the payment relying on the statute quoted and expressly offered to compensate the defendant for any damage he might have suffered from the breach. The trial court had found that there was no damage. The supreme court denied relief to the vendee, holding that these facts did not come within the statute. It was stated that the problem was not one of the enforcing forfeitures which equity will not do, but that the question was how far equity shall interfere to defeat a forfeiture for violation of a condition subsequent. The statute was treated as a mere codification of the equity rule for relief against forfeitures. This rule was stated to be that where parties have made time of the essence and inserted the express stipulation, equity cannot interfere. Furthermore, it was held that as the breach was as to a collateral matter there was no measure by which equity could determine the damage caused by the breach. The court thought it was quite immaterial that the trial court had found that there was no damage to the plaintiff owing to the fact that the boom had spent itself and the lumber yard had become useless. It was then concluded that:

"A court of equity cannot undertake to set aside deliberate contracts or obligations of parties fairly and freely assumed because time may show that the obligation was onerous or unprofitable."

Legislative assistance by means of the enabling statute was ineffective to secure any different result. To this the suggestion seems cogent that equity relieved against precisely similar stipulations in the case of mortgages. The mortgagor and mortgagee were not allowed to place clogs on the equity of redemption no matter how fairly and freely they acted or how deliberately they assumed the obligation. The net result of the decision was that this statute was made to conform to the court's rather narrow view

of what equity should do in such cases without statutory assistance.

This interpretation of the statute has had its effect upon the foreclosure cases. The courts under it have never preserved the vendee's interests sua sponte, as the Alberta court did. On the contrary, he is compelled to seek relief under the statute by affirmative action.49

Encouraged doubtless by the success encountered in avoiding the obvious intent of this statute but occasionally seeing their contract rights, so carefully fabricated, defeated, by a discovery on the part of the court of a waiver by their own conduct, vendors soon learned to add another cut throat provision to their contracts. The following provision taken from a recent case is illustrative: the waiver of any breach by the vendor "shall not be deemed or held to; be a waiver of any subsequent or other breach of said covenant or agreement, nor a waiver of any other covenant or agreement herein contained."50 The California appellate court in dealing with such a stipulation adhered to the view that parties capable of contracting can make their own contracts with which a court of equity cannot interfere. A forfeiture was enforced against the vendee, the court ignoring the statute.

A final blow was administered to the statute in a foreclosure case51 by excluding from its operation all contracts in which time is made the essence of the contract. This result was reached by construing this statute with another section52 of the code which expressly excepted contracts where time has been made of the


52Cal. Civ. Code, sec. 1492. "Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime." The following cases are relied upon by the court as supporting this rule: Glock v. Howard & Wilson Colony Co., (1898) 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Grey v. Tubbs, (1872) 43 Cal. 359; Martin v. Morgan, (1890) 87 Cal. 203, 22 Am. St. Rep. 240, 25 Pac. 350; Woodruff v. Semi-Tropic L. & W. Co., (1890) 87 Cal. 275, 25 Pac. 354 and others.
essence. The court decided that the same result must have been intended by the legislature here. Some earlier cases were thought to have intimated that equity might relieve despite the presence of this clause, if a showing "such as would appeal to equity be made." The court continued: "What is such a showing as would justify equity to interpose its remedial power in favor of the defaulting vendee in such a case none of the cases,—at least, none coming under our immediate observation—has pointed out. But, however this all may be, we do not think that the present case falls within the doctrine of the rule above adverted to," even though it was admitted by the court that the plaintiff in this case who was seeking strict foreclosure and enforcement of forfeiture of payments made—"designedly and with the intent of causing the defendant to become in default in the matter of compliance with a vital provision of the contract" laid a trap for the vendee. The facts were that the defendant, an alien who did not understand our tax laws and who had contracted to purchase the land from the plaintiff, agreed to pay the taxes. He relied upon the offer of the plaintiff to see that the tax notices reached him. The plaintiff directed the officials to mail the notices to the defendant in care of plaintiff. It was found as a fact that the vendor deliberately planned the default by concealing the receipt of the notice from the defendant in order to effect a forfeiture of payments made. The court refused the statutory relief to the defendant, ruling that the case did not come under the statutory provision. Relief was denied to the plaintiff, however, on an equitable estoppel doctrine instead of granting the relief which the vendee expressly requested under the statute. The actual decision was sound enough. There was clearly an estoppel, but the express ruling that these facts did not justify relief under the statute was fatal to its effective use. Certainly the field of usefulness of section 3275 is very decidedly limited if not entirely destroyed.

53As a result of this narrow view of the statute one finds it has been used for vendee's benefit very rarely if at all in foreclosure cases. Odd Fellows' Savings Bank v. Brander, (1899) 124 Cal. 255, 56 Pac. 1109; Sparks v. Hess, (1860) 15 Cal. 186; Keller v. Lewis, (1880) 56 Cal. 466; Fairchild v. Mullan, (1891) 90 Cal. 190, 27 Pac. 201; So. Pac. Ry. Co. v. Allen, (1896) 112 Cal. 455, 44 Pac. 796; Rayfield v. Van Meter, (1898) 120 Cal. 416, 52 Pac. 666. The same tendency to ignore statutes is seen in other actions, for example actions to quiet title. Neher v. Kauffman, (1925) 197 Cal. 674, 242 Pac. 713.

54McDonald v. Kingsbury, (1911) 16 Cal. App. 244, 116 Pac. 381 made a half-hearted use of it in a case which seems quite as much an equitable estoppel as the case of Collins v. Eksoozian, (1923) 61 Cal. App. 184, 214 Pac. 670.
The supreme court of Montana recognized that the statute provided a remedy for the party in default by which he might secure relief against a forfeiture if he could allege and prove facts upon which it would be equitable to relieve him from the consequences of his default. To this extent it is declared to be a modification of the general rule which denies to a defaulting vendee any relief. Against the contention of the vendee that the vendor-plaintiff because of the statute must offer to restore the payments made, less his damage, as a condition to coming into equity, it is pointed out that this remedy is not a rescission of the contract. Instead it was one in which the vendor is relying on the contract, no longer a vital instrument because of vendee's breach, to enforce his right to have it terminated. In other words, it is a strict foreclosure without the saving grace of a new date and an opportunity to the vendee to perform. Likewise, in an action to remove cloud on title and terminate the rights of the vendee the same problem is presented. The court confesses that there would seem to be no clearer case for the application of the statute than cases of the character here involved. The contract admittedly calls for a forfeiture, but nevertheless, by its terms is reserved to the vendor the power to act under the contract, to terminate the same, and the only protection the vendee has seems to be an independent action under the statute. If this is allowed, which seems not yet decided, it would involve needless litigation. It is not adequate protection to terminate the contract and leave vendee to a separate action. Finally, it seems a little significant that in this jurisdiction no case of foreclosure of the contract was found in which any defense under the statute was made. For some reason attorneys in defending strict foreclosure cases seemingly hesitate to make use of it.

In South Dakota the purpose of the section is stated to be to allow plaintiff to "recover back the money so paid, less the amount of damages which the other party has sustained by reason of his failure to comply with the terms of the contract."

55Cook-Reynolds Co. v. Chipmen, (1913) 47 Mont. 289, 33 Pac. 694; Clark v. American Development Mining Co., (1903) 28 Mont. 468, 72 Pac. 978.
56Suburban Homes Co. v. North, (1914) 50 Mont. 108, 145 Pac. 2.
An express stipulation for a forfeiture will not prevent relief, and the court declared that the statute should be applied in all cases which can be brought within its provisions. But if the vendor seeks to quiet his title as against the contract or a strict foreclosure is sought, the statute does not apply as by the view of the court no forfeiture problem is then presented.

In North Dakota the statutory provision does not seem to have been resorted to very frequently by defaulting vendees. In the cases in which the section has been utilized the facts have been pretty strongly in favor of the vendee. Some significance may be attached to the fact that the commission codifying the laws of 1913 in North Dakota cite under this section the case of Parsons v. Semille in California already shown to have rendered the section ineffective.

This review of the treatment which this section of the Field code, rejected in New York, has received at the hands of the courts in the states where it has been made a part of the statute law, shows that it has not been effective in protecting the defaulting vendee. In foreclosure cases it has been treated as inapplicable. When a court of equity refuses to do equity in an exercise of an inherent power, a statute attempting to confer the power upon the court will likely receive scant consideration. It is difficult to see how the legislatures could have been more specific, but apparently something more in legislation is necessary before

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50Bates v. Loffler, (1911) 28 S. D. 228, 133 N. W. 283. The supreme court modified the trial court's decree for plaintiff by fixing a period of ninety days within which the vendee could perform, but in event of failure, his interests are cut off and title quieted in plaintiff. In other words strict foreclosure. Court does not consider this a rescission, in which case the payments would be returned, but an action to foreclose and refused any relief to vendee under the statute.

51Hickman v. Long, (1914) 34 S. D. 639, 150 N. W. 298; Taylor v. Martin, (1927) 51 S. D. 536, 215 N. W. 695. Court ignores the forfeiture statute, indeed it is not raised at all, for the reason that strict foreclosure is thought to have nothing to do with a forfeiture, just as in Oconto Co. v. Bacon, (1923) 181 Wis. 538, 195 N. W. 412, 40 A. L. R. 175.

52Bennett v. Glaspell, (1906) 15 N. D. 239, 107 N. W. 45; Johnston Farm Investment Co. v. Huff, (1925) 52 N. D. 589, 204 N. W. 333. Attorneys in this case relied largely on Oconto Co. v. Bacon, (1923) 181 Wis. 538, 195 N. W. 412, 40 A. L. R. 175 which said there was no forfeiture. The court found facts favorable to vendee.

54Parsons v. Smilie, (1893) 97 Cal. 647, 32 Pac. 702.

61N. D. Comp. L. 1913, sec. 7138.


63"It should not be admitted that a court of equity has an inferior instinct for natural justice or an inferior power to give effect to it than chancellors possessed three centuries ago." 2 Williston, Contracts, sec. 773.
the vendee in these jurisdictions can be considered as adequately protected against forfeiture.

In Nebraska, Oregon, California, Minnesota and possibly Iowa, whether the vendee's rights shall be foreclosed strictly or by sale, is in the discretion of the court. Quite early in Nebraska strict foreclosure was recognized as a remedy open to the vendor. In Harrington v. Birdsall, however, the court announced a doctrine which has become the pattern for it and other courts.

"The remedy by strict foreclosure of land contracts cannot be resorted to in all cases. The remedy being a harsh one, courts of equity will decree a strict foreclosure only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted in cases where it would be inequitable to refuse them. If the vendee or purchaser has not been guilty of gross laches, nor unreasonably negligence in performing the contract, a strict foreclosure should be refused on the ground that it would be unjust, even though the vendee may have been slightly in default in making of a payment. So, for the same reason, a strict foreclosure will be denied where the premises have greatly increased in value since the sale, or where the amount of unpaid purchase money is much less than the value of the property. On the other hand, if the vendee, without sufficient excuse, fails to make his payments according to the stipulations of his contract, and for an unreasonable time remains in default, the vendor may have a strict foreclosure—unless some principle of equity would be thereby violated."

The rule announced by Dean Pound approves this discretionary doctrine. He says:

"Strict foreclosure should only be permitted where no substantial payment has been made, or where the present value of the land is less than the amount due vendor, or where—purchaser having made improvements under the contract, vendor elects to pay for them."

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65Carns v. Sexsmith, (1922) 193 Iowa 1080, 188 N. W. 657. The foundation case in California, Sparks v. Hess, (1850) 15 Cal. 186 recognizes that strict foreclosure was an optional remedy with the vendor. See also Kellar v. James, (1878) 33 Cal. 113. Speaking of vendor's remedies, court said: "If payments are not made when due, he may, if out of possession, bring his ejectment and recover possession, but if he comes into equity for relief his better remedy, in case of persistent default on part of vendee, is to institute proceedings to foreclose the right of the vendee to purchase." Fairchild v. Mullan, (1891) 90 Cal. 190, 27 Pac. 201; So. Pac. Ry. Co. v. Allen, (1896) 112 Cal. 455, 44 Pac. 796; Gates v. Green, (1907) 151 Cal. 65, 90 Pac. 189; Denton v. Scully, (1879) 26 Minn. 325, 4 N. W. 41.

66Foster v. Ley, (1891) 32 Neb. 404, 49 N. W. 450; Gallagher v. Giddings, (1891) 33 Neb. 222, 49 N. W. 1126.

67(1893) 38 Neb. 176, 56 N. W. 961.

68(1920) 33 Harv. L. Rev. 834.
The Nebraska rule would seem quite sufficient to protect the defaulting vendee but one finds some seemingly inequitable results in its application to fact situations as they come before the courts and the same tendency to deal rather harshly with vendees. A few Nebraska cases will be found in the note.99

The supreme court of Oregon followed the Nebraska doctrine quoted above, but went a little further in limiting its application by declaring "strict foreclosure is the exception not the rule."90

This court, also, seems willing to enter a decree of strict foreclosure in cases where the report of the case does not show adequately that the equities are adjusted and it sometimes seems to act without sufficient evidence. For instance, in the Flanagan Estate Case,91 the vendee paid $13,250 on a $50,000 purchase price and the court foreclosed the interest strictly without revealing anything received by vendee for his $13,250 in way of value of use, depreciation in value or otherwise. The same tendency is seen in Suburban Homes Co. v. North.92 The court admitted that there was no evidence of the value of the improvements alleged to have been made by the vendee, or even of the amount paid by him. Nevertheless a sweeping decree was rendered for the vendor. Such important facts should not be left to inference.

The theory of the Oregon court, however, is not free from doubt, for in 1911, the court decided a case93 which seems to announce an entirely contra principle and to follow Button v. Schroyer.94 The trial court had apparently directed a foreclosure

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99In Farmers Bank v. Thornburg, (1898) 54 Neb. 782, 75 N. W. 45, purchase price was $2000. $200 cash and $560 deferred payments were made. Vendee was in default for but short time. Evidence not convincing that amount of depreciation in land values equalled the payments made. Contract had to weather depression of 1893. Strict foreclosure granted. The facts in Harrington v. Birdsall, (1893) 38 Neb. 176, 56 N. W. 961 doubtless warranted strict foreclosure. Patterson v. Mikkelson, (1910) 86 Neb. 512, 125 N. W. 1104. "The plaintiff has paid less than 1/6 of the purchase price of the land, had refused to complete his contract, does not ask permission to do so and has delivered possession of the farm to the defendant. Under the circumstances we think the defendant is entitled to a decree of strict foreclosure of his contract." Sponsler v. Max, (1925) 113 Neb. 477, 203 N. W. 566 ($1000 paid on a $10,700 contract price). The opinion leaves one in doubt about the equities of the parties, yet foreclosure decreed.

90(1904) 45 Or. 335, 77 Pac. 485; See also Security Sav. Co. v. Mackenzie, (1898) 33 Or. 209, 52 Pac. 1046.

91(1904) 45 Or. 335, 77 Pac. 485.

92Suburban Homes Co. v. North, (1914) 50 Mont. 108, 145 Pac. 2.

93Miles v. Hemenway, (1911) 59 Or. 318, 111 Pac. 696, 117 Pac. 273.

94(1856) 5 Wis. 598.
by sale. Commenting on this decree, Moore, C. J., said:

"The same conclusion has been reached by the court of last resort of a sister state, where it was held that as the title to the land, agreed to be sold and conveyed, did not pass to the purchaser, that part of a decree foreclosing the vendor's equitable lien which directed a sale of the premises and a recovery of any deficiency, was erroneous."

The case of Sievers v. Brown⁷⁶ which held that there should be a decree directing a sale was disapproved, the learned judge saying that while it "might be an expression of equitable principle, it must be regarded as inconsistent with the current of judicial enumeration." On a rehearing the case was remanded but not with any denial of principles announced but on a rather strained construction of the terms of the contract. Such seems clearly an approval of the doctrine of Button v. Schroyer.⁷⁶ A decision by the same judge who wrote the opinion in Miles v. Hemenway,⁷⁷ however, seems equally strong for the opposite principle. In this case he said:

"The justice of the rule, announced in England and followed in Wisconsin, may well be doubted, and particularly so when the vendor received a large portion of the purchase money; in which case equity would seem to demand that the premises be sold to satisfy the balance due on the contract, upon the payment of which the vendee should be entitled to the remainder of the money derived from such sale."⁷⁸

Many cases indicate, however, that the discretion rule prevails in Oregon, in spite of this seeming contradiction.⁷⁹ On the whole, the

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⁷⁵(1899) 34 Or. 454, 56 Pac. 171. The judge said in this case, however, that it was unnecessary to decide the point.

⁷⁶(1856) 5 Wis. 598.

⁷⁷(1911) 59 Or. 318, 111 Pac. 696, 117 Pac. 273.


⁷⁹Security Savings Bank v. Mackenzie, (1898) 33 Or. 209, 52 Pac. 1046; Gray v. Perry, (1895) 25 Or. 1, 34 Pac. 1091. In Hawkins v. Rogers, (1919) 91 Or. 483, 179 Pac. 565, court very properly made decree of strict foreclosure conditioned upon vendor's paying for improvements made by vendee. If he elects to take back land seems fair to pay for improvements. Sheehan v. McKinstry, (1922) 105 Or. 473, 210 Pac. 167 (one-third of price paid.) Court said: "Nothing has been alleged or even suggested which makes it inequitable in this case to grant the remedy of strict foreclosure; therefore under the facts alleged and proved it was error for the court to refuse the plaintiff the remedy of strict foreclosure." The opinion does not reveal why it was not inequitable. But as it stands the court seems to be cutting off vendee's equitable interests predicated upon the payment of $6000 without explanation. Anderson v. Hurlbert, (1923) 109 Or. 284, 119 Pac. 1092 (vendee who paid over half was refused recovery of payments, and the vendor in cross-action was given strict foreclosure. Vendee, however, was in pretty weak position). Anderson v. Mores, (1924) 110
vendee does not seem to receive equal protection with the vendor in the application of the court's discretion rule. It should be stated by way of caution, however, that data are not available from which to determine with certainty the efficiency of the administration of this discretion rule in any of the states where it applies. It is a discretion in the trial court and the relatively few cases which get into the appellate courts do not furnish adequate data for a determination of the problem, particularly since an appellate court hesitates to question an exercise of discretion on the part of the trial court.

There is a body of statutes, of which the Minnesota provision is fairly typical, which the courts seem also to have construed against the vendees to a greater or less degree.

"When default is made in the conditions of any contract for the conveyance of real estate or any interest therein, whereby the vendor has a right to terminate the same, he may do so by serving upon the purchaser, his personal representatives or assigns, either within or without the state, a notice specifying the conditions in which default has been made, and stating that such contract will terminate thirty days after the service of such notice unless prior thereto the purchaser shall comply with such conditions and pay the costs of service. ... If within the time mentioned the person served complies with such conditions and pays the cost of service, the contract shall be thereby reinstated; but otherwise shall terminate."\(^{81}\)

The supreme court of Minnesota has recently explained the purpose of this statute.\(^{82}\) It is pointed out that before the statute if time were made of the essence of the contract and the vendee defaulted, the vendor could forfeit the contract without notice; if time were not of the essence, the vendor, by giving reasonable notice, could make it so. "This statute," said the court, "takes from the vendor in all cases the arbitrary power to terminate the contract without notice."

Strict foreclosure was early recognized as a remedy available to the vendor,\(^{83}\) in Minnesota, and later it was held to rest entirely within the discretion of the court, depending on the fact situation,

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\(^{80}\) Superior Land Co. v. Nichols, (1892) 81 Wis. 656, 51 N. W. 878.

\(^{81}\) Mason's Minn. St. 1927, sec. 9576. Minn. G. S. 1913, sec. 8081. Omitted portions prescribe the method of service of notice.

\(^{82}\) Graceville State Bank v. Hofschild, (1926) 166 Minn. 58, 206 N. W. 948.

\(^{83}\) Drew v. Smith, (1862) 7 Minn. 301.
whether the foreclosure should be strict or by sale. Now the statute, explains the supreme court: "prescribes the only way in which the vendor may, by his own act, terminate the contract and thereby forfeit the rights of the vendee thereunder." This is no different, in its effect, from strict foreclosure, with the exception that the vendee has a shorter time in which to make his payment. Its much greater convenience and simplified procedure, approximating as it does self help, accounts for its frequent use and the disappearance of the old foreclosure actions. The court said in the Vanderpoel Case, "By force of the statute the contract terminated thirty days after service of the notice given by the vendor, unless the delinquent payments were made prior thereto. The statute is absolute and at the end of the prescribed time all rights of the parties under the contract cease."

Any subsequent tender by the vendee, or prayer for specific performance is ineffective and apparently the extent of the damage suffered by the vendor is an unessential incident. Thus a statute, which in the language of the supreme court of Iowa, was a "merciful provision extending a little grace to a party in default who may be staggering under the load of his undertaking," and, as pointed out by Professor Ballantine, was designed to afford relief against forfeitures, becomes a smoothly working device most favorable and convenient to the vendor and deprives the

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84 Denton v. Scully, (1879) 26 Minn. 325, 4 N. W. 41; Eberlein v. Randall, (1906) 99 Minn. 528, 109 N. W. 1133.
85 Needles v. Keys, (1921) 149 Minn. 477, 184 N. W. 33. (Italics are writer's). See International Realty Co. v. Vanderpoel, (1914) 127 Minn. 89, 148 N. W. 895; Nolan v. Greeley, (1921) 150 Minn. 441, 185 N. W. 647.
87 (1923) 7 Minnesota Law Review 255.
88 International Realty Co. v. Vanderpoel, (1914) 127 Minn. 89, 148 N. W. 895.
89 Clark v. Dye, (1924) 158 Minn. 217, 197 N. W. 202. (Vendee tendered balance within six weeks of expiration of the thirty days.) Rejected. Court, holding proceeding was in nature of strict foreclosure. It said: "The tender of payments after the 30 days expired, and the tender of payments in open court, were futile. All rights were lost by the expiration of the time in which appellant had the right to make his payments and protect his rights." Sylvester v. Holasek, (1901) 83 Minn. 362, 86 N. W. 336; State Bank of Milan v. Sylte, (1925) 162 Minn. 72, 202 N. W. 70.
90 Waters v. Pearson, (1914) 163 Iowa 391, 144 N. W. 1026. Iowa Code 1924 sec. 4299. This section is to all intent and purpose the same as the Minnesota statute quoted.
91 (1921) 5 Minnesota Law Review 351.
vendee even of the possible gracious exercise of discretion on the part of the court, which has hitherto been afforded him in regular foreclosure proceedings.\textsuperscript{22}

Under a similar statute the Iowa court apparently keeps some sort of power of adjustment of rights within its grasp. At least, if the vendor's damages are less than the advance payments, the court said: "We know of no sound reason of law or morals why the vendee should not recover the balance remaining." When a vendor elects to terminate the contract and keep the land instead of insisting on specific performance, he must account for the difference between advance payments and his damage.\textsuperscript{93} Furthermore, it is intimated that there may be some fact situations in which the court may control a vendor who proceeds under this statute. In \textit{Carus v. Sexsmith} the court said, "And in a proper case the vendor may terminate the rights of the vendee by statutory notice and declaration of a forfeiture."\textsuperscript{94} It was found that it was not error in this case to decree strict foreclosure. While it is left to inference, it may readily be guessed, that, as the contract was made in 1919, and the default was in 1921, that the land depreciation, which vendee must bear, exceeded the amount of the payments made.\textsuperscript{95} It is not explained what would be an improper case.

The North Dakota statute\textsuperscript{96} is much more elaborate than that in Minnesota but seems to accomplish about the same result. Just as in Minnesota, the time allowed in the notice for performance by the vendee, was thirty days. In 1917, however, it was extended to six months and again, in 1921, to one year.\textsuperscript{97} This legislative

\textsuperscript{22}Denton v. Scully, (1879) 26 Minn. 325, 4 N. W. 41. Strict foreclosure can be decreed, "or if, upon consideration of the circumstances of the case and the interest of all the parties concerned, it appears more just and equitable to direct a sale of the defendant's interest in the lands, or in some instances the sale of the land itself," that may be decreed in the discretion of the court.

\textsuperscript{93}Waters v. Pearson, (1914) 163 Iowa 391, 144 N. W. 1026.

\textsuperscript{94}Carus v. Sexsmith, (1922) 193 Iowa 1080, 188 N. W. 657.

\textsuperscript{95}Apparently the vendor can avoid the court's control if he can get his case before it in an action to quiet title. Ashford v. Meyer, (Iowa 1910) 125 N. W. 194. (The land contract had become a cloud on vendor's title.) "The action is not one for rescission, involving the necessity of returning to defendant the purchase money paid. A forfeiture upon breach of condition subsequent may be provided for in such a contract, and on failure of the vendee to comply with the conditions within thirty days after notice of intention to declare forfeiture is given, the rights of the vendee are lost."

\textsuperscript{96}N. D. Comp. Laws 1913, secs. 8119-8122 inc.

\textsuperscript{97}N. D. Laws 1917, ch. 151; Laws 1921, ch. 65; N. D. Comp. Laws Sup., sec. 8122.
extension of the time from thirty days to one year, considering the conditions in agriculture during those years, is very significant. The statute must have been working harshly. It would clearly indicate some legislative tolerance for a vendee in default. The supreme court refused to show any such tenderness, however, and indicates a disposition to allow vendor to proceed according to the strict letter of the law. Mr. Justice Grace vigorously attacks the whole summary method. In the case of Lander Co. v. Demming, in a strong dissent he said:

“The arbitrary cancellation of the contract, upon notice is a law which, in its terms and operation, is almost wholly for the benefit of the creditor, and takes but little note of the rights of the debtor. It is a law which enables rapacious creditors, by a mere notice, to confiscate the equity of the vendee in the land. If valid at all, it should receive a most liberal construction...”

The court, however, seems to consider itself bound strictly by the statute but it required the vendor strictly to comply therewith. The court has on one occasion, at least called the statute a drastic measure.

South Dakota apparently stands alone in its statutory provision. It expressly codifies a strict foreclosure procedure and then modifies it by empowering the court to "equitably adjust the rights of all the parties." In Hickman v. Long the vendee, who had made considerable payments, demanded repayment thereof to avoid a forfeiture, offering to compensate the vendor for the use and occupation of the land. The court denied any relief to him, following exactly the argument of the Wisconsin court, viz., strict foreclosure of land contracts is a proceeding which has

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100 People State Bank v. Stenson, (1922) 49 N. D. 100, 190 N. W. 74.
101 S. D. Code 1919, sec. 2914, 15, 16.
102 S. D. Code 1919, sec. 2914, 15, 16.
nothing to do with forfeitures. As has been urged, no amount of denial on the part of the court changes the facts. It was further stated that the contract was treated as "in full force and affect," that performance was requested, "and it is only in case of failure to perform within a time to be fixed by the court that the first party asks that the contract and the second party's rights thereunto be foreclosed." Under the statute the time allowed a vendee in which to perform is ten days.\footnote{The time allowed by statute in strict foreclosure varies; 10 days was ruled too short a period in Dickinson v. Loehr, see footnote 19. Six months seems a very common period. Taft v. Reddy, (1926) 191 Wis. 144, 210 N. W. 364. Bladwin v. McDonald, (1916) 24 Wyo. 108, 156 Pac. 27.} It is submitted that under economic conditions prevailing in agriculture in South Dakota during the past decade the allowance of ten days is futile, if the vendees interests are to be regarded. Such a period would be absurdly short under any conditions.

It seems that the South Dakota court is particularly reluctant to aid the vendee when it is remembered that the legislature has expressly authorized the court to act by two statutes; one to relieve against forfeiture,\footnote{S. D. Code, 1919, sec. 1958.} the other, the one under consideration directing the adjustment of equities. Even the state itself has taken advantage of the remedy,\footnote{Scott v. Darling, (1917) 39 S. D. 558, 165 N. W. 536. (Vendee lost $4840 payment.)} and apparently forced a severe loss upon a helpless but defaulting vendee. The impression received from a reading of the decisions of that court\footnote{Moter v. Hershey, (1925) 48 S. D. 493, 205 N. W. 239; Sweet v. Purintini, (1918) 40 S. D. 17, 166 N. W. 161; Keator v. Ferguson, (1906) 20 S. D. 473, 107 N. W. 678; Speer v. Phillips, (1909) 24 S. D. 257, 123 N. W. 724; Vendee must be given opportunity to perform. Bates v. Loffler, (1911) 28 S. D. 228, 133 N. W. 283 (accomplished in bill to quiet title.)} is that the vendee in default receives but scant consideration and the changed economic conditions are not made a basis for any considerable use of this provision. A very good instance of the court's attitude is the case of Sorum v. Sorensen.\footnote{(1922) 45 S. D. 313, 187 N. W. 423.} The contract was made during boom conditions and admittedly a very high price was agreed upon. The deferred payments were possible, considering the financial condition of purchaser, only if high prices and prosperity in agriculture then prevailing continued. They did not continue. The vendee was unable to perform, having
paid in all that he had. One must agree with the court that the defense was not properly made and the court could rightly have rejected it, but it seems the court was wrong in granting the vendor's prayer for relief. It should have remanded the case for new trial, giving the defendant an opportunity to present his equities properly if he had any. The feeling cannot be avoided, however, that even if properly presented the court would have refused to consider them. Smith, J., said:

"Both parties had equal opportunity of exercising judgment and foresight as to the possible and probable changes in prices in agricultural products, and lack of judgment in such matters is no ground for releasing either party from contract obligations."

It might be observed that both parties displayed the same lack of judgment. The judge continued:

"As well might the court of equity refuse foreclosure of a mortgage, fair and just when entered into, because of changes in economic conditions which might make it impossible for a mortgagor to pay his indebtedness."

Even in South Dakota the court would not permit the strict foreclosure of a mortgage. A period of redemption would be allowed even after a foreclosure by sale. Here by notice the vendor terminates a contract against a vendee who is helpless, and, while in many cases, in all probability, the vendee has no equities, because of great depreciation in land values which he must bear, yet, it would seem the court should not refuse him a hearing on them or should not, as the case stood on appeal, enter a decree terminating any possible interests which he might have. The only quarrel with the South Dakota cases is that the court does not seem to utilize their power to make an adjustment in the interest of defaulting vendees. One knows that in most cases there is little or no equity left in vendee, but the court should require clear evidence of that fact and make it appear in the cases decided.

One of the surprising facts in this matter of adjustments and protection of vendees' interests, in all the states in which strict foreclosure of land contracts exists, is that not a single case has been found in which a vendor is appealing from a decision of the trial court, on the ground that judgment too favorable to the vendee was rendered. It is believed that if trial courts were utilizing their power to protect the vendee to any considerable extent there would be cases in which the vendor questioned such an adjustment. Data on which to base a dependable generalization
are not available, but the conclusion may be ventured that defaulting vendees are not being adequately protected by the courts. The reason for this can only be conjectured. Perhaps it is an innate conservatism, or even favoritism for the man who has. Certainly it is an attempt at furthering what is considered a sound policy. It is disappointing, however, that legislation, which, on its face, seemed clearly designed to protect the vendee class has been construed so as to work an opposite result. The cases reviewed will be found to have originated largely in periods of economic depression. The harvest of cases seems to follow remarkably closely the depression in the business cycle. This is quite inevitable. The unexpected happens. Events which neither party to the contract contemplated or expressly stipulated for in the contract come to pass. It is submitted that the court of equity should mould its decrees with more consideration for the rights of the defaulting vendee, and not enforce the contract even though the terms thereof may warrant it.