

1973

# Cancellation of Contracts for Deed: The Constitutionality of the Minnesota Statutory Procedure

Minn. L. Rev. Editorial Board

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## Recommended Citation

Editorial Board, Minn. L. Rev., "Cancellation of Contracts for Deed: The Constitutionality of the Minnesota Statutory Procedure" (1973). *Minnesota Law Review*. 3041.  
<https://scholarship.law.umn.edu/mlr/3041>

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## Note: Cancellation of Contracts for Deed: The Constitutionality of the Minnesota Statutory Procedure

### I. INTRODUCTION

Several recent United States Supreme Court decisions have struck down certain summary creditor remedies as violative of due process for failure to provide the debtor with an opportunity for a hearing prior to a final determination of his rights. These decisions suggest that the Minnesota statute governing cancellation of contracts for deed<sup>1</sup> is unconstitutional. The statute prescribes a summary extrajudicial method for termination of the property interest of a defaulting vendee, a method which makes no provision for a hearing at which the vendee can present a defense to his default before he is deprived of his property rights. Moreover, the Minnesota Supreme Court has applied the statute to the defrauded vendee in a way which denies him both the right to recover for his injury and the right to assert vendor fraud as a defense to his default at any subsequent hearing. The purpose of this Note is to discuss the constitutional issues in the context of the defrauded vendee and to propose several ways to save the constitutionality of the statutory cancellation procedure.

### II. BACKGROUND

Prior to the creation of the statutory procedure for cancellation of contracts for deed,<sup>2</sup> the provisions of the contract were controlling in the event of a breach. If time was of the essence of the contract, the vendor could cancel it in the manner provided by its terms.<sup>3</sup> Thus, if the contract was silent on notice to a defaulting vendee, he might unknowingly forfeit all rights as of the day of the breach.<sup>4</sup> If time was not of the essence of the contract, the vendor had to notify the vendee of the breach and

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1. MINN. STAT. § 559.21 (1971).

2. Chapter 223 of the Laws of 1897 was the precursor of MINN. STAT. § 559.21 (1971).

3. *True v. Northern Pac. Ry.*, 126 Minn. 72, 147 N.W. 948 (1914); *Johnson v. Eklund*, 72 Minn. 195, 75 N.W. 14 (1898). See *Ballantine, Forfeiture for Breach of Contract*, 5 MINN. L. REV. 329, 345 (1921).

4. See, e.g., *Graceville State Bank v. Hofschild*, 166 Minn. 58, 61, 206 N.W. 948, 949 (1926).

allow a reasonable time for performance before he could cancel the contract.<sup>5</sup>

In an equitable action to foreclose a land contract, the court could allow either a strict foreclosure or a foreclosure by sale.<sup>6</sup> In a strict foreclosure, the court generally provided a period exceeding 30 days in which the vendee could rectify the default.<sup>7</sup> Originally such an extension was merely discretionary, but later it became a right of the defaulting vendee.<sup>8</sup>

The vagaries of contractual provisions and the inconsistent application of common law equity often treated the vendee rudely.<sup>9</sup> Chapter 223 was passed in 1897 to afford relief against the harshness of the common law rule which permitted the vendor to terminate the contract immediately upon default by the vendee.<sup>10</sup> The statute provides one uniform method of vendee notice and subsequent cancellation:

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 30 days after the service of such notice unless prior thereto the purchaser shall comply with such conditions and pay the costs of service . . . . Such notice must be given notwithstanding any provisions in the contract to the contrary . . . .<sup>11</sup>

5. See, e.g., *Id.*; *Austin v. Wacks*, 30 Minn. 335, 15 N.W. 409 (1883).

6. See *Vanneman, Strict Foreclosure on Land Contracts*, 14 MINN. L. REV. 342, 344 (1930).

7. See, e.g., *Eberlein v. Randall*, 99 Minn. 528, 109 N.W. 1133 (1906) (90 days); *London & Northwest Am. Mortgage Co. v. McMillan*, 78 Minn. 53, 80 N.W. 841 (1899) (90 days); *Drew v. Smith*, 7 Minn. 301 (1862) (six months).

8. *Drew v. Smith*, 7 Minn. 301 (1862).

9. Compare *Melco Inv. Co. v. Gapp*, 259 Minn. 82, 105 N.W.2d 907 (1960) (cancellation pursuant to the notice requirements of the statute) with *True v. Northern Pac. Ry.*, 126 Minn. 72, 147 N.W. 948 (1914) and *Johnson v. Eklund*, 72 Minn. 195, 75 N.W. 14 (1898).

10. *Needles v. Keys*, 149 Minn. 477, 184 N.W. 33 (1921). The statute's

primary purpose . . . is to prevent the vendor taking advantage, through a provision in the contract, or otherwise, of the vendee's failure to make payments on time or of other defaults, and depriving him of his rights in the property without a definite notice of cancellation.

*Mathwig v. Ostrand*, 132 Minn. 346, 348, 157 N.W. 589 (1916).

The Iowa supreme court said a bit more lyrically that a similar Iowa statute "is a merciful provision . . . extending a little grace to a party in default who may be staggering under the load of his undertaking." *Waters v. Pearson*, 163 Iowa 391, 397, 144 N.W. 1026, 1029 (1914).

11. MINN. STAT. § 559.21 (1971) (emphasis added).

This procedure allows a vendor to cancel a contract for deed without recourse to the courts. The vendee is protected from cancellation for nonpayment, however, since the statute provides that the contract will be reinstated if the vendee makes up the default before expiration of the 30-day period.<sup>12</sup> If the vendor chooses to cancel under the statute, he retains any payments already made by the vendee<sup>13</sup> but loses the chance he would have in court to recover those payments which are in default.<sup>14</sup>

Rather than using statutory cancellation for vendee default, the vendor may pursue an action for specific performance,<sup>15</sup> rescission,<sup>16</sup> strict foreclosure<sup>17</sup> or damages for breach of con-

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12. Thus, in *Needles v. Keys*, 149 Minn. 477, 184 N.W. 33 (1921), the vendee was protected against oppressive provisions of the contract which gave the vendor the option to declare the entire balance due and payable upon default by the vendee. The vendor exercised this election and shortly thereafter served the statutory notice claiming the balance due as the default. In holding that the payment of only past due installments was effective to reinstate the contract, the court said:

We think the legislature did not intend to permit [vendor], by his own act, to add to the conditions which the vendee must perform to cure his default and save his equitable rights. We think that the legislature intended that the contract should not be forfeited if, within the prescribed time, the vendee removed such defaults as were made grounds of forfeiture by the terms of the contract itself. And we hold that in proceedings under this statute, the vendor cannot, by exercising an option to declare deferred instalments due immediately, require the vendee to pay such deferred instalments or forfeit his contract.

*Id.* at 480, 184 N.W. at 34 (emphasis added). Of course, if the contract calls for both installment payments and the assumption of a mortgage, the vendee's attempt to reinstate the contract by remitting only the past due installment(s) will fail unless the vendor has waived the mortgage payment(s). Compare *Odegard v. Moe*, 264 Minn. 324, 119 N.W.2d 281 (1962) (vendor waiver of compliance with notice of mortgage default) with *Swanson v. Miller*, 189 Minn. 158, 248 N.W. 727 (1933) (no vendor waiver).

13. *Nelson Real Estate Agency v. Seeman*, 147 Minn. 354, 180 N.W. 227 (1920).

14. *Accord*, *Wayzata Enterprises, Inc. v. Herman*, 268 Minn. 117, 128 N.W.2d 156 (1964); *Smith v. Dristig*, 176 Minn. 601, 224 N.W. 157 (1929). Compare *Andresen v. Simon*, 171 Minn. 168, 213 N.W. 563 (1927), with *Moorehead Inv. Co. v. Carlson*, 177 Minn. 174, 224 N.W. 842 (1929).

15. See, e.g., *Robitshek v. Maetzold*, 198 Minn. 586, 270 N.W. 579 (1936); *Stacey v. Taylor*, 196 Minn. 202, 264 N.W. 809 (1936); *Nelson Real Estate Agency v. Seeman*, 147 Minn. 354, 180 N.W. 227 (1920); *Mathwig v. Ostrand*, 132 Minn. 346, 157 N.W. 589 (1916).

16. See, e.g., *Hunter v. Holmes*, 60 Minn. 496, 62 N.W. 1131 (1895).

17. See, e.g., *State Bank of Milan v. Sylte*, 162 Minn. 72, 202 N.W. 70 (1925).

tract.<sup>18</sup> However, statutory cancellation is a form of self-help which provides the one remedy whereby the vendor can avoid the time and expense of a judicial proceeding. As a result, the statute is used by vendors more than any other remedy, and its greater convenience and simplified procedure account for the virtual disappearance of the old foreclosure proceedings.

### III. APPLICATION OF THE STATUTE TO THE DEFRAUDED VENDEE

#### A. THE OLSON RULE

The natural reaction of a vendee who thinks he has been defrauded is to stop payment on his contract. Under Minnesota law, such a reaction has dire consequences. It makes no difference whether the vendee intended by his "default" to rescind the contract or merely to recover from the vendor the amount of damages suffered.<sup>19</sup> In either case, if the vendor subsequently serves the statutory notice and the contract is thereby terminated, the vendee's right of action for rescission or damages arising from fraud is defeated.

This remedial abridgement was first dictated in *Olson v. Northern Pacific Ry.*,<sup>20</sup> where the vendee sought damages for the vendor's misrepresentation concerning the quality and character of the land involved. The court held that because the contract had been terminated under the statute,<sup>21</sup> the vendee could not maintain a damage action for fraudulent representation. Key to the decision was the conclusion that "[the vendee] has no contract upon which to predicate damages."<sup>22</sup> This conclusion,

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18. See, e.g., *Kelley v. Olson*, 272 Minn. 134, 136 N.W.2d 621 (1965); *Costello v. Johnson*, 265 Minn. 204, 121 N.W.2d 70 (1963); *Home Counselors, Inc. v. Folta*, 246 Minn. 481, 75 N.W.2d 417 (1956); *Wilson v. Hoy*, 120 Minn. 451, 139 N.W. 817 (1913). If the vendor retains the land, the measure of damages is the difference between market value and contract price, plus vendor's expense of performance, minus sums already paid by vendee.

19. As noted in *Blosick v. Warmbold*, 151 Minn. 264, 187 N.W. 136 (1922), vendee rescission prior to the service of notice is effective to extinguish the contract. However, if the defrauded vendee withholds payments to effect rescission, the contract can be terminated under the statute.

20. 126 Minn. 229, 148 N.W. 67 (1914).

21. The vendee was almost three years in default on the annual payments when the statutory notice was served. This damage action was brought on the 29th day of the running of the statute. No payments were made prior to the expiration of the 30 days.

22. *Olson v. Northern Pac. Ry.*, 126 Minn. 229, 231, 148 N.W. 67, 68 (1914).

of course, assumes first that termination of the contract under the statute is tantamount to rescission of the contract and second that an action for fraud must be based upon the contract and cannot exist independently in tort.

The assumption that termination under the statute is equivalent to a rescission of the contract is questionable.<sup>23</sup> The effect of rescission is to consider the contract as not having existed, and the result of rescission is to place the parties in their pre-contract positions.<sup>24</sup> The *Olson* court insisted that there was no contract upon which to base an action for fraud, but also allowed the vendor to retain all payments received *under the terms of the contract*. If the contract is deemed a nullity, it seems inconsistent to award the seller something akin to liquidated damages for default by the vendee. The parties should instead be returned to the status quo ante.<sup>25</sup>

Even if one assumes that the contract cannot survive statutory cancellation, this assumption does not lead inevitably to the conclusion that a fraud action is thereby lost. The majority in *Olson* reasoned that the vendee, by eschewing the remedy of rescission in favor of a damage action, had attempted to affirm a contract which was no longer in existence and therefore was

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23. See Comment, 8 MINN. L. REV. 163 (1923) for a discussion of the difference between termination and rescission.

24. [Vendee] could rescind and recover what he had parted with, or he could retain what he obtained and recover damages for its being of less value than the amount paid or agreed to be paid therefor. Choosing the first means wiping out the contract from its inception, while proceeding under the second is a binding determination to abide by the contract in all its terms except that the consideration paid or agreed to be paid may, in effect, be lessened by the amount of the recovery. The two remedies are inconsistent, therefore the selection of one will not entitle the vendee in that proceeding to recover what might have been obtained under the other.

*Olson v. Northern Pac. Ry.*, 126 Minn. 229, 230, 148 N.W. 67, 68 (1914) (emphasis added).

25. By electing statutory cancellation, the vendor pursues "rescission" rather than an action for damages or one for specific performance. Under the *Olson* rule, however, the vendor retains all payments made under the contract irrespective of either the actual damages suffered from vendee default or the fair rental value of the land during the vendee's possession. It is said in 12 S. WILLISTON, CONTRACTS § 1454 (3d ed. 1970):

The normal redress for a tort is to give what will restore the injured party to as good a position as he had before the tort. Where a contract has been broken, it is possible to approximate the redress given in tort actions by giving the injured party the value of the performance rendered by him and received by the other party.

This . . . form of redress is allowed in the law of contracts as an alternative remedy to an action for breach of contract.

barred from a fraud recovery because he could have removed the default and kept the contract in force. However, Justice Brown pointed out in a well-reasoned dissent that affirmance of the contract was not affirmance of the fraud and that the procedural niceties of affirmance versus disaffirmance should not be determinative of the fraud action.<sup>26</sup> The cause of action arises from the deceit practiced at the inception of the contract, not from the contract itself.<sup>27</sup> Moreover, where a contract has been procured through fraud, if the vendor is permitted to cancel the contract under the authority of the statute or of the stipulations in the contract itself and the vendee is denied an independent cause of action, the vendor thereby secures immunity for the fraud he has committed. The law should deny to a wrongdoer the right to gain any advantage for himself. Justice Stone urged in a later case that the independent cause of action in tort should not be denied:

It is wrong to treat statutory cancellation as the equivalent of rescission. Like a rescission, it terminates the contract and all its obligations. But unlike rescission, it does not restore the status quo. Because a rescission does that, it puts the party injured by fraud, if any, in a position where he suffers no damage. That bars his action for deceit because actual damage is an element of it. The statutory cancellation does not restore to the victim of fraud what he parted with. Therefore it cannot be treated as the equivalent of rescission and should not be attended by the effect, which a rescission has, of barring the action in tort for the deceit.<sup>28</sup>

Decisions subsequent to *Olson* have continued to apply its rationale despite the vendee's attempts to circumvent the effect of statutory cancellation. In *International Realty & Securities Corp. v. Vanderpoel*<sup>29</sup> the vendee who was three weeks in de-

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26. *Olson v. Northern Pac. Ry.*, 126 Minn. 229, 235, 148 N.W. 67, 70 (1914).

27. The action of fraud or deceit in inducing the entering into a contract or procuring its execution is not based upon the contract, but is independent thereof, although it is regarded as an affirmance of the contract. Hence it is a general rule that a vendee is entitled to maintain an action against the vendor for fraud or deceit in the respects mentioned, even though he has not complied with all the duties imposed upon him by the contract.

Annot., 74 A.L.R. 165, 169 (1931).

28. *West v. Walker*, 181 Minn. 169, 174, 231 N.W. 826, 828 (1930) (Stone, J., dissenting).

29. 127 Minn. 89, 148 N.W. 895 (1914). Cf. *Graceville State Bank v. Hofschild*, 166 Minn. 58, 206 N.W. 948 (1926) (cancellation statute applies notwithstanding lack of contractual provision for vendor cancellation in case of vendee default); *Nelson Real Estate Agency v. Seeman*, 147 Minn. 354, 180 N.W. 227 (1920) (Soldiers' and Sailors' Civil

fault brought an action claiming vendor fraud and seeking rescission and recovery of installments paid. Several weeks later, the vendor served the statutory notice and, after the expiration of the 30 days without payment, obtained a cancellation of the contract. Thereafter the vendee, unable to amend the complaint to change the action from rescission to specific performance,<sup>30</sup> voluntarily dismissed his original action and brought the present one for specific performance and abatement of purchase price. It was the vendee's contention that the damages resulting from the vendor's fraud had paid and discharged the overdue installments and thereby removed the default claimed in the statutory notice.<sup>31</sup> The court reiterated that all rights of the parties under the contract cease at the end of the prescribed time. As a tender of payment made after the expiration of the 30 days is of no avail, so an attempt to apply a claim for damages as payment is of no greater effect.<sup>32</sup>

#### B. AMELIORATION OF THE OLSON RULE

There are several ways in which the defrauded vendee may be able to avoid the logical inconsistency and potential unfairness of the *Olson* rule, but each way provides inadequate protection. First, if the vendee can establish that he rescinded the contract prior to default and service of the statutory notice, he can recover his installments from the vendor even though the contract was subsequently cancelled under the statute.<sup>33</sup>

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Relief Act cannot be invoked to require refund of down payment as condition precedent to cancellation).

30. The attempt to amend the complaint was predicated on the fact that rescission would have failed for laches. The court ruled that although it strictly observed the election of remedies doctrine, the voluntary dismissal of the original rescission action did not bar the subsequent action for specific performance. The same result would currently be reached much more easily under notice pleading. See notes 38-41 *infra* and accompanying text. Cf. *Blythe v. Kujawa*, 177 Minn. 79, 224 N.W. 464 (1929).

31. There is support for the vendee's contention:

In the Minnesota cases under consideration the concession that the vendor had committed a fraud upon the vendee includes the element of damage thereby suffered by the latter, else it would not constitute actionable fraud. There are, therefore, unadjusted rights and liabilities between the parties, upon the settlement of which depends the question of default. Where the vendee has a claim against the vendor of this character, he is not legally in default until the amount of his claim has been determined.

Annot., 74 A.L.R. 165, 173 (1931).

32. See also *West v. Walker*, 181 Minn. 169, 231 N.W. 826 (1930).

33. The vendee's recovery of payments made will be lessened by



Second, if the vendee presents a tenable claim of fraud, he may recover some of his purchase money in an action for "money had and received"<sup>34</sup> instituted after statutory cancellation. Finally, if the vendee institutes an action based on fraud *before* the vendor serves notice, the court will enjoin the vendor from proceeding further under the statute. Inasmuch as the effects of the *Olson* rule are clearly quite harsh in some cases, the inadequacy in such cases of each of the three "remedies" must be closely examined.

### 1. Rescission

The vendee who is free from default may maintain a rescission action to recover payments already made on the contract for deed. In *Blosick v. Warmbold*,<sup>35</sup> the vendee was induced to purchase a farm by the vendor's representation that the acreage was free from quackgrass, Canadian thistles and other noxious weeds. The vendee took possession but as the summer wore on it became apparent that the tillage was infested with weeds. In reaction to the misrepresentation, the vendee notified the vendor that the contract was rescinded and offered to return the land. The vendor refused this tender and, as a payment was due and unpaid the following day, then served the notice of cancellation under the statute. The court granted rescission for fraud even though the 30 days had passed without payment and said in discussing the effect of the statutory notice:

Nor will [vendor's] efforts to cancel the contract by service of the statutory notice deprive [vendee] of his right to recover what he had parted with. *There was no default at the time of the service of the notice of rescission.* The statutory notice to

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the fair rental value of the property during his possession. See notes 23-25 *supra* and accompanying text.

34. This action at law has been described in two early Minnesota opinions. The action is in the nature of an equitable remedy to compel one *unjustly enriched* at the expense of another to disgorge. *Todd v. Bettingen*, 109 Minn. 493, 124 N.W. 443 (1910). In *Brand v. Williams*, 29 Minn. 238, 239 (1882), the court said:

An action for money had and received can be maintained whenever one man has received or obtained the possession of the money of another which he ought in equity and good conscience to pay over. . . . There need be no privity between the parties, or any promise to pay, other than that which results or is implied from one man's having another's money, which he has no right conscientiously to retain. . . . When the fact is proved that he has the money, if he cannot show a legal or equitable ground for retaining it, the law creates the privity and the promise. . . . It is not necessary . . . that the money received by the defendant should have been [a] . . . sum . . . belonging exclusively to plaintiff . . . .

35. 151 Minn. 264, 187 N.W. 136 (1922).

cancel the contract upon the ground of the nonpayment of a monad of interest for the period of three days can avail [the vendor] nothing in this litigation.<sup>36</sup>

The court placed obvious emphasis on the fact that the vendee had rescinded the contract prior to his default in payment and the subsequent statutory notice. As a practical matter, however, the vendee in *Blosick* was likely unique in his reaction to vendor fraud; he gave notice to the vendor and offered to return the property. Most vendees will not "formally" rescind but rather will simply withhold payments. Thus, although rescission for fraud is one way to avoid the *Olson* rule, it is available only to vendees who are well informed of their legal rights.

## 2. *Money Had and Received*

In *Olson* itself, the court suggested that the vendee might have recovered the money already paid notwithstanding the cancellation of the contract. An action at law for money had and received, it was said, "might be considered virtually the same as one for rescission and would be governed by the principles which are applied in equity suits to rescind for fraud."<sup>37</sup> The action is one for unjust enrichment and does not depend upon the contract but rather is based upon unconscionable gain by one of the parties at the expense of the other.

Although available, the remedy has seldom been pursued; the most likely explanation is the moribund doctrine of election of remedies. In those few cases where the action has been discussed,<sup>38</sup> the vendee has typically sought other relief such as specific performance and damages for fraud, and the court has restricted the pleadings to those claims on the theory that election of remedies limits the vendee to one course of action.<sup>39</sup> Thus, the vendee who did not explicitly seek money had and received at the outset could not plead it at a later time. Minnesota has since adopted rules of civil procedure premised upon "no-

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36. *Blosick v. Warmbold*, 151 Minn. 264, 268, 187 N.W. 136, 137 (1922) (emphasis added).

37. *Olson v. Northern Pac. Ry.*, 126 Minn. 229, 234, 148 N.W. 67, 69-70 (1914).

38. See, e.g., *Houchin v. Braham Inv. Co.*, 202 Minn. 540, 279 N.W. 370 (1938); *West v. Walker*, 181 Minn. 169, 231 N.W. 826 (1930).

39. See, e.g., *West v. Walker*, 181 Minn. 169, 172, 231 N.W. 826, 827 (1930), where the court said:

The complaint in the instant case cannot be construed as one for money had and received with any better success than in the *Olson* case. . . . In fact [the vendee] is in possession and insists on retaining it. . . . (emphasis added).

tice pleading" which allows liberal amendment and the presentation of inconsistent claims.<sup>40</sup> As a result, the procedural strictures which have frustrated maintenance of the action in the past<sup>41</sup> should loosen in the future.

Although the Eighth Circuit Court of Appeals denied unjust enrichment for lack of proof in *Zirinsky v. Sheenan*,<sup>42</sup> that decision suggests the circumstances in which such an action may be successful. Where the vendor has received substantial payments which have not been offset by a commensurate loss of use of and income from the property, he will be held to a stricter accountability for the money "had and received." In other words, as the down payment and initial installments increase and the vendee's time of possession decreases, the chances of a successful unjust enrichment action become greater.<sup>43</sup> The vendee will not be able to circumvent the *Olson* rule but rather will gain some recovery in spite of the rule. Although the action for money had and received affords the defrauded vendee some monetary relief, he will still have been deprived of his property without a meaningful opportunity to litigate his fraud claim.

### 3. Injunctive Relief

In *Freeman v. Fehr*,<sup>44</sup> another misrepresentation of quack-grass case, the vendee brought an action for rescission and return of money paid on the contract. To protect his position, he further obtained a temporary injunction against the service of the statutory notice by the vendor. This was permissible, the court reasoned, because it would secure the vendee's right to bring an action for specific performance and damages at a later time if the present action failed.<sup>45</sup> If the rescission action suc-

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40. MINN. R. CIV. P. 8.1 (notice); MINN. R. CIV. P. 8.5 (inconsistent claims); MINN. R. CIV. P. 15.01 (liberal amendment).

41. See 2 PIRSIG ON MINNESOTA PLEADING § 1796 (4 ed. 1956).

42. 413 F.2d 481 (8th Cir. 1969). By analogizing to contractual liquidated damage situations, the court suggested that a successful fraud claim is not a prerequisite to a successful action for money had and received. This conclusion is logically compelling, but it is an incorrect statement of Minnesota law. See Comment, 54 MINN. L. REV. 1152 (1970).

43. The vendee in *Zirinsky* merely deposited the payments with the vendor and was not to get possession until full payment of the purchase price.

44. 132 Minn. 384, 157 N.W. 587 (1916).

45. If the present rescission action were defeated because of laches or ratification, the vendee could subsequently elect to affirm the contract, perform it and sue for damages for the fraud. Under the *Olson* rule the second suit could not be maintained if the contract had been terminated under the statute. To enjoin the service of notice then

ceeded, the service of the statutory notice by the vendor would be an "idle ceremony"<sup>46</sup> because the contract would have already been terminated by the vendee. However, if no injunction issued and the contract was cancelled during the pendency of an unsuccessful rescission action, the vendee would be irreparably harmed by the loss of his right to perform the contract and to recover damages for the fraud. *Freeman* appears to be an escape from the *Olson* rule but as a practical matter may provide scant aid since it contemplates that the vendee will anticipate service of the statutory notice and its effect on his rights. However, most vendees will become aware of their legal problems only after the vendor has served the notice.<sup>47</sup>

The swath of vendee protection was broadened somewhat in *Follingstad v. Syverson*.<sup>48</sup> After the vendee brought an action seeking damages for vendor fraud and an offset against the unpaid purchase price, the vendor served the statutory notice for default on the balance. The vendee countered with a request that the vendor be enjoined from "proceeding further with the cancellation." Although the action had been brought prior to service of notice as in *Freeman*, the vendee had neglected to enjoin the service of notice at that time. Because the prior damage and offset action raised doubt about what the final balance owing would be,<sup>49</sup> the court questioned the effectiveness of a subsequent notice which stated a fixed amount in default under the contract.<sup>50</sup> The court then distinguished an earlier case<sup>51</sup>

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is to assure the alternative remedy. This works no mischief upon the election of remedies rule. See notes 37-41 *supra* and accompanying text.

46. *Freeman v. Fehr*, 132 Minn. 384, 387, 157 N.W. 587, 588 (1916).

47. In *Nolan v. Greely*, 150 Minn. 441, 443, 185 N.W. 647, 648 (1921), the court refused to set aside the service of notice once it had been made:

Here the giving of the notice was a fact accomplished, and from then on the statute was in operation shortening from day to day the time in which to remove the defaults.

48. 160 Minn. 307, 200 N.W. 90 (1924).

49. Must [vendee] pay \$10,000 and interest to [vendors] as a condition precedent to his maintenance of an action to determine his claim, which he has a legal right to assert without undue hindrance or penalty, that he does not owe that much?

*Id.* at 310, 200 N.W. at 91.

50. The argument that the amount in default is unascertainable when potentially offset by damages has been rejected where service of statutory notice precedes the action for damages. See note 31 *supra* and accompanying text for criticism of this result. Where the amount of default is in fact questionable, it is illogical to draw a distinction based merely upon the chronology of the damage action and the vendor's service of notice.

51. See *Nolan v. Greely*, *supra* note 47.

in which relief had been denied because the vendee sought to vacate the service of notice or suspend the effect of the notice in a suit brought *after* notice had been served. Although the notice was already in effect in *Follingstad*, the vendee merely sought to enjoin further proceedings under the notice such as recording proof of cancellation and proceedings to oust the vendee from possession. Thus, an injunction will issue only where the vendee commences an action before the vendor serves the notice<sup>52</sup> and will lie not against the running of the statute itself, but only against the vendor's exercise of his rights under the statute.<sup>53</sup> Once again, if the vendee does not initiate action before the vendor's service of notice, the *Olson* rule will destroy the vendee's defense to his default.

#### IV. CONSTITUTIONALITY

The foregoing discussion points out the abridgement of the vendee's rights by the statute and the *Olson* rule. After the vendor serves the statutory notice, the defrauded vendee can protect his right to litigate the underlying issue of fraud only by making those payments specified in the notice and thereby removing the default.<sup>54</sup> If the contract has been terminated by the expiration of the 30-day statutory period, under the *Olson* rule a subsequent fraud action will fail and the vendee will have lost the right to retain his property.<sup>55</sup> The recent United States Supreme Court decisions in *Sniadach v. Family Finance Corp.*<sup>56</sup>

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52. To maintain a damage action and avoid the *Olson* rule, the vendee must act before the vendor. This race-to-the-courthouse situation also exists for a rescission action. See note 36 *supra* and ensuing text.

53. One case has permitted an injunction in an action commenced after service of notice. In *Craigmile v. Sorenson*, 241 Minn. 222, 62 N.W.2d 846 (1954), the vendors had refused the vendee's tender of the amount in default during the 30 days. A vendee action for declaratory and other relief was brought and an injunction fashioned as in *Follingstad* was allowed. The court's rigid approach to injunctive relief had to give way where the vendor actively prevented payment of the amount in default.

54. An injunction against the vendor's exercise of his statutory rights will lie only where the vendor, by refusing tender of the payments specified in the notice, has frustrated the vendee's attempt to remove the default. See note 53 *supra*.

55. The vendee may be able to reinstate the contract if the vendor has not complied with the technicalities of statutory service; see, e.g., *Enga v. Felland*, 264 Minn. 67, 117 N.W.2d 787 (1962); or if the vendor has waived his assertion of default; see, e.g., *Odegaard v. Moe*, 264 Minn. 324, 119 N.W.2d 281 (1962).

56. 395 U.S. 337 (1969).

and *Fuentes v. Shevin*<sup>57</sup> raise serious doubts about the constitutionality of this statutory scheme. By cutting off a vendee's rights if he is not sufficiently informed to obtain a timely injunction or to seek rescission before default, the present cancellation procedure works a denial of due process because the property is "taken" without a hearing.

In *Sniadach* the Supreme Court struck down the Wisconsin summary prejudgment garnishment procedure as a violation of due process. The statute allowed the garnishor to freeze the defendant's wages immediately and serve a summons and complaint upon the defendant within 10 days thereafter. Although the defendant would retain the wages if successful on the merits in the subsequent suit, "in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise."<sup>58</sup> The Court noted that while such a summary procedure might be sustained in "extraordinary situations,"<sup>59</sup> no special state or creditor interest compelled this garnishment procedure and the statute was not narrowly drawn to meet such situations. The Court arguably based its decision on the particular type of property involved and the dire consequences of the deprivation of wages. As a result, several lower courts later confined *Sniadach* to its facts and held that it was a unique case "involving a specialized type of property presenting distinct problems in our economic system."<sup>60</sup> Other courts looked beyond the kinds of property involved and viewed *Sniadach* as setting forth general principles of due process in the context of prejudgment proceedings.<sup>61</sup>

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57. 407 U.S. 67 (1972).

58. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969).

59. *Id.* at 339.

60. *Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100, 105 (10th Cir. 1970). Cf. *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971) (prejudgment attachment constitutional); *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971) (garnishment unconstitutional only when applied to wages); *American Olean Tile Co. v. Zimmerman*, 317 F. Supp. 150 (D. Hawaii 1970) (garnishment of wages only); *Young v. Ridley*, 309 F. Supp. 1308 (D.D.C. 1970) (mortgage foreclosure constitutional); *Termplan Inc. v. Super. Ct.*, 105 Ariz. 270, 463 P.2d 68 (1969) (garnishment of wages only).

61. See *Adams v. Egle*, 338 F. Supp. 614 (S.D. Cal. 1972) (repossession and disposition of collateral by a secured party); *Collins v. Viceroy Hotel Corp.*, 338 F. Supp. 390 (N.D. Ill. 1972) (innkeeper's lien laws); *Lebowitz v. Forbes Leasing & Fin. Corp.*, 326 F. Supp. 1335 (E.D. Pa. 1971) (foreign attachment); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeepers' lien laws); *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970) (replevin); *Santiago v. McElroy*, 319

In *Fuentes* the Supreme Court put to rest the notion that the right to due process hinges on the nature of the property in question. There several vendees under conditional sales contracts assailed the constitutionality of Florida and Pennsylvania replevin statutes which provided for seizure by a state agent of a person's possessions upon the ex parte application of one who claimed a right to the possessions and posted a bond for twice their value. Neither statute required that the possessor of the property be given notice or an opportunity to challenge the seizure at any kind of prior hearing.<sup>62</sup> The Court found that both procedures were unconstitutional in failing to provide for hearings "at a meaningful time"<sup>63</sup> and that the nature of the property interests involved<sup>64</sup> was relevant not to the right to notice and hearing but only to the form of the notice and hearing required by due process.<sup>65</sup>

The *Sniadach* and *Fuentes* decisions clearly suggest a constitutional deficiency in Minnesota's statutory procedure for cancellation of contracts for deed. The vendee does receive notice that his rights under the contract are in jeopardy. However, once the vendor has served the statutory notice of default, the vendee is afforded no meaningful opportunity to present a defense to the loss of those rights. The statute itself provides no means to suspend the contractual termination other than by tender of the payments which are contested. Similarly, the Minnesota court has not recognized the vendee's right to enjoin termination during the 30-day statutory period.<sup>66</sup> If the contract has

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F. Supp. 284 (E.D. Pa. 1970) (distrain); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42, (1971) ("claim and delivery" law); *Randone v. Appel*, Dept. of Super. Ct., 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (prejudgment attachment); *Jones Press, Inc. v. Motor Travel Serv., Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970) (garnishment).

62. In Florida a hearing was required after seizure. In Pennsylvania it was up to the vendee to initiate an action to contest the seizure.

63. This was the primary question as framed by the court. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

64. The vendees' respective contracts covered, *inter alia*, a stove and stereo; a bed and table; and a child's clothes, furniture and toys.

65. 407 U.S. 67, 90.

[A narrow reading] of *Sniadach* and *Goldberg* reflects the premises that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect.

*Id.* at 88.

66. See notes 47-53 *supra* and accompanying text.

been effectively cancelled under the statute, the vendee can still refuse to relinquish possession of the property. In this situation, the vendor must bring an action for unlawful detainer,<sup>67</sup> and a hearing will be held. However, the scope of an unlawful detainer hearing is restricted to *legal* defenses, and the vendee cannot raise his equitable defense of fraud.<sup>68</sup> Even if equitable defenses were allowed, the *Olson* rule would dictate that the vendee had lost his defense to the default when the 30 days expired. Thus, the unlawful detainer "hearing" is clearly not the "hearing at a meaningful time" envisioned in *Fuentes*. A hearing that can be had only when the vendee has lost his defense is no hearing at all.

Instructive in the consideration of this constitutional shortcoming is the pre-*Fuentes* decision in *Young v. Ridley*<sup>69</sup> where a federal district court upheld the constitutionality of the District of Columbia mortgage foreclosure statute. The statute permitted extrajudicial foreclosure by public auction after a 30-day notice of default without a hearing for the homeowner prior to the sale. The court upheld the statute both because extrajudicial foreclosure was permitted only when the instrument contained a power of sale clause and because during the 30-day statutory notice period the homeowner could secure injunctive relief pending determination of the merits of his defense to the default.

The first basis for the decision, the homeowner's prior consent to summary foreclosure, involves a waiver of constitutional rights. This was impugned in *Fuentes* where the Supreme Court held that a contractual waiver of due process rights must be "voluntarily, intelligently, and knowingly" made, that both parties must be "aware of the significance" of the waiver clause, and that the waiver must not result from "a case of unequal bargaining power or overreaching."<sup>70</sup> This strict approach to the waiver of constitutional rights in a conditional sales contract should apply with equal force when the waiver appears in a mortgage or a contract for deed. Form contracts which bury such waivers in lines of standardized fine print are commonly used in Minnesota.<sup>71</sup> It is improbable that the vendee is aware

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67. MINN. STAT. §§ 566.01-.17 (1971).

68. See notes 80-83 *infra* and accompanying text.

69. 309 F. Supp. 1308 (D.D.C. 1970).

70. *Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972). The Court relied on its recent outline of the relevant considerations in *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

71. The basic forms are found in Uniform Conveyancing Blanks,



of the existence of the waiver let alone its significance. Moreover, *Fuentes* suggests that even an obvious and explicit waiver may be ineffective where the contract is one of adhesion. The vendee in a contract for deed does not wield the same bargaining clout as does the homeowner in a mortgage. The vendee may be unable to secure a mortgage and thus may depend upon the contract for deed either because he has virtually no credit rating or because he can afford but a small down payment.<sup>72</sup> In such case, the vendor more likely dictates rather than negotiates the terms of the contract.

The second basis for the *Young* holding was that the homeowner could obtain injunctive relief during the statutory notice period. Moreover, the *Sniadach* situation in which the defendant was deprived of the use of his property without a prior hearing was inapposite. In *Young* the mortgagor was not deprived of the use and possession of his property prior to public sale and could secure an injunction of the right to that sale pending a hearing of his defense to the default. The existence of such relief may render the District of Columbia foreclosure statute constitutional but the validity of the statute depends on a two-step process. The Minnesota cancellation procedure makes the first step in that it does not deprive the recalcitrant vendee of the use and possession of his property prior to a hearing,<sup>73</sup> but it stops there. Since no hearing is allowed prior to the loss of the defrauded vendee's most valuable defense, the hearing prior to the loss of possession becomes a mere formality.

## V. REFORM

Before attempting to bring the statutory cancellation procedure within equitable and constitutional bounds, one must face the threshold question of whether the procedure should be retained at all. The law sanctions the installment land contract as an alternative to the purchase money mortgage even though they apparently serve the same function. The reason generally given to justify the contract for deed is that it permits the pur-

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Forms 54-60, authorized by MINN. STAT. § 507.07 (1971) and printed in MINN. STAT. ANN. following Chapter 507.

72. This is one of the reasons for the popularity of, and indeed the necessity for, the contract for deed. See Warren, *California Installment Land Sales Contracts: A Time For Reform*, 9 U.C.L.A.L. REV. 608, 625 (1962). On the inequality of bargaining power, see Vanneman, *Strict Foreclosure on Land Contracts*, 14 MINN. L. REV. 342 (1930).

73. See note 66 *supra* and accompanying text.

chase of real estate with a smaller down payment by one with a less solid credit history than would be acceptable to the seller in a mortgage transaction.<sup>74</sup> There is a general policy to promote a home-owning public, and state recognition of the contract for deed is one way to realize this purpose.<sup>75</sup> Thus, any discussion of a procedure for cancellation of the contract must include a balancing of the different interests involved to avoid frustration of this legislative design. The vendee wishes to retain this form of "easy credit" in the purchase of a home and at the same time needs to be protected against arbitrary cancellation by the vendor.<sup>76</sup> The vendor wants to get his property back quickly if the vendee defaults in his payments.<sup>77</sup> Indeed, if the vendor did not have the advantage of swift cancellation to compensate for giving up possession for a small down payment, either the down payment would be increased commensurate with the greater risk<sup>78</sup> or the contract for deed would virtually disappear.<sup>79</sup> It is this vendor interest in a speedy remedy for default which must be accommodated to the requirements of due process and the vendee's right to be made whole if he has been defrauded.

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74. See Rudolph, *The Installment Land Contract as a Junior Security*, 54 MICH. L. REV. 929, 948 (1956).

75. Another approach would be to sanction the use of trust indentures as an alternative to the conventional mortgage transaction. Thus, in upholding the constitutionality of a three-acre classification for trust indenture use, the Montana supreme court recited the Montana legislature's policy statement:

Because the financing of homes and business expansion is essential to the development of the state of Montana, and because such financing . . . has been restricted by the laws relating to mortgages of real property, and because more such financing of homes and business expansion is available if the parties can use security instruments and procedures not subject to all the provisions of the mortgage laws, it is hereby declared to be the public policy of the state of Montana to permit the use of trust indentures . . . .

Great Falls Nat'l Bank v. McCormick, 152 Mont. 319, 322, 448 P.2d 991, 993 (1968).

76. Many states have enacted such protections. See, e.g., ARIZ. REV. STAT. ANN. § 33-741 (1956) (duration of notice increases with the increase in vendee equity); IOWA CODE §§ 656.1-.2 (1946) (30 days); LA. REV. STAT. ANN. § 9:2941 (West 1950) (45 days); MARYLAND RULES OF PROCEDURE Rule W 79 (1971) (30 days); N.D. CENT. CODE §§ 32-18-01, 04 (1960) (one year).

77. The vendor would not readily enter into a contract if foreclosure were by public sale as with mortgages or if the statutory notice period were materially extended. See Rudolph, *supra* note 74.

78. See Note, *Minnesota Land Contract Law in Action*, 39 MINN. L. REV. 93, 104-10 (1954).

79. See 12 KAN. L. REV. 475 (1964).

Both the constitutional deficiency of the statutory cancellation procedure and its failure to adequately protect the defrauded vendee can be met in two ways: (1) the hearing in an action for unlawful detainer could be expanded to allow a meaningful opportunity to present defenses to vendee default; or (2) the vendee could be granted the right to injunctive relief during the 30-day period and thereby protect his rights pending adjudication of his defenses to the default.

#### A. UNLAWFUL DETAINER

At present, the scope of the hearing in an action for unlawful detainer<sup>80</sup> is too restricted to afford the defrauded vendee the "hearing at a meaningful time" required by due process. As a defense to the vendor's action for possession, fraud is insufficient per se and can be asserted only with the aid of affirmative equitable relief such as specific performance.<sup>81</sup> However, by statute<sup>82</sup> the vendee is limited in unlawful detainer to the presentation of legal defenses.<sup>83</sup> Thus, the defrauded vendee is not allowed to contest the very default upon which is premised the termination of his contract under the cancellation statute. "The statute regulating forcible entry and unlawful detainer actions was

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80. The unlawful detainer procedure is provided by MINN. STAT. §§ 566.01-.17 (1971).

81. *Gallagher v. Moffit*, 233 Minn. 330, 46 N.W.2d 792 (1951).

82. MINN. STAT. § 488A.01 (1971) denies equity jurisdiction to the municipal court. In *Dahlberg v. Young*, 231 Minn. 60, 66, 42 N.W.2d 570, 575 (1950), the court said:

[A] direct examination of [the statutes] indicates that the legislature . . . had no intention to confer upon the municipal court the power to exercise affirmative equitable relief in unlawful detainer actions. The obvious purpose was merely to extend the court's jurisdiction in this type of action to cases involving disputes as to the title, which disputes, however, did not require an exercise of purely equitable relief for their termination. The specific restriction upon the exercise of equitable jurisdiction is found in the same paragraph . . . and if the legislature had intended a change in that restriction with regard to unlawful detainers, no doubt it would have used express language to accomplish that purpose.

83. *E.g.*, (1) adequacy of notice and signature: *Robitshek Inv. Co. v. Wick*, 171 Minn. 127, 213 N.W. 551 (1927); *Clark v. Dye*, 158 Minn. 217, 197 N.W. 209 (1924); *First Nat'l Bank v. Coon*, 143 Minn. 262, 173 N.W. 431 (1919); (2) waiver by vendor: *Odegard v. Moe*, 264 Minn. 324, 119 N.W.2d 281 (1962); *Clark v. Dye*, 158 Minn. 217, 197 N.W. 209 (1924); (3) adequacy of service: *Enga v. Felland*, 264 Minn. 67, 117 N.W.2d 787 (1962); (4) real party in interest: *Gruenberg v. Saumweber*, 188 Minn. 568, 248 N.W. 724 (1933); (5) mortgage rather than contract for deed: *Albright v. Henry*, 285 Minn. 452, 174 N.W.2d 106 (1970); *Minnesota Bldg. & Loan Ass'n v. Closs*, 182 Minn. 452, 234 N.W.2d 872 (1931).

designed to be summary and speedy . . . and does not contemplate [what] might work delays."<sup>84</sup>

This summary nature of the unlawful detainer hearing was recently approved by the United States Supreme Court in *Lindsey v. Normet*<sup>85</sup> where a tenant had tried to assert the landlord's failure to maintain the premises as a defense to his default. The Court found that Oregon's unlawful detainer statute which limited triable issues solely to the tenant's default was constitutional.<sup>86</sup> However, the Oregon scheme also provided that when an equitable matter is interposed, the unlawful detainer action is stayed pending determination of the equitable issue. A similar interposition and stay is recognized in Minnesota;<sup>87</sup> the vendee will be allowed to secure an injunction of the unlawful detainer action pending the outcome of his separate suit. If the vendee prevails on the merits of his fraud claim, such result provides a fraud defense which is sufficient per se and which can be asserted in the vendor's action for possession.

If the unlawful detainer hearing is to be used to save the constitutionality of Minnesota's cancellation statute, one of two changes must be made. The first approach requires both that the legislature expand the scope of the hearing itself to encompass not only legal but also equitable defenses to vendee default and that the Supreme Court overrule *Olson* so that the equitable defense of fraud is not lost to the vendee at the expiration of the 30-day notice period. The second approach requires only that the Supreme Court overrule *Olson* so that the vendee can fairly litigate his fraud claim after having obtained an injunction staying the unlawful detainer proceedings. Broadening the unlawful detainer hearing seems to be the less desirable alternative. The utility of the action to both the vendor and lessor would be defeated by any reduction of its present speed and simplicity. Moreover, the Supreme Court has recognized<sup>88</sup> that the state has a strong interest in isolating one limited action for

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84. *Lilienthal v. Tordoff*, 154 Minn. 225, 227, 194 N.W. 722 (1922). The court was there considering an order remitting the cause to the trial court for the purpose of moving for a new trial.

85. 405 U.S. 56 (1972).

86. The Court has twice held that it is permissible to segregate an action for possession of property from other actions arising out of the same factual situation that may assert valid legal or equitable defenses or counterclaims.

*Id.* at 67.

87. See *William Weisman Holding Co. v. Miller*, 152 Minn. 330, 188 N.W. 732 (1922).

88. See *Lindsey v. Normet*, 405 U.S. 56 (1972).

possession so that the bulk of cases may be handled with minimal drain on state funds and judicial energy. Overruling *Olson* seems the better approach. If an injunction staying unlawful detainer proceedings is to be allowed pending a hearing on the vendee's suit for fraud, that hearing must be one at which the vendee can fully litigate his claim. *Olson* clearly denies the right to such a hearing by holding that the vendee is deemed to be without a contract and consequently without equitable relief once the 30-day statutory period has run. If *Olson* is overruled, the vendee will be permitted redress for vendor fraud and, more importantly, will have the opportunity required by due process to defend against his default.

#### B. INJUNCTIVE RELIEF

Constitutional objection to the cancellation procedure would be met if the vendee were allowed the right to injunctive relief from the running of the statutory period pending a hearing on his defenses to the default.<sup>89</sup> The defrauded vendee could then sue for damages or abatement of the purchase price and yet retain his right to perform the contract should the fraud action fail.<sup>90</sup> In the event the fraud action were unsuccessful, the vendor's financial interest would be protected by the injunctive bonding procedure.<sup>91</sup> If the vendee successfully established the existence of fraud, the vendor could not shield himself behind the statutory termination as in the past. Injunctive relief would thus obviate the doctrinal ambiguity of the *Olson* rule, provide redress for the defrauded vendee's injury and avoid the denial of due process inherent in a summary prejudgment deprivation of property. The Minnesota legislature could follow North Dakota's lead and make statutory provision for this remedy.<sup>92</sup> However, even a judicial recognition of the relief, especially under the aegis of saving constitutionality, would not significantly diminish the vendee protection intended by the legislature in the existing statute.

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89. See the discussion of *Young*, *supra* notes 69-73 and accompanying text.

90. The vendee has in the past been denied an injunction except where the injunction is sought in a suit instituted prior to the notice of default. See note 48 *supra* and accompanying text.

91. MINN. STAT. § 585.02 (1971) permits the injunction; MINN. STAT. § 585.04 (1971) provides that injunctive relief must be conditioned upon protection of the defendant. See also *Northwest Hotel Corp. v. Henderson*, 257 Minn. 87, 100 N.W.2d 493 (1959).

92. N.D. CENT. CODE § 32-18-06 (1960) authorizes injunctive relief.

## C. REQUIREMENT AND SCOPE OF HEARING

The United States Supreme Court has said that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."<sup>93</sup> This suggests that a hearing, even if it allows the vendee to present full defense to his fraud, will not meet the requirements of due process where the vendee has the burden of initiating the action. In other words, the vendor may not be allowed to cancel a contract for deed without first providing the vendee an opportunity to object to the cancellation and to contest the default at an adequate hearing. If this is a correct interpretation of due process requirements, the allowance of injunctive relief either during the 30-day notice period or before or during an action for unlawful detainer would not save the constitutionality of the cancellation statute because such injunctive action must be initiated by the vendee. However, expansion of the scope of the unlawful detainer hearing would accomplish this purpose because the vendor must bring such an action.

The Court has not squarely faced the issue of whether the vendor-creditor *must* initiate a judicial proceeding before the recovery of possession of property under a contract, but the broad language of recent opinions supports this interpretation. In discussing the Pennsylvania replevin statute, the *Fuentes*<sup>94</sup> Court was particularly disturbed by the fact that the law did not require that there *ever* be a hearing on the merits of the conflicting claims to possession of the replevied property. The creditor was not statutorily obliged to initiate a court action to effect repossession. To secure even a post-seizure hearing, the debtor had to initiate a lawsuit himself.<sup>95</sup> However, the Court did not decide whether a debtor's mere opportunity to bring suit in protection of his rights would comport with due process, but rather described the kind of prior hearing required:

The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication. Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test.<sup>96</sup>

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93. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

94. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

95. *Id.* at 77-78.

96. *Id.* at 96-97.

In the context of the defrauded vendee, it seems clear that the "real test" can be met only by a full adjudication of the vendee's claim of fraud as a defense to default.<sup>97</sup> It is equally clear that a hearing of this scope, whether in an action for unlawful detainer or otherwise, would frustrate the vendor's interest in a summary recovery of the property. If the vendor is required to go to court whenever he seeks statutory cancellation, the continued existence of the contract for deed as a form of financing is questionable.<sup>98</sup> On the other hand, it may be constitutionally impermissible to require a hearing only when the vendee assumes the burden of initiating a lawsuit.

If the statutory procedure will pass constitutional muster only where the vendor is required to initiate a judicial proceeding prior to the cancellation of a contract for deed, there likely can be no accommodation of the requirements of due process and the viability of the contract for deed. It would be anomalous indeed if the due process protection afforded the vendee were so stringent that vendors would no longer use the contract for deed as a form of real estate financing. No court has yet held that placing the burden of initiating a suit in protection of property rights upon the debtor is constitutionally prohibited. This latter solution appears to be the only way to satisfy the practicalities of the contract for deed transaction.

To support a relaxation of the requirements of due process in the procedure for the cancellation of the contract for deed, one must look to the practical consequences of a stringent due process standard. In the analogous mortgage situation, these consequences are illustrated by the legislative history of a proposed amendment to the District of Columbia mortgage foreclosure statute. The amendment would have required notice to the mortgagor rather than

[a judicial foreclosure proceeding in every case which would require] service of process, time for an answer, a hearing, and other procedural steps, resulting in delays of several months if

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97. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 268-79 (1970) (emphasis added). The majority opinion in *Sniadach* did not consider the nature of the required hearing, but Justice Harlan in a concurring opinion suggested that notice and hearing should be "aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use." 395 U.S. 337, 343 (emphasis in original).

98. See note 79 *supra* and accompanying text.

there is no objection, and quite possibly as much as several years if contested.

This delay would unduly restrict the legitimate financial institution in transacting its normal business. The committee believes that *there is no reason to penalize the reputable lender*. The purpose of this legislation is to correct the flagrant abuses of a few dishonest firms preying on District homeowners. . . .

In addition to being time consuming, a court foreclosure would be a costly process for all parties involved. The property owner would have additional costs in the way of legal fees and court costs . . . which costs would reduce the owner's equity in the property. The lender must face the prospect of property deterioration and a decrease in value as well as being required to advance money toward protection of its security which may never be recovered. *The additional costs imposed on the lending institution by requiring that they obtain a court order for each foreclosure would ultimately be borne by the borrowers.*

In making a mortgage loan the lender considers not only the credit of the borrower but the security offered for the loan as well. If the security is less available because of a more restricted foreclosure procedure, the lender takes this into account in determining if the loan is to be made and the loan terms to be offered. *Thus, a court foreclosure procedure may restrict the flow of mortgage money in the District of Columbia.*<sup>99</sup>

Congress determined that a 30-day notice to the mortgage borrower prior to foreclosure by sale would protect the borrower against the dishonest lender without burdening the honest mortgagee or jeopardizing the availability of mortgage money. Constitutional objections to the summary nature of the foreclosure procedure were met by a provision for injunctive relief pending adjudication of the mortgagor's defense to his default.<sup>100</sup>

The committee amendment would require proper notification of the owner of the encumbered property well in advance of the proposed date of sale. This would allow the property owner ample time to seek remedies under existing law. *The obligor now has adequate remedy* by seeking injunctive relief in the U. S. district court if he has grounds on which to defend himself against the threatened foreclosure.<sup>101</sup>

It would seem that there must be a trade-off between the vendee's interest in the provision of a hearing prior to *every*

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99. Senator Mansfield's reading of the purpose of the bill into the Congressional Record, 114 CONG. REC. 22314 (daily ed. July 19, 1968) (emphasis added). See also 114 CONG. REC. 28884 (daily ed. October 1, 1968) (remarks of Rep. Dowdy).

100. See the discussion of *Young v. Ridley*, *supra* notes 69-73 and accompanying text.

101. 114 CONG. REC. 22314 (daily ed. July 19, 1968) (emphasis added).



attempted cancellation of a contract for deed and the vendor's interest in the speedy recovery of his security in every case of default. The vendee-initiated suit to retain his property sacrifices little of these interests to the continued existence of the contract for deed. The delay caused by injunctive relief would not unduly restrict the legitimate vendor in transacting his normal business; such relief is aimed at the correction of flagrant abuses by the few dishonest vendors. The requirements of due process should not be so inflexibly imposed that the contract for deed will no longer be available as an alternative to conventional mortgage financing.

## VI. CONCLUSION

If due process permits placing upon the vendee the burden of initiating a lawsuit to obtain a meaningful hearing, and this Note has suggested that it must, the allowance of injunctive relief will save the constitutionality of Minnesota's cancellation statute. If such relief is granted either during or after<sup>102</sup> the 30-day notice period, the court will protect the vendee from the loss of the right to fully defend against his default. This approach to reform would minimize any decrease in the attractiveness of the contract for deed as a form of land conveyance. Providing a meaningful hearing in this manner would not affect the vendor's speedy remedy for vendee default in most cases. The fact is that most vendees stop payments under a contract for deed either because they cannot afford to continue or because they lose interest in retaining the property, not because they have been defrauded and want to assert that or some other meritorious claim. Whatever dampening effect such reform would have on due process would be more than outweighed by the importance of maintaining a viable extrajudicial cancellation procedure.

Summary extrajudicial cancellation cannot be retained as a viable procedure if due process demands that the vendor provide a hearing whenever a contract for deed is to be cancelled. The legislature would be compelled to expand the scope of the unlawful detainer hearing to allow equitable defenses to default or, alternatively, to devise a new procedure whereby a similar kind of hearing would be provided solely in the con-

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102. In this case, the Minnesota court must reject the harshness and inconsistency of the *Olson* rule. See notes 89-92 *supra* and accompanying text.

tract for deed context.<sup>103</sup> In this case, it seems most difficult to accommodate the vendor's interest in a speedy recovery procedure and the vendee's right to an opportunity to be heard at a meaningful time. Due process would require that the speed and efficiency of a summary extrajudicial cancellation procedure give way to the cumbersome but fair machinery of a trial.

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103. The Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 97 n.33 (1972), said:

[L]eeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of [property] when the [vendor] has little probability of succeeding in the merits of the dispute.

