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FORFEITURE OF PAYMENTS UNDER A LAND PURCHASE CONTRACT IN MONTANA

In many parts of the country long-term installment contracts are replacing purchase-money mortgages as the most popular method for financing sales of real estate on credit.¹ The traditional protections available to a mortgagor under a purchase-money mortgage have not been extended to purchasers under long-term installment contracts. For a concrete example, let us suppose a typical land purchase contract situation.² The purchaser of a \$10,000.00 house has agreed to pay \$2,000.00 down from his savings and to make monthly payments of \$75.00. In addition, he has agreed to pay taxes of \$100.00 per year and the yearly premium of \$20.00 on the insurance. Suppose that at the end of three years this purchaser loses his employment and defaults in his payments. Thirty days after default he receives notice to vacate. Unlike a tenant under a lease, during the three years he has kept house and grounds in repair, paid \$360.00 for taxes and insurance, expended \$200.00 for improvements on the house and \$800.00 in building a garage. These amounts total \$6060.00 without counting payments and efforts for upkeep, repairs and utilities. He will now lose his home and the expenditures made upon it. The fair rental value of the property being \$85.00 per month, the vendor has the right to receive \$3,060.00 for the period, which still leaves a net gain to the vendor of \$3,000.00. Should he be permitted to keep this \$3,000.00 windfall at the expense of the buyer? In other words, should a vendor be entitled under a land purchase contract to retain money paid, without regard to damages sustained, upon default of the purchaser?

Concerning this problem Professor Williston has stated:³

Few questions in the law have given rise to more discussion and difference of opinion than that concerning the right of one who has materially broken his contract without legal excuse to recover for such benefits as he may have conferred on the other party by part performance . . . two fundamental legal policies seem here to come into conflict. On the one hand, it seems a violation of the terms of the contract to allow a plaintiff in default to recover. . . . On the other hand, to deny recovery often gives the defendant more than fair compensation for the injury he has sustained and imposes a forfeiture upon the plaintiff . . . but the second of these opposing policies has increased in favor in recent years. Except where the obliquity of the defective performance is of a sort that indicates moral obliquity, and where, therefore, the courts feel that the one who is in default may properly be penalized, the tendency is to grant him restitution if a substantial net benefit has accrued to the defendant by partial performance.

Even though there is a tendency toward greater liberality as indicated by Professor Williston, the fact remains that the majority of American jurisdictions refuse to allow the defaulting purchaser to recover any of

¹N.Y. Law Revision Commission, *Act, Recommendation and Study Relating to Installment Land Contracts* 343-385 (1937).

²Bodenheimer, *Forfeitures Under Real Estate Installment Contracts in Utah*, 3 UTAH L. REV. 30 (1952).

³5 WILLISTON, *CONTRACTS* § 1473 (Rev. ed. 1938).

his payments or the value of the improvements.⁴ This position has been criticized by nearly every legal writer in the field⁵ Prompted in part by the "instinctive revolt against making the vendor more than whole,"⁶ a strong minority of jurisdictions deny the right of the vendor to retain, as forfeited, money paid on the contract in excess of the damages actually suffered from the breach.⁷ The American Law Institute favors the position of the minority in its Restatement of Contracts, where relief for the defaulting purchaser is advocated.⁸

At least sixteen states have enacted legislation of various types in an effort to secure for the purchaser a more equitable adjustment of his rights.⁹ A recent commentator speaking of the status of such legislation said that in no state is the interest of the defaulting purchaser adequately protected by legislation.¹⁰ In New York, in 1937, a well drafted bill to prevent inequitable forfeitures and to regulate in general the rights of purchasers under installment land contracts failed to pass the legislature.¹¹

Montana has a statute which authorizes general relief against forfeitures.¹² By the adoption of this and other sections¹³ Montana would seem

⁴ CORBIN, CONTRACTS §§ 1075, 1129 (1941) ; 3 WILLISTON, CONTRACTS § 791 (Rev. ed. 1938) ; MCCORMICK, DAMAGES § 153 (1935). In England and Canada the rule is different. 3 WILLISTON, CONTRACTS § 791 (Rev. ed. 1938).

⁵Corbin, *The Right of a Defaulting Vendee to Restitution of Installments Paid*, 40 YALE L. J. 1013 (1931) ; Ballentine, *Forfeiture for Breach of Contract*, 5 MINN. L. REV. 329 (1921) ; Venneman, *Strict Foreclosure on Land Contracts*, 14 MINN. L. REV. 342 (1930) ; Pound, *The Progress of the Law, Equity*, 33 HARV. L. REV. 929 (1920) ; Simpson, *Legislative Changes in the Law of Equitable Conversion, by Contract: II*, 44 YALE L.J. 777 (1935).

⁶Dooley v. Stillson, 46 R.I. 332, 128 Atl. 217, 52 A.L.R. 1501 (1921).

⁷Annot., 31 A.L.R. 2d 19 (1951).

⁸RESTATEMENT, CONTRACTS § 357 (1932), permits restitution to a plaintiff in default under a contract if his part performance has resulted in a net benefit to the defendant, provided that the breach of contract was not "willful and deliberate." A breach due to financial hardship or error of judgment is not considered willful and deliberate.

⁹N.Y. Law Revision Commission, *op. cit. supra* note 1, at 385.

¹⁰Note, *Installment Land Contracts: Legislative Protection of Defaulting Purchaser*, 52 HARV. L. REV. 129 (1938).

¹¹*Ibid.*, containing a general evaluation of the proposed New York legislation. It provides for rescission by the vendor upon the purchaser's default, but with a grace of thirty days, and of six months in case the purchaser has made improvements on the land ; but on the expiration of such period, the purchaser's equity of redemption is foreclosed, and the vendor may take possession, with the added right of damages for breach of the contract. But in estimating the vendor's damages, the purchaser is credited with payments previously made on account of the purchase, and also with payments, if any, made pursuant to assessments for public improvements. The provisions of this proposed legislation indirectly serve as commentary on the sufficiency of the law as it now exists. This is especially true in view of the extensive study conducted by the New York Law Revision Commission. N.Y. Law Revision Commission, *op. cit. supra* note 1.

¹²REVISED CODES OF MONTANA, 1947, § 17-102 : "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in the case of a grossly negligent, willful, or fraudulent breach of duty." (Hereinafter the REVISED CODES OF MONTANA are cited R.C.M.) California and North Dakota have enacted the same provision. CAL. CIV. CODE § 3275 (1951) ; N. D. REV. CODE § 32-0112 (1943).

¹³It might be well to note here that Montana and California have identical Code sections dealing generally with this matter. R.C.M. 1947, §§ 13-804, 13-805, 17-102, 17-208, 17-306, and 17-307, correspond with CAL. CIV. CODE §§ 1670, 1671, 3275, 3294, 3306, and 3307 (1941), respectively.

to have declared a legislative preference for the second of the two opposing policies Professor Williston mentions above.¹⁴ The statute has, however, been so strictly construed by the Montana Supreme Court as to make it virtually ineffective.¹⁵ Thus, in order to obtain relief from forfeiture under the statute, one must plead and prove facts which appeal to the conscience of a court of equity and prove that such default was not grossly negligent, willful, or fraudulent.¹⁶ Although that rule may be justified, its application has been so questionable in some cases to make a mockery of "conscience" and "equity." In *Estabrook v. Sonsteli* financial inability to perform due to circumstances beyond the vendee's control was not deemed sufficient to "appeal to the conscience of a court of equity."¹⁷ Likewise, in *Pratt v. Daniels-Jones Co.* the fact that the failure to pay an installment when due was through mere inadvertence was not considered sufficient to avoid forfeiture under the statute.¹⁸

In contrast, there have been a number of cases in which the statute was invoked as the basis upon which forfeiture was denied. In *Huston v. Vollenweider*¹⁹ it was held that where the vendee withheld payments under the erroneous belief that the vendor had breached the contract, the question of whether there had been a breach being fairly debatable, a sufficient showing was made to "appeal to the conscience of a court of equity." The court allowed the vendee to recover the excess, if any, of the amount of payments made over the fair rental value of the premises during the period of occupancy. In *Williams v. Hefner*²⁰ the vendee withheld the payment of an installment when due because of an erroneous belief that the vendor would be unable to deliver a marketable title. The questions regarding the title were fairly debatable. Although the time for paying the installment was made of the essence and had passed, the court relied upon the statute under consideration in allowing the vendee a reasonable time to tender the balance of the purchase price and complete the sale. The latest pronouncement by the court concerning the application of the statute was in *Herman v. Herman*.²¹ It reiterated the requirement for the showing of "facts appealing to the conscience of a court of equity." It was then held that the vendee was entitled to recover an installment paid when the vendor allowed

¹⁴See text at note 3 *supra*, wherein the second policy is stated to be the one opposed to giving the defendant more than fair compensation for the injury he has sustained and imposing a forfeiture upon the plaintiff.

¹⁵RESTATEMENT, CONTRACTS § 357 (1940) (Montana Annotations); Note, *op. cit. supra* note 10.

¹⁶*Friedrichsen v. Cobb*, 84 Mont. 238, 275 Pac. 267 (1928). The defaulting vendee could not recover in suit for amount paid under the contract where he did not offer to pay the rental value of the premises during the period of occupancy, nor allege that defendant could be given back his property, value undiminished. The vendee's right to rescind was held waived by failure to surrender the property. He had paid \$13,628 of the \$27,000 price and held possession for seven years.

¹⁷86 Mont. 435, 284 Pac. 147 (1930). The vendee in possession was held to have waived the right to rescind for misrepresentation where ten years of uncomplaining possession had been shown. The vendee had paid \$18,500 on the price of \$25,000 and the vendor was thus allowed to retain \$13,600 more than he had been damaged.

¹⁸47 Mont. 487, 133 Pac. 700 (1913). The vendee paid \$637.00 on price of \$6,370.00 plus interest at 6% and taxes. He was in possession of the property for one year.

¹⁹101 Mont. 156, 53 Pac. 112 (1935).

²⁰89 Mont. 361, 297 Pac. 492 (1931).

²¹123 Mont. 39, 207 P.2d 1155 (1949).

the vendee to be in default a number of years without demanding payment or giving notice of cancellation, and thereafter conveyed the land to another. Thus, although the court relieved against a forfeiture, it did so through an application of the test which led to the grossly inequitable result reached in the *Sonstelie* case. Also, that case was one of those cited and relied upon as authority for the holding. Therefore, it would appear that if the court were confronted again with facts similar to those of the *Sonstelie* case a result similar to that arrived at would follow.

Other statutes have either been considered only cursorily or lightly disregarded in Montana. Thus, a code provision invalidating contracts for forfeiture of property subject to a lien in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption,²² was held to have no application to land purchase contracts because the vendor has title and therefore no lien.²³ Another statute,²⁴ providing that liquidated damage provisions are void, was circumvented by saying that the provision being void, the parties are left where they would have been had no such stipulation been made.²⁵ On the other hand, the Montana Supreme Court has held that although payments made may be retained, the vendor may not recover for past due installments, thus impliedly recognizing the inequities of the situation.²⁶

The early leading Montana cases²⁷ relied upon the New York case of *Lawrence v. Miller*²⁸ as authority for allowing the forfeiture of payments under a land purchase contract. The forfeiture concept developed in that case has been totally unsatisfactory, however, as is demonstrated by the proposed legislation in New York and the Revision Commission's report thereon.²⁹ In *Lawrence v. Miller* the court said:

"The defendant came by it rightfully, in pursuance of a contract lawfully made, between competent parties. He has failed in no

²²R.C.M. 1947, § 45-112: "All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption are void."

²³Cook-Reynolds Co. v. Chipman, 47 Mont. 289, 133 Pac. 694 (1913).

²⁴R.C.M. 1947, § 13-804: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void except as expressly provided in the next section."

²⁵Cook-Reynolds Co. v. Chipman, 47 Mont. 289, 133 Pac. 694 (1913). The defendant vendee was allowed recovery where there was waiver of performance by the vendor and reliance thereon gave rise to estoppel. The court said that in the absence of an equitable showing, a defaulting purchaser is not entitled to the return of his advance payments even though there was no provision for liquidated damages in the contract.

²⁶Edwards v. Muri, 73 Mont. 339, 237 Pac. 209 (1925). The purchaser under a land purchase contract had paid taxes for one year only and had been in possession for two years. He had paid \$193.00 of \$6,170.00 price. In holding for the vendor the court said that he could not recover for unpaid installments due but could keep those paid upon terminating the contract.

²⁷Edwards v. Muri, 73 Mont. 339, 237 Pac. 209 (1925); Clark v. American Development and Mining Co., 28 Mont. 468, 72 Pac. 978 (1903). In the latter a defaulting vendee was held not entitled to a return of payments made under an installment contract for the sale of land. The case followed a strict contract theory. \$83,000.00 worth of ore was removed and \$165,000.00 paid on price of \$500,000.00. No showing was made of any net benefit to the vendor.

²⁸66 N.Y. 131 (1881). This case is still the law in New York. N.Y. Law Revision Commission, *op. cit. supra* note 1, at 366.

²⁹N. Y. Law Revision Commission, *op. cit. supra* note 36 at 343.

duty to the vendee. Wherefore, then, should he give up that which was rightfully his own? When and whereby did it cease to be his and to be due to the vendee? If the contract had been kept by both parties, the money paid would still be his of right. . . . To allow a recovery of this money would be to sustain an action by a party on his own breach of his own contract, which the law does not allow . . . ; to maintain this action would be to declare that a party may violate his agreement, and make an infraction of it by himself a cause of action. That would be ill doctrine.'³⁰

It is submitted that the court missed the point, which is that the payments were made under the terms of the contract in exchange for the property. Upon default, the primary performance anticipated is breached and the buyer is to lose the property to the seller. When the expected performance fails, the seller should not receive both the money due for performance and the property because of non-performance.

Professor Ballentine has also given an answer to the reasoning of this case which has been characterized as representative of the prevailing view among legal scholars. He wrote:

"Just as the law refuses to individuals the remedy of seeking redress by self-help without resort to the 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 and ruinous exactions in the nature of penalties and forfeitures.'³¹

The early Montana cases also relied on *Glock v. Howard & Wilson Colony Company*, which is the leading California case allowing strict forfeiture.³² As would be expected under a strict forfeiture rule, the *Glock* case gave rise to a plethora of cases creating exceptions to the harsh rule.³³ The rule of the *Glock* case in California was circumvented and modified³⁴ and finally, in 1951, was all but overruled by *Freedman v. The Rector*.³⁵ The *Freedman* case holds that even a willfully defaulting vendee may recover that portion of the down payment which is in excess of the vendor's damages. This decision and the decision in the *Barkis* case³⁶ establish a rule in California, under statutes identical to those in Montana, which align properly the vendor-purchaser cases with the mortgagor-mortgagee cases and with the modern trend.

In the Montana cases there has been no distinction made between situations where the purchaser was in possession and where he was not in possession.³⁷ On principle, it is submitted that there is no need to distinguish

³⁰Lawrence v. Miller, 86 N.Y. 131, 140 (1881).

³¹Ballentine, *supra* note 5, at 352.

³²123 Cal. 1, 55 Pac. 713 (1898).

³³Annot., 31 A.L.R. 2d 8 (1953); Pound, *The Progress of the Law: Equity*, 33 HARV. L. REV. 929 (1920).

³⁴*E.g.*, *Barkis v. Scott*, 34 Cal. 2d 116, 208 P.2d 367 (1949). See Comment, 2 STAN. L. REV. 235 (1949).

³⁵37 Cal. 2d 16, 230 P.2d 629, 31 A.L.R. 2d 1 (1951).

³⁶*Barkis v. Scott*, 34 Cal. 2d 116, 208 P.2d 367 (1949).

³⁷*Yellowstone County v. Wight*, 115 Mont. 411, 145 P.2d 516 (1943). The vendee was not in possession and the court made a sweeping decree in his favor.

in this manner when relief is allowed on the grounds that the vendor would be unjustly enriched if allowed to retain the payments in excess of his actual damages. Improvements have been treated in the same way as cash payments so that the vendor has been allowed to keep the improvements where forfeiture was allowed and he had no actual notice of the improvements.

In the cases generally, and in the Montana cases specifically, there has not been any distinction based on the amount to be forfeited. Indirectly, however, by finding waiver or rescission or other grounds the courts have generally avoided unconscionable results. In only one Montana case³⁸ was the vendor allowed to retain, as forfeited, an amount grossly in excess of his damages. That case might be distinguished on the ground that the plaintiff sought there, in effect, a rescission for misrepresentation in which he had acquiesced for almost ten years. The court held that his complaint did not state a cause of action.

It is submitted that since California has repudiated the *Glock* case and achieved what seem to be equitable results in the *Barkis* and *Freedman* cases, under the same statutes as exist in Montana, it should not be difficult for Montana to achieve the same results. There has been only one case³⁹ involving a forfeiture under a land purchase contract in Montana since the *Herman* case in 1949, and that one involved a void parol contract for the sale of land and is explainable on that ground alone.

In view of the foregoing analysis it appears that there are two possible solutions to the defaulting purchasers predicament in Montana where the amount sought to be forfeited is grossly in excess of the vendor's damages. First, if he can plead and prove "facts that appeal to the conscience of a court of equity," as that requirement has been defined by the Montana court, he can recover under the above mentioned statute authorizing general relief against forfeitures.⁴⁰ Second, the defaulting vendee may attempt to avoid forfeiture of his payments in excess of the vendors damages on the authority of the *Freedman* case, in which the California court granted relief on the basis of statutes identical to those of Montana.

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³⁸*Estabrook v. Sonsteli*, 86 Mont. 435, 284 Pac. 147 (1930).

³⁹*Lewis v. Peterson*, 127 Mont. 474, 267 P.2d 127 (1953).

⁴⁰R.C.M. 1947, § 17-102.