LAND CONTRACTS—WISCONSIN FORM

The purpose of this article is to annotate the principal provisions of the land contract form approved by the Wisconsin Legislature in 1919[1] and to discuss some of the problems attending its use.

The rights and duties of the parties under a land contract are primarily explained through the doctrine of equitable conversion. By this doctrine, upon execution of the contract, the purchaser is regarded in equity as the owner of the land, and the vendor as a secured creditor having a legal position not unlike that of a mortgagee. Wisconsin particularly recognizes the analogy between a land contract and a mortgage, in that the vendor, like the mortgagee, holds a security interest in the land.[2] Courts have deemed it just to give the purchaser a period in which to redeem, and much of the confusion in the law of land contracts has resulted from the clashing of this equitable doctrine with rules of contract law which had their origin in the law courts.

Forfeiture Clause

> It is distinctly agreed . . . by . . . the parties hereto, that if the party of the second part [purchaser] shall fail to make any payments of purchase money and interest, . . . at the times and in the manner specified, or fail to pay the taxes and assessments, . . . this agreement shall at the option of the said party of the first part [vendor] be henceforth utterly void without notice whatsoever, and all payments thereon forfeited, subject to be revived and renewed only by the act of the party of the first part, or the mutual agreement of both parties; . . .[3]

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[1] WIS. STAT. (1939) § 235.16; Laws of 1919, c. 584. Of the groups of forms approved by the legislature, numbers 33, 34, and 35 are: "Land Contract without Insurance Clause," "Land Contract with Insurance Clause," and "Land Contract with Insurance Clause by Corporation." The Wisconsin Court seems never to have given any special weight in construing provisions of this contract to the fact of legislative "approval."

[2] Gates v. Parmly, 93 Wis. 294, 307, 66 N.W. 253 (1896).

[3] General discussions of the problems presented by forfeiture clauses may be found in 2 WILLISTON, CONTRACTS (2d ed. 1936) § 791, 3 *id.* § 1476; Ballentine, *Forfeiture for Breach of Contract* (1921) 5 MINN. L. REV. 329; Vanneman, *Strict Foreclosure on Land Contracts* (1930) 14 MINN. L. REV. 342; Corbin, *Right of a Defaulting Vendee to the Restitution of Installments Paid* (1931) 40 YALE L. J. 1013; Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: I* (1935) 44 YALE L. J. 559.

It is not clear from the Wisconsin cases whether the forfeiture clause makes time of the essence;[4] if it does, there is the further question of what effect that has on the rights of the parties.[5] Language in *Britt v. Bauman*[6] suggests that such a provision does not make time of the essence. The court cites with approval an early case[7] holding that a forfeiture clause of the same general tenor did not so operate.[8] Other cases have also indicated that the forfeiture clause in itself is insufficient to make the time of performance an essential element of the contract.[9] On the other hand the court has said that a clause similar to the forfeiture clause in the approved form was sufficient.[10] This is irreconcilable with the more recent dictum in the *Britt* case and is weakened by the fact that when the court makes such an assumption, it also uniformly finds waiver.[11]

A clear cut answer to the question is perhaps not so important in Wisconsin, where the court has indicated that, at any rate, it will not

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[4] Pomeroy was of the opinion that a forfeiture clause alone did not make time of the essence. POMEROY, SPECIFIC PERFORMANCE (3d ed. 1926) § 378. There is considerable authority contrary to Pomeroy: Judd v. Skidmore, 33 Minn. 140, 22 N.W. 183 (1885); Garcin v. Pennsylvania Furnace Co., 186 Mass. 405, 411, 71 N.E. 793, 794 (1904); Keller v. Garneaux, 40 S.D. 53, 166 N.W. 305 (1918). *But cf.* Sylvester v. Born, 132 Pa. 467, 19 Atl. 333 (1890).

[5] For an excellent historical discussion of the early cases, see Lewis, *Questions Relating to Time in Cases of Specific Performance* (1902) 50 AM. L. REG. O.S. [41 N.S.] 639, (1903) 51 *id.* [42 N.S.] 1.

[6] 199 Wis. 514, 226 N.W. 955 (1929). The dictum is less significant because it is simply the premise for a conclusion that the purchaser might have made a proper showing (it was held he did not) warranting belief in equity from his forfeiture. Such relief would probably be granted in Wisconsin even if time were of the essence.

[7] Hall v. Delaplaine, 5 Wis. 206, 215 (1856).

[8] *Ibid.* Purchaser sought specific performance after having been in default. The court assumed he would have no right to a conveyance if time were of the essence. It concluded that nothing in the circumstances or contract (although there was a forfeiture clause) made time of the essence, and that the purchaser would be entitled to specific performance if not for the intervening rights of a third party. Damages were awarded.

[9] "It is the modern tendency, especially in equity, not to treat time of the essence unless there is some express term in the contract so providing." Hermansen v. Slatter, 196 Wis. 426, 429, 187 N.W. 177, 178 (1922); repeated in Droppers v. Hand, 208 Wis. 681, 686, 242 N.W. 483, 485 (1932). Since these cases cited *Hall v. Delaplaine* in connection with the above statement, it may be concluded that the court would not consider a forfeiture clause such an "express term" as to make time of the essence. As to the words necessary to make time of the essence, see POMEROY, SPECIFIC PERFORMANCE (3d ed. 1926) § 389. As to circumstances so operating, see *id.* §§ 384-386.

[10] Phillips v. Carver, 99 Wis. 561, 575, 75 N.W. 432, 436 (1898).

[11] Miswald-Wilde Co. v. Armory Realty Co., 210 Wis. 53, 243 N.W. 492 (1933); Raddatz v. Florence Inv. Co., 147 Wis. 636, 133 N.W. 1100 (1912); Phillips v. Carver, 99 Wis. 561, 75 N.W. 432 (1898); Gates v. Parmly, 93 Wis. 294, 66 N.W. 253, 67 N.W. 739 (1896).

literally enforce such a clause, where to do so will work a forfeiture.[12] It is probable that if the clause has any effect at all in Wisconsin, it is no more than that of an additional factor inducing a shorter period of redemption. This view is strengthened materially by a recent case, *Levin v. Grant*.[13] In this case, shortly before the expiration of a two year period of redemption (during which purchaser had repeatedly defaulted) the parties entered into a stipulation whereby, if the purchaser paid his installments regularly for another year, he would be entitled to still another year in which to redeem. The purchaser, however, continued to default and vendor sought a writ of assistance against a third party who had acquired the purchaser's interest. The circuit court denied the vendor's motion, revived the action, and granted the third party a period of seven days in which to redeem. Upon appeal, the Supreme Court held (1) that equity will not relieve for non-performance of a condition precedent, and (2) that by the stipulation agreement purchaser acquired no interest in the land.[14] On rehearing the court reversed its holding and affirmed the judgment of the circuit court, upon the basis of *Gates v. Parmly*,[15] where it was held that equity will relieve for the breach of a condition precedent, when the contract is one to secure the payment of money. The significance of this decision is that, although time was clearly material to the stipulation agreement and there was no allegation of waiver, the effect of this was merely to shorten the redemption period, not to impose an absolute forfeiture.[16]

The clear language of the forfeiture provision suggests that the vendor can cut off the purchaser's rights without notice and without going into court. No Wisconsin case has been found in which the court has expressly approved such a procedure on the part of the

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[12] *See* Britt v. Bauman, 199 Wis. 514, 226 N.W. 955 (1929); Oconto Co. v. Bacon, 181 Wis. 538, 547, 195 N.W. 412, 415 (1923). *Cf.* Doctorman v. Schroeder, 92 N.J.Eq. 672, 114 Atl. 810 (1921) (forfeiture enforced although purchaser was only forty minutes late).

[13] 238 Wis. 537, 298 N.W. 63, 300 N.W. 171 (1941).

[14] As the stipulation agreement was made before purchaser's equity of redemption had expired, it would seem that the contract never became void so as to cut off the equity of the purchaser, but rather that a new contract was created.

[15] 93 Wis. 294, 66 N.W. 253 (1896).

[16] A time of the essence provision may also adversely affect the vendor. It has been held incumbent upon the vendor to cure his title and tender it upon the date set for conveyance, unless there was waiver by the purchaser. Wimer v. Wagner, 323 Mo. 1156, 20 S.W.(2d) 650 (1929); note 79 A.L.R. 1240.

vendor,[17] and no careful lawyer (especially where the contract is of record) would attempt to rely on it. Actually, upon default by either party, the other has an election[18] of remedies, both legal and equitable.[19]

It is well settled that a vendor as well as a purchaser may have specific performance of a land contract.[20] In suing for it, he is exercising his option to declare the contract still in force, and he must tender conveyance to get a decree.[21] The difficulty is in determining how the decree shall be enforced. A contempt process is of course unavailable, and the Wisconsin court has expressly so stated.[22] In *Taft v. Reddy*,[23] the vendor under a contract containing an acceleration clause[24] owed $25,000 on land worth approximately $16,000. The trial court ordered a sale of the purchaser's interest

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[17] But note that in a recent case, Wenzel v. Roberts, 236 Wis. 315, 294 N.W. 871 (1940), it was suggested that where the purchaser was in serious default and had left the premises, that this was sufficient to constitute abandonment of purchaser's interest. This statement, however, taken in its context probably means merely that purchaser rescinded the contract with vendor's approval.

[18] Several cases have discussed the obligations imposed on the parties by their election of remedies. In Miswald-Wilde Co. v. Armory Realty Co., 210 Wis. 53, 66, 243 N.W. 492, 495 (1933), purchaser sent a written statement that he "rescinded" the contract because of vendor's breach. Nevertheless the court held that he was not bound to the remedy of rescission unless (1) there was evidence of vendor's reliance thereon, or (2) vendor had specially pleaded purchaser's election. *Cf.* Oconto Co. v. Bacon, 181 Wis. 538, 543, 195 N.W. 412, 413 (1923) where the court, in a dictum, stated that any unambiguous act consistent with one remedy and inconsistent with the others will be deemed conclusive evidence of an election.

[19] Actions of the vendor against the purchaser: specific performance, suit at law for loss of bargain and payments due, strict foreclosure, action to quiet title [Oconto Co. v. Bacon, 181 Wis. 538, 543, 195 N.W. 412, 413 (1923)], and ejectment [Slama v. Dehmel, 216 Wis. 224, 228, 257 N.W. 163, 165 (1934)]. This last remedy was approved earlier in the *Oconto* case, *supra*, p. 545, 195 N.W. at 414.

Actions by the purchaser against the vendor: specific performance, action at law for damages, rescission or cancellation, treating breach as a defense and using it as a discharge. Miswald-Wilde Co. v. Armory Realty Co., 210 Wis. 53, 66, 243 N.W. 492, 497 (1933). See Note (1930) 6 WIS. L. REV. 59.

[20] Harris v. Halverson, 192 Wis. 71, 211 N.W. 295 (1927); Taft v. Reddy, 191 Wis. 144, 210 N.W. 364 (1926); Heins v. Thompson and Flieth Lbr. Co., 165 Wis. 563, 163 N.W. 173 (1917); Kipp v. Laun, 146 Wis. 591, 131 N.W. 418 (1896). In general, see Horack, *Specific Performance for the Purchase Price* (1915) 1 IOWA L. BULL. 53; Lewis, *A Vendor's Right to Specific Performance* (1902) 41 AM. L. REG. 65.

[21] Harris v. Halverson, 192 Wis. 71, 211 N.W. 295 (1927).

[22] Taft v. Reddy, 191 Wis. 144, 210 N.W. 364 (1926); Heims v. Thompson and Flieth Lbr. Co., 165 Wis. 563, 163 N.W. 173 (1917). *Cf.* Smith v. Smith, 84 N.J. Eq. 299, 93 Atl. 890 (1915); Pease v. Cooper, 61 Ga. 626 (1878); Corbus v. Tweed, 69 Ill. 205 (1873); Andrews v. Sullivan, 7 Ill. 327 (1845).

[23] 191 Wis. 144, 210 N.W. 364 (1926).

[24] This fact does not appear in the reported case, but is disclosed by the record.

after thirty days. This, of course, was a sale of a negative value, and the Supreme Court held the decree erroneous. It ordered, instead, a sale of the land as a whole and a deficiency judgment in favor of the vendor for the amount of the purchase price not satisfied by the proceeds.[25] Other jurisdictions have adopted a similar method of enforcement.[26] Some cases, however, suggest an alternative remedy whereby the vendor is given an absolute decree for the amount due, which is enforceable by execution against any of the purchaser's property.[27]

A far more troublesome problem arises when the entire purchase price under an installment contract is not yet due at the time of the decree, and the contract contains no acceleration clause. This is particularly important in connection with the approved form, which has no such clause.[28] Any sale, either of the land itself or of the purchaser's interest in the land, in order to satisfy only the amount actually owing at the time of the sale, leads to difficulties.[29] The only practical solution would seem to be a decree providing for some sort of acceleration in the event of further default in payments, so that the proceeds of a sale of the land could be applied to payment

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[25] Much of the difficulty on this point seems to have come from a confusing similarity between enforcement by sale of a specific performance decree and foreclosure of a vendor's lien. See discussion of this in State of New York, Report of the Law Revision Commission (1937) 358-360. See also POMEROY, SPECIFIC PERFORMANCE (3d ed. 1926) § 14 (n) and cases there cited.

[26] Smith v. Smith, 84 N.J.Eq. 299, 93 Atl. 890 (1915); Andrews v. Sullivan, 7 Ill. 327 (1845).

[27] People *ex. rel.* Sarlay v. Pope, 230 App. Div. 649, 246 N.Y.S. 414 (1930); Anderson v. Wallace Lbr. and Mfg. Co., 30 Wash. 147, 70 Pac. 247 (1902). The Wisconsin court, in Heims v. Thompson and Flieth Lbr. Co., 165 Wis. 563, 573, 163 N.W. 173, 177 (1917), suggested that such an enforcement of a specific performance decree might be had. This case is, however, prior to *Taft v. Reddy*, and no decision has either held both methods of enforcement available or has excluded either of them.

[28] *Quare*, whether the forfeiture clause in the approved form could possibly be construed as working an acceleration in event of purchaser's default?

[29] To sell the land, reimburse the vendor for only the installments actually due, and give the remainder of the proceeds to the purchaser would be obviously absurd, leaving vendor with the remaining installments both unpaid and unsecured. The proceeds might be held in trust and paid to vendor as installments came due, but that would be needlessly roundabout. In such a situation a Michigan case, Cady v. Taggart, 223 Mich. 191, 193 N.W. 848 (1923), ordered a sale merely of purchaser's equitable interest, the proceeds to be used for payment only of the amount then due. Such a decree seems most unsatisfactory. If vendor were allowed to bid in for the amount then due, he might regain full title to the land and yet have all the remaining installments still owing. If not, either the equitable interest would be sold to someone else, resulting, in effect, in an assignment of the contract, or, more likely, it would not be sold at all, and vendor would be left without any means of enforcement.

of the entire amount still owing.[30] The Wisconsin court has never squarely passed on this point, but its language in *Harris v. Halverson*[31] suggests that it would so provide even in the absence of an express clause.

Another remedy available to the vendor and analogous to specific performance in that it constitutes an election to stand on the contract is an action at law to recover money damages.[32] The approved form makes payment by the purchaser a condition precedent (or at least concurrent) to tender of conveyance by the vendor. In *Jefferson Gardens, Inc., v. Terzan*,[33] it was held that a vendor might have judgment for the last installment before tendering conveyance, but that execution would be stayed until such tender.

The principal remedy, when vendor elects not to stand on the contract, is that of strict foreclosure, whereby, after a redemption period, purchaser's equity is extinguished, and vendor regains possession of the land and retains the purchase money received. Vendor is, of course, not entitled to a deficiency judgment. This is contrary to the Wisconsin procedure in mortgage cases and also to the rule in a majority of jurisdictions, which allows foreclosure by sale of land contracts.[34]

The most important consideration in connection with this remedy is the length of the redemption period allowed. Since 1933 this has been subject to statutory regulation.[35] The 1935 amendment lengthened the possible period of redemption from one to three years.[36] This "emergency legislation" was construed in *Benkert v. Gruenewald*,[37] not as giving the court power to extend the period of redemption, this being an inherent power of equity, but rather as expressing a maximum limitation, much greater than usually allowed,

[30] Such a solution, although not strictly in accordance with the terms of the contract, would not be unfair to the purchaser. Clearly, only the principal installments due would be accelerated, not the interest on them. See FRY, SPECIFIC PERFORMANCE (6th ed. 1921) 1176.

[31] 192 Wis. 71, 78, 211 N.W. 295, 297 (1927).

[32] As to the measure of damages in a suit at law by either purchaser or vendor, see 4 WILLISTON, CONTRACTS (2d ed. 1937) § 1399.

[33] 216 Wis. 230, 237, 257 N.W. 154, 156 (1934). This is an exercise of equitable power in a "legal" proceeding, but under the code wholly commendable. Also a judgment in strict foreclosure is a defense to vendor's action on notes given for the purchase price, Kunz v. Whitney, 167 Wis. 446, 167 N.W. 747 (1918).

[34] Vanneman, *Strict Foreclosure on Land Contracts* (1930) 14 MINN. L. REV. 342.

[35] Wisconsin Laws of 1933, c. 301.

[36] Wisconsin Laws of 1935, c. 362.

[37] 223 Wis. 44, 48, 269 N.W. 672, 673 (1936).

and not affecting the court's discretion to fix any time up to the maximum. In this case, the purchaser was in default and hopelessly insolvent; he still owed $34,000 on land worth at most $25,000. Under these circumstances, it was an abuse of discretion for the trial court to follow the recommendation of the mediation board[38] under the emergency statute and grant a redemption period of two years. Three factors were considered by the court in reaching this conclusion: first and most important was the inability of the purchaser to redeem, considering his state of insolvency, the value of the land, and the slight possibility of refinancing. Second was the size of the purchaser's equity. Third was the consideration that since under strict foreclosure the vendor has no right to a deficiency judgment, the purchaser would not be injured by sale at a depressed price, and, therefore, does not need an extension of the period of redemption to protect him against that event. Other considerations, not expressly mentioned, are, of course, the length of the default and the materiality of time to the contract. The court intimated that the amount purchaser had paid was of slight importance, since the only purpose of a redemption period is to give him a chance to redeem, and its length should be determined according to the possibility of his doing so.[39]

One of the vendor's primary concerns is to prevent a purchaser in default from using his period of redemption merely to receive the rents and profits a while longer, without having any real intention of redeeming. Appointment of a receiver as a method of preventing this practice has seldom been resorted to. If the vendor can show that the rents and profits of the land are in material danger,[40]

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[38] In Levin v. Grant, 238 Wis. 537, 298 N.W. 63, 300 N.W. 171 (1941) the circuit court gave vendor judgment in strict foreclosure with a two year period of redemption. The judgment also provided that the vendor had the right to apply to the mediation board of the county for an order terminating the period of redemption if the purchaser defaulted in the monthly payments which were agreed upon in a prior proceeding before the board.

[39] Binzel v. Oconomowoc Brewing Co., 226 Wis. 498, 277 N.W. 98 (1938). See also St. Joseph's Hospital of Franciscan Sisters v. Maternity Hospital and Dispensary Ass'n, 224 Wis. 422, 272 N.W. 669, 273 N.W. 791 (1937) where the majority allowed an exceptionally long period of redemption in favor of a charitable institution and Wickham, J., dissented on the grounds that there was no proof the purchaser would be able to redeem.

[40] In Fondtosa Highlands, Inc. v. Paramount D. Co., 212 Wis. 163, 248 N.W. 131 (1933), receivership was denied because the land was unproductive and unimproved and further because vendor did not show the land was in danger of material injury. *See* Baker v. Bohnert, 158 Wis. 337, 148 N.W. 1093 (1914) where a receiver was appointed pending action by the owner of a farm to cancel a lease.

the present statute[41] allows the court to appoint a receiver both during the trial and during the period of redemption. The vendor in *Sharf v. Hartung*[42] was allowed a receiver when he showed that his purchaser had not paid the taxes on an office building which was yielding rents and profits. Although there is no authority on the subject, it would seem that the appointment of a receiver might well warrant giving the purchaser a longer period of redemption, since the vendor's interests would then be safeguarded.

Another remedy, which goes on the theory that vendor disaffirms the contract, is an action to quiet title. But its availability is probably limited to such extreme circumstances as those in *Oconto Co. v. Bacon.*[43] In that case, after expiration of a year, neither the purchaser nor his assignee had made any of the payments or improvements called for in the contract, nor had they even offered to do so, when the vendor declared the contract void. The court allowed vendor's action to quiet title without granting the purchaser any period of redemption. There are several possible explanations for this decision. The first is that there was a total failure of consideration. The second is that the passage of time extinguished whatever equity purchaser derived from the making of the contract. Third, it should be noted that the purchaser at no time offered to "do equity" by tendering performance.

As a result of judicial refusal to enforce the rigors of the forfeiture clause, not only are the vendor's remedies little aided thereby, but also the vendee's remedies are not thereby impaired. Specific performance is, of course, the vendee's principal remedy against a defaulting vendor. When the purchaser is also in default, the question arises as to the correlation between the existence of his equity of redemption and his right to specific performance, notwithstanding his default. Where time is not of the essence,[44] it has been held that ". . . courts will hold the bargainor to the contract, and compel him to convey, although the purchase money was not paid or tendered at the exact time fixed in the contract for the payment; provided that compensation can be made to him for the delay, it appearing also to be conscientious that the conveyance should be made."[45] The conclu-

[41] WIS. STAT. (1941) § 268.16(1).
[42] 217 Wis. 500, 259 N.W. 257 (1935).
[43] 181 Wis. 538, 195 N.W. 412 (1923).
[44] It would seem that time of essence provisions should have no different effect in this instance than when vendor seeks foreclosure of the contract.
[45] Hall v. Delaplaine, 5 Wis. 206, 214 (1856).

sion from this is that purchaser may have specific performance at any time while he still retains an equity of redemption, if he tenders full performance with compensation.[46] This is strongly supported by *Hernansen v. Slatter*.[47] On the other hand specific performance was denied the purchaser in *Williams v. Williams*[48] when he had been in default for over ten years after the date set by the contract for completion of performance. The court does not indicate whether purchaser had ever paid anything, so that it would seem he had no substantial equity left, and vendor might very well have maintained an action to quiet title. But this case does not negative the correlation, and it seems reasonable to conclude that, so long as purchaser has any equity with which he could defend an action to quiet title, he may have specific performance upon making proper tender.

If the purchaser rightfully chooses to rescind the contract, he is entitled to a lien on the property. Problems arising in the application of this rule are: (1) when is the purchaser entitled to a lien, (2) when does the lien come into being, and (3) what does the lien include? The first has recently been answered by the case of *Weidner v. Hyland*.[49] The vendor there was the first to default in that his title was defective, although the defect was easily curable. The purchaser thereafter defaulted in payments, and it was evident from his own admission that he could not continue payment. Nevertheless, the court held that the purchaser was entitled to a lien, basing its decision solely on the fact that the vendor was the first to default. Necessarily the conclusion must be that the purchaser is entitled to a lien whenever vendor first defaults and that a subsequent default by the purchaser has no effect on his right. The only advantage to be seen in such a rule is its certainty, for it does not consider the equities of the parties. The second question was originally settled by *Miswald-Wilde Co. v. Armory Realty Co.*,[50] where the court held that the lien attached upon the filing of the *lis pendens*. Dicta in the *Weidner* case, however, led to the statement of a new rule in *Wenzel v. Roberts*[51] that "The lien attaches when a payment on the pur-

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[46] *Id.* at 216.

[47] 176 Wis. 426, 429, 187 N.W. 177, 178 (1922): "Where time is not of the essence of the contract and the thing to be done can be done as well at a later as an earlier day without detriment to the party for whom the thing is to be done, the delay will not prevent specific performance."

[48] 50 Wis. 311, 6 N.W. 814 (1880).

[49] 216 Wis. 12, 255 N.W. 134, 256 N.W. 244 (1934).

[50] 210 Wis. 53, 68, 243 N.W. 492, 498, 244 N.W. 589, 246 N.W. 305 (1933).

[51] 236 Wis. 315, 318, 294 N.W. 871, 873 (1940).

chase price is made, and remains whenever the right to recover the payment exists. . . ." The *Miswald-Wilde* case answered the last question when the court, upon rehearing, held that the lien included only the purchase price payments plus interest thereon, rather than purchase price plus loss of bargain. If the purchaser wants also to recover loss of bargain, he must sue at law for damages.

The Tenant by Sufferance Clause

> The party of the second part further agrees to hold the said premises from the date hereof, as the tenant by sufferance of the said party of the first part, subject to be removed as a tenant holding over, by process under the statute in such case made and provided, whenever default shall be made in the payment of any of the installments of purchase money, interest, taxes, assessments or insurance premiums as above specified. . . .

When a land contract is silent as to right of possession, the rule is that possession remains in the vendor.[52] The parties may, however, contract to put the purchaser in possession, and such a clause as the one above has been held so to operate by implication in Wisconsin.[53] From this it would seem to follow that the vendor has a right to give possession to the purchaser upon any terms or conditions. Thus, in the early Wisconsin case of *Wright v. Roberts*,[54] a clause like the one above was held expressly to create a landlord-tenant relationship between the parties, so that after the purchaser had defaulted, the vendor could recover damages for use and occupation. Presumably the same reasoning would allow him, as a landlord, to recover possession of the land by summary proceedings[55] upon purchaser's default, although the case does not mention this possibility.

The case of *Diggle v. Boulden*,[56] however, held that under a contract containing such a clause, the vendor's remedy at law would be inadequate since the purchaser's equities would bar any action against him as tenant by sufferance,[57] and in any event such action would be ineffective to extinguish the purchaser's equity of redemption.

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[52] 66 C.J. § 784.
[53] Martin v. Scofield, 41 Wis. 167 (1876).
[54] 22 Wis. 161 (1867).
[55] WIS. STAT. (1941) § 291.
[56] 48 Wis. 477, 4 N.W. 678 (1880).
[57] Newton v. Leary, 64 Wis. 190, 25 N.W. 39 (1885) (Title to land cannot be tried in an unlawful detainer action).

When in *Hill v. Sidie*[58] the question came up again in an action for use and occupation, the court held that the clause would not change the parties' relationship into one of landlord and tenant. This, of course, made actions for unlawful detainer and for use and occupation equally unavailable. This decision was confirmed in *Krawow v. Wille*,[59] and the result is that today the tenant by sufferance clause is nearly meaningless. It may still be that it is possible to contract for a return of possession to vendor upon purchaser's default by means of a clause which provides only for that, and does not attempt to superimpose a landlord-tenant relationship on that of vendor-purchaser. And perhaps, as suggested in a dictum in *Oconto Co. v. Bacon*,[60] the vendor can still recover possession by summary proceedings, even under the clause, in a case where the purchaser's equity is clearly nonexistent.

Where the vendor is primarily concerned with regaining possession of the land, ejectment is another remedy which should be considered. This has been held available in *Britt v. Bauman*.[61] There the purchaser was in default only $175 in taxes, yet the court allowed vendor's action. It indicated that equitable defenses are available in ejectment, and that, therefore, there would be no danger of a forfeiture. The implications are (1) that although purchaser could defend by making up his default, he would have to tender before pleading, and no period of redemption would be allowed, and (2) that because of this lack of a redemption period, a judgment in ejectment would not operate to extinguish purchaser's equity entirely. It is not clear whether purchaser would have to tender the whole amount of the default. Assuming that purchaser retains an equity,[62] it would be necessary for vendor to bring an action to quiet title or strict foreclosure to extinguish the equity. Since the first also makes no provision for a redemption period it would probably not be allowed under ordinary circumstances. A second action for strict foreclosure may be the only solution. The possibility that ven-

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[58] 116 Wis. 602, 93 N.W. 446 (1903).

[59] 125 Wis. 284, 103 N.W. 1121 (1905).

[60] 181 Wis. 538, 545, 195 N.W. 412, 414 (1923).

[61] 199 Wis. 514, 226 N.W. 955 (1929). Ejectment as vendor's remedy was earlier approved in Oconto Co. v. Bacon, 181 Wis. 538, 545, 195 N.W. 412, 414 (1923). There is the possibility that the ejectment judgment finally adjudicates the rights of the parties and cuts off the purchaser's equity because purchaser has a chance to set up his equitable defense in that action.

[62] Gillett v. Eaton, 6 Wis. 33 (1857) held a mortgagee could not cut off the mortgagor's equity by means of ejectment.

dor can bring an action in ejectment to regain possession during purchaser's period of redemption following a strict foreclosure action might well be considered, but a strict foreclosure judgment with its provision for a writ of assistance would probably be held to preclude the vendor from a further action in ejectment.

The Title Clause

> [Vendor] . . . in case the aforesaid sum . . . with the interest and other moneys shall be fully paid and all the conditions herein provided shall be fully performed at the times and in the manner above specified, will on demand, thereafter cause to be executed and delivered to said party of the second part . . . a good and sufficient Warranty Deed, in fee simple, of the premises above described, free and clear of all legal liens and incumbrances, except the taxes and assessments herein agreed to be paid by the party of the second part, and except any liens or incumbrances created by the act or default of the party of the second part. . . .

It is evident that a "good and sufficient Warranty Deed,"[63] as required by the approved form, requires vendor to convey a marketable title.[64] A marketable title is one which is free from any unreasonable hazard of litigation.[65] The Wisconsin court has used various tests in applying this standard: The title must be free from defects that would cause a reasonable doubt in the mind of a reasonably prudent and intelligent person.[66] While the purchaser cannot be compelled to take a doubtful title, he will not be permitted to object because of a bare possibility of encumbrance.[67] If the doubt concerns a question of law, it must be a fairly debatable one, one on which a judicial mind would hesitate before decision.[68] If the doubt concerns a question of fact, there must be inability to prove the fact easily and readily at a future time.[69] A marketable title is one saleable generally as well as locally without abatement in price.[70]

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[63] Even in the absence of specific provision, under the majority rule the vendor must prepare the deed; in England the purchaser must prepare the deed if he sues for specific performance. 27 R.C.L. 522.

[64] Douglas v. Ransom, 205 Wis. 439, 237 N.W. 260 (1931); Hermansen v. Slatter, 176 Wis. 426, 187 N.W. 177 (1922); Neff v. Rubin, 161 Wis. 511, 154 N.W. 976 (1915) See Stebbins, *A Lawyer's Opinion after Examination of Title*, Proceedings of Wis. Bar Ass'n (1940) 47 *et seq.*

[65] Zunker v. Kuehn, 113 Wis. 421, 88 N.W. 605 (1902); Gates v. Parmly, 93 Wis. 294, 66 N.W. 253 (1886).

[66] Haumersen v. Sladky, 220 Wis. 91, 264 N.W. 563 (1936).

[67] Nelson v. Jacobs, 99 Wis. 547, 75 N.W. 406 (1898).

[68] Id. at 560, 75 N.W. at 410.

[69] Gates v. Parmly, 93 Wis. 294, 66 N.W. 253 (1896).

[70] Douglas v. Ransom, 205 Wis. 439, 237 N.W. 260 (1931).

In general marketability is a matter of good record title,[71] but it may be established by facts outside the abstract, unless, as the approved form does not, the contract calls expressly for a good title.[72] In like matter marketability may be disproved by facts outside the abstract. Where facts *aliunde* the record are relied upon to establish marketable title, they must be readily accessible at future times.

Whether purchaser may have rescission before the day set for conveyance on the ground that vendor does not have marketable title was litigated in *Knapp v. Davidson*.[73] There the contract provided for conveyance only upon full payment of the purchase price. The purchaser, however, sued for rescission after part payment, having discovered that vendor had never had legal title. The court stated:[74]

> A valid contract for the sale of land may be made by one who has only the equitable title, or a partial title, or one subject to incumbrances, and if the vendor fails to convey as stipulated in the agreement he may be compelled to respond in full damages, but he is entitled to the time agreed on for performance in which to remove incumbrances or perfect his title.

But it suggests exceptions to this rule where 1) there was fraud in inducement, 2) vendor's performance is clearly impossible, and possibly 3) where vendor is insolvent. This still leaves two questions: first, what is meant by "impossibility"; and second, the applicability of the rule to contracts requiring conveyance before full payment. Partial answers to both are found in *Miswald-Wilde Co. v. Armory Realty Co.*[75] After contracting to convey upon payment of twenty-five per cent of the purchase price, vendor placed a blanket mortgage upon land including that contracted for. Vendor tendered a deed

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[71] There is no provision in the approved form dealing with the obligation to furnish an abstract. The general rule in the United States is that unless required to do so by the contract, the vendor is under no obligation to furnish an abstract of title. Note (1925) 52 HARV. L. REV. 1460. The Wisconsin court expressed approval of this rule by dictum in Clarke v. Marsch, 171 Wis. 225, 227, 177 N.W. 11, 12 (1920). The same case, however, indicates that the term may be supplied by custom if left indeterminate in the contract, and both parties have knowledge of the custom or "are so situated that knowledge may be presumed." *Id.* at 228. Because of the possible difficulty of proving custom in a given case, the contract ought to contain a provision regarding vendor's obligation to furnish an abstract.

[72] Zunker v. Kuehn, 113 Wis. 421, 88 N.W. 605 (1902).

[73] 179 Wis. 493, 192 N.W. 75 (1923).

[74] *Id.* at 500, 192 N.W. at 77. This holding is in accord with the weight of authority. *But see* 3 WILLISTON, CONTRACTS (2d ed. 1936) §§ 878, 870; Note (1930) 6 WIS. L. REV. 255; Note (1926) 39 HARV. L. REV. 134.

[75] 210 Wis. 53, 243 N.W. 492 (1933).

subject to this mortgage, and, in spite of a release provision in the mortgage, this was held anticipatory breach, because, (1) the release provision was operative only if vendor was not in default on the mortgage, and (2) the release price for the land in question exceeded the purchase money owing. It seems clear that by "impossibility" which will sustain rescission and excuse performance by purchaser, the court means, not legal "impossibility", but such uncertainty of ultimate performance as is here held to constitute anticipatory breach.

Another aspect of this problem is treated in the case of *Douglass v. Ransom.*[76] There all the defects were curable, but vendor refused either to correct them or to allow a sufficient abatement from the purchase price to compensate purchaser for an action to quiet title. Vendor instead attempted to rescind the contract, and purchaser brought specific performance. The decree in purchaser's favor allowed the election either of accepting the defective title with the requested abatement, or of allowing vendor sixty days to perfect his title.[77]

While the approved form makes no provision for a statement of vendor's present interest in the land, such a provision is desirable. The usual purchaser assumes that vendor has marketable title, and to use a form which is silent on that point leads to misunderstanding and unnecessary litigation. The effects of this omission are the more serious, because the purchaser cannot ordinarily raise the question of marketability before having paid the entire purchase price. It has been suggested that a vendor who does not have marketable title should not be allowed to sue for payments due.[78]

When the vendor furnishes an abstract of title[79] it is the duty of purchaser to make an examination of the abstract and point out any objections that he intends to insist upon.[80] Failure to object to defects prior to an action on the contract will result in waiver of the right to rescind the contract by reason of such defects.[81] Generally,

[76] 205 Wis. 439, 237 N.W. 260 (1931).

[77] Where there is a failure of title as to a portion of the land, the court may require the vendor to give the title which he possesses and order an abatement in the purchase price in proportion to the deficiency. McFarland v. Dixon, 176 Wis. 652, 187 N.W. 671 (1922).

[78] Note (1938) 52 HARV. L. REV. 129, 135 discusses the act submitted by the New York Law Revision Commission prohibiting action by the vendor for installments due unless he has marketable title.

[79] See note 71 *supra.*

[80] Chandler v. Gault, 181 Wis. 5, 10, 194 N.W. 33, 35 (1923).

[81] *Ibid.* and authority cited.

purchaser must give vendor a reasonable opportunity to cure defects.[82]

The Tax Clause

> The said party of the second part [purchaser] further agrees that he will pay, when due and payable, all taxes and assessments which have been assessed or levied on the above described premises since the 1st day of January, . . . and also all such as may be hereafter assessed or levied thereon or upon the interest of said party of the first part in said premises. . .

Where the contract is silent as to taxes, the rule is that the party in possession pays them.[83] In *Ritchie v. City of Green Bay*,[84] it was held that a vendor could not be held liable for taxes during the redemption period following foreclosure action against the purchaser who was tax exempt. This is in accord with the general rule, since even though judgment had been given, the contract was still in existence, and purchaser was in possession.

Another problem is that of apportionment of taxes when both parties have been in possession during a single year. The approved form takes care of this by stating specifically when purchaser's liability shall commence. In the absence of such a provision, the court has held in *Atwood v. Gugel*[85] that a statutory provision is applicable. The statute referred to provides that, "as between grantor and grantee," the grantee shall be liable if "conveyance" is made before December first—otherwise grantor is liable.[86] On its face, this decision would seem to overrule the possession rule, but since subsequent decisions[87] have upheld the latter, it must be concluded that the court assumed possession was changed at the time the contract was executed, a fact which does not appear in the decision. Furthermore, the applicability of this statute to a land contract is doubtful,[88] and it would seem more equitable to apportion the year's taxes on a prorata basis determined by possession.

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[82] *Cf.* Droppers v. Hand, 208 Wis. 681, 242 N.W. 483 (1932). But see Note (1933) 27 ILL. L. REV. 558.

[83] Williamson v. Neeves, 94 Wis. 656, 69 N.W. 806 (1897).

[84] 215 Wis. 432, 254 N.W. 113 (1934).

[85] 166 Wis. 430, 165 N.W. 1085 (1918).

[86] WIS. STAT. (1941) § 74.62.

[87] Ritchie v. City of Green Bay, 215 Wis. 432, 254 N.W. 113 (1934).

[88] Ordinarily the terms "grantee" and "grantor" would not be used to refer to the parties to a land contract nor would such a contract be designated as a "conveyance."

The Insurance Clause

> The party of the second part [purchaser] further agrees that the said party of the first part [vendor] shall insure and keep insured against loss or damage the building now on said premises and such as may hereafter be erected thereon during the life of this contract in the sum of at least. . . against loss or damage by fire . . . in the name of the party of the first part as owner in fee, with clause in said policy that the said party of the second part has a land contract interest therein and the loss, if any, under such insurance shall be payable to the said party of the first part to the extent of his interest and the surplus, if any, to the said party of the second part, subject, however, to the rights of mortgagees, if any, respecting such insurance; such policy or policies to be held by the said party of the first part . . . as collateral to this contract; and the said party of the second part shall pay the premium on such policy or policies when due. . . .

The approved form may be obtained either with or without this clause, or with an insurance clause by corporation.[89] The clause seems clearly to imply that any risk of loss is on the purchaser under the contract.[90]

In the absence of any insurance clause, the courts have used three rules to allocate the risk of loss. A majority of courts, relying on the doctrine of equitable conversion, have placed it on purchaser as soon as the contract is made.[91] A minority have placed it on the vendor, regarding him as the legal owner until actual conveyance.[92] A third rule, advocated by Williston,[93] places it on the party in possession of the property. This last rule was adopted by Wisconsin in *Appleton Electric Co. v. Rogers.*[94] Subsequently in 1941, the legislature adopted the *Uniform Vendor and Purchaser Risk Act*,[95] which is merely a codification of the possession rule already adopted by the court. With the exception of the *Appleton* case there has been

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[89] It should be noted that form 34 does not provide for insurance against hazards others than fire, such as flood, windstorm, and eminent domain; therefor, in some cases it may be advisable to use the insurance by corporation form.

[90] For a discussion of the problems of insurance law involved, see Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II* (1935) 44 YALE L. J. 754.

[91] Keener, *The Burden of Loss as an Incident of the Right to the Specific Performance of a Contract*, (1901) 1 COLO. L. REV. 1.

[92] Thompson v. Gould, 37 Mass. 134 (1838).

[93] Williston, *The Risk of Loss*, (1895) 9 HARV. L. REV. 106.

[94] 200 Wis. 331, 228 N.W. 505 (1930).

[95] WIS. STAT. (1941) 235.72; Laws of 1941, c. 283.

little litigation under the possession rule.[96] Where the parties want to continue insurance under an existing policy of the vendor it is necessary, *before transfer of possession*, to get the insurer's consent that the policy shall protect the interest of both parties. Failure to do so will raise the issue of whether vendor has violated the requirement that he get the insurer's consent before there is a change of interest, title or possession.[97] And in Wisconsin if the purchaser is in possession he will bear the risk of loss but will probably be unable to collect any of the proceeds of the vendor's policy.[98] Vendor himself may only be indemnified to the extent of his loss which would be nothing where the purchaser is a responsible party.

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[96] In Osterloh v. Osterloh, 231 Wis. 319, 285 N.W. 742 (1939), the property burned while the vendor was in the process of moving out of possession. The purchaser, whose interest was protected by insurance, took possession of the land afterwards, notwithstanding the fire. Relying particularly on his taking possession without objection, the court denied purchaser's action for rescission. This decision might also be rationalized on the theory that, though neither of the parties was in actual possession at the time of loss, right to possession had already vested in the purchaser.

[97] WIS. STAT. (1941) § 203.01 (2) l. 31-34 provides: "this entire policy shall be void . . . if any changes, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard). . . ." No Wisconsin case has been found in which the vendor brought action on an insurance policy either before or after the purchaser was placed in possession. The majority of jurisdictions hold that so long as there is no change in possession, an executory contract of sale without conveyance of title does not amount to such a change of interest as voids the insurance. The weight of authority, however, holds that if the purchaser takes possession of the property this is such a substantial change of interest as will avoid the policy. VANCE, INSURANCE (2d ed. 1930) 719 *et seq.*; HANDLER, CASES AND MATERIALS ON VENDOR AND PURCHASER (1933) 397. Two Wisconsin cases have discussed the effect of this clause upon the purchaser's rights: De Keyser v. National Liberty Ins. Co., 216 Wis. 566, 257 N.W. 673 (1934); Kornstued v. American Ins. Co., 216 Wis. 470, 257 N.W. 670 (1934).

[98] In Appleton Electric Co. v. Rogers, 200 Wis. 331, 339, 228 N.W. 505, 508 (1930), the purchaser sought to recover the proceeds of an insurance policy when loss occurred while the vendor was in possession of the property. It was held that the insurance contract was personal and did not run with the land. The court quoted with approval Rayner v. Preston, 18 Ch. D. 1 (1881) in which it was held that the purchaser, even though the risk of loss was upon him, was not entitled either to claim the insurance money received by the vendor or to have it applied to repair the damaged premises. However this suggestion in the *Appleton* case is no more than a dictum, for it was held that the risk of loss was upon the vendor. If the Wisconsin court does adopt the rule of *Rayner v. Preston* when confronted with a case in which purchaser has the risk of loss and vendor the insurance, it will hold contrary to the majority of American courts. Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II,* (1935) 44 YALE L. J. 754, 765. The majority of courts cut through the insurance policy as an indemnity contract and adopt the layman's understanding that insurance is "on the buildings." To hold otherwise would seem to give the insurer an unwarranted windfall.

Conclusion

Proper use of any standard form demands adaptation to the needs of the particular transaction. The foregoing discussion of the important provisions of the approved form suggest some inadequacies in the form here discussed which should be considered by attorneys. While the following suggestions do not purport to be all-inclusive, they seem worthy of consideration in most instances.

If the parties desire to make time of the essence, this should be expressly stated in the contract, for it is uncertain whether the forfeiture clause in itself has this effect.

If installments running over a considerable period of time are involved, an acceleration clause should be added to avoid possible difficulties in vendor's remedies.

A provision defining the rights of the parties with respect to possession, without attempting to create a landlord-tenant relationship, should be substituted for the "tenant by sufferance" clause.

A clause providing for insurance against hazards other than fire, such as windstorm, eminent domain, and liability in tort, ought to be considered.

In many cases, especially where the down payment is small, the inclusion of a clause prohibiting assignment should be considered by the vendor.[99]

The possibility of a provision encumbering crops as further security for annual installments should be investigated in farm contracts.[100]

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[99] The law is not settled on the operation of such a provision, but courts generally, in this respect treating land contracts like leases, have held them valid as to the vendor. Sloman v. Cutler, 258 Mich. 372, 242 N.W. 735 (1932). An excellent general discussion is to be found in Goddard, *Non-Assignment Provisions in Land Contracts* (1932) 31 MICH. L. REV. 1. The form in which the provision is drawn may be of great importance: thus it may be either (1) a promise by purchaser not to assign, (2) a stipulation that any assignment shall be void, or (3) a provision whereby non-assignment is made a condition precedent to the continuance of the contract. For a discussion of the effects of these, see Grismore, *Effect of a Restriction on Assignment in a Contract* (1933) 31 MICH. L. REV. 299.

[100] See Kohler Improvement Co. v. Preder, 217 Wis. 641, 259 N.W. 833 (1935); Layng v. Stout, 155 Wis. 553, 145 N.W. 227 (1914); Rowlands v. Vorchting, 115 Wis. 352, 91 N.W. 990 (1902); Federal Land Bank v. McCloud, 52 Idaho

The contract should expressly provide for the furnishing of an abstract of title, the payment of stamp taxes, and the payment of filing fees.

The purchaser should be protected against the possibility of his being obliged to continue payments in the face of defects in the vendor's title which may not be cured by deed day.

The parties should agree to join in giving a new mortgage, or obtaining a renewal or extension of the existing mortgage, where it will expire before the purchaser has fully performed and obtained a deed to the property.*

694, 20 P. (2d) 201 (1933). *But Cf.* Killebrew v. Hines, 104 N.C. 182, 10 S.E. 159 (1889); Yeisley v. Bennett, 121 Mich. 422, 80 N.W. 114 (1899); Bentler v. Brypolfson, 38 N.D. 401, 165 N.W. 553 (1917).

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