CONTRACTING EQUITABLY IN REAL ESTATE INSTALLMENT CONTRACTS

I. INTRODUCTION

For decades the real estate installment contract has been used in Iowa for transactions involving rural land, usually farms. In recent years the contract has become more popular in the sale and purchase of residential real property. Installment contracts have been the subject of much critical analysis.[1] The statutes governing the contracts, the case law construing the statutes and the contracts, and the contracts themselves have most frequently been criticized for the resultant inequities to the buyers;[2] although there has been some criticism for overprotecting the buyer to the detriment of the seller.[3] The increasing use of the installment contract as a financing method for residential real estate purchases justifies a re-examination of the contents of the contract.[4] It is without doubt that the number of legal disputes resulting from installment contracts is significant.[5] The relationship between the parties is unique. They are not mortgagor-mortgagee, nor are they landlord-tenant. Their relationship is somewhere in between and is governed almost solely by their contract.[6]

The contract typically binds the parties for five to twenty years. None of its provisions, except forfeiture,[7] to a limited extent, and foreclosure,[8] are regulated by statute. The buyer invests his life savings in the down payment in hopes of owning his own home. However, the buyer frequently does not consult an attorney,[9] and both parties often rely on a form contract provided by the real estate agent or by the seller's attorney.

The form real estate installment contract made available to attorneys

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1. *E.g.*, Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729 (1960) [hereinafter cited as Hetland]; Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II*, 44 YALE L.J. 754, 776-77 (1935); Warren, *California Instalment Land Sales Contracts: A Time for Reform*, 9 U.C.L.A. L. REV. 608 (1962); Comment, *Remedying the Inequities of Forfeiture in Land Installment Contracts*, 64 IOWA L. REV. 158 (1978); Note, *Forfeiture and the Iowa Installment Land Contract*, 46 IOWA L. REV. 786 (1961).

2. *See* note 1 *supra*.

3. Note, *Reforming the Vendor's Remedies for Breach of Installment Land Sale Contracts*, 47 S. CAL. L. REV. 191, 192 (1973).

4. *See* M. HARRIS & N. HINES, INSTALLMENT LAND CONTRACTS IN IOWA 108 (University of Iowa Agricultural Law Center Monograph No. 5, 1965) [hereinafter cited as HARRIS & HINES].

5. *See, e.g.*, notes 30-33 *infra* and accompanying text.

6. HARRIS & HINES, *supra* note 4, at 6-7, 108-09.

7. *See* notes 30-54 *infra* and accompanying text.

8. *See* notes 68-72 *infra* and accompanying text. *See also* HARRIS & HINES, *supra* note 4, at 108-09.

9. *Id.* at 16.

by the Iowa State Bar Association (ISBA)[10] will be used in this Note as a medium for discussion of typical installment contract provisions. Iowa case law as it pertains to specific contract provisions will be summarized in the text and annotated in the footnotes. The ISBA contracts fall prey to the problems inherent in all form contracts; undue reliance on them will not always serve the purpose intended. The form contracts strongly favor the seller. A zealous buyer's attorney would need to so thoroughly modify the contract as to make the form practically unusable.

The ISBA should change the current form contract, or should provide at least one more alternative contract. A form contract should be available which more equitably balances the interests of the parties. It is true that

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10. Iowa State Bar Association, official forms numbers 21 and 21-½ will be focused upon. Both forms are entitled "Real Estate Contract—Installments." The only difference in the content of the contracts is found in paragraph one "Total Purchase Price": form 21 contains a lengthy clause seemingly intended to cover any financial arrangement between the parties; form 21-½ contains a short, concise clause with a blank space for individual drafting. Due to the identical nature of the other contract provisions, this Note will refer to only one contract, form 21 [hereinafter cited as ISBA Form 21].

The form contract advises users to consult their lawyers for the legal effect of the form. The ISBA Legal Forms Committee distributes a letter to attorneys using any of its forms. The letter is a "general caveat and disclaimer of warranty." The letter also indicates the Committee's receptiveness to suggestions, comments and criticisms from lawyer-users.

ISBA Form 21 contains the following provisions:

a. names of the parties and description of the property
b. the following numbered paragraphs and clause headings
    1. Total Purchase Price
    2. Possession
    3. Taxes
    4. Special Assessments
    5. Mortgage
    6. Insurance
    7. Care of Property
    8. Liens
    9. Advancement by Sellers
    10. Joint Tenancy in Proceeds and Security Rights in Real Estate
    10-½. "Sellers"
    11. Time is of the Essence
    12. Exceptions to Warranties of Title
    13. Deed and Abstract, Bill of Sale
    14. Approval of Abstract
    15.1 Forfeiture
    15.2 Foreclosure
    16. Attorney's Fees
    17. Interest on Delinquent Amounts
    18. Assignment
    19. Personal Property
    20. Construction
    21. Special Provisions
c. signatures and addresses of the parties
d. notary public

each party should have legal representation, and that in the absence of an agreeable form contract, the parties should negotiate one to fit their needs. It is likely, though, that a form contract could be drafted which would more closely approximate the interests of both parties, thus saving the parties some of the time, effort and expense of drafting a new contract from scratch. Furthermore, the current contracts contain provisions which are of questionable enforceability.[11]

The purpose of this Note is to examine the relationship of the parties, the contract and the applicable case law as a step toward revision of the current form contract. Additionally, the contract annotations, the discussion of the case law and the summary of the procedures by which many of the installment contracts reach the courts of Iowa will hopefully serve as a research tool for practicing Iowa property lawyers.

II. Real Estate Installment Contracts Generally

A. *The Parties*

1. *The Buyer*

The installment contract appeals to the buyer because he can purchase with a low down payment, and usually with little regard to his credit rating.[12] In times of "tight money," when large down payments are required and purchase money mortgages are difficult to secure, the installment contract serves as a means to the end of purchasing a home. Closing costs are minimal for both parties.[13] The installment contract buyer of residential property usually will make monthly payments amortized over twenty to thirty years, although the contract may call for a balloon payment or for refinancing after a shorter period. The payment schedule will generally provide for level monthly payments for the duration of the contract.[14] The payments made for the first few years will be applied predominantly to interest, with very small reductions in the principal balance.

The buyer becomes equitable owner,[15] and typically takes possession, pays property taxes, insures the property against loss, and assumes other responsibilities of ownership pursuant to the contract.[16] The contract and

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11. *See, e.g.*, notes 55-61 *infra* and accompanying text.

12. *E.g.*, Comment, *Attacking the "Forfeiture as Liquidated Damages" Clause in North Carolina Installment Land Sales Contracts as an Equitable Mortgage, Penalty, and Unfair and Deceptive Trade Practice*, 7 N.C. Cent. L.J. 370, 371 (1976) [hereinafter cited as *Attacking Liquidated Damages*].

13. Mixon, *Installment Land Contracts: A Study of Low Income Transactions, With Proposals for Reform and a New Program to Provide Home Ownership in the Inner City*, 7 Hous. L. Rev. 523, 529-30 (1970) [hereinafter cited as Mixon]; *Attacking Liquidated Damages*, *supra* note 12, at 372.

14. *See* Mixon, *supra* note 13, at 528.

15. *See* notes 80-81 *infra* and accompanying text.

16. *See* ISBA Form 21, *supra* note 10. *See also* Mixon, *supra* note 13, at 528; Nelson &

the common law[17] consider the buyer to have the incidents of property ownership. However, the seller retains legal title[18] and has both the usual remedy of a mortgagee—foreclosure[19]—as well as the summary remedy of forfeiture.[20] Consequently, the buyer's "ownership rights" are somewhat tenuous.

2. *The Seller*

The seller of residential property is advantaged by having the installment financing. In "tight money" situations, the seller who is able to afford to forego an immediate return of the equity in his property can attract additional buyers by providing the installment contract as a buyer's financing device.[21] Persons who do not qualify for conventional purchase money mortgages are still potential buyers for an installment contract seller. The seller can accept a smaller down payment and lower interest rates as an enticement to the buyer. With conventional lending institutions in 1980 charging interest rates fluctuating between the low and middle teens on mortgages, the seller can charge one or two percent below the prevailing rate of lenders and provide the buyer with an attractive interest rate, while still receiving a return on his money which approximates current money market certificate interest rates.

Besides availing oneself to a larger class of buyers and receiving an attractive interest rate, the seller under installment contracts has other benefits. The seller can delay recognition of income from sale pursuant to the Internal Revenue Code § 453.[22] The seller is not obligated at common law nor under most installment contracts to have or be able to convey marketable title until the contract has been fully satisfied by the buyer.[23] Indeed, a typical contract may even expressly permit the seller to mortgage the property.[24] Furthermore, if the contract so provides, and it is reasonably safe to say that a vast majority do, the seller has the summary remedy of forfeiture in the event of default by the buyer.[25]

Whitman, *The Installment Land Contract—A National Viewpoint*, 1977 B.Y.U. L. Rev. 541 [hereinafter cited as Nelson & Whitman].

17. *E.g.*, O'Brien v. Paulsen, 192 Iowa 1351, 1353, 186 N.W. 440, 441 (1922).

18. *Id. See* notes 80-81 *infra* and accompanying text.

19. *See* notes 68-72 *infra* and accompanying text.

20. *See* notes 30-64 *infra* and accompanying text.

21. Hines, *Forfeiture of Installment Land Contracts*, 12 Kan. L. Rev. 475, 478 (1964).

22. I.R.C. § 453.

23. *See* notes 104-06 *infra* and accompanying text.

24. *E.g.*, ISBA Form 21, *supra* note 10, ¶ 5. *See* note 108 *infra* and accompanying text.

25. *E.g.*, ISBA Form 21, *supra* note 10, ¶ 15.1. *See* notes 30-37 *infra* and accompanying text.

B. *Form Contracts*

1. *The Problem*

Mass produced forms are used extensively by attorneys and real estate brokers in all stages of real estate transactions. Iowa attorneys frequently rely on forms provided by the Iowa State Bar Association (ISBA). Even when attorneys try to personalize a real estate installment contract to the special needs of their client, the ISBA form real estate installment contract is the point from which they start. Furthermore, it is not unreasonable to suggest that attorneys hired by real estate brokers or real estate associations use the ISBA form contract as a starting place.

A quick review of real estate installment form contracts in general shows them to strongly favor the seller's interests.[26] However, it is not surprising that the contracts are more protective of the seller's interests. Real estate brokers, while in somewhat of a double-agent role for both the buyer and the seller, are technically the sellers' agents. The seller contracts with, hires and pays the broker. The broker's first obligation is to protect his client.

Often the seller is the only party to consult an attorney.[27] The seller's attorney can rely almost blindly on the ISBA form contracts and be assured that his client is fairly well protected. An attorney for a buyer, on the other hand, must make major modifications to the form or completely re-write the contract in order to effectively represent his client's interests. This poses at least two problems. First, the buyer is likely to be exposed to higher legal fees. Secondly, there may be problems in negotiations of the contract provisions if the buyer refuses to rely on the form contract offered by the seller. The interests of the parties need to be carefully protected. Additionally, in this type of real estate transaction more than most, it is imperative that hard feelings between the parties be minimized. These parties will be bound to the contract and to each other for the term of the contract, usually five to twenty years or more. The event is hardly limited to a pure business transaction. It is a personal transaction involving a personal residence.

2. *Changes Are Needed in the ISBA Form Contract*

The ISBA form real estate installment contracts need a thorough re-examination. As previously mentioned and as will be seen, the contracts favor the seller. The contracts are undoubtedly intended to be enforceable. They should also be intended to fairly reflect the interests of the parties.

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26. *See* ISBA Form 21, *supra* note 10.

27. Comment, *Forfeiture: The Anomaly of the Land Sale Contract*, 41 ALBANY L. REV. 71, 72 (1977) [hereinafter cited as *Forfeiture: The Anomaly*]. *See* HARRIS & HINES, *supra* note 4, at 16 (results of a study which revealed that almost half of the buyers of farm property under an installment contract did not consult an attorney).

The form contracts were drafted in 1958.[28] In the past twenty years there have been societal changes which deserve attention as they relate to the real estate installment contract. Property values have soared, making the purchase of property an even more desired investment for home buyers, and giving sellers under the installment contract the potential windfall of forfeiting the buyer and regaining the property which has appreciated at a faster rate than inflation. Interest rates for conventional purchase money mortgages reached all-time highs in 1980.

In addition to changes in economic conditions, the law is changing. Notions of consumer protection can no longer be ignored. "Caveat emptor" is giving way to a requirement of reasonableness and fair dealing.[29]

III. Contract Annotations and Analysis

A. *The Forfeiture Clause*

1. *Generally*

The forfeiture clause is at the root of most legal disputes concerning installment contracts. The clause is typically all-inclusive—providing the seller with the summary remedy of forfeiture for any breach or default under the contract.[30] Paragraph 15.1 of the ISBA form contract number twenty-one lists several specific acts or omissions by the buyer which may result in forfeiture. The contract further specifies that failure "to perform any of the agreements as herein made or required" will justify the seller's option to forfeit the contract.[31]

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28. ISBA Form 21, *supra* note 10, states a copyright date of 1958. ISBA Form 21-½, *supra* note 10, indicates a revision in September 1979. *See* note 10 *supra* for a comparison of the two contracts.

29. *See* Lockard v. Carson, 287 N.W.2d 871, 877 (Iowa 1980).

30. Harris & Hines, *supra* note 4, at 81.

31. ISBA Form 21, *supra* note 10, ¶ 15.1 provides:

> FORFEITURE. If Buyers (a) fail to make the payments aforesaid, or any part thereof, as same become due; or (b) fail to pay the taxes or special assessments or charges, or any part thereof, levied upon said property, or assessed against it, by any taxing body before any of such items become delinquent; or (c) fail to keep the property insured; or (d) fail to keep it in reasonable repair as herein required; or (e) fail to perform any of the agreements as herein made or required; then sellers, in addition to any and all other legal and equitable remedies which they may have, at their option, may proceed to forfeit and cancel this contract as provided by law (Chapter 656 Code of Iowa). Upon completion of such forfeiture Buyers shall have no right of reclamation or compensation for money paid, or improvements made; but such payments and/or improvements if any shall be retained and kept by Sellers as compensation for the use of said property, and/or as liquidated damages for breach of this contract; and upon completion of such forfeiture, if the Buyers, or any other person or persons shall be in possession of said real estate or any part thereof, such party or parties in possession shall at once peacefully remove therefrom, or failing to do so may be treated as tenants holding over, unlawfully after the expiration of a lease, and may

A review of Iowa case law reveals that one of the most frequent causes for forfeiture of a land installment contract is default of the installment payment.[32] Other reasons for contracts having been forfeited include failure to pay real estate taxes,[33] failure to keep property insured,[34] and causing a mechanic's lien[35] or an Internal Revenue Service income tax lien[36] to encumber the seller's record title. Under the form contract a buyer could also be forfeited for failure to secure the written approval of the seller before making any material alterations to the property.[37]

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accordingly be ousted and removed as such as provided by law.

See also ISBA Form 21, *supra* note 10, ¶ 19:

> PERSONAL PROPERTY. If this contract includes personalty, then Buyer grants Seller a security interest in such personalty. In the case of Buyer's default, Seller may, at his option, proceed in respect to such personalty in accordance with the Uniform Commercial Code of Iowa or treat such personalty in the same manner as real estate, all as permitted by Section 554.9501(4), Code of Iowa.

32. *E.g.*, Skubal v. Meeker, 279 N.W.2d 23, 25 (Iowa 1979); Jensen v. Schreck, 275 N.W.2d 374, 383 (Iowa 1979); Bettis v. Bettis, 228 N.W.2d 193, 194 (Iowa 1975); Warren v. Yocum, 223 N.W.2d 258, 259 (Iowa 1974); Abodeely v. Cavras, 221 N.W.2d 494, 496 (Iowa 1974); Babb's, Inc. v. Babb, 169 N.W.2d 211, 212 (Iowa 1969).

33. Miller v. American Wonderlands, Inc., 275 N.W.2d 399, 400 (Iowa 1979); Babb's, Inc. v. Babb, 169 N.W.2d 211, 212 (Iowa 1969); Westerman v. Raid, 203 Iowa 1270, 212 N.W. 134 (1927).

ISBA Form 21, *supra* note 10, ¶¶ 3-4 respectively provide:

> TAXES. Sellers shall pay ___, and any unpaid taxes thereon payable in prior years. Buyers shall pay any taxes not assumed by Sellers and all subsequent taxes before same become delinquent. Whoever may be responsible for the payment of said taxes, and the special assessments, if any, each year, shall furnish to the other parties evidence of payment of such items not later than July 15 of each year. Any proration of taxes shall be based upon the taxes for the year currently payable unless the parties state otherwise.
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> SPECIAL ASSESSMENTS. Sellers shall pay the special assessments against this property; (Strike out either (a) or (b) below.)
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> (a) Which, if not paid in the year 19___, would become delinquent and all assessments payable prior thereto.
>
> (b) Which are a lien thereon as of ___. (date)
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> (c) Including all sewage disposal assessments for overage charge heretofore assessed by any municipality having jurisdiction as of date of possession. Buyers, except as above stated, shall pay all subsequent special assessments and charges, before they become delinquent.

34. *See* notes 73-76 *infra* and accompanying text.

35. *See* Miller v. American Wonderlands, Inc., 275 N.W.2d 399, 401 (Iowa 1979) (Notice of forfeiture was served for default relating to real estate taxes. The court indicated the subsequent causing of the filing of a mechanics' lien was also a violation of the contract.). *See* notes 96-98 *infra* and accompanying text.

36. *See id.* (The court indicated that causing the filing of a federal tax lien against the property violated the terms of the contract.)

37. ISBA Form 21, *supra* note 10, ¶ 7. *See* notes 88-95 *infra* and accompanying text.

2. *Notice of Forfeiture*

Immediately upon breach of the contract, the seller may serve Notice of Forfeiture on the buyer pursuant to chapter 656 of the Iowa Code.[38] It is necessary that the contract specifically provide for forfeiture.[39] A "time is of the essence" clause is also generally regarded as important for bolstering a forfeiture for failure to make timely payments.[40]

Assuming the two above-mentioned clauses are included in the contract, the seller need not provide any grace period during which the buyer may cure a late payment, except as provided by chapter 656.[41] This statute was written to provide some protection to the defaulting buyer.[42] Upon being served with a Notice of Forfeiture, the buyer has thirty days in which to cure the default.[43] The statute has no provision for varying the period of time to cure—it is thirty days regardless of the materiality of the breach or of the equity that the buyer has in the property.[44]

The familiar maxim that "equity abhors forfeiture" is recognized in Iowa courts of both law and equity.[45] Consequently, the statutory notice requirements are strictly construed.[46] While the courts are bound by the strict language of the statute, it is not unusual to see judicial efforts to soften the

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38. IOWA CODE § 656.2 (1979). *See* Jensen v. Schreck, 275 N.W.2d 374, 384 (Iowa 1979). "Statutory proceedings for forfeiture of a real estate contract provide the only means for a vendor to enforce its provisions. . . ." *Id.*

39. HARRIS & HINES, *supra* note 4, at 80-81. *See* Lake v. Bernstein, 215 Iowa 777, 780, 246 N.W. 790, 792 (1933); Fowler v. Dieleman, 192 Iowa 563, 566, 185 N.W. 79, 80 (1921). (Both cited cases required a forfeiture clause or a "time is of the essence" clause.). *Cf.* Westerman v. Raid, 203 Iowa 1270, 1274-75, 212 N.W. 134, 136 (1927) (not requiring the word "forfeit," finding the words "null and void" in the contract to be equivalent to words of forfeiture). *See also* Annot., 102 A.L.R. 852 (1936).

40. *See* HARRIS & HINES, *supra* note 4, at 81. *See generally* Lake v. Bernestein, 215 Iowa 777, 780, 246 N.W. 790, 792 (1933); Fowler v. Dieleman, 192 Iowa 563, 566, 185 N.W. 79, 80 (1921).

41. *See* Jensen v. Schreck, 274 N.W.2d 374, 384 (Iowa 1979), where the court stated that Iowa Code section 656 "is designed to extend 'a little grace to a party in default who may be staggering under the load of his undertaking.' " (citations omitted).

42. IOWA CODE ANN. § 656 (1979) (history of statute). *See* Jensen v. Schreck, 275 N.W.2d 374, 386 (Iowa 1979); Waters v. Pearson, 163 Iowa 391, 397 144 N.W. 1026, 1029 (1914).

43. IOWA CODE § 656.2 (1979). *See* IOWA CODE § 656.4 (1979)(requiring buyer to pay costs of serving notice).

44. *But cf.* Bettis v. Bettis, 228 N.W.2d 193, 195 (Iowa 1975) (holding that the facts justified extending the 30-day statutory notice to provide a "reasonable time" to cure). *See* note 47 *infra* and accompanying text.

45. *E.g.*, Collins v. Isaacson, 261 Iowa 1236, 1242, 158 N.W.2d 14, 17 (1968); Beck v. Trovato, 260 Iowa 693, 698, 150 N.W.2d 657, 660 (1967); Kilpatrick v. Smith, 236 Iowa 584, 593, 19 N.W.2d 699, 703 (1945). *But cf.* Miller v. American Wonderlands, Inc., 275 N.W.2d 399, 402 (Iowa 1979) ("The fact that forefeitures are not favored does not mean they will never be enforced.").

46. *E.g.*, Jensen v. Schreck, 275 N.W.2d 374, 386 (Iowa 1979).

effect of the statute in favor of the defaulting buyer.[47] Most of the legal disputes regarding forfeiture of real estate installment contracts are heard in the equity division of the court. Consequently, the facts of a particular case can effectively impact on the court's determination of whether to strictly adhere to the statute and to the contract, or, in its discretion, to disregard or interpret certain provisions of both the contract and the statute.

Although the Iowa Supreme Court has stated that the notice requirement is strictly construed against the party seeking forfeiture,[48] the strict construction has been somewhat limited to the thirty-day time requirement.[49] The notice of forfeiture need not correctly state the defaults causing forfeiture.[50] As long as the notice provides "one matter on which [the seller] is entitled to give notice of forfeiture,"[51] the notice will not be rendered invalid.

At first glance, perhaps the leniency in the itemization of reasons for default seems equitable. A seller having a valid cause for forfeiting a contract should not be deprived of his remedy just because he technically erred by including an invalid clause. However, this rule invites abuse. A seller need not take care in drafting his notice. The court has not required that the notice be drafted in good faith. There is nothing to prevent a seller from intentionally enumerating unfounded demands as a scare tactic or perhaps just to overwhelm the buyer into failing to cure the otherwise "valid" defaults.

As between the parties, the forfeiture is in force upon the failure of the buyer to cure the default within thirty days.[52] The statutory provision for

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47. Lett v. Grummer, No. 226-64936 (Iowa S. Ct., decision filed Jan. 14, 1981) (applying the statute but refusing to forfeit the contract for a miniscule breach); Skubal v. Meeker, 279 N.W.2d 23, 27 (Iowa 1979) (invoking the flexibility of the court of equity to vacate forfeiture and reform the contract); Beck v. Trovato, 260 Iowa 693, 697, 150 N.W.2d 657, 659 (1967) (Seeking to prevent injustice, a court of equity will look to substance rather than form, and if necessary be somewhat less strict than a court of law.).

48. *See* notes 45-46 *supra* and accompanying text.

49. *See* Abodeely v. Cavras, 221 N.W.2d 494, 499 (Iowa 1974); Hampton Farmers Coop. Co. v. Fehd, 257 Iowa 555, 559-62, 133 N.W.2d 872, 875-76 (1965) (allowing the forfeiture to stand, even though the notice of forfeiture incorrectly accelerated the payments; demanding the buyer to cure the default of an installment payment and interest plus the principal balance).

50. Hampton Farmers Coop. Co. v. Fehd, 257 Iowa 555, 559-62, 133 N.W.2d 872, 875-76 (1965). *Cf.* Fowler v. Dieleman, 192 Iowa 563, 566-67, 185 N.W. 79, 81 (1921) (notice to quit possession within 30 days held insufficient to constitute notice of forfeiture).

51. Hampton Farmers Coop. Co. v. Fehd, 257 Iowa 555, 561-62, 133 N.W.2d 872, 876 (1965).

52. Abodeely v. Cavras, 221 N.W.2d 494, 499 (Iowa 1974). IOWA CODE § 656.5 (1979) provides:

> Proof and record of service. If the terms and conditions as to which there is default are not performed within said thirty days, the party serving said notice or causing the same to be served, may file for record in the office of the county recorder a copy of the notice aforesaid with proofs of service attached or endorsed thereon (and, in cases of service by publication, his personal affidavit that personal service

filing the notice of forfeiture and the affidavit with the county recorder is for the benefit of third parties.[53] The filing is not mandatory.[54]

3. *Liquidated Damages*

The ISBA forfeiture clause also provides that upon completion of the forfeiture the seller shall keep all payments and improvements made as liquidated damages.[55] The Iowa Supreme Court allows "retention of liquidated damages if they are not out of proportion to the loss or injury actually sustained or reasonably anticipated."[56] The court has seemingly adopted a two-step test for providing an example of when liquidated damages will be allowed in an installment contract: If the amount sought to be retained by the seller is a small percentage of the total purchase price, and "if the purchaser's breach occurred soon after execution of the agreement."[57] Consequently, in *Jensen v. Schreck*, the court held that payments and improvements to the property totalling almost $3,000 could be retained by the seller under a $56,000 contract.[58] The court has not, however, given a similar test for holding a liquidated damages clause to be unenforceable as a penalty.

A buyer seeking to escape from the liquidated damages clause must plead and prove that the stipulated damages are a penalty.[59] When the buyer can show that the seller is receiving the benefit of gain, rather than compensation for losses reasonably anticipated, the court will declare the damages clause to be a penalty and will not enforce it.[60] The court has also suggested that a liquidated damages clause may be held unenforceable if it

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could not be made within this state), and when so filed and recorded, the said record shall be constructive notice to all parties of the due forfeiture and cancellation of said contract.

But cf. Kilpatrick v. Smith, 236 Iowa 584, 592-93, 19 N.W.2d 699, 702 (1945) (The seller's leasing of the premises before the 30 days had passed invalidated the notice of forefeiture, even though the buyer had not cured the default.).

53. Abodeely v. Cravas, 221 N.W.2d 494, 499 (Iowa 1974).

54. *Id.*

55. ISBA Form 21, *supra* note 10, ¶ 15.1. *See* note 31 *supra.*

56. Jensen v. Schreck, 275 N.W.2d 374, 387 (Iowa 1979).

57. *Id.*

58. *Id.*

59. Heaberlin v. Heaberlin, 255 Iowa 403, 409, 122 N.W.2d 841, 844 (1963); Pace v. Zellmer, 194 Iowa 516, 518, 186 N.W. 420, 421 (1922); Selby v. Matson, 137 Iowa 97, 99-100, 114 N.W. 609, 610 (1908).

60. Brown v. Verzani, 181 Iowa 237, 244, 164 N.W. 601, 603 (1917); Joeckel v. Johnson, 178 Iowa 231, 241, 159 N.W. 672, 675-76 (1916); Annot., 6 A.L.R.2d 1401 (1949). *See* cases not involving land contracts: Engel v. Vernon, 215 N.W.2d 506, 516 (Iowa 1974) (covenant-not-to-compete found to have a non-enforceable liquidated damages clause); Huntsman v. Eldon Miller, Inc., 251 Iowa 478, 481-82, 101 N.W.2d 531, 533 (1960) (employment contract contained a liquidated damages clause found to be a penalty). *See also* Golden Sun Feeds, Inc. v. Clark, 258 Iowa 678, 683, 140 N.W.2d 158, 161 (1966). *See generally* Hetland, *supra* note 1; Mixon, *supra* note 13, at 600; *Forfeiture: The Anomaly, supra* note 27, at 106-07; *Attacking Liquidated Damages, supra* note 12, at 383; Annot., 31 A.L.R.2d 8 (1953).

relates to two or more conditions of the contract which are of differing degrees of importance.[61]

The form contract's forfeiture paragraph is ripe for challenge. First, the contract provides for forfeiture in the event of *any* breach.[62] There is little doubt that the various provisions of the contract which are subject to a buyer's breach are of differing degrees of importance to the total contract.[63] Secondly, the liquidated damages clause provides for the same damages regardless of the damage caused to the seller under the various possible breaches. Finally, the longer the buyer performs under the contract, the greater the liquidated damages sum becomes.[64]

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61. Huntsman v. Eldon Miller, Inc., 251 Iowa 478, 482, 101 N.W.2d 531, 533 (1960). The court explained:

> It is well settled that if a contract or bond is given to secure the performance of two or more conditions of varying degrees of importance, or if the damages stipulated are grossly in excess of the damages reasonably to be anticipated from a breach of the conditions, the agreement will be construed to provide a penalty.

Id. (quoting Holt v. Doty, 193 Iowa 582, 588, 187 N.W. 550, 552 (1922)). *See* notes 117-20 *infra* and accompanying text.

See also McMurray v. Faust, 224 Iowa 50, 58-59, 276 N.W. 95, 100 (1937) (A single liquidated damages clause in a contract containing several stipulations of different degrees of importance may be construed as a penalty.); Joekel v. Johnson, 178 Iowa 231, 241, 159 N.W. 672, 676 (1916).

62. ISBA Form 21, *supra* note 10, ¶ 15.1. *See* note 31 *supra*. *See also* HARRIS & HINES, *supra* note 4, at 81.

63. For example, the causing of a few-hundred-dollar-mechanics' lien (in violation of ISBA Form 21, *supra* note 10, ¶ 8; *see* note 96 *infra*) to be filed against the property may not be as serious as defaulting on the fire and casualty insurance of the premises. *Id.* ¶ 6. *See* note 74 *infra*. Likewise being a few days late on a monthly installment is not likely to be as problematic to the seller as the buyer causing a sizeable income tax lien to encumber the property.

64. The contract does not actually provide a liquidated damages *sum;* but rather, provides a liquidated damages *formula* which increases the sum throughout the duration of the contract. The formula looks something like this: liquidated damages = [(installment payments x number of months paid) + (annual property taxes x years paid) + (annual property insurance x years paid) + buyer's improvements to the property + increased value of the property caused by inflation] minus [the sum of damage or destruction to the property + taxes or insurance paid by seller + cost of re-sale].

A possible scenario under the forfeiture paragraph and the liquidated damages clause, if both were held enforceable is as follows: The parties contract for a $50,000 home, installments are amortized over a twenty year period at 10% interest, with the principal balance due at the end of ten years (the buyer will presumably seek a conventional purchase money mortgage at that time). The buyer makes a 10% down payment of $5,000. The buyer makes timely payments for eight years, pays all property taxes and insures the property. In the ninth year the buyer builds a two car garage and changes the location of the driveway without the consent of the seller. The improvements to the property add $5,000 to the value of the property. In addition, drastic increases in value of real property (10% for each year) make the house now worth about $114,000 ($108,934 plus the $5,000 garage). The seller serves notice of forfeiture for breach of paragraph seven of the form contract: the buyer did not receive written consent for the material alteration of the property. The buyer is unable to "cure" the garage within 30 days. The seller has earned interest on his investment while his investment has increased significantly in value. Pursuant to the forfeiture and liquidated damages clauses the seller can re-

B. *Time Is of the Essence Clause*

The "time is of the essence" clause is generally considered necessary for the strict enforcement of the forfeiture remedy.[65] Not only must installment payments be timely made, but all provisions of the contract must satisfy the "time is of the essence" clause.[66] The effect to the buyer is a lack of grace period under the contract. The statutory notice given by the seller, however, does provide a thirty-day period of grace during which the buyer can cure.[67]

C. *The Foreclosure Clause*

The foreclosure remedy available to the seller under an installment contract is rarely used. The form contract provides for foreclosure in the event of breach of any of the contract provisions for which forfeiture is a remedy.[68] Foreclosure, however, is not a summary remedy and does not by its terms operate to destroy the buyer's equity in the property. For purposes of applying the foreclosure statute,[69] the Iowa courts treat the parties as mortgagee and mortgagor.[70]

The statutory protection provides a more equitable result for a buyer who has equity in the property exceeding the costs of foreclosure.[71] In addition to the buyer's entitlement to the monies from the foreclosure sale which exceed the contract's principal balance and other costs due the seller, the

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take possession of his now $114,000 property, can retain his interest income for the nine years and can retain the $5,000 down payment, having had the benefit of non-payment of nine years of expenses ordinarily incident to ownership of real property (i.e. taxes, insurance and maintenance).

65. *See* notes 39-40 *supra* and accompanying text.

66. ISBA Form 21, *supra* note 10, ¶ 11 provides: "TIME IS OF THE ESSENCE of this Agreement. Failure to promptly assert rights of Seller shall not, however, be a waiver of such rights or a waiver of any existing or subsequent default." (For a discussion of the problems of waiver see notes 121-23 *infra* and accompanying text).

67. *See* notes 11-14 *supra* and accompanying text.

68. ISBA Form 21, *supra* note 10, ¶ 15.2, provides:

> FORECLOSURE. If Buyers fail, in any one or more of the specified ways to comply with this contract, as in (a), (b), (c), (d) or (e) of numbered paragraph 15.1 above provided, Sellers may upon thirty (30) days wrtten notice of intention to accelerate the payment of the entire balance, during which thirty days such default or defaults are not removed, declare the entire balance hereunder immediately due and payable; and thereafter at the option of the Sellers this contract may then be foreclosed in equity and a receiver may be appointed to take charge of said premises and collect the rents and profits thereof to be applied as may be directed by the Court. It is agreed that the periods of redemption after sale on foreclosure may be reduced under the conditions set forth in Sections 628.26 and 628.27, Code of Iowa.

69. IOWA CODE § 628 (1979).

70. Junkin v. McClain, 221 Iowa 1084, 1091, 265 N.W. 362, 366 (1936). *See* Dimon v. Wright, 206 Iowa 693, 214 N.W. 673 (1927).

71. *See* Mixon, *supra* note 13, at 600; *Forfeiture: The Anomaly*, *supra* note 27, at 102-05; *Attacking Liquidated Damages*, *supra* note 12, at 378-79.

buyer has a redemptive period of six months to one year during which he can recover the property.[72]

D. *The Insurance Clause*

The buyer under an executory contract for the sale and purchase of land assumes the risk of loss under common law.[73] Consequently, the form contract's provision requiring the buyer to maintain insurance[74] is in accord with judicial thought. The clause, however, has further significance. It specifies the type of insurance policy required and demands deposit of the policy with the seller.[75] A buyer failing to secure insurance or failing to provide the seller with a copy of the policy is in breach of the contract and can be forfeited.[76]

The insurance clause does pose some problems. In the event of loss, the insurance is "payable to Sellers and Buyers as their interests may appear."[77] The proceeds from the insurance may or may not be used by the seller to repair or replace the premises; and if not so used, the seller must make "reasonable application of such funds."[78]

It is well settled in Iowa that both parties to an executory land contract have insurable interests.[79] The doctrine of equitable conversion operates to

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72. IOWA CODE §§ 628.3, .26 (1979). *See* Annot., 51 A.L.R.2d 672 (1957).

73. *E.g.*, Rector v. Alcorn, 241 N.W.2d 196, 200 (Iowa 1976). The court explained: *"[A]bsent agreement to the contrary,* the equitable conversion doctrine places risk of improvements loss upon the purchasers during the executory phase of the contract . . . if the property is destroyed or otherwise depreciated in value without fault of either party." *Id.* (emphasis supplied by the court). *See also* Annot., 27 A.L.R.2d 444 (1953).

74. ISBA Form 21, *supra* note 10, ¶ 6 provides:

> INSURANCE. Except as may be otherwise included in the last sentence of paragraph 1(b) above, Buyers as and from said date of possession, shall constantly keep in force, insurance, premiums therefore to be prepaid by Buyers (without notice or demand) against loss by fire, tornado and other hazards, casualties, and contingencies as Seller may reasonably require on all buildings and improvements, now on or hereafter placed on said premises and any personal property which may be the subject of this contract, in companies to be reasonably approved by Sellers in an amount not less than the full insurable value of such improvements and personal property or not less than the unpaid purchase price herein whichever amount is smaller with such insurance payable to Sellers and Buyers as their interests may appear. BUYERS SHALL PROMPTLY DEPOSIT SUCH POLICY WITH PROPER RIDERS WITH SELLERS for the further security for the payment of the sums herein mentioned. In the event of any such casualty loss, the insurance proceeds may be used under the supervision of the Sellers to replace or repair the loss if the proceeds be adequate; if not, then some other reasonable application of such funds shall be made; but in any event such proceeds shall stand as security for the payment of the obligations herein.

75. *Id.*

76. *See* notes 30-31 *supra* and accompanying text.

77. *See* note 74 *supra.*

78. *Id.*

79. Rector v. Alcorn, 241 N.W.2d 196, 200 (Iowa 1976); Ambrose v. Harrison Mut. Ins.

make a buyer the equitable owner, which is an insurable interest; a seller retains legal title as security for his interest which is also an insurable interest.[80] The relationship between the parties is often characterized as "practically the same as that of mortgagor and mortgagee."[81] Consequently, the insurance proceeds applied "as their interests may appear" has been held to mean that the seller's interest is limited to the security (*i.e.*, the property) and that the insurance proceeds are not to be taken in retirement of the debt.[82] The money received from casualty insurance should be applied to rebuilding the structures.[83] Consequently, the seller would again have the security, and the buyer would again have the use of the buildings. This is the equitable result.[84] Neither party is entitled to the money without the consent of the other.[85]

The form contract seems to give the seller some discretion whether to rebuild the buildings and other improvements.[86] While at first glance such discretion appears contrary to the case law, the seller could argue buyer-consent.[87] The buyer freely contracted that the seller *may* apply the proceeds to rebuild to replace the loss, not that the seller *must* do so. A careful reading of the insurance clause reveals that if an equitable result is to be achieved by the terms and application of the contract the form contract needs to be redrafted.

E. *Care of Property*

The seller is rightfully interested in some guarantee that the property will be adequately maintained to secure his legal interest in the property. The form contract contains a paragraph presumably to that end.[88] The

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Ass'n, 206 N.W.2d 683 (Iowa 1973) (holding both buyer and seller under a real estate installment contract were proper parties to sue the insurance company for non-payment of loss); Hatch v. Commerce Ins. Co., 216 Iowa 860, 862-63, 249 N.W. 164, 165 (1933) (distributing insurance proceeds between the parties).

80. *E.g.*, Rector v. Alcorn, 241 N.W.2d 196, 200 (Iowa 1976).

81. Hatch v. Commerce Ins. Co. 216 Iowa 860, 862, 249 N.W. 164, 165 (1933). *See also* Junkin v. McClain, 221 Iowa 1084, 1091, 265 N.W. 362, 366 (1936).

82. Hatch v. Commerce Ins. Co., 216 Iowa 860, 862, 249 N.W. 164, 165 (1933).

83. *See id.*

84. *See id.*

85. *See id. See also* Annot., 64 A.L.R.2d 1402 (1959).

86. *See* notes 74-78 *supra* and accompanying text.

87. *See* note 85 *supra* and accompanying text.

88. ISBA Form 21, *supra* note 10, ¶ 7 provides:

> CARE OF PROPERTY. Buyers shall take good care of this property; shall keep the buildings and other improvements now or hereafter placed on the said premises in good and reasonable repair and shall not injure, destroy or remove the same during the life of this contract. Buyers shall not make any material alteration in said premises without the written consent of the Sellers. Buyers shall not use or permit said premises to be used for any illegal purposes.

See also Lett v. Grummer, No. 266-64936 (Iowa S. Ct., decision filed Jan. 14, 1981) (applying a

buyer is required to maintain the buildings and other improvements. Written consent from the seller is a prerequisite to "any material alteration" of the premises.[89]

The provision does more than just protect the seller's security interest; it interferes somewhat with the buyer's rights of ownership and use. The contract does not give a hint as to what the parties consider to be a "material alteration." The buyer is not only prohibited from damaging or destroying the premises, but is restricted from improving the premises.[90]

Improvements to the property provide an obvious benefit to the seller's security interest.[91] Likewise, the buyer benefits from the use and enjoyment of any improvement.[92] However, if the buyer makes any material alteration without the written consent of the seller, the buyer's interest can be forfeited under the all-inclusive language of the forfeiture clause of the form contract.[93] It might be argued that the "Care of Property" paragraph is no more coercive than similar clauses found in conventional money mortgages. The clauses may be the same, but the seller's summary remedy of forfeiture serves to distinguish the impact on the contract buyer.[94]

There are at least two ways in which the clause could be improved. First, the clause could be framed to require the buyer to save the property from waste, damage or destruction; but to allow improvements to the property. Secondly, the seller's remedy for breach of the clause could be made less harsh than forfeiture.[95]

F. *Liens*

It is somewhat curious that the "Liens" paragraph of the form contract only prohibits mechanics' liens from being "imposed upon or foreclosed against" the property.[96] The clause could, and perhaps should, specifically

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similar contract provision and refusing to enforce forfeiture for a minor breach).

89. *Id.*

90. *See* note 64 *supra*, for a hypothetical fact situation demonstrating the potential coercive effect of the "Care of Property" clause of the contract.

91. HARRIS & HINES, *supra* note 4, at 67-69.

92. *Id.*

93. *See* notes 30-31 *supra* and accompanying text. In Beason v. Johnston, 194 Iowa 1100, 1102-03, 191 N.W. 311, 312 (1922), the court held that the removal of a partition did not constitute a breach of the mortgagor's contractual duty to keep the premises in repair. *Cf.* Coffin v. Younker, 196 Iowa 1021, 1026, 195 N.W. 591, 593 (1923) (distinguishing Beason v. Johnston, and holding the parties to the strict langauge of the contract).

94. *Compare* notes 30-37 *and* 55-64 *supra* and accompanying text *with* notes 68-72 *supra* and accompanying text.

95. HARRIS & HINES, *supra* note 4, at 68, recommends a seller's injunction "to prevent continuation of an improper or wasteful practice." *See also* notes 117-20 *infra* and accompanying text.

96. ISBA Form 21, *supra* note 10, ¶ 8 provides: "LIENS. No mechanics' lien shall be imposed upon or foreclosed against the real estate described herein."

For a discussion of mechanics' liens and executory land contracts, see Home Carpet, Inc. v.

prohibit the buyer from encumbering the seller's record title with judgment liens or income tax liens,[97] for example.[98] However, once again forfeiture may be too harsh a remedy to impose on a buyer for breaching the contract by having a lien imposed upon the property.

G. *Sellers as Joint Tenants*

The common law rule, followed in Iowa, provides that absent a clear intention to the contrary, an executory installment contract works to destroy joint tenancy in the sellers.[99] Under the contract, the doctrine of equitable conversion operates to give the buyer equitable title to the property, and the seller retains bare legal title as security for the personalty interest he now holds.[100] Upon the buyer's death the property would descend to his heirs; upon the seller's death, the personal property would pass to the representatives of the estate, not to the seller's heirs.[101]

The form contract is intended to avoid the destruction of joint tenancy which would otherwise result from the equitable conversion of the property. The joint tenancy paragraph[102] is sufficiently clear in its intention to preserve a joint tenancy with right of survivorship in the proceeds of sale.[103]

Bob Antrim Homes, Inc., 210 N.W.2d 652, 654-55 (Iowa 1973). *See also* Annot., 102 A.L.R. 233 (1936).

97. In Miller v. American Wonderlands, Inc., 275 N.W.2d 399, 401 (Iowa 1979), the court indicated that the buyer's causing of a federal tax lien to be filed against the property was a breach of the contract. However, the court did not quote the provision of the contract which had been breached, nor did the income tax lien constitute the particular breach for which forfeiture was sought and granted. *Id.*

98. For related problems involving vendee's rights, see Annot., 82 A.L.R.3d 1040 (1978); Annot., 51 A.L.R.2d 672 (1957).

99. *In re* Estate of Baker, 247 Iowa 1380, 1385-86, 78 N.W.2d 863, 866-68 (1956); Annot., 64 A.L.R.2d 918 (1959).

100. Knapp v. Baldwin, 213 Iowa 24, 27, 238 N.W. 542, 544 (1931); Larson v. Metcalf, 201 Iowa 1208, 1210-11, 207 N.W. 382, 383 (1926).

101. *E.g.*, Knapp v. Baldwin, 213 Iowa 24, 27, 238 N.W. 542, 544 (1931).

102. ISBA Form 21, *supra* note 10, ¶ 10 provides:

> JOINT TENANCY IN PROCEEDS AND SECURITY RIGHTS IN REAL ESTATE. If and only if, the Sellers immediately preceding this sale, hold the title to the above described property in joint tenancy, and such joint tenancy has not later been destroyed by operation of law or by acts of the Sellers, this sale shall not constitute such destruction and the proceeds of this contract, and any continuing and/or recaptured rights of Sellers in said real estate, shall be and continue in Sellers as joint tenants with rights of survivorship and not as tenants in common; and Buyers, in the event of the death of one of such joint tenants, agree to pay any balance of the proceeds of this contract to the surviving Seller (or Sellers) and to accept deed solely from him or them consistent with paragraph 13 below unless and except this paragraph is stricken from this agreement.

103. *See In re* Estate of Baker, 247 Iowa 1380, 1388-89, 78 N.W.2d 863, 866-68 (1956).

H. *Title Clauses*

The form contract contains three paragraphs which govern the handling of the abstract of title and the deed.[104] Absent contrary contract provisions, the common law rule only requires the seller to have marketable title at the time that the buyer has fully performed under the executory contract.[105] The form contract in effect requires no more of the seller than does the common law.[106]

Consequently, the seller is in a position of "selling his cake and eating it too." For the duration of the contract the seller is at liberty to encumber the record title in any way that does not interfere with the buyer's possession.[107]

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104. ISBA Form 21, *supra* note 10, ¶¶ 12-14. Paragraph 12 provides:

EXCEPTIONS TO WARRANTIES OF TITLE. The warranties of title in any Deed made pursuant to this contract (See paragraph 13) shall be without reservation or qualification EXCEPT: (a) Zoning ordinances; (b) Such restrictive covenants as may be shown of record; (c) Easements of record, if any; (d) A limited by paragraphs 1, 2, 3 and 4 of this contract; (e) Sellers shall give Special Warranty as to the period after equitable title passes to Buyers; (f) Spouse if not a titleholder, need not join in any warranties of the deed unless otherwise stipulated; (g)_____
(Mineral reservations of record?)

(h)_____
(Liens?) (Easements not recorded?) (Interests of other parties?) (Lessees?)

Paragraph 13 provides:

DEED AND ABSTRACT, BILL OF SALE. If all said sums of money and interest are paid to Sellers during the life of this contract, and all other agreements for performance by Buyers have been complied with, Sellers will execute and deliver to Buyers a ____ Warranty Deed conveying said premises in fee simple pursuant to and in conformity with this contract; and Sellers will at this time deliver to Buyers an abstract showing merchantable title, in conformity with this contract. Such abstract shall begin with the government patent (unless pursuant to the Iowa State Bar Association title standards there is a lesser requirement as to period of abstracting) to said premises and shall show title thereto in Sellers as of the date of this contract; or as of such earlier date if and as designated in the next sentence. This contract supersedes the previous written offer of Buyers to buy the above described property which was accepted by Sellers on the __ day of ____, 19__. Sellers shall also pay the cost of any abstracting due to any act or change in the personal affairs of Sellers resulting in a change of title by operation of law or otherwise. If any personal property is a part of this agreement, then upon due performance by Buyers, Sellers shall execute and deliver a Bill of Sale consistent with the terms of this contract. Sellers shall pay all taxes on any such personal property payable in 19__, and all taxes thereon payable prior thereto.

Paragraph 14 provides:

APPROVAL OF ABSTRACT. Buyers have ____ examined the abstract of title to this property and such abstract is ____ accepted.

105. *E.g.*, Wemer v. Long, 185 N.W.2d 243, 247 (Iowa 1971) (declaring that a defaulting buyer cannot avoid forfeiture on the basis of the seller's unmarketable title). *But see* Youngblut v. Wilson, 294 N.W.2d 813, 818 (Iowa 1980) (the contract required marketable title as defined in the Iowa Title Standards, a more stringent requirement of the seller).

106. *See* ISBA Form 21, *supra* note 10, ¶ 13. *See also* note 104 *supra*.

107. ISBA Form 21, *supra* note 10, ¶ 2 provides:

Furthermore, the contract specifically provides that the seller may mortgage the premises during the executory phase of the contract.[108] The seller has a whole list of remedies as against the buyer in the event of default at any stage of their dealings;[109] but to earn those remedies the seller need only put the buyer in possession—if the parties so agreed[110]—and wait for the buyer to default. The buyer's only remedy for the seller's non-tender of marketable title at the end of the contract—after the buyer has fully performed—is money damages,[111] hardly an adequate remedy.

Harris and Hines have recommended a contract clause which would require the seller to have marketable title at the time the buyer takes possession.[112] The seller would execute a warranty deed to be held by an escrow

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POSSESSION. Buyers, concurrently with due performance on their part shall be entitled to possession of said premises on the __ day of ____, 19__; and thereafter so long as they shall perform the obligation of this contract. If Buyers are taking subject to the rights of lessees and are entitled to rentals therefrom on and after date of possession, so indicate by "yes," in the space following _____.

108. ISBA Form 21, *supra* note 10, ¶ 5 provides:

MORTGAGE. Any mortgage or encumbrance of a similar nature against the said property shall be timely paid by Sellers so as not to prejudice the Buyers' equity herein. Should Sellers fail to pay, Buyers may pay any such sums in default and shall receive credit on this contract for such sums so paid. MORTGAGE BY SELLERS. Sellers, their successors in interest or assigns may, and hereby reserve the right to at any time mortgage their right, title, or interest in such premises or to renew or extend any existing mortgage for any amount not exceeding __% of the then unpaid balance of the purchase price herein provided. The interest rate and amortization thereof shall be no more onerous than the installment requirements of this contract. Buyers hereby expressly consent to such a mortgage and agree to execute and deliver all necessary papers to aid Sellers in securing such a mortgage which shall be prior and paramount to any of Buyers' then rights in said property. DEED FOR BUYERS SUBJECT TO MORTGAGE. If Buyers have reduced the balance of this contract to the amount of any existing mortgage balance on said premises, they may at their option, assume and agree to pay said mortgage according to its terms, and subject to such mortgage shall receive a deed to said premises; or Sellers at their option, any time before Buyers have made such a mortgage commitment, may reduce or pay off such mortgage. ALLOCATED PAYMENTS. Buyers, in the event of acquiring this property, from an equity holding instead of a holder of the fee title, or in the event of a mortgage against said premises, reserve the right, if reasonably necessary for their protection to divide or allocate the payments to the interested parties as their interests may appear. SELLERS AS TRUSTEES. Sellers agree that they will collect no money hereunder in excess of the amount of the unpaid balance under the terms of this contract less the total amount of the encumbrance on the interest of Sellers or their assigns in said real estate; and if Sellers shall hereafter collect or receive any moneys hereunder beyond such amount, they shall be considered and held as collecting and receiving said money as the agent and trustee of the Buyers for the use and benefit of the Buyers.

109. *See, e.g.*, notes 128-32 *infra* and accompanying text.

110. *See* note 107 *supra*.

111. *See* note 138 *infra* and accompanying text.

112. HARRIS & HINES, *supra* note 4, at 49-50. Their recommendation is for the following clause:

agent until the buyer had fully complied with the contract, and at that time the deed would be delivered to the buyer.[113]

I. *Attorney's Fees*

The form contract expressly provides for the seller's recovery of attorney's fees in the event a buyer's breach causes the seller to pursue legal actions against the buyer or other parties.[114] The contract once again favors the seller by not providing some protection to the buyer. The Iowa Supreme Court recently declared that attorney's fees were not required to be paid by the buyer in order to satisfy the statutory requirement that buyer pay service costs pursuant to the forfeiture statute;[115] however, the court neglected to indicate whether the contract between the parties provided for payment of attorney's fees.[116]

IV. Other Pertinent Case Law

A. *Materiality of Breach and Liquidated Damages*

As previously stated, the form contract provides the forfeiture remedy and liquidated damages in the event of a breach of any provision of the contract.[117] However, the liquidated damages—the true boon to forfeiture—may not stand a challenge if invoked for a minor breach. Iowa contract law seems to support the proposition that a liquidated damages clause

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> TITLE, ABSTRACT, AND DEED. The seller further agrees to transfer a marketable record title to the land sold and to furnish the buyer an abstract of title, covering the period between the original government grant and the appropriate date as shown in this contract, for review a month before the buyer is given possession. The buyer will be given thirty days to correct defects, if any. If defects cannot be cured within thirty days, the buyer may rescind the contract at his option. The seller will bear all the cost of perfecting the abstract of title. The seller further agrees, upon fulfillment of all the conditions of this contract, to convey the property by warranty deed to the buyer shown above or to whomsoever he may designate, showing the title to be held under whatever arrangement the buyer may desire. The deed will be executed at or before the buyer takes possession and will be deposited with an escrow agent for delivery to the buyer upon completion of the terms of this contract.

Id.

113. *Id.* For a thorough discussion of title problems under installment contracts, see Nelson & Whitman, *supra* note 16, at 566-73.

114. ISBA Form 21, *supra* note 10, ¶ 16 provides:

> ATTORNEY'S FEES. In case of any action, or in any proceedings in any Court to collect any sums payable or secured herein, or to protect the lien or title herein of Sellers, or in any other case permitted by law in which attorney's fees may be collected from Buyers, or imposed upon them, or upon the above described property, Buyers agree to pay reasonable attorney's fees.

115. Miller v. American Wonderlands, Inc., 275 N.W.2d 399, 401 (Iowa 1979); Iowa Code § 656.4 (1979).

116. Miller v. American Wonderlands, Inc., 275 N.W.2d 399, 401 (Iowa 1979).

117. *See* notes 30-31 *supra* and accompanying text. *See also* note 61 *supra*.

is a penalty on its face if the same sum is stipulated in a contract involving provisions of varying degrees of importance.[118] In equity, minor breaches of a lease have been held to warrant denial of cancellation and forfeiture of the lease.[119] Equity also allows contract damages to a party who substantially performs.[120]

B. *Waiver of Seller's Right to Forfeit*

The question of waiver is essentially limited to activities of the seller after serving notice of forfeiture on the buyer. It has been held in Iowa that any prior conduct on the part of the seller which might otherwise constitute waiver is effectively withdrawn upon the seller's exercise of the forfeiture remedy.[121] Therefore, only the seller's post-service-of-notice-of-forfeiture conduct is considered.

A buyer seeking to convince the court that the seller has waived his right to forfeit carries a heavy burden of persuasion.[122] The buyer must show "by a preponderance of the evidence *unequivocal* conduct on the part of the vendor, *clearly establishing the vendor regards the contract as in full force and effect subsequent to the forfeiture.*"[123]

C. *Constitutionality of the Forfeiture Statute*

Two recent cases challenged the constitutionality of the statutory provision for summarily forfeiting a buyer.[124] The challenges were based on due process grounds and state involvement in deprivation of buyers' property without judicial proceedings.[125] The Iowa Supreme Court upheld the statute, deciding that the state's involvement was miniscule and that, if anything, the state had acted to protect the buyer under the statute.[126]

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118. Huntsman v. Eldon Miller, Inc., 251 Iowa 478, 482, 101 N.W.2d 531, 533 (1960); McMurray v. Faust, 224 Iowa 50, 58-59, 276 N.W. 95, 100 (1937); Elzey v. City of Winterset, 172 Iowa 643, 650-52, 154 N.W. 901, 904 (1915). *See also* HARRIS & HINES, *supra* note 4, at 110.

119. Beck v. Trovato, 260 Iowa 693, 697, 150 N.W.2d 657, 659 (1967).

120. Lautenback v. Meredith, 240 Iowa 166, 172-73, 35 N.W.2d 870, 874 (1949); Miller v. Gray, 205 Iowa 1305, 1307, 217 N.W. 228, 229 (1928) (The party substantially performing "may recover as for a complete performance, less such damages as the other party may have been put to by reason of the matters not performed."); Elzey v. City of Winterset, 172 Iowa 643, 154 N.W. 901 (1915).

121. *E.g.*, Bettis v. Bettis, 228 N.W.2d 193, 195 (Iowa 1975).

122. *E.g.*, Miller v. American Wonderlands, Inc., 275 N.W.2d 399, 402 (Iowa 1979).

123. *Id.* (emphasis supplied by the court) (quoting Wemer v. Long, 185 N.W.2d 243, 247 (Iowa 1971)). *See also* Babb's Inc. v. Babb, 169 N.W.2d 211 (Iowa 1969); Cassiday v. Adamson, 208 Iowa 417, 224 N.W. 508 (1929); Comment, *Iowa Land Installment Contracts: Acceptance of Part-Payment as Waiver*, 55 IOWA L. REV. 729 (1970).

124. Skubal v. Meeker, 279 N.W.2d 23 (Iowa 1979); Jensen v. Schreck, 275 N.W.2d 374 (Iowa 1979).

125. *See* Jensen v. Schreck, 275 N.W.2d 374, 384-86 (Iowa 1979).

126. *Id.*

D. *Procedural Challenges to the Forfeiture Statute*

Forfeiture, as a summary remedy, does not provide for the use of judicial proceedings by the parties.[127] Although forfeiture is a summary remedy, the wealth of case law on the subject clearly shows that one, or both, of the parties often litigates the validity of a given forfeiture. The issue has received attention in sellers' actions to foreclose,[128] to quiet title,[129] to evict the buyer,[130] for specific performance,[131] and for declaratory relief.[132] Buyers have litigated the forfeiture question in actions for rescission,[133] reformation,[134] possession,[135] declaratory relief,[136] injunction,[137] damages[138] and specific performance.[139] A buyer recently prevailed in an action to set aside a forfeiture on the grounds that the contract had been forfeited on "trivial and insignificant" grounds.[140] The one conclusion that seems certain is that forfeiture is only a summary remedy as against a buyer who refrains from fighting.

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127. Iowa Code § 656 (1979).

128. Junkin v. McClain, 221 Iowa 1084, 265 N.W. 362 (1936); Dimon v. Wright, 206 Iowa 693, 214 N.W. 673 (1927); Carns v. Sexsmith, 193 Iowa 1080, 188 N.W. 657 (1922); McCreary v. McGregor, 183 Iowa 732, 167 N.W. 633 (1918); Harris & Hines, *supra* note 4, at 91.

129. Miller v. American Wonderlands, Inc., 275 N.W.2d 399 (Iowa 1979); Westerman v. Raid, 203 Iowa 1270, 212 N.W. 134 (1927).

130. Skubal v. Meeker, 279 N.W.2d 23 (Iowa 1979); Warren v. Yocum, 223 N.W.2d 258 (Iowa 1974); Reed v. Gaylord, 216 N.W.2d 327 (Iowa 1974); Cassiday v. Adamson, 208 Iowa 417, 224 N.W. 508 (1929); Fowler v. Dieleman, 192 Iowa 563, 185 N.W. 79 (1921).

131. Abodeely v. Cavras, 221 N.W.2d 494 (Iowa 1974); Brown v. Verzani, 181 Iowa 237, 164 N.W. 601 (1917).

132. McCubbin v. Urban, 247 Iowa 862, 77 N.W.2d 36 (1956).

133. Kilpatrick v. Smith, 236 Iowa 584, 19 N.W.2d 699 (1945); Selby v. Matson, 137 Iowa 97, 114 N.W. 609 (1908); Downey v. Riggs, 102 Iowa 88, 70 N.W. 1091 (1897); Harris & Hines, *supra* note 4, at 93.

134. Skubal v. Meeker, 279 N.W.2d 23 (Iowa 1979); Westercamp v. Smith, 239 Iowa 705, 31 N.W.2d 347 (1948).

135. Babb's Inc. v. Babb, 169 N.W.2d 211 (Iowa 1969); Downey v. Riggs, 102 Iowa 88, 70 N.W. 1091 (1897).

136. Hampton Farmers Coop. Co. v. Fehd, 257 Iowa 555, 133 N.W.2d 872 (1965); Kilpatrick v. Smith, 236 Iowa 584, 19 N.W.2d 699 (1945).

137. Rector v. Alcorn, 241 N.W.2d 196 (Iowa 1976).

138. Lake v. Bernstein, 215 Iowa 777, 246 N.W. 790 (1933); O'Brien v. Paulsen, 192 Iowa 1351, 186 N.W. 440 (1922); Joeckel v. Johnson, 178 Iowa 231, 159 N.W. 672 (1916); Selby v. Matson, 137 Iowa 97, 114 N.W. 609 (1908); Harris & Hines, *supra* note 4, at 96.

139. Youngblut v. Wilson, 294 N.W.2d 813 (Iowa 1980); Westercamp v. Smith, 239 Iowa 705, 31 N.W.2d 347 (1948); Harris & Hines, *supra* note 4, at 94.

140. Lett v. Grummer, No. 266-64936 (Iowa S. Ct., decision filed Jan. 14, 1981) (court applied the maxim *de minimis non curat lex* in holding that six broken window panes in an obsolete hog house were insufficient grounds to forfeit an installment contract with a $16,000 balance on property worth $300,000).

V. Conclusion

The contents of an installment contract for the sale and purchase of real property are extremely important to both the buyer and the seller. The parties will be bound for several years. Statutory protections are minimal, and likely to remain so. Equitable results in the courts are limited on the one hand by stare decisis, and on the other hand by the intent of the parties as evidenced by the terms of the contract.

It is not likely that many buyers would intend, if they realized the true meaning of the ISBA form contract, to be bound to its terms. The ISBA, as a body promulgating form contracts, should take the responsibility to either alter the current form contract, or to offer an alternative. Both buyers and buyers' attorneys would be benefited. Sellers would not necessarily suffer under the changes; they would merely be giving up some of the provisions which go beyond securing their legal interest. More equitable results can and should be provided under the contract. This Note is intended to be a research tool for Iowa property lawyers. Absent ISBA contract changes, perhaps this writing effort will be of assistance to individual attorneys or law firms in drafting their own contracts.

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