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RELIEF UPON DEFAULT UNDER A CONTRACT FOR PURCHASE AND SALE OF LAND

BY ELLIS J. SOBOL*

This article has as its object a determination of the status of Colorado law in regard to contracts for the purchase and sale of real estate.

The law of property is peculiar in that upon the execution of a contract for the purchase and sale of land the vendee acquires an equitable interest in the land; in some jurisdictions it is necessary that the vendee enter upon the land pursuant to the contract in order to acquire his equitable interest.[1] The vendee gets such an interest in spite of clauses in the contract saying that he is to acquire no interest whatsoever in the land until all of the payments making up the full purchase price have been paid. Specifically, the question to be examined is: what facts must exist before the court will treat the relationship of the parties as that of mortgagor and mortgagee and declare that the interest of the vendee in the land upon his breach cannot be forfeited except by a foreclosure and sale; or failing that, when will equity step in and aid the vendee by giving him a chance to redeem by making payment within a specified time?[2] It has been stated by the Colorado court, as well as by courts of other jurisdictions, that it is of importance in the court's determination—in cases where there is a breach by the vendee and an attempt by the vendor to enforce a forfeiture—whether the contract contains clauses making time of the essence and providing for a forfeiture of all improvements and payments made by the vendee upon his failure to meet any payment on time and notice by the vendor declaring a forfeiture.[3] The inequity in the enforcement of such provisions is at once apparent. The less the importance of the breach by the vendee, the greater the amount forfeited to the vendor as penalty or liquidated damages;[4] besides, if the relationship of the parties is like that of mortgagor and mortgagee, a time-of-essence clause should have no more effect than a similar clause in a mortgage.[5] It is thought by the writer that time-of-essence and forfeiture clauses are not really of great importance in Colorado, but rather, that the cases must be distinguished on other facts; that of prime importance are: the amount

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[1] deFuniak, HANDBOOK OF MODERN EQUITY, pp. 242, 243 (1st Edition, 1950).

[2] WALSH, A TREATISE ON EQUITY, pp. 429, 430 (1930).

[3] American Mortgage Co. v. Logan, 90 Colo. 157, 7 P. 2d 953 (1932). 3 WILLISTON ON CONTRACTS, § 791 (Revised Edition, 1936). CORBIN, *The Right of a Defaulting Vendee to the Restitution of Instalments Paid*, 40 YALE LAW JOURNAL 1030. POMEROY'S EQUITY JURISPRUDENCE, § 1408 (4th ed., 1918).

[4] CORBIN, *op. cit.*, pp. 1014 & 1029.

[5] WILLISTON, *op. cit.*, § 791.

of the purchase price paid in relation to the total purchase price, the time in default, whether after default the vendee is ready and willing to tender payment, and whether the vendee is in possession.

CONTRACT FOR PURCHASE AND SALE SIMILAR TO MORTGAGE

The early Colorado cases are not of much help because counsel for the vendor had not yet made use of an action for possession and forfeiture. But it is at once clear that the court recognized that such transactions are similar to a mortgage and that the primary object of the parties is to secure to the vendor the payment of the full purchase price. In *Todd v. Simonton* [6] the defendant was in possession pursuant to a contract for purchase and sale of land under the terms of which defendant was to pay the total price of $1,200 by September 1, 1861, the contract containing neither time-of-essence nor forfeiture clauses. The defendant paid nothing and in November, 1861, sold to one Stout, who went in to possession. The plaintiff brought an action against the defendant and Stout asking for a judgment for the amount of the purchase price, or in default of payment, that he be decreed to have a lien, that the premises be sold, and the proceeds applied to the amount due. The court stated that the *relation of the parties was analogous to that of mortgagor and mortgagee* and that the proper remedy was strict foreclosure.[7]

Nevin v. Lulu and White S. M. Co.[8] involved a transaction wherein plaintiff loaned the defendants $12,000, and the defendants conveyed by warranty deeds some mining property to trustees of the plaintiff. The defendants stayed in possession. The trustees and the defendants entered into an agreement whereby the trustees were to notify the defendants within ninety days whether they wanted to retain a one-half interest in the property, which they could do on payment of additional money, or whether they wanted payment of $12,000. Upon the election by the trustees to take payment and upon failure of defendants to pay the $12,000 within ninety days after notice, defendants were to forfeit all interest in the property, and time was declared to be essential. The trustees notified defendants that they elected to take payment of $12,000. The defendants failed to pay on time, and did not pay anything. The trustees quitclaimed to the plaintiff who brought action and asked that the deeds be adjudged a mortgage, that there be a foreclosure and sale, and that plaintiff be given judgment for

[6] 1 Colo. 54 (1867).

[7] WALSH, *op. cit.*, pp. 429-431. Strict foreclosure, by which the equitable estate of the purchaser is extinguished by decree unless he completes the purchase by a date fixed by the court, is allowed in some states where the interest of the purchaser, as measured by payments of purchase money and for improvements, is not large. It is clear that where the equity of the purchaser is substantial, foreclosure by sale should be required in order that the purchaser's interest may be protected on the sale, just as a mortgagor's equity may be protected in corresponding cases of foreclosure of mortgages.

[8] 10 Colo. 357, 15 P. 611 (1887).

any deficiency. The lower court decreed strict foreclosure, but on appeal the court decided that Section 263 of the Code of 1883, enacted, after the decision in *Todd v. Simonton,* which provides that "a mortgage of real property shall not be deemed a conveyance whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale . . ." applied and that under its terms foreclosure and sale was the only proper remedy. It is obvious from the facts that the parties intended only a security transaction. Since defendants had paid nothing, and since the plaintiff evidently wanted only his money, there would have been no advantage for counsel to enforce the forfeiture by bringing a possessory action.

ACTION UNDER UNLAWFUL DETAINER STATUTE

Ruth v. Smith [9] was the first Colorado case in which counsel made use of a possessory action against a vendee in possession pursuant to a contract for purchase and sale of land. The action was brought under the unlawful detainer statute of 1885,[10] which in its terms was the same as our present forcible entry and detainer statute.[11] In that case the contract contained neither time-of-essence nor forfeiture clauses. The vendee had paid $41 out of a total purchase price of $371.20, or about 11 per cent of the purchase price, and the defendant in that case had been in default about three months. The defendant did not interpose any equitable defense or advance the argument that his interest had to be foreclosed. Instead he elected to stand on his demurrer to the complaint. The case was reversed by the supreme court because the lower court awarded $86.66 unliquidated damages without hearing testimony as to the extent of damage, and because the plaintiff had been awarded greater damages than he had asked for in his complaint. The court did not object to the possessory action and did not state that it would be necessary to treat the transaction as a mortgage. We may infer from this case that, even though there are no time-of-essence or forfeiture clauses in the contract, a vendor may recover possession and need not foreclose where the vendee has paid only 12 per cent of the purchase price and where he has been in default for three months. It is not clear from the report or from the record of the case what was to happen to the $41 paid toward the purchase price by the vendee. It is not clear whether restitution would be granted if the amount paid by the vendee exceeded the amount of damages sustained by the vendor.

The next case to be considered is *Gordon Tiger Mining and Reduction Company v. Brown.*[12] There the contract provided that the vendee erect a mill on the mining property involved within six months and operate it continuously; a percentage of the profit

[9] 29 Colo. 154, 68 P. 278 (1901).
[10] 1 Mills Annotated Statutes, § 1973.
[11] COLO. STAT. ANN., c. 70 § 4, Ninth (1935).
[12] 56 Colo. 301, 138 P. 51 (1914).

from the ore mined and milled was to be paid to the vendor until the vendor had received a total of $200,000, in which was to be included an amount credited to the vendee because of its payment of certain liens against the property. There was a clause providing for forfeiture of payments and of improvements in the event that the vendee decided that the mines could not be worked profitably. In addition, the parties entered into an escrow agreement providing that the deeds be deposited with a certain bank to be delivered to the vendee on production of evidence of payment of $200,000; on failure of the vendee to fulfill the contract by continuous operation of the mine and mill, the deeds were to be returned to the vendor. The vendee entered into possession but failed to mine any ore or erect the mill as agreed, but did make certain improvements. It appears that the vendor intentionally misrepresented the title as to a one forty-eighth interest, but the vendee did nothing about it for 16 months after learning of the fraud. When the vendee was in default about 18 months, the vendor brought action for possession, return of the deeds, and forfeiture of payments and improvements. The defendant had been credited with payments consisting of expenses incurred in the payment of liens amounting to $49,000, and defendant had spent a total of $142,000 for improvements. The defendant asked rescission on the ground of fraud as to the one forty-eighth interest.

FORFEITURE IS UPHELD

The supreme court decided that the defendant had waived its right of rescission because of its delay but gave the defendant leave to file an amended answer in the district court. In its amended answer the defendant asked damages for the fraud and subrogation to the rights of lien claimants; it alleged it had fraudulently been induced to pay the liens. The plaintiff offered to clear up the defect in title, and the court then gave the defendant thirty days in which to decide whether it wished to perform the contract and pay the balance in a reasonable time. The defendant declined to perform and the district court declared a forfeiture and rendered a decree quieting title. The Colorado supreme court on appeal said that in enforcing the forfeiture it was doing nothing more than enforcing the contract and that, although the defendant was entitled to damages, they did not consist of the amount the defendant would have been entitled to by virtue of a rescission. In this case, it appears, a forfeiture was enforced where the contract provided for forfeiture and contained a time-of-essence clause and the vendee had paid about 25 per cent of the purchase price, and with improvements had expended a total equal to approximately 95 per cent of the purchase price; the vendee was 18 months in default. Yet the case is not authority against the mortgage theory or equitable relief on a similar state of facts because the district court did offer equitable relief, which offer was refused. From this case we may infer that, in order to be

entitled to equitable relief or treatment as a mortgagor, the vendee must evidence a willingness to perform the contract and must ask for either or both.

In *Roller v. Smith*,[13] the next pertinent case in point of time, we find a contract containing the usual time-of-essence and forfeiture clauses. The defendant was two months and eight days in default and had paid about 8½ per cent of the total purchase price of $4,000. The court paid lip service to forfeitures and said that the defendant was entitled to no equitable relief because this was an action to enforce and not to cancel the contract, thereby implying that the court would deny equitable relief in all such actions no matter what the interest of the vendee. The court held for the defendant because notice of forfeiture to the vendee was not according to the terms of the contract. The court's statements regarding denial of equitable relief are therefore *dicta*. But it may be asked whether payments by the vendee of only 8½ per cent constitute a sufficient interest to warrant protection by a court of equity. The court in its opinion states that the defendant asked equitable relief, although a search of the record in the supreme court does not reveal that the defendant had advanced any such claim or request. The case also illustrates the fact that forfeitures are viewed with disfavor in both law and equity, and a court will usually demand strict compliance with the terms of a forfeiture provision. In this case the court found that notice from the assignee of the vendor was not sufficient under the terms of the contract.

No Equitable Relief Where Small Percentage Is Paid

Schiffner v. Chicago Title and Trust Co.[14] is a clear case where the Colorado court enforced a forfeiture. In that case counsel for the vendee insisted that the defendant had an interest in the land and that the relationship of the parties was like that of mortgagor and mortgagee. The court in its opinion said that there can be no mortgage unless the mortgagor has real estate to pledge, and in that case the defendant had none. The contract had the usual provisions, forfeiture and time-of-essence clauses, although that fact was not stressed by counsel for the vendor, nor was it mentioned by the court in its opinion. The case might be considered by some as authority for enforcing a forfeiture clause under all circumstances, but an examination of the facts shows its limitations. The action was brought under the unlawful detainer statute and involved two tracts of land; the vendee had made no payments on installments at all; as to one tract, only about 7 per cent of the purchase price had been paid, and as to the other only 13 per cent had been paid. The vendee was in default for a period of five years and four months, and the vendee made no effort or statement that he was willing to tender any of the amount due. The defendant did, however, show that as to one tract of land he had expended

[13] 76 Colo. 371, 231 P. 656 (1924).
[14] 79 Colo. 249, 244 P. 1012 (1926).

considerable sums for improvements, in addition to the payment of 7 per cent of the purchase price. All the case decides, therefore, is that where the vendee has paid only 7 per cent to 13 per cent of the purchase price, has been guilty of long delay, and has made no offer to tender the amount due, he will not be entitled to treatment as a mortgagor or to relief in equity. The amount spent for improvements can be of little importance unless such amount is spent in pursuance of the contract, for it cannot be said that the vendor wants the improvements even though they do pass to him in the event of a forfeiture.

VENDOR BRINGS ACTION TO QUIET TITLE

Phares v. Don Carlos,[15] *Scroggs v. Harkness Heights Land Co.*,[16] *Pope v. Parker*,[17] *American Mortgage Co. v. Logan*,[18] and *Lowe v. Sory* [19] are all cases in which the vendor brought action to quiet title. In the *Phares* case the vendee was not in possession. The vendee had defaulted on certain indebtedness due the plaintiff, and the property securing the debt had been sold pursuant to a trust deed. The parties entered into a new agreement whereby the defendant had the option to redeem provided payment was made before a certain date. The defendant failed to make payment on time, and time was extended twenty days on the defendant's payment of 25 per cent of the purchase price and agreement to pay a $100 bonus. On failure of the defendant to make further payment on time, the plaintiff brought action to quiet title. The lower court held for the plaintiff and denied the defendant any relief. The Colorado supreme court refused to enforce a forfeiture because the contract contained no forfeiture clause. Apparently on the theory that time was essential, it denied that the defendant had any interest in the land, granted the defendant restitution and quieted title. The case does not contradict the thesis of this paper (*supra*, end of second paragraph). As has been noted the vendee was not in possession, and it does not appear that the vendee offered to tender the balance due.

In the *Harkness Heights Land Co.* case, again the vendee was not in possession.[20] There the appealing defendant claimed under one Addis who had an unrecorded contract of purchase from the plaintiff company which held record title. Addis had paid about 26 per cent of the purchase price and was four months in default. The contract provided that time was essential and for forfeiture. The defendant relied solely on the theory of estoppel, in that the

[15] 71 Colo. 508, 208 P. 458 (1922).
[16] 76 Colo. 597, 233 P. 831 (1925).
[17] 84 Colo. 535, 271 P. 1118 (1928).
[18] 90 Colo. 157, 7 P. 2d 953 (1932).
[19] 101 Colo. 341, 111 P. 2d 1054 (1941).
[20] WALSH, *op. cit.*, p. 376. It seems clear that the notion that possession gives the purchaser an equitable interest which he would not have otherwise is not based on any valid reason . . . Possession, particularly when the purchaser has changed his position by making improvements will make his equitable claim to relief from forfeiture much more certain, but such facts are by no means essential.

plaintiff had held Addis out as owner and was now estopped from denying title in Addis. The court found that the evidence showed that the defendant's agent who conducted the transaction for the defendant had notice of the plaintiff's title and that Addis held by contract. The court quieted the plaintiff's title. The defendant did not ask for restitution and it is an interesting question whether restitution to the defendant as assignee of Addis' interest would have been granted. In view of the *Phares* case, it is believed that restitution would have been granted had it been sought. It is difficult to see why the addition of a forfeiture clause in the *Harkness Heights Land Co.* case should make any difference if it were found that the amount retained was not liquidated damages but was a penalty. Since the total amount paid, although amounting to about 26 per cent of the purchase price, was only $140, it may be that the court would have considered it as liquidated damages had a claim for restitution been advanced.

A POSSIBLE RULE

Pope v. Parker [21] is a case which further helps us in trying to develop a workable rule. The assignee of the vendee was in possession pursuant to contract, and the assignor defaulted. There was a new agreement, and the assignor again defaulted. The assignor then gave the plaintiff vendor a quitclaim deed, and the plaintiff brought action. Thirty-one per cent of the purchase price had been paid, and the time in default under the second contract was about three months. The first contract had neither time-of-essence nor forfeiture clauses, but the second contract did provide that time was essential. The court said that both contracts were mortgages which secured to the plaintiff the performance of the vendee's obligation, and that the fact that the plaintiff retained title to the property as security had the same effect as if the defendant's assignor had conveyed it to him, thereby deciding, by implication, that it made no difference in the court's decision whether the contract declared time to be essential or not. The court held that under Section 281 of the Code (1921), since the contract was in effect a mortgage, the only proper remedy was foreclosure.

Why must the contract in this case be treated as a mortgage while those in *Roller v. Smith* and in *Schiffner v. Chicago Title and Trust Co., supra,* were not so treated? These cases were decided within four years. In the *Pope* case the vendee's payments were in a greater amount. In the *Smith* case only 8½ per cent of the purchase price had been paid, and in the *Schiffner* case, from 7 per cent to 13 per cent had been paid as compared with about 30 per cent here. Further, in the *Schiffner* case the vendee had been in default over five years and made no attempt to tender the amount due.

In the *American Mortgage Co. v. Logan* case,[22] the vendor brought action to quiet title; the contract had time-of-essence and

[21] *Supra,* note 17.
[22] *Supra,* note 18.

forfeiture clauses. The court held that the contract was not a mortgage and that the defendant was entitled to no relief against a forfeiture. But there the vendee was not in possession. There were two extensions of time by subsequent agreements, and although the defendant was credited with payment of $8,000, or 30 per cent of the purchase price, that payment had been made in stock of the vendee company which was largely worthless.[23]

In *Lowe v. Sory*,[24] the vendor brought action to quiet title. The total purchase price was $30,000, and in addition the defendant agreed to pay the sums of $4,544.17 and $1,650 to other persons interested in the property. The defendants pleaded that the plaintiff had wrongfully obtained possession of the property, and defendants asked that they be given possession, that they be decreed to have equitable title and be given damages. Plaintiff's general demurrer was sustained and defendants refused to amend. The supreme court affirmed the lower court's ruling quieting title in the vendor. Defendants had paid $13,500 out of the total purchase of $30,000 or about 45 per cent. The defendants' interest in this case was greater than that in *Pope v. Parker* where the court had refused to enforce a forfeiture. However, here the defendant was not in possession, and made no attempt to offer to pay the amount due. The court said that the possession of the plaintiff was lawful "considering that the defendants were in default, not attempted to be gainsaid, and that as the result thereof plaintiff enjoyed contractual right to 're-enter upon the premises and take possession.'" The court noted that the defendant had not alleged that they came within the rule cited in the *American Mortgage Co.* case [25] and that defendants did not allege their inability to perform, or that plaintiff caused defendants' default or contributed thereto. The court said that defendants' attitude toward their obligation to pay, by their pleading, seemed to be that they did not intend or even wish to pay. Thus in addition to the fact that the defendants had been given extensions, it appears that they were not in possession and made no attempt or offer to tender the amount due.

Relief Where Large Percentage of Price Is Paid

The case of *Fairview Corp. v. American Mines and Smelting Co.*[26] involved a lease and option to purchase some mining property. The price was to be paid in yearly installments, and certain royalties from the working of the mine were to be applied to the purchase price. The defendant defaulted in payment of the installments, and there were several new agreements whereby time was extended. On the day of the last installment the vendor sent notice

[23] Frazer Arnold, *The Mortgage in Essence: A Stride Forward in Equity*, 19 *Rocky Mt. L. R.* 123 (1947).

[24] *Supra*, note 19.

[25] The general rule is that a vendee is not entitled to relief against a forfeiture where he makes no attempt to fulfill his part of the contract, and where his default was not caused by fraud, ignorance not wilful, surprise, accident, or mistake.

[26] 86 Colo. 77, 278 P. 800 (1926).

of a forfeiture. The vendee had paid about 57 per cent of the purchase price and was less that one month in default after his failure to pay during the period provided for in the contract for payment after notice. There were neither time-of-essence nor forfeiture clauses in the contract. The court said that the lease and option agreement merged into a contract of purchase and sale by the extension agreements and stressed that a large part of the purchase price had been paid. It pointed to the absence in the contract of forfeiture and time-of-essence clauses.[27] The court held that the relationship of the parties was similar to that of mortgagor and mortgagee, saying that the plaintiff kept title for *security only* and that his proper action was in foreclosure.

FORFEITURE CLAUSE NOT CONTROLLING

On the basis of cases thus far considered it might be said that the provision in the contract for a forfeiture is of importance because in the cases of *Pope v. Parker* and *Fairview Mining Corp. v. American Mines and Smelting Co.*, both *supra*, there were no provisions for forfeiture. But the more recent cases now to be considered reject any such thesis. In *Rocky Mountain Gold Mines, Inc. v. Gold, Silver, and Tungsten, Inc.*,[28] there was a lease which provided for fulfillment of various conditions as to the working of the mine, including getting a certain mill in working condition by a certain date. On failure to do so the lessor was to pay lessee a certain sum each 30 days thereafter until the mill was in the stipulated condition. The lessor was to receive certain royalties from the mining operation, and if the royalties did not equal certain fixed sums at certain stated dates the lessee was to make up the difference. Time was declared essential, and on failure of the lessee to perform any covenant, the lessor might terminate the lease. The lessee agreed to surrender the property on expiration or termination of the lease. There was also an option to purchase, after full payment. Performance of the lease terms was essential to the right to exercise the option. The total purchase price was $85,000. The lessee had paid $53,148.62 or about 62 per cent of the purchase price, and had made improvements and spent money getting operations started in an amount which far exceeded the purchase price. The defendant failed to pay one-half of a monthly payment and plaintiff sent notice of termination and brought action of ejectment. The defendant asked relief in equity. The supreme court said that it appeared that the main purpose of the lease and option agreement was the sale of the property and payment of the purchase price and that when the vendee has substantially performed, the contract operates as security as to the balance to be paid, and equitable relief is available. The court noted that there was no long delay, that the time-of-essence clause was not controlling, and that there was no need for the defendant to tender the amount due because that rule does not apply in an

[27] Time is always of the essence in an option agreement, but as has been stated the original agreement had merged into one of purchase and sale.

[28] 104 Colo. 478, 93 P. 2d 973 (1939).

action which has as its object only the construction of a contract and relation of the parties.[29]

In *Cavos v. Geihsler* [30] the court again recognized that there was a point at which the vendee by his payments would obtain a sufficient interest in the property to be protected as a mortgagor or by relief in equity. The vendees had agreed to assume an existing encumbrance on the property and taxes, and in addition, to make monthly payments with interest. The defendants had reduced the encumbrance, but according to the findings of fact of the lower court they still owed slightly more than the original amount of the amount payable in monthly installments. The contract provided that time was of the essence, and for forfeiture. In all, the defendants paid close to 18 per cent of the total purchase price and were in default 31 days on a new contract executed by the parties. The supreme court ordered the trial court to enter a decree of strict foreclosure, granting defendants six months to pay the amount due.

CASE IS OF LIMITED APPLICATION

It does not seem that the case determines the lowest level at which a vendee has by payment obtained a sufficient interest in the property to warrant protection by equity. The finding of fact was that the defendants still owed over $1,500 in installments and $2,200 on the encumbrance out of a total purchase price of $4,500, and the Supreme Court of Colorado recited the finding of facts of the lower court. But the supreme court had written an opinion declaring a forfeiture, reversing a decree of foreclosure in the lower court. On rehearing, an *amicus curiae* brief was filed which pointed to the fact that the plaintiff, although frequently requested to do so, could not show how much had been paid by the defendants. The brief further pointed to convincing evidence in the record that the defendants had made payments on an average of $45 per month during the total time in occupancy, for about five years. From the evidence in the record it is hard to see how the lower court reached its conclusion that the defendant still owed more than the original total amount to be paid in installments. It is possible that the court reversed itself because it believed that the defendants had paid more than 18 per cent of the purchase price.

Wiley v. Lininger [31] was a case where the contract had no time-of-essence nor forfeiture clauses. Counsel brought action asking foreclosure. The lower court gave the plaintiff judgment for the back installment and interest and gave the defendant six months to pay the amount due into the registry of the court; if the defendant failed to do so, the plaintiff was to be at liberty to petition the court for such further order as might be proper. The Supreme Court of Colorado found that the contention of the defendant that

[29] It is not apparent how an action in ejectment can be termed one for a declaratory judgment.

[30] 109 Colo. 163, 123 P. 2d 822 (1942).

[31] 119 Colo. 497, 204 P. 2d 1083 (1949)

the decree of the lower court worked a forfeiture was untenable, and that the lower court was in error in entering judgment for the amount due, since the plaintiff had requested foreclosure. The court did not direct the trial court what decree to enter, but stated that the lower court should take into consideration the fact that the defendant had made substantial payments and that the contract did not provide for a forfeiture.

COURT AGAIN DENIES MORTGAGE THEORY

In the last case to be considered, *Miller v. Temple*,[32] we again find the court denying that the typical contract for purchase and sale of land could be a mortgage. The contract provided that time was of the essence and for forfeiture, and the vendee was to be guilty of unlawful detainer if he held possession after notice of forfeiture. The court said that it would defeat the clear provision in the contract for action in unlawful detainer if the contract be held a mortgage, but such statement was made because of the unusual facts in the case. The assignee of the vendee had sold to the plaintiff when the last payment under the contract was four days overdue and promised conveyance of title upon payment of the balance of $2,500 in two years, which was the amount owed to the vendor. The vendor went to see the plaintiff who had gone into possession and told him that $2,500 was still due on the contract, but no definite arrangements were made between the plaintiff and vendor about payment. About five months later the vendor served notice of forfeiture, whereupon the plaintiff brought action for specific performance alleging an oral agreement on the part of the vendor to accept plaintiff's promissory note for the balance due. The defendant filed a cross-complaint in unlawful detainer. The finding of fact was against the plaintiff regarding the oral agreement alleged. We find that in this case the vendor had received payments amounting to about 30 per cent of the purchase price and that the default had existed for a year and eight months. The plaintiff, vendee, claimed at the trial that he did not know whom to pay and that he was willing to pay the balance of the purchase price. The vendor stated on cross-examination that he was willing to accept payment of the balance of the purchase price. The court granted the vendee thirty days to pay the balance due and cited the rule of the *American Mortgage Co.* case.[33] While the rule seems to fit the facts of this case, it does not fit the facts of any of the other cases in which the court has refused to enforce a forfeiture. Why then, if this is the true rule, has not a forfeiture been enforced in those cases? It may be that the court was willing to allow the buyer in the *Miller* case equitable relief even after he had been in default for a longer period of time than is usual in the cases, because of his ignorance; or it may be that the case limits the time in default which will be allowed to one year and eight months; default in the other cases where the court refused

[32] 120 Colo. 546, 211 P. 2d 989 (1949).
[33] *Supra*, note 25.

to enforce a forfeiture did not exceed six weeks, *e.g., Rocky Mountain Gold Mines* case;[34] default in the *Cavos* case [35] was only 31 days, but there had ben several new agreements extending time. More important, probably, is that the buyer was in possession, that about 30 per cent of the purchase price had been paid, that the vendee claimed that he was entitled to treatment as mortgagor, and that the vendee was ready and willing to tender the balance due.

CONCLUSION

An examination of the cases has shown that the court has stated different rules in its decisions. But the cases can perhaps be distinguished and thus reconciled. The elements of reconciliation and distinction are: payment of a substantial part of the purchase price, possession by the vendee, length of time in default, and whether the vendee is willing to pay the amount due. If the cases are examined under this viewpoint, as has been done, it will be seen that when all elements have been present the buyer has been treated as mortgagor or granted equitable relief.

In the cases of *Scroggs v. Harkness Heights Land Co.; Phares v. Don Carlos; American Mortgage Co. v. Logan;* and *Lowe v. Sory* the vendee was not in possession. Foreclosure and sale or strict foreclosure were not deemed proper, and a forfeiture was enforced in all those cases except that of *Phares v. Don Carlos* where restitution was granted the vendee. In the *Lowe* case the vendee had made payments amounting to about 45 per cent of the purchase price, a greater amount than in other cases where the court refused to enforce a forfeiture, but in addition to not being in possession, the vendee did not attempt to pay the balance due.

In the cases of *Fairview Mining Corp. v. American Mines and Smelting Co.; Pope v. Parker; Rocky Mountain Gold Mines v. Gold, Silver, and Tungsten; Cavos v. Geihsler;* and *Miller v. Temple* the vendee was treated as mortgagor or given a chance to redeem within a time set by the court. In the *Cavos* case only about 18 per cent of the purchase price had been paid, but for reasons stated it is not believed that the *Cavos* case can be considered representative as to the percentage of the purchase price which will constitute a sufficient payment by the vendee. About 30 per cent of the purchase price had been paid in *Pope v. Parker* and *Miller v. Temple* and over one-half in the *Fairview* and *Rocky Mountain* cases. Thus it may be inferred that payment of about 30 per cent of the purchase price by the vendee may constitute a sufficient interest if the other elements are present.

A willingness to pay the amount due and the length of time in default have only been mentioned by the court in cases where the payments by the vendee have been small, or when he was not in possession. Therefore, it is not known whether either factor would be of controlling importance in the event that the vendee had made substantial payments and was in possession.

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[34] *Supra*, note 28.
[35] *Supra*, note 30.