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FORFEITURE, INEQUALITY OF BARGAINING POWER, AND THE AVAILABILITY OF CREDIT: AN HISTORICAL PERSPECTIVE

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INTRODUCTION

A breach by one party to a contract often allows the other to terminate the agreement.¹ Such termination may result in a "forfeiture." Forfeiture is used in two senses. First, the defaulting party may "forfeit" any expenditures he has made in part performance, even if the part performance benefited the other party. Second, the defaulting party, even if he has not partly performed, may "forfeit" his expectancy, the value of the other party's promise.

The law has always shown some hostility to forfeitures in both senses.² Sometimes the defaulting party is awarded restitution for any benefit conferred on the other party. Such restitution avoids forfeiture in the first sense, though not in the second. Sometimes a party can recover his expectancy despite his default, for example, if the breach was not "material." Sometimes the defaulting party is allowed to "cure" his breach, that is, he is allowed to perform at a later date, and thereby reinstate his rights under the contract.

As this article will show, these three methods of avoiding for-

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¹ This has long been true, even if the contract does not expressly so provide. McGovern, *Dependent Promises in the History of Leases and Other Contracts*, 52 TUL. L. REV. 659, 659-60 (1978).

² *Id.* at 681-88.

feiture—restitution, immaterial breach, and cure—have a long history. However, relief from forfeitures has expanded greatly over the course of time, particularly in this century. Many attribute this trend to the rise of inequality of bargaining power. Where the parties have unequal bargaining power, contractual provisions, it is said, should not be enforced because the weaker party did not truly consent. Such inequality is supposed to be a recent phenomenon, attributable to the rise of large businesses since the Industrial Revolution³ or to the extension of credit to less affluent persons in this century.⁴ Whereas before the twentieth century “contract law was predicated upon the model of a contract between two parties of relatively equal bargaining power,” in most contracts today consent “is a fiction.”⁵ If true, this change would explain the increasing reluctance of the law to allow forfeitures.

However, the argument that contracts between unequal parties should not be enforced is much older than the twentieth century. In protesting against the legalization of interest Thomas Wilson in 1572 asked “what equaltye is in bargaynyng, I praye you, when the one partie is famished, and the other is hoggesty fed?”⁶ Like many others, Wilson assumed that inequality in wealth amounted to inequality in power.⁷ Interest bearing loans were “compulsorie debts . . . made against the will altogether (as God knoweth) of the needy and poore borrower . . . because neede maketh the olde wife to trotte.”⁸ The same idea is found in the Old Testament: “[T]he rich rules over the poor, and the borrower is the slave of the lender.”⁹

The hostility to printed form contracts so often manifested today is partly based on the idea of unequal bargaining power; the party who prepares the form compels the other to adhere to terms already settled because the draftsman of the form has all the power.¹⁰ But often another point is involved in the criticisms of printed forms: the forms are in *fine* print, hard to read and even harder to understand, and in any

³ J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 201 (1971); McDowell, *Party Autonomy in Contract Remedies*, 57 B.U.L. REV. 429, 430 (1977). *But cf.* Williams, Book Review, 25 U.C.L.A. L. REV. 1187, 1210 (1978) (pointing out that recent scholarship has cast doubt on the supposition that “nineteenth century industrialism introduced significant inequalities for the first time”).

⁴ Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 433 (1968).

⁵ Sweet, *Liquidated Damages in California*, 60 CALIF. L. REV. 84, 85 (1972).

⁶ T. WILSON, A DISCOURSE UPON USURY 287 (1572) (R. Tawney ed. 1925).

⁷ *See, e.g.*, W. BLUM & H. KALVEN, THE UNEASY CASE FOR PROGRESSIVE TAXATION 78 (1953).

⁸ T. WILSON, *supra* note 6, at 256.

⁹ *Proverbs* 22:7 (RSV).

¹⁰ Macauley v. Schroeder Publishing, [1974] 1 W.L.R. 1308, 1316 (H.L.); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943). For a trenchant criticism of the idea that a standard form indicates unequal bargaining power, see Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359, 364-65 (1976).

event, not read or understood by the other party, who is therefore surprised when the form is invoked against him.¹¹ According to a much discussed comment to the Uniform Commercial Code, “unfair surprise” rather than “superior bargaining power” is the principle which justifies refusal to enforce “unconscionable” contractual provisions.¹²

Guarding against such surprise is not a new issue either. The Statute of Merchants of 1285 provided stringent remedies for collecting debts if the debtor had executed a bond in a prescribed form. To guard against surprise, the statute required that its penalties should “be openly read before the debtor” when the bond was executed.¹³ Modern statutes for the same reason often require that harsh provisions be printed in large type.¹⁴ Such requirements may do little good, since parties entering a contract typically do not contemplate default and therefore may pay little heed to provisions for forfeiture even if they are aware of them. Antonio was clearly aware of the pound-of-flesh stipulation in Shylock’s famous bond, for it was discussed orally. But he gave it little thought; “fear not, man, I will not forfeit it.”¹⁵ In eighteenth-century France, Pothier suggested that debtors agree to contracts which provide “an excessive penalty” in case of default because of their “false confidence” that they will not default; thus their consent is “founded on an error” and is invalid.¹⁶

The answer to these ancient arguments for limiting freedom of contract is equally old: if creditors are not allowed to exact interest, they will not lend money.¹⁷ Restricting creditors’ remedies will result in restricting the availability of credit. This was a source of concern in the Old Testament,¹⁸ and similar arguments are repeated today.¹⁹ To this argument two responses have appeared. First, some remedies are rejected on grounds of “justice” even if the result is to reduce the availability of credit.²⁰ No one would allow Shylock his pound of flesh even

¹¹ *Bridge v. Campbell Discount Co.*, [1962] A.C. 600, 629; Warren, *Statutory Damages and the Conditional Sale*, 20 OHIO ST. L.J. 289, 298-99 (1959).

¹² U.C.C. § 2-302, Comment 1.

¹³ Statute of Merchants, 13 Edw. 1, c. 1, § 33 (1285).

¹⁴ CAL. CIV. CODE § 2982(a) (West Supp. 1977); OHIO REV. CODE ANN. § 2323(D) (Baldwin 1975).

¹⁵ W. SHAKESPEARE, *THE MERCHANT OF VENICE*, act I, scene 3, line 132.

¹⁶ I R. POTHIER, *OBLIGATIONS* § 345 (1781). See also C. McCORMICK, *HANDBOOK OF THE LAW OF DAMAGES* § 147, at 601 (1935).

¹⁷ In the debates in the House of Commons in 1572 over the legalization of interest it was said “to have any man lend his money without any commodity, hardly should you bring that to pass.” S. D’EWES, *A COMPLEAT JOURNAL* 172 (1692). See also 2 W. BLACKSTONE, *COMMENTARIES* *455.

¹⁸ *Deuteronomy* 15:9 (RSV).

¹⁹ E.g., U.S. NAT’L COMM’N ON CONSUMER FINANCE, *CONSUMER CREDIT IN THE UNITED STATES* 24 (1972) [hereinafter cited as *CONSUMER CREDIT*]; Williams, *supra* note 3, at 1211.

²⁰ Cf. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1088 (1976) (moral considerations limit the outer reaches of a creditor’s remedies). See also Warren, *Consumer Credit Law: Rates, Costs and Benefits*, 27 STAN. L. REV. 951, 961-64 (1975).

if he would not otherwise have made the loan. Indeed, for Thomas Wilson the creditor's threat not to lend was an argument *for* prohibiting interest; without credit "moste men woulde lyve within their boundes, and leave their wanton apparell, their unnecessary feastynges, their fond gamnynges," and so forth.²¹ Many today also suggest that the wide availability of credit is not a benefit for the poor but a trap which leads them to overextend themselves.²²

Others reject this argument on the ground that the law should not paternalistically "protect" the poor from getting what they want. Even so, there is a second argument for limiting creditors' remedies, namely that harsh remedies are not in fact needed to assure the availability of credit. For example, the last four centuries "have seen steadily increasing indulgence to delinquent mortgagors, yet this same period has seen amazing growth in the volume of mortgage loans. Time has proved that [medieval] law was much more brutal than was required to serve the economic function of security."²³

The thesis of this article is that the historical trend to limit forfeitures for default cannot be explained by any increase in inequality of bargaining power as a modern phenomenon. Rather the dominant factor has been a change in attitude toward contract, a growing reluctance to enforce forfeitures arising from default except to the extent that failure to enforce them will lead to an undesirable restriction of credit. Courts and legislatures have increasingly concluded that forfeitures can be avoided without such adverse consequences. In part, this conclusion is due to the rise of alternative remedies which protect creditors without the harshness of a forfeiture.

This thesis will be examined as to four types of contracts: feudalism,²⁴ mortgages,²⁵ leases,²⁶ and sales.²⁷

FEUDALISM

If a feudal tenant failed to perform his services, his lord could seize the land.²⁸ But the tenant could recover the land if he cured the

²¹ T. WILSON, *supra* note 6, at 369.

²² See CONSUMER CREDIT, *supra* note 19, at 229; Whitford & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607, 626.

²³ E. DURFEE, CASES ON SECURITY 13 (1951). The National Commission on Consumer Finance also found that "restriction of confessions of judgment had no significant effect on the rate of charge for consumer credit or on its availability." CONSUMER CREDIT, *supra* note 19, at 26.

²⁴ See text accompanying notes 28-34 *infra*.

²⁵ See text accompanying notes 35-88 *infra*.

²⁶ See text accompanying notes 89-109 *infra*.

²⁷ See text accompanying notes 110-68 *infra*.

²⁸ McGovern, *supra* note 1, at 664.

default.²⁹ At common law the tenant's right to cure was unlimited, but some local customs allowed foreclosure. In London, for example, the lord could hold the land for a year and a day. If during this period the tenant paid the arrears, he would get the land back; otherwise it would remain the lord's forever.³⁰ The Statute of Gloucester in 1278 introduced a similar method of foreclosure for the whole country. A lord could sue to recover land only if his tenant had been in default for two years. Even then the tenant could save his estate if he appeared before judgment, tendered the arrears, and provided satisfactory security for his future performance. After judgment, however, the tenant was foreclosed.³¹

These provisions were interpreted liberally in favor of defaulting tenants.³² However, the right to cure could be waived by contract. Already in the thirteenth century some charters provided that if a tenant failed to pay rent, the tenement would be forfeited "without further delay."³³ Provisions giving a lord an immediate right of entry on default were regularly enforced.³⁴

MORTGAGES

A similar pattern appears in the medieval law of mortgages. Failure to pay the debt on time did not necessarily result in forfeiture. The mortgagor would be summoned to court and told that he must redeem the mortgage "within a reasonable time" or otherwise the mortgagee would own the property.³⁵

This procedure, known today as strict foreclosure, was applicable only if the mortgage agreement was silent. An agreement providing for forfeiture if the debtor did not pay on time was binding.³⁶ Such an agreement, the *lex commissoria* in Roman law, was made invalid by the

²⁹ 3 H. BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 155 (G. Woodbine ed., S. Thorne trans. 1977). See also BRACON'S NOTE BOOK pl. 270, 348 (F. Maitland ed. 1887).

³⁰ Statute of Gavelet, 1316, 10 Edw. 2; LIBER ALBUS 55-56, 403 (H. Riley ed. 1862). For a similar custom in Kent, see Consuetudines Cantie, 1 STATUTES OF THE REALM 224a-225 (uncertain date); T. ROBINSON, THE COMMON LAW OF KENT 244-46 (1741).

³¹ Statute of Gloucester, 1278, 6 Edw. 1, c. 4.

³² For example, a tenant could dispute the amount of the arrears due and still redeem after the dispute was resolved against him. Y.B. Mich. 41 Edw. 3, f. 29, pl. 29 (1367). Also the statutory requirement that the tenant find security was often watered down to mean only that if the tenant defaulted again he would lose the land. Y.B. Mich. 17 & 18 Edw. 3 (R.S.) 232, pl. 41 (1343); Y.B. Pasch. 32 & 33 Edw. 1 (R.S.) 462 (1305).

³³ THE LONDON EYRE OF 1276, at 105, pl. 409 (M. Weinbaum ed. 1976).

³⁴ E.g., Y.B. Pasch. 9 Edw. 3, f. 7, pl. 17 (1334); T. LITTLETON, TREATISE OF TENURES § 325 (T. Tomlins ed. 1841); *Roll and Writ File of the Berkshire Eyre of 1248*, 90 SEL. SOC'Y 194, pl. 455 (1973).

³⁵ R. GLANVILLE, TRACTATUS DE LEGIBUS ET CONSUEUDINIBUS REGNI ANGLIE 122-23 (G. Hall ed. 1965).

³⁶ *Id.* at 121.

Emperor Constantine in 326 A.D.³⁷ Constantine's prohibition against the *lex commissoria* was adopted on the continent by medieval writers on civil and canon law.³⁸ But English law continued to recognize the *lex commissoria* as valid. The only hint of protest appears in Britton, written at the end of the thirteenth century, and Britton rejects it in language worthy of the most ardent proponents of freedom of contract: "[I]f [debtors] say that equity ought to assist them, by reason of the smallness of the debt, that shall not avail them, since every freeman may dispose of his property at his will."³⁹ Not until the late sixteenth century did equity allow mortgagors to redeem a default despite the language of the agreement. Relief was first given in special cases of hardship, where, for example, the debtor had failed to pay on time because of some misfortune. Later, however, it was extended to all cases of default, regardless of the cause.⁴⁰

Why did England enforce the *lex commissoria* for so long? Why was it first disregarded in the late sixteenth century? These are difficult questions which have rarely been discussed, and never satisfactorily answered. In the eighteenth century, chancellors invoked the inequality-of-bargaining-power idea against agreements which barred redemption of mortgages: "necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."⁴¹ Similar reasoning appears in discussions of the *lex commissoria* by medieval canonists and civilians on the continent. The mortgagor is a "poor man" who because of his "great necessity" will agree to any terms which the creditor imposes; thus, creditors "extort" these provisions.⁴² Perhaps this idea influenced the chancellors who first allowed redemption in the sixteenth century. But the assumption that all borrowers were "necessitous men" who were compelled by poverty to borrow was *less* true in the sixteenth century than it had been during the middle ages. Antonio resorted to Shylock not because he was poor, but because "all my fortunes are at sea."⁴³ Opponents of the legalization of interest in the sixteenth century had to meet the argument that borrowers were sometimes wealthy merchants

³⁷ CODE 8.35.3.

³⁸ AZO, *SUMMA AUREA* 211v (1557) (book 8, tit. De Pignoribus § 4); 2 *CORPUS JURIS CANONICI* 530 (X.3.21.7) (A. Friedberg ed. 1959); *HOSTIENSIS* (Henricus de Segusio), *SUMMA AUREA* 155v (1537) (book, 3 tit. De Pignoribus); 3 *PANORMITANUS* (Nicholas de Tudeschis), *COMMENTARIA* 97 (1522) (on X.3.21.7).

³⁹ 2 *BRITTON* 128 (3.15.6) (F. Nichols ed. 1865). *See also* 2 *H. BRACON*, *supra* note 29, at 73; 3 *id.* at 286; T. *LITTLETON*, *supra* note 34, § 332.

⁴⁰ R. *TURNER*, *THE EQUITY OF REDEMPTION* 24-26 (1931), suggests such a pattern, but because of the dearth of good equity reports for this period, the development is hard to trace.

⁴¹ *Vernon v. Bethell*, 28 Eng. Rep. 838, 839 (Ch. 1762).

⁴² J. *DE RAVANIS*, *LECTURA SUPER CODICE* (on C. 8.34.3). *See also* *PANORMITANUS*, note 38 *supra*.

⁴³ W. *SHAKESPEARE*, *THE MERCHANT OF VENICE*, act I, scene 1, line 163.

who would make a handsome profit with the borrowed money.⁴⁴ Interest was legalized at that time because “[l]oans to enable rich capitalists or landowners to finance profitable undertakings, which had been the exception, were becoming the rule. Loans to meet the occasional necessities of the small producer, formerly the typical case, were dropping into an unregarded background.”⁴⁵

Nevertheless, this was the very time when chancellors began to protect mortgagors from forfeiture. One of the earliest decrees for redemption recites that the mortgagor was “a very poor man” and the defendants were “hard dealing men working . . . upon the simplicity of their poor neighbors.”⁴⁶ But the granting of relief to mortgagors has never depended on the status of the parties. Ever since the equity of redemption has been recognized, waivers of the right to redeem have been held invalid, regardless of whether the borrower was rich or poor, consumer or merchant, or whatever else.⁴⁷

Another objection to the *lex commissoria*, apart from inequality of bargaining power, was that borrowers do not anticipate default when a loan is made.⁴⁸ Thus, after default, when surprise is no longer a factor, borrowers have always been permitted to waive their right to redeem.⁴⁹

Medieval and modern mortgages differ with respect to the risk of surprise. Medieval mortgages were enforced only if the mortgagor gave possession of the property to the mortgagee when the mortgage was executed. Although this rule was designed to protect third parties who would be misled if the debtor were left in possession,⁵⁰ it had the incidental effect of putting the mortgagor on notice of the seriousness of his undertaking. Courts have always been less sympathetic to defaulters who forfeit money which they have paid as compared with those who *promise* to pay a penalty, because “the sober second thought, which usually preceded cash outlay, renders grossly disproportionate deposits less frequent in fact than disproportionate promises.”⁵¹

For this reason, the common law distinguished mortgages, which required surrender of possession at the execution of the mortgage, from penal bonds, which were only promises to pay should there be a failure to perform. If performance by the mortgagor became impossible, the mortgagor nevertheless lost the land; if performance of a penal bond

⁴⁴ T. WILSON, *supra* note 6, at 236, 371.

⁴⁵ *Id.* at 59-60.

⁴⁶ C. MONRO, ACTA CANCELLARIA 107-08 (1847).

⁴⁷ UNIFORM LAND TRANSACTIONS ACT § 3-501(d); U.C.C. § 9-501(3); RESTATEMENT OF SECURITY § 55(1) (1941).

⁴⁸ Debtors readily consent to the *lex commissoria* hoping they will be able to redeem at the agreed time. See I. ANDREA, COMMENTARIA (1581) (on X.3.21.7).

⁴⁹ DIGEST 13.7.34; U.C.C. § 9-506; UNIFORM LAND TRANSACTIONS ACT § 3-512(e); 12 M. PLANIOL & G. RIPERT, DROIT CIVIL FRANCAIS § 445 (2d ed. 1953).

⁵⁰ 2 W. BLACKSTONE, *supra* note 17, at *160; R. GLANVILLE, *supra* note 35, at 123-24.

⁵¹ C. McCORMICK, *supra* note 16, § 153, at 615.

became impossible, the obligor was relieved.⁵² Even if the maker of a penal bond defaulted without excuse, although the common law courts enforced the penalty, they considered such bonds to be "odious" and construed them favorably to the debtor.⁵³ As early as the fourteenth century, law courts showed reluctance to enforce penal bonds,⁵⁴ and when equity began to grant relief against them in the seventeenth century, the common law courts soon followed suit.⁵⁵ On the other hand, the common law courts refused to follow equity in giving relief to mortgagors.⁵⁶

Because medieval mortgages involved a transfer of possession and not a mere promise, they probably operated less harshly in most cases than the typical penal bond. The *lex commissoria* is harsh if the value of the mortgaged property exceeds the debt. But medieval mortgages frequently provided that if the mortgagee acquired the land by forfeiture, he would pay an additional sum to the mortgagor, a sum which was apparently intended to reflect the difference between the debt and the value of the land.⁵⁷

At the end of the sixteenth century, it first became customary to leave the mortgagor in possession.⁵⁸ The coincidence in time between the rise of this practice and the appearance of the equity of redemption is too striking to be accidental. Now the mortgage and the penal bond began to look very much alike; the arguments about surprise pertained to both, and in fact the two were often linked together.⁵⁹

A second change in the sixteenth century also helps to explain the beginning of relief for mortgagors in default: the abolition of the medieval prohibition against interest. Throughout the middle ages Christians were prohibited from charging interest on loans. As we shall see, this prohibition had the indirect effect of limiting any reasonable alternatives to the *lex commissoria*.

The only alternative to the *lex commissoria* suggested by Glanville in the twelfth century was judicial strict foreclosure.⁶⁰ Yet strict foreclosure has often been described as "infinitely troublesome and dila-

⁵² E. COKE, FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 207 (London 1628).

⁵³ Y.B. Trin. 22 Hen. 6, f. 57, pl. 7, at f. 58 (1444); I J. POWELL, ESSAY UPON THE LAW OF CONTRACTS 397 (London 1790).

⁵⁴ See *Umfraville v. Lonstede*, 19 SEL. SOC'Y 58, 59 (1308-1309).

⁵⁵ *Stern v. Vanburgh*, 84 Eng. Rep. 347 (K.B. 1669); LORD NOTTINGHAM, MANUAL OF CHANCERY PRACTICE AND PROLEGOMENA OF CHANCERY AND EQUITY 203 (D. Yale ed. 1965); Gray, *The Boundaries of the Equitable Function*, 20 AM. J. LEGAL HIST. 192, 214 n.61 (1976).

⁵⁶ 2 W. BLACKSTONE, *supra* note 17, at *158-59.

⁵⁷ 12 LIBER ASSISARUM f. 34, pl. 5 (1338); A. LEVETT, STUDIES IN MANORIAL HISTORY 170 (1938); THE LONDON EYRE OF 1276, *supra* note 33, at 105. Of course, we have today no way of knowing whether the additional payment was in fact adequate for this purpose.

⁵⁸ R. TURNER, *supra* note 40, at 89.

⁵⁹ See Anonymous, 21 Eng. Rep. 1 (Ch. 1650).

⁶⁰ See text accompanying note 35 *supra*.

tory,"⁶¹ "tedious and expensive."⁶² Moreover, this expense and delay to the creditor was not justified by any substantial benefit to the debtor, since debtors rarely took advantage of the additional time to pay which the foreclosure decree gave them. "[W]e may be pretty certain," said Maitland in his description of a typical foreclosure, "that the money will not be paid—it is only in novels, and in novels written by ladies, that the mortgagee's hand is stayed at the last moment" by payment.⁶³

It is not surprising, therefore, that medieval law allowed mortgagees to avoid judicial strict foreclosure by contract. But what of the unfairness to the debtor which arises if the debtor is unable to pay but the property is worth more than the debt? Under these circumstances in Roman law the property would be sold, the debt paid out of the proceeds of sale, and the surplus turned over to the debtor.⁶⁴ Alternatively, the property would be assessed and, if the value exceeded the debt, the creditor would pay the excess to the debtor.⁶⁵ These alternatives seem sensible and fair, but they were not practicable under the economic conditions which prevailed in medieval England,⁶⁶ because of the lack of a market for land and the corollary lack of a method for assessing its value. Whenever circumstances other than an unpaid mortgage arose which today would require land to be valued or sold, medieval law instead asked "how much is the land worth per annum?" For example, when land was partitioned, the issue was not how much was each parcel worth, but how much was it worth per year; any differences were made up not by payment of a lump sum, but by an annual rent.⁶⁷ When a tenant was recompensed for losing land, he did not get money equal to the value of the lost land, but rather other land of equivalent annual value.⁶⁸ When judgment creditors were allowed to reach lands of the debtor, the lands, instead of being sold, were delivered to the creditor to raise the money from the income; as soon as enough money was raised to pay the debt, the land reverted to the debtor.⁶⁹ A similar procedure was used for enforcing Jewish mort-

⁶¹ *Tucker v. Wilson*, 24 Eng. Rep. 379, 380 (Ch. 1714).

⁶² 5 S.C. STAT. § 169 (1791). Similar complaints are heard today. UNIFORM LAND TRANSACTIONS ACT, art. 3, Intro. Comment.

⁶³ F. MAITLAND, *EQUITY* 271 (1909).

⁶⁴ CODE 8.27.20; DIGEST 13.7.42.

⁶⁵ CODE 8.33.3.4.

⁶⁶ Although a charter of King John gave Jewish mortgagees a power of sale, *Select Pleas, Starrs, and Other Records from the Rolls of the Exchequer of the Jews*, 15 SEL. SOC'Y 2 (J. Rigg ed. 1902) [hereinafter cited as *Select Pleas*], other methods of foreclosure were normally used. See note 74 *infra*.

⁶⁷ T. LITTLETON, *supra* note 34, at § 251; 2 BRACTON, *supra* note 29, at 219.

⁶⁸ 4 H. BRACTON, *supra* note 29, at 223-33; *Roll and Writ File of the Berkshire Eyre of 1248*, 90 SEL. SOC'Y 129, pl. 300 (1973). Cf. 3 H. BRACTON, *supra* note 29, at 397 (When a tenant lost a portion of his leasehold to a claim of dower, the remaining portion could be retained after the leasehold's expiration for a time sufficient to recoup the value of the lost portion.).

⁶⁹ See Statute of Westminster II, 13 Edw. 1, c. 18 (1285); Statute of Merchants, 13 Edw. 1, c. 1, § 29 (1285).

gages.⁷⁰

Thus, foreclosure by sale was not a practical alternative in medieval England, but a procedure was available which protected the debtor and also assured the creditor of his debt. Why was it not used for enforcing ordinary mortgages? The obstacle was the prohibition against interest. In both Roman and modern law a creditor in possession of mortgaged property must apply the income from the property against the debt.⁷¹ But in medieval England the parties could agree otherwise. Such agreements, though "unjust" and "dishonest," were not prohibited by the king's court⁷² since the agreements served to evade what the royal judges regarded as an impractical rule, the canon law prohibition of all interest. Jewish mortgagees, who *were* allowed to charge interest, had to account, but only for income from the mortgaged land which exceeded the lawful rate of interest.⁷³ For Christians this solution was not open because a creditor who took any interest was guilty of "usury" under canon law.⁷⁴ Thus, the canon law, despite its disapproval of the *lex commissoria*, contributed indirectly to its acceptance in medieval England by inhibiting the use of the only reasonable alternative available at the time. Removal of this obstacle by the legalization of interest coincided with the appearance of the equity of redemption in the sixteenth century.

The rise of the equity of redemption led to a revival of the procedure of strict foreclosure first described by Glanville in the twelfth century. This procedure is usually considered unjust to debtors since, if the land is worth more than the debt but they are unable to pay within the time allowed by the court, they forfeit their equity.⁷⁵

Nevertheless, foreclosure by sale, the Roman law solution to these difficulties,⁷⁶ was very slow to appear in England. Sales by court order appeared in the seventeenth century,⁷⁷ but they were rare. Not until the eighteenth century do provisions appear in mortgages giving the mortgagee a power of sale. The validity of such provisions was not

⁷⁰ Statutes of Jewry, 1 STATUTES OF THE REALM 221 (uncertain date); *Select Pleas*, *supra* note 66, at 19-27.

⁷¹ UNIFORM LAND TRANSACTIONS ACT § 3-504(h); RESTATEMENT OF SECURITY § 27 (1941); CODE 4.24.2.

⁷² R. GLANVILLE, *supra* note 35, at 124.

⁷³ *Select Pleas*, *supra* note 66, at 19-27.

⁷⁴ 2 CORPUS JURIS CANONICI 811 (X.5.19.1.2) (A. Friedberg ed. 1959). After interest became lawful for Christians in the sixteenth century, equity began to require Christian mortgagees in possession to account. *E.g.*, *Pell v. Blewet*, 21 Eng. Rep. 146 (Ch. 1630-1631); *Holman v. Vaux*, 21 Eng. Rep. 146 (Ch. 1613).

⁷⁵ G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES §§ 311-312 (2d ed. 1970).

⁷⁶ Contractual provisions allowing secured creditors to sell upon a default appear as early as the first century A.D. F. SCHULTZ, CLASSICAL ROMAN LAW 415 (1951). Later such a sale was permitted even if the agreement did not allow it. DIGEST 13.7.4.

⁷⁷ *See Booth v. Rich*, 23 Eng. Rep. 478 (Ch. 1678).

settled until the nineteenth century.⁷⁸ As late as 1811 the Master of Rolls thought that a foreclosure sale was unprecedented.⁷⁹ A foreclosure sale without either a court order or authorization in the agreement became possible only in 1860 when a statute implied a power of sale in all mortgages in England.⁸⁰

How can one explain late appearance of foreclosure by sale in England even in modern times when a market for land was available? Perhaps a sentimental attachment to keeping land in the mortgagor's family affected English law. In America, where such sentiment is less strong, foreclosure by sale became common much earlier.⁸¹ Perhaps, too, the advantages of sale over strict foreclosure⁸² are not as great as they seem. Although strict foreclosure was expensive and time consuming, the mortgagee usually could avoid it by suing on the debt or by taking possession of the land and satisfying his claim out of the income.⁸³ The rare cases of foreclosure sales of land before the nineteenth century usually occurred where these alternatives were unavailable because the property was not income-producing or the mortgagor was insolvent.⁸⁴

The asserted advantages to the *mortgagor* of foreclosure by sale are also questionable. In the earliest cases it was the mortgagee, not the mortgagor, who requested sale.⁸⁵ True, if a sale produced a surplus, the surplus would go to the mortgagor; this was never seriously ques-

⁷⁸ See *Croft v. Powel*, 92 Eng. Rep. 1230 (Ex. 1738). As late as 1799, Powell doubted the validity of a power of sale, 1 J. POWELL, A TREATISE ON THE LAW OF MORTGAGES 13-19 (4th ed. London 1799), but in *Corder v. Morgan*, 34 Eng. Rep. 347 (Ch. 1811), its validity was established.

⁷⁹ *Goodier v. Ashton*, 34 Eng. Rep. 249 (Ch. 1811). Two years later, the Chancellor said in ordering a sale that "if there was no Precedent, I would make One." *Monday v. Monday*, 35 Eng. Rep. 87, 88 (Ch. 1813). In 1852, Chancery's power to order a sale was confirmed by 15 & 16 Vict., c. 86, § 48 (1852).

⁸⁰ 23 & 24 Vict., c. 145, § 11 (1860). In some American states foreclosure by sale still requires a court order. *E.g.*, ILL. REV. STAT. ch. 95, § 23 (1977). On the other hand, foreclosure by sale of *personal property* without court order has been allowed since the eighteenth century. *Tucker v. Wilson*, 24 Eng. Rep. 379 (Ch. 1714); U.C.C. § 9-504.

⁸¹ 1 Pa. Laws ch. 153 (1705); 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 1025-1026 (4th ed. Boston 1846). Judgment creditors were authorized to sell land in the American colonies in 1732, 5 Geo. 2, c. 7, § 4 (1732), over a century before a comparable statute for England was enacted. See J. WILLIAMS, PRINCIPLES OF THE LAW OF REAL PROPERTY 295-96 (23d ed. 1920). Also, in trust law a power of sale is "more readily inferred in the United States than it was in England" because "there is not in the United States the same tendency to retain property from generation to generation." RESTATEMENT (SECOND) OF TRUSTS § 190, Comment a (1959).

⁸² See text accompanying note 35 *supra*.

⁸³ See *Turner, The English Mortgage of Land as a Security*, 20 VA. L. REV. 729, 738 (1934).

⁸⁴ 2 J. STORY, *supra* note 81, § 1026. A Pennsylvania statute of 1705 authorizing mortgagees to sell land recited that mortgagors "have proved insolvent" and that "mortgages are become no effectual security, considering how low the annual profits of tenements and improved lands are here." 1 Pa. Laws ch. 153, § 6 (1705).

⁸⁵ See *Daniel v. Skipwith*, 29 Eng. Rep. 89 (Ch. 1786); *Dashwood v. Bithazey*, 25 Eng. Rep. 347 (Ch. 1729). See also 2 W. BLACKSTONE, *supra* note 17, at *159.

tioned.⁸⁶ But, "sad experience has taught us that a power of sale . . . can be harder on the debtor than strict foreclosure ever was. The surplus to be returned to the debtor after the sale is a glittering mirage" which very rarely materializes.⁸⁷ If the mortgaged property is actually worth more than the debt, the debtor can usually sell his right of redemption to another.⁸⁸ Thus, it may be a mistake to regard the rise of foreclosure by sale as a major landmark in the history of the law's protection against forfeitures.

LEASES FOR YEARS

The landlord under a lease for years historically had no right to evict a tenant who failed to pay the rent unless the lease so provided,⁸⁹ but such provisions were common.⁹⁰ The Statute of Gloucester of 1278, moreover, provided that a tenant who committed waste would forfeit his land.⁹¹ The history of forfeiture by defaulting tenants parallels the history of mortgages, with two noteworthy differences. First, the common law was more sympathetic to lessees than to mortgagors, probably because forfeiture for a lessee, unlike a medieval mortgagor, involved a loss of possession. Second, paradoxically, equity never gave lessees as much protection as mortgagors though equity went farther than the common law.

The law courts refused to enforce the statutory forfeiture for waste unless the waste was material; "for if it amount to only twelve pence, or some such petty sum, the plaintiff shall not recover."⁹² The courts also construed ambiguous terms in a lease in favor of the defaulting lessee, "for conditions are odious in law, and if the words thereof be doubtful, they shall be construed for the avail of him who is bound by it."⁹³ Furthermore, the courts refused to allow lessors to exercise a right of entry under a lease unless they first made a demand for the rent past due.⁹⁴ The requirement of a demand became highly technical. The lessor had to appear on the leased land on the due date and remain until the sun had set; if he "demands the rent, and afterwards goes off the land, and is not there at the last instant of the day, the same is not a sufficient

⁸⁶ 1 Pa. Laws ch. 153, § 7 (1705); 23 & 24 Vict., c. 145, § 14 (1860); 30 Geo. 2, c. 24, § 11 (1757).

⁸⁷ G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.2, at 1188 (1965).

⁸⁸ See Jordan & Warren, *supra* note 4, at 441; Turner, *supra* note 83, at 738.

⁸⁹ McGovern, *supra* note 1, at 665.

⁹⁰ These provisions were usually less harsh than provisions for forfeiture in mortgages in that the lessor typically could reenter only if the rent was in arrears for a substantial period, such as a month or even more. T. MADOX, FORMULARE ANGLICANUM 142-43, 147-48, 152 (1702).

⁹¹ Statute of Gloucester, 1278, 6 Edw. 1, c. 5, § 2.

⁹² 3 W. BLACKSTONE, *supra* note 17, at *228. See also Y.B. Hil. 38 Edw. 3, f. 7 (1364); Y.B. Trin. 5 Edw. 2, pl. 52 (1312), reprinted in 33 SEL. SOC'Y 247 (1916).

⁹³ Smith v. Bustard, 74 Eng. Rep. 131, 132 (K.B. 1589).

⁹⁴ Y.B. Pasch. 20 Hen. 6, f. 30, pl. 24 (1442); Y.B. Mich. 47 Edw. 3, f. 12, pl. 11 (1370); 40 LIBER ASSISARUM f. 241, pl. 11 (1365).

demand.”⁹⁵ Furthermore, the demand had to specify the exact amount due; if the lessor “doth demand one penny more or less than is due, or in his demand doth not shew the certainty of the rent . . . the demand is not good.”⁹⁶

Nevertheless, though forfeitures were odious to the law courts, if the contract clearly provided for one, the courts would enforce it. Equity went further. Toward the end of the sixteenth century, when it first gave relief to defaulting mortgagors, chancery also began to relieve defaulting tenants. At first, unusual factors in each case were emphasized, for example, “the Default of Payment . . . was not voluntary, but grew by the Negligence of a Servant.”⁹⁷ In time, however, equitable relief for defaulting lessees became routine.⁹⁸

In the case of leases, unlike mortgages, the law courts soon followed equity’s lead. By the end of the seventeenth century, they would stay actions of ejectment by a lessor based on a default in paying rent if the lessee proffered the arrears of rent in court.⁹⁹

Once the tenant’s right to cure was recognized, equity began to entertain bills to foreclose by lessors analogous to bills to foreclose mortgages.¹⁰⁰ But foreclosure of leases was rendered unnecessary by a statute of 1731 which provided summary proceedings for lessors who had a right of entry for nonpayment of rent. Six months after judgment was entered in this proceeding the lessee was “barred and foreclosed from all relief or remedy in law or equity.”¹⁰¹

Modern law protects defaulting tenants in two ways. The defaulting tenant may be given equitable relief, which, like the relief given in the earliest days of equity, is discretionary¹⁰² and may be denied if the tenant’s default was “willful.”¹⁰³ However, defaulting tenants today also have an absolute right to cure which is limited only in time. In England a tenant can stay ejectment by bringing the arrears of rent to

⁹⁵ Wood v. Chivers, 74 Eng. Rep. 806, 807 (K.B. 1573).

⁹⁶ Fabian v. Windsor, 74 Eng. Rep. 278 (C.P. 1589). Cf. UNIFORM CONSUMER CREDIT CODE § 5.110(2). The technicalities surrounding demand became so burdensome that leases began to provide expressly for a right of entry *without* a prior demand. Such provisions were held effective. Challoner v. Ware, 124 Eng. Rep. 356 (C.P. 1627); Perryman v. Bowden, 124 Eng. Rep. 341 (C.P. 1627); 1 W. WOODFALL, LANDLORD AND TENANT § 1913 (27th ed. 1968).

⁹⁷ Throgmorton’s Case, 21 Eng. Rep. 595, 596 (Ch. uncertain date). See also Gardiner v. Ugnall, 21 Eng. Rep. 77, 78 (Ch. 1578-1579).

⁹⁸ See Anonymous, 22 Eng. Rep. 1095 (Ch. 1690).

⁹⁹ See, e.g., Phillips v. Doelittle, 88 Eng. Rep. 247 (K.B. 1725); Downes v. Turner, 91 Eng. Rep. 505 (K.B. 1696).

¹⁰⁰ See, e.g., 2 Lord Nottingham’s Chancery Cases, 79 SEL. SOC’Y 727, pl. 916 (1678-1679).

¹⁰¹ 4 Geo. 2, c. 28, § 2 (1731).

¹⁰² See, e.g., CAL. CIV. PROC. CODE § 1179 (West 1972); 1 W. WOODFALL, *supra* note 96, § 1968.

¹⁰³ Fry v. D.H. Overmyer Co., 269 Or. 281, 525 P.2d 140 (1974); Annot., 31 A.L.R.2d 321, 348 (1953).

court before trial.¹⁰⁴ In the United States, usually the lessor must give the defaulting tenant notice and a chance to cure for a specified number of days.¹⁰⁵

Lessees, unlike mortgagors, have no right to foreclosure by sale. If in fact the lessor after evicting a lessee in default re-leases the property for a higher rent, the surplus belongs to the lessor, not the lessee.¹⁰⁶ The different treatment of leases and mortgages has led to problems of classification. What purports to be a "lease" may be held to be a security transaction so that the lessee is entitled to any surplus,¹⁰⁷ whereas if a court finds that the transaction "really" is a lease, the defaulter is less favorably treated.¹⁰⁸

Probably this distinction between mortgages and leases is based on the fact that a mortgagor traditionally sought property which was originally his whereas a lessee seeks an expectancy under a contract which he has failed to perform. A claim for an expectancy presents a less pressing claim for relief than a claim based on a benefit which the plaintiff originally conferred on the defendant.¹⁰⁹ The same idea appears in the history of sales.

SALES

Executory Sales

A buyer who failed to pay on time was allowed to cure his default in Roman law; if he was prepared to pay the price "not long afterwards" the time it was due, he could enforce the sale.¹¹⁰ Modern law has generally adopted a similar doctrine. At common law a seller could withhold delivery until payment was made, but a default by the buyer did not permit immediate termination of the contract.¹¹¹ A seller had to accept a tender of the price made within a "convenient time"

¹⁰⁴ The Common Law Procedure Act, 1852, 15 & 16 Vict., c. 76, § 212; County Courts Act, 1959, 7 & 8 Eliz. 2, c. 22, § 191(1).

¹⁰⁵ See, e.g., CAL. CIV. PROC. CODE § 1161 (West 1972); UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 4.201. A similar requirement exists in France. 10 M. PLANIOL & G. RIPERT, note 49 *supra*. The right to notice and a chance to cure is generally nonwaivable, unlike the common law requirements of demand. UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 1.403(a)(1) *But see* note 96 *supra*.

¹⁰⁶ Cf. RESTATEMENT (SECOND) OF PROPERTY § 12.1, Comment 1 (1976) (abandonment by tenant of leased property); *Garber's Auto Rental, Inc. v. Genoa Packing Co.*, 311 N.E.2d 589 (Mass. App. 1974) (proceeds from sale of repossessed vehicles belong to lessor).

¹⁰⁷ *A.D. Puffer & Sons Mfg. Co. v. Lucas*, 112 N.C. 377, 17 S.E. 174 (1893).

¹⁰⁸ *In re San Francisco Indus. Park Inc.*, 307 F. Supp. 271 (N.D. Cal. 1969); *Fry v. D.H. Overmyer Co.*, 269 Or. 281, 525 P.2d 140 (1974).

¹⁰⁹ *Fuller & Perdue, The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 56 (1936).

¹¹⁰ DIGEST 45.1.135.2.

¹¹¹ See, e.g., *Langfort v. Administratrix of Tiler*, 91 Eng. Rep. 104 (N.P. 1704). However, according to Brian, C.J., if a buyer "departs after the contract is made without tendering [the price] and comes back and tenders the money, [the seller] is not bound to receive it." Y.B. Hil. 18 Edw. 4, f. 21, pl. 1 (1479). Although the two statements are hard to reconcile, they are both

after the due date, for “[i]n a sale of chattels, time is not of the essence.”¹¹² The English Sale of Goods Act of 1893 and the American Uniform Sales Act also gave the buyer a right to cure which was foreclosed by the lapse of a “reasonable time” after notice from the seller.¹¹³

The Uniform Commercial Code, however, allows a seller to “cancel” whenever a buyer “fails to make payment due on or before delivery,” with no opportunity for cure.¹¹⁴ In view of the general tendency of the law to expand the right of cure, the Code rule is surprising. The Code applies only to the sale of goods.¹¹⁵ The Uniform Land Transactions Act, in accordance with prior law, allows a seller of land to cancel only if the buyer’s failure to pay on time is a “material breach.”¹¹⁶

The leniency which has generally been shown to defaulting buyers does not apply if the contract provides otherwise. The Uniform Land Transactions Act, for example, states that if “the contract explicitly provides that failure to perform at the time specified discharges the duties of the other party,” there is no right of cure.¹¹⁷ Thus, the law of sales today, unlike the modern law of mortgages, gives effect to the *lex commissoria* if the sale is executory.

The dichotomy between sales and mortgages goes back to the Emperor Constantine whose decree of 326 A.D. prohibited the *lex commissoria* in mortgages but not in sales.¹¹⁸ The distinction between mortgages and sales was often noted by medieval writers¹¹⁹ and is found in the French Civil Code of 1804.¹²⁰ In early nineteenth-century England, Sugden found justification for the distinction in the difference between the bargaining power of a mortgagor and that of a buyer. Sugden reasoned:

In a mortgage [a forfeiture clause] is inserted by the mortgagee for

repeated as good law in 2 S. COMYN, A TREATISE OF THE LAW RELATIVE TO CONTRACTS 211, 213 (1807).

¹¹² *Martindale v. Smith*, 113 Eng. Rep. 1181, 1184 (Q.B. 1841).

¹¹³ Sale of Goods Act, 1893, 56 & 57 Vict., c. 71, § 48(3); UNIFORM SALES ACT §§ 60(1), 61(2).

¹¹⁴ U.C.C. § 2-703; *Goldstein v. Stainless Processing Co.*, 465 F.2d 392 (7th Cir. 1972). However, in an installment contract, the seller must show that the default “substantially impairs the value of the whole contract.” U.C.C. § 2-612(3).

¹¹⁵ U.C.C. § 2-102.

¹¹⁶ UNIFORM LAND TRANSACTIONS ACT § 2-302(b)(1); *See also* RESTATEMENT OF CONTRACTS § 276 (1932).

¹¹⁷ UNIFORM LAND TRANSACTIONS ACT § 2-302(b)(2). *See also* RESTATEMENT OF CONTRACTS § 276(e)(i) (1932); UNIFORM SALES ACT §§ 60(1), 61(1); Sale of Goods Act, 1893, 56 & 57 Vict., c. 71, §§ 10(1), 48(4). In order to prevent surprise, UNIFORM LAND TRANSACTIONS ACT § 2-302(c) provides that the phrase “time is of the essence” is not explicit enough. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 267, Comment d (Tent. Draft No. 8, 1973).

¹¹⁸ The version of Constantine’s decree which appears in the Theodosian Code omits the words “in mortgages” (*pignorum*). *See* CODE THEOD. 3.2. But the *lex commissoria* clearly continued to be valid in sales. *See* DIGEST 18.3.

¹¹⁹ HOSTIENSIS, note 38 *supra*; PANORMITANUS, note 38 *supra*.

¹²⁰ Compare C. CIV. art. 2078 with *id.* art. 1656.

his own advantage; but as the land is merely a security for the debt, . . . a mortgagee ought . . . not to obtain the estate itself, by taking advantage of the necessities of the mortgagor. . . . But in an agreement for sale of an estate, . . . the parties themselves have *mutually* fixed upon the time; the *bona fides* of such a transaction seem to be a bar to the interference of a court of equity.¹²¹

Sugden assumes that mortgagors were borrowers, and that only borrowers are necessitous enough to submit to terms "inserted" by the other party "for his own advantage." The assumption that borrowers and buyers differed in bargaining power has been made by many. While freedom of contract was the rule,

exceptions were made . . . in favour of . . . borrowers, to whom equity manifested some tenderness, on the supposition that the . . . mortgaging of their . . . properties was usually induced by the pressure of financial need

[In a sale,] no element of pressure or duress exists . . . , [and] both parties to the contract are on terms of bargaining equality with each other. . . .¹²²

Apart from the difference in bargaining power, Sugden pointed out that the effects of a forfeiture provision in a sale and a mortgage were different. Whereas in a mortgage, forfeiture would give the mortgagee a windfall, title to property which was generally worth more than the debt, in a sale forfeiture would leave the parties in the status quo ante.¹²³ The expectancy of the defaulting buyer did not deserve protection.

Sugden's assumption that forfeiture left the defaulting buyer in the status quo was untrue if the buyer had made a down payment, unless the payment was returned. Instances of defaulting buyers obtaining restitution of their down payment appear as early as the eighteenth century,¹²⁴ but most courts allowed the seller to retain any payments the buyer had made. Often the terms of the agreement so provided, but even where the agreement was silent, courts generally permitted the seller to keep the money on the ground that "the purchaser cannot insist on abandoning his contract and yet recover the deposit because that would enable him to take advantage of his own wrong."¹²⁵ Even the first Restatement of Contracts, which generally allowed restitution to a defaulting party for benefits conferred in part performance, excepted buyers who had made "a comparatively small advance payment as earnest money,"¹²⁶ apparently on the theory that such payments would

¹²¹ E. SUGDEN, VENDORS & PURCHASERS 346-47 (5th ed. 1818).

¹²² Stockloser v. Johnson, [1954] 1 Q.B. 476, 495 (C.A.) (Romer, L.J.).

¹²³ E. SUGDEN, note 121 *supra*.

¹²⁴ See, e.g., Hodgson v. Loy, 101 Eng. Rep. 1065, 1068 (K.B. 1797). See also Palmer v. Temple, 112 Eng. Rep. 1304 (K.B. 1839); CODE 4.54.6.

¹²⁵ Howe v. Smith, 27 Ch. D. 89, 98 (C.A. 1884) (Bowen, L.J.). See also Lawrence v. Miller, 86 N.Y. 131 (1881); C. CIV. art. 1590 (Fr.); INSTITUTES 3.24.pr.

¹²⁶ RESTATEMENT OF CONTRACTS § 357, Comment i (1932).

probably not exceed the seller's damages.¹²⁷

More recent case law, however, tends to award restitution to defaulting buyers, even in the face of a contract which calls for forfeiture of the down payment.¹²⁸ Paralleling this trend in case law are provisions in the Uniform Commercial Code for sales of goods, promulgated in 1952, and the Uniform Land Transactions Act for land sales, promulgated in 1975, which allow defaulting buyers to recover down payments which exceed the seller's damages.¹²⁹ Such protection for the defaulting buyer is sometimes justified on the grounds of "the gross disparity in economic power that frequently exists in contracts of this type."¹³⁰ Yet neither the Commercial Code nor the Land Transactions Act distinguishes between powerful and powerless buyers, and the cases awarding restitution have often involved large commercial deals where presumably the buyer did not lack bargaining power.¹³¹

Buyer in Possession

Developments over the past century and a half have made Sugden's distinction between sales and mortgages unrealistic. Mortgages are now often used to secure buyers' obligations to pay the price when property is sold. Despite the supposed differences in bargaining power between buyers and borrowers the protection given to mortgagor-borrowers since the sixteenth century has been extended to mortgagor-buyers.¹³² A mortgage was a mortgage, regardless of its function. A similar myopia at first prevented courts from noticing changes which occurred in sales. Sellers began to give buyers possession of property under contracts calling for payment of the price in installments. In England such sales usually took the form of "hire purchase" which was nominally a lease with an option to purchase by the lessee. Use of such "hire purchase" agreements expanded rapidly after 1895 when the House of Lords held that they were effective against third parties.¹³³ Sales of goods on the installment plan have expanded greatly, in the United States as well, since the end of the nineteenth century.¹³⁴ The

¹²⁷ *Id.* Illustration 6.

¹²⁸ *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103 (2d Cir. 1953); *Freedman v. Rector, Wardens & Vestrymen*, 37 Cal. 2d 16, 230 P.2d 629 (1951).

¹²⁹ U.C.C. § 2-718; UNIFORM LAND TRANSACTIONS ACT § 2-516.

¹³⁰ [1952] N.Y. LAW REVISION COMM'N REP. 88.

¹³¹ *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103 (2d Cir. 1953) (sale of printing presses for \$350,000); *Dies v. British & Int'l Mining & Fin. Corp.*, [1939] 1 K.B. 724 (1938) (sale of arms for £270,000); *Cook v. King Manor & Convalescent Hosp.*, 40 Cal. App. 3d 782, 115 Cal. Rptr. 471 (1974) (sale of hospital for \$2,000,000).

¹³² Compare the proposal of Dean Warren that "until the buyer's equity is built up to a certain point" a streamlined foreclosure should be available on default by a buyer. Warren, *California Instalment Land Sales Contracts: A Time for Reform*, 9 U.C.L.A. L. Rev. 608, 642 (1962).

¹³³ *Helby v. Matthews*, [1895] A.C. 471.

¹³⁴ "The practice of instalment buying in the nineteenth century was not regarded by the community as socially respectable. . . . Not until the advent of mass production techniques in the

most commonly used legal device here has been the conditional sale.

Under either the conditional sale or the hire purchase form, installment sales offered possibilities of forfeiture much harsher than any envisioned by Sugden. First, since the installment buyer's expectancy was coupled with possession, it included a reliance which deserved more protection than an expectancy under an executory contract. Second, buyers often paid several installments under the contract before defaulting; the amount of the forfeiture if the payments were not returned in such a case was much larger, relative to the contract price, than the loss of a down payment.¹³⁵

Nevertheless, courts in England took no notice of these developments. In *Cramer v. Giles*¹³⁶ the plaintiffs had "leased" a piano to the defendants who were to become the owners on paying twelve installments. The contract provided: "In case of default in the punctual payment of any installment, the installments previously paid shall be forfeited to [plaintiffs] who shall thereupon be entitled to resume possession of the instrument" The defendants had paid ten installments and belatedly offered the last two, but the plaintiffs recovered the piano because "time was of the essence of the contract."

Not until 1938, when Parliament passed the Hire-Purchase Act, were buyers in default given protection.¹³⁷ The protection only extended to buyers who had paid a third or more of the price. The relief given was much like strict foreclosure of mortgages. A seller who sought to recover goods after the buyer had defaulted had to go to court, and the court could postpone repossession on conditions which it considered "just."¹³⁸ However, there was no requirement of a resale to assure that any surplus be preserved for the defaulting buyer. The Hire-Purchase Act was predicated on the idea that "there was an unfortunate inequality of bargaining power between the parties to installment contracts,"¹³⁹ and was limited to contracts for payments of less than £ 100 in order "to differentiate between those installment buyers who needed the protection of the Act and those who did not."¹⁴⁰

More recently, however, English courts have begun to protect buyers not covered by the Act. In *Campbell Discount Co. v. Bridge*,¹⁴¹ the

automobile industry . . . did instalment purchasing come into its own." Warren, *supra* note 11, at 296.

¹³⁵ RESTATEMENT OF CONTRACTS § 357, Illustrations 6, 7 (1932).

¹³⁶ 1 Cababé & Ellis 151 (Q.B. 1883).

¹³⁷ Hire-Purchase Act, 1938, 1 & 2 Geo. 6, c. 53. A few years earlier similar relief had been enacted for Scotland. Hire Purchase and Small Debt Act, 1932, 22 & 23 Geo. 5, c. 38, § 5 (Scot).

¹³⁸ Hire-Purchase Act, 1938, 1 & 2 Geo. 6, c. 53, §§ 11(1), 12(4).

¹³⁹ J. HAMM, THE ENGLISH HIRE PURCHASE ACT, 1938, at 9 (1940).

¹⁴⁰ *Id.* at 29. A lower ceiling was set for motor vehicles so as not to "seriously affect the sale of new cars." *Id.* at 31.

¹⁴¹ [1961] 1 Q.B. 445 (C.A.).

Court of Appeal enforced a harsh provision in a hire purchase of a car for a price above the statutory ceiling, stating: "Parliament has rightly put certain fetters on hire-purchase contracts on social grounds prompted by considerations of the kind of persons who enter into them. . . . It has . . . chosen not to put fetters on transactions of the size of that in the present case. This court cannot seek to repair that deliberate omission"142

The House of Lords, however, disagreed. Lord Denning observed that a hire purchase was "in effect, though not in law, a mortgage,"143 and was therefore subject to the equitable relief historically given against penalties. Moreover, the vice in the contract was not unequal bargaining power but surprise. "The contract is contained in a printed form. Not one hirer in a thousand reads it, let alone understands it."144

In the United States a few courts gave defaulting buyers under a conditional sale the same protection which was historically accorded to mortgagors,¹⁴⁵ but many did not.¹⁴⁶ As in England, the legislatures ultimately provided relief for defaulting buyers of goods where the courts did not. American law, unlike English, has not followed the analogy of judicial strict foreclosure of mortgages. Rather, in the United States the earlier progression of mortgage law from strict foreclosure to foreclosure by sale has been repeated as to sales. In New York, to take one example, a statute of 1885 required a conditional seller who repossessed household goods to retain them for thirty days, during which time the purchaser could cure. If the thirty days elapsed without cure, "all interest of the purchaser . . . in such property . . . shall cease."¹⁴⁷ Later statutes, however, required the seller to resell the goods and pay any surplus to the buyer.¹⁴⁸

With adoption of the Uniform Conditional Sales Act, and later the Uniform Commercial Code, the assimilation between sales of goods and mortgages became virtually complete.¹⁴⁹ This legislation has been justified on the ground that the conditional buyer is "presumably the poorer, the weaker and the more credulous party."¹⁵⁰ But unlike the English Hire-Purchase Act, the Uniform Commercial Code protects all defaulting buyers, large merchants as well as small consumers.

142 *Id.* at 458 (Pearce, L.J.).

143 *Bridge v. Campbell Discount Co.*, [1962] A.C. 600, 626.

144 *Id.* at 629.

145 *General Motors Acceptance Corp. v. Dickinson*, 249 Ky. 422, 60 S.W.2d 967 (1933).

146 *Newport Motor Sales, Inc. v. Bove Chevrolet Inc.*, 84 R.I. 195, 122 A.2d 167 (1956); Glenn, *The Conditional Sale at Common Law and as a Statutory Security*, 25 VA. L. REV. 559, 569 (1939).

147 Act of June 11, 1885, ch. 488, § 2, [1885] N.Y. Laws 829.

148 *See, e.g.*, Act of May 3, 1895, ch. 523, § 1, [1895] 1 N.Y. Laws 307, 308; *cf.* Act of May 4, 1900, ch. 762, [1900] 2 N.Y. Laws 1624 (defaulting buyer may recover amount paid under conditional sales contract where seller resells).

149 *See* UNIFORM CONDITIONAL SALES ACT §§ 20, 26; U.C.C. § 9-102.

150 *Burdick, Codifying the Law of Conditional Sales*, 18 COLUM. L. REV. 103, 114 (1918).

Arguably the trend in the United States to equate buyers and mortgagors has gone too far. If a buyer has made no payments, or if all his payments are returned, why should his expectancy be protected any more than the lessee's? The distinction between sales and leases leads to problems of classification.¹⁵¹ However, the problem is not of great practical importance. Because of the rapid depreciation of personal property, the "surplus" guaranteed to the installment buyer by modern statutes is generally illusory. "It may be that a . . . sale [under the Uniform Conditional Sales Act] has produced a surplus . . . but the phenomenon has never been documented."¹⁵²

Both courts and legislatures have been much slower to protect buyers of land than buyers of goods. In 1937 a report of the New York Law Revision Commission found it "surprising" in view of the "extensive regulation of real estate mortgages and conditional sales of personal property," that no "comparable safeguards against oppression" governed installment land contracts.¹⁵³ However, the "safeguards" which the Commission proposed to remove this anomaly were surprisingly limited. Under the Commission's proposal a seller had to give the buyer written notice and not less than thirty days to cure before terminating. Buyers whose rights were terminated were given restitution.¹⁵⁴ But no requirement of foreclosure by sale to preserve the buyer's expectancy was suggested. Even the Commission's limited proposals were not adopted in New York. Today, however, a few states have enacted statutes of the strict foreclosure type, allowing land buyers a limited period after notice to cure defaults.¹⁵⁵ Moreover, a trend has appeared in judicial decisions to protect defaulting buyers of land. This trend has gone farthest in California.¹⁵⁶ The history in California has been described as a "golden age" for sellers prior to 1949,¹⁵⁷ typified by a decision denying a buyer a right to cure "[w]here time is expressly made of the essence of the contract,"¹⁵⁸ and holding that the seller could keep all money paid by a defaulting buyer.¹⁵⁹ More recent

¹⁵¹ Cf. UNIFORM CONDITIONAL SALES ACT § 1 (defining the terms "conditional sale" and "performance of the condition").

¹⁵² 2 G. GILMORE, *supra* note 87, § 44.4, at 1227.

However, the Federal Trade Commission recently has been taking action to make certain that repossession surpluses, estimated in the millions of dollars, are in fact paid to the defaulting purchasers. See, e.g., [1978] 6 TRADE REG. REP. (CCH) § 21,477, at 21,489 (Oct. 15, 1978); *Ford Dealer Told to Repay to Ex-Owners Surpluses in Sales of Repossessed Units*, Wall St. J., Jan. 18, 1979, at 16, col. 2.

¹⁵³ [1937] N.Y. LAW REVISION COMM'N REP. 372.

¹⁵⁴ *Id.* at 345-47.

¹⁵⁵ Nelson & Whitman, *The Installment Land Contract—A National Viewpoint*, 1977 B.Y.U. L. REV. 541, 544.

¹⁵⁶ *Id.* at 559.

¹⁵⁷ Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729, 732 (1960).

¹⁵⁸ *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 9, 55 P. 713, 716 (1898).

¹⁵⁹ *Id.* at 13-14, 55 P. at 717.

decisions for defaulting buyers have been of two kinds. First, buyers willing and able to cure have been allowed to do so.¹⁶⁰ Second, buyers who do not seek cure have been awarded restitution of their payments.¹⁶¹ It remains unclear, however, whether a buyer who is unable to cure can, like a mortgagor, force a sale and obtain any surplus realized thereon.¹⁶²

Recent decisions in favor of land buyers in California and elsewhere¹⁶³ may portend a complete assimilation of sales and mortgages for land as well as goods. This is proposed in the new Uniform Land Transactions Act.¹⁶⁴ Historically the law has resisted such assimilation, perhaps because the cumbersome system of foreclosing mortgages on land which exists in many states has operated to restrict the availability of credit. More liberal credit terms have been possible under the installment contract because it traditionally allowed quick and inexpensive foreclosure when a buyer defaulted.¹⁶⁵ However, the experience in California suggests that giving more protection to buyers under installment contracts will not seriously impair credit. Despite predictions that the installment contract would cease to be an effective means for selling houses because of probuyer decisions, "the use of this mode of financing home purchases has expanded in recent years," and "astonishingly liberal credit terms are made available to [contract buyers] with virtually no credit rating."¹⁶⁶ The negligible impact of the probuyer decisions on the availability of credit may be due to the fact that buyers are often ignorant of their rights.¹⁶⁷ The Uniform Land Transactions Act requires that defaulters be informed of the privileges which the Act gives them.¹⁶⁸ What effect such disclosure will have on credit remains to be seen.

CONCLUSION

The significance of the trend to protect defaulters from forfeiture has often been exaggerated. Blackstone in the eighteenth century supposed that "in strictness of law an estate worth 1000 £ might be for-

¹⁶⁰ *Ward v. Union Bond & Trust Co.*, 243 F.2d 476 (9th Cir. 1957); *MacFadden v. Walker*, 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971); *Barkis v. Scott*, 34 Cal. 2d 116, 208 P.2d 367 (1949).

¹⁶¹ *Freedman v. Rector, Wardens & Vestrymen*, 37 Cal. 2d 16, 230 P.2d 629 (1951).

¹⁶² *Ward v. Union Bond & Trust Co.*, 243 F.2d 476, 480-81 (9th Cir. 1957), indicated that he can, but this seems inconsistent with the statement in *Honey v. Henry's Franchise Leasing Corp.*, 64 Cal. 2d 801, 804, 415 P.2d 833, 835, 52 Cal. Rptr. 18, 20 (1966), that when the buyer breaches the seller "has an election to rescind or to enforce the contract."

¹⁶³ The trend has even reached England. *See, e.g., Starside Properties Ltd. v. Mustapha*, [1974] 1 W.L.R. 816 (C.A.).

¹⁶⁴ UNIFORM LAND TRANSACTIONS ACT § 3-102(a).

¹⁶⁵ Warren, *supra* note 132, at 625.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 633.

¹⁶⁸ UNIFORM LAND TRANSACTIONS ACT § 3-506(b).

feited for non-payment of 100 £" when a mortgagor defaulted.¹⁶⁹ But it is doubtful whether such harsh consequences often occurred in medieval mortgages before equity began to allow redemption by defaulting mortgagors.¹⁷⁰ Recognition of an equity of redemption for defaulting buyers is largely a product of the twentieth century, but so is the installment sale.¹⁷¹ Thus, the recent trend to assimilate installment sales and mortgages can be regarded as an application of long-established principles to a new phenomenon, rather than a fundamental change in the law. Old precedents can be found which anticipate recent decisions awarding defaulting buyers restitution of their payments.¹⁷²

Moreover, the modern protections against forfeiture have little practical significance in many cases. Default is usually caused by inability to pay, and, thus, the defaulter can rarely take advantage of his right to cure.¹⁷³ The buyer's right to restitution of his payments is typically wiped out by the seller's claim for damages or by the seller's claim to the rental value of the property while the buyer was in possession.¹⁷⁴ The surplus from foreclosure sales which the law gives to mortgagors and buyers rarely materializes in practice.¹⁷⁵

Nevertheless, to some extent the law *has* changed. Relief for forfeiture, once occasional and discretionary, has become routine, and in many cases is codified by a statute like the Uniform Commercial Code. Many have explained the change by saying that inequality of bargaining power vitiates consent, and that this is a recent phenomenon, or has only been recognized recently. But, in fact, arguments based on inequality between the parties to a contract have recurred ever since the middle ages. Some have questioned the argument on the ground that any investigation into the relative economic power of the parties is too complex and time-consuming.¹⁷⁶ Historically, the problem of measuring bargaining power has generally been ignored; all borrowers were assumed to be "famished" and therefore without power whereas all lenders were "hoggesty fed." Similar assumptions have been made about buyers and sellers, lessees and lessors. Occasional attempts have been made to limit relief to the powerless, as in the English Hire-

¹⁶⁹ 2 W. BLACKSTONE, *supra* note 17, at *159.

¹⁷⁰ See note 57 and accompanying text *supra*.

¹⁷¹ See note 134 and accompanying text *supra*.

¹⁷² See authorities cited in note 124 *supra*.

¹⁷³ See text accompanying note 63 *supra*.

¹⁷⁴ Cf. *Honey v. Henry's Franchise Leasing Corp.*, 64 Cal. 2d 801, 415 P.2d 833, 52 Cal. Rptr. 18 (1966) (buyer's recovery limited to excess of his payments over amount necessary to give seller the benefit of his bargain); *Nelson & Whitman*, *supra* note 155, at 555 (discussing cases denying restitution where seller's damages exceeded buyer's payments).

¹⁷⁵ See text accompanying note 152 *supra*.

¹⁷⁶ Dawson, *supra* note 20, at 1119; Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1075-76 (1977).

Purchase Act, but drawing the line is difficult.¹⁷⁷ The result has been that privileges often justified as protections for the poor have been successfully invoked by persons who were hardly “necessitous.”

Perhaps this is just as well, for the argument that inequality of bargaining power vitiates consent proves too much. Few would maintain that *all* borrowers (or buyers or lessees), or even poor ones, should be privileged, like infants, to disaffirm any contract for any reason or no reason at all. In fact, it is only with regard to terms which appear “harsh” or “unjust” that arguments about unequal power are made, and the fact of inequality does not help to identify *which* terms are too harsh or unjust to be enforced.

The argument is also made that terms which “surprise” the defaulter should not be enforced because he did not truly consent to them. This argument also *seems* modern when made in the context of a printed form since the use of the printing press to produce contracts has become widespread only during the last hundred years. But concern with surprise is also old. Even before the invention of printing there was a not unreasonable belief that a party might seal a bond without really understanding its terms.¹⁷⁸ Arguably, *any* term which dictates the consequences of default operates to surprise, since default is not contemplated when an agreement is made. Since the argument is old it can hardly explain the modern trend to expand relief from forfeitures.

Moreover, this argument also proves too much. Pothier used it only to condemn “excessive” penalties.¹⁷⁹ Karl Llewellyn, in an often-quoted passage, objected only to “unreasonable or indecent terms” in printed forms.¹⁸⁰ The idea of “surprise” gives no criterion for distinguishing between the “unreasonable and indecent” and acceptable terms.

Much of the confusion which surrounds this topic arises from the notion that the sole issue is whether a stipulation for forfeiture was freely and knowingly consented to. In fact, however, many of the earlier cases allowing forfeitures did not rest on any stipulation in the contract. The defaulter’s claim for relief was rejected simply because he was a “wrongdoer” who deserved no sympathy.¹⁸¹ Distinctions were often made between defaulters based on their moral turpitude. A tenant who did homage to the wrong lord by “fraud or malice” forfeited his tenement, whereas one who did it “par folie, et nient par malice” did not.¹⁸² A similar distinction was made in deciding whether a jailer should forfeit his job when a prisoner escaped; “if it was a voluntary

¹⁷⁷ See, e.g., notes 139, 140 and accompanying text *supra*; Swarb v. Lennox, 405 U.S. 191 (1972).

¹⁷⁸ Cf. note 14 *supra* (modern approach requires large type in documents).

¹⁷⁹ See text accompanying note 16 *supra*.

¹⁸⁰ K. LLEWELLYN, THE COMMON LAW TRADITION 370 (1960).

¹⁸¹ See note 125 and accompanying text *supra*.

¹⁸² 2 BRITTON, *supra* note 39, at 44. See also 2 H. BRACON, *supra* note 29, at 230.

escape, it is reasonable that he lose his office, and if it was against his will, he is only punishable by fine."¹⁸³ The earliest cases in which mortgagors and lessees were allowed to cure a default stressed that the default was caused by some misfortune.¹⁸⁴ The first Restatement of Contracts followed this approach. The materiality of a breach depended in part on whether it was "wilful, negligent or innocent."¹⁸⁵ Contracts induced by fraud, as distinguished from innocent misrepresentation, could be rescinded without regard to materiality.¹⁸⁶ A party in default could get restitution for benefits conferred only if his breach was "not wilful and deliberate."¹⁸⁷

More recently the law has begun to ignore moral turpitude. The Restatement (Second) of Contracts eliminates wilfulness as a factor in determining whether a breach is material.¹⁸⁸ The distinction between fraud and innocent misrepresentation remains, but now even fraud can be cured.¹⁸⁹ In 1951 it was said that, although "a mortgagor suing to redeem does not . . . need to show that his default is ethically excusable," with regard to buyers, the "ethical character" of the breach "with respect to wilfulness or inadvertence or practical impossibility" had to be considered.¹⁹⁰ More recently, however, courts have extended relief to buyers whose defaults were wilful.¹⁹¹ Under modern statutes, like the Uniform Commercial Code, the "ethical character" of the default is irrelevant, whether the buyer seeks restitution or cure.¹⁹²

This tendency to ignore moral turpitude in determining remedies for breach of contract seems sound. If the function of civil law is to provide compensation for harm, the harm to the injured party is not affected by the moral turpitude of the defaulter. Even if civil law has a secondary role of discouraging undesirable conduct, the traditional distinctions between "wilful" and "innocent" breach made little sense since the punishment did not fit the wrong. Denying restitution of payments made by a wilful defaulter, for example, only hurt those wilful defaulters who had made payments; any connection between the size of the forfeiture effected by the rule and the culpability of the defaulter

¹⁸³ Y.B. Mich. 39 Hen. 6, pl. 45, at f. 33 (1460).

¹⁸⁴ See notes 40, 97 and accompanying text *supra*.

¹⁸⁵ RESTATEMENT OF CONTRACTS § 275(e) (1932).

¹⁸⁶ *Id.* § 476, Comment b.

¹⁸⁷ *Id.* § 357.

¹⁸⁸ RESTATEMENT (SECOND) OF CONTRACTS § 266 (Tent. Draft No. 8, 1973). The defaulter's "good faith" is substituted for wilfulness as being more "precise," but Comment (e) and Illustration 7 emphasize that lack of good faith is not determinative.

¹⁸⁹ *Id.* §§ 306, 307. Under the first Restatement, § 476(d), cure was possible only for innocent misrepresentation.

¹⁹⁰ E. DURFEE, *supra* note 23, at 169-70.

¹⁹¹ *MacFadden v. Walker*, 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971); *Freedman v. Rector, Wardens & Vestrymen*, 37 Cal. 2d 16, 230 P.2d 629 (1951).

¹⁹² U.C.C. §§ 2-718, 9-506.

was purely coincidental. These arguments are not novel,¹⁹³ but they are more widely accepted today than in the past.

In the nineteenth century Henry Maine associated the growth of contract with advancing morality.¹⁹⁴ Today we justify enforcing contracts not as a moral imperative but as a way to accomplish social goals. Professor Childres, for example, derided "the 'bad man' notion of the law of contracts. . . . Contracting is a matter of expedience and commerce, not sin."¹⁹⁵ Indeed, some have suggested that breach of contract should not be discouraged where it leads to a more efficient allocation of resources.¹⁹⁶ Given this attitude, a penalty for default which is not necessary to further commerce seems inappropriate and "unjust." If, as history indicates, a forfeiture is not necessary to assure the future availability of credit, the fact that the party seeking relief from forfeiture failed to perform a promise seems irrelevant.

How much legal pressure on the debtor is needed to assure the optimal availability of credit? This is not an easy question, but we have more sophisticated ways to answer the question than in the past.¹⁹⁷ Moreover, modern law has developed remedies for creditors which are less harsh than forfeiture but are nonetheless effective. Today lenders do not need to disguise interest as did the medieval creditor.¹⁹⁸ Foreclosure by sale has arisen to protect the interests of both debtor and creditor. In the thirteenth century Bracton suggested penal bonds were an appropriate way to avoid the difficulty of proving damages.¹⁹⁹ As courts began to formulate rules for assessing damages the need for penal bonds declined.²⁰⁰ More recently, the revolution in credit information wrought by the computer may "provide the creditor with his most potent collection device" yet—the "ability to make a debtor's defaults instantly known to the entire credit world."²⁰¹ Under these circumstances, the trend in the law to relieve against forfeitures seems likely to continue, though not for the reasons usually given.

¹⁹³ Britton v. Turner, 6 N.H. 481, 487 (1834).

¹⁹⁴ H. MAINE, ANCIENT LAW 306 (London 1861).

¹⁹⁵ Childres & Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 NW. U.L. REV. 433, 435 (1969).

¹⁹⁶ Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970).

¹⁹⁷ For example, state by state comparisons may show the effect on credit availability of a particular remedy. See Whitford & Laufer, note 22 *supra*. See also note 23 and accompanying text *supra*.

¹⁹⁸ See note 73 *supra*.

¹⁹⁹ 2 H. BRACTON, *supra* note 29, at 285.

²⁰⁰ Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 931 (1974).

²⁰¹ Jordan & Warren, *supra* note 4, at 440.