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# INSTALLMENT LAND CONTRACTS IN MISSOURI POSE POTENTIAL HAZARDS FOR LENDERS

*Senn v. Manchester Bank*<sup>1</sup>

In 1966 North American Developers, Inc. began work on a residential development surrounding a country lake. The undeveloped land was sold in parcels by North American with the unrecorded installment land contract used as the financing device. North American would enter into a contract for deed with a purchaser who in turn would execute a note in favor of the developer. Soon after North American began selling the lots it entered into a note purchase agreement with Manchester Bank. To assure North American's performance under the note purchase agreement, the developer delivered a deed of trust covering the development to the Bank. Manchester Bank bought notes pursuant to the agreement and with each note, it received an executed warranty deed covering the lot(s) sold. After buying a note, Manchester Bank notified the purchaser(s) of the contract sale and that payments were to be made to the Bank.

The sale of the lots proceeded smoothly until North American stopped paying its bills. A number of lawsuits followed, and in December 1967, judgment was entered against North American in the *Redeye Sling & Cable Co.* case.<sup>2</sup> The situation was complicated further when Highland Gardens Nursery, Inc. filed an equitable mechanic's lien suit and joined North American, Manchester Bank, and all lien claimants. In December 1969, judgment was rendered in the *Highland Gardens* suit.<sup>3</sup> On July 31, 1970, an execution sale of the real estate was held on behalf of a *Redeye Sling* judgment lienor. After December 1972, the subdivision was sold pursuant to the *Highland Gardens* judgment. "[T]he people who had bought lots . . . were left with a functionally useless development"<sup>4</sup> and a title barely worth the paper on which the warranty deed was written.

In 1974 the purchasers filed a class action suit against Manchester Bank and obtained a judgment of \$491,892 actual damages and \$737,838 punitive damages.<sup>5</sup> On appeal, the Missouri Supreme Court affirmed the judgment although the court held that some of those plaintiffs who had defaulted on their notes should not be allowed to recover.<sup>6</sup> According to the court, liability resulted from the Bank's failure to protect the purchasers'

1. 583 S.W.2d 119 (Mo. En Banc 1979).

2. *Smith v. North American Developers, Inc.*, No. 38-151 (Cir. Ct. Jefferson County, Mo., Dec. 11, 1967) (mechanic's lien suit).

3. *Highland Gardens Nursery, Inc. v. North American Developers, Inc.*, No. 38-479 (Cir. Ct. Jefferson County, Mo., Dec. 18, 1969), *vacated later decree*, 494 S.W.2d 321 (Mo. 1973).

4. 583 S.W.2d at 123.

5. *Senn v. Manchester Bank*, No. 43-770F (Cir. Ct. St. Louis, Mo., May 20, 1976), *aff'd*, 583 S.W.2d 119 (Mo. En Banc 1979).

6. 583 S.W.2d at 137-38.

titles or to inform them of the mechanic's lien suit, and from the Bank's attempt to keep the buyers unaware of the status of their titles.<sup>7</sup> In this case of first impression in Missouri, the court held the Bank liable with "[t]he decision below . . . not supported by citation to any reported cases from Missouri or any other jurisdiction."<sup>8</sup> Manchester Bank's liability stemmed from the use of installment land contracts. Because the contracts accompanied the purchasers' negotiable notes, the court was compelled to first address the concept of the holder-in-due-course.

Manchester Bank bought the notes from North American for value, claiming that it was a holder-in-due-course and as such was entitled to the payment of the debts, regardless of the status of the purchasers' titles.<sup>9</sup> The court rejected this contention. It concluded that the Bank was not a holder-in-due-course within the meaning of section 3-302 of the Uniform Commercial Code.<sup>10</sup> The majority found Manchester Bank to be an assignee of the contract for deed, a status that went *beyond* the scope of a mere holder-in-due-course.<sup>11</sup> The court opined that although an assignment of rights,

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7. *Id.* at 128-29.

8. Brief for the Missouri Bankers Association as Amicus Curiae at 2. In fact, only one case was found where the facts and analysis (at least of the dissent) were analogous to *Senn*: *Thompson v. Lincoln Nat'l Life Ins. Co.*, 114 Mont. 521, 138 P.2d 951 (1943). In *Thompson*, an action for breach of an installment land contract, the assignee of the vendor's interest held legal title in trust for the assignees of the vendee's interest. The court found that the vendor's assignee had not assumed the obligations of the contract and therefore did not breach its duty when it sold its interest, impressed with the trust, to a third party. A vigorous dissent reasoned that the defendant assumed the obligations of the contract, led the vendees into a false sense of security when the defendant told the vendees that upon late payment of the principal it would convey title and, then breached the contract when it conveyed its interest, before payment was made, making it impossible for the defendant to deliver the deed to the plaintiffs. *Cf. Connor v. Great Western Sav. & Loan Ass'n*, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968) (court concluded that the defendant was so entwined with the subdivision development that it had a duty to protect the plaintiffs' interests).

9. See *Third Nat'l Bank v. Hardi-Gardens Supply, Inc.*, 380 F. Supp. 930 (M.D. Tenn. 1974) (party, who took notes without knowledge that payment was conditioned upon the terms of a separate agreement, was a holder-in-due-course and had a right to payment whether or not the terms of the separate agreement were met); *First Nat'l Bank v. Marcinkowska*, 279 F. Supp. 251 (N.D. Miss. 1967) (despite the loss of the object of security, the maker of a note is obligated to pay the debt to a holder-in-due-course).

10. Missouri's holder-in-due-course statute provides:

(1) A holder in due course is a holder who takes the instrument  
 (a) for value; and  
 (b) in good faith; and  
 (c) *without notice* that it is overdue or has been dishonored or of  
*any defense against or claim to it* on the part of any person.

RSMo § 400.3-302 (1978) (emphasis added).

11. The court, relying on *Commerce Trust Co. v. Denson*, 437 S.W.2d 94 (Mo. App., K.C. 1968), reasoned that since Manchester Bank was an assignee of the contract for deed, it could not be a holder-in-due-course. Upon receiving the notes and land contracts, the Bank was charged with notice of North American's obligation to convey good and marketable title. The rationale was that since the Bank was aware of this obligation in the executory contract, it knew that North

in this instance the right to collect monies due upon the notes, does not usually cast the obligations of the assignor under the contract upon the assignee,<sup>12</sup> the assignee can either expressly or impliedly assume such obligations.<sup>13</sup> Since the Bank did not expressly assume the obligations, the court observed that "[w]hether an assignee has assumed the obligations of the contract is to be determined by the intent of the parties and may be *implied from acceptance of benefits* under the contract."<sup>14</sup> The majority reasoned that the effect of the note purchase agreement between Manchester Bank and North American was to give the Bank the benefits which the developer possessed under the contract for deed.<sup>15</sup>

American would not perform at the time the Bank bought the notes because Manchester Bank had assumed the obligation. *See* note 17 *infra*. *But cf.* *Levy v. Artophone Co.*, 249 S.W. 158 (Mo. App., St. L. 1923) (knowledge of the transaction does not affect the negotiability of a note); *Cheltenham Nat'l Bank v. Snelling*, 230 Pa. Super. Ct. 498, 326 A.2d 557 (1974), *cert. denied*, 421 U.S. 965 (1975) (mere knowledge of a separate agreement is not notice of any defense to a note). The principle of *Levy* is now codified in Missouri by RSMo § 400.3-304(4)(b) (1978). The *Commerce Trust* court, however, found *Levy* inapplicable because the indorsee, as in the *Senn* case, had assumed the obligations in the executory contract and therefore knew that the assignor would not perform.

Notice of the breach must occur prior to or contemporaneously with the taking of the notes. *See Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S.W. 754 (1898); *Fitzgerald v. Barker*, 96 Mo. 661, 10 S.W. 45 (1888) (holder cannot be prejudiced when he acquires knowledge of a defense to the note subsequent to purchasing it); *Cass Ave. Bank v. Greenwald*, 224 Mo. App. 344, 29 S.W.2d 209 (St. L. 1930).

12. "By virtue of an assignment of the contract by the vendor the assignee does not assume the obligations of the vendor toward the purchaser." 92 C.J.S. *Vendor & Purchaser* § 310(c) (1955). *See Pelser v. Gingold*, 214 Minn. 281, 8 N.W.2d 36 (1943); *Industrial Loan & Inv. Co. v. Lowe*, 173 Neb. 624, 114 N.W.2d 393 (1962) (assignment by the purchaser of land); *Bimrose v. Matthews*, 78 Wash. 32, 138 P. 319 (1914) (assignee, in taking an assignment of the contract for the sale of land, did not assume the vendor's obligation to convey perfect title); *Howell v. Kraft*, 10 Wash. App. 266, 517 P.2d 203 (1973) (assignee of a land contract did not assume obligations unless by the terms of the instrument he had expressly assumed them). *See generally* 6A C.J.S. *Assignments* §§ 94-95 (1975).

13. *See Central Ry. v. Woolfolk Chem. Works, Ltd.*, 122 Ga. App. 789, 792, 178 S.E.2d 710, 713 (1970) (an assignee can impliedly assume the obligations of a contract by accepting the benefits); *Massey-Ferguson Credit Corp. v. Brown*, 567 P.2d 440, 443 (Mont. 1977); *Northern Pac. Ry. v. Sunnyside Valley Irrigation Dist.*, 11 Wash. App. 948, 950, 527 P.2d 693, 695 (1974), *rev'd on other grounds*, 85 Wash. 2d 920, 540 P.2d 1387 (1975). *See generally* 6 AM. JUR. 2d *Assignments* § 109 (1963); 6A C.J.S. *Assignments* § 95 (1975).

14. 583 S.W.2d at 127 (emphasis added) (quoting *Walker v. Phillips*, 205 Cal. App. 2d 26, 32, 22 Cal. Rptr. 727, 731 (1962)).

15. The benefit under the installment land contract was the right to declare a forfeiture, thereby allowing the vendor to keep the land and the payments made as liquidated damages. 583 S.W.2d at 128. Not only could this right be viewed as a benefit, but also as a right to enforce the terms of the contract. Such enforcement also might lead to an imposition of the obligations of the contract upon the vendor's assignee, as was observed in *Thompson v. Lincoln Nat'l Life Ins. Co.*, 114 Mont. 521, 536-37, 138 P.2d 951, 958 (1943) (Adair, J., dissenting), *quoting with approval* 4 AM. JUR. *Assignments* § 104 (1936) (now 6 AM. JUR. 2d *Assignments* § 111 (1963)):

[U]nder certain circumstances and conduct the law will imply that the assignee has assumed the contractual obligations of the assignor. "It is not

The note purchase agreement required North American to deliver the executed warranty deeds to the Bank and gave Manchester Bank an option to declare a forfeiture upon a purchaser's default as well as the right and means to enforce it. The court decided that since Manchester Bank accepted North American's benefits under the installment land contract, the Bank impliedly assumed the developer's obligation to convey good and marketable title to the purchasers.<sup>16</sup> On this basis, it was adjudged that the Bank could not be a holder-in-due-course.<sup>17</sup> By assuming the obligation, the Bank became an assignee of the entire contract for deed and stood in the shoes of the developer. The court, however, did not hold Manchester Bank liable as an assignee of the contract for failing to convey clear title. Instead, the majority found the installment land contract to be determinative on the issue of liability.

The court analyzed the relationship between a vendor and vendee in order to determine the relationship between the Bank and the purchasers.<sup>18</sup> When the plaintiffs entered into installment land contracts with North American, they received only an equitable interest in the land. The vendor, North American, retained legal title in trust for the benefit of the purchasers as security for the unpaid purchase price.<sup>19</sup> According to the court, when Manchester Bank impliedly assumed the vendor's entire contract for

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to be inferred from the rule that the assignee of a contract is not personally responsible to the other party for the obligations imposed by the contract on the assignor unless he assumes such obligations, that he may enforce the contract without the performance of the obligations which it imposes. On the contrary, he takes the right with all the burdens to which it was subject in the hands of the assignor, and if he undertakes to enforce the right by an action, he must show that the conditions have been performed either by his assignor or by himself. The assignee is bound by the terms of the contract to the same extent as the assignor."

See *Pioneer Loan & Land Co. v. Cowden*, 128 Minn. 307, 150 N.W. 903 (1915) (assignee of a lease could neither enforce the contract until the obligations were performed, nor accept its benefits without its obligations).

16. The agreement to convey by warranty deed meant that North American had an obligation to convey good and marketable title. See, e.g., *Wilkinson v. Vaughn*, 419 S.W.2d 1 (Mo. 1967). In fact, "[t]he obligation of the vendor in a contract for the sale of land, in the absence of any provision or stipulation to the contrary, is to convey a good or marketable title." 77 AM. JUR. 2d *Vendor and Purchaser* § 191 (1975).

17. The majority cited with approval the analysis of the court in *Commerce Trust Co. v. Denson*, 437 S.W.2d 94, 97 (Mo. App., K.C. 1968), which held that the assignee, by its assumption of the obligation to provide insurance, had manifested knowledge that the payee had no intention of performing the obligation. This knowledge defeated the holder-in-due-course status.

18. Since Manchester Bank stood in the shoes of the vendor, the court found it "necessary to examine the relationship of the vendor to the purchaser under a contract for deed to see if, as plaintiffs insist, defendant was acting in a fiduciary capacity or as a trustee." 583 S.W.2d at 129.

19. See *Hernandez v. Prieto*, 349 Mo. 658, 162 S.W.2d 829 (1942); *State ex rel. City of St. Louis v. Baumann*, 348 Mo. 164, 153 S.W.2d 31 (En Banc 1941); *Savings Trust Co. v. Skain*, 345 Mo. 46, 131 S.W.2d 566 (En Banc 1939). See generally 77 AM. JUR. 2d *Vendor and Purchaser* §§ 316-317 (1975).

deed, it took legal title as security for the unpaid purchase price.<sup>20</sup> Since the Bank was the trustee of the legal title, a fiduciary duty emerged; the scope of which was defined by the terms of the land contract. The majority concluded that for these reasons the Bank not only had an obligation to convey good and marketable title, but also a fiduciary duty to protect that title.<sup>21</sup> The Bank's failure to adequately protect the title,<sup>22</sup> or at least to notify the purchasers of the pending suit,<sup>23</sup> resulted in a breach of fiduciary duty.<sup>24</sup> Hence, Manchester Bank was held liable for the purchasers' actual loss which resulted from the Bank's inability to convey good and marketable title.<sup>25</sup>

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20. One commentator has observed:

As the vendor's legal estate is held by him on a naked trust for the vendee, this trust, impressed upon the land, follows it in the hands of other persons who may succeed to his legal title . . . who take with notice of the vendee's equitable right. In other words, the vendee's equitable estate avails against the vendor's . . . voluntary assignees, and his grantees with notice. . . .

2 J. POMEROY, EQUITY JURISPRUDENCE § 368 (5th ed. 1941).

21. The court found a fiduciary relationship conceived by the underlying installment land contract, and did not entertain the question of whether a fiduciary duty to protect the purchasers' titles was created through reliance by the purchasers, a special confidence or trust reposed in the Bank, or a communicated confidential relationship between the parties. 583 S.W.2d at 129-30.

22. The court failed to deal directly with Manchester Bank's contention that the plaintiffs would not have received good title no matter what action the Bank had taken in the *Highland Gardens* suit. The Bank argued, in essence, that the purchasers would have lost title to their lots anyway because the mechanics' liens had priority and the *Redeye Sling* execution sale, which Manchester Bank did not discover until just before the appeal of the *Senn* case, eliminated the plaintiffs' unrecorded interests. Brief for Appellant at 59-66.

23. Manchester Bank asserted that even if it had a fiduciary duty, it was discharged from notifying the purchasers because they had either constructive or actual knowledge of the liens. Constructive knowledge existed because "a purchaser of property which is undergoing construction is put on notice that mechanics' liens may be asserted against the property." *Id.* at 58. See *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972); *Wadsworth Homes, Inc. v. Woodridge Corp.*, 358 S.W.2d 288 (Mo. App., K.C. 1962); *Hammond v. Darlington*, 109 Mo. App. 333, 84 S.W. 446 (St. L. 1904) (improvement or commencement of building gives its own notice to the world of possible mechanics' liens); RSMo § 429.060 (1978) (first spade rule). Many of the purchasers also apparently had actual knowledge of the liens. Brief for Appellant at 9.

24. 583 S.W.2d at 129.

25. The court characterized Manchester Bank's breach of its fiduciary duty not as a breach of contract, but as a tort. The majority, in reliance on *Jones v. Garden Park Homes Corp.*, 393 S.W.2d 501 (Mo. 1965), noted that where a conveyance was made with an intent to defraud, an action lies in tort. 583 S.W.2d at 130. The court recognized that "[a]lthough the defendant did not convey the land," *id.*, because of the Bank's attempt to mislead the plaintiffs concerning the title they would receive "[a]s trustee holding legal title . . . defendant acted with the intent to defraud the lot purchasers. It kept them ignorant of the liens filed against their land and continued to collect on the notes despite its knowledge that the deeds were worthless." *Id.* at 131.

It was suggested that had the sale of the lots taken place after passage of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720 (1976), the plaintiffs might have been protected from some of the risks inherent in the financial arrangement. Brief for Appellant at 2-3. The Act, however, probably

The breach of a fiduciary duty also led to the recovery of punitive damages<sup>26</sup> in that Manchester Bank was deemed to have acted with intent to defraud the plaintiffs by concealing the title status from the purchasers.<sup>27</sup>

The dissent in *Senn* would accord Manchester Bank holder-in-due-course status on the basis that the Bank did not assume North American's obligation by virtue of the note purchase agreement. Under this view, the effect of the financial arrangements was merely to provide security for the loan. Any additional security advantages, such as retaining the installment land contracts and the warranty deeds, that resulted from the arrangements were "due to the unique quality of a land-sale contract and not to the Bank's assuming more than a holder's interest in this transaction."<sup>28</sup> The Bank, therefore, had no obligation to provide good title or to protect the purchasers' titles. Indeed, the majority position "places the Bank in an impossible position."<sup>29</sup> On the one hand, Manchester Bank was "expected to render fiduciary obligations to plaintiffs," while on the other hand, the Bank simultaneously was to "protect effectively its own interest in the property."<sup>30</sup> In the dissent's view, the principal opinion has created "a new cause of action heretofore outside the legal concepts of suable tortious conduct."<sup>31</sup> In addition to imposing

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would not have created a foundation to support a fraud action by the purchasers against the Bank. *See, e.g.,* Bartholomew v. Northampton Nat'l Bank, 584 F.2d 1288 (3d Cir. 1978); *Zachery v. Treasure Lake, Inc.*, 374 F. Supp. 251 (N.D. Ga. 1974) (lender which financed purchases of land was not a developer or agent within the meaning of the Act).

26. Under Missouri law, punitive damages usually are not recoverable in an action on a contract. *Williams v. Kansas City Pub. Serv. Co.*, 294 S.W.2d 36, 40 (Mo. 1956). *See* Comment, *Punitive Damages in Missouri*, 42 Mo. L. Rev. 593, 605-07 (1977). In *Senn*, the installment land contract created a fiduciary duty which permitted the court to find the tort of intent to defraud and allowed a recovery for punitive damages. 583 S.W.2d at 131-32.

27. After examining the Bank's correspondence with its counsel and the purchasers, the majority concluded that "it was defendant's deceptions that contributed to plaintiffs' ignorance of the mechanic's lien case and plaintiffs' consequent inability to protect their interests in that case." 583 S.W.2d at 130.

28. *Id.* at 139 (Donnelly, J., dissenting). Even if there was an assignment of the contract, the proposed UNIFORM LAND TRANSACTIONS ACT, which has not yet been passed by any state, appears to support the dissent's position. Section 1-315(c) of the Act provides:

An assignment of "the contract" or "all my rights under the contract", or an assignment in similar general terms is an assignment of rights and, unless the language or the circumstances (as in an *assignment for security*) indicate the contrary, is a delegation of performance of the duties of the assignor, and its acceptance by the assignee constitutes a promise by him to perform those duties. (Emphasis added.)

This position follows and approves RESTATEMENT OF CONTRACTS § 164 (1932). *See* *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973); RESTATEMENT (SECOND) OF CONTRACTS § 160 (Tent. Drafts Nos. 1-7, 1973).

29. 583 S.W.2d at 140 (Donnelly, J., dissenting).

30. *Id.*

31. *Id.* In reaching the conclusion that Manchester Bank was not liable to the purchasers, the dissent relied on RESTATEMENT (SECOND) OF TORTS §§ 871,

"tort liability for compensatory damages on the basis of an implied assumption of contractual obligations by Manchester Bank," the majority "imposes liability for *punitive damages* on the basis of fraudulent intent."<sup>32</sup> Even if the Bank had a fiduciary duty to the vendees, thereby creating a right to compensatory damages, an award of exemplary damages does not appear justified. "It has long been the rule in this state that at least legal malice is required for the imposition of punitive damages."<sup>33</sup> Manchester Bank pursued a course of action to which it believed it was entitled as a holder-in-due-course. As the dissent noted, "a good faith mistake as to the legality of an act has been held to negate legal malice."<sup>34</sup>

The court's holding does not destroy holder-in-due-course status with regard to negotiable instruments. The holder status was meant to insulate a total stranger to the underlying transaction against common defenses and claims.<sup>35</sup> Thus, the decision affirms a trend in Missouri and other jurisdictions which provides that the more knowledge of, or participation in, the underlying transaction a holder has, the less justification there is to designate him a holder-in-due-course.<sup>36</sup> Manchester Bank not only knew of the underlying transaction and its terms, but required the installment land contracts and the warranty deeds to accompany the notes purchased. Although the majority found that the Bank was not a holder-in-due-course because it was an assignee of the contract for deed, the knowledge of the contract's terms and the participation of the Bank in the underlying transaction alone might have been sufficient to defeat Manchester Bank's asserted status as a holder-in-due-course.<sup>37</sup> Nevertheless, the determination

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890 (1979). These sections provide that a person's actions must be "culpable and not justifiable under the circumstances" and outside "the limits of a privilege of his own," in order to be liable for a tort. Under this view, the fact that Manchester Bank was a holder-in-due-course would mean that its actions were justifiable under the circumstances and within the limits of its privilege.

32. 583 S.W.2d at 140 (Donnelly, J., dissenting).

33. *Id.* See *Schmidt v. Central Hardware Co.*, 516 S.W.2d 556 (Mo. App., St. L. 1974). For a discussion of the bases for punitive damages in Missouri, see Comment, note 26 *supra*.

34. 583 S.W.2d at 140 (Donnelly, J., dissenting). See *Pollock v. Brown*, 569 S.W.2d 724 (Mo. En Banc 1978).

35. See *American Plan Corp. v. Woods*, 16 Ohio App. 2d 1, 240 N.E.2d 886 (1968) (where the financier participated in the business transactions with a dealer and had knowledge of the sale terms, the lender was not a holder-in-due-course). See, e.g., Comment, *The Concept of Holder in Due Course in Article III of the Uniform Commercial Code*, 68 COLUM. L. REV. 1573 (1968).

36. *Waterbury Sav. Bank v. Jaroszewski*, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967) (payee can be a holder-in-due-course if he has not participated in the negotiations leading to the execution of the note and contract); *Taylor v. Atlas Security Co.*, 213 Mo. App. 282, 249 S.W. 746 (K.C. 1923) (lender, who knew of the facts surrounding the transaction and supplied the note and contract, was not a holder-in-due-course); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).

37. See *Commercial Credit Corp. v. Orange County Machine Works*, 34 Cal. 2d 766, 214 P.2d 819 (1950) (when a financier actively participates in a transaction from its inception, the lender cannot be regarded as a holder-in-due-course); *First & Lumbermen's Nat'l Bank v. Buchholz*, 220 Minn. 97, 18 N.W.2d 771 (1945) (assignee of a note and conditional sales contract was not a holder-in-due-



that the Bank was not a holder-in-due-course was insufficient to declare the Bank liable.<sup>38</sup> The liability of Manchester Bank hinged on the use of the installment land contract.<sup>39</sup>

Without use of the contract for deed, the Bank would have had no obligation to convey good and marketable title, no fiduciary duty, and no liability. In fact, the same result would be unlikely if a different financing method had been employed by North American. An analogous situation would have occurred if North American had still financed the purchases, but instead of using a contract for deed, had sold the land with a nominal down payment, and then had taken back a note secured by either a mortgage or deed of trust. No obligation to convey clear title on the part of the Bank could have existed had a mortgage or deed of trust been used by North American.<sup>40</sup> The entire title to the land would have passed to the purchaser with the land acting as security subject to the mortgage or deed of trust.<sup>41</sup> There would have been no vendor-vendee relationship or reasoning based on mortgage law that could have imposed a fiduciary duty on the Bank.<sup>42</sup> Manchester Bank would have had no duty to protect the title of the purchasers or to notify them of the pending lien suit.<sup>43</sup>

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course); *Local Acceptance Co. v. Kinkade*, 361 S.W.2d 830 (Mo. En Banc 1962) (a lender, who knew in advance that all sales would be made exclusively using a particular financing method and assented to that method, might not be a holder-in-due-course).

38. As the court stated:

Unlike *Commerce Trust* [437 S.W.2d 94 (Mo. App., K.C. 1968)], plaintiffs here seek to hold defendant, the assignee of their notes, liable for a breach of duty. They are not attempting to assert a defense in an action by an assignee for the balance due on a note. Thus, it is necessary that plaintiffs prove more than a lack of holder-in-due-course status.

583 S.W.2d at 126.

39. *Id.* at 129. See notes 20 & 21 and accompanying text *supra*.

40. See *Fincher v. Miles Homes, Inc.*, 549 S.W.2d 848, 852 (Mo. En Banc 1977) (a party's ownership of the deed of trust on the property did not make him the owner of the title to the property); *Kline v. McElroy*, 296 S.W.2d 664 (Mo. App., K.C. 1956) (with a deed of trust, the title to real estate was not involved); *Gregg v. Williamson*, 246 N.C. 356, 98 S.E.2d 481 (1957) (assignment of a mortgage did not pass any title to land). See, e.g., *In re Orwig's Estate*, 185 Iowa 913, 167 N.W. 654 (1918) (the vendor's interest in the land was much larger than that of a mere mortgagee).

41. See *World Inv. Co. v. Kolburt*, 317 S.W.2d 697 (Mo. App., St. L. 1958) (chattel mortgage; a mortgagor must have legal title for his mortgage to be a lien on the property); *In re Title Guar. Trust Co.*, 113 S.W.2d 1053 (Mo. App., St. L. 1938) (a mortgage or deed of trust was not treated as an outright conveyance of the title).

42. With a deed of trust, the legal title theoretically passes to the trustee to hold in trust as security for the unpaid debt. But many states, Missouri included, treat the deed of trust as a lien and apply mortgage law. See *Bank of Italy Nat'l Trust & Sav. Ass'n v. Bentley*, 217 Cal. 644, 20 P.2d 940 (1933); *R.L. Sweet Lumber Co. v. E.L. Lane, Inc.*, 513 S.W.2d 365 (Mo. En Banc 1974) (deed of trust is a lien creating only a right to enforce obligations running from the grantor to the beneficiary); *City of St. Louis v. Koch*, 156 S.W.2d 1, 5 (Mo. App., St. L. 1941) ("A deed of trust in the nature of a mortgage given on land to secure the payment of a debt is held to be 'a lien and nothing more.'").

43. The statement is perhaps self-evident. If the entire title passed to the

The Missouri Supreme Court appears to be discouraging the use of installment land contracts in the state.<sup>44</sup> Unlike some states, Missouri does not have a statute controlling the use of such contracts.<sup>45</sup> Without some intervention by the legislature regulating contracts for deed, the trend of Missouri courts to protect vendees might well continue.<sup>46</sup> In the meantime, the *Senn* decision should discourage lenders from providing funds where an installment land contract is the financing method used. With the long-term land contract, the watchword should be: *caveat argentarius*, let the lender beware.

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buyers, no title would exist for Manchester Bank to protect. See *City of St. Louis v. Koch*, 156 S.W.2d 1 (Mo. App., St. L. 1941). Once the purchasers received title to the land and recorded their deeds, they would become "necessary" parties to a mechanic's lien suit under RSMo § 429.280(1) (1978).

44. Installment land contracts in Missouri involve hazards for both the vendor and vendee. See Nelson, *The Use of Installment Land Contracts in Missouri—Courting Clouds on Titles*, 33 J. Mo. BAR 161 (1977); Smith, *Contract for Deed . . . Caveat!*, 21 J. Mo. BAR 492 (1965); Comment, *Installment Contracts for the Sale of Land in Missouri*, 24 Mo. L. REV. 240 (1959). For an excellent discussion of the problems of using installment land contracts, see Warren, *California Instalment Land Sales Contracts: A Time for Reform*, 9 U.C.L.A. L. REV. 608 (1962).

45. See IOWA CODE ANN. §§ 656.1-6 (West 1950) (enforcing the forfeiture clause of an installment land contract may only be done by following the statutory procedure); MINN. STAT. ANN. § 559.21 (West Supp. 1979) (provides a "grace period" within which late payments may be made to reinstate the contract). One state has gone so far as to treat contracts for deed as mortgages for all purposes. OKLA. STAT. ANN. tit. 16, § 11A (West Supp. 1976). See generally G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* §§ 3.27-28 (3d ed. 1979).

46. In one sense the court intimates approval of forfeiture clauses and that it will honor their enforcement, by not allowing some plaintiffs who had defaulted to recover. Whether the court intended this inference or not, in general, Missouri courts have demonstrated a dislike for installment land contracts. See *O'Fallon v. Kennerly*, 45 Mo. 124, 127 (1869) ("There is no doubt that equity may decree a specific performance of a contract for the sale of property, notwithstanding a default in payment upon the day specified."). The trend of the Missouri courts with respect to installment land contracts was perhaps best expressed in *Cochran v. Grebe*, 578 S.W.2d 351 (Mo. App., W.D. 1979):

Forfeitures are highly disfavored by the law and the courts are therefore quick to find a waiver or estoppel. . . .

. . . [N]otwithstanding a default in payment upon the day specified and despite an express stipulation for forfeiture, equity may nevertheless decree specific performance of a contract for sale of land in order to prevent consequent unfairness to the vendee. This rule can be justified on the ground that a contract for deed is a form of security device similar in purpose to a mortgage or deed of trust. Just as redemption is permitted to a mortgagee, so also a parallel right of "equitable redemption" should be extended to a vendee under a contract to purchase.

*Id.* at 353-54.