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ALAN WILSON
ATTORNEY GENERAL

July 2, 2014

The Honorable Timothy L. Nanney
Register of Deeds
Greenville County Square
301 University Ridge, Suite 1300
Greenville, South Carolina 29601

Dear Mr. Nanney:

In your letter dated November 22, 2013, you ask for this office's opinion regarding the recording requirements the Office of the Register of Deeds should impose for cancellations and terminations of a bond for title, land contract, or other miscellaneous agreement and whether the seller involved in such an agreement can unilaterally cancel the contract after the purchaser's default, pursuant to the contract's terms. By way of background you state:

> Certain documents presented to the Register of Deeds for recording are contract type documents requiring signatures from all parties. These documents are bond for titles, land contracts and other miscellaneous agreements. A cancellation or termination document must be recorded subsequently to end the agreement/contract and also is signed by the parties.
>
> Recently a cancellation or termination document was presented for recording with only the seller's signature. The attorney submitting the document stated that the seller included a clause in the agreement which gave the seller the right, upon default, to place upon the public record a cancellation or termination of the contract with only his signature.

In relation to the facts presented above, you ask the following two questions:

(1) "Do the terms of the buyer/seller contract allowing the seller to put on the public record a cancellation or termination executed only by the seller, supersede or override the standard Register of Deeds recording guidelines requiring both parties sign the document;" and
(2) "Is the Register of Deeds recording requirement guideline correct in requesting that both parties' signatures be included on cancellations or terminations of bond titles, land contracts or miscellaneous agreement documents?"

Based on the analysis below, we are unaware of any statutory authority or court rule defining the requirements for recording the cancellation of a bond for title. We therefore conclude that implementing parameters outside of those defined by statute would be beyond the Register of Deeds' purview. Nonetheless, we will attempt to add clarity to you questions by providing a brief history and analysis of

the bond for title which, as research for this opinion has proven, is an area of the law ridden with inconsistency. Prior to analysis, it is important to note that while you use the terms "bond for title" and "land contract" in your correspondence, the title for this type of contract varies and has been referenced as an installment land contract, contract to convey, agreement for sale, an executory contract,[1] among others.[2] This opinion will use the aforementioned terms interchangeably.

Law / Analysis

1. Bond for Title: A Background

The Bond for title and its legal implications have been a source of great confusion perhaps because it is, as one court termed, "a somewhat anomalous instrument." In re Rosenthal, 238 F. 597, 600 (S.D. Ga. 1916), aff'd sub nom., Georgia R.R. Bank v. Koppel, 246 F. 390 (5th Cir. 1917).[3] Often referred to as the "poor man's mortgage," a bond for title is commonly signed by purchasers who lack the equity and the credit rating to obtain traditional mortgage financing. Joel Rebecca Donelson, The Bond for Title: A Modern Look at Alabama's Land Installment Contract, 46 Ala. L. Rev. 137, 138 (1994); Freyfogle, supra note 3, at 611. A bond for title has been defined by our supreme court as "an agreement to make title in the future upon the performance of certain conditions, such as being an executory or incomplete sale." Wahl v. Hutto, 249 S.C. 500, 504, 155 S.E.2d 1, 3 (1967) (citations omitted). In other words, a bond for title serves as both a contract for the sale of land and a financing device in that the vendor/seller retains title to the property and the vendee/purchaser makes monthly installments of the purchase price and interest. Upon payment of the last installment, the vendor delivers the deed to the property to the vendee. Donelson, supra, at 138. In legal effect, a bond for title is regarded as a contract to convey real property and is an entirely different instrument from a deed. 92 C.J.S. Vendor and Purchaser § 33 (2014).

Because the recording of any instrument was unknown at common law, the necessity of recording a bond for title has been established through statutory authority. Annotation, Recording of executory contracts for the sale of real estate, 26 A.L.R. 1546 (1923 and Supp.2014). Thus, while the recording of a bond for title was consistently not required in years past, this has gradually changed over time by the passage of statutory recording acts providing generally that if the instrument under which rights are claimed is not recorded within a specific time, a subsequent creditor, or purchaser for value without actual notice, will not be affected. Epps v. McCallum Realty Co., 139 S.C. 481, 138 S.E. 297, 302 (1927); See, e.g., Churchill v. Little, 23 Ohio St. 301, 307 (Ohio 1872) superseded by statute as stated in In re Scott, 424 B.R.315 (Bankr. S.D. Ohio 2010) (the holding that "[o]ur statute does not require such contracts to be

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[1] But see In re Kingsmore, 295 B.R. 812, 822-25 (2002); This case notes the inconsistency among South Carolina courts' treatment of installment land contracts, some treating them as executory contracts and others hinting that they may constitute as an equitable mortgage. Id. Kingsmore ultimately concluded that "the state law of South Carolina continues to treat installment land contracts as executory and generally distinct from equitable mortgages." Id. at 825. This distinction is particularly relevant in bankruptcy proceedings and in determining the extent of the purchaser's rights upon breach of an installment land contract. See Id. at 821-22.

[2] See Baxter Dunaway, Annotation, State Laws and Practices Regarding Installment Land Contracts, 2 L. Distressed Real Est. Appendix 14A (2013) (providing a state-by-state analysis of remedies available for breach of an installment land contract thereby including the various titles states refer to such a contract).

[3] See also Eric T. Freyfogle, Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures, 1988 Duke L.J. 609, 610 (1988) (specifically discussing the law of installment land contract forfeitures and describing it as "amazingly muddled . . . to an unhealthy degree").

recorded. . . . A contract for the sale of land is a mere chose of action. It conveys no title and no interest in the land. It is a mere agreement to convey title upon certain terms." was superseded by statute as noted in In re Scott, 424 B.R. at 334 "there is nothing in § 5301.01, § 5301.25(A), or any other provision of the Ohio Revised Code that suggests that properly executed mortgages on equitable interests are ineligible to be perfected by proper recording. . . . A mortgage upon an estate, or any interest therein, legal or equitable, to be valid as against third persons, must be signed, acknowledged, witnesses, and recorded"); see also Mesick v. Sunderland, 6 Cal. 297 (Cal. 1856), overruled in part by Stafford v. Lick, 7 Cal. 479 (Cal. 1857) (the holding that "statute did not authorize the recording of an executory contract for the sale of land" was overruled in part by Stafford v. Lick holding statutory authority required conveyances of land to be recorded to provide constructive notice to third parties).

Likewise, courts interpreting South Carolina's general recording act[4] have specifically found that installment land contracts, or a bond for title, must be recorded to protect the purchaser's interest, as was opined in Epps v. McCallum Realty Co., 138 S.E. at 302.[5] Epps involved an unrecorded written contract for the sale of land between seller, McCallum Realty Company, and purchaser, Lizzie Rogers. Id. at 301. Under the terms of the contract, Rogers took possession of the land with the agreement to pay the purchase price in installments. Id. McCallum retained title to the property with the understanding that upon payment of the entire purchase price, Rogers would receive a deed of conveyance, transferring complete legal title in the property. Id. at 298-99. Despite the contractual agreement with Rogers, McCallum entered into a mortgage with R.D. Epps, and Epps subsequently brought an action to foreclose

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[4] South Carolina's general recording act, S.C. Code Ann. § 30-7-10 (2007), states:
All deeds of conveyance of lands, tenements, or hereditaments, either in fee simple or for life, all deeds of trust or instruments in writing conveying estate, creating a trust in regard to the property, or charging or encumbering it, all mortgages or instruments in writing in the nature of a mortgage of any real property, all marriage settlements, or instruments in the nature of a settlement of a marriage, all leases or contracts in writing made between landlord and tenant for a longer period than twelve months, all statutory liens on buildings and lands for materials or labor furnished on them, all statutory liens on ships and vessels, all certificates of renunciation of dower, all contracts for the purchase and sale of real property, all assignments, satisfactions, releases, and contracts in the nature of subordinations, waivers, and extensions of landlords' liens, laborers' liens, sharecroppers' liens, or other liens on real property created by law or by agreement of the parties and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds or clerk of court in those counties where the office of the register of deeds has been abolished or in the office of the Secretary of State delivered or executed after July 31, 1934, except as otherwise provided by statute, are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated. In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.

[5] See also In re Rosenthal, 238 F. 597, 602 (S.D. Ga. 1916), aff'd sub nom., Georgia R.R. Bank v. Koppel, 246 F. 390 (5th Cir. 1917) (noting in its decision regarding a dispute over South Carolina property that "[w]e are clear in our mind that this statute [Civ.Code 1922 § 3542, the precursor to S.C. Code Ann. § 30-7-10 (2007)] required the original bond for title . . . to be recorded").

the mortgage after McCallum went into bankruptcy. Id. at 298. From the time she entered the contact, Rogers was continuously in possession of the land and made payments "long before" the execution of the mortgage. Id. However, she was prevented from making payment of the balance, and therefore never received a deed of conveyance. Id. As both Rogers and Epps had competing claims to the land, this action ensued and turned upon whether Epps had constructive notice of Roger's interest in the land from her possession, or whether the "executory contract" entered into between Rogers and McCallum was "an instrument in writing conveying real estate" that was required to be recorded pursuant to statute. Id. at 301-06.

In its opinion, the supreme court reversed the lower court's ruling that: "the contract in question in this case is not such an instrument of writing as is required by law to be recorded, in order to charge subsequent grantees or [e]ncumbrancers with notice." Id. at 300. The lower court erroneously reasoned that "a written contract of sale was not a conveyance," which it defined as "the transfer of the title to land by one or more persons to another or others." Id. at 305. In contrast, the supreme court found that it was "manifest" that the recording statute:

> contemplated an instrument which conveyed real estate, and yet which was not a deed of conveyance; which created a trust or trusts, and yet was not a deed of trust; which charged or [e]ncumbered the same, and yet was not a mortgage, or an instrument in the nature of a mortgage.
>
> Such an instrument we conceive an executory contract for the sale of land to be. It most assuredly conveys, or transfers, an interest in real estate which may be mortgaged by the vendee; which is devisable and descendible; and which may be assigned, or become subject to a mechanic's lien.

Id. (citations omitted). The court thus concluded that "an executory contract for the purchase and sale of land, or of any interest therein, being within the contemplation of section 5312,[6] must be recorded as in said section provided, and if not so recorded, possession will not operate as constructive notice thereof." Id. at 306.

The court made its determination based on the finding that Rogers was the "equitable owner" of the land, and such rights were transferred to her under the written contract. Id. at 305. Such contract created a "trust" in the land and, despite the apparent inequity, it was necessary for Rogers to record the bond for title to protect her interest and to put the rest of the world on notice of that interest:

> [w]e regret the hardship to this . . . woman who has labored for years to secure a little home for herself and her children, but we see no way to avoid it without a hardship upon an innocent mortgagee. . . . Had she complied with the recording statute, she would have been protected. She had the power to protect herself, and failed to exercise the same. By not doing so, she made it possible for McCallum [ ] to defeat her rights, and induced an innocent, unsuspecting third party to lend money to the lot, believing it to be unencumbered.

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[6] Civ.Code 1922 § 5312 was an amendment to Civ. Code 1922 § 3542, both precursors to S.C. Code Ann. § 30-7-10 (2007).

Id. at 305-07.

The Epps decision hints at the paramount concern associated with the bond for title, being the lack of protection such a contract provides to the purchaser, contrary to rights and protections afforded to the purchaser under a typical mortgage. Donelson, supra, at 142. It has been said that the

> principal flaw in the land installment contract is that it contains cut-throat provisions that favor the vendor over the vendee. Since the vendee usually is not represented by an attorney during the negotiations, she will not request protections such as a title search, title insurance, appraisal, survey, or escrow. On the other hand, the seller has a speedy and cost-effective way, through the *forfeiture clause*, to regain the property and any improvements the buyer makes, plus all previously paid installments.

Id. (emphasis added). While Epps took a step towards greater protection for the purchaser under an installment land contract by holding the legislature clearly intended for such a contract to be recorded, as set forth below, courts have gone further in recent years to extended protection to the purchaser by limiting, in certain instances, the enforceability of forfeiture clauses.

2. **Bond for Title: The Enforceability of Forfeiture Clauses**

When you note in your correspondence that a cancellation document was "presented for recording with only the seller's signature [and] [t]he attorney submitting the document stated that the seller included a clause in the agreement which gave the seller the right, upon default, to place upon the public record a cancellation or termination of the contract with only his signature" we assume the attorney was attempting to cancel a bond for title, installment land contract, or whatever the land contract's specific title may have been, on behalf of the seller, pursuant to the terms of the document's forfeiture clause. Forfeiture is defined as the "divesture of property without compensation" and the "loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." Black's Law Dictionary 712 (8th ed. 2004). Installment land contracts almost always contain a forfeiture clause which generally provide for termination of the contract when the purchaser defaults, and after the declaration, provides that the vendor can recover his property and retain all of the installments the purchaser has made. Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 364 (2002) (citing 15 Richard R. Powell, Powell on Real Property, § 84D.01 (2000)); Freyfogle, supra note 3, at 610.

Despite variance among states of what protections are afforded to the purchaser under a bond for title, courts and lawmakers are consistently showing greater solicitude toward the purchaser by providing more protections under the law, some states going as far as treating the bond for title as the functional equivalent of mortgage. Freyfogle, supra note 3, at 610. Some of the steps state legislatures have taken to curb the favorable position of the seller in the event of the purchaser's default in a land sales contract include: the prohibition of forfeiture and requirement that the seller to use foreclosure proceedings in the event of a default; allowance of a grace period upon default; and permitting forfeiture only if the amount paid by the purchaser is less than a stated percentage of the loan, or the time from the date of the contract is less than that proscribed by statute. Caryl A. Yzenbaard, Residential Real Estate Transactions § 4:46 (2005). In addition to statutory provisions, courts have also placed limits on forfeiture by requiring installment land contracts to be treated as a mortgage on default; treating installment land contracts as an equitable mortgage, when appropriate; implying the equitable right of redemption under contract principles if there are compelling inequities; and allowing some restitution to the purchaser in the event a

forfeiture is declared. Id.

a. Judicial Restraints: The Equitable Right of Redemption

South Carolina courts are among those hesitant to enforce a forfeiture clause in an installment land contract. "A court of equity abhors forfeitures, and will not lend its aid to enforce them" is an often quoted principle in relevant South Carolina case law. See, e.g., Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011) (citing Jones v. N.Y. Guar. & Indem. Co., 101 U.S. 622, 628, 25 L.Ed. 1030 (1879)). Our supreme court spoke directly to the issue in Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 364 (2002) and placed limits on forfeiture remedies when it held that:

> a provision in an installment land contract declaring forfeiture in the event of purchaser default can, in particular circumstances, constitute a penalty. In those circumstances, as in other contractual instances where a stipulated sum amounts to be a penalty, we conclude it would be inequitable to enforce the forfeiture provision without first allowing the purchaser an opportunity to redeem the installment contract by paying the entire purchase price, if under the circumstances of the case, enforcement of the clause proves to be inequitable.[7]

Lewis involved a purchaser's action for breach of contract and specific performance and seller's counterclaim for an order terminating an installment land contract for the purchase of real estate in North Myrtle Beach. Id. at 169, 568 S.E.2d at 362. The installment land contract contained the following forfeiture clause:

> [i]n the event the Purchaser should fail to make any due installment, and such default shall continue for a period of thirty (30) days, the Seller shall have the right to declare this contract terminated and all amounts previously paid by the Purchaser will be retained by the Seller as rent.

Id. The purchaser of the property made 141 of the approximately 182 monthly payments from October 1976 to July 1988. Id. At the time the purchaser ceased payments, the balance owed on the contract was $2,440.14. Id. Approximately one year after the purchaser's default, the seller mailed the purchaser a notice canceling the contract; however, the notice was returned to the seller "unclaimed." Id. Thereafter, the purchaser attempted to resume payments in 1992, but the seller's representative passed away without making comment. Id. In 1996 the purchaser's attorney forwarded the seller a check for $2,451.34, but the check was refused. Id. The master-in-equity determined the purchaser had defaulted under the terms of the contract, and therefore, the seller had the right to terminate the agreement pursuant to its terms. Id. at 170, 568 S.E.2d at 362. Reversing the lower court, the court of appeals held the purchaser had an equitable interest in the property, and the seller's right to forfeiture or foreclosure was subject to the purchaser's right of redemption which could not have been waived by the agreement. Id.

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[7] The equitable right of redemption permits the vendee to pay the entire principal amount owed and any other amounts due to avoid forfeiture. See Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 364 (2002).

Affirming but modifying the court of appeals' opinion, the supreme court based its holding that enforcement of a forfeiture provision in an installment land contract would be inequitable without the right of redemption under particular circumstances, on various contract principles. Id. at 172, 568 S.E.2d at 364. First, the court noted the well-established rule of contract law that that when a contract is clear and unambiguous, the language alone determines the contract's force and effect and that it is not the function of the court to rewrite contracts for the parties. Id. (citing C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n., 296 S.C. 373, 373 SE.2d 584 (1988); South Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988); Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983)). However, the Court went on to note that while parties to a contract can agree to the amount of liquidated damages owed due to nonperformance, if the sum stipulated is clearly disproportionate to the probable damage resulting from the breach of contract, the stipulation is an unenforceable penalty. Id. at 172, 568 S.E.2d at 363 (citing Tate v. Le Master, 231 S.C. 429, 99 S.E.2d 39 (1957)). Last, the court quoted the age-old equitable principle that "[e]quity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice." Id. (quoting Lane v. N.Y. Life Ins. Co., 147 S.C. 333, 374, 145 S.E. 196, 209 (1928)).

The court also cited authority from numerous jurisdictions that have claimed the "equitable power to deny or delay forfeiture when fairness demands." Id. at 172, 568 S.E.2d at 364 (internal citations omitted). In addition, it pointed out that:

> the main problem with the forfeiture remedy is that it often puts the seller in too favorable a position and, therefore, is the subject to attacks based on equitable considerations of unfairness and unconscionably [and] [i]n fact, the authoritative treatise on real property law provides, no state today is likely to condone a purchaser forfeiture that greatly exceeds the vendor's loss.

Id. (citing 4 Richard R. Powell, Real Property § 37.12[1][c] at 132 (2001); 15 Powell, Real Property § 84D.01[4] at 12).

Last, the Court touched on the equitable rights afforded to a purchaser in an installment land contract, noting that in an installment sales contract, the vendor has long been equated with the mortgagee and the vendee with the mortgagor thereby leading to the conclusion that "there is no equitable reason why the right of redemption should not likewise be afforded to vendees in an installment land contract in the appropriate circumstances." Id. at 173, 568 S.E.2d at 364 (citing Dempsey v. Huskey, 224 S.C. 536, 80 S.E.2d 119 (1954)). To determine those "appropriate circumstances" when equity would require redemption, the court referenced certain factors that should be considered on a case-by-case basis including the amount of the purchaser's equity, the length of the default period and the number of defaults, the amount of monthly payments in relation to the rental value, the value of improvements to the property, and the adequacy of the property's maintenance" Id. at 174, 568 S.E.2d at 364 n.5 (citing Cedar Lane Investments v. American Roofing Supply of Colorado Springs, Inc., 919 P.2d 879 (Colo. App. 1996)).[8]

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[8] The Court also cited other authorities imposing additional factors for consideration to determine if redemption in equitable: "[w]hether forfeiture is unreasonable depends upon amount and length of default, amount of forfeiture, reason for delay in payment, and speed in which equity is sought." Lewis, 351 S.C. 167, 175, 568 S.E.2d 361, 365 n.5 (2002) (citing Rotherberg v. Follman, 19 Mich. App. 383, 172 N.W.2d 845 (1969)). "In

While it is our opinion that Lewis does not provide the vendee with an absolute right of equitable redemption under a land installment contract (a court of equity "may" relieve a defaulting purchaser from the strict forfeiture provision of an installment land contract and allow an opportunity for redemption "when equity so demands"), it is reasonable to conclude, as the court notes, that if the benefits to the seller by enforcing the forfeiture clause greatly exceed the purchaser's loss, forfeiture would not be enforced without first permitting the purchaser the right to redeem the property at issue by paying the amount of principal owed. Id. at 172, 568 S.E.2d at 364.

b. Legislative Restraints: Notice of Forfeiture and Right to Cure

Although the provisions of most installment contracts allow a seller to declare a default and to accelerate the unpaid balance with no notice to the purchaser, as appears to be the case in the example provided in your letter, in almost all states common law rules and statutory provisions negate such terms and require that sellers give fair notice of a possible forfeiture. Freyfogle, supra note 3, at 615. Most states require that a notice of forfeiture specify the nature of the default, the action needed to cure, and the time by which the cure must take place. Id. at 616. Furthermore, the notice must state clearly that forfeiture will occur if the cure is not preformed. Id.

In re Kingsmore, 295 B.R. 812, 814 (Bankr. D. S.C. 2002) involved a Chapter 13 bankruptcy proceeding and, specifically, what rights the debtor had as a defaulting purchaser under two installment land contracts. Decided only two months after the supreme court issued its opinion in Lewis, Kingsmore applied the Lewis decision when making its own holding. Id. While additional analysis of the Lewis decision provided by the court is helpful to further clarify the rights a purchaser has upon default of an installment land contract,[9] of particular importance to this opinion was the court's distinction of a purchaser's possible right to redemption and his or her right to cure. Id. at 819. Addressing the creditor's argument that providing the debtor with a right to cure was the equivalent of affording her the chance of exercising her right to equitable redemption, the court referenced S.C. Code Ann. § 37-5-111(1) (2002) of the South Carolina Consumer Protection Code. S.C. Code Ann. § 37-5-111(1) (2002) provides that in a secured or unsecured transaction payable in two or more installments, after a default in payment, the creditor may not accelerate maturity of the unpaid balance or take possession of or enforce a security interest in goods that are collateral until twenty days after the notice of the consumer's right to cure, as specified in S.C. Code Ann. § 37-5-110 (Supp. 2013). Within the time provided, the debtor may cure all defaults by making payments in the amount due without acceleration. S.C. Code Ann. § 37-5-111(1) (2002).

In Kingsmore, the court concluded that the rights of equitable redemption, allowing a debtor to

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determining whether the attempted forfeiture should be set aside, courts consider the amount of default, the reason for the purchaser's default, the reason for the purchaser's default, the amount of money the purchaser would forfeit compared to the purchase price, and the relationship of the monthly payments to the fair rental value of the property." Id. (citing 4 Powell, Real Property § 37.21 at 135).

[9] See In re Kingsmore, 295 B.R. 812, 822-26 (2002) (noting that "South Carolina law is checkered in its treatment of a purchaser's interest under an installment land contract" and pointing out that some court have treated the purchaser's rights under such a contract like an equitable mortgage and others as an executory contract. However, interpreting the South Carolina Supreme Court's ruling in Lewis, the court held "the state law of South Carolina continues to treat installment land contracts as executory and generally distinct from equitable mortgages").

pay the entire debt in full to avoid forfeiture, and the right to cure, providing an opportunity to "catch up" on payments owed, were "two different types of rights, one statutory and the other equitable." Kingsmore, 295 B.R. at 819-20. Because these two rights are separate and distinct, the court concluded the debtor's notice of right to cure, and her failure to cure thereafter, did not extinguish her equitable right of redemption. Id. at 820. Thus, Kingsmore gives clarity that the statutory protections of notice of default and right to cure extend to installment land contracts and also distinguishes this right from the equitable right of redemption.

c. Application to the Office of the Register of Deeds

From the holding in Kingsmore, we believe a court would find it is necessary for the seller to strictly comply with the statutory protections of notice of default and notice to cure afforded to the purchaser of a land contract when cancelling the contract based on statutory notice after the purchaser's default. It is therefore our opinion that a seller cannot unilaterally cancel an installment land contract without strict compliance with the purchaser's notice of default and right to cure, despite the terms of the contract's forfeiture clause permitting him to do so. In addition, if a purchaser later enforces his right of equitable redemption, as established in Lewis, a court could grant this right if equity so demands despite the purchaser's failure to cure, as was set forth in Kingsmore. Id.

Some states have determined that if the seller does strictly comply with the statutory notice protections afforded to the purchaser – providing proper notice of default and complying with the purchaser's right to cure – the purchaser could complete the cancellation of the installment land contract without judicial process upon proof that he has complied with the statutory requirements. See, e.g., N.D. Cent. Code § 32-18-05 (2001) (stating that in order to complete statutory cancellation of land contracts by notice in North Dakota, the vendor must record (1) notice of the cancellation; (2) an affidavit of service upon the vendee or assignee; and (3) an affidavit that the default has not been cured within the time for redemption); Minn. Stat. § 559.21 (1984) (requiring "a copy of the notice with proof of service thereof, and the affidavit of the seller, the seller's agent of attorney, showing that the purchaser has not complied with the terms of notice, may be recorded in the county recorded or register of titles, and is prima facie evidence of the facts stated in" for cancellation of a land sales contract by statutory notice); see also James E. Leahy, Land Contracts Revisited, 69 N.D. L. Rev. 515, 519-20 (1993) (noting that North Dakota's requirement that notice of cancellation be recorded "presumably clears title for the vendor"). Based upon the aforementioned examples implemented by other state legislatures, it is our opinion that a seller attempting to cancel a land sales contract pursuant to statutory notice would be required to show proof of statutory compliance that would likely include notice of the cancellation, an affidavit of service upon the vendee/purchaser, as well as an affidavit that default has not been cured within the requisite time period.

While statutory provisions such as those cited above have been enacted in some states to avoid judicial process, it is essential to note that we have found no similar statute that has been passed by the South Carolina Legislature speaking to the requirements of recording a cancelation of a bond for title based on statutory notice provided to the purchaser. Because the recording of any instrument did not exist under common law, the process of recording a document is purely statutorily based. See Annotation, Recording of executory contracts for the sale of real estate, 26 A.L.R. 1546 (1923 and Supp.2014). In a 1901 opinion, our supreme court recognized the statutory nature of recording laws when it noted that:

> [the] object of a registration law is to provide a ready means to the public of learning the status of property, real or personal, so far as claims to the same may be in persons other than the owner. These registration laws are purely the creation of the statute law, and therefore are subject to such variety as to from, methods, etc. as to the legislature mind may seem best.

Milford v. Aiken, 61 S.C. 110, 39 S.E. 233, 234 (1901). Due to the statutory nature of recording instruments, opinions issued by this Office have continuously concluded that the Register of Deeds, when performing his or her duties pursuant to the recording statutes, should be considered as a ministerial officer whose duties are absolute and prescribed by law. See Ops. S.C. Att'y Gen., 2006 WL 12072666 (April 12, 2006); 2005 WL 469068 (Feb. 10, 2005); 1982 WL 189145 (Jan. 20, 1982). Similarly, we have also opined, in regards to a clerk of court acting as a Register of Mesne Conveyances (Register of Deeds), that "the duties of said officer with respect to the maintenance of public recordation of deeds, mortgages, etc. is largely perfunctory, involving little discretion in the exercise thereof." Op. S.C. Att'y Gen., 1977 WL 24676 (Oct. 27, 1977). Since our legislature has not spoken to the requirements for recording of a cancelation of a bond for title based on statutory notice, it is our opinion that imposition of recording requirements by the Register of Deeds would be beyond the scope of his or her duties. We therefore conclude that unilateral cancelation of a bond for is a function for the judiciary.

While perhaps unlikely, it is arguable that if a purchaser does voluntarily surrender his equitable interest, allowing the seller to accelerate the debt owed and regain possession without judicial process, S.C. Code Ann. § 32-3-10 (2007) – the statute of frauds requiring that for "any contract or sale of lands, tenements or hereditaments or any interest in or concerning them" the agreement must be in writing and signed – would require the termination or cancellation of a bond for title be in writing and signed by the parties. Furthermore, the recording of the consensual termination of the land contract, effecting legal and equitable title to the land, would be critical in clearing title for the seller and placing the world on notice of the relinquishment of the purchaser's equitable interest in the property.

Conclusion

Analysis of the history of the bond for title and the steps the South Carolina Judiciary and Legislature have taken in recent years to protect a purchaser's equitable rights under such a contract illustrate that forfeitures are not favored in South Carolina and courts will relieve against them when necessary in the interest of justice. Thus, despite a land contract's forfeiture clause being clear and unambiguous, we conclude from our analysis that it is likely that a court would find a purchaser's statutory right to notice of default and right to cure would override the seller's right to automatic forfeiture and acceleration established by the contract's terms. While our legislature has not spoken to the issue, we believe that if a seller strictly complies with the statutory notice protections afforded to the purchaser, proof of compliance would be required prior to cancellation of the contract with the Register of Deeds without judicial process. However, absent statutory authority, the Register of Deeds, acting as a ministerial officer, is prevented from implementing these procedures. Furthermore, even if the legislature were to enact a statute speaking to the cancelation of a bond for title through statutory notice, a court could still enforce a purchaser's equitable right of redemption if forfeiture results in a penalty and equity so demands.

We caution that due to the absence of express direction from the legislature on your questions,

clarification is strongly recommended. Please note all opinions expressed herein are informative only and should not be construed as official. If we can answer any questions pertaining to this opinion, please do not hesitate to contact our Office.

Sincerely yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General