North Dakota Law Review

Volume 36 | Number 3 Article 1

1960

Land Purchase Contracts in North Dakota

Shelley J. Lashkowitz

Follow this and additional works at: https://commons.und.edu/ndlr

Part of the Law Commons

Recommended Citation

Lashkowitz, Shelley J. (1960) "Land Purchase Contracts in North Dakota," *North Dakota Law Review*: Vol. 36 : No. 3 , Article 1.
Available at: https://commons.und.edu/ndlr/vol36/iss3/1

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

LAND PURCHASE CONTRACTS IN NORTH DAKOTA

Shelley J. Lashkowitz*

I. INTRODUCTION

The purpose of this article is to set forth in simple and understandable language the rights and responsibilities of buyers and sellers of farm lands where the transactions are made by contracts for deed.[1] At the present time, many farmers and other purchasers of land are making wide use of this type of agreement because smaller down payments are customarily required to purchase a farm when a contract for deed is used than when the property is purchased outright and a mortgage is given for the balance of the purchase price.

Advantages

The fact that the customary initial payment made by the purchaser at the time the contract for deed is executed is relatively small in comparison to a mortgage transaction furnishes the primary advantage to the use of the contract for deed from the standpoint of the buyer. The down payment has been as low as five per cent in some instances and seldom runs higher than approximately thirty per cent of the total purchase price. The reason for this situation lies in the fact that the interest of the purchaser can be terminated by the buyer with less expense and with a chance for greater profit than would be the case if a mortgage were used.[2] The contract for deed thus involves a somewhat greater economic risk for the buyer than does the mortgage, and the decision whether to use one type of instrument or the other should be made with that fact in mind. It is impossible to make a blanket recommendation in favor of one instrument as against the other without a careful consideration of the financial position of the prospective purchaser. In making any such decision, competent legal advice should be obtained.

Disadvantages

The major disadvantages to be weighed in considering the use of the contract for deed are two in number:

(a) Offsetting the advantage of the smaller down payment cus-

---

* Member of the North Dakota Bar, 801 Black Building, Fargo, N. Dak.

1. Contracts for deed are variously referred to as "agreements to convey," "contracts of sale," "contracts of sale and purchase," "agreements for purchase and sale," "installment sales and contracts," and "land sale contracts." They vary widely in form and effect, and the purchaser or prospective purchaser of land should be careful to obtain legal counsel in entering into a land purchase transaction utilizing such an instrument.

2. See Note, 7 U.C.L.A. Law Rev. 83, 95 et seq. (1960).

tomarily required, it should be pointed out that the smaller the amount of the initial payment the greater will be the interest payments to be made on the balance of the price. Thus the ultimate total price paid by the buyer and received by the seller may well be substantially higher than in the case of the mortgage.

(b) Should the buyer default in making his payments of installments or interest, or fail to pay taxes or keep up insurance on buildings in accordance with the terms of the agreement, he could readily lose all payments made by him up to the time of the default. Hence it is possible he might under some conditions be unable to get any equity out of the property in the event he finds himself unable to meet the financial obligation he has assumed by signing the contract.

II. COMPARISON BETWEEN CONTRACT FOR DEED AND MORTGAGE IN TERMS OF LEGAL EFFECT

The differences between the contract for deed and the mortgage may be summarized by a comparison of the operation of the two types of instruments. The following series of questions and answers will indicate wherein the two instruments are similar and wherein they diverge.

1. *Who has title to the land after the instrument is executed?*

Contract for Deed.— After a contract for deed has been signed by the parties, the vendor retains the legal title to the land until the vendee has fully performed the terms of the contract. However, the law regards the vendee as the owner of the property for most purposes, since the vendee ordinarily gets the right to immediate possession and use of the property. In lawyer's language, it is customarily said that the vendor has a *legal title* and the vendee has an *equitable* title.[3]

Mortgage. — In a mortgage transaction, the purchaser receives legal title to the property immediately. The seller has a legal lien on the property.

2. *When is the purchaser entitled to a deed?*

Contract for Deed. — After a contract for deed has been signed

3. The fact that for many legal purposes the title to land which has been sold by a contract for deed shifts to the vendee *immediately* upon the execution of the contract is the aspect of the contract for deed which most lay persons find most puzzling. Despite the fact that by the terms of the contract itself the purchaser often will not receive a deed to the land for many years, this so-called "doctrine of equitable conversion" is nevertheless applicable. As noted in the answer to question 5 in the text, *infra*, the risk of loss to buildings on the property shifts to the buyer as soon as the contract is signed. Similarly, so does liability for taxes, in the absence of a contract provision. It should be noted that if the seller dies prior to completion of the contract, his interest in the land is regarded as a species of *personal* property rather than real property, and descends pursuant to the legal rules governing personality.

by the parties, the purchaser is entitled to a deed only *after* payments on the contract have been fully completed.

Mortgage. — In the ordinary mortgage transaction, the purchaser of property gets his deed immediately, since the seller signs and delivers the deed at the time the mortgage is executed.

3. *Can the instrument be recorded?*

Contract for Deed. — Yes. However, it should be noted that sellers of land are sometimes reluctant to place such contracts of record. This is for the reason that if default occurs and the contract is terminated the record title of the seller is kept clear and unclouded. In order to be technically entitled to recordation, of course, the contract must be acknowledged by the seller.

Mortgage.—Yes.

4. *Should the instrument be recorded?*

Contract for Deed. — Yes. A failure to record means that the purchaser may in some instances be victimized by an unscrupulous vendor.

Mortgage. — Yes. A failure to record means that in some instances the seller may be victimized by an unscrupulous purchaser.

5. *Where is the risk of loss?*

Contract for Deed. — Since the purchaser becomes the equitable owner of the property, if a loss occurs — for example, the destruction of a building on the property by fire — the loss falls on the purchaser rather than the seller.

Mortgage. — The situation is much the same as in the case of the contract for deed. The purchaser has normally received a deed making him the legal owner of the property, and the risk of loss follows ownership.

6. *Who must pay Taxes?*

Contract for Deed. — As between buyer and seller, liability for taxes where a contract for deed is involved is normally regulated by the contract. In the absence of a contract provision, however, the buyer must normally pay the taxes since he is the equitable owner of the land.

Mortgage. — The buyer must normally pay all taxes.

7. *When must the vendor make a good title?*

Contract for Deed. — The fact the vendor's title may be defective at the time a contract for deed is executed does not necessarily mean that the contract is invalid, provided the defect is of a type the seller can clear up prior to the date on which the contract requires him to give a deed. Thus, assume a seller signs a contract for deed in

which he promises to convey title to the purchaser in 1965 in return for annual payments. The fact that in 1960 there may be an outstanding mortgage on the property does not mean the contract is ineffective, since the seller can clear up the mortgage prior to the date on which he must tender a deed to the purchaser. It should be carefully noted that the courts read into every contract for deed an implied warranty on the part of the seller to deliver a good title to the purchaser; this is true whether the contract specifically says so or not.

Mortgage.—The seller must have a good title at the time he signs the deed to the purchaser.

8. *What happens when the purchaser defaults?*

Contract for Deed.—The seller has numerous remedies, including: (a) a suit to recover overdue installments, (b) a suit for specific enforcement of the contract, (c) the right to rescind the contract, (d) the right to ejectment of the vendee, (e) the right to foreclose the contract, (f) the right to sue for damages resulting from the purchaser's breach of contract, or (g) the right to sue to quiet title. Which of these remedies will be used depends on the facts of the individual case.

Mortgage. — The seller's remedies are somewhat more limited. Usually a promissory note is executed by the buyer at the same time the mortgage is executed, and the seller may elect to sue to recover on the note. Otherwise his remedies are limited to foreclosure of the mortgage in the manner prescribed by the North Dakota Code. The wide variety of remedies at the disposal of the vendor in the case of a contract for deed is one reason why the contract for deed is often popular with vendors. In the case of both the contract for deed and the mortgage, however, there are legal provisions authorizing the buyer to redeem defaults.

III. PROVISIONS OF CONTRACT

The contract for deed normally contains provisions embracing the following matters:

(a) The names of the sellers and purchasers.

(b) A full and complete description of the property sold.

(c) An agreement that the seller will convey to the buyer upon prompt and full performance by the buyer, the described property by a warranty deed.

(d) The consideration (purchase price) for the sale of the land, including:

(1) The amount of the down payment.

(2) The time and method of paying the balance of the purchase price, including a stipulation governing the question whether payment is to be made by cash installments or crops raised on the farm.

(e) Payment of taxes by the buyer.

(f) Maintenance and upkeep of the buildings.

(g) Insurance against loss by fire, windstorms or hail, with a provision making loss payable to the vendor and vendee as their interests may appear.

(h) The date on which the buyer is to have possession of the property and be entitled to the income therefrom.

(i) The furnishing to the buyer by the seller of an abstract of title to the property.

(j) A provision making the agreement binding upon all of the parties, their assigns, administrators or executors.

(k) A provision that if the vendee defaults in making the required payments, or the payment of interest or taxes, that the agreement becomes void and the vendor may proceed with cancellation of the contract.

IV. OTHER LEGAL ASPECTS

Certain other matters should also be touched upon:

Parties to Contract

If the vendor is married, his wife should be made a party to the contract. If he is unmarried, divorced, or a widower, that fact should also be stated.

Pre-Payment Clause

In a good many farm contracts it is provided that any amount may be paid on the contract at any time. Where the contract runs for a specific time without the priiilege of pre-payment, the buyer cannot pre-pay. The importance from the standpoint of the buyer of having a pre-payment clause in the contract for deed should be stressed, since during years when crops are good the pre-payment clause makes it possible to use the additional income of the purchaser to reduce the amount owing on the contract.

Notarization

Every installment contract or contract for deed should be acknowledged before a notary public. The reason is that an acknowledged instrument can be recorded with the Register of Deeds of the county wherein the land is situated, whereas an unacknowl-

edged instrument cannot be so recorded. Recordation of the contract gives public notice that the land described in the contract has been sold and protects the rights of the parties.

Abstract of Title

An abstract of title is a condensed history of the title of land. It consists of a summary of the material portions of all of the different instruments of conveyance which in any manner affect the land or the title thereto. It furnishes a method for determining the title to the land, the estates or interests held by various persons, and the liens, charges, or liabilities to which the land may be subject.

The abstract of title should *always* be examined by an attorney, who should be asked to give an opinion as to the marketability of the title.

Purchase Price

The price to be paid by the purchaser is governed by an express provision in the contract for deed either setting forth a fixed sum or providing how the sum is to be calculated, as in a sale by the acre, where price is determined by the quantity of land conveyed. Since the price or consideration to be paid is an essential ingredient of the contract, the contract must at least furnish a basis from which the price may be ascertained to be legally binding. Where the contract specifies a mode of ascertaining the price, it must be followed; until the ascertainment of the price pursuant to the mode prescribed, the contract is conditional and becomes absolute only when the price has been determined.

Although a contract for the sale of real property usually contains an express promise to pay a purchase price, a promise to pay the purchase price of land may be implied from the execution of a deed and its acceptance by the grantee.

Most courts, including those of North Dakota, hold that a seller of land cannot be required to accept payment of a purchase price in any other manner or form than that agreed upon. In this respect a seller of realty for a designated total amount in monthly payments cannot be required to accept the total amount in a lump sum, so as to be deprived of interest or deferred payments without his consent.[4]

Interest Rates

The legal rate of interest in North Dakota is four per cent a year, unless a different rate not exceeding seven per cent per year is provided for by the contract.

4. Goetz v. Hubbell, 66 N.D. 491, 266 N.W. 836 (1936).

Under the statutes of North Dakota all contracts bear the same rate of interest after maturity as they bore prior to maturity. In fact, the statute on interest goes so far as to say that any contract attempting to make the rate of interest higher after maurity is void. The interest statutes also provide that no person shall take or receive or agree to take or receive, in money, goods, or things in action, or in any other way, any greater sum or greater value for the loan or forebearance of money, goods, or things in action, than seven per cent per annum, and in the computation of interest the same shall not be compounded. It is further provided that when an interest charge is usurious there is a forfeiture of the entire interest and, in addition, a forfeiture of twenty-five per cent of the principle.[5]

Taxes

The purchaser under a contract for deed customarily agrees to pay all taxes on the property. If the contract is made during the latter part of the year, and contains no provision for the payment of taxes during that year, the buyer will be obligated to pay them. Consequently there should be a provision in the contract stipulating whether the buyer or seller is to pay taxes for the year during which the land is purchased.

Marketable Title

The contract for deed customarily stipulates that the seller will give a warranty deed upon the performance of the conditions imposed upon the buyer. The law implies an undertaking on the part of the seller to convey a good and marketable title. By a marketable title is meant a title free and clear of all liens, encumbrances and defects; in the event a title proves defective, the seller is legally obligated to clear up the defects at his own expense. The Supreme Court of North Dakota has defined a marketable title in numerous cases. In substance, the Court has held that the title must be a title in fee simple, free from litigation, free from palpable defects, and free from grave doubts, so that the purchaser will be enabled to hold the land in peace and to sell it as he wishes in the future to a person of reasonable prudence.[6]

Insurance

As previously stated, the vendee under a contract for deed normally obligates himself to insure buildings on the property at his own expense. In the policy of insurance there should be a clause

5. See N.D. Rev. Code §§ 27-1405, 47-1409, 47-1410 and 47-1411 (1943).
6. Kennedy v. Dennstadt, 31 N.D. 422, 154 N.W. 271 (1915).

to the effect that in the event the insured building is destroyed the insurance proceeds would be payable to the vendor as his interest may appear.

Where insurance has been obtained by the *vendor* and a destruction of a building or buildings occurs, the vendor must apply the amount of the insurance to reduce the amount due under the contract.[7]

Possession

The contract for deed should provide that the purchaser is to have possession of the land, as well as the income from it for rental or from the crops that he may raise. However, the Supreme Court of North Dakota has sustained a contract where the vendor not only retained possession but also legal title to the crops raised on the land. In that case the contract for deed was in the customary form with the exception that it contained the following provision:

> "It is mutually agreed that until the payment due each year hereunder to the said first parties, the legal title to and the possession of, or crops grown upon said land during that year shall be and remain in the first parties as owners thereof."[8]

The contract for deed can provide, and sometimes does provide, for the purchase of the land on a crop-payment plan. In such contracts the seller usually retains a lien on each year's crop until the installment during that year is paid.

Statute of Frauds

The term "Statute of Frauds" refers to a law whch requires certain types of contracts to be made in writing. Thus the North Dakota Statute of Frauds requires that any contract "for the sale of real property, or of any interest therein, must be evidenced by some note or memorandum thereof and subscribed by the party to be charged, or by his agent."[9]

In substance, this provision means that oral agreements for the sale of farm lands are not legally binding in the great majority of cases.[10] The purpose behind this legal requirement is that of preventing uncertainty and removing or minimizing the chance of imposition by one party on another in real estate transactions through the assertion of unfounded or fraudulent claims.

It should be noted that *any* writing which specifies the terms of an agreement for the sale of land with reasonable clarity and is signed by the seller or the buyer is sufficient to constitute a legally

7. Gunsch v. Gunsch, 71 N.W.2d 623 (N.D. 1955).
8. Bentler v. Brynjolfson, 38 N.D. 401, 165 N.W. 553 (1917).
9. N.D. Rev. Code § 9-0604 (1943).
10. But see the discussion of rural contracts and part performance, *infra*.

binding contract, so far as the signer is concerned, within the meaning of the statute. Thus, correspondence — an exchange of letters — between a buyer and a seller of land has been deemed legally sufficent where the letters indicate a clear understanding on the part of the writers as to the nature and terms of their bargain.

Prior to executing a formal contract for deed, parties to real estate transactions often write a preliminary agreement which is called a "binder." Great care should normally be exercised in the execution of such instruments. They constitute contracts and their terms, if sufficiently clear, are legally enforceable.

Under certain circumstances, notwithstanding the Statute of Frauds, oral agreements for the sale of land are enforced by the courts. This exception to the statutory rule is discussed in the following section.

Oral Contracts and Part Performance

As noted above, oral agreements for the sale of land are not ordinarily enforced by the courts. However, the courts have recognized that in certain circumstances the too-rigid enforcement of this rule can lead to inequitable or unjust results. In consequence the courts have developed a rule known as the "doctrine of part performance." This legal doctrine provides, generally speaking, that when there is an oral contract for the sale of land, either party to the contract may have the agreement judicially enforced if (a) the contract has been partially performed and (b) the party seeking relief from the court has so materially changed his economic position in carrying out his agreement that it would be unjust and unfair to declare the agree ment invalid.

Such oral contracts are enforced in harmony with the principle that the courts will not allow the Statute of Frauds to be used as an instrument for imposition or injustice. In other words, the doctrine of part performance was established for the same purpose for which the Statute of Frauds itself was enacted, namely the prevention of fraud. It arose from the necessity of preventing the Statute itself from becoming an instrument through which unscrupulous parties might impose upon or cheat inexperienced buyers or sellers of land.

Numerous cases indicate that the doctrine of part performance is firmly established as the law of this state. As early as 1886 it was held that an oral agreement for the sale of real property could not be ruled legally invalid when it had been partially performed.[11] Thus, when a purchaser of land under an oral contract takes open

11. Fideler v. Norton, 4 N.D. 258, 32 N.W. 57 (1886).

possession of the land, makes improvements on it, and pays a portion of the purchase price, the seller cannot thereafter set the agreement aside on the ground it is not in writing.[12] Similarly, where an oral gift has been made of a tract of land and the donee has taken possesson and made substantial improvements so that it would work a substantial injustice to hold the gift invalid, the Statute of Frauds can not be applied to avoid the gift.[13] The Supreme Court of North Dakota extended the application of this doctrine in 1916 by stating that the Statute of Frauds does not apply where there has been full performance by one party and acceptance of such performance by the other, when all that remains to be done is the payment of money.[14]

Effect of Misrepresentations

It often happens that persons desiring to sell or purchase farm lands will make representations with regard to the transaction which the other party subsequently discovers to be unfounded. The legal effect of the misrepresentations presents a problem of considerable complexity. Whether they are sufficient to allow a purchaser or seller to withdraw from a contract is a question to be decided on the individual facts of each case, and legal counsel should be sought when such a question arises.

In general it may be said that unless a promise or representation with regard to a sale of land is reduced to writing and inserted in the contract for deed, it is not enforceable. This is because (a) the policy embodied in the Statute of Frauds normally prevents enforcement of an oral agreement with regard to land and (b) the courts regard the terms of the written contract as being the final and true understanding of the parties to the agreement and are unwilling to allow the terms of the contract to be varied by oral testimony. Real estate transactions are thus generally governed by the legal maxim "caveat emptor," (let the buyer beware) a phrase meaning that the law does not imply any warranties in a contract for the sale of land, and will not enforce warranties not embodied in the contract.[15]

To the foregoing statements, however, there exist two exceptions. First, every contract for the sale of land does contain at least one implied warranty: the vendor agrees, unless stipuated otherwise in the contract, that when the time for performance comes he will con-

12. Muir v. Chandler, 16 N.D. 551, 113 N.W. 1038 (1907).
13. Heur v. Heur, 64 N.D. 497, 253 N.W. 856 (1934).
14. Erickson v. Wiper, 33 N.D. 193, 157 N.W. 592 (1916).
15. Asher v. Jensen, 43 N.D. 355, 175 N.W. 365 (1919); Held v. Yumisko, 7 N.D. 422, 75 N.W. 807 (1898).

vey to the purchaser a marketable title — i. e., a title in fee simple, free and clear of liens, defects, or encumbrances. Second, the contract may be set aside if the misrepresentations have been so extreme as to pass beyond the category of mere "puffing" and are of a legally fraudulent character.

Fraud exists within the legal meaning of the term when a party to a contract for the sale of land, with the intent of deceiving another party for the purpose of inducing him to enter into the contract, knowingly and intentionally makes false representations of a material character, provided that the party to whom the misrepresentations were made relies upon them as being truthful and suffers loss as a result.

The effect of fraud is to render the contract voidable at the option of the defrauded party rather than automatically void.[16] This means that the defrauded party must elect to rescind the contract within a reasonable time after discovery of the deception or he will be deemed to have waived the fraud.[17] Once fraud has been established, the injured party has the opton of rescinding the contract or of suing for damages.

Certain limitations upon the rights to assert fraud as a defense to a contract for the sale of land should be mentioned. If a contract for the sale of land is valid in its inception, it cannot be rendered fraudulent by subsequent events such as the mere failure of a party to perform it; non-performance is ordinarily a breach of contract rather than a fraud. Before one is entitled to set up the defense of fraud it is incumbent upon the defrauded party to show that he exercised reasonable care prior to the execution of the contract. Thus, if a person was induced to sign a written contract without reading it, he will not be entitled to avoid the execution of the contract.[18] And, as noted above, the claim of fraud must be made with reasonable promptness.

Interpretation and Construction of Contracts

In the interpretation and construction of contracts for the sale of land, the contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the intention is ascertainable, lawful, reasonable, and

16. Carufel v. Counts, 60 N.D. 91, 232 N.W. 609 (1930); Moon v. Martin State Bank, 59 N.D. 352, 230 N.W. 11 (1930); Asher v. Jensen, 43 N.D. 355, 175 N.W. 365 (1919);; Nelson v. Grondahl, 12 N.D. 130, 96 N.W. 299 (1903); Heald v. Yumisko, 7 N.D. 422, 75 N.W. 807 (1898).

17. Kamer v. Lee & Son, 61 N.D. 28, 237 N.W. 166 (1931); Bauer v. National Union Fire Ins. Co., 51 N.D. 1, 198 N.W. 546 (1924).

18. Carufel v. Counts, 60 N.D. 91, 232 N.W. 609 (1930).

capable of being carred out. Where parties to a written contract have attached to certain words a particular meaning, it must be presumed that the same meaning was intended wherever like words are used in that contract.[19] Therefore, words in a contract are to be construed in the manner in which the parties understood them; attention is to be given to every clause and word in the instrument for the purpose of ascertaining the understanding and intent of the parties. A land contract is to be viewed as a whole and in the light of circumstances surrounding its execution with a view to determining the intention of the parties. Where it consists of, or is evidenced by, several connected instruments constituting one agreement when construed as a whole, all the instruments must be considered together in determining the understanding of the parties. The courts endeavor to construe contracts for the sale of land, as they also construe other contracts, in such a manner as to uphold and give effect to them rather than to invalidate them, wherever possible.[20]

The latest cases hold that when payment and conveyance are to be simultaneous,[21] or where the conveyance is to be made on payment, a delivery or tender of the deed is necessary in order to give the vendor a right to recover in an action for the purchase price. Where the stipulations are concurrent — that is, where the deed is to be delivered on the payment of the price, either on a named date or without any day being specified — an actual tender and demand by one party is absolutely necessary to put the other in default and to cut off his right to treat the agreement as still subsisting. So long as neither party makes such tender — of the deed by the vendor, or the price by the purchaser — neither party is in default; the contract remains in force and either party may make a proper tender or offer and sue, until barred by the Statute of Limitations.[22]

Alteraton of Written Contract

The North Dakota statute provides that a contract in writing may be altered by another contract in writing, or by an executed oral agreement, and not otherwise. An oral agreement is executed within the meaning of the statute when the party performing it has incurred a detriment which he was not obligated by the original contract to incur. The parties to a contract consent orally to modify or

19. Young v. Metcalf Land Co., 18 N.D. 441, 121 N.W. 1101 (1909); Baird v. Fuerst, 60 N.D. 592, 235 N.W. 594 (1931).
20. See Note, 98 A.L.R. 887 (1935).
21. See Note, 35 A.L.R. 108 (1925).
22. N.D. Rev. Code § 38-0104 (1943).

waive the terms of a written contract, again, if only the modified contract is executed.[23]

V. ASSIGNMENTS

Assignment by Vendor.—Since the vendor in a contract for deed holds legal title to the land even after the execution of the contract, he is entitled to sell the land to a third party. The purchaser, however, will take the land subject to the rights of the buyer under the contract for deed. As an assignee, he steps into the shoes of the original vendor and is obligated to perform the contract for deed and fulfill all the conditions imposed by the contract on the original vendor.[24]

The conveyance of the vendor's interest in a contract for deed to a third person, or an assignment by him, passes with it the right to receive the purchase price remaining unpaid at the time that the original purchaser had notice of the conveyance or assignment.

Assignment by Vendee. — The purchaser, or vendee, prior to obtaining a deed and prior to full performance on his part, is normally entitled to assign or transfer his interests to a third party. The assignee, of course, then becomes obligated to carry out the conditions and terms contained in the contract for deed, and upon performance is entitled to a conveyance from the vendor.

The assignment from the purchaser to a third party should contain a provision to the effect that the assignee assumes all liability under the contract for deed and agrees to fulfill, perform, and carry out the terms and provisions it contains.

Provisions Against Assignment. — Some contracts for deed contain a stipulation that they are not assignable without the consent of the vendor. The construction of such clauses has come up before the courts numerous times.

The following quotation has been approved by the Supreme Court of North Dakota:

> "This provision of the contract was obviously intended to prevent the assignment of the same, while it was executory, to persons who might not be able or well disposed to faithfully execute it. It was a provision which was inserted in the agreement to enable . . . the vendor to control the selection of an assignee . . . so long as the agreement remained part unperformed, or so long as he was interested in the choice of an assignee who had the

23. N.D. Rev. Code § 9-0906 (1943); Reeves & Co. v. Bruening, 13 N.D. 157, 100 N.W. 241 (1904); Cughan v. Larson, 13 N.D. 373, 100 N.W. 1088 (1904); Benesh v. Travelers Ins. Co., 14 N.D. 39, 103 N.W. 405 (1905); Annis v. Burnham, 15 N.D. 577, 108 N.W. 549 (1906); Case Threshing Machine Co. v. Loomis, 31 N.D. 27, 153 N.W. 479 (1915).

24. Semmler v. Beulah Coal Co., 48 N.D. 1011, 188 N.W. 310 (1922).

requisite means and ability to do what remained to be done. Inasmuch, then, as the provision in question was only intended to secure the faithful performance of the agreement by the purchaser or his assignee, it would be both unreasonable and inequitable to hold that . . . the vendor is privileged to take advantage of the provision, to avoid performance on his part, after the entire amount of the purchase money has been promptly paid or tendered. We must assume, whatever may be the fact in this regard, that the provision against assigning the contract without the vendor's consent, was inserted therein for an honest and legitimate purpose; that is to say, for the purpose of securing the punctual payment of the purchase money, and a full compliance with other executory agreements, either by the original purchaser or by his assignee."[25]

The following statement about the effect of such clauses has also been made:

"The majority of the cases take the view that the fact that the assignment of a land contract is made in violation or disregard of a provision thereof that the vendee shall not assign, or that he shall not assign without the vendor's written consent shall not be valid, does not preclude the assignee from maintaining a suit to compel specific performance, if the contract has been fully performed by the vendee and assignee, or either of them, or if the assignee offers and is able to complete the performance. The theory adopted by the courts which so rule is that the stipulation against assignment is ordinarily to be construed as intended only to safeguard performance on the part of the vendee, so that when full performance has been rendered, or is presently offered, the stipulation becomes of no further consequence."[26]

The North Dakota Supreme Court has held that a provision in a contract for the sale of land declaring that an assignment should not be effective without the written consent of the vendor does not preclude the assignee of the contract from bringing an action against the vendor to compel him to specifically perform, where the assignee offered and was willing to complete performance of the contract on his own part.[27]

VI. CANCELLATION OF CONTRACTS FOR SALE OF LAND

When a purchaser fails to carry out any of the material provisions in his contract of purchase, the seller has the right to cancel or foreclose the contract.

A material provision is one which (a) fixes the time for payment of installments of the purchase price, (b) provides for the insur-

25. Cheney v. Bilby, 74 Fed. 52, 64 (8th Cir. 1896).
26. See Note, 138 A.L.R. 205 (1942).
27. See note 7, *supra*.

ance of buildings on the property, or (c) provides for the payment of taxes.

In order to cancel the contract, the seller must either give written notice of cancellation to the buyer or proceed by bringing an action to cancel the contract.

A. CANCELLATION BY NOTICE

Where a seller of land elects to cancel the contract by giving notice, the procedure is specified by statute. The notice itself must be in writing, and must be served upon the purchaser of the property or his assignee. The notice must be dated and must set forth the default which the seller believes the purchaser to have committed. It must further notify the purchaser of the date on which the cancellation will take effect, which is one year after the service of the notice.

The one-year period of waiting before the notice of cancellation becomes effective is given by the law for the benefit of the purchaser, in order to give him an opportunity to remedy his default. If the purchaser or his assignee performs and makes good the default within one-year period by paying the required sum together with the cost of serving the notice, his contract is then reinstated and remains in full force and effect as if no default had occurred therein. If he does not perform within the time stated, the contract is then terminated. Once terminated in this fashion, the right of redemption from the default is lost and the purchaser cannot subsequently reinstate the contract by tender of performance or payment. Prior payments made to the vendor are lost.

Where the contract of sale has been recorded, a copy of the notice of cancellation served upon the purchaser, together with an affidavit of service and the additional affidavit of the seller that the default was not cured within the one-year period given by the notice, should also be recorded.

A provision in any contract for deed purporting to eliminate the necessity of giving notice cancellation is void.

When cancellation by notice is attempted, a buyer who believes he has a defense is entitled to go before a judge of the district court in the county where the land is located and to set forth in an affidavit the fact that he has a counter-claim or other valid defense against the collection of the amount claimed to be due under the contract. If the court finds the affidavit well-founded, it will issue an injunctive order restraining the seller from cancelling the contract. Any further proceedings are taken before the court.

B. CANCELLATION BY ACTION

In addition to the remedy of cancellation by notice, the vendor also possesses the right to cancel or foreclose a contract for the sale of land by bringing a legal action for such purpose. Such an action is of an equitable character, which means that it is always tried to the judge alone. If a preponderance of the evidence in the case shows that there has been a default, the judge will enter a decree cancelling the contract between the parties and forever barring the purchaser from any right, title, or interest in the land involved.

Where a contract is cancelled by action, the one-year redemption period is not applicable. The court may, however, prescribe such period of redemption as appears equitable and fair under the circumstances of the case.

Cancellation of the contract either by notice or foreclosure absolutely relieves the purchaser from any further liability for the unpaid portion of the purchase price. The vendor cannot recover any deficiency judgment against the purchaser.