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James E. Leahy

CANCELLATION OF LAND CONTRACTS

By James E. Leahy*

Among the judicial remedies found in Title 32 of the NDRC 1943, is the one covering cancellation of land contracts. Chapter 32-18 of the code sets forth a procedure which a vendor may follow to terminate such a contract. This procedure, however, is not exclusive. Courts of equity have always had the power to cancel contracts for the sale of land, and as was pointed out in the case of *Nelson v. McCue,*[1] ". . . the method of cancellation provided by statute is merely cumulative and concurrent; . . ."[2]

Should a vendor elect to secure a cancellation of the contract by action, and not under the statutory method, several remedies are available to him. He may sue for cancellation and request the court to determine the amount due and set the time that the vendee may have to cure the default.[3] He may bring an action of foreclosure and request that the amount due to be determined, and that the property be sold at a judicial sale and the proceeds applied on the judgment.[4] If the vendor so desires, he may bring an action to quiet title under Chapter 32-17 of the code and have the contract removed as a cloud on his title.[5]

It will be the purpose of this article to discuss each of the various methods separately, and to point out as far as possible, the requirements which must be met in order for a vendor to effect a legal cancellation of a contract for deed. The vendee's rights of rescission or specific performance will not be discussed.

CANCELLATION BY STATUTORY METHOD

The statutory method of cancellation of land contracts came into being by virtue of Chapter 204 of the Session Laws of 1903. Basically this method is unchanged, with the exception that the time allowed to cure the default has been extended from 30 days[6] to one year,[7] after the service of the notice of cancellation. Pro-

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* A member of the firm of Cupler, Tenneson, Serkland & Leahy, Fargo, North Dakota.

1. 37 N. D. 183, 163 N.W. 724 (1917).
2. *Ibid.*
3. Vail v. Evesmith, 62 N. D. 99, 241 N.W. 719 (1932); Raad v. Grant, 43 N. D. 546, 169 N.W. 588 (1918).
4. Vail v. Evesmith, *supra* note 3; D. S. B. Johnson Land Co. v. Whipple, 60 N. D. 334, 234 N.W. 59 (1931).
5. Fyten v. Cummins, 52 N. D. 445, 203 N.W. 178 (1925); Fargusson v. Talcott, 7 N. D. 183, 73 N.W. 207 (1897).
6. N. D. Sess. Laws 1903, c. 204, §4.
7. N. D. Rev. Code §32-1804 (1943).

visions have also been added for recording the notice[8] and for bringing the matter into court upon an affidavit of the vendee that he has a legal counter claim or valid defense against the vendor.[9]

NOTICE

Once a default has occurred and a vendor decides to cancel the contract by the statutory method, he must give written notice to the vendee or his assigns.[10] In *Williams v. Corey*,[11] our court held that "assigns" means, ". . . vendees of the purchaser when known to the vendor, . . ." and further, that a purchaser from a vendee is entitled to the statutory notice even though the contract contained a provision against assignment without the written consent of the vendor. The court held that such a provision in the contract is collateral to the main purpose and can be waived by the vendor.

The notice must state that a default has occurred and that the contract will be cancelled or terminated upon the expiration of one year from the service of the notice.[12] It must be served in the same manner as provided for service of a summons in the district court, if the person upon whom service is to be made is a resident.[13] The notice can be published if the vendee or his assignee is a non-resident or cannot be found in North Dakota. A sheriff's return of not found, is prima facie evidence that the vendee cannot be located or is a non-resident[14]

Although the statutes do not prescribe a form of notice to be used, our court has given some indication of what the notice should contain. For example, in *Glein v. Miller*,[15] the court held that where there was no acceleration clause in the contract, the notice was defective for attempting to declare the entire balance due. Thus a notice to be valid, must only contain a demand for payment of the amount of the default, where the contract does not contain an acceleration clause. In the case of *E. J. Lander & Co. v. Deemy*,[16] the notice stated the default which had occurred, and the amount due on the contract. It also stated that the plaintiff had elected to cancel and terminate the contract

8. N. D. Rev. Code §32-1805 (1943).
9. N. D. Rev. Code §32-1806 (1943).
10. N. D. Rev. Code §32-1801, 32-1802 (1943).
11. 21 N. D. 509, 131 N.W. 457 (1911).
12. N. D. Rev. Code §32-1802 (1943).
13. N. D. Rev. Code §32-1803 (1943).
14. N. D. Rev. Code §32-1803 (1943) (Must be published three times).
15. 45 N. D. 1, 176 N.W. 113 (1920).
16. 46 N. D. 237, 176 N.W. 922 (1920).

and that such cancellation would take effect 30 days after the service upon the vendee. The vendee made no effort to cure the default and the court therefore held that contract was effectively cancelled.

The notice prescribed by this statute is absolutely necessary, where the cancellation is sought by the statutory method. The parties cannot even contract against it.[17] Notice is not necessary, however, where the cancellation is sought by an action at law or in equity.[18] Nor is notice required where there has been an abandonment of the contract by the vendee.[19]

The code does not state when the notice must be given. Can a vendor, therefore, wait as long as he likes, after default, leaving the matter in status quo, and later give an effective notice? Long before the enactment of the statutory procedure for cancellation, it was established in this state, that "When a party stipulates that he will give written notice of his election to take advantage of a breach, where time is of the essence of the agreement, an unreasonable delay in giving this notice is equivalent to an assurance that as to that default the provision with respect to time has been waived."[20]

This rule is so well established in this state, that the writer is of the opinion that it applies to the statutory method of cancellation in the same manner as it applied prior to the enactment of that procedure. Thus, if the vendor does not give timely notice, after learning of a default he may have waived his right to a cancellation, at least as to that default. Our court gives that implication in *Duffy v. Egeland.*[21]

TIME TO CURE DEFAULT

After the notice has been served upon the vendee, he has one year in which to correct the default,[22] and the contract is not cancelled but remains in force until the year has expired.[23] Should the vendee have a counterclaim or a defense to the cancellation of the contract, he or his attorney may present an affidavit to that effect, to the judge of the district court in the county where the property is situated, and that judge may direct that all further

17. N. D. Rev. Code §32-1804 (1943).
18. N. D. Rev. Code §32-1804 (1943); Raad v. Grant, 43 N. D. 546, 169 N.W. 588 (1918).
19. Harrington v. Eggen, 51 N. D. 87, 199 N.W. 447 (1924).
20. Fargusson v. Talcott, 7 N. D. 183, 73 N.W. 207 (1897).
21. 26 N. D. 135, 143 N.W. 350 (1913).
22. N. D. Rev. Code §32-1804 (1943).
23. Hammer v. Woodworth Elevator Co., 55 N. D. 449, 214 N.W. 251 (1927).

proceedings be had in the district court.[24] It is thus conceivable that a vendee may wait 364 days and then present such an affidavit to the court, and secure further time to cure the default. Section 32-1806, NDRC 1943, however, states that the judge "may enjoin" the cancellation, and "may direct" that all further proceedings be had in the court. It would therefore seem that the court is to be guided by equitable principles. And if it would be unjust to allow further time to the vendee, the court probably would not enjoin the cancellation.

MAKING RECORD OF CANCELLATION

Once the notice has been served and the one year period of redemption has expired without the vendee curing the default, the contract is cancelled and the vendee has no further interest in the land. To make a record of the cancellation, a copy of the notice, which was served upon the vendee, together with an affidavit of service, and an affidavit of the vendor or his assigns may be put of record in the office of the register of deeds. The affidavit of the vendor shall state that the default of the vendee under the terms of the contract was not cured within one year from the date of service of the notice.[25]

CANCELLATION BY ACTION IN DISTRICT COURT

Action to Cancel[26]

Where a vendor desires to cancel a contract for deed, by action, and merely terminate the interest of the vendee therein, he may do so, and possibly secure speedier relief than by using the statutory method. For example, in *Ryan v. Bremseth*,[27] the action was to cancel a contract for deed. The lower court found the vendee in default, but allowed him approximately one month to cure the defaults, and that if he did not do so his interest in the property would be at an end. Upon application of the vendee the court extended the time another month. The defaults were not cured and judgment was entered determining that the vendee's interest was at an end. The vendee appealed. The Supreme Court, in affirming the lower court *held*, (1) that no

24. N. D. Rev. Code §32-1806 (1943); Lee v. Jordan, 50 N. D. 365, 195 N.W. 660 (1923).
25. N. D. Rev. Code §32-1805 (1943).
26. The words "cancellation" and "foreclosure" are used interchangeably in the cases. In this article, where the relief sought is merely a termination of the vendee's interest, the term cancellation will be used. The term foreclosure will be used to describe an action where the vendor seeks a judgment of foreclosure and a sale thereof.
27. 48 N. D. 710, 186 N.W. 818 (1922).

statutory written notice of intention to cancel the contract was required in order to maintain the action, and (2) that the lower court did not err in not granting a six months period of redemption as provided in the then existing statutory method of cancellation, and (3) that in this this method of cancellation, the court would apply equitable principles. The court then allowed the vendee further time to cure the defaults.

In this type of action, then, to cancel a contract, the result is the same as that reached where the cancellation is sought under the statute, except that it is possible to secure a shorter period of redemption. Whether or not a shorter period will be required of the vendee to redeem, will depend upon the facts and as a general rule, the court will balance the equities in favor of the vendee.

Another example of the balancing of equities, is the case of *People's State Bank of Hillsboro v. Steenson.*[28] The lower court granted a cancellation, but did not allow any time for redemption. Upon appeal, the Supreme Court affirmed the lower court's decision as to the cancellation, but set up a method of redemption that amounted almost to a re-writing of the contract.

Some statements in the cases of *Jessen v. Pingel,*[29] and *Knowles v. Older,*[30] are unfortunate as far the law of cancellation of land contracts is concerned. While the *Jessen Case* was not originally one to cancel a land contract, the vendee's right of redemption under such a contract was at issue and discussed by the court. The court in referring to land contracts, states that what is now Chapter 32-18 specifically provides against a "strict foreclosure." This would seem to indicate that a strict cancellation without a right of redemption could never be granted, and that the statutory redemption period of one year would apply to actions brought for that purpose. In the *Knowles Case,* also, even though that was an action brought to cancel the contract, the court seems to imply that the one year statutory redemption period applies.

The writer does not believe that our court intended to lay down such a rule. In the *Jessen Case,* the court goes on to point out that under the statutes, the vendee has one year to cure the default, ". . . unless an action is commenced for such purpose . . ." meaning of course, an action for the purpose of cancellation. Thus the court indicates that the redemption period is not controlled

28. 49 N. D. 100, 190 N.W. 74 (1922).
29. 65 N. D. 209, 257 N.W. 2 (1934).
30. 57 N. D. 128, 220 N.W. 625 (1928).

by the statute, when cancellation is sought by action. The case of *Funderburg et al v. Young, et al,*[31] supports this conclusion. In that case our court wrote this syllabus:

> "3. Where the vendee in a land contract has been in default since 1925 and all of the payments provided in the contract are long past due, payments for the past several years being negligible, and no offer to pay any definite substantial sum is made; no equitable showing is presented which would preclude the court from terminating the contract upon failure of the vendee to make good the default within thirty years."

See also the case of *Breher v. Hase,*[32] where in the court specifically stated that the then existing statute, giving six months to redeem, does not apply to cancellation by action.

Where cancellation is sought by action, therefore, the equities of the case are what govern the length of the redemption period.

ACTION TO FORECLOSE CONTRACT

As stated above, in footnote 26, in speaking of an action to foreclose a land contract, the writer means that the action is similar to the foreclosure of a mortgage. The relief sought being a judgment declaring the amount due, and for an order of sale of the property to satisfy the judgment. That was the type of action used in the case of *D. S. B. Johnston Land Co. v. Whipple.*[33] The trial court determined the amount due and ordered the land sold. This procedure was approved by the Supreme Court, and has been cited with approval in subsequent cases.[34]

The *Johnston Land Co. Case, supra,* has been overuled on one point, and that is with regard to the allowance of a deficiency judgment against the vendee. Such an allowance was upheld in that case. However, as the court points out in *Schaff v. Kennelly,*[35] a deficiency judgment may not be allowed in an action to foreclose a land contract, but must be sought in a separate action brought under what is now Sections 32-1906 and 1907 of the 1953 Supplement to the NDRC 1943.

Neither the *Johnston Land Co. Case,* nor the *Schaff Case* states whether the vendee under the contract, was given any time to redeem, after the foreclosure sale.[36] It would seem, however,

31. 68 N. D. 481, 281 N.W. 87 (1938).
32. 54 N. D. 87, 208 N.W. 974 (1926).
33. 60 N. D. 334, 234 N.W. 59 (1931).
34. Schaff v. Kennelly, 61 N.W.2d 538 (N. D. 1953); Vail v. Evesmith 62 N. D. 99, 241 N.W. 719 (1932).
35. 61 N.W.2d 538 (N. D. 1953).
36. Upon inquiry the writer was informed that the judgment of foreclosure in the Schaff Case, *supra* note 34, provided that the vendee have one year within which to redeem.

that that is governed by Section 32-1906, which provides that in an action to foreclose a mortgage or for the cancellation or foreclosure of a land contract, the court shall have the power to order the delivery of possession of the property to the foreclosure sale purchaser, but not before the expiration of one year.

At first glance it would appear that Section 32-1906, as amended, might also allow a period of one year to redeem in an action where the relief sought is only a cancellation of the contract, without a judgment and sale. The statute states, "In any action for the foreclosure of a real estate mortgage or the cancellation or the foreclosure of a land contract, . . .", however a close reading will reveal that it pertains only to those situations where there has been a determination of the amount due and judgment and sale ordered.

The phrase, ". . . or the cancellation or foreclosure of a land contract . . . ." did not appear in the statute until it was amended in 1937.[37] The case of *Funderburg et al v. Young, et al,*[38] was decided after that date. That case was for a cancellation, and our court approved a 30 day redemption period, pointing out that in suits to cancel land contracts, the court must render such judgment as the equities of the case require. Thus clearly indicating that the court is not bound by any statutory redemption period.

It is therefore the opinion of the writer, that the one year redemption period in Section 32-1906, does not apply, where the vendor is seeking only a cancellation of the contract, and a return of the property. Under those circumstances, the redemption period is governed by the equities of the case.

It should be noted here, that the court in the *Schaff Case, supra,* decided several other questions pertinent to the foreclosure of land contracts. It held that no power of attorney is required where the foreclosure is of a contract, nor is it necesary that a notice before foreclosure be given prior to the commencement of the action.

ACTIONS TO QUIET TITLE

The right to terminate a vendee's rights under a land contract by an action to quiet title has long been recognized by our courts. One of the earliest cases which allowed that remedy was *Fargusson v. Talcott.*[39] In that case, the court apparently weighed the

37. N. D. Sess. Laws 1937 c. 159.
38. 68 N. D. 481, 281 N.W. 87 (1938).
39. 7 N. D. 183, 73 N.W. 207 (1897).

equities and ordered entry of judgment allowing the vendee 30 days to make good the defaults. If he did not do so, his interest as vendee was to be terminated and the vendor given immediate possession of the property.

When a vendor seeks to terminate the vendee's interest in a land contract in an action to quiet title, the court will be guided by equitable principles, as such an action is essentially an equitable action.[40] The period of redemption will depend upon the facts of the case, and will be based upon the equities found to exist.

RECOVERY OF MONEY OR OTHER RELIEF

In some of the cases wherein the termination of the vendee's interest is sought, the vendor has attempted to recover, not only the land, but also a money judgment. For example, in *Roney v. Halvorsen Co.*,[41] the vendor by way of counterclaim, sought to recover the purchase price of the land after once having cancelled the contract by notice. The Supreme Court pointed out that one cannot adopt contradictory positions. Where a person has two modes of redress, which are inconsistent, the assertion of one precludes him from asserting the other. This rule has been approved in subsequent cases.[42] Thus it is well settled in this state, that the cancellation of the contract, by whatever method the vendor desires to use, relieves the vendee from any further liability for the unpaid portion of the purchase price.[43]

The above rule, of course, does not mean that a money judgment can never by recovered in an action involving a land contract. Where the contract is foreclosed, as was done in the *Johnston Land Co. Case* and the *Shaff Case*,[44] the court renders a money judgment, and orders the land sold to satisfy it. No deficiency, however, can be recovered except in the manner provided for in Section 32-1906 and 1907, as amended.

In the case of *Fyten v. Cummins*,[45] the vendor brought an action to remove the contract as a cloud on her title. She also sought a personal judgment against the vendee for damages arising out of a breach of certain covenants in the contract. These damages were not for any portion of the purchase price, but were for

40. Northwestern Mutual Savings and Loan Ass'n. v. Hanson, 72 N. D. 629, 10 N.W.2d 599 (1943).
41. 29 N. D. 13, 149 N.W. 688 (1914).
42. C. A. Finch Lumber Co. v. Weishaar, 55 N. D. 695, 215 N.W. 155 (1927); Security State Bank v. Krach, 36 N. D. 115, 161 N.W. 568 (1917).
43. Vail v. Evesmith, 62 N. D. 99, 241 N.W. 719 (1932).
44. See subheading, "Actions to Foreclosure."
45. 52 N. D. 445, 203 N.W. 178 (1925).

injuries to the premises and advancements made by the vendor. The lower court allowed a cancellation of the contract and quieted title in the vendor, and also rendered a personal judgment against the vendee in excess of Six Thousand Dollars. On appeal the Supreme Court affirmed the part of the judgment relating to the cancellation of the contract but struck from it the award for damages. The court in so doing, did not say that such a judgment could not be rendered in such a case, but only held that it was error not to determine the amount of the vendee's equity in the land and credit that against the amount due the vendor. In other words, if a money judgment for damages, is sought in addition to a cancellation of the contract, then the amount of the vendee's interest in the land must be determined and credited against the amount found due to the vendor.

It should be noted that ordinarily where a contract is cancelled by any of the methods herein discussed, no refund is allowed the vendee for any part of the purchase price he has paid to the vendor. The court in the *Fyten Case,* laid down a different rule where the vendor seeks a money judgment for damages in addition to the cancellation of the contract.

The case of *Lee v. Jordan,*[46] illustrates, that the vendor may secure other relief in an action to cancel a land contract. After the service of the notice of cancellation by the vendor under the statutory method, the vendee obtained an order from the district court directing that further proceedings be had in that court. Thereafter, the vendor started an action for cancellation and alleged, among other things that the vendee was threatening to remove buildings, and crops from the land. The vendor then requested an order restraining the vendee from doing these acts. The vendor also secured a temporary restraining order, from which the vendee appealed. The Supreme Court affirmed the issuance of the temporary order.

SUMMARY

A vendor in this state has open to him four methods of procedure to cancel and terminate a land contract. He may proceed by the statutory method as set forth in Chapter 32-18 of the code. If he does, he must give the required notice to the vendee or his assigns. This method allows the vendee a minimum of one year in which to cure the default.

46. 50 N. D. 365, 195 N.W. 660 (1923).

A vendor may secure speedier relief by bringing an action to cancel, or an action to quiet title, in the District Court. In either of these methods, the court can terminate the contract and will allow a period of redemption in accordance with the equities that the court finds to exist.

Should a vendor not want the property back, he may bring an action of foreclosure, similar to that of a foreclosure of a mortgage and secure a judgment and order of sale of the property. Under this method the vendee will have one year to redeem from the foreclosure sale and no deficiency judgment can be awarded against him, except in accordance with the provisions of Sections 32-1906, 1907, NDRC 1943 as amended.

In some instances, a vendor may secure other relief in addition to the cancellation of the contract. But if he asks for money damages for breach of any of the covenants in the contract, or for advances made for taxes, etc., the vendee's equity in the land must be credited against the amount of damages found due to the vendor.