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Land Contracts Revisited

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I. INTRODUCTION

In 1956, the NORTH DAKOTA LAW REVIEW published an article entitled *Cancellation of Land Contracts*.[1] The article discussed cancellation of land contracts by notice as provided in chapter 32-18, actions to cancel land contracts in the district court, foreclosure under chapter 32-19, and cancellation by a quiet title action. The following article updates the law regarding those remedies and adds sections on specific performance and rescission.

II. CHAPTER 32-18—STATUTORY CANCELLATION BY NOTICE

This chapter provides a method whereby a vendor may cancel a land contract without intervention of the district court. As the following discussion will illustrate, this method is not exclusive.[2] Even if the contract provides that the vendee will " 'upon demand . . . quietly and peaceably surrender to [the vendors] possession of said premises . . . ,' "[3] the vendor is not restricted to cancellation by notice.[4] The supreme court has said that although a contract may contain a provision that allows a vendor to cancel it by notice if a vendee defaults in payments, the vendor is not required to exercise the option to cancel.[5]

The statutory requirements for cancellation must be strictly followed. As the court pointed out in *Rohrich v. Kaplan*:[6] "Chapter 32-18 [] [of the North Dakota Century Code] [] sets out a strict procedure for cancellation of a contract for the future conveyance of real estate."[7]

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1. James E. Leahy, *Cancellation of Land Contracts*, 32 N.D. L. REV. 5 (1956).

2. *See* Adolph Rub Trust v. Rub, 474 N.W.2d 73, 76 (N.D. 1991), *cert. denied*, 112 S.Ct. 1276 (1992), *reh'g denied*, 112 S.Ct. 1713 (1992) (finding that cancellation of contract for deed under chapter 32-18 is not an exclusive remedy).

3. Schaff v. Kennelly, 61 N.W.2d 538, 550 (N.D. 1953).

4. *Id.*

5. D.S.B. Johnston Land Co. v. Whipple, 234 N.W. 59 (N.D. 1930).

6. 248 N.W.2d 801 (N.D. 1976).

7. Rohrich v. Kaplan, 248 N.W.2d 801, 805 (N.D. 1976). *See also* Pyle v. Egeberg, 356 N.W.2d 94, 97 (N.D. 1984).

A. SECTION 32-18-01—INSTRUMENTS FOR FUTURE CONVEYANCE—CANCELLATION—OWNER MUST GIVE WRITTEN NOTICE TO VENDEE OR PURCHASER.

A vendor choosing statutory cancellation by notice must give "written notice to the vendee or purchaser, or his assigns."[8] Failure to give notice to an assignee whom the vendor knows exists will make the cancellation ineffective. As Justice William L. Paulson pointed out for the North Dakota Supreme Court: "When the seller has knowledge or notice that the buyer in a land contract has assigned his interest therein to some other person, it is incumbent upon the seller to serve notice of cancellation upon the assignee."[9]

A vendor may lose the right to cancel a land contract under this chapter if he or she after default acts in a manner inconsistent with the intent of the statutes. In *Sadler v. Ballantyne*,[10] the vendors notified the vendees of a default in payment of an annual installment and two years' taxes.[11] Before the redemption period expired, the vendees paid the defaulted payment plus one additional installment but did not pay the back taxes.[12] After the redemption period expired, the vendors learned that the taxes had not been paid.[13] They immediately recorded an affidavit canceling the contract, but did not return the payments received. The vendors then brought an action to quiet title which the district court granted, but which the supreme court reversed.[14] The supreme court said: "We conclude that the Sadlers' [vendors] retention of the installment payments, after learning that Ballantyne [vendee] had not paid the delinquent real estate taxes, was inconsistent with an intent to cancel the January 16, 1972, contract for deed and constituted a waiver of the right to cancel such contract under Chapter 32-18."[15]

If a vendor elects to proceed under this chapter, he or she is not barred from bringing an action for cancellation before the time for redemption specified in the notice of cancellation has

8. N.D. CENT. CODE § 32-18-01 (1976 & Supp. 1991).
9. Sadler v. Ballantyne, 268 N.W.2d 119, 122 (N.D. 1978) (citation omitted).
10. 268 N.W.2d 119 (N.D. 1978).
11. Sadler v. Ballantyne, 268 N.W.2d 119, 121 (N.D. 1978).
12. *Id.*
13. *Id.* at 122.
14. *Id.* at 125.
15. *Id.* For a case in which the court reached a different result, see Pyle v. Egeberg, 356 N.W.2d 94 (N.D. 1984).

expired. In *Johnson v. Gray*,[16] after the vendees had defaulted, the vendors gave the statutory notice, but thereafter brought an action in the district court. The lower court, applying the doctrine of election of remedies, dismissed the action. The supreme court reversed, noting that the vendees had suffered no detriment from the vendor's choosing to proceed by an action to cancel.[17] The court wrote, "as the sellers commenced the action herein prior [to the elapse of the statutory time], it is our view that they are not precluded from bringing the action."[18]

B. SECTION 32-18-02—DEFAULT—CONTENTS OF NOTICE.

This section specifically requires that:

1. the vendor act within a reasonable time after default;
2. the notice be in writing;
3. it be served upon the vendee or assignee;
4. the notice state that the default has occurred;
5. the contract will be canceled; and
6. the time the cancellation will be effective, as provided in section 32-18-04 of the North Dakota Century Code.[19]

A reasonable time within which the vendor must act depends upon the circumstances of each case.[20]

The notice required under this section must contain three elements: 1) a statement that a default has occurred; 2) notification that the contract will be canceled; and 3) a date upon which the termination shall take effect. If any one of these is missing, the notice is defective. For example, in *Williamson v. Magnusson*,[21] the notice failed to state the time when the cancellation would be effective.[22] The supreme court said the notice failed to comply with the statute.[23] However, a notice which contains the essential elements, but erroneously claims a default in payment of taxes and interest, is still valid even if it also accelerates the balance due on

16. 251 N.W.2d 923 (N.D. 1977).
17. Johnson v. Gray, 251 N.W.2d 923, 926 (N.D. 1977).
18. *Id.*
19. N.D. CENT. CODE § 32-18-02 (1976 & Supp. 1991).
20. In Duffy v. Egeland, 143 N.W. 350, 352 (N.D. 1913), evidence indicated that the parties were in communication with each other during the period of default. Based upon this evidence, the court concluded that "it would be preposterous to hold that as a matter of law he [the vendor] had waived his right to cancel." *Id.*
21. 336 N.W.2d 353 (N.D. 1983).
22. Williamson v. Magnusson, 336 N.W.2d 353, 355 (N.D. 1983).
23. *Id.*

the purchase price.[24]

With regard to acceleration, a vendor who cancels a land contract by statutory notice cannot demand payment of the balance remaining due on the contract even if it contains an acceleration clause. In discussing acceleration, the supreme court pointed out that section 32-18-04 of the North Dakota Century Code allows a defaulting vendee a certain amount of time " 'to perform the conditions or comply with the provisions upon which the default shall have occurred.' "[25] "We do not believe," the court wrote, "that the Legislature intended, by the use of this language, to allow a seller to make payment of an accelerated balance one of the conditions with which the buyer must comply in order to reinstate the contract and to prevent forfeiture of his equitable interests in the property under this statute."[26]

C. SECTION 32-18-03—NOTICE OF DEFAULT—HOW SERVED.

This section requires notice to be served "in the manner provided for the service of a summons in the district court . . . ."[27] This means that notice must be served in accordance with Rules 4(d) through (k) of the Rules of Civil Procedure.[28] If the vendee is not a resident of North Dakota or "cannot be found therein," the notice may be served by publication "once each week for three successive weeks."[29]

D. SECTION 32-18-04—TIME ALLOWED TO CORRECT DEFAULTS.

This section grants a defaulting vendee either a six-month or one-year period of redemption "to perform the conditions or comply with the provisions upon which the default shall have occurred . . . ."[30]

The pertinent provisions of the statute are:

1) If the amount claimed due under such instrument at the date of the notice is more than sixty-six and two-

24. Johnson v. Gray, 265 N.W.2d 861, 865 (N.D. 1978).
25. *Id.* at 863 (quoting N.D. CENT. CODE § 32-18-04 (1976 & Supp. 1991)).
26. *Id.*
27. N.D. CENT. CODE § 32-18-03 (1976).
28. N.D. R. CIV. P. 4(d)-(k).
29. N.D. CENT. CODE § 32-18-03 (1976).
30. N.D. CENT. CODE § 32-18-04 (1976 & Supp. 1991).

thirds percent of the original indebtedness, the time allowed to correct the default shall be six months.

2) In any other case, the time for correction shall be one year.[31]

After setting forth the effect of the vendee's performance or nonperformance, and noting that a contract cannot "obviate the necessity of giving the aforesaid notice,"[32] the section concludes with the following statement: *"The time allowed to correct the default shall not be less than one year except in contracts involving an area not to exceed three acres."*[33]

The "amount claimed due" in the statute is synonymous with the amount of the "default" which the vendee must cure. This is because the vendor cannot demand payment of the balance due on the purchase price, and the vendees "must be allowed to cure or correct their defaults in the manner specified by the statute."[34] In most cases, the "amount claimed due" will be one or two installments, and/or nonpayment of taxes, and therefore will usually be substantially less than "sixty-six and two-thirds of the original indebtedness."[35] This, therefore, will bring into play item two of the statute, giving the vendee one year to redeem.[36]

It is doubtful that this was the intention of the Legislature. One can surmise that the Legislature intended to give only a six-month period of redemption when the amount *remaining due on the contract*, rather than the amount in default, "is more than sixty-six and two-thirds percent of the original indebtedness."[37] In such cases, the vendor's interest in the contract would be substantially greater than the vendee's; thus, the time to cure the default should be less.

E. SECTION 32-18-05—NOTICE OF CANCELLATION TO BE RECORDED

In order to complete cancellation under this chapter, the ven-

31. *Id.*
32. *Id.*
33. *Id.* (emphasis added).
34. Johnson v. Gray, 265 N.W.2d 861, 863 (N.D. 1978).
35. N.D. CENT. CODE § 32-18-04 (1976 & Supp. 1991). In Johnson v. Gray, 265 N.W.2d 861 (N.D. 1978), the "original indebtedness" was $47,000 and the default was only the first installment of $2,000. *Id.* at 865. The vendor's notice gave the vendees one year to redeem. *Id.* at 862. In Sadler v. Ballantyne, 268 N.W.2d 119 (N.D. 1978), the "original indebtedness" was $326,500 and the default was $11,754. *Id.* at 120. The vendors gave one year to cure the default. *Id.* at 121.
36. N.D. CENT. CODE § 32-18-04 (1976 & Supp. 1991).
37. *Id.*

dor must record: 1) the notice of 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.[38] This presumably clears title for the vendor, although no title standard expressly states this.

F. SECTION 32-18-06—COUNTERCLAIM—INJUNCTION AGAINST CANCELING CONTRACT.

A defaulting vendee who believes that he or she has "a legal counterclaim or any other valid defense," may secure relief by filing an affidavit with the district court.[39] If the court is satisfied that such a defense exists, the judge may order all further proceedings be held in the district court.[40] Notice of the defense or counterclaim must be given to the vendor or his or her attorney.[41] Presumably, this must be done by the vendee or his or her attorney. The vendor may appeal the district court's order.[42]

III. CANCELLATION OF LAND CONTRACTS BY ACTION

As noted earlier, cancellation of land contracts under chapter 32-18 of the North Dakota Century Code is not an exclusive remedy. Therefore, a vendor may proceed to cancel by an action in the district court. In such cases, no notice other than commencement of the action needs to be given to the defaulting vendee.[43]

An action to cancel a land contract is an equitable one, and therefore equitable principles apply.[44] There is no right to a jury even though a party has raised " 'legal defenses.' "[45] Further, the court has said that "[w]here a trial court exercises its discretion after weighing the equities of the case, we will not interfere unless an abuse of discretion is affirmatively established."[46]

A vendor seeking cancellation of a contract is not entitled to recover the purchase price[47] or money damages. In reference to

38. N.D. CENT. CODE § 32-18-05 (1976).
39. N.D. CENT. CODE § 32-18-06 (1976).
40. *Id.*
41. *Id.*
42. Board of Univ. and Sch. Lands v. Vance, 122 N.W.2d 200, 202 (N.D. 1963).
43. Schumacher Homes, Inc. v. J. & W. Enterprises, 318 N.W.2d 763, 765 (N.D. 1982); Adolph Rub Trust v. Rub, 474 N.W.2d 73, 76 (N.D. 1991), *cert. denied*, 112 S.Ct. 1276 (1992), *reh'g denied*, 112 S.Ct. 1713 (1992).
44. Funderberg v. Young, 281 N.W. 87, 89 (N.D. 1938); *Adolph Rub Trust*, 474 N.W.2d at 75.
45. *Adolph Rub Trust*, 474 N.W.2d at 75.
46. Shervold v. Schmidt, 359 N.W.2d 361, 363 (N.D. 1984) (citations omitted).
47. Vail v. Evesmith, 241 N.W. 719, 721 (N.D. 1932); Zent v. Zent, 281 N.W.2d 41, 46 n.1 (N.D. 1979); Langenes v. Bullinger, 328 N.W.2d 241, 246 (N.D. 1982).

disallowing money damages, Justice Paul M. Sand wrote: "[W]e believe the award of the money judgment in addition to the other remedies provided by the judgment would permit the Langeneses [vendors] to accomplish indirectly what they could not accomplish directly through an action pursuant to the cancellation statutes or foreclosure statutes."[48]

A. ACCELERATION

A vendor choosing to cancel a contract by notice under chapter 32-18 of the North Dakota Century Code cannot accelerate the payments due, even if the contract contains an acceleration clause. However, this is not true when the vendor seeks to cancel by action. In *Jesz v. Geigle*,[49] the supreme court affirmed the lower court's acceleration and cancellation of the contract because it could find no evidence that doing so would be inequitable.[50] The court, however, expressly left open the question whether courts may disregard an acceleration clause when it would be equitable to do so. "We need not reach that issue because of the equities in this case."[51] Because the equities were on the vendor's side, acceleration was approved.

When the equities are in favor of the vendee, however, equitable principles may prevent the application of the acceleration clause. That was the situation in *Shervold v. Schmidt*,[52] in which the default clause stated that "time was of the essence."[53] The vendor, however, had accepted both early and late payments, including payments made after the vendor had demanded the total amount due on the contract.[54] In affirming the district court's refusal to grant cancellation, the supreme court stated: "We conclude that, in light of the equities presented, the trial court was correct in its determination that the Shervolds' [vendors'] actions in accepting late payments were inconsistent with the terms of the contract and that it would be inequitable to

48. *Langenes*, 328 N.W.2d at 246.

49. 319 N.W.2d 481 (N.D. 1982).

50. Jesz v. Geigle, 319 N.W.2d 481, 482 (N.D. 1982). A headnote in *Jesz v. Geigle* misrepresents that both in actions at law and in equity, provisions making time of the essence are "binding." Headnote 2 reads: "Where parties to the contract for deed expressly make time of the essence, such a provision is binding not only in law but also in equity." That headnote, however, somewhat overstates what the court actually did in the *Jesz* case.

51. *Id.* at 483.

52. 359 N.W.2d 361 (N.D. 1984).

53. Shervold v. Schmidt, 359 N.W.2d 361, 364 (N.D. 1984).

54. *Id.*

declare a cancellation of the contract for deed."[55] In distinguishing *Shervold* from *Jesz*, the court concluded that in *Shervold*, the vendors in effect indicated by their actions that time really was not of the essence.[56]

If a vendor intends to accelerate the remaining payments due, he or she should so state in the complaint. If failure to do so misleads or prejudices the vendee, the court may, in its discretion, prohibit acceleration.[57]

B. REDEMPTION

There is no statutory period of redemption applicable to actions to cancel a land contract. According to the supreme court, "the trial court is left to its discretion in the matter."[58] Even if the district court does not set a time by which a vendee may redeem, that decision will be upheld if the equities so dictate.[59]

IV. FORECLOSURE

In discussing the choice of remedies available to a vendor, North Dakota Supreme Court Justice A. M. Christianson wrote more than sixty years ago:

> Upon defendants [vendees] making default, the plaintiff [vendor] had a choice of remedies. He might have canceled the contract by statutory proceedings; he might have maintained an action to cancel the contract; or he might have foreclosed the contract by action and obtained a judgment against the defendants for the amount due upon the purchase price, and had . . . the defendant's interest in the land sold at judicial sale and the proceeds applied upon the judgment.[60]

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55. *Id.*
56. *Id.*
57. Straub v. Lessman, 403 N.W.2d 5, 7 (N.D. 1987) (citation omitted).
58. Bender v. Liebelt, 303 N.W.2d 316, 318-19 (N.D. 1981).
59. *Id.* The court has approved the following redemption periods: Schumacher Homes, Inc. v. J & W Enterprises, 319 N.W.2d 763, 765 (N.D. 1982) (allowing 90 days); Jesz v. Geigle, 319 N.W.2d 481, 481 (N.D. 1982) (allowing one year); Shervold v. Schmidt, 359 N.W.2d 361, 362 (N.D. 1984) (allowing 30 days); Striegel v. Dakota Hills, Inc., 365 N.W.2d 491, 493, 497 (N.D. 1985) (allowing 30 days); Adolph Rub Trust v. Rub, 474 N.W.2d 73 (N.D. 1991), *cert. denied*, 112 S.Ct. 1276 (1992), *reh'g denied*, 112 S.Ct. 1713 (1992) (allowing 30 days); Straub v. Lessman, 403 N.W.2d 5, 6-7 (N.D. 1987) (allowing two months).
60. Vail v. Evesmith, 241 N.W. 719, 721 (N.D. 1932) (citations omitted). *See also* Yon v. Great Western Dev. Corp., 340 N.W.2d 43, 47 (N.D. 1983) (examining remedies of specific performance and foreclosure).

In Ryan v. Bremseth, 186 N.W. 818 (N.D. 1922), the supreme court used the words "cancel" and "canceling" synonymously with "foreclose" and "foreclosure." These words, of course, refer to separate and distinct causes of action. *Ryan* was an action to cancel a

In a foreclosure action, "the vendee does not acquire title to the property but retains a right of redemption and an advantageous position during the redemption period."[61] The period of redemption is one year as set forth in North Dakota Century Code section 32-19-06.[62] Should the proceeds of the foreclosure sale leave a deficiency, the vendor may be able to recover that amount by a separate action under sections 39-19-06 to -07 of the North Dakota Century Code, relating to deficiency judgment sales.[63]

Even if the land contract waives any rights the vendee has under sections 32-19 of the North Dakota Century Code, that waiver is invalid. "We therefore conclude . . . ," a majority of the court has said, "that, because of the public policy against deficiency judgments, the procedural rights granted mortgagors and vendees under the anti-deficiency judgment law cannot be contractually waived in advance of default."[64] The same is not true, however, if "a mortgagor or vendee who, *after default*, determines that his or her position in a controversy can be improved by waiving certain procedural rights and benefits granted by the anti-deficiency judgment law[,] [he or she] should not be precluded from contractually waiving those rights."[65]

Justice Gerald W. VandeWalle disagreed: "I am unconvinced that under the statutory scheme permitting deficiency judgments we should recognize any waiver."[66] In this case, however, the majority held that "the agreement [between the parties] does not contain a clear, unequivocal, and unambiguous waiver of any of those procedural rights or defenses under the anti-deficiency judgment statutes."[67]

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contract, not to foreclose it, as the court noted in Vail v. Evesmith, 241 N.W. 719, 721 (N.D. 1932).

61. *Yon*, 340 N.W.2d at 47. As pointed out *supra* note 59, the court has approved various periods of redemption in actions to cancel a land contract. Apparently, the supreme court has concluded that the one year period set forth in section 32-19-06 of the North Dakota Century Code does not apply in such cases. The reasoning behind this may be that the court believes this section applies only when the premises has been sold in a foreclosure sale. Furthermore, the court has not held that all sections of chapter 32-19 of the North Dakota Century Code apply to actions to cancel. For example, in Schaff v. Kennelly, 61 N.W.2d 538 (1953), the court held that neither the notice requirements of what is now section 32-19-20 of the Century Code, nor the requirement of a power of attorney under what is now section 32-19-02 of the Century Code apply to foreclosure of land contracts.

62. N.D. CENT. CODE § 32-19-06 (1976 & Supp. 1991).

63. *Yon*, 340 N.W.2d at 47. *See also* Hagan v. Havnvik, 421 N.W.2d 56, 61 (N.D. 1988) (stating that a separate action is necessary in order to obtain deficiency judgment).

64. Brunsoman v. Scarlett, 465 N.W.2d 162, 167 (N.D. 1991) (citations omitted).

65. *Id.* at 168 (emphasis added).

66. *Id.* at 169 (VandeWalle, J., concurring).

67. *Id.*

V. SPECIFIC PERFORMANCE

Specific performance of a land contract is available to either vendor or vendee, although vendors have not had much success with this remedy. A person seeking specific performance "is held to a higher standard than if he [or she] merely asks for money damages for breach of the contract."[68]

A. SPECIFIC PERFORMANCE FOR THE VENDOR

A vendor requesting specific performance must overcome several obstacles. The first is section 32-04-09 of the North Dakota Century Code, which creates a presumption in favor of a *vendee* that a failure to "transfer real property cannot be relieved adequately by pecuniary compensation."[69] Second, in *Jonmil, Inc. v. McMerty*,[70] the court said that section 32-04-09 "does not support an action by *seller* for specific performance."[71] The court, however, has refused to hold "that specific performance at any time or under any conditions will not be available to the vendor,"[72] but has pointed out that "whether or not specific performance of a contract for deed is available to the seller is not without its problems and difficulties in North Dakota."[73]

One of the problems which the court sees is the application of the deficiency judgment statues[74] to actions for specific performance. In *McKee v. Kinev*,[75] heirs of a vendor sued "for a personal money judgment . . . to collect the balance due and owing on the contract, together with interest and costs."[76] Although the court did not treat the case as one for specific performance, the parties stipulated that " 'the plaintiffs are ready, willing and able to make conveyance of the legal title . . . and have tendered and offered to make such conveyance upon payment by the defendant of the balance due under said contract.' "[77] The court considered the case simply as one for a money judgment, and therefore, the deficiency judgment statutes required dismissal of the complaint.[78]

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68. Sand v. Red River Nat'l Bank & Trust Co., 224 N.W.2d 375, 378 (N.D. 1974).
69. N.D. CENT. CODE § 32-04-09 (1976 & Supp. 1991).
70. 265 N.W.2d 257 (N.D. 1978).
71. Jonmil, Inc. v. McMerty, 265 N.W.2d 257, 259 (N.D. 1978) (emphasis added). *See also* Wolf v. Anderson, 334 N.W.2d 212, 215 (N.D. 1983).
72. *Jonmil, Inc.*, 265 N.W.2d at 260.
73. *Id.*
74. N.D. CENT. CODE § 32-19-06 to -07 (1976 & Supp. 1991).
75. 160 N.W.2d 97 (N.D. 1968).
76. McKee v. Kinev, 160 N.W.2d 97, 98 (N.D. 1968).
77. *Id.* at 99.
78. *Id.* at 100-101.

Jonmil, Inc. v. McMerty[79] was another case in which the North Dakota Supreme Court affirmed a trial court decision denying specific performance to a vendor.[80] The supreme court concluded that "technically Jonmil, Inc., [the vendor] did not request specific performance of the basic contract, but sought relief under part of the default provisions . . . ."[81] The court then held that because the vendor "elected to proceed under the default provision, even though denominated specific performance and argued as such, [it] is bound by its election."[82]

The court, however, confused the issue by discussing the application of the deficiency judgment statute in connection with actions for specific performance. The court raised this hypothetical: "[L]et us assume the seller on a contract for deed seeks specific performance from the purchaser and the court grants it, but the purchaser is unable to pay the money."[83] In such a case, the court noted that "[t]he seller, in the absence of a separate note, would have no recourse other than the cancellation of the contract for deed. If the seller were to seek a money judgment, [sections] 32-19-06 and 32-19-07 [of the North Dakota Century Code], prohibiting deficiency judgments, would have to be considered."[84] The court, of course, is correct, but it is not the vendor's seeking specific performance that triggers the deficiency judgments statutes; seeking a "money judgment" is the catalyst.

The cloud of the deficiency judgment statute hovered over the court again in *Wolf v. Anderson*[85] and *Williamson v. Magnusson*.[86] In both cases, the court bypassed questions relating to the application of these statutes to specific performance actions.[87] In denying specific relief to a vendor in *Wolf*, however, the court wrote: "We do not hold that there is no case in which a vendor can obtain specific performance of a contract for the sale of real property."[88]

A vendor should be able to obtain specific performance of a land contract against a vendee when damages for nonperformance

79. 265 N.W.2d 257 (N.D. 1978).
80. Jonmil, Inc. v. McMerty, 265 N.W.2d 257, 261 (N.D. 1978).
81. *Id.* at 260.
82. *Id.* at 261.
83. *Id.* at 260.
84. *Id.*
85. 334 N.W.2d 212 (N.D. 1983).
86. 336 N.W.2d 353 (N.D. 1983).
87. *See* Wolf v. Anderson, 334 N.W.2d 212, 214 n.2 (N.D. 1983); Williamson v. Magnusson, 336 N.W.2d 353, 356 n.1 (N.D. 1983).
88. *Wolf*, 334 N.W.2d at 216.

would be inadequate.[89] "[T]he judgment in most cases will consist of the amount of money remaining due the vendor under the terms of the contract. In return, the vendee acquires title to the property."[90]

In such a situation, the deficiency statutes should have no application for several reasons:

1) Sections 32-19-06 to -07 of the North Dakota Century Code specifically apply only to "the cancellation or the foreclosure of a land contract" which contemplate a judicial sale of the property;[91]
2) a specific performance judgment will order the vendee to perform, i.e., pay the balance of the purchase price, but that is not a *deficiency* which results from a judicial sale wherein the money received was less than the balance due on the contract; and
3) the court has pointed out that there is substantial difference between foreclosure and specific performance actions.[92]

As Justice Vande Walle wrote for the court, "absent from a proceeding in which specific performance is sought is a jury determination of the value of the land. Ordinarily, the granting of specific performance will result in a judgment for the amount remaining due under the terms of the contract even if the agreement calls for the price to be substantially more than the land is worth."[93]

Assuming that a vendor does have a right to specific performance, he or she "has the burden of proving he [or she] is entitled to it" and that "the legal remedy of damages is inadequate."[94] The vendor's failure to prove the inadequacy of monetary damages caused the supreme court to reverse a grant of specific performance in *Williamson v. Magnusson*.[95]

B. SPECIFIC PERFORMANCE FOR THE VENDEE

Specific performance in favor of the vendee has been granted in a number of cases[96] and denied in others.[97] Even if a vendor is

89. *Williamson*, 336 N.W.2d at 356 (reversing trial court's ruling because there was no explanation of why money damages were inadequate).
90. *Yon*, 340 N.W.2d 43, 46 (N.D. 1983) (citation omitted).
91. N.D. CENT. CODE § 32-19-06 (1976 & Supp. 1991).
92. *Yon*, 340 N.W.2d at 46.
93. *Id.* at 47.
94. *Wolf*, 334 N.W.2d at 215 (citations omitted).
95. 336 N.W.2d 353, 356 (N.D. 1983).
96. Pederson v. Dibble, 98 N.W. 411 (N.D. 1904); Beddow v. Flage, 132 N.W 637 (N.D.

unable to convey all of the property that was contracted for, the vendee is entitled to a conveyance of any property over which the vendor has control and an abatement of the purchase price.[98]

In *Beddow v. Flage*,[99] the court stated that even though the land contract was signed only by the vendor, it was still subject to specific performance by the vendee if the vendee "has performed or offers to perform it . . . and the case is otherwise proper for enforcing specific performance."[100] The court also approved payment of damages to the vendee because the vendor withheld possession and delayed conveying the property.[101] Finally, in two cases in which vendees were denied specific performance, the trial court found "over-reaching," "unfairness," and "sharp practices" on their part.[102]

VI. ACTIONS TO QUIET TITLE

With regard to the use of quiet title actions to cancel land contracts, Justice Alvin C. Strutz wrote for the North Dakota Supreme Court: "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."[103] In such actions, the trial court is to be guided by equitable principles.[104]

VII. RECISSION

Chapter 9-09 of the North Dakota Century Code provides a unilateral method of rescinding contracts,[105] including land

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1911); Gunsch v. Gunsch, 71 N.W.2d 623 (N.D. 1955); Rohrich v. Kaplan, 248 N.W.2d 801 (N.D. 1976); Green v. Gustafson, 482 N.W.2d 842 (N.D. 1992); Orfield v. Harney, 157 N.W. 124 (N.D. 1916).

97. Sand v. Red River Nat'l Bank & Trust Co., 224 N.W.2d 375 (N.D. 1974); Knudtson v. Robinson, 118 N.W. 1051 (N.D. 1908); Zimmerman v. Campbell, 245 N.W.2d 469 (N.D. 1976).

98. Gunsch v. Gunsch, 71 N.W.2d 623, 630 (N.D. 1955) (affirming the trial court's award of abatement when vendor could convey only one-half of the minerals); Green v. Gustafson, 482 N.W.2d 842, 846 (N.D. 1992) (ordering conveyence of property and abatement when the vendor owned only 2/3 of the property).

99. 132 N.W. 637 (N.D. 1911).

100. Beddow v. Flagg, 132 N.W. 637, 639 (N.D. 1911) (citations omitted).

101. *Id.* at 640.

102. *Sand*, 224 N.W.2d at 379 (holding that the trial court's finding of overreaching not clearly erroneous); *Zimmerman*, 245 N.W.2d at 471 (finding that facts indicating "unfairness, artifice, sharp practice, [and] overreaching" allow the equity court to apply them in its discretion).

103. Knauss v. Miles Homes, Inc., 173 N.W.2d 896, 901 (N.D. 1969) (citations omitted).

104. *Id.*

105. N.D. CENT. CODE ch. 9-09 (1987 & Supp. 1991); Omlid v. Sweeney, 484 N.W.2d 486, 489 (N.D. 1992).

contracts.[106]

This unilateral rescission may be enforced by adjudication.[107] However, a person seeking rescission must have complied with section 9-09-04 of the North Dakota Century Code by acting promptly in seeking rescission and offering to "restore to the other party anything of value."[108] By not doing both, a person may have waived his or her right to rescind.[109] Furthermore, the court has held that when a vendee seeks to rescind a land contract, he or she cannot "demand that the Seller[s] pay damages, including loss of anticipated profits, as a prerequisite to return of the premises."[110] Rescission under chapter 9-09 of the North Dakota Century Code "completely abrogates the contract from the beginning."[111]

A party may also "bring an action in equity setting forth his election to rescind and ask the court to declare a termination of the contract."[112] In choosing to proceed in equity, however, one must understand that a " 'party is not entitled to equitable relief if there is a remedy provided by law which is equally adjusted to rendering complete justice.' "[113]

As pointed out in *Heinsohn v. William Clarmont, Inc.*,[114] rescission, "whether the object of a suit in equity or an action at law, is governed by equitable principles."[115] These equitable principles include compliance with section 9-09-04 of the North Dakota Century Code, which requires that the party act promptly and restore everything of value to the other party.[116]

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106. Schaff v. Kennelly, 61 N.W.2d 538, 546 (N.D. 1953) (discussing contracts to purchase real estate).

107. *Id.* at 546. *See also Omlid*, 484 N.W.2d at 490; N.D. CENT. CODE § 32-04-21 (1976 & Supp. 1991).

108. Holcomb v. Zinke, 365 N.W.2d 507, 510 (N.D. 1985); West v. Carlson, 454 N.W.2d 307, 309 (N.D. 1990) (requiring restoration of everything of value). *See also* Borsheim v. O & J Properties, 481 N.W.2d 590, 594 n.7 (N.D. 1992) (discussing the necessity of offering to restore or for restoration *before* commencement of the action).

109. Berg v. Hogan, 322 N.W.2d 448 (N.D. 1982) (finding that the failure to ascertain facts and to act promptly to discover legal rights *may* constitute a right to rescind waiver). *See also Holcomb*, 365 N.W.2d at 510 (stating that "[a] party failing to promptly exercise the right of rescission . . . *waives* that right" (emphasis added)); *West*, 454 N.W.2d at 309; Mader v. Hintz, 186 N.W.2d 897, 901 (N.D. 1971); Fedorenko v. Rudman, 71 N.W.2d 332, 338 (N.D. 1955).

110. Alton's, Inc. v. Long, 352 N.W.2d 198, 200 (N.D. 1984). *See also* Blair v. Boulger, 358 N.W.2d 522, 523 (N.D. 1984), *cert denied*, 471 U.S. 1095 (1985).

111. Schaff v. Kennelly, 61 N.W.2d 538, 547 (N.D. 1953).

112. *Id.* at 546. *See also* Omlid v. Sweeney, 484 N.W.2d 486, 490 (N.D. 1992).

113. *Omlid*, 484 N.W.2d at 490 (citations omitted). *See also In re* Estate of Hill, 492 N.W.2d 288, 295 n.3 (N.D. 1992).

114. 364 N.W.2d 511 (N.D. 1985).

115. Heinsohn v. William Clarmont, Inc., 364 N.W.2d 511, 513 (N.D. 1985) (citations omitted). *See also Omlid*, 484 N.W.2d at 490; Borsheim v. O & J Properties, 481 N.W.2d 590, 594 (N.D. 1992).

116. *Omlid*, 484 N.W.2d at 489 n.2.

Although rescission is permitted in both law and equity it is "not held in high esteem by the courts."[117]

VIII. MONETARY RELIEF

A. CANCELLATION ACTIONS

One of the general rules applicable in cancellation of land contract cases is

> that a party may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one with knowledge or the means of knowledge of such facts as would authorize a resort to each will preclude him thereafter from going back and electing again.[118]

This rule was applied when a vendor canceled a land contract by notice and thereafter asserted a counterclaim for the unpaid purchase price.[119] These remedies, the court found, are inconsistent, and the vendor, having made his choice, is foreclosed from asserting the other.[120]

B. SPECIFIC PERFORMANCE ACTIONS

A vendor may choose not to cancel the contract but to sue for the purchase price instead. This may be done by an action for specific performance. In such a case, "the granting of specific performance will result in a judgment for the amount remaining due under the terms of the contract even if the agreement calls for the price to be substantially more than the land is worth."[121]

In *Schwarting v. Schwarting*,[122] the court upheld a district court judgment granting specific performance to the vendee.[123] During the time this judgment was on appeal, the vendee remained in possession of the land. Shortly after the affirmance of the judgment by the supreme court, the vendors leased the land to

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117. *Heinsohn*, 364 N.W.2d at 513.
118. Roney v. H. S. Halvorsen Co., 149 N.W. 688, 690 (N.D. 1914) (citations omitted).
119. *Id.* at 689.
120. *Id.* (finding that "[t]he defendants had clearly elected to cancel . . . . Such being the case, it is clear that the defendants could not sue for the unpaid balance . . .").
121. Yon v. Great Western Dev. Corp., 340 N.W.2d 43, 47 (N.D. 1983). As pointed out in the text accompanying notes 68-95, vendors have not been very successful with this remedy.
122. 354 N.W.2d 706 (N.D. 1984).
123. Schwarting v. Schwarting, 354 N.W.2d 706, 709 (N.D. 1984).

the vendee. While the appeal in the first case was pending, the vendors brought an action against the vendee for rent plus payment of taxes which the vendors had paid.[124] The district court refused to order payment of rent, but did give judgment against the vendee for interest on the contract until the date the deed was given, plus the taxes. The supreme court affirmed, with two justices dissenting.[125] Believing that the equities favored the vendors, the majority adopted a rule that "a purchaser should not be able to enjoy the use and profits of the land as well as the balance due on the purchase price without paying interest on the balance."[126] The dissenters, however, believed that the equities in this case were with the vendee.

C. FORECLOSURE ACTIONS

A vendor may secure monetary relief by foreclosing the contract under chapter 32-19 of the North Dakota Century Code. In such an action, "the vendor seeks a judgment declaring the amount due on the contract and an order of sale of the property to satisfy the judgment."[127] Should the money received from the sale be insufficient to satisfy the balance due, a vendor may bring a separate action to recover the deficiency under sections 32-19-06 to -07 of the North Dakota Century Code.[128] The case of *Langenes v. Bullinger*[129] is another illustration of the application of the election of remedies rule. The vendors sued

> for the balance due on the contract for deed plus interest, and in the event the Bullingers [vendees] did not pay the balance due, then the Langeneses [vendors] sought a judgment terminating the contract for deed and the possession of the Bullingers. Alternatively, the Langeneses sought to obtain possession of the property and reserved their right to obtain a deficiency judgment against the Bullingers.[130]

The trial court awarded the vendors a money judgment in the amount of $21,591.44 for payments due on the contract plus inter-

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124. *Id.*
125. *Id.* at 710-11.
126. *Id.* at 709 (citations omitted).
127. Yon v. Great Western Dev. Corp., 340 N.W.2d 43, 47 (N.D. 1983) (citations omitted).
128. *Id.*
129. 328 N.W.2d 241 (N.D. 1982). Although the West Reporter syllabus characterizes this as a foreclosure action, that characterization is questionable.
130. Langenes v. Bullinger, 328 N.W.2d 241, 242-43 (N.D. 1982).

est.[131] The judgment stated that if the vendees paid the judgment, the contract would be still in effect, but also provided that "[i]f there is a cancellation of the land contract as provided herein, *the money judgment is not extinguished.*"[132]

In reversing the judgment, the supreme court reiterated the general rule "that a vendor in an action to cancel a contract for deed cannot recover a personal money judgment and also cancel the contract for deed."[133]

D. QUIET TITLE ACTIONS

A vendor seeking to cancel a contract by a quiet title action may secure monetary relief as well, however, "the value of any equity which [the vendee] had must, of course, be credited on his personal liability."[134]

E. RESCISSION ACTIONS

In *Skinner v. Scholes*,[135] the court wrote:

> The object sought by the judgment in such a case [rescission of a land contract] is to place the parties as nearly as possible in statu[s] quo. In that behalf the general rule is that interest on the purchase money paid and the use of the land under the contract, where the purchaser is in possession, shall offset each other.[136]

However, if the rescinding vendee has made improvements upon the land, he or she may be able to recover or offset the costs thereof.[137]

A party who believes that he or she has grounds to rescind a contract, of course, need not resort to that course of action. For example, the court has said that "[a] person who has been fraudulently induced to enter into a contract may either rescind the contract, or retain the benefits of the contract and obtain damages for injuries from the fraud."[138]

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131. *Id.* at 242.
132. *Id.* at 243 (emphasis in original).
133. *Id.* at 246.
134. Fyten v. Cummins, 203 N.W. 178, 182 (N.D. 1925).
135. 229 N.W. 114 (N.D. 1930).
136. Skinner v. Scholes, 229 N.W. 114, 117 (N.D. 1930) (citations omitted). *See also* Funk v. Baird, 6 N.W.2d 569, 575 (N.D. 1942). The court held that the vendees were not tenants and therefore could not be charged rent. However, they were responsible for the value of the use of the land.
137. *Skinner*, 229 N.W. at 117.
138. West v. Carlson, 454 N.W.2d 307, 309 (N.D. 1990) (citations omitted).

IX. SUMMARY

A. CHAPTER 32-18—CANCELLATION BY NOTICE

A vendor choosing to cancel by giving notice under this chapter must strictly follow the statutory requirements. The vendor must demand only the amounts in default, and cannot accelerate the balance due on the contract. Service of the notice must be in accordance with Rule 4 of the North Dakota Rules of Civil Procedure.[139]

There is some question as to when the six-month redemption period set forth in section 32-18-04 of the North Dakota Century Code applies. It appears that in almost all cases, the notice must give the vendee one year in which to correct the default. Cancellation is complete with the filing of the papers required under section 32-18-05 of the North Dakota Century Code.

A defaulting vendee who believes he or she has a defense to the cancellation may seek relief from the district court. If the court believes the defense is valid it may order all further proceedings to be had in court.

B. CANCELLATION BY ACTION

Cancellation by notice is not an exclusive remedy, and therefore an action to cancel a land contract may be brought in the district court. No notice other than commencement of the action is necessary. Neither the purchase price nor monetary damages is available. A vendor can, however, accelerate the balance due if the contract contains an acceleration clause, and if the equities are on his or her side. The redemption period is within the discretion of the trial court.

C. FORECLOSURE

Land contracts may be foreclosed under chapter 32-19 of the North Dakota Century Code, but the vendor must bring another action in order to obtain a deficiency judgment under sections 32-19-06 to -07. A vendee cannot, by contract, waive any rights he or she may have under these sections. However, he or she may waive such rights after default if it would be beneficial to do so.

139. For a discussion of service by certified mail under Rule 4(d)(2)(A)(iv), see Farm Credit Bank v. Huether, 454 N.W.2d 710, 712-13 (N.D. 1990).

D. SPECIFIC PERFORMANCE

For a vendor, the underlying rule is that specific performance will not be granted if legal damages are adequate. When the vendee fails to perform, there should be no reason why a vendor should not receive specific performance when damages would inadequately compensate him or her. The deficiency statutes should not come into play if the vendor confines his or her request to payment of the unpaid purchase price.

For a vendee, however, section 32-04-09 of the North Dakota Century Code creates a presumption that failure to receive the property contracted for "cannot be relieved adequately by pecuniary compensation."

E. ACTIONS TO QUIET TITLE

An action to quiet title is an equitable action and has long been available as a method of cancellation of land contracts.

F. RESCISSION

Rescission of contracts is not favored by the courts. Nevertheless, it is available to either the vendor or the vendee as a method of canceling a land contract. Chapter 9-09 of the North Dakota Century Code provides a unilateral method of rescinding a contract. If that method is used, it must be strictly followed. If a party resorts to legal action to rescind, equitable principles will apply whether the action is in equity or law.

X. CONCLUSION

The number of actions described herein for cancellation of land contracts raises questions about the effectiveness of chapter 32-18 of the North Dakota Century Code. For example, it appears that in almost all cases, a vendor attempting to cancel a land contract by statutory notice must give the vendee a year to cure the default. However, as pointed out earlier, in actions to cancel land contracts, trial courts have discretion to give the vendee whatever period seems equitable and many give no more than thirty days.

Furthermore, a vendor using chapter 32-18 of the North Dakota Century Code cannot accelerate the balance due on the contract. However, a court may grant acceleration in an action to cancel if time is of the essence.

Also, presumably the recording of a notice of cancellation and affidavits, as required by section 32-18-05 of the North Dakota

Century Code, is sufficient to confirm title in the vendor. At present, however, there is no title standard that confirms this, which causes some uncertainty.

Faced with these impediments, it is understandable why a lawyer representing a vendor would prefer to seek cancellation of a land contract by action instead of by statutory notice.