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INSTALLMENT CONTRACTS FOR THE PURCHASE OF LAND IN NEBRASKA

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I. INTRODUCTION

The purpose of this study, one of thirteen now being conducted in midwestern states, is to discuss some major problems facing a buyer when he signs an installment contract to purchase land. The information is not designed to answer all of the intricate legal problems which arise but rather is intended to inform prospective buyers of pitfalls so they can protect their interests by seeking proper advice.

Statistics compiled by the United States Department of Agriculture show land purchases by installment contracts have increased in recent years. In 1956, approximately 9.6 percent of all land transactions in Nebraska were by installment contracts. In 1957, the percentage had risen to 13.4. From the viewpoint of buyers, if use of installment contracts can serve their needs better than mortgages but not disproportionately increase the risk, utilization of such agreements would appear economically advantageous. On the other hand, if contracts give an unfair advantage to the one with superior bargaining power, their use should be undertaken only with a full understanding of the consequences. Therefore, this study compares land contracts with mortgages to show the advantages and disadvantages of each.

A. Theory of a Land Contract

An installment land contract is an agreement for the purchase and sale of a specific parcel of land.[2] Usually, after a small down

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[1] This is one of a series of articles written under the sponsorship of the Agricultural Economics Division, College of Agriculture, University of Nebraska, for the purpose of providing a summarization of the law of installment land contracts.

[2] Apking v. Hoefer, 74 Neb. 325, 104 N.W. 177 (1905); Wilderman v. Watters, 149 Neb. 102, 30 N.W.2d 301 (1948); 12 Am. Jur., Contracts, § 234, p. 757; See also Neb. Rev. Stat. § 76-205 (Reissue 1950) which states that the intent of the parties must be derived from the entire instrument.

payment, the buyer makes payments over a specified period of time at the conclusion of which he receives full title.[3] While the periodic payments continue, he has the use, possession and control of the property even though title remains in the seller. Under these circumstances, the law recognizes that the buyer should bear the duties of ownership. Therefore, the doctrine of equitable conversion splits the title into (1) the bare legal title retained by the seller and (2) all other ownership characteristics transferred to the buyer.[4] In other words, the buyer has an equitable estate composed of all rights and duties of ownership while the seller holds legal title as security, subject to those rights.[5]

Because of equitable conversion, the situation is analogous to a mortgage. For example, if a buyer purchases land, receives title and gives a mortgage back, he has almost the identical estate so far as the possession, use and control of the land are concerned as he would have under a contract.

One of the most generally recognized practical disadvantages of mortgages is that mortgagees demand larger initial payments than do those selling on land contracts. On the other hand, the practical disadvantage of land contracts is the lack of adequate statutory safeguards against strict foreclosure. These considerations are more fully explored in subsequent portions of this paper.

[3] See Justice v. Button, 89 Neb. 67, 131 N.W. 871 (1925) which holds that the seller need not have perfect title at the time of execution, but impliedly must perfect it at performance time; but that title must be marketable; Tierney v. Dietsch, 110 Neb. 462, 194 N.W. 475 (1923); McLaughlin v. Nelson, 113 Neb. 308, 202 N.W. 871 (1925). See also Northouse v. Torstenson, 146 Neb. 187, 19 N.W.2d 34 (1945) which states that a marketable title is one which can be sold readily to a reasonably prudent man. For other standards, see Neb. Rev. Stat. §§ 76-601 to 76-644 (Reissue 1958). Comments in connection with each section plus other standards of title examination which have not been legislatively approved may be found in the Nebraska Lawyer's Desk Book.

[4] See Stukenholtz v. Parriott, 113 Neb. 296, 202 N.W. 873 (1875) which held that a buyer is not entitled to possession unless expressly provided in the contract. For the rule of equitable conversion, see United States v. Sode, 93 F. Supp. 398 (1950); In re Wiley's Estate, 150 Neb. 898, 36 N.W.2d 483 (1949), opinion supplemented 151 Neb. 633, 38 N.W.2d 434 (1949); Jewett v. Black, 60 Neb. 173, 82 N.W. 365 (1900).

[5] I Glen, Mortgages, § 14 (1943); Federal Farm Mtg. Corp. v. Fischer, 137 Neb. 559, 290 N.W. 444 (1940); Edminister v. Higgins, 6 Neb. 265 (1877). See also 17 Neb. L. Bul. 54 (1938).

II. SOME MAJOR CONSIDERATIONS UNDER A LAND CONTRACT

A. Escrow Agreements

Common practice is to place the deed in escrow until provisions of the contract have been performed.[6] This places control of the title in a neutral third party who must deliver the deed according to the terms of the escrow agreement. By definition, an escrow is "a written instrument which by its terms imports a legal obligation, and which is deposited by the grantor . . . with a stranger or third party, to be kept by the depository until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee or obligee."[7]

A completed escrow transaction is composed of two deliveries. The first delivery is to the depository "in escrow" and the second is to the buyer. The initial delivery must be irrevocable and made[8] to one who is not the agent of either party.[9] Delivery does not take place until it is apparent that it was intended by the parties.[10] The first delivery does not affect the seller's title and the deed is ineffective until given by the escrow agent to the buyer.[11]

The escrow agent, who is sometimes spoken of as the agent of both parties,[12] must deliver to the buyer upon performance of the conditions or return the deed to the seller upon nonperformance. He, of course, exercises discretion as to when the conditions have been performed and substantial performance is insufficient.

[6] McGinley v. Forrest, 107 Neb. 307, 186 N.W. 74, 22 A.L.R. 567 (1921). Also see 2 Pomeroy's Equity Jurisprudence, § 364 (5th ed. 1941).

[7] Killeen v. Doran, 118 Neb. 750, 754, 226 N.W. 435, 437 (1929).

[8] Willis v. Sponsler, 117 Neb. 1, 223 N.W. 637 (1928); Milligan v. Milligan, 161 Neb. 499, 74 N.W.2d 274 (1955); Ambler v. Jones, 102 Neb. 40, 165 N.W. 886 (1917) (where it was held that even if the wife signed the deed that was in escrow, she must also sign the escrow contract when it was for her homestead); Hill v. Natlor, 99 Neb. 791, 157 N.W. 922 (1915).

[9] Ladman v. Farmers & Merchants Bank, 130 Neb. 460, 265 N.W. 252 (1930), where delivery was held incomplete when made to the agent of donor. Wier v. Batdorf, 24 Neb. 83, 38 N.W. 22 (1888) where delivery of deed was held insufficient.

[10] Milligan v. Milligan, 161 Neb. 499, 74 N.W.2d 74 (1955).

[11] Robertson v. Reiter, 38 Neb. 198, 56 N.W. 877 (1893).

[12] Farming Corp. v. Bridgeport Bank, 113 Neb. 323, 202 N.W. 911 (1925).

Strict compliance with the conditions of the contract is essential.[13] If the agent is honestly uncertain concerning whether the contract has been performed, he may hold back performance and interplead the other party when court proceedings are commenced.[14] If it is found that the depository has honestly detained the deed in an attempt to ascertain true ownership, he will not be liable for conversion.[15] He cannot, however, in violation of his trust convey good title to another.[16]

The first delivery merely assures the buyer that the deed will be available when he has performed. Consequently, the deed is not recorded at this time as a conveyance although the contract of sale is usually recorded. Legal title remains in the seller. The delivery of the deed into escrow does not prevent subsequent, recorded liens from attaching to the land. So, if the buyer's contract is unrecorded these subsequent interests, if recorded, will prevail over him even though the deed is in escrow. Because of this possibility, some jurisdictions recognize the doctrine of relation-back. This doctrine treats the second delivery as having taken place at the time of the first delivery and has been applied in cases where: (1) the seller marries subsequent to the first delivery but prior to the second, (2) the seller dies or becomes insane or, (3) he has leased the property. The relation-back doctrine, being a form of equitable relief, is not recognized except to avoid an inequitable result. Thus, it also has been employed to ward off liens of the seller's creditors.[17]

B. TAXES

Ordinarily, taxes on real property are payable by the owner. For purposes of taxation, a land contract is treated as a mortgage to the extent of the unpaid purchase price, and the mortgagee and buyer must pay taxes in proportion to that interest.[18] Usually

[13] Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N.W.2d 150 (1953).

[14] Farming Corp. v. Bridgeport Bank, 113 Neb. 323, 202 N.W. 911 (1925).

[15] Ibid.

[16] Cotton v. Gregory, 10 Neb. 125, 4 N.W. 939 (1880), where the rule was stated but held inapplicable when grantee accepted part of the benefits.

[17] See generally 30 C.J.S., Escrows, § 13, p. 1218; Annot., 117 A.L.R. 84. For authority that the doctrine does apply against creditors of the vendor, see Stokewell v. Shalit, 204 Mass. 270, 90 N.E. 570 (1910); Whitfield v. Harris, 48 Miss. 710 (1873); but see May v. Emerson, 52 Ore. 262, 96 Pac. 454, 16 Ann. Cas. 1129 (1908).

[18] Neb. Rev. Stat. § 77-1401 (Reissue 1950). See also III American Law of Property, § 11.35, p. 101 (1952).

the buyer agrees in the contract to pay all of the taxes and, if the contract is recorded, he is assessed for all of the taxes.

C. IMPROVEMENTS

Improvements which a buyer would reasonably assume are part of the freehold pass under a contract of sale if no contrary intent appears.[19] In *Roden v. Williams*,[20] the defendant sold land to the plaintiff without mentioning that defendant's tenant owned improvements consisting of a granary, a big shed, a cattle shed, a hog shed and a privy. When the tenant removed these buildings after the signing of the contract, it was held that the defendant was liable to the plaintiff for their value because they were improvements which the plaintiff, without notice to the contrary, had a right to assume were part of the land.

D. CROPS

"Crops", a term used in this discussion to mean only annual crops such as corn, wheat and rye which are grown by planting and cultivation, are frequently classified by courts either as personal property or as real property to determine their disposition under various circumstances such as in case of death, default, or foreclosure. One of the chief incidents of real property ownership is the right to receive profits from the land in the form of rent and crops. Thus, recent cases support the view that these rights pass to the buyer, devisee or heir of the land unless a contrary intent appears.[21]

Historically, courts ruled that mature crops, those requiring no further support from the soil, were personal property and that unmatured crops were real estate. The Nebraska Supreme Court rejected this distinction, however, and adopted the view that unharvested crops, unless reserved to the seller in the land contract, become the property of a buyer when he takes possession. Har-

[19] Neb. Rev. Stat. § 76-104 (Reissue 1950) states in part, "An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested. . . ."

[20] 100 Neb. 46, 158 N.W. 360 (1916).

[21] See generally, 15 Am. Jur., Crops, § 11, p. 202; see also Roden v. Williams, supra. Crops are regarded as appurtenant to realty and pass by deed unless a contrary intent appears. Cooper v. Kennedy, 86 Neb. 119, 124 N.W. 1129 (1910); In re Estate of Anderson, 83 Neb. 8, 118 N.W. 1108 (1908).

vested crops, of course, are not appurtenant to realty and therefore title to them does not pass to the buyer but remains in the seller.[22]

Even though a buyer defaults and title to the land is in litigation, he may harvest the crops; and this is true even though the buyer has been divested of possession. It has been held that such a right is unavailable to one the court finds occupied the land as a trespasser.[23] Further, when the defaulted contract contains forfeiture provisions of both land and crops, the buyer or his tenant may still harvest the crops until the seller has taken legal action to regain possession.[24]

1. *Status of Crops After Judicial Sale*

Annual growing crops belonging to the debtor do not pass to the buyer at foreclosure sales in Nebraska[25] and whether severed or not such crops are classified as personalty. Therefore, the debtor who loses possession by virtue of foreclosure proceedings may still re-enter to harvest crops.[26] This view, followed by only a minority of courts, has been criticized for not giving effect to the intent of the parties.[27] It encourages uninterrupted tillage to the soil, however, when title to the land on which the crops are growing remains unsettled and on this basis the rationale appears sound.

E. INSURANCE

Some jurisdictions, including Nebraska, by applying the doctrine of equitable conversion, place the entire risk of loss on the

[22] 8 Thompson, Real Property, § 4581, p. 528 (1940); See Annot., 95 A.L.R. 1127 (1935).

[23] Warner v. Sohn, 86 Neb. 519, 125 N.W. 1072 (1910).

[24] Sornberger v. Berggren, 20 Neb. 339, 30 N.W. 413 (1886). See also Perkins v. Potts, 52 Neb. 110, 71 N.W. 1017 (1897) where it was held that in the absence of legal action by the seller to regain possession, an attornment was void and the buyer through his tenant retained legal possession.

[25] Aldrich v. Bank of Ohiowa, 4 Neb. 276, 89 N.W. 726 (1876); Foss v. Marr, 40 Neb. 559, 59 N.W. 122 (1894); Jensen v. Gurley Grain Co., 128 Neb. 266, 258 N.W. 549 (1935).

[26] Jensen v. Gurley Grain Co., 128 Neb. 266, 258 N.W. 549 (1935).

[27] See note, 15 Neb. L. Bul. 399 (1937) where the rule is compared with the majority rule. For cases holding that rights to crops as well as rent are so much a part of the land that they descend as realty, see Hahn v. Verrett, 143 Neb. 820, 11 N.W.2d 551 (1943); Hiatt v. Hiatt, 146 Neb. 652, 20 N.W.2d 921 (1909).

buyer whether he is in or out of possession.[28] Other jurisdictions place the risk of loss on the one who by the contract will possess the land. The latter rule seems more equitable because it is more probable that the person who is in possession of the land will be able to explain a loss than it is for one who is not in possession. For this reason the latter rule has received favorable comment by legal writers.[29]

In Nebraska, both a seller and a buyer have an insurable interest and may insure the property for its full insurable amount and collect the entire proceeds in case of destruction. A special difficulty arises, however, when the seller continues to insure the property after a contract has been executed and then destruction occurs. Theoretically, he has nothing to insure because the buyer has the risk of loss. What should be done with the proceeds of the insurance? Some authorities hold that the seller may keep them even though the buyer remains liable for the full purchase price. By this rule, the seller profits by the amount of the compensable damage even though the title he will ultimately convey is deficient to the extent of the damage. Nebraska's rule in this respect is a fairer one and specifies that if the seller insures the property and destruction occurs, the purchase price is reduced to the extent of the insurance recovery.[30] The remainder of the loss falls on the buyer.

The buyer should insure the property. By doing so, he is in a better position to insure to a higher or more current percentage of value as well as to provide coverage for improvements to the property.

F. Waste

In the previous section, consideration was given to the rights and liabilities of the parties to the contract if destruction of the subject matter occurred through no one's negligence. This topic concerns actions available to the parties if destruction occurs through negligence. If one of the parties to the contract commits a negligent act, the other party's remedy is called "waste". Where third persons are liable, the action is for trespass.

[28] See generally, Simpson, Legislative Changes in the Law of Equitable Conversion by Contract, 44 Yale Law Journal 754 (1935), and III American Law of Property, § 11.31, p. 96 (1952).

[29] Ibid.

[30] McGinley v. Forrest, 107 Neb. 309, 186 N.W. 74, 22 A.L.R. 567 (1921). There was a large discrepancy between the insurance recovery and the actual value of the house, which the buyer must absorb.

Waste is the destruction, material alteration, or deterioration of all or a material part of the freehold by any person rightfully in possession but who has neither fee title nor the full estate.[31] If the seller has retained possession pending completion of the contract, he is liable to the buyer for injuries to the property beyond ordinary depreciation or deterioration.[32]

The principles of waste in the law of mortgages are applicable to land contracts. The general rule is that when the buyer is in possession under a land contract he can do nothing which will impair the security of the seller.[33] Nebraska has held that an injunction is available to the mortgagee to prevent deterioration of the land.[34]

G. Third Party Liability

If damage to the property occurs through the negligent or willful acts of third persons, an action of trespass may be brought. Because it arises out of an invasion of the right to possession, it is available to a buyer in possession.[35] An allegation that the plaintiff is the equitable owner of the premises under a contract of sale at the time of loss is sufficient for the buyer to maintain a cause of action.[36] The buyer cannot, however, recover for more than his portion of the loss measured by the percentage paid of the total purchase price.[37]

The reader may wonder why a buyer may recover from third persons only those damages proportionate to his paid-in equity but in the prior insurance illustration the buyer received full credit on the purchase price for the insurance proceeds received by the seller. Because the doctrine of equitable conversion places as between the parties the full loss on the buyer, it would seem that he logically could recover from third parties the entire amount

[31] See generally, 55 Am. Jur., Vendor & Purch, § 390.

[32] Hayman v. Rownd, 82 Neb. 598, 118 N.W. 328 (1908); Fawn Lake Ranch Co. v. Cumbow, 102 Neb. 288, 167 N.W. 75 (1918); Bee Bldg. Co. v. Peters Trust Co., 106 Neb. 294, 183 N.W. 302 (1921).

[33] III American Law of Property, § 11.22 (1952).

[34] Vybiral v. Schildhauer, 130 Neb. 433, 265 N.W. 241 (1936), where the waste alleged was the removal of growing timber.

[35] See generally, III American Law of Property, § 11.33 (1952); H. & G., I. R. R. v. Ingalls, 15 Neb. 123, 16 N.W. 762 (1883); Gartner v. Chicago, R. I. & P. R. R., 71 Neb. 444, 98 N. W. 1052 (1904).

[36] Gartner v. Chicago, R. I. & P. R. R., 71 Neb. 444, 98 N.W. 1052 (1904).

[37] H & G., I. R. R. v. Ingalls, 15 Neb. 123, 16 N.W. 762 (1883).

of losses sustained which he ultimately must replace. This anomaly is an outgrowth of old distinctions between law and equity and does not necessarily repudiate the doctrine of equitable conversion. Presently, there is no logical necessity for the rule because: (1) a buyer may recover for only that portion of the entire loss which he must bear by equitable conversion and (2) trespassers benefit in cases where an absentee seller is unavailable or otherwise is unwilling to be joined as a party plaintiff.

The best course is for the buyer to join the seller as either a party plaintiff or defendant if the purchase price has not fully been paid, and there is some indication in the cases that there might be a defect of parties if this is not done.[38] The seller in such an action cannot complain that the buyer is in default under the contract or that the contract is insufficient in law. The primary consideration of the court in awarding damages is that the real party in interest has been compensated, and that the defendant will not be subject to another suit for the same damages. If the seller is not joined as a party, he may recover in a later action for damages to the extent of his interest in the property, measured by the unpaid purchase price.

H. The Relationship of the Buyer to the Seller's Creditors and Assignees

Consideration should now be given whether a buyer's right to pay his seller under the contract is affected either by notice of an assignment by the seller or by registration of a judgment against the seller. In Nebraska a judgment rendered in, or transferred to, the county where the land is located becomes a lien against the judgment debtor's lands.[39] If the seller is a debtor, lands sold by him on contract become subject to the judgment lien because the seller has title. If the contract is executed before such judgment decree, the buyer's interest is superior to the seller's creditors regardless of whether the contract is recorded.[40]

[38] Gartner v. Chicago, R. I. & P. R. R., supra, note 36. If the buyer has not paid the entire purchase price, he cannot recover for more than his portion of the loss. Murphy v. Chicago, B. & Q. R. R., 101 Neb. 73, 161 N.W. 1048 (1917).

[39] Neb. Rev. Stat. § 25-1504 (Reissue 1956).

[40] Omaha Loan & Bldg. Co. v. Turk, 146 Neb. 859, 21 N.W.2d 865 (1946), where it was held that the prior filing of a judgment has no effect on the priority of a mortgage then in existence, the only requirement being that the mortgage be duly recorded before it is entitled to priority.

The judgment becomes a lien only on the seller's interest which, of course, is the unpaid purchase price.[41] Therefore, every payment the buyer makes to the seller after the lien attaches hurts the creditor because in effect, an amount of land equal to each payment is transferred to the buyer in fraud of the creditor.

The question thus arises: when and to whom may a buyer safely make payments after a judgment lien has attached? Nebraska has held that the mere filing of a judgment against the seller is not constructive notice to the buyer of the judgment creditor's rights.[42] In other words, the law places no burden on the buyer to search the records before each payment to ascertain whether liens have attached since the last prior payment. He may safely pay until he has actual notice of the judgment lien. No Nebraska Supreme Court case decides what constitutes actual notice, but dicta in *Filley v. Duncan* indicates that positive action by a creditor in the form of a creditor's bill is necessary to modify the buyer's duty to pay pursuant to the contract terms.[43] This view appears to be a sound one because neither constructive nor actual notice is a proper criterion for modifying a prior contract.

After actual notice is received, the buyer is required to assume the initiative in determining to whom he can safely make payments. Otherwise, he would pay at his peril. Fairness would seem to require that this burden should be on the creditor but nevertheless the majority of other states which have decided the question hold that the buyer can continue safely to pay his seller only until he receives actual notice. Until *Filley v. Duncan* is reaffirmed, a prudent buyer in Nebraska should follow the majority rule. After notice, the buyer should be cautious in making

[41] Courtnay v. Parker, 16 Neb. 311, 20 N.W. 120 (1884); Bauermeister v. McDonald, 124 Neb. 142, 247 N.W. 424 (1932); Olander v. Tighe, 43 Neb. 344, 61 N.W. 633 (1895).

[42] Wehn v. Fall, 55 Neb. 546, 76 N.W. 13 (1898).

[43] 1 Neb. 134 (1871). At page 144, the Court said, "Whether a simple notice to the vendee of the existence of judgment liens acquired since her contract, would be sufficient to make any further payments to the vendor, the judgment debtor, at her own peril, it is unnecessary to decide. In my opinion, however, it is not. In a proceeding in the nature of a creditor's bill, payment could be enjoined until the rights of the parties are determined. The party who seeks to interfere with and override a lawful transaction, and intercept payments due under legal obligations, and have the same applied in satisfaction of his claims should, it seems to me, provide himself with authority from some competent power." This theory is unique and other authority supporting this view could not be found.

further payments without first consulting both the judgment creditor and the seller. A possible arrangement to protect the buyer would be for him, with consent of the others, to pay the judgment and deduct the amount paid from the remaining balance due on the purchase price. Such payment has been made and successfully deducted where the incumbrance was in the nature of a tax lien.[44]

In the other situation, assignment by the seller, the seller's assignee stands in the same shoes as the seller, so the buyer can safely pay the seller in discharge of his obligation until he has notice of the assignment.[45]

I. Statutory Interest of Surviving Spouse in Deceased's Contract Equity

In Nebraska, dower and curtesy, which were the surviving spouses' legal share of the deceased's property, have been abolished.[46] Dower was the wife's share of the husband's estate and curtesy was the husband's share of the wife's estate. In their place, Nebraska has by statute given the surviving spouse, man or wife, a definite percentage of the deceased spouse's property.[47] This statutory interest is actually an enlargement of the dower-curtesy laws for it applies to both real and personal property. Before dower and curtesy were eliminated in 1907, a wife in Nebraska had no dower rights in property of this nature because the husband had only possession and equitable title during his lifetime, not a freehold estate.[48] At the present time, however,

[44] Mill v. Saunders, 4 Neb. 190 (1875). It is doubted whether the vendee could do this as a matter of right. After notice, it would to a certain extent be a cloud on the title that the vendor could convey in the same way as a tax lien (if the vendee did not have the duty to pay it) so there is some logic in allowing a vendee to do it. This may be more enhanced where the contract provides for a warranty deed with usual convenant against encumbrances. See Maupin, Marketable Title to Real Estate, § 203, p. 552 (2d ed. 1921).

[45] Gwynne v. Goldware, 102 Neb. 260, 166 N.W. 625 (1918). See Annot., 87 A.L.R. 1515 (1933).

[46] Neb. Rev. Stat. § 30-104 (Reissue 1956).

[47] Neb. Rev. Stat. § 30-101 (Reissue 1956).

[48] See generally 2 Pomeroy's Equity Jurisprudence, § 368 (1941) for common law rule. In Crawl v. Harrington, 33 Neb. 107, 49 N.W. 1118 (1891), it was held before dower was abolished that the wife received no dower rights in equitable interests of deceased. In Cutler v. Meeker, 71 Neb. 722, 99 N.W. 514 (1904) also decided before dower was abolished, it was held that equitable interests of deceased were alienable, de-

Section 30-101 of the Nebraska statutes provides that the surviving spouse's share may be taken against both legal and equitable properties of the deceased.

Where the full purchase price has been paid and the deceased at the time of his death had a right to a conveyance of the land, the weight of authority is that the wife may demand her statutory share.[49] However, it would seem equitable that if the deceased purchaser possessed a lesser share at his death, the surviving spouse should contribute a proportionate share toward the performance of the contract before his or her rights may be enforced. Some cases in other jurisdictions have adopted this rule.[50]

In the case of mortgages, Section 30-320 of the Nebraska statutes provides that the deceased mortgagor's personal estate must first be used to discharge indebtedness on the land.[51] If the similarities of the two security devices are accepted, this rule should apply as well to the land contract situation by analogy. If the note which accompanies a mortgage is a "debt" within the meaning of the statute,[52] then, the indebtedness represented by a land contract also is a personal "debt" of the buyer. If this is true, the surviving spouse would be entitled to receive his or her statutory share in the land free of debt or at least under an arrangement for the payment of the debt.

J. Assignment

The principles in connection with assignment of contracts are simple when the type of assignment is known. Three methods are used. The first is a novation which involves a complete as-

scendible and devisable as if legal title were held. The Harrington rule was confirmed in Grandjean v. Beyl, 78 Neb. 354, 114 N.W. 414, 15 Ann. Cas. 577 (1907) in spite of the Cutler case because it had become a rule of property. For current cases indicating status of equitable interests see Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252 (1954) and Meck v. Wiig, 129 Neb. 746, 262 N.W. 829 (1933) where the court regarded the statutory interest as an enlargement over dower, a contingent interest in the fee.

[49] See Annot., 66 A.L.R. 65 (1930).

[50] Hart v. Logan, 49 Mo. 46 (1846); Greenbaum v. Austrian, 70 Ill. 591 (1873).

[51] Lienhart v. Conway, 146 Neb. 821, 21 N.W.2d 749 (1946) where it was held that the deceased's personal estate must first be used to pay off the debt of the mortgage when the deceased was personally liable on the note.

[52] Neb. Rev. Stat. § 30-230 (Reissue 1956).

signment by the assignor or by the party liable on the contract. Here the promisor on the contract agrees to look only to the assignee for its performance and the effect is that a new contract has been made. The second method is the same except that the promisor does not release the assignor of liability. This type most frequently occurs in refinancing land contracts. The third type occurs when a buyer contracts to sell under another contract the land he is buying on the first contract. He promises under the terms of the later contract that he will acquire title and give his deed to the subcontractor at the time set for performance. The buyer under a subcontract can look only to his seller for performance, whereas if he claims by way of an assignment of the original contract he also is entitled to performance from the original seller.

Because the law favors free alienability of land, prohibitions contained in contracts against assignment are usually narrowly construed.[53] Nebraska has held that where the assignee of a contract has fully performed by payment to the seller, the assignee was entitled to specific performance even though the contract contained a provision that no assignment would be valid unless assented to by the seller.[54]

1. *Assignment by Vendee*

It is generally held that a purchaser under a contract has an interest that may be sold or transferred to another.[55] He cannot, however, create in another an interest greater than he has because his interest is equitable, not legal,[56] and even though the assignee assumes the obligations of the contract, the buyer is not relieved of liability.[57] The seller, if sued by the assignee, may raise any defenses thereto that he could raise against the assignor. Where the assignee has performed the contract, he is entitled to bring a suit of specific performance against the seller.[58] On the other hand, doubt has been raised by some writers as to whether, in the ab-

[53] III American Law of Property, § 11.36, p. 105 (1952).

[54] Wagner v. Cheney, 16 Neb. 202, 20 N.W. 222 (1884) where the court allowed the plaintiff-assignee specific performance and note was made of the fact that no penalty had been provided in case of assignment and also that the plaintiff offered to secure the remainder of the debt with a mortgage according to the terms of the contract.

[55] Tierney v. Dietsch, 110 Neb. 462, 194 N.W. 475 (1923).

[56] Gwynne v. Goldware, 102 Neb. 260, 166 N.W. 475 (1923).

[57] Pollard v. Laeson, 115 Neb. 136, 211 N.W. 998 (1927).

[58] Wagner v. Cheney, 16 Neb. 202, 20 N.W. 222 (1884).

sence of an assumption of the duty to pay under the contract, the seller may enforce his rights against the assignee.[59] Nebraska has held that such obligations are deemed to be assumed in the absence of express provisions.[60] But where the original parties have contracted for deferred payments, the assignee cannot require the vendor to accept his notes when it appears that it was the security of the original vendee that was desired.[61]

2. *Assignment by Vendor*

Ordinarily, the contract embodies the personal obligation of the buyer to pay. Negotiable notes, such as those used in mortgage transactions, are not used frequently. The vendor, holding both the legal title and the contract, may by sale of the land or by assignment of the contract effectively transfer his interest to his assignee. In either case, an assignee with notice stands in the shoes of the original vendor in so far as the performance of the contract is concerned. If the legal title to the land is not transferred to the assignee when the contract is assigned, the assignee is entitled to have the land conveyed to him when the time for performance of the contract arrives.[62] The rights of a buyer or assignee who purchases from the seller without notice of a prior contract is discussed in the section concerning notice.

III. FACTORS AFFECTING THE ENFORCEABILITY OF THE CONTRACT

The following subsections under this heading are concerned with the contract's sufficiency in law and its enforceability against a seller or against his assignee.

A. Statute of Frauds

The original English statute of frauds of 1677 was enacted to prevent fraud and perjuries on landowners by persons who sought to prove an effective contract or conveyance of land by anything but written evidence of the agreement.[63] Most states have stat-

[59] III American Law of Property, § 11.38 (1952); Restatement, Contracts, § 164 (1932).

[60] Murphy v. Illinois Trust & Savings Bank, 57 Neb. 519, 77 N.W. 1102 (1899).

[61] Rice v. Gibbs, 40 Neb. 264, 58 N.W. 724 (1894).

[62] III American Law of Property, § 11.41 (1952).

[63] Stat. 29 Car. II, C. 3 (1677); see also III American Law of Property, § 11.3 (1952).

utes that are similar and which can be traced to the original English statute. For the most part, Nebraska has preserved the substance of the English statute. Although the statute of frauds embraces several different classes of oral transactions within its prohibitions, one particular part is pertinent to this paper. It states, "Every contract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made."[64] The several requirements which must be met in order to avoid the operation of this statute are treated separately:

1. *The Memorandum*

No particular degree of formality is required in the execution of a written agreement so long as it is signed by the seller[65] and contains an adequate description of the land, identifies the buyer,[66] and states the price to be paid.[67] The exact conditions of payment need not be stated.[68] The contract may be entered into by a series of correspondence so long as a definite offer and an unconditional acceptance are ascertainable.[69] The contract is sufficient if no specific time for performance is contained in the writings, and the buyer need only comply within a reasonable time to be entitled to a decree of specific performance.[70] Therefore, the requirements of the statute are that the terms of the contract be

[64] Neb. Rev. Stat. § 36-105 (Reissue 1952).

[65] Smith v. Severn, 93 Neb. 148, 139 N.W. 858 (1913); Gartell v. Stafford, 12 Neb. 545, 11 N.W. 732 (1882); Campbell v. Kewanee Finance Co., 133 Neb. 887, 277 N.W. 593 (1938); Ballou v. Sherwood, 32 Neb. 666, 49 N.W. 790 (1891); Robinson v. Cheney, 17 Neb. 673, 24 N.W. 378 (1885).

[66] Barkhurst v. Nevins, 106 Neb. 33, 182 N.W. 563 (1921).

[67] Frahm v. Metcalf, 75 Neb. 241, 106 N.W. 227 (1905); McWilliams v. Lawless, 15 Neb. 131, 17 N.W. 349 (1883); Collyer v. Davis, 72 Neb. 887, 101 N.W. 1001 (1904).

[68] Ruzicka v. Hotovy, 72 Neb. 589, 101 N.W. 328 (1904).

[69] Pottratz v. Piper, 95 Neb. 145, 145 N.W. 265 (1914); Shoff v. Ash, 95 Neb. 255, 145 N.W. 271 (1914); O'Shea v. Smith, 142 Neb. 231, 5 N.W.2d 348 (1942). A definite offer and an unconditional acceptance must be ascertainable from the correspondence. Horn v. Stuckey, 146 Neb. 625, 20 N.W.2d 692 (1945); Mercer v. Payne & Sons Co., 115 Neb. 420, 213 N.W. 813 (1927); Alexander v. Turner, 139 Neb. 364, 297 N.W. 589 (1941); Gilgren v. Price, 140 Neb. 124, 299 N.W. 325 (1941).

[70] Iske v. Iske, 95 Neb. 603, 146 N.W. 918 (1914).

fairly determinable from the writing or writings in order to avoid the statutory bar.

2. *Part Performance*

Most often, sellers seek to have a court of equity apply the statute as a bar to an action of specific performance by buyers. For example, buyers who have purchased land by oral contract usually seek to have the court compel the seller to convey the land. If other relief such as damages will adequately compensate the buyer, specific performance is unavailable to him.[71] In many cases, however, possession is the fairest possible relief to the buyer who has contracted to purchase land in good faith. Therefore, because of frauds that would result through use of the statute as an absolute bar to relief, certain exceptions to its operation have developed and some contracts are enforced even though there is no written memorandum of the agreement. A Nebraska statute provides: "Nothing contained in . . . [the preceding] . . . sections shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance."[72] Courts have utilized several tests which are helpful in applying this statute but those tests certainly are not to be exclusively relied upon in this litigious area of law.

a. *Solely Referable Rule*

In *Overlander v. Ware*,[73] the court stated, "The thing done constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him."[74] Later, in *Baker v. Heavrin*,[75] a buyer was denied specific performance when he showed as part performance acts of purchasing tools for use on the purchased land and obtaining a loan. The court stated that these acts did not refer to the performance contemplated under this contract. This rule was applied in numerous other cases in

[71] Anderson v. Anderson, 150 Neb. 879, 36 N.W.2d 287 (1949).

[72] Neb. Rev. Stat. § 36-106 (Reissue 1952).

[73] 102 Neb. 216, 166 N.W. 611 (1918).

[74] Overlander v. Ware, 102 Neb. 216, 218, 166 N.W. 611, 612 (1918).

[75] 148 Neb. 766, 29 N.W.2d 375 (1947).

denying relief so that at one time it could be said that unless all of the acts done by a buyer or grantee were explicable as performance of the conditions of the contract rather than some other relationship no relief would be granted.[76] The rule was eased in *Riley v. Riley,* where the court said, ". . . the fact that there may be adversary evidence indicating that the acts refer to some other contract or situation will not defeat this satisfaction of the rule."[77] Presently, it is thought by some writers that the former harshness of the Nebraska rule has been eased by recent cases[78] and the statute restored to its function of preventing frauds on buyers.

b. *Payment of the Purchase Price*

Generally, payment of the purchase price alone without other acts of performance by the buyer is not sufficient[79] because the buyer has an adequate remedy at law to recover payments made. Something more than mere payment of the purchase price therefore must be shown before a court of equity will grant specific performance. Specific performance has been granted in Nebraska in cases where the buyer under a contract had fully performed and the seller had delivered possession.[80]

3. *Possession*

A particularly difficult problem arises when a tenant in possession of the land orally contracts with his landlord to purchase this land

[76] Taylor v. Clark, 143 Neb. 563, 10 N.W.2d 495 (1943); Crnkovich v. Crnkovich, 144 Neb. 905, 15 N.W.2d 66 (1944); Caspers v. Frerichs, 146 Neb. 740, 21 N.W.2d 513 (1946). See also Smith v. Kinsey, 148 Neb. 786, 28 N.W.2d 588 (1947); but compare Herbstreith v. Walls, 147 Neb. 805, 25 N.W.2d 375 (1947) where specific performance was granted after the plaintiff had proved an unsigned contract for the purchase of the land and part performance by him within its terms. In this case, however, plaintiff had little difficulty in proving a contract.

[77] 150 Neb. 176, 183, 33 N.W.2d 525, 529 (1948).

[78] Lake, Selected Problems in Contract Liability, 32 Neb. L. Rev. 1 (1952). See also Teft, The Doctrine of Part Performance in Nebraska, 7 Neb. L. Bul. 327 (1929); Note, 27 Neb. L. Rev. 417 (1948), and Nebraska State Bar Association Proceedings in 28 Neb. L. Rev. 231 (1949).

[79] Bloomfield State Bank v. Miller, 55 Neb. 243, 74 N.W. 569 (1898); Riddell v. Riddell, 70 Neb. 472, 97 N.W. 709 (1903); Barkhurst v. Nevins, 106 Neb. 33, 182 N.W. 563 (1921); Herring v. Whitford, 119 Neb. 724, 230 N.W. 665 (1930).

[80] Morrison v. Gosnell, 76 Neb. 539, 196 N.W. 753 (1906); Lipp v. Hunt, 25 Neb. 91, 41 N.W. 143 (1888).

because the tenant in this situation must show actions in addition to possession which are more consistant with a contract of purchase than with a tenancy. Former holdings of the Nebraska Supreme Court based on the "solely referable" rule indicated such a contract would be impossible to prove.[81] In a recent case, however, a tenant in possession obtained relief on his oral contract to purchase when he proved he had paid amounts greater than the previous rent and also had paid insurance and taxes which as a tenant he would not be required to do.[82]

4. *Improvements*

Specific performance is often granted to a buyer who has made improvements on the land because damages would not adequately compensate him for his time and effort. Improvements which are consistent with a buyer's possession under a contract are usually those of a permanent nature such as buildings and lasting improvements on structures.[83] It has been held that when the value of improvements exceeds the value of the land specific performance will be granted;[84] and also that recovery may be had by persons who improve land and rely upon promises that it will be given them if they remain on and work the land until the death of the promisor or some other event.[85]

B. Notice and the Recording Acts

In this subsection, consideration is given to the effect of notice to third parties of the transaction. Between the buyer and seller,

[81] Steger v. Kosch, 77 Neb. 147, 108 N.W. 165 (1906); Lewis v. North, 62 Neb. 552, 87 N.W. 312 (1901); Schields v. Harbach, 49 Neb. 262, 68 N.W. 524 (1896) where possession by a tenant under a contract to purchase was held insufficient to constitute part performance to take it out of the statute of frauds. See also Crnkovich v. Crnkovich, 144 Neb. 904, 15 N.W.2d 66 (1944).

[82] Herbstreith v. Walls, 147 Neb. 805, 25 N.W.2d 409 (1946).

[83] Campbell v. Kewanee Finance Co., 133 Neb. 887, 277 N.W. 593 (1938) where in addition to painting the barn and planting crops, the vendee fertilized the soil and leveled a barrow pit.

[84] Coleridge Creamery Co. v. Jenkins, 66 Neb. 129, 92 N.W. 123 (1902).

[85] Hackbarth v. Hackbarth, 146 Neb. 919, 22 N.W.2d 184 (1946), where the grantee was entitled to a conveyance only after clear, satisfactory and unequivocal proof of agreement. But see Merriman v. Merriman, 75 Neb. 222, 106 N.W. 174 (1905) where proof was held insufficient; Garner v. McCrea, 147 Neb. 541, 23 N.W.2d 731 (1946); but compare Wlaschin v. Affleck, 167 Neb. 403, — N.W.2d — (1958) where a buyer was granted damages for improvements made after an oral contract.

recordation of the contract is not important, but where third parties have acquired or subsequently acquire liens on the land, such as mechanics liens, other mortgages, judgments or even other contracts of sale, recordation is important to protect the priority of the buyer's equity.

Generally, a buyer in good faith, having no actual or constructive notice of liens or equitable rights of third persons in the land, is protected against prior unrecorded interests in the land. In order to become a buyer in good faith, he must not have been notified of outstanding encumbrances prior to the sale through (1) actual knowledge of other liens; (2) facts which would cause a reasonable man to investigate further; (3) a search of the records or constructive notice.

The Nebraska notice statute is a "race-notice" type enactment which has been adopted by a minority of other jurisdictions.[86] Under this statute, the buyer or other lienholder must record his interest before other interests are recorded.[87] In other words, he must "race" to the record to record first. The time of execution of the instrument or attachment of the lien is unimportant unless it is recorded if subsequent parties have no notice of these interests. The Nebraska statute provides that all interests, including land contracts, must be recorded in the county where the land is located in order to be protected against subsequent recorded interests.[88] A recordable interest in land embraces every conveyance by which real estate may be "aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and leases for one year or for less time."[89] The term "real estate" embraces all lands, tenements, and hereditaments, including chattels real, but not including leases for less than a year.[90]

If the buyer does not search the records, he nevertheless is held to have knowledge of all recorded interests therein which are entitled to be recorded. The buyer need only notice however those interests of record which are traceable to the title of the seller.[91]

[86] IV American Law of Property, § 17.5, p. 545, note 63 (1952).

[87] Neb. Rev. Stat. § 76-238 (Reissue 1950).

[88] Neb. Rev. Stat. § 76-211 (Reissue 1950).

[89] Nb. Rev. Stat. § 76-203 (Reissue 1950).

[90] Neb. Rev. Stat. § 76-201 (Reissue 1950).

[91] Traphagen v. Irwin, 18 Neb. 195, 24 N.W. 684 (1885); Weatherington v. Smith, 77 Neb. 303, 109 N.W. 164 aff'd 77 Neb. 369, 112 N.W. 566 (1906).

Thus, a recorded interest of one whose grantor did not record will not be valid against the buyer who could not discover it in the chain of his own seller's title. Where the buyer has assumed a mortgage on the land, he may rely on the debt and due date of record and need not inquire further.[92] The record must show the land to which the interest attaches. A failure to close the boundaries in the description of the land so that a complete tract was not described was held not to furnish adequate notice of a prior equity.[93]

A recorded mortgage or other interest should be released of record to clear title. This is done either by writing the release on the margin of the record[94] or by recording a certificate of discharge signed by the mortgagee.[95]

In addition to searching the record the buyer must not have actual notice of existing encumbrances on the land. Possession of the land by persons other than the seller is notice to the buyer of whatever rights that person possesses in the land, even though he has taken possession by an unrecorded document. The buyer is also bound to know facts which a reasonable inquiry would elicit. When a house is purchased, possession by one other than the seller is not difficult to ascertain, but with unimproved land possession is not so easily ascertainable. The question whether there is possession or not is a question of fact[96] and the circumstances must appear so suspicious as to put a reasonably prudent man upon inquiry.[97] It has been held that placing a fence around the land and grazing cattle upon it was sufficient to show possession.[98] Also, where a prior conveyance of land by the seller was mistakenly recorded but actually conveyed the land being purchased, it was held that the buyer could not prevail.[99] On the other hand, where the circumstances do not show that the land is possessed by another through a reasonable inspection, the good

92 Stewart v. Walker, 80 Neb. 68, 113 N.W. 814 (1907).

93 Gillespie v. Sawyer, 15 Neb. 536, 19 N.W. 449 (1883).

94 Neb. Rev. Stat. § 76-252 (Reissue 1950).

95 Neb. Rev. Stat. § 76-253 (Reissue 1950).

96 Laughlin v. Garniner, 104 Neb. 237, 176 N.W. 727 modified 104 Neb. 237 (1920).

97 Miller v. Vanicek, 106 Neb. 661, 184 N.W. 132 (1921).

98 Millard v. Wegner, 68 Neb. 574, 94 N.W. 802 (1903); Lyon v. Gombert, 63 Neb. 630, 88 N.W. 774 (1902).

99 Miller v. Vanicek, supra, note 97.

faith of the buyer has been upheld.[100] When actual knowledge of another interest is had before the entire purchase price is paid, the buyer is not a bona fide purchaser to the extent of the payment remaining.[101]

An abstracter is usually employed to compile the recorded interests against the land for the parties. He warrants either to one or both parties that the abstract contains all of the recorded interests affecting the land up to the present transaction. If he has failed to find all of these interests through his own negligence, he is liable on his warranty.[102]

Once a document is recorded, the owner of that interest is protected. A subsequent destruction of the records,[103] the failure of the clerk to record[104] or the act of the clerk in recording wrongly[105] will not deprive the recording party from the protection of the statutes as constructive notice to all who subsequently deal with the land.

C. Joint Tenancies and Tenancies in Common

Joint tenancies and tenancies in common are considered at this point to illustrate the effect of a land contract on these types of land tenure.[106] For purposes of illustration, assume that A and B are brothers, single and hold land jointly by a deed from their father as "joint tenants with right of survivorship." C wishes to purchase this land from A and B. What must C know? A true joint tenancy exists when four unities of ownership are present equally in two or more persons. It is defined as "An estate . . . created in two or more persons at the same time by the same conveyance, and the holders of such an estate must be given an equal and like interest therein and be given equal and like right to the possession of the corpus of the estate. That there must be a unity

100 Bowhay v. Richards, 81 Neb. 764, 116 N.W. 677 (1908); Hunt v. Lipp, 30 Neb. 469, 46 N.W. 632 (1890); Ensign v. Citizens' Interurban Ry., 92 Neb. 363, 138 N.W. 718 (1912).

101 Birdsall v. Cropsey, 29 Neb. 672, 44 N.W. 857, modified, 29 Neb. 679, 45 N.W. 921 (1890); see also Frerking v. Thomas, 64 Neb. 193, 89 N.W. 1005 (1902).

102 Crook v. Chilvers, 99 Neb. 684, 157 N.W. 617 (1916).

103 Deming v. Miles, 35 Neb. 739, 53 N.W. 665 (1892).

104 Perkins v. Strong, 22 Neb. 725, 36 N.W. 292 (1888).

105 Powers v. Spiedel, 184 Neb. 630, 121 N.W. 968 (1909).

106 34 Neb. Law Rev. 280 (1954).

of possession, a unity of interest, a unity of time and a unity of title in the holders of such an estate in order for it to exist. . . ."[107] If one or more of these unities is destroyed, the right of survivorship ceases and a tenancy in common results.

Thus, a tenancy in common may arise "where two or more hold the same land, with interest accruing under different titles, or accruing under the same title, but at different periods, or conferred by words of limitation importing that the grantees are to take in distinct shares."[108] When A and B, the joint tenants, sign the contract to sell this land and deliver possession the unities of possession, interest and title are destroyed because of the doctrine of equitable conversion and thus the survivorship feature is also destroyed.[109] Some consequences of this are: (1) if A or B should die, C must make his payments half to the survivor and the other half to the personal representative of the deceased seller and (2) if A and B regain possession by rescission or C's default, a new deed to recreate the joint tenancy may be required.

If either A or B had contracted singly to sell his interest, the survivorship feature would also be destroyed because the characteristic of a true joint tenancy is that any one of the tenants can destroy the survivorship feature by destroying one of the unities.

It has been said, although no Nebraska case has so decided, that the act of all joint tenants in mortgaging property would not destroy the joint tenancy, whereas the act of one joint tenant in mortgaging would sever the joint tenancy.[110] This is probably explicable in that where all joint tenants mortgage, the unity of interest remains the same, but where one mortgages, his interest in relation to the other co-owners is changed. Also, the doctrine of equitable conversion does not apply to mortgages.

Where land is purchased from sellers who are joint tenants, it is important to specify in the contract whether the survivorship

[107] Stuehm v. Mikulski, 139 Neb. 374, 377, 297 N.W. 595, 597 (1941).

[108] Jones v. Shrigley, 150 Neb. 137, 147, 33 N.W.2d 510, 516 (1949).

[109] Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252 (1954). Although technically the unity of possession is destroyed, it may be doubted whether this is correct, for a joint tenancy can also be had in personal property and by equitable conversion, the joint tenants would have equal substituted rights in the purchase money. On the rationale of this case, if a contract were signed without surrendering possession, equitable conversion would still cause the joint tenancy to be severed. See for an excellent discussion of this case and similar cases in other jurisdictions, Comment, 24 Mo. L. Rev. 108 (1959).

[110] See 34 Neb. Law Rev. 292 (1954).

feature is to control payments made after the death of one of the sellers.

D. Mistake and Incapacity

At the time a contract is made certain requirements must be met; otherwise, the agreement is invalid. The contract must not be for an illegal purpose;[111] there must be no honest mistake as to the important features of the agreement;[112] and the parties must be legally competent. A child must have reached his majority before he has capacity to make other than a voidable contract[113] or be represented by a guardian.[114] Under the common law a woman's capacity to bind her own property by contract was not recognized,[116] but to a large extent this has been rectified by enabling acts so that now a married woman can contract,[115] sue and be sued almost to the same extent as if she were a man.[117] The above features of contract law are usually well understood and applied so that little conflict arises over them.

E. Fraud and Misrepresentation

A cheated man is not bound by his contract. If the seller causes the buyer to rely to his detriment upon false representations, then the buyer may be allowed restitution. In seeking to rescind the buyer cannot accept any benefits under the contract and must deny its force as a binding agreement.[118] Because a comprehensive discussion of this subject requires an analysis of the law of fraud, deceit and torts as well as some statutory authority, no extended treatment is presented here.

111 See generally, III American Law of Property, § 11.21, p. 59 et seq. (1952).

112 Goger v. Voecks, 156 Neb. 696, 57 N.W.2d 621 (1953).

113 Neb. Rev. Stat. § 38-101 (Reissue 1952).

114 Neb. Rev. Stat. § 38-601 (Reissue 1952).

115 Neb. Rev. Stat. § 38-201 et seq. (Reissue 1952).

116 Neb. Rev. Stat. § 42-202 (Reissue 1952). See also Marmet v. Marmet, 160 Neb. 366, 70 N.W.2d 301 (1955).

117 Ginsburg, Contractual Liability of Married Women in Nebraska, 20 Neb. L. Rev. 191 (1941); Neb. Rev. Stat. 25-305, 306 (Reissue 1952).

118 See for an excellent statement of the rule, Wolford v. Freeman, 150 Neb. 537, 35 N.W.2d 98 (1948).

F. Deed of Trust and Power of Sale

In some jurisdictions, the deed of trust is used as a security device. Under this arrangement a deed is delivered to a trustee to hold it subject to the conditions of the trust instrument and to receive payments from the buyer. If the buyer defaults, the trustee is empowered to sell the property extra-judicially for the benefit of the seller and in this way to avoid the process of judicial foreclosure. The chief advantage of deeds of trust, the extra-judicial sale, is not recognized in Nebraska.[119]

Similarly, powers of sale in a mortgage which purport to empower the mortgagee to sell extra-judicially, are invalid.[120] The Nebraska cases consistently adhere to the rule that every conveyance absolute upon its face, when shown to a court of equity to be a security transaction, must be treated as a mortgage and foreclosed as such.[121] Thus, in Nebraska, no unfair advantage can be obtained by a seller of land by use of extra-judicial powers of sale.

G. Mortgage by Deed Absolute

A mortgage by deed absolute, except for bona fide purchasers, also comes to naught in the equity court. Between the parties, when it is shown that a deed absolute on its face was given with the intention only to secure a debt rather than to convey the land described the deed is a mortgage. In other words, passage of title is disregarded when it has been given as security. A Nebraska

[119] At IV American Law of Property, p. 496, § 16204, note 14, "Durfee could find only one state (Neb.) in which the power of sale is judicially nullified. See also Kirkendall v. Weatherby, 77 Neb. 421, 109 N.W. 757, 9 L.R.A. (N.S.) 515 (1906); Cullen v. Casey, 1 Neb. (Unof.) 344, 95 N.W. 605 (1901)."

[120] Fiske v. Mayhew, 90 Neb. 196, 133 N.W. 195 (1911) where in citing Webb v. Hoselton, 4 Neb. 308, the court stated, "The fact that the mortgage in this instance is in the form of a deed of trust does not change its character from a mere security for the payment of money, nor does it convey the legal title nor do the restrictions therein contained prevent the plaintiff from availing herself of the safeguards thrown around the debtor to prevent a sacrifice of her property." See also Hurley v. Estes, 6 Neb. 386 (1877), where an instrument given as security is a mortgage no matter what its form and must be judicially foreclosed.

[121] Wheeler v. Sexton, 34 Fed. 154 (1888) where it was stated that the mortgagee's sole remedy is by judicial foreclosure. See also deed of trust cases, Kyger v. Ryley, 2 Neb. 20 (1873), Comstock v. Michael, 17 Neb. 298, 22 N.W. 549 (1885).

statute declares: "Every deed conveying real estate, which, by any other instrument in writing, shall appear to have been intended only as security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage. . . ."[122] Ordinarily, a deed passes the title to the grantee, but where the deed is accompanied by a defeasance in writing, the two instruments are construed as the equivalent of a mortgage.[123] The grantor can sell the land to another and give good title. The grantee, or mortgagee, cannot gain any advantage from recording his deed, unless the defeasance is recorded at the same time.[124] It can be seen from cases in this and the preceding sections that little advantage can be gained from calling a security transaction anything but a mortgage.

IV. MORTGAGES

This article is concerned with the law of mortgages only as it is applicable to installment land contracts, and therefore the rights and liabilities of parties to a mortgage are not discussed at great length; and it should be emphasized that in any discussion of mortgages much depends upon the terms of the instrument. If the rights and duties are not set forth in the mortgage, the controlling factor is title to the land. This is in the mortgagor. Therefore in the absence of expression, most of the duties of ownership such as upkeep of the land are on the buyer.

The mortgage relationship results from a transfer of title to the buyer who in turn executes a mortgage to either the seller or to a third party creditor. The latter becomes the mortgagee and is vested with a legal lien, usually a first lien, on the land. The salient features are that the seller gives up both title and possession but in a court of equity, the movement of title is disregarded once a security relationship is proven. What the court sees is that each party has substantial equitable rights in the land. The mortgagee

[122] Neb. Rev. Stat. § 76-251 (Reissue 1950).

[123] Ashbrook v. Briner, 137 Neb. 104, 288 N.W. 374 (1939); Campbell v. Ohio Life Ins. Co., 161 Neb. 653, 74 N.W.2d 546 (1956) where the Ashbrook case was approved and followed.

[124] Neb. Rev. Stat. § 76-251 (Reissue 1950). The last sentence reads, "and the person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a defeasance of the same or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith and at the same time." This statute is discussed in Note, 28 Neb. L. Rev. 481 (1949).

has a mortgage lien which represents a security interest. The mortgagor has an equity of redemption—the right to purchase or pay past due payments until foreclosure. It is this equity of redemption that is foreclosed upon default. When the divergencies of mortgage and land contract law are discussed, the foremost feature is the difference between foreclosure by judicial sale and strict foreclosure. The law requires mortgages to be foreclosed by judicial sale. Land contracts may be similarly foreclosed at the election of the seller. On the other hand, strict foreclosure of land contracts is permissible only under certain conditions. Perhaps it is proper to speak of foreclosure also as the presence or absence of an equity of redemption.

A. The Mortgage Foreclosure Process in Nebraska

In the usual mortgage relationship, the mortgagee has a first mortgage on the land together with a negotiable promissory note of the same date signed by the mortgagor. The note represents the debt which is the principal obligation. When it is extinguished, the mortgage is automatically extinguished.

Mortgage foreclosures in Nebraska are governed by statute and a judicial sale is the *exclusive way* by which the mortgagor's equities or rights in the land may be cut off. Any attempt by the mortgagee outside this statutory procedure to sell the land and recover his money is void.[125] This is true even when the parties have agreed by the terms of the mortgage for a different disposition in case of default for insertion of clauses in the mortgage which cut off the mortgagor's rights without court action is a clog on the equity of redemption and void. An instance of this type is found in the sections concerning powers of sale and deeds of trust. Another type of clogging the equity of redemption is strict foreclosure which occurs whenever the mortgagee may by the terms of the instrument or by permission of the court enter the land, seize possession, and declare the mortgagor's interest forfeited and the contract at an end. Strict foreclosure does not involve a sale but only forfeiture and repossession by the seller. It is allowed today in varying forms in a minority of states but then only with certain limitations.[126]

[125] Supra, notes 90, 91, and 92.

[126] See generally, IV American Law of Property, § 16.179 (1952); I Glenn, Mortgages, § 59 (1943).

1. *Stay of Foreclosure*

Upon application by the mortgagor within 20 days after the decree of foreclosure,[127] the court's decree ordering sale of the premises is stayed for nine months.[128] Where a land installment contract is foreclosed as a mortgage a nine months stay is given the buyer.[129] However, if strict foreclosure of a land contract is granted by the court the stay of sale will not be granted.[130] It should be noted that at the election of the seller land installment contracts are foreclosed as mortgages under certain circumstances because the seller wishes a later action for the deficiency rather than just to regain possession of the land.

Nebraska requires the mortgagee on default to elect whether he will sue on the debt or foreclose against the land. By electing to foreclose he has selected his remedy and cannot have judgment against the mortgagor in the same suit for any deficiency between the sale price of the land and the amount of the debt.[131] But later suit is allowed for this deficiency[132] although serious doubt exists that this interpretation of the statute was ever intended by the legislature.[133]

The model foreclosure action is actually an additional stay of sale in itself because it is lengthy and time-consuming.[134] After payment of costs, the proceeds of the sale go first to the mortgagee to the extent of his debt and then to other lienholders according to priority. The remainder belongs to the mortgagor. The mortgagee may sue on the note if the whole or a portion of it is due

127 Columbus Land, Loan & Bldg. Ass'n. v. Phillips, 124 Neb. 672, 247 N.W. 600 (1933) where it was held that no excuses for failure to request stay would be allowed. See also Jenkins Land & Live Stock Co. v. Attwood, 80 Neb. 806, 115 N.W. 305 (1908) where it was held that a sale made within nine months period was void and no title passed.

128 Neb. Rev. Stat. § 25-1506 (Reissue 1956).

129 Spencer v. Moyer, 29 Neb. 305, 45 N.W. 464 (1890); Hawkins v. Mullen, 119 Neb. 567, 230 N.W. 252 (1930).

130 Harrington v. Birdsall, 38 Neb. 176, 56 N.W. 961 (1893).

131 Federal Farm Mtg. Corp. v. Cramb, 137 Neb. 857, 290 N.W. 440 (1940).

132 Federal Farm Mtg. Corp. v. Claussen, 138 Neb. 518, 293 N.W. 424 (1904).

133 20 Neb. Law Rev. 70 (1941). See also "One Action Rule", IV American Law of Property, § 16.201 (1952); I Glenn, Mortgages, § 96, p. 597 (1943). These articles challenge the reasons for requiring two separate actions instead of one. It is pointed out that to require two actions is merely to twice harass the debtor for the same thing.

134 See IV American Law of Property, § 16.185, p. 446 (1952).

and owing. This suit does not destroy the mortgagor-mortgagee relationship even if the mortgaged property is attached but merely results in a money judgment.

The foreclosure suit must be brought in the county where the land is situated.[135] The petition must identify the land, the amount of the debt, and request the land be sold. The court has the power to decree the sale of all or a part of the land, whichever is necessary to discharge the amount due on the mortgage.[136] When it is found that the debt is in substantial default and that the stay of foreclosure has either been waived or has expired, the court decrees foreclosure and orders the sale. The decree is actually a judgment for the debt which must be satisfied from the proceeds of the sale. Because a foreclosure action is equitable, there is no right to a determination of the facts by a jury.[137]

2. *The Sale*

The arrangements for the sale as to the person who is to conduct it, the place, the time and notice must be technically correct. For example, the sale must be made by the sheriff unless some other person is designated by the court,[138] and a special master, appointed to make the sale, must make it. He cannot delegate that authority.[139] The place of sale is the courthouse and a sale from any door is permissible without stipulating it in the notice.[140] The time of sale is determined by the mortgagee and must be conducted at the time it is advertised to be held.[141]

3. *Bidding*

The mortgagee may bid at the sale[142] and thus protect his interest at least to the extent of his lien.[143] If the mortgagee should

135 Neb. Rev. Stat. § 25-2137 (Reissue 1956).

136 Neb. Rev. Stat. § 25-2138 (Reissue 1956).

137 Dold v. Munson, 107 Neb. 501, 186 N.W. 353 (1922).

138 Neb. Rev. Stat. § 25-2144 (Reissue 1956).

139 Penn. Mut. Life Ins. Co. v. Creighton Bldg. Co., 54 Neb. 228, 74 N.W. 583 (1898).

140 Peck v. Starks, 64 Neb. 341, 89 N.W. 1040 (1902). See also Bowman v. Caldwell, 135 Neb. 554, 283 N.W. 194 (1939) where decree stated "east front door" and the sale actually took place inside the courthouse within 30 of the door it was held a valid sale.

141 Gross v. Leidech, 63 Neb. 420, 88 N.W. 667 (1902).

142 Stover v. Stark, 61 Neb. 374, 258 N.W. 466 (1901).

143 See generally, I Glenn, Mortgages, § 94.1, p. 586 (1943).

be the highest bidder the owner or mortgagor may redeem and thus protect his interest. Theoretically this is good but as a practical matter the mortgagor is seldom able to do so.

4. *Redemption and Confirmation*

The officer who sells the land must report to the court the results of the sale. The court then examines all relevant facts pertaining to the sale and when satisfied that it has taken place according to law and that a subsequent sale would not bring a larger amount, the court confirms it.[144] The owner's right to redeem continues until the court has done this. If the owner redeems from the mortgagee, he must pay him the amount due on the note, not just the amount of the mortgagee's bid.[145] This rule, of course, protects the mortgagee and discourages redemption from him where he has purchased the land for less than the amount due him. When the owner redeems from a purchaser who is not a party to the suit, he need only pay the sale price.[146] The purchaser of the land or the mortgagee need not accept redemption of only a part interest by a co-tenant, but may demand that he pay the entire amount of the debt. Also, a co-tenant of a tenancy in common must hold the redeemed land for the other tenants subject to payment of their proportionate share of the debt.[147]

The right to redeem continues until after the court has confirmed the sale and the Supreme Court has heard the appeal.[148] Generally, the court will not reverse a confirmation of sale unless the sale price is low enough to shock the conscience of the court or to evidence fraud.[149] This encourages fair and competitive bidding at sales and upholds bids honestly made under normal circumstances.

144 Neb. Rev. Stat. § 25-1531 (Reissue 1956).

145 Dougherty v. Kubat, 67 Neb. 269, 93 N.W. 317 (1903).

146 Neb. Rev. Stat. § 25-1530 (Reissue 1956).

147 Dougherty v. Kubat, supra, note 145.

148 Philadelphia Co. v. Gustus, 55 Neb. 435, 75 N.W. 1107 (1898).

149 Forsythe v. Bermel, 138 Neb. 802, 295 N.W. 693 (1941); Lemere v. White, 122 Neb. 676, 241 N.W. 105 (1932); Lindberg v. Tolle, 121 Neb. 25, 235 N.W. 670 (1931); Keller v. Boehmer, 130 Neb. 763, 266 N.W. 577 (1936); Lincoln Nat. Ins. Co. v. Curry, 138 Neb. 741, 295 N.W. 282 (1940).

V. STRICT FORECLOSURE OF LAND CONTRACTS IN NEBRASKA

As already pointed out, the mortgagee usually has two remedies when the mortgagor defaults. He may sue on the debt or foreclose the mortgage. On the other hand in the law of land contracts, the seller in addition to these two remedies may rescind the contract, sue for specific performance,[150] or seek strict foreclosure. If the seller chooses to foreclose by judicial sale, little distinction can be made between the two security devices. It has long been a rule in Nebraska that where a contract is foreclosed as a mortgage the seller's remedy is not confined solely to the proceeds received from the sale of the land and that a deficiency judgment may be had later.[151] The only distinction between land contracts and mortgage foreclosures is that a plaintiff in a suit to foreclose a land contract need not allege that no action has previously been had for the debt. Such an allegation is required when mortgages are foreclosed.[152] The factor governing mortgage foreclosure suits is not damages but the amount of the debt owing to the mortgagee.

If a seller under a land contract wishes strict foreclosure, he must seek permission of a court of equity. Permission will be granted or withheld depending upon the following considerations:

A. Where Value of Land is Less than the Amount Due Under the Conract

This rule is merely a short cut to judicial sale for when the court determines that the present value of the land will not satisfy the seller's equity, then little can be gained by having a judicial sale.[154] The principal case involved a buyer equity of $15,000 as compared to the remaining amount due under the contract of $29,000. The court determined that the land would bring but

[150] Colson v. Johnson's Estate, 111 Neb. 773, 197 N.W. 674, 35 A.L.R. 924 (1924).

[151] Hendrix v. Barker, 49 Neb. 369, 68 N.W. 531 (1896) where plaintiff elected to foreclose as a mortgage and claim later deficiency judgment it was held that the vendee-defendant could not have a decree of strict foreclosure. See also Gardels v. Kloke, 36 Neb. 493, 54 N.W. 832 (1893); Dorsey v. Hall, 7 Neb. 460 (1878).

[152] Connecticut Gen. Life Ins. Co. v. Leahy, 125 Neb. 644, 251 N.W. 278 (1934).

[153] See Vanneman, "Strict Foreclosure on Land Contracts", 14 Minn. Law Rev. 359 (1930).

[154] Swanson v. Madsen, 145 Neb. 815, 18 N.W.2d 217 (1945).

$24,000 at a judicial sale and as this would not satisfy the seller's recovery under judicial sale, the court declared that strict foreclosure was proper. But strict foreclosure has been denied when the value of land increases after execution of the contract.[155]

B. Equitable Considerations

In *Stroble v. Smith*,[156] the Nebraska Supreme Court granted strict foreclosure when it determined that the rental value lost by the vendor during the contract period was approximately the same amount as the buyer's paid-in equity. The court considered also that the present value of the land was $3,400.00 compared with $3,951.62 remaining unpaid on the contract.

Throughout the cases granting strict foreclosure, it is repeated that "courts of equity will decree a strict foreclosure of land contracts only under peculiar and special circumstances, and that applications of that character are addressed to the sound legal discretion of the court", and they are granted only in cases where it would be inequitable and unjust to refuse them.[157]

The courts dislike forfeitures[158] and will avoid them if they tend to be penalties rather than liquidated damages. As already stated, the parties are denied the right to contract in such a way as to disguise a security transaction. This denial extends notably to attempts to "clog the equity of redemption" or to bring about extra-judicial sale. But can the parties contract in such a way as to bring about forfeiture or strict foreclosure without a court foreclosure proceeding governed by those equitable considerations that previously guided a court of equity? The answer is unsettled except for several cases which must be discussed in detail.

C. Forfeiture by Contract

In *Ruhl v. Johnson*, S, the owner, contracted to sell real estate to B for $38,000.00. The contract provided for a down payment of

155 Harrington v. Birdsall, 38 Neb. 176, 56 N.W. 961 (1893); Farmers & Merchants State Bank v. Thornberg, 54 Neb. 782, 75 N.W. 45 (1898).

156 131 Neb. 291, 267 N.W. 326 (1936).

157 Harrington v. Birdsall, 38 Neb. 176, 56 N.W. 961 (1893). See also Farmers & Merchants State Bank v. Thornburg, 54 Neb. 712, 75 N.W. 45 (1898); Patterson v. Mikkelson, 86 Neb. 512, 125 N.W. 1104 (1910); Grove v. Dineen, 4 Neb. (Unof.) 722, 96 N.W. 253 (1903); Swanson v. Madsen, 145 Neb. 815, 18 N.W.2d 217 (1945).

158 Adler v. Kohn, 96 Neb. 346, 147 N.W. 1131 (1914); Plummer v. Fie, 167 Neb. 367, — N.W.2d — (1958).

$12,000 and monthly payments of $256.46. B paid a total of $17,385 before defaulting and was $2,194.00 behind in payments when a strict foreclosure suit was commenced. The Nebraska Supreme Court denied strict foreclosure because of B's large equity in the land.[159] In a later action,[160] S obtained possession of the premises from B by a writ of assistance. B then brought suit against S and sought restitution and damages for withholding possession. The court denied both remedies to B because by the terms of the contract, S, not B, was entitled to possession. Thus damages were not allowed unless B had a right to possession which he did not have by the terms of the contract. The rule which allowed a buyer to recover from a seller for rents and profits received when the seller was in possession was held available only in proceedings to foreclose or redeem. The buyer could not redeem and could not demand foreclosure and it was clear that he could have neither rents and profits nor possession until he did redeem.

It should be noted that the principal case did not foreclose the buyer's equity of redemption, or at least it did not profess to do so. Thus theoretically at least, the buyer never loses his equity of redemption and that right will remain a cloud on the seller's title. The probability of B's redeeming, however, becomes more negligible with the passage of time. The case holds, however, that unless B was entitled to possession of the premises under the contract, he will be denied relief. In short, redemption was his sole remedy which he obviously could not do.

D. EJECTMENT

In *Abbass v. Demont*,[161] the buyer contracted to buy land from the seller for $8,950.00. The buyer defaulted after paying $2,143.80. The seller sought ejectment under Neb. Rev. Stat. 25-2124[162] and

159 Ruhl v. Johnson, 154 Neb. 810, 49 N.W.2d 687 (1951).

160 Johnson v. Ruhl, 162 Neb. 330, 75 N.W.2d 717 (1956).

161 152 Neb. 77, 40 N.W.2d 265 (1949); accord, Johnson v. Norton, 152 Neb. 714, 42 N.W.2d 622 (1950).

162 "In an action for the recovery of real property, it shall be sufficient if the plaintiff states in his petition that he has a legal estate therein and is entitled to the possession thereof, describing the same, and that the defendant unlawfully keeps him out of possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived." Neb. Rev. Stat. § 25-2124 (Reissue 1956). See also Dysart, Foreclosures in Nebraska, § 187 (a) and cases collected therein for distinction between actions for ejectment and quiet title. See Worthington v. Woods, 22 Neb. 230, 34 N.W. 368 (1887) where it was held that the action of forcible entry and detainer would not lie to recover possession held under a contract of sale.

it was granted. In its opinion, the court said that where by a contract the seller is entitled to immediate possession in case of default and the paid-in amounts are treated as rent and forfeited, then ejectment will lie. The court further stated that no redemption would be allowed because the contract expressly declared that upon default the seller could cancel it and no contract existed to redeem. The other tests discussed above were not mentioned by the court.

Thus it is apparent that the equity of redemption as it is known in the law of mortgages does not exist in the law of land contracts. If the seller elects to foreclose the contract as a mortgage, the buyer's equity is recognized. In this instance, the seller usually desires a later action for the deficiency. If a foreclosure action is instituted, the buyer would also be entitled to an accounting for rents and profits received by the seller in possession.[163] But the seller may also have the land by forfeiture when he declares the contract at an end and ejects the buyer. According to the *Johnson case,* the buyer is not entitled to an accounting or damages from a seller in possession or a return of his payments[164] unless the contract has so provided. It can be seen from the foregoing illustrations that the equity of redemption may exist solely at the election of the seller and that the buyer may be relegated to the protection he would have under contract law. It is apparent that to be in a position to commence strict foreclosure, the seller need only insert clauses in the contract providing that: (1) time is of the essence,[165] (2) the seller is entitled to immediate possession in case of default, (3) amounts paid in shall be considered as rents or damages, (4) the entire amount is due and owing on default,[166] and (5) the contract shall be forfeited and at an end at the election of the seller.[167]

E. Rescission and Restitution

Generally, a buyer may rescind the contract when the seller has misrepresented a material fact concerning the subject matter

[163] Abbass v. Demont, 152 Neb. 77, 40 N.W.2d 265 (1949).

[164] Kear v. Hausmann, 152 Neb. 512, 41 N.W.2d 850 (1950).

[165] Dodge v. Galusha, 151 Neb. 753, 39 N.W.2d 539 (1949).

[166] Colson v. Johnson's Estate, 111 Neb. 773, 197 N.W. 674, 35 A.L.R. 924 (1924), where it was said that without such a provision, the vendor can only sue for those amounts due and owing.

[167] Johnson v. Ruhl, 162 Neb. 330, 75 N.W.2d 717 (1956).

of the contract or has defaulted in performance. It has been pointed out that the buyer may elect to sue for specific performance, damages or restitution. Each action, when elected, precludes the other remedies. In restitution, the buyer denies the further existence of the contract and seeks only a return of the status quo by having his purchase money returned to him.[168] The essence of restitution is the denial of the contract and substantial compliance by the buyer. He must come into equity with clean hands. Frequently, it happens that the parties, after default, renegotiate with each other to restore the contract. The buyer, if he assents to other and different performance by the seller, forfeits his right to rescind. Under a contract where time is of the essence, the promisor must perform on the date set for performance or he has breached the contract and given the promisee an opportunity to rescind.[169] On the other hand, where time is not of the essence, the promisor may tender performance within a reasonable time after performance date and not be in default.[170]

There is some confusion in the earlier Nebraska cases concerning the effect of an election to rescind. One case held that a buyer in default could recover his payments after the seller rescinded and sold the land to another.[171] This case was later criticized by the court, and it has never been followed. The rule now is that a buyer in default cannot recover his payments from a seller who has rescinded.[172] Conduct by the buyer after the seller's default which causes the seller to proceed with the contract amounts to a waiver. So, where the buyer demanded that the seller institute a quiet title action in order to produce a marketable title, it was held that the right to rescind had been waived.[173]

When a buyer has rescinded, he must be prepared as a condition precedent to an action for the return of the payments to

[168] Dent v. Johnson, 111 Neb. 162, 195 N.W.2d 539 (1949), where the vendee was allowed restitution.

[169] Dodge v. Galusha, 151 Neb. 753, 39 N.W.2d 539 (1949); Kear v. Hausmann, 152 Neb. 512, 41 N.W.2d 850 (1950).

[170] Klapka v. Shrauger, 135 Neb. 354, 281 N.W. 612 (1938); Seaver v. Hall, 50 Neb. 878, 70 N.W. 373 (1897), affirmed 52 Neb. 316, 72 N.W. 217 (1897).

[171] Eaton v. Redick, 1 Neb. 305 (1871). This decision was later criticized in Patterson v. Murphy, 40 Neb. 818, 60 N.W. 1 (1894).

[172] Maloy v. Muir, 62 Neb. 80, 86 N.W. 916 (1901).

[173] Shonsey v. Clayton, 107 Neb. 695, 187 N.W. 113 (1922).

give up possession and release the contract on the record.[174] Also, it is incumbent upon the rescinding party to tender performance at the time of his election unless it is obvious that it would be futile to do so.[175] An interesting case on this point is *Hawkins v. Mullen*,[176] in which the seller sought to clear his title against a defaulting buyer. The court held that the seller must do equity by refunding the buyer's payments in order to rescind. At the buyer's request, the payments were given the status of a mortgage on the land and foreclosure was decreed. The holding, although a complete reversal of the foreclosure theory, is sound for it recognizes the buyer's legal interest in the land.[177]

VI. CONCLUSION

Where then, does Nebraska stand in regard to the buyer-seller relationship? As has been illustrated, the foreclosure by judicial sale used in mortgage law is very acceptable. The nine months stay of foreclosure is adequate protection for the errant buyer to plant and harvest another crop. It also forces sellers into making concessions from strict contract terms. Under the present law, the prudent seller may use contracts for the purpose of avoiding the costly and time consuming process of judicial foreclosure. In theory, the rules against clogs on the equity of redemption, bidding in and so forth are applicable only to the law of mortgages. Serious consideration should be given as to why these rules are accepted in land contract law only when the seller chooses statutory foreclosure.

To allow a seller who is in the superior position to begin with to "shop at the counter of remedies" so that he can never lose even when the land has seriously depreciated in value is to discourage the successful conveyance of land to low equity buyers.

[174] Schlake v. Healey, 108 Neb. 35, 187 N.W. 427 (1922); Watkins v. Harrison, 110 Neb. 439, 194 N.W. 435 (1923).

[175] Klapka v. Shrauger, 135 Neb. 354, 281 N.W. 612 (1938); Sponsler v. Max, 113 Neb. 477, 203 N.W. 566 (1925). See also Olson v. Woodhouse, 112 Neb. 527, 199 N.W. 815 (1924).

[176] 118 Neb. 129, 223 N.W. 670 (1929).

[177] See 17 Neb. L. Bul. 54 (1938), where the case is discussed as a recognition of a vendee's lien. In a later action between the parties, the court upheld the seller's right to a stay of foreclosure. Hawkins v. Mullen, 119 Neb. 567, 230 N.W. 252 (1930). Compare with Harrington v. Birdsall, 38 Neb. 176, 56 N.W. 961 (1893) where buyer was denied stay in strict foreclosure proceedings.

Where the land has depreciated so far that it will not satisfy the seller's equity, a possible solution is to require the seller to accept his proportionate share of the loss and forego deficiency judgments. This may be extreme, however, where third party creditors are involved. The essential principle, though, is not to allow the buyer equity as recognized by mortgage law to become obscured by other measures of value, such as damages.