

**OPINION**  
**45-172**

October 1, 1945 (OPINION)

LANDS OWNED BY THE STATE

RE: Sale of - Taxes - Cancellation of

Upon your request I have considered the tax exemption problem which has arisen between the Bank of North Dakota, as agent for the state treasurer, as trustee for the state of North Dakota, and Cavalier County officials, with reference to the real estate property taxes against a 400 acre farm purchased by Gestson and Laxdal of Gardar, North Dakota. I understand that the trustee undertook to convey the farm to Gestson and Laxdal free and clear of all incumbrances by a special warranty deed which was delivered to the purchasers in the month of July, 1943. Now, I am informed that the county auditor of Cavalier County, Mr. Rasmusson, will not approve the transfer of the deed on the ground that the farm in question was sold by the trustee in 1937 and was, therefore, taxable during 1938, 1939, 1940, and 1941. The auditor has spread taxes for some of the four years next following 1937, but no information is available here as to the exact procedure in spreading said taxes. The bank, as agent, and the individual purchasers have so far refused to pay the taxes contending that the farm was sold in May, 1941 when the contract for deed was issued to Gestson and Laxdal. It further appears from the file that the county board, that is the board of county commissioners, of Cavalier County, at one time abated these taxes. The basic issue thus presented is this: When was this farm sold?

It appears that the Bank of North Dakota, as agent for the state treasurer, and as trustee for the state of North Dakota, entered into a lease on September 30, 1937, with Johannes Gestson and Helgi Laxdal of Gardar, North Dakota, covering the E°SE\, the SW\SE\, the SE\SW\ of 10, the W°SW\ of 11, the NE\NW\ and the NW\NE\ of 15, and the NE\SW\, SE\NW\ of 16, all in township 161, North of range 57 West. This lease was designated as a "lease with option to purchase." The lease commenced as of October 1, 1937 and ended as of November 1, 1940. The lease contained the following provision:

In consideration of the payment by the lessee of the initial sum hereinbefore mentioned on the date hereof, the receipt whereof is hereby acknowledged, the lessor gives and grants unto the lessee at any time prior to the termination hereof by lapse of time or forfeiture, the right and option to purchase the said real estate of the lessor at and for the sum of Forty-five hundred dollars, together with interest thereon from March 1, 1938, at the rate of 5 percent per annum. It is understood that the lessee shall receive credit upon said purchase price for all sums paid as rental in the event he avails himself of the privilege and option herein granted. It is further understood that when the payments so made as rental shall amount to Seventeen hundred dollars of principal, together with all accrued interest thereon to that date, then the said lessee shall be entitled to the usual contract upon such premises for the balance of Twenty-eight hundred dollars,

which contract shall be payable in seven annual installments on the first day of November, as stated, in each year, with interest as above stated.\* \* \*

The privilege and option to buy the land above described was exercised within the terms of the lease, and the farm was sold to the lessees in May, 1941. It is undoubtedly the contention of the county officials of Cavalier County that this constitutes a contract of sale as of the date of the lease. Section 57-0208 (2) of the 1943 Revised Code states:

All property described in this section to the extent herein limited shall be exempt from taxation:

2. All property, real or personal, owned by this state, but no land contracted to be sold by the state shall be exempt."

Section 57-2902 of the 1943 Revised Code states:

Upon the sale of tracts of land by the said trustee for the state of North Dakota, and upon payment to him of not less than twenty percent of the sale price of the particular tract or tracts sold, the provisions of section 57-2901 shall become inoperative with respect to such lands, and the general statutory remedy to enforce and effectuate tax liens and titles again shall be applicable."

Section 57-2901 of the 1943 Revised Code states that there is a suspension of tax liens "during the time such tract is owned by said trustee."

A careful reading of the lease indicates an intention to lease the premises therein described for certain cash rental payments for a three year term. In addition to the rental agreement, the above quoted provisions of the lease grants to Gestson and Laxdal the privilege of purchasing the farm at an agreed and stipulated price of Forty-five hundred dollars. But such privilege did not accrue to them until the total rental payments amounting to Seventeen hundred dollars were paid. Paragraph 11 of said lease states:

The parties hereto expressly agree and declare that the relation hereby created is that of landlord and tenant, and that only in case of the exercise of the option hereby granted shall the lessee become entitled to a contract of sale and purchase."

Thus by an express provision in the lease it becomes entirely clear that there was no purchase agreement or contract to sell the land until the option to buy was exercised by the lessees, and that both parties had clearly so stated in the provision from the lease just quoted. The contract was a lease with an option to purchase and not a "sale" nor a contract to sell, and that the position of the county authorities of Cavalier County to the contrary is clearly erroneous and based upon a false premise. The case of State v. Crum, 70 N.D. 177, 292 N.W. 392 is in point. Syllabus 3 in that case states:

An option to purchase property is a mere privilege to buy,

given by the owner of the property to another. The optionee is not a purchaser."

The case goes on to state in the opinion (referring to the option which is quoted in the opinion) "that this provision did not convey to the defendant any interest in the premises.\* \* \* Without considering whether there was any consideration for this provision so as to dignify it by the name of option, there was no binding obligation upon the defendant to exercise it. Even if the provision be considered a continuing offer, expiring at the time of the demand for the surrender of the premises, nevertheless, it is no more than an option." "An option is defined as a privilege given by the owner of the property to another to buy the property at his election. It secures the privilege to buy and is not of itself a purchase. The owner does not sell his property; he gives another the right to buy at his election." See *Western U. Teleg. Co. v. Brown*, 253 U.S. 101, 110, 64 L. ed. 803, 807, 40 S. Ct. 460. Any number of similar definitions of "an option" may be found in *Words and Phrases*, Vol. 30, pages 12 and 13.

There is no competent proof of the sale of the farm, covered by the lease hereinbefore referred to, having been made prior to the completion of the payment of Seventeen hundred dollars for rental. There is some indication that the lessees made declarations to the effect that they had purchased this farm before the option was exercised. However, under the circumstances, such declarations "were merely the expression of personal conclusions of the lessees and do not involve the necessary legal distinction that prevails between options and contracts of purchase and does not alter in any way the inherent legal nature of the different steps in the total transaction which resulted ultimately in this particular to change the status of Gestson and Laxdal from tenants to that of owners and holders of real property."

The conclusion is inescapable that the real property above described was not purchased by Gestson and Laxdal until in May, 1941 when they exercised the option privilege hereinbefore quoted, and completed the payment of Seventeen hundred dollars of rental money.

It is, therefore, my opinion that Gestson and Laxdal did not become purchasers until that time and consequently the property was exempt from taxation under the statutes hereinbefore referred to until after it was acquired by Gestson and Laxdal under a contract for deed. It is further my opinion that Mr. Rasmusson, as county auditor, should cancel from the tax books such taxes as may be listed against this farm until the same was acquired by the lessees under contract for deed entered into with them, after which time it became again taxable. It is further my opinion that the transfer of the special warranty deed of Gestson and Laxdal to the above described real estate should be approved by the county auditor in order that the same may be recorded, and that in fact, Gestson and Laxdal are in a position to compel the county auditor by appropriate legal proceedings to transfer said deed so that the same may be recorded in the office of the register of deeds.

NELS G. JOHNSON

Attorney General