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Buying Blackacre: Form Contracts and Prudent Provisions, 23 J. Marshall L. Rev. 15 (1989)

John H. Scheid

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ARTICLES

BUYING BLACKACRE: FORM CONTRACTS AND PRUDENT PROVISIONS

JOHN H. SCHEID*

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The author wishes to acknowledge the efforts that the late Robert Kratovil played in the preparation of this article, and the constant encouragement I received from Bob throughout its writing. The original thought was to prepare an article that would blend the theoretical and practical aspects of the formation of a real estate contract. To that end, the author consulted Bob and mentioned that the goal of the article was to recommend additions and deletions to the form contract that would best prevent litigation. With a wink of his eye, Bob said: "Well—you don't want this to be too accurate—and prevent too many problems—or else, how will we lawyers ever find work?" Then Bob set to work, and within one week returned over five pages of suggestions. It was an unparalleled privilege to have worked with him.

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Appendix A

Real Estate Sale Contract

The contract of sale is the key to the real estate transaction. It is the critical document which fixes the fundamental rights and obligations of the parties from the time it is signed through the closing of title and, in many cases, even beyond.¹

The complexity of the law of contracts and of real property demands that one qualified by education and experience determine the legal sufficiency of a real estate sale agreement and advise the prospective seller or purchaser as to the rights and obligations arising thereunder. Objective counseling by one's own attorney as to the practicability or desirability of undertaking the sale or purchase is also often necessary to avoid precipitous actions which may prove to be legally, financially or socially disadvantageous.²

I. INTRODUCTION

One of the first matters that a new attorney will be asked to handle once he has entered practice will be the representation of a friend in the latter's purchase (or sale) of a home. There are numerous form contracts extant in the legal and lay community and more often than not the would-be purchaser will present to the attorney a *fait accompli*, a signed contract. If there are parts of the executed contract that are significantly detrimental to one's client, the attorney should attempt, via renegotiation, to effect some modification, alteration or amendment. If such changes are not possible or are not economically feasible, and unless the contract is avoidable for some reason, the seller's attorney will have to coordinate the ordering of title insurance, clearing of title objections and preparation of the closing documents. The buyer's attorney will basically have to advise his client as to pertinent dates, check the commitment for title insurance against the contract's specifications, check the closing documents, and generally follow the dictates of the instrument. The attorney will also have to educate his client as to the financial ramifications of the executed contract, and assist his client in following the dictates of the instrument.

On occasion, and fortunately with increasing frequency, the client will seek his attorney's advice before signing the contract. It is in this situation that the attorney can perform a unique service for his client. The form contract that is included with this article is one

1. See *Indoe v. Dwyer*, 176 N.J. Super. 594, 598, 424 A.2d 456, 460 (1980).

2. *Id.* at 598, 424 A.2d at 460.

that is commonly used in metropolitan areas. It is in the nature of a short term contract, providing for a closing, with the passing of title and full payment of the purchase price, within a relatively short period, e.g., 60 days. This type of contract is to be distinguished from an installment contract where the purchaser agrees to pay for the property over a number of years, and only at the end of that lengthy period will the purchaser receive a deed to the land.

Many contracts today provide for a "lawyer's approval" within three to five days after the contract has been signed. In theory this gives the attorney *carte blanche* authority to amend the contract in any way thought desirable. The practical difficulty with this after-the-fact counseling, in the author's opinion, is that this power of the lawyer to veto the deal casts him in the role of a spoiler. Once a party—be he seller or buyer—has psychologically committed to sell or buy real estate, the lawyer via the "lawyer's approval" rider, will be looked upon as the villain if he recommends too many major changes which the other party is unlikely to accept. Notwithstanding the above, it is the author's opinion that all recommended changes, and reasons therefore, be fully explained to the client. The lawyer simply must present his case to his client, and then let the client make the final judgment.

The intentions of the author in this article are not only to advise the reader what prudently might be done, but also, and more importantly, to explain why various deletions, additions, and amendments should be made on the contract. Circumstances alter cases. If the attorney knows why the changes are being made, he can more readily and with greater assurance recommend the suggested changes to the client, whether that client be seller or purchaser. The authorities cited in these materials are mainly from Illinois. However, leading cases and representative statutes from other jurisdictions are also included for purposes of comparison and contrast.

II. PARTIES, PRICE AND SUBJECT MATTER

A. Name(s) of Purchaser(s) (1)*

Contracts for purchase of real estate³

Whenever any contract for the purchase of real estate hereafter entered into shows that the title is to be taken by the vendees as joint tenants and not as tenants in common, and one or more of such vendees die before the delivery of the deed to such vendees, then in such case no heir, legatee or legal representative of such deceased vendees shall have or take any right, title or interest under the contract or in

* The numbers which follow this article's headings correspond to those numbers as they appear in the Real Estate Sale Contract located *infra* at appendix A.

3. ILL. REV. STAT. ch. 76, § (1a) (1987).

such real estate, but the obligation of the vendor or vendors under the contract (upon the performance thereof) shall be to convey such real estate to such surviving vendee or vendees, and if all such vendees die before such delivery then to the heirs or legatees of the last survivor; but nothing herein contained shall operate to change the effect of any assignment by any of the above stated vendees.⁴

Property held in joint tenancy passes to the surviving joint tenant or tenants, circumventing the deceased's probate estate,⁵ and becomes the absolute property of the surviving tenant(s) not by virtue of succession, but rather because of co-ownership rights initially defined by the instrument.⁶ Similarly, if the purchasers sign the contract as joint tenants with right of survivorship, and if one of the prospective purchasers dies during the executory period of the contract, there will be no need for the surviving purchaser to deal with the deceased's heirs or legatees. The surviving purchaser's rights and correlative duties are his to exercise alone.

Denominating the purchasers as joint tenants is especially important in installment contracts, usually to be performed over a considerable period of time, since the risk of disability or death increases as the executory period lengthens. Similarly, and for analogous reasons, the sellers should also be described as joint tenants.

B. Legal Description (2)

The attorney should retain for himself the right to insert the legal description, because specific performance by buyer, or by seller, will not be possible without a correct and adequate description of the property. Although it would be ideal to have the legal description of the property at the time the contract is signed, this is almost never the case. If the parties agree that the legal description may be inserted later, the contract will be definite enough to be specifically enforceable.⁷

A deed, mortgage or other real estate document must describe the land to be conveyed in such a way that the land can be located and identified.⁸ The purpose of the legal description is to fix the boundaries of the land to be sold (or that which is involved in the transaction).

A street address alone should never be used without also including the city and state in the description.⁹ Descriptions by popular

4. *Id.*

5. See *In re Alpert's Estate*, 102 Ill. App. 3d 600, 602, 430 N.E.2d 181, 183 (1981).

6. *Id.* See *Klajbor v. Klajbor*, 406 Ill. 513, 518, 94 N.E.2d 502, 505 (1950).

7. See *Schmalzer v. Jamnik*, 407 Ill. 236, 242, 95 N.E.2d 347, 351 (1950).

8. See R. KRATOVIL, *REAL ESTATE LAW* § 5.12 (9th ed. 1988).

9. See *Kraus v. Campe*, 328 Ill. App. 37, 43, 65 N.E.2d 127, 130 (1946).

names of land tracts, however, have been found to be sufficient.¹⁰ Descriptions called "Mother Hubbard" clauses, wherein the deed purports to convey "all the land owned by X in Cook County, Illinois," may be sufficient to pass title from grantor to grantee, but may not give constructive notice to third parties. In such a case, an affidavit can be filed by the grantee with a specific description of the conveyed land.¹¹

In sum, the full legal description is desirable in a contract. If the description, supplemented by extrinsic evidence, adequately describes the property that is to be conveyed, then the document is binding and effective.¹²

There are certain essential terms that must be in a contract to make it actionable.¹³ The essential terms that must be contained in a real estate contract are:

Identification of the Buyers (vendees)
 Identification of the Sellers (vendors)
 Description of the property, by either:

a) legal description

b) common address

Consideration—usually the price, but possibly other property that is to be exchanged for the subject property.

Signature of the party to be charged.¹⁴

Relative to the necessity of a signed, written contract, reference is made to the Illinois Statute of Frauds, which provides as follows:

Land—Writing—Signature—Exceptions¹⁵

§ 2. No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person hereunto by him lawfully authorized in writing, signed by such party. This section shall not apply to sales upon execution or by any officer or person pursuant to a judgment or order of any court in this state.¹⁶

10. *Id.*

11. *See* Luthi v. Evans, 223 Kan. 622, 628, 576 P.2d 1064, 1070 (1978). *See also* Annotation, *Recorded Real Property Instrument as Charging Third Party with Constructive Notice of Provisions of Extrinsic Instrument Referred to Therein*, 89 A.L.R. 3d 901 (1979).

12. *See* Ashline v. Verble, 55 Ill. App. 3d 282, 284, 370 N.E.2d 613, 615 (1977).

13. *See* Intini v. Marino, 112 Ill. App. 3d 252, 254-55, 445 N.E.2d 460, 462 (1983). *See also* McDaniel v. Silvernail, 37 Ill. App. 3d 884, 886, 346 N.E.2d 382 (1976).

14. *See* Callaghan v. Miller, 17 Ill. 2d 595, 599, 162 N.E.2d 422, 425 (1959).

15. ILL. REV. STAT. ch. 59, § 2 (1987).

16. *Id.*

Therefore, it is only necessary that the party to be charged, meaning the defendant in any eventual suit, sign the contract in order to make the contract enforceable against him. Like other areas of the law subject to the Statute of Frauds, part performance by a party, e.g. a purchaser taking possession and making permanent improvements, may satisfy the Statute of Frauds.¹⁷

C. Street Address (3)

If the correct or complete legal description is omitted from the contract, the common address will suffice to satisfy the definiteness required in a real estate contract. However, be careful that no patent or latent ambiguities arise. For example, in *Heroux v. Romanowski*,¹⁸ the supreme court held that a description of the property that included a street address, county and a terse description of the buildings was too indefinite to be enforceable.

The lot dimensions, inasmuch as they are denominated as "approximate," are descriptive rather than definitive. Hence, if there is a latent or patent ambiguity between the legal description or the common street address on the one hand, and the "approximate lot dimensions" on the other hand, the party seeking to enforce the contract may attempt to introduce parol evidence.¹⁹ Therefore, the question might be asked: "May parol evidence be used to explain any ambiguity?" In answer to this question, Professor Robert Kratovil²⁰ stated:

"[O]ral evidence can be introduced to show what tract of land was intended" when a deed of "my house and lot" was conveyed.²¹

Similarly, in *Ashline v. Verble*,²² the plaintiff-vendee paid \$450 to defendant-vendor in return for 3½ acres of the defendant's 6½ acres of land. Plaintiff received a note from defendant cast in the following terms: "Received of Nettie Ashline (plaintiff) \$450.00 for 3½ acres Partial Payment on ground the March 22 1972. Contract to be drawn (sic) up Later [signed] Harry Verble."²³ Certainly, a less than artful description.

Plaintiff then made additional payments and was also told by the defendant in response to her query: "Do I owe you anything on this property?" "No, Nettie, you have it more and paid for.[sic]" When defendant refused to deliver a deed, the plaintiff sued for spe-

17. See *Thomas v. Moore*, 55 Ill. App. 3d 907, 912, 370 N.E.2d 809, 814 (1977).

18. 336 Ill. 297, 298, 168 N.E. 305, 306 (1929).

19. See *McDaniel v. Silvernail*, 37 Ill. App. 3d 884, 887, 346 N.E.2d 382, 384 (1976).

20. See R. KRATOVIL, *supra* 8, § 5.12, at 50.

21. *Id.* (citing *Brenneman v. Dillon*, 296 Ill. 140, 148, 129 N.E. 564, 570 (1920)).

22. 55 Ill. App. 3d 282, 283, 370 N.E.2d 613, 614 (5th Dist. 1977).

23. *Id.*

cific performance of the oral contract. The trial court allowed the plaintiff to introduce parol evidence to describe the land, after it was established that the plaintiff had given good consideration, was in possession of the land, and had made valuable improvements on the land (which, in turn, satisfies the part performance exception to the statute of frauds).²⁴

Thus, Illinois courts are prone to permit the introduction of parol evidence at trial where the vendee has partially performed. However, if the contract is substantially executory on both sides it is the author's opinion that in the event of litigation prosecuted by either vendee or vendor, the courts will be much more reluctant to permit parol evidence in order to resolve an ambiguity caused by mutually slovenly drafting of parties with equal bargaining power.²⁵

The classic case of *Mitchell v. Lath*,²⁶ may come to mind. *Mitchell* dealt with an attempt by the purchaser to force the seller to remove an unsightly ice house located on property across the road from the subject premises. The purchaser's complaint was dismissed by the court. The court held that such an ancillary agreement would certainly have been part and parcel of the detailed contract, and the court therefore precluded introduction of evidence of any such agreement.

Lastly, if the contract contains a merger clause, Illinois courts have tended to be very restrictive as to the amount of evidence that may be introduced to explain a term in the contract.²⁷ A "merger clause" or an "integration clause" is a provision that expressly states that the parties' contractual rights and duties are all contained within the written document, thus precluding the introduction of any parol evidence, oral or written, antedating the contract.²⁸

Hence, a court might take a restrictive view on the admission of extrinsic evidence, refuse to admit parol evidence in the face of an

24. *Id.* at 284, 370 N.E.2d at 615. See *Guel v. Bullock*, 127 Ill. App. 3d 36, 468 N.E.2d 811 (1984) (the court permitted parol evidence to explain an ambiguity caused by the omission of the city and state in describing a property's location).

25. See *Crocker v. Smith*, 366 Ill. 535, 537, 9 N.E.2d 309, 309-10 (1937). See also *McDaniel v. Silvernail*, 37 Ill. App. 3d 884, 887, 346 N.E.2d 382, 384 (1976).

26. 247 N.Y. 377, 160 N.E. 646 (1928).

27. The RESTATEMENT (SECOND) OF CONTRACTS supports this notion: § 216. Consistent Additional Terms.

(1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.

(2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is

(a) agreed to for separate consideration, or

(b) such a term as in the circumstances might naturally be omitted from the writing.

RESTATEMENT (SECOND) OF CONTRACTS § 216 (1981).

28. See A. CORBIN, CORBIN ON CONTRACTS § 578 (1964).

objection thereto, and thereafter find the contract void for vagueness. In short, these cases indicate the need to be precise and complete.

D. Personal Property (4)

It is important to include every item of personalty, and to cross out any item that the seller either does not own or wishes to retain. A Bill of Sale will be given to the buyers at closing and every item in the personal property paragraph of the contract should appear on the Bill of Sale.²⁹ A practice has arisen in the drafting of these form contracts to include the words "if any" after the words "personal property." The effect of this addition, in the author's judgment, is to render the personal property clause unenforceable as to any particular item in the event that the parties later disagree that the item was on the premises at the time the contract was signed. Delete the words "if any," if the personal property, from the buyer's viewpoint, is an important part of the transaction.

If an item of personalty is affixed to the realty in such a way that it has become part of the real estate or is uniquely adapted to it, that item should theoretically pass with the real estate as a "fixture." In *Material Service Corp. v. McKibbin*, the Illinois Supreme Court said:

As to whether an article has become a fixture depends upon many things, the principal one of which is the manner of attachment of the article to the realty. If it is attached by one who has a limited estate in the realty, as to whether it becomes a fixture or not may depend upon the intention of the owner and the one attaching the article to the soil.³⁰

A fixture is defined as: "an article that was once personal property, but has been installed in or attached to the land or a building in a more or less permanent manner, so that the law regards the article as part of the real estate."³¹ Thus, in theory, a prior owner's intention when purchasing and installing some article could affect a later vendee's rights to that article. Also, although it is currently and philosophically out of favor, the concept of "caveat emptor" still has some residual effect in today's market.

There are fundamentally three different tests to determine whether an item is personal property or a fixture, any one of which a court might utilize in deciding the issue. The first test relates to the manner of attachment. The question for this test is whether the removal of the fixture would cause "substantial injury" to the build-

29. See generally, J. REILLY, *THE LANGUAGE OF REAL ESTATE* 51 (2d ed. 1982).

30. 380 Ill. 226, 232, 43 N.E.2d 939, 945 (1942).

31. See R. KRATOVIL, *supra* note 8, at § 3.01.

ing.³² Some examples of this kind of fixture are: water pipes; linoleum floor cemented down; electrical wiring; and sump pumps. Water and sewer mains are considered "real property" because they are incorporated into the realty.³³ A second test deals with the character of an article and its adaptation to the real estate. An example falling within this second category would be a specially constructed item, fitted to a certain place in a building, such as computer equipment located on a specially constructed floor.³⁴ The final test is the intention of the parties when the item was originally installed. This is an objective test: would the average person, at the time of installation, have considered the article to be a fixture in light of the foregoing tests? Look at the nature of the article, the mode of annexation, etc. Basically what constitutes a "fixture" will depend on the facts and circumstances of the case, and upon the relationship, agreement and intent of the parties.³⁵ Therefore, if a landlord pays for an item installed at the request of the tenant, a presumption arises that the parties intended a permanent fixture.³⁶ Examples of these types of items are gas stoves or other appliances in a rental apartment that were intended for use of the tenants.

Since the parties, by their mutual and express intentions, can always define an article as "personalty" which arguably could be considered a fixture,³⁷ the safest procedure is to list any article in the personal property section of the contract about which a doubt could later arise.³⁸ Ideally, the attorney for the buyer or seller should sit down with his client before the contract is signed and go over each item of personalty that the client expects to be included in the purchase price. Unfortunately, this is very often impractical under the circumstances. Most real estate contracts are signed under conditions where an attorney's consultation is unavailable.³⁹

If the buyer and the seller have agreed, prior to closing, that the seller will repair any item of personal property, such a covenant

32. *Finley v. Ford*, 304 Ky. 136, 200 S.W.2d 138 (1947). This test, however, is not used very often in modern times; whereas, formerly it was the only test.

33. *National Blvd. Bank v. Citizens Utilities Co. of Ill.*, 107 Ill. App. 3d 992, 438 N.E.2d 471 (1982).

34. *Id.*

35. *Borrowman v. Howland*, 119 Ill. App. 3d 493, 457 N.E.2d 103 (1983).

36. *Crane Erectors & Riggers Inc. v. LaSalle Nat'l Bank*, 125 Ill. App. 3d 658, 466 N.E.2d 397 (1984).

37. *See Lilienquist v. Pitchford's, Inc.*, 269 Or. 339, 525 P.2d 93 (1974).

38. *See Stobel v. Northwest G.F. Mut. Ins. Co.*, 152 N.W.2d 794 (N.D. 1967) (the court held that a barn was not a fixture and remained personal property); *Madfes v. Beverly Devel. Corp.*, 251 N.Y. 12, 166 N.E. 787, *modified*, 251 N.Y. 589, 168 N.E. 438, 229 N.Y.S. 881 (1929) (gas ranges held to be personal property); *Kelvinator Sales Corp. v. Byro Realty Corp.*, 136 Misc. 720, 231 N.Y.S. 632 (City Ct. 1930), *aff'd*, 233 App. Div. 653, 249 N.Y.S. 910 (1931) (refrigerator held to be personal property).

39. *See generally* 35 AM. JUR. 2D *Fixtures* § 18 (1962).

should be inserted at this point in the contract. If at closing the repairs have not been made, the buyer might consider a separate agreement signed at closing by which the seller recommits himself to the repairs. Otherwise, after the conveyance, the buyer, faced with seller's default, could be met with the seller's argument that all contractual obligations have been extinguished by his delivery and the buyer's acceptance of the deed.

E. Name(s) of Seller(s) (5)

Both seller and their spouse should sign the contract even though only one person owns the property. Otherwise in the buyer's action for specific performance, the non-signing spouse could not be forced to execute a deed in order to compel them to release any homestead rights that they may have in the property.⁴⁰ Homestead rights must be released in writing.⁴¹ Although the signing spouse would be subject to a suit for damages upon their failure to convey, without the non-signing spouse's release of homestead rights, a deed from the seller would not convey a marketable title, and obviously would not be acceptable to a reasonable buyer.⁴² Dower, of course, has been eliminated in Illinois.⁴³

If the land is held in a land trust, the common practice is to have the beneficiary sign the contract as the seller. This assumes that the beneficiary possesses the sole power of direction. It might be considered prudent to also have the land trustee sign as the seller. For example, in *Madigan v. Buehr*,⁴⁴ the court held that if a contract for the sale of real property, held in land trust, designates the trustee as the seller, then the beneficiary must obtain the trustee's signature on the contract. But the court also noted that a beneficiary, having the power of direction, may contract to sell the legal and equitable title to land trust property if the beneficiary: 1) discloses and describes the trust; 2) points out his power of direction; and 3) promises to use that power to convey title.⁴⁵

If less than all the beneficiaries having power of direction sign the contract as seller, it is doubtful whether such a contract is specifically enforceable at the instance of the buyer. The buyer, of course, is faced with the dilemma of not knowing whether all beneficiaries, who share the power of direction, have been included as sell-

40. *Crum v. Krol*, 99 Ill. App. 3d 651, 425 N.E.2d 1081 (1981).

41. ILL. REV. STAT. ch. 110, ¶¶ 1-101, 1-102 (1982).

42. *Watson v. Doyle*, 130 Ill. 415 (1899).

43. ILL. REV. STAT. ch. 110, ¶. 2-9 (1976).

44. 125 Ill. App. 2d 8, 260 N.E.2d 431 (1970).

45. See *Lampinen v. Hicks*, 73 Ill. App. 3d 376, 391 N.E.2d 1105 (1979) (contract for the sale of land trust property is enforceable even though it fails to disclose the existence of the trust). See also *Rizakos v. Kekos*, 56 Ill. App. 3d 404, 371 N.E.2d 896 (1977).

ers. If, prior to making his offer, buyer determines that the property is indeed held in a land trust, buyer should reserve to himself the right to amend the contract at a later time by requiring any after-discovered beneficiaries to become signatories to the contract. If, however, all beneficiaries who have the power of direction sign the contract of sale, and it is stated therein that they will direct the land trustee to convey, the contract should be specifically enforceable.⁴⁶

It is theoretically possible for one to contract to sell property that he does not own.⁴⁷ A seller does not make any implied promise that he will have title to the property during the executory period of the contract—only that he will convey merchantable title at closing.⁴⁸ Similarly, one can contract to either “convey” or “cause to be conveyed” the title to the property. Hence, if the seller is the sole beneficiary of a land trust with the exclusive right of direction, a contract signed by that individual should be specifically enforceable.

Prior to closing the purchaser may designate another to be the grantee of a deed. Contracts for the purchase of real estate, like other contracts that are non-personal in nature, are generally assignable. Therefore, even though the purchaser cannot relieve himself of the duty to pay, he may designate a grantee other than himself to receive the conveyance.

If the seller is a corporation, the buyer's attorney should demand that the selling corporation's board of directors issue a formal resolution authorizing the sale. “The sale of real estate by a corporation should be executed in pursuance of a resolution by the board of directors authorizing and directing the particular conveyance.”⁴⁹ If the seller is a close corporation, it would be wise to obtain from the secretary of the corporation a certificate reciting that all directors and shareholders voted unanimously to sell the property.⁵⁰

46. See *Swerdlow v. Mallin*, 131 Ill. App. 3d 900, 476 N.E.2d 464 (1985); *Emerich v. Leviton*, 117 Ill. App. 3d 832, 454 N.E.2d 45 (1983); *First Nat'l Bank v. Oldenburg*, 101 Ill. App. 3d 283, 427 N.E.2d 1312 (1982). See also Annotation, *Modern Status of Defaulting Vendee's Right to Recover Contractual Payments by Vendor as Forfeited*, 4 A.L.R. 4th 993 (1981).

Parenthetically, an installment contract which is to be performed over a period in excess of five years for residential property containing six or less dwelling units must list all land trust beneficiaries. All beneficiaries holding power of direction must also sign. If these stipulations are not met, the installment contract is voidable by the purchaser. ILL. REV. STAT. ch. 29, ¶¶ 8.31, 8.32 (1987).

47. See *White v. Bates*, 234 Ill. 276 (1908). (the seller need not have title at the time he enters into the contract).

48. *Crum v. Krol*, 99 Ill. App. 3d 651, 425 N.E.2d 1081 (1981).

49. R. SEMENOW, *QUESTIONS AND ANSWERS ON REAL ESTATE*, ¶. 198-99 (1978).

50. In our modern age of foreign investment, it should be noted that aliens are permitted to own land in Illinois. However, pursuant to that very statute, an alien must become a citizen within six years after reaching age 21, or he must convey the property to a bona fide purchaser. If the alien fails to comply with this statute, the state's attorney is theoretically empowered to bring a complaint to compel sale of the

III. QUALITY OF TITLE THAT VENDEE AGREES TO ASSUME

A. *Type of Deed* (6)

The usual form of deed given in a real estate transaction is a warranty deed. In order to constitute an effective conveyance, the written deed must contain the name of the grantor, grantee, description of the property and words evidencing a present intent to convey.⁵¹ Other forms of deeds in common use are executor's deeds, quit claim deeds, and trustee's deeds. Of course, notwithstanding the form of the deed used, if the grantor owns no interest in the property, no property interest will be conveyed.

The effect of giving a warranty deed is defined as follows:⁵²

8. Warranty deed—Form—Effect

§ 9. Deeds for the conveyance of land may be substantially in the following form:

The grantor (here insert name or names and place of residence), for and in consideration of (here insert consideration) in hand paid, conveys and warrants to (here insert the grantee's name or names) the following described real estate (here insert description), situated in the county of _____, in the state of Illinois.

Dated this _____ day of _____, 19____.

(A.B.)

The names of the parties shall be typed or printed below the signatures. Such form shall have a blank space of 3 inches by 3 inches for use by the recorder. However, the failure to comply with the requirement that the names of the parties be typed or printed below the signatures and that the form have a blank space of 3 inches by 3 inches for use by the recorder, shall not affect the validity and effect of any such form.

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple, to the grantee, his heirs or assigns, with covenants on the part of the grantor, (1) that at the time of the making and delivery of such deed he was the lawful owner of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all incumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and persons who may lawfully claim the same. And such covenants shall

property. See ILL. REV. STAT. ch. 6, § 2 (1976).

51. See Application of Country Collector, 1 Ill. App. 3d 707, 274 N.E.2d 164 (1971); Glenview Club v. Becker, 113 Ill. App. 2d 127, 251 N.E.2d 778 (1969); Mould v. Rohm, 257 Ill. 436; 100 N.E. 971 (1913).

52. ILL. REV. STAT. ch. 30, § 8 (1985).

be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at length in such deed.⁵³

The word "warranty" refers to the condition of the title to the land, not the condition of the premises such as the heating plant or electrical circuitry. If the buyer wishes to receive an express warranty regarding the physical premises, such an express warranty must be explicitly stated in a separate paragraph of the contract.

A quitclaim deed, on the other hand, carries with it no present warranties from the grantor.

9. Quitclaim deed—Form—Effect⁵⁴

§ 10. Quitclaim deeds may be, in substance, in the following form:

The grantor (here insert grantor's name or names and place of residence), for the consideration of (here insert consideration), convey and quit claim to (here insert grantee's name or names) all interest in the following described real estate (here insert description), situated in the county of _____, in the state of Illinois.

Dated this _____ day of _____, A.D. 19_____.

A.B.

The names of the parties shall be typed or printed below the signatures. Such form shall have a blank space of 3 inches by 3 inches for use by the recorder. However, the failure to comply with the requirement that the names of the parties be typed or printed below the signatures and that the form have a blank space of 3 inches by 3 inches for use by the recorder shall not affect the validity and effect of any such form.

Every deed in substance in the form described in this section, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance, release and quit claim to the grantee, his heirs and assigns, in fee of all the then existing legal or equitable rights of the grantor, in the premises therein described, but shall not extend to after acquired title unless words are added expressing such intention.⁵⁵

The purchaser should be aware of the fact that there is case law in some states to the effect that a grantee of a quit claim deed may not be considered a bona fide purchaser ("BFP") within the meaning of that state's recording acts. Hence a grantee on a quit claim deed, even if he otherwise would have qualified as a BFP by paying all the consideration, receiving the deed, and being without actual notice of another's prior interest, will nevertheless not qualify as a BFP *vis-a-vis* a prior grantee. Thus, it is wise for the purchaser to insist on receiving a warranty deed in the contract.

53. Amended by P.A. § 81-1509, Art. II, § 23, eff. Sept. 26, 1980.

54. ILL. REV. STAT., ch. 30, ¶ 9 (1985).

55. Amended by P.A. 81-1509, Art. II, § 23, eff. Sept. 26, 1980.

It is best to use comprehensive language when creating a joint tenancy to negate the possibility that another form of tenancy will be created.⁵⁶ Illinois has ceased to recognize a tenancy by the entireties after its adoption of the Married Woman's Act of 1861.⁵⁷

A deed by a landowner to himself and another as joint tenants and not as tenants in common, absent any mention of "right of survivorship," will nevertheless create a valid joint tenancy.⁵⁸ The Illinois Statute states:

Joint tenancy created notwithstanding grantor is named as grantee whenever a grant or conveyance of lands, tenements, or hereditaments shall be made where the instrument of grant or conveyance declares that the estate created be not in tenancy in common but with right of survivorship, or where such instrument of grant or conveyance declares that the estate created be not in tenancy in common but in joint tenancy, the estate so created shall be an estate with right of survivorship notwithstanding the fact that the grantor is or the grantors are also named as a grantee or as grantees in said instrument of grant or conveyance. Said estate with right of survivorship, so created shall have all of the effects of a common law joint tenancy estate.

This section shall not apply to nor operate to change the effect of any grant or conveyance made prior to the effective date of this amendatory Act.⁵⁹

It should be noted that some states have purported to abolish a joint tenant's right of survivorship so that as with tenancy in common, at the death of one joint tenant, his interest would pass to persons named in his will.⁶⁰ However, even in those states a right of survivorship will be preserved if the deed to the joint owners expressly states that on death the property passes to the surviving grantee.⁶¹ Illinois, however, still adheres to the fundamental common law doctrine that joint tenancy—be it in property or in rights under an executory contract—consists of co-equal and co-terminal powers and rights.⁶²

56. See Annotation, *What Constitutes a Devise or Bequest in Joint Tenancy Notwithstanding*, 46 A.L.R. 2d 523 (1956). See also ARK. STAT. ANN. § 50-411; DEL. CODE ANN. tit. XXV § 701 (1953); MD. CODE ANN., Real Property, § 2-117 (1981).

57. ILL. REV. STAT. ch. 40, ¶ 1001 (1874). See also *Douds v. Fresen*, 392 Ill. 477, 64 N.E.2d 729 (1946); *Lawler v. Byrne*, 252 Ill. 194, 96 N.E. 892 (1911). Regarding the creation of a tenancy by the entireties in a deed to husband and wife, see Annotation, *Estates By Entireties as Affected by Statute Declaring Nature of Tenancy Under Grant or Devise to Two or More Persons*, 32 A.L.R. 3d 570 (1970).

58. ILL. REV. STAT. ch. 76, ¶ 1b (1953).

59. *Id.*

60. Cf. ARIZ. REV. STAT. § 33-431(1939); FLA. STAT. ANN. § 689.15 (1941).

61. See Annotation, *Construction of Devise to Persons as Joint Tenants and Expressly to the Survivor of Them, or to Them, with the Right of Survivorship*, 69 A.L.R. 2d 1058 (1960).

62. See generally ILL. REV. STAT. ch. 76 (1987). Generally, the Illinois statutes pertaining to real estate contract drafting and conveyancing are found in the Illinois revised statutes in chapter 29 (Contracts) and chapter 30 (Conveyances). ILL. REV.

In order that the deed be a "recordable" deed, there are certain statutory requirements including:

- a) legal description;
- b) name and address of grantee;⁶³
- c) name and address of deed preparer;⁶⁴
- d) an acknowledgement of personal representative or officer authorized to execute deeds, if applicable;⁶⁵
- e) state and county transfer tax stamps affixed and an appropriate tax declaration;⁶⁶
- f) municipal transfer tax stamps, if applicable;⁶⁷
- g) Names of all parties and witnesses typed or printed to the side or below the signatures;⁶⁸
- h) name and address of person to receive tax bill;
- i) compliance with the Plat Act, if applicable; and,⁶⁹
- j) in Cook County, the permanent tax number.

In order for a deed to constitute an effective conveyance, the deed must be delivered to the grantee.⁷⁰ Although there is a rebuttable presumption that an acknowledged and recorded deed was delivered and accepted by the grantee, the mere fact of possession of the deed may not be sufficient to prove acceptance.⁷¹

As to the creation of a joint tenancy by and among grantees, one of whom is also the grantor, Illinois used to follow the common law rule that a joint tenancy could not be created unless the "four

STAT. ch. 29 (1987); ILL. REV. STAT. ch. 30 (1987). See also Anderson, *Tax Consequences of Selling or Losing a Home*, 24 PRACTICAL LAWYER 57 (1978); Ridloff, *How to Prepare a Contract of Sale for Commercial Real Property*, 25 PRACTICAL LAWYER 11 (1979).

63. ILL. REV. STAT. ch. 115, ¶ 12.1 (1987). Note, however that even if names are missing, the deed constitutes constructive notice to a subsequent grantee that there has been an earlier conveyance.

64. ILL. REV. STAT. ch. 115, ¶ 9.3 (1987). The deed is still valid without this information.

65. ILL. REV. STAT. ch. 30, ¶ 31 (1987).

66. ILL. REV. STAT. ch. 120, ¶ 1003 (1987).

67. CHICAGO, ILL., MUNICIPAL CODE, ch. 200.1, § 200.1-2136 (1983); CHICAGO, ILL., MUNICIPAL CODE, ch. 185, § 185-46.3 (1983). In Chicago, the deed must contain a certification of payment of current water and sewer taxes that are required before Chicago Transfer Tax Stamps are issued. Other municipalities have idiosyncratic requirements that must be met before a conveyance can take place. Otherwise the buyer runs the risk of being cited later for an ordinance violation. For example, in some jurisdictions, a home must pass an inspection (especially true for new construction). Also, a municipality may require that adequate insurance be obtained to cover unique local problems such as protection against damage structures in a flood plain.

68. ILL. REV. STAT. ch. 30, ¶¶ 8, 9, 34c (1987); ILL. REV. STAT. ch. 115, ¶ 9.2 (1987).

69. ILL. REV. STAT. ch. 109, ¶ 1 (1987).

70. *Gallagher v. Girote*, 23 Ill. 2d 170, 177 N.E.2d 103 (1961); *Parker v. Roberts*, 408 Ill. 159, 96 N.E.2d 533 (1951); *Newton v. Village of Glen Ellyn*, 374 Ill. 50, 27 N.E.2d 821 (1940).

71. *In re Shedrick*, 122 Ill. App. 3d 861, 462 N.E.2d 581 (1984). See generally Annotation, *What Constitutes Acceptance of Deed by Grantee*, 74 A.L.R. 2d 992 (1960).

unities" (time, title, interest and possession) were observed.⁷² This remained good law until 1953 when the statute⁷³ was amended, thus dispensing with the "strawman" gambit, previously utilized to satisfy the unities requirement. Therefore, by using appropriate language to create a joint tenancy, A can now convey to A and B in joint tenancy. Public policy is cited as the main reason for the statutory amendment.⁷⁴ Recent Illinois cases apply the same rules to both the creation and severance of a joint tenancy. Therefore, a joint tenancy may be severed by the conveyance of a joint tenant's interest to himself as a tenant in common without the use of an intermediary.⁷⁵

IV. TITLE EXCEPTIONS

If subparagraphs (a) through (h) of paragraph 2 in the contract are not amended or stricken, the seller is entitled at closing to deliver a deed to the buyer with title to the property subject to these exceptions. However, it is incumbent upon the seller to convey merchantable title to the buyer at closing.

Juxtaposing the seller's obligation to convey "merchantable title" to buyers and the section called "Conditions and Stipulations" on the reverse side of the contract, there may be room to argue that an ambiguity exists. Paragraph 1 of Conditions and Stipulations provides that: "The Title Commitment shall be conclusive evidence of good title as therein shown as to all matters insured by the policy subject only to the exceptions as therein stated."

Paragraph 2 states that if there are unpermitted exceptions, seller shall either have those exceptions removed or, presumably by paying an additional premium, "have the title insurer commit to insure against loss or damage that may be occasioned by such exceptions." It would thus seem, at first reading, that seller and buyer have agreed that an insurable title is a merchantable title. That is, if a title insurance company will insure over the exception, the buyer must take the title as thus insured, since, presumably when he eventually sells, the next buyer will be accorded the same protection.

It is questionable whether a third party's agreement—in this

72. See *Deslauriers v. Senesac*, 331 Ill. 437, 163 N.E. 327 (1928).

73. ILL. REV. STAT. ch. 76, § 1(b) (1987).

74. *Frey v. Wubbena*, 26 Ill. 2d 62, 185 N.E.2d 850 (1962).

75. *Minonk State Bank v. Grassman*, 95 Ill. 2d 392, 447 N.E.2d 822 (1983). See *Conveyances*, 13 ILL.P. § 178 (1955); Annotation, *Severance or Termination of Joint Tenancy by Conveyance of Divided Interest Directly to Self*, 7 A.L.R. 4th 1268 (1981); Annotation, *Character of Tenancy Created by Owner's Conveyance to Himself and Another, or to Another Alone, of an Undivided Interest*, 44 A.L.R. 2d 595 (1955).

case, that of a title insurance company—to insure over an otherwise substantial exception, e.g., a private easement over the north quarter of the lot, transforms an unmerchantable title into a “merchantable title.” The instant buyer may be protected, via indemnity, by the title company’s endorsement over and against the particular adverse interest that makes the title technically unmerchantable. However, when this buyer later attempts to sell the land to a second buyer, the easement, of course, is still present.

There does exist in the Chicagoland area the practice of the first title company, which has previously insured over an exception for its buyer-client, agreeing to hold a second title company harmless when the second title company insures over that same exception for a later buyer. In other words, the first title company feels that since it previously agreed, for example, to insure over an easement for its own client, it implicitly agreed to make title merchantable when that buyer later contracts to sell. Hence, when the subsequent buyer seeks insurance over that exception, the second title company will grant that insurance, providing that the first title company agrees to indemnify and hold the second company harmless from claims arising therefrom. This arises as a matter of comity between title companies, and, in the author’s opinion, is not mandated by its earlier contract of insurance with the first buyer. The first buyer has no guarantee that his buyer will in turn agree that “insurable” means “merchantable”. Buyer may be conceding too much and is possibly disabling himself from later conveying merchantable title.

It is altogether feasible, however, to convey a merchantable title to land which at the same time is subject to certain exceptions that possibly would be very undesirable from the buyer’s standpoint. Therefore, some attorneys urge that all the subparagraphs be stricken. However, such action by the buyer’s attorney will make it virtually impossible for the seller to perform. That is, the seller will be quite unable to convey title that is not subject to some conditions, liens, encumbrances, and the like. Hence, a dilemma arises.

In an ideal world, where lawyers are drafting the contract and time pressures do not exist, the buyer’s attorney would have before him the seller’s old title policy. The buyer’s attorney could then draft the contract as being subject only to the exceptions found within the seller’s policy that are unobjectionable to his own client. However, the seller’s title policy is frequently not made available to the buyer’s attorney. Contract drafting, like politics, consists of compromise and the art of the possible.

The following are suggestive only of the additions, deletions, and amendments that could be prudently made by the buyer’s

attorney.

A. *Covenants* (7)

“Covenants, conditions, and restrictions of record” should be stricken. For example, there may be a covenant or restriction running with the land that prevents the buyer from erecting a fence, a pool, a detached garage or conducting a business from a basement office. Restrictive covenants are enforceable unless they violate public policy such as covenants dealing with race, ethnicity, or sex.⁷⁶ If there are conditions affecting the land that the seller cannot remove, for example, “If alcoholic beverages are ever sold, manufactured or consumed on the premises, then the premises will revert to the grantor,” the buyer should be made aware of such conditions before he signs the contract. Some drafters delete only the word “condition” and leave the words “covenants” and “restrictions” in the contract to make the contract more palatable to the seller. The basic reason for this is that financing may very well be unavailable if the land is subject to any “conditions,” and purchasers in the secondary mortgage market may not be willing to buy a mortgage subject to such a limitation. Similarly, some state laws forbid institutional lenders to lend money on land that is subject to “conditions.”

Possibly a buyer may be willing to accept the property as it is; that is, he has no intention of changing, adding or removing any structure. Further, he believes that, because of the low asking price and the shortage of time within which to accept the offer, he cannot afford to cross out every exception in this paragraph because this will cause the seller to reject his offer. In this situation, an addition might be made to various exceptions, modifying them as follows: “Providing that the existing structures and use do not violate said covenants and restrictions.” This is an attempt by the buyer to have the seller commit himself that his land is in conformity with all covenants and restrictions. If, upon reviewing a new survey, such is found not to be the case, although such non-conformity may not amount to a “material breach” thus rendering the title “unmarketable,” the buyer will have greater leverage in arguing that the seller has breached the contract, rather than if the buyer had simply agreed to take subject to all covenants and restrictions. To repeat, however, the more conservative approach is to strike all unknown or potentially undesirable exceptions, and then require the seller to explain the exceptions that do exist before your client agrees to take

76. See *Levitt Homes Inc. v. Old Farm Homeowners Assn.*, 111 Ill. App. 3d 300, 444 N.E.2d 194 (1982); *Cordogan v. Union Nat'l Bank of Elgin*, 64 Ill. App. 3d 248, 380 N.E.2d 1194 (1978).

subject to them.

B. Easements (8)

As to the phrase "private, public and utility easements," an attorney should strike everything except "utility easements," and add the word "customary" before the word "utility." If the seller, or a predecessor in interest, had ever granted a private easement to the owner of a contiguous piece of property, that easement will run with the land and make the seller's land subject to the neighboring dominant estate. Likewise, a parking or driveway easement, even under an unrecorded lease, is something that a diligent purchaser should be able to discover upon a reasonable inspection.⁷⁷ The reason is that a purchaser is charged with notice of the rights of parties in visible and open possession,⁷⁸ and also with any easement that may be visible upon inspection and may have therefore arisen by implication or prescription.

In like manner, a buyer would not want to contract to purchase property and, after a title opinion has been issued, only then discover that the back 10 feet of his soon-to-be-acquired property is subject to an easement for ingress and egress in favor of a neighboring piece of property pursuant to a grant of easement recorded long ago.

Public utility easements, on the other hand, actually benefit the property. They do constitute encumbrances on the property and if stricken the seller could not, in theory, convey a deed pursuant to the terms of the contract. Therefore, the words "utility easements" are customarily left in the contract. But your client should be aware that concomitant with the grant of easement is the utility's right to enter the land and maintain its service. Hence, if a predecessor in title has poured a cement patio over the underground electric lines, the electric company could enter the land, break up the patio in order to service the defective underground electric line, and send the owner of the property—soon to be the buyer—a bill for the demolition. As an added precaution therefore some attorneys add the words: "to which the present use and occupancy conform." This is an attempt to make the seller commit himself that the utility easements, whether visible or not, are not presently violated.

C. Roads (9)

The phrase "Roads and highways, if any" also presents questions. If there is a public easement that affects the land, or a road or

77. *Pacemaker Food Stores Inc. v. Seventh Mont Corp.*, 117 Ill. App. 3d 636, 453 N.E.2d 806 (1983).

78. *Burnex Oil Co. v. Floyd*, 106 Ill. App. 2d 16, 245 N.E.2d 539 (1969).

highway that has been platted but is not yet visible on inspection, the buyer may not want to purchase the property. Usually a commitment for title insurance is not issued until after the contract is signed. If the buyer were to agree in his contract to take the land subject to an unknown exception, for example, the county's right to use an additional 15 feet of seller's property to widen a highway, when the title report indicates that such an exception exists, the buyer nevertheless must buy the property or lose his earnest money. Consequently, these words "roads and highways, if any" should be stricken.

D. Party Walls (10)

Strike the exception, "party wall rights and agreements, if any" unless it is appropriate considering the demised premises since this exception refers to rights of owners of row houses, condominiums, and duplexes.

E. Leases (11)

Strike the phrase "existing leases and tenancies." The buyer does not want to buy property that is subject to a lease. Note that possession of property, except for Torrens property, constitutes constructive notice of the possessor's interests in the property.⁷⁹ Further, if the tenant, in addition, were to have an option to buy the property, the tenant's option to purchase would be superior to the buyer's interest.⁸⁰ Therefore, in the sales contract the buyer should not agree to take the property subject to any undetermined or undeterminable lease or tenancy.

Of course, if the property is an apartment building the words "existing leases and tenancies" must be left in the contract. But a schedule of those leases and tenancies, with pertinent data, should be attached to the contract.

If, indeed, someone were living on the premises, and the seller represents that this person has a lease that ends on a certain date, the seller should make this express warranty in the contract. The seller should also supply the buyer with some written proof during the executory period of the contract that the tenant's lease will expire on a certain date, and perhaps that seller holds no security deposit which buyer would have to refund on the termination of the lease. During the executory period of the contract the buyer's attorney should check the leases to be sure that they conform to the schedule as to such items as length and rentals.

Lastly, it would be prudent for the buyer, during the executory

79. *Id.* at 18, 245 N.E.2d at 543.

80. *Miller v. Green*, 264 Wis. 159, 58 N.W.2d 704 (1953).

period of the contract, to obtain from each lessee a statement to the effect that his lease will terminate on a specific date, and that his leasehold interest is his sole interest in the land.

F. Uncompleted Improvements (12)

Strike the "special taxes or assessments for improvements not yet completed" phrase. If the city or town were contemplating a new school, road improvements, etc., and had already made assessments, although the improvement was still in the planning stages, such a hidden assessment would effectively raise the price of the property. Of course, the improvement would enhance the value of the property to the buyers, but the annual cost to the buyers might be greater than their finances and income would warrant.

G. Completed Improvements (13)

The phrase "installments not due at the date hereof of any special tax or assessment for improvements heretofore completed" should be stricken. This clause refers to special or local assessments that are currently being paid by the property owners for public improvements that benefit the area. The improvements, such as a new school or park, might be a great selling point when the real estate broker takes a prospective buyer to see the property. But, has that improvement been paid for yet? If not, the purchaser's outlay would increase, perhaps dramatically. Assessments are customarily payable once a year, in ten to twenty annual installments. The buyer would consequently be faced with a yearly payment that he might not be able to afford. Therefore, it is incumbent on the buyer's attorney to forestall this contingency.

An argument can be persuasively made by the buyer that a special tax or assessment within the meaning of this phrase can be construed as a lien of a fixed amount, and therefore should be deducted from the proceeds of sale payable to seller at closing. However, a prudent buyer would want to determine in advance what future payments, if any, both principal and interest, will be required in future years. Therefore, the wiser alternative would be to strike this phrase.

Assessments are not taxes, and hence they are not deductible on the purchaser's income tax return. They simply raise the tax basis of the property and lessen the amount of capital gain realized when the property is sold. In sum, the prudent buyer should strike this exception.

H. Seller's Mortgage (14)

The phrase "mortgage or trust deed specified below" should be stricken. Unless the buyer is assuming the seller's mortgage, or taking

subject to it without actually assuming it, if the seller's mortgage is not paid upon closing the sale, that mortgage will remain viable and capable of being foreclosed upon a default in payment of the underlying debt, or upon a breach of any covenant contained within the mortgage itself. Usually, the seller's mortgage indebtedness is paid off from the proceeds of the sale. Theoretically, the seller is to present a lien free title to buyer at closing. But this is impossible until seller pays off his mortgage which in turn depends on seller receiving the purchase price.

Therefore, in order to protect the seller from the accusation that he does not have a technically marketable title at closing, a contract often provides that the seller may pay his mortgage indebtedness with the proceeds of the sale. In the form contract which appears in Appendix A of this article. Conditions and Stipulations, paragraph 1, provides that liens, which would include a seller's mortgage indebtedness, may be paid from the purchaser's proceeds.

The buyer usually takes it on faith that the seller's mortgagee, once seller's debt has been paid, will release the mortgage. When the seller's mortgagee is an established lending institution, that institution's "pay-off letter," stating just how much will be required to pay off the mortgage, can usually be relied upon by the buyer at the closing. A check sent to that institution will eventually produce a release deed that, when recorded, will expunge the seller's mortgage as an encumbrance on the property. In many states, there is legislation penalizing mortgagees who refuse to issue release deeds although the debt has been fully repaid. Consequently, when seller's mortgagee is an established institution, there is little risk to buyer that the seller's old mortgage will not be removed as a lien on title. However, if the seller's mortgagee is a private party, or a lender of doubtful financial credibility, the buyer should insist on closing with the seller's mortgagee present. At the closing, the buyer will give a check to the seller's mortgagee in the amount of the outstanding loan in return for a release deed immediately hand delivered from seller's mortgagee to buyer. Only then will buyer pay the seller his equity. If the seller's mortgagee is a private party, it is essential that the buyer close in escrow.

I. Real Estate Taxes (15)

Fill in the current year in the phrase "general taxes for the year _____ and subsequent years." All real estate becomes subject to general real estate taxes on the first day of the year, although these taxes are not assessed or collected until the following year.⁸¹ The

81. ILL. REV. STAT. ch. 120, ¶¶ 508a, 697 (1987).

owner of the property becomes personally liable for the taxes.⁸² In Cook County, general real estate taxes are payable in March and August of the following year. Therefore, the buyer has no choice but to take the property subject to general real estate taxes, which must be prorated at the time of the closing to give buyer credit for unpaid taxes up to the date of closing.

In the event that the property has been improved by seller in the recent past, but the County Assessor has not yet been informed of that fact (for example, three years ago seller put in a new bedroom and bath), the County Assessor has the right to reassess the property for those three years and collect additional taxes. If buyer determines that there has indeed been a recent improvement, he could check with the County Assessor to see if that improvement has been included in the Assessor's calculations. Or an escrow could be set up. Or seller could represent on the contract that the Assessor has been advised of these improvements. . . .

When representing the buyer and being faced with a form contract that lists all the exceptions found in paragraph 2, subparagraphs (a)-(h), the buyer's attorney is faced with a choice of being overly protective or being a gambler. If most or all of these exceptions are stricken, the contract cannot be performed. The seller simply cannot tender an unrestricted title. On the other hand, if the buyer's attorney decides to gamble and permit all the printed exceptions to remain in the contract—thus virtually assuring a sale—he subjects his client to unknown risks. Some compromise is desirable. Ideally, the attorney should sit down with the buyer, explain the risks involved in allowing the various exceptions to remain in the contract, and let his client make his own conscious assumption of the risk.

V. MONEY, MONEY, MONEY

A. *Earnest Money* (16)

In most real estate transactions where a broker is involved, the broker will recommend that the buyer pay at least ten percent down as earnest money. The reason for this is that if the buyer breaches, there will then be adequate money in escrow for the broker to receive his commission (usually six percent although this percentage is theoretically negotiable between seller and broker in the listing contract). The rest of the earnest money, in the event of a buyer's breach, will be retained by the seller as liquidated damages, per paragraph five of the Conditions and Stipulations. Although many peo-

82. ILL. REV. STAT. ch. 120, ¶ 508a. (1987). See *In re Application of Boone County Collector*, 131 Ill. App. 3d 939, 476 N.E.2d 800 (1985); *Griffin v. Gould*, 72 Ill. App. 3d 747, 391 N.E.2d 124 (1979).

ple believe that ten percent must be placed down as earnest money, this sum is not fixed by law and should be negotiated between buyer and seller if the circumstances call for a lesser or greater amount.

If the buyer tenders a less than reasonable amount the seller should reasonably expect to have an additional amount produced by buyer within a short time thereafter. Otherwise buyer has effectively procured an option to buy. The contract should, to protect seller, set a time within which any additional amount will be tendered.⁸³

Briefly as to commission splitting, generally a broker's claim for a commission is defeated by splitting his fee with one who is not licensed to be a broker, or with a salesman.⁸⁴ However, current practice is for the listing broker to divide the commission with the seller broker (the broker who escorts the buyer through the property, and in general acts as the buyer's representative throughout the negotiations). This is commonly done on a 50-50 basis., and is perfectly logical since the selling broker is really a sub-agent of the listing broker and in reality works for—since he is paid by—the seller.

Illinois has allowed the seller's broker to split the commission with the buyer himself "where this concession is necessary to obtain the buyer's signature on the contract." The seller is not harmed, and it is simply a sacrifice on the listing broker's part.⁸⁵

B. Price Less Earnest Money (17)

The amount of money inserted here is the difference between the purchase price and the earnest money. This amount will usually be realized from a combination of the buyer's mortgage proceeds and his own assets. This sum should be brought by the buyer to the closing in the form of a certified or cashier's check.

C. Assuming Seller's Mortgage (18)

If the buyer intends to assume the seller's mortgage, this paragraph must be completed. There are two meanings commonly used in reference to the words "assumption of mortgage." The first of these meanings is that used by brokers, namely: is the indebtedness of the seller large enough so that the seller's equity is correspondingly low enough that the buyer can pay for the equity? A seller's equity equals the difference between the purchase price and the seller's indebtedness.

83. See generally 1 Illinois Real Estate (Law. Co-op.) § 7:1 (1987).

84. See *Thorp v. Carte*, 252 Md. 523, 250 A.2d 618 (1969). See also Annotation, *Licensed Real Estate Broker's Right to Compensation as Affected by Lack of License on the Part of Partners, Co-Adventurers, Employees, or Other Associates*, 8 A.L.R. 3d 523 (1966).

85. See *Lageschulte v. Steinbrecher*, 36 Ill. App. 3d 909, 344 N.E.2d 750 (1976). See also Annotation, *Secret Agreement to Share or Split Commission with Broker Representing Adverse Party*, 63 A.L.R. 3d 1219 (1975).

The second meaning is whether the seller's mortgage documents will allow a third party to assume—step into the shoes of—the seller. Mortgage documents today almost universally contain “due-on” clauses. The “due-on” clause states that if the mortgagor defaults in the payment of the underlying debt, sells the land without first obtaining the mortgagee's permission, or breaches any one of the numerous covenants contained within the mortgage, the mortgagee has the right to accelerate the loan and, if need be, foreclose on the mortgage. “Due on” clauses have been found to have as a valid purpose the protection of the lender's security interest, and therefore, they are enforceable as reasonable restraints on alienation.⁸⁶ If the seller's mortgage documents contain a “due on” clause, the Illinois Supreme Court has held that the mortgagee may exact a premium for the buyer's attempt to assume the seller's mortgage, or as an alternative, the mortgagee may resort to foreclosure.⁸⁷ Assuming that a state were to find a due-on clause violative of its own state public policy, the United States Supreme Court has recently held that a federal regulation,⁸⁸ which authorizes a federal savings and loan association to enforce a due on clause, has pre-empted that state's judicially established public policy.⁸⁹ Assuming that there are no due-on clauses that would legally prevent a buyer from taking over the seller's mortgage, there are fundamentally three kinds of “assumptions.”

The first example is an assumption without release of the seller. In this situation, the buyer becomes indebted to the lender by signing a note or other evidence of indebtedness, or by accepting a deed with an assumption agreement inserted therein. The lender in effect thereby becomes a third party beneficiary of the contract or deed between the seller and the buyer. The assuming grantee's liability is not based on the original note; rather, it is based either on his individual commitment to the lender or on his own contract with the grantor, transforming the payee-mortgagee into a third party beneficiary.⁹⁰ Under this form, the lender can proceed against the buyer, the seller, or the land by way of foreclosure in the event of a default in the payment of the debt. The buyer can also be liable for a deficiency, where the land when sold at a foreclosure sale does not cover

86. *Baker v. Loves Park Sav. & Loan Ass'n.*, 61 Ill. 2d 119, 333 N.E.2d 1 (1975).

87. *Abdul-Karim v. First Federal Sav. & Loan*, 101 Ill. 2d 400, 462 N.E.2d 488 (1984).

88. 12 C.F.R. § 545.8-3(f) (1982).

89. *Fidelity Sav. & Loan Ass'n. v. De La Cuesta*, 458 U.S. 141 (1982).

90. *City Mortgage Inv. Club v. Beh*, 334 A.2d 183 (D.C. App. 1975). *Cf. LaGrange Federal Sav. & Loan v. Rock River Corp.*, 97 Ill. App. 3d 712, 423 N.E.2d 496 (1981) (court sanctioned a direct action by the mortgagee against the assuming grantee, although the court stated such action was not necessarily based on a third party beneficiary theory).

the full amount of the debt. Some courts have held that once the buyer becomes personally liable to the lender, the seller then becomes transformed into a surety, thereby being only secondarily liable to the lender.⁹¹

The second type is an assumption with release of the seller. In this situation the lender releases the seller from all liability under his original debt, and agrees to look only to the new buyer for the payment of the debt. Today, with interest rates high and continuing to rise, this would only occur if the buyer would agree to pay a higher interest rate to the lender than the seller had been previously obligated to pay. Essentially, this amounts to a novation.⁹²

In a number of states, before a mortgagee may proceed against an assuming buyer, the mortgagee must show that there had been a previous personal liability of the seller to the mortgagee. Thus, if the seller had himself only taken subject to the mortgage, without having assumed any personal liability to the mortgagee, the next buyer could not be liable to the mortgagee, notwithstanding the buyer's attempted assumption. A substantial number of other courts have held, however, that the intentions of the seller and buyer are paramount, and if they intended that the mortgagee be a third party beneficiary of their assumption agreement, then the mortgagee has rights thereon regardless of the seller's lack of personal liability.⁹³ It should be noted that an assuming buyer becomes liable not only to the mortgagee, but also, of course, to the seller. Thus, if the mortgagee forecloses because of the buyer's default, dragging the seller into the fray, the seller should have an action over and against the buyer.⁹⁴

The third type of assumption is taking subject to the seller's mortgage. Under this form, the buyer does not agree to be personally bound to the lender, but simply agrees to take the land knowing that there is an existing mortgage. The seller remains liable to the lender, the buyer is not liable, and the land remains encumbered. If the mortgage does not forbid an assumption, and the seller is willing to allow the buyer to purchase without becoming personally liable to the lender, the contract should specifically spell out that the buyer is simply taking "subject to" seller's mortgage, that the parties do not intend the buyer to be personally liable to the lender, and lastly that this contract is for the benefit of only the seller and buyer. This obviates any argument by the lender that it has become a third party beneficiary of the seller-buyer contract.

91. *Conerty v. Richtsteig*, 379 Ill. 360, 41 N.E.2d 476 (1942).

92. See R. KRATOVIL, *supra* note 8, at § 23.02 (9th ed. 1988).

93. See G. OSBORN, *OSBORN ON MORTGAGES* § 265 (2d ed. 1970).

94. See *Sharp v. Lance*, 602 S.W.2d 238 (Tenn. 1980).

D. The Mortgage Contingency Clause (19)

It should be noted that there are a myriad of mortgage plans, in addition to the conventional fixed rate. There are for example, variable rate, adjustable rate, balloon mortgages, FHA insured, and VA insured. The following discussion assumes that the buyer is going to seek conventional financing and indeed the form assumes this. If a different financing plan is contemplated, substantial amendments must be made to this paragraph of the form contract.

A mortgage contingency clause is a classic example of a "condition precedent," which has been defined as:

§ 224. A condition is an event, not certain to occur, unless its non-occurrence is excused, before performance under a contract becomes due.⁹⁵

The amount of the loan, the rate of interest, and the years of amortization are each important terms to the contract, and if any one is not filled in, the contract may be found void for vagueness. For example, where the sales contract contained the following language: "This offer to purchase is further contingent upon the purchaser obtaining the proper amount of financing," the court held it to be missing an "essential term," *i.e.*, the amount of loan.⁹⁶ Therefore, the entire contract was void for vagueness.⁹⁷

The buyer must make a reasonable effort to obtain financing.⁹⁸ The reason for this is that where the ability of the buyer to obtain a loan is an express condition of the contract, there is an implied obligation on his part to make a bona fide effort to satisfy that condition.⁹⁹ Simply making an inquiry without making a formal loan application has been held to be an insufficient effort.¹⁰⁰ Failure to make a reasonable effort will result in excusing the condition precedent of the mortgage contingency clause. The buyer's obligation to purchase will then become unconditional.

If the buyer makes a good faith attempt to obtain a loan in conformity with the terms of the contract and fails, then, upon proper notice having been given to the seller, within the time specified in the contract, the buyer will be entitled to a return of his earnest money.¹⁰¹ Since the contract itself provides that the buyer must give

95. RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981).

96. *Gerruth Realty Co. v. Pire*, 17 Wis. 2d 89, 115 N.W. 2d 557 (1962).

97. *Id.* See also *Ide Farm & Stable Inc. v. Cardi*, 110 R.I. 735, 297 A.2d 643 (1972).

98. *Honkomp v. Dixon*, 97 Ill. App. 3d 476, 422 N.E.2d 949 (1981); *Fry v. George Elkins Co.*, 162 Cal. App. 2d 256, 327 P.2d 905 (1958).

99. *Osten v. Shah*, 104 Ill. App. 3d 784, 433 N.E.2d 294 (1982).

100. See *Lewicki v. Chrachol*, 56 Ill. App. 2d 54, 205 N.E.2d 491 (1965). See also *Billman v. Hensel*, 181 Ind. App. 272, 391 N.E.2d 671 (1979).

101. *Lewicki*, 56 Ill. App. 2d at 54, 205 N.E.2d at 491 (1965).

notice of his inability to obtain financing, the buyer must strictly comply with this provision. It is a good idea for the buyer's attorney to prepare ahead of time a letter to the seller, dated a few days before the end of the contingency period, advising the seller of the buyer's lack of success in obtaining a commitment for a loan. This letter should be mailed within the contingency period in accordance with the provisions of paragraph 8 of the contract, under Conditions and Stipulations. A delay of even one day in giving notice to the seller could be a fatal mistake, and result in the buyer having to pay cash, secure a loan on terms that he cannot afford, or forfeit his earnest money.

According to the contract, the seller is entitled to secure a mortgage for the buyer. The buyer, of course, has to cooperate with the seller in giving any potential lender the requisite data, and if he were to refuse to cooperate, he would be guilty of "prevention", i.e., a lack of cooperation, and the condition precedent of obtaining a mortgage would be excused.¹⁰² Prevention by a party may excuse a condition precedent to a contract, thus making the promisor's promise unconditional.¹⁰³

If the seller attempts to find financing for the buyer, the buyer is not obligated to accept it if the terms are "unreasonable," or do not conform to the contract provisions.¹⁰⁴ Perhaps the buyer does not want to remain obligated on the contract for "a like period of time" while seller attempts to find him a loan. Then the paragraph should be amended to provide that seller's only alternative is to offer buyer a purchase money mortgage.

Finally, the contract provides that the seller can offer the buyer a purchase money mortgage. This is a form of financing whereby the seller, rather than a financial institution or other third party, becomes the mortgagee. There are both advantages and disadvantages to the buyer if he takes a purchase money mortgage. Some commentators have suggested that a purchase money mortgage could work to the detriment of the buyer, because the seller would likely require a balloon payment after five or ten years. This is an inaccurate analysis since seller, when offering a purchase money mortgage, must tender the same terms as to such item as amount, percent, and rate of amortization, as buyer originally agreed to seek from a third party

102. *Fry*, 162 Cal. App. 2d at 256, 327 P.2d at 905.

103. See generally A. CORBIN, CORBIN ON CONTRACTS § 767 (1964); RESTATEMENT (SECOND) OF CONTRACTS § 245 (1981).

104. See *Honkomp v. Dixon*, 97 Ill. App. 3d 476, 422 N.E.2d 949 (1981). See also Aiken, 'Subject to Financing' Clause in Interim Contracts for the Sake of Realty, 43 MARQ. L. REV. 265 (1960); Annotation, *Sufficiency of Real Estate Buyer's Efforts to Secure Financing Upon Which Sale is Contingent*, 78 A.L.R. 3d 880 (1977).

lender. One obvious drawback to a purchase money mortgage is that the seller might not be as tolerant of a buyer's tardiness in making mortgage payments and additionally might be quicker to foreclose. Another reason why a buyer might be relegated to a purchase money mortgage is that the property is truly overpriced, or encumbered to such a degree that no conventional lender will touch it. In such a case, when a buyer wishes to sell the property, he may find no one willing either to pay what he paid, or to take title with the previously extant encumbrances. In short, when conventional lenders turn down a buyer's loan application but the seller is more than willing to finance the sale, the buyer may be purchasing future problems. If the buyer suspects this eventuality, the clause permitting the seller to offer financing should be stricken.

E. Time to Obtain Mortgage (20)

The number of days commonly inserted is thirty to forty-five. Note that two days of each week are non-working days, when a lending institution might not be open for applications. The insertion of the word "working" or "calendar" before the word "days" will change the buyer's schedule. It will also affect the seller, for as soon as this contract is signed the seller's property is, in effect, removed from the market while the buyer begins to seek his financing.

F. Loan Particulars (21)

The dollar amount inserted here could be an absolute sum or a percentage of the purchase price. The latter alternative is suggested if the contract will later be amended through the negotiation period and the contract price will be changed. If, for example, the price were to be lowered so that the earlier stated loan amount sought would now be more than ninety percent of the purchase price, some lending institutions either will not or may not lend this amount. The buyer, of course, could agree to take a lower loan, but technically, he could insist on receiving the amount of loan inserted in the mortgage contingency clause, which might be a practicable impossibility. This would permit the buyer to escape from the contract. Conversely, if the buyer inserts an absolute dollar amount, and then the price is negotiated higher, but the loan amount is not simultaneously raised, the buyer may not have the extra cash at closing.

Attorneys are not supposed to advise clients regarding the value of the property they are buying, as this is within the broker's area of expertise. But when the amount of a mortgage indebtedness is involved, it is incumbent upon the attorney to caution the buyer about his capability of meeting long term payments. Young buyers especially should be counseled in this regard. The same caveats apply to the amount of interest and the method of amortization, since they are all interrelated and cumulatively will affect the amount of the

buyer's monthly mortgage payments. Prudent buyers often consult a lending institution before making an offer and have their loans "precleared."

In the absence of an agreement between borrower and lender that the borrower has the right to prepay his loan without penalty, the lender has the right at common law to insist that the loan continue for its stated term.¹⁰⁵ Hence, if the borrower were, for example, to receive an inheritance, he could not retire his loan in advance. Nor could he refinance, if rates dropped, without paying the lender a penalty.

Prior to the time that interest rates rose so high, it was considered prudent on the part of the buyer's attorney to insert in this paragraph the right of the buyer to prepay the loan without penalty. Now, however, if the loan is used to purchase a residence and the interest rate "exceeds 8% per annum" the lender may not charge a prepayment penalty.¹⁰⁶

G. Loan Service Charges (22)

These are "points" that the lending institution charges to grant the loan. These monies are frequently subtracted from the proceeds of the loan before they are distributed to the borrower. This, of course, lessens the net proceeds of the loan payable to the buyer. The borrower should be advised that if he pays these "points" by a separate check, the Internal Revenue Service, interpreting Internal Revenue Code Section 163 in its Revenue Rulings, has determined that they are interest which can be deducted on the buyer's tax return. On the other hand, if these service charges are merely subtracted from the loan proceeds, they are not so deductible, but only serve to raise the tax basis of the house for later capital gains treatment. Also, special rules apply, determined by Federal Regulation, regarding who is responsible for the payment of "points", when the loan is insured by The Federal Housing Authority or by the Veterans Administration.

VI. TRANSFER OF TITLE AND POSSESSION

A. Closing (23)

The place of closing should be convenient to the drafter. A date should be selected with respect to the accomplishment of the following:

Furnishing evidence of title within the time allotted by the con-

105. *Peter Fuller Enter. v. Manchester Sav. Bank*, 102 N.H. 117, 152 A.2d 179 (1959). See also *Dunham v. Ware Sav. Bank*, 384 Mass. 63, 423 N.E.2d 1002 (1981).

106. ILL. REV. STAT. ch. 17, § 6404(2)(a) (1987).

tract. Failure to do so may allow a reluctant buyer to cancel out.

Allowing ample time for buyer to discover defects in title and for seller to correct same. Buyer could otherwise be deemed to have waived these defects.

Obtaining special endorsements by buyer from the title insurance company when the circumstances warrant them.

Preparation of closing documents, including (but not limited to):

seller's affidavit of title (including ALTA and extended coverage if the transaction is insured by a title company);

evidence of compliance with zoning, fire, health laws and ordinances;

deed;

mortgage;

obtaining a recent survey;

obtaining a chattel lien search, if appropriate;

obtaining ordinance violation search;

inspection of the property by buyer to;

look for unrecorded easements, building restriction violations (could be a separate and distinct defect in title), zoning violations;

check the mechanical systems, perhaps utilizing an expert.

While the contract should fix a closing date, in the event it does not, a "reasonable time" will be presumed.¹⁰⁷ Either buyer or seller may then select a date and file notice as to the date for closing. When a date of closing is fixed and the contract provides that time is of the essence, an unprepared party at that date probably will not be granted a delay, absent compelling circumstances. It should be remembered that usually neither party's lawyer nor the broker has the power to grant extensions of time to close. Therefore, it is unwise to rely solely on their assurances of extension. The parties themselves must agree to any extensions of time.¹⁰⁸

B. Possession and Risk of Loss (24)

The right to possession of land follows legal title, and the risk of loss depends on possession. A buyer does not acquire legal title until he receives his deed.¹⁰⁹ In an installment contract, the parties may agree that buyer may take possession before he receives his deed. Indeed, this is almost universally the case. If the contract requires buyer to maintain and repair buildings, such a provision may impliedly carry with it the right of possession by the buyer.

107. Cf. F. GIBSON, *REAL ESTATE LAW* 506 (1983).

108. See generally R. WERNER, *REAL ESTATE CLOSINGS* ch. 2 (1979); R. KRATOVIL, *supra* note 8, at § 14.07.

109. See Annotation, *Effect of Failure of Contract for Sale or Exchange of Real Estate to Specify Time for Giving of Possession*, 56 A.L.R. 2d 1272 (1957).

The fundamental principle at common law was that, through the doctrine of "equitable conversion," the risk of loss passed to the buyer upon the signing of the contract. If the contract was silent as to when the risk of loss shifted, then most states declared that the risk of loss passed to the buyer at the time the contract was signed.¹¹⁰ Therefore, the buyer could not unilaterally rescind the contract in the event of a loss during the executory period of the contract. The buyer had to close with no abatement in price for the diminished value of the land.¹¹¹ For example, in *Kindred v. Boalbey*,¹¹² an installment contract purchaser, who was obliged to keep the premises insured, was required to pay the balance due on the contract out of the insurance proceeds received by the purchaser after a fire.¹¹³

The risk of loss can be placed on the seller by providing for this in the contract. In an increasing number of states the risk of a casualty loss is on the seller until the property is conveyed to the buyer by deed. But if the buyer has taken possession before the deal closes, he may have assumed the risk of loss. The underlying rationale is that once the buyer is in possession he is in a better position to prevent casualty losses. Absent a statute, in all states the risk of loss is on the seller where:

(1) the contract specifically provides for such risk allocation;

(2) the seller does not have marketable title at the time of the loss, the argument being that it is unfair to put risk of loss on the buyer when the seller is in no position to perform his own contract obligations;¹¹⁴

(3) seller delays closing and loss occurs during delay;

(4) loss is due to seller's carelessness.¹¹⁵

The key is still possession. The reason is that the one in possession is better able to prevent the loss and therefore retains (as seller) or assumes (as buyer) the risk of a casualty loss.¹¹⁶ Therefore, where the buyer "in possession" has paid the full purchase price under compulsion, unjust enrichment of the seller will not be allowed, and the buyer will be entitled to payment of the casualty

110. See G. SIEDEL, REAL ESTATE LAW 232 (1979).

111. Annotation, *Vender and Purchaser - Risk of Loss*, 27 A.L.R. 2d 466 (1953); Annotation, *Rights and Liabilities of Parties to Executory Contracts for Sale of Land Taken by Eminent Domain*, 27 A.L.R. 3d 572 (1969).

112. 73 Ill. App. 3d 37, 391 N.E.2d 236 (1979), cert. denied, 446 U.S. 912 (1980).

113. See also *Marbach v. Gradl*, 73 Ill. App. 2d 303, 219 N.E.2d 572 (1966).

114. *Eppstein v. Kuhn*, 225 Ill. 115, 80 N.E. 80 (1906).

115. Iowa Law Bulletin, 3 IOWA L. REV. 171 (1971); A. CORBIN, *supra* note 28, at § 661.

116. *Skelly Oil Co. v. Ashmore*, 365 S.W.2d 582 (Mo. 1963).

insurance proceeds.¹¹⁷

However, in Illinois and in many other states, the Uniform Vendor's and Purchaser's Risk Act applies.¹¹⁸ Indeed, under Conditions and Stipulations paragraph 4, the contract specifically provides for its application. Basically, under this Act the risk of loss during the executory period of the contract passes upon the first to occur of: (1) transfer of title or, (2) transfer of possession. Specific reference should be made to the Act if an escrow is contemplated since unique rules apply in the event of a loss during escrow. Similarly, the Uniform Land Transactions Act § 2-406, enacted in many states, but not yet in Illinois, provides for a similar allocation of risk of loss during the executory period of the contract.

C. Possession Holdover (25)

This section of the contract is meant to provide a *per diem* sum of money that will be paid to the buyer if the seller does not deliver possession at closing. The buyer should make this sum sufficiently large that it would be painful for the seller to stay and would, likewise, cover all expenses of buyer. The buyer will have, among others, the following expenses to consider: taxes from the date of closing; interest on his mortgage indebtedness; insurance, rent of the premises where he must live until the seller vacates; storage costs for his furniture; discomfort and delay.

D. Broker's Commission (26)

The name of the listing broker, and sometimes of the selling broker, is inserted here principally for purposes of information. The listing contract between seller and broker is the principal legal document governing the broker's rights to a commission. However, in the event that the seller and broker have entered into an oral listing, the insertion of the broker's name and amount of his commission at this point in the contract could assist the broker in his action for payment. The broker's theory of recovery would be based on a third party beneficiary theory. Naming the broker on the contract also might satisfy a state's requirement that a brokerage contract must be in writing.

As to the right of the broker to earn a commission where the deal does not close, the case of *Ellsworth Dobbs, Inc. v. Johnson*,¹¹⁹ broke new ground. The case held that the broker cannot collect his commission from the seller if the buyer cannot obtain financing and the deal falls through. The case really saved the seller from an unan-

117. *Gard v. Rasanskas*, 248 Iowa 1333, 85 N.W.2d 612 (1957).

118. ILL. REV. STAT. ch. 29, ¶¶ 8.1-8.3 (1987).

119. 50 N.J. 528, 236 A.2d 843 (1967).

ticipated liability where a financing clause was totally omitted from the contract. The court held, in part, that the broker knew that the buyer would have to obtain financing, and therefore the broker did not produce a buyer ready, willing and able to buy when the buyer signed an unconditional cash contract. Consequently, although brokers are usually entitled to a fee when they produce a buyer who is "ready, willing and able to buy," here the broker was entitled to no commission because the deal, without the fault of the seller, never closed.

The broker's recovery of a commission will not be defeated by the subsequent refusal or inability of the parties to complete the transaction. Such action could be viewed as a form of mutual prevention which, in turn, would excuse the implied condition of a successful closing that was required in the *Ellsworth* case.¹²⁰ *Ellsworth Dobbs* is currently followed in many states, and it is expected to become the law everywhere because the rationale of the case comports with the general expectations of lay parties to real estate contracts.¹²¹

VII. THE TIES THAT BIND

A. Earnest Money Escrow (27)

Frequently, the broker holds the earnest money as escrowee for the mutual benefit of the parties. Whether the broker technically may do this, since he is the agent of the seller, is open to debate. Nevertheless, it is a common practice for the listing broker to hold the earnest money during the executory period of the contract.

It should be remembered that the earnest money is the property of the buyer until the closing. Hence, the buyer is entitled to earn interest on this money. Depending on the amount of earnest money, and the length of time between the date of contract signing and closing, the interest might be substantial. Hence, an addition is recommended to this line such as: "the earnest money is to be placed in an interest bearing account, with the interest to be credited to buyer at closing." If there is no broker, either the seller's or buyer's attorney may act as the escrow agent, although many attorneys are reluctant to serve in a dual capacity. However, if the attorney does act as escrow agent, he should put the earnest money into an interest bearing account, with the Lawyers Trust Fund as beneficiary.¹²²

If the land is being sold by owner and there is no broker in-

120. *Becker v. Arnold*, 42 Colo. App. 178, 591 P.2d 596 (1979).

121. See R. KRATOVIL, *supra* note 8, at § 10.12. See also Annotation, *Liability of Defaulting Purchaser to Owner's Broker or Auctioneer*, 30 A.L.R. 3d 1370 (1970).

122. ILL. REV. STAT. ch. 110A, ¶ 9-102(d) (1988).

volved, a seller could reasonably ask for the insertion of a clause such as: "Buyer warrants that no broker has been instrumental in causing buyer to make this offer." In this way, if a broker ever were to make a claim against seller and recover a commission because of this particular sale, seller could then assert a third party action against buyer.¹²³

B. Statute of Frauds (28)

The Illinois statute provides that any contract for the sale of land to be enforceable must be signed by the party to be charged.¹²⁴ The memorandum will satisfy the statute if it contains on its face the following: (1) the names of the vendor and vendee; (2) a description of the property sufficiently definite to identify it as the subject matter of the contract; (3) the price, terms and conditions of the sale; and, (4) the signature of the party to be charged.¹²⁵ Even a contract for the sale of a beneficial interest in a land trust, which for most other purposes is considered to be personal property, falls under the statute of frauds.¹²⁶ Customarily both parties must sign the contract. This is especially true if the contract expressly provides that a sale is intended only where all parties agree to its terms.¹²⁷

For example, even though the husband is the title holder to the property, the buyer should be sure to secure the wife's signature to the contract, whereby, in effect, she agrees to release her dower interest (no longer extant in Illinois¹²⁸) and homestead rights in the land.¹²⁹ Otherwise, the husband will breach his contract if he is unable to deliver a deed to the buyer at closing since he has impliedly promised to secure his wife's signature on the deed. If the wife does not sign the contract, the buyer will not be able to force her to sign the deed. Hence, buyer could not obtain a marketable title.

Occasionally, one person (e.g., husband) will obtain the signature of the spouse (e.g., wife) without the latter having read the contract. One court has held that merely because a wife signed a sales contract at the behest of her husband after having failed to read it was not, in itself, a sufficient reason for rescission.¹³⁰

123. *McCue v. Deppert*, 21 N.J. Super 591, 91 A.2d 503 (App. Div. 1952).

124. ILL. REV. STAT. ch. 59, ¶ 2 (1987).

125. *Callaghan v. Miller*, 17 Ill. 2d 595, 162 N.E.2d 422 (1959).

126. *IMM Acceptance Corp. v. First Nat'l Bank & Trust Co.*, 148 Ill. App. 3d 949, 499 N.E.2d 1012 (1986).

127. *Madia v. Collins*, 408 Ill. 358, 97 N.E.2d 313 (1951). See also Annotation, *Land Contract Not Signed by All Owners*, 154 A.L.R. 778 (1945); 92 C.J.S. *Vendor & Purchaser* § 547 (1955).

128. ILL. REV. STAT. ch. 110, ¶ 2-9 (1987).

129. ILL. REV. STAT. ch. 110, ¶ 12-901 (1987).

130. *Greer v. Kooiker*, 312 Minn. 499, 253 N.W.2d 133 (1977).

A party may also enter into a legally enforceable contract by means of an authorized agent, called an attorney in fact, per a written power of attorney.¹³¹ If the seller has died after signing the contract, performance may be completed by the seller's personal representative, pursuant to seller's will or by court order.¹³²

VIII. VENDOR'S COMMITMENT TO DELIVER MERCHANTABLE TITLE: CONDITIONS AND STIPULATIONS

A. *Torrens System* (29)

In Illinois, the Torrens system of title assurance exists only in Cook County, where it applies to 25% to 28% of the parcels. There are unique legal aspects to the Torrens System:

"Registration," not the delivery of the deed, passes ownership to the grantee.

The deed remains in the Registrar's Office—it is not returned to the grantee.

Registrar of Titles investigates the validity of the transfer, unlike the Recorder of Deeds who simply records the deed. A new certificate of title is issued in new grantee's name after such investigation is completed.

A mortgage is not effective against the property until it has been checked as to form and signature and entered on the certificate of title by the Registrar. However, the Registrar does not check into the validity of the mortgage.

A judgment or other lien is not effective against Torrens property until the judgment or lien is noted on the certificate of title.

"The Torrens certificate purports to be conclusive proof that the title is as therein stated."¹³³

The Registrar, unlike a Title Insurance Company, does not assume the defense of any litigation that attacks the validity of title. The property owner defends any litigation at his own expense and may not look to the Registrar for reimbursement of litigation expenses, including attorney's fees and court costs.

Illinois has enacted legislation allowing Torrens property owners to withdraw from the system.¹³⁴

If the property is registered in Torrens, the seller will not want to furnish title insurance. The original reason that buyers began to demand title insurance for Torrens property was the length of time that it took the Torrens office to process the buyer's certificate. Currently, the buyer has to wait over a year to receive his owner's

131. See R. KRATOVIL, *supra* note 8, at § 11.19.

132. See *Holly v. Hirsch*, 135 N.Y. 590, 32 N.E. 709 (1892); *In re Greenway*, 236 Wis. 503, 295 N.W. 761 (1941).

133. R. KRATOVIL, *supra* note 8, at § 15.07.

134. ILL. REV. STAT. ch. 30, ¶ 148 (1987).

certificate.

However, the buyer's lender will usually insist on title insurance, and the buyer will then have to pay the cost. The principal reason that a buyer's lender will insist on title insurance to protect its mortgage interest is that, frequently, the buyer's note and mortgage are sold or discounted to a third party on the secondary mortgage market. The purchaser of the note and mortgage, often located in a distant city, will not agree to purchase this mortgage unless a title insurance company stands behind the integrity of the title. Consequently, even though the land is registered in Torrens, a buyer's lender will insist on mortgage title insurance being furnished at someone's expense—certainly not its own. Hence, it is to the buyer's benefit that title insurance be provided by the seller even when the property is registered in Torrens. In addition, it is submitted that better title protection is afforded to the buyer by title insurance than by the Torrens system. Hence the prudent buyer will insist on being provided title insurance in the sales contract. If the property is registered in Torrens, it becomes a negotiable point as to who will assume the costs of title insurance.

If the property is not registered in Torrens, that is, it is "title property," then title insurance is a *sine qua non* for the protection of the buyer's interest. Every form contract that the author has seen requires the seller, at his expense, to provide a commitment for title insurance. Absent such a provision, the buyer would have to assure himself about the integrity of the seller's title. However, since the seller will pay the premium, the seller has the right to choose the title insurance company that will search the public records and issue the commitment. A possible conflict arises here because the buyer's mortgagee—who also will insist on a mortgagee's insurance policy—may not agree with the title company selected by the seller or his attorney. Consequently, the seller's attorney should contact the buyer's mortgagee as soon as possible, perhaps even before the potential mortgagee has committed itself to grant a mortgage to the buyer, in order to resolve this question.

IX. PRORATIONS (30)

Adjustment provisions usually pertain to such items as utility bills, taxes, rents, service contract charges, etc. In order to compel proration of an item, it must have been provided for in the written contract.¹³⁵ Where, with no fault on buyer's part, there has been a delay in the closing, thus preventing him from entering into posses-

135. *Forest Preserve Real Estate Imp. Corp. v. Miller*, 379 Ill. 375, 41 N.E.2d 526 (1942). See also *Antietam-Sharpsburg Mus. v. William H. Marsh, Inc.*, 249 A.2d 721 (Md. 1969); *Wilson v. Campbell*, 244 Ark. 451, 425 S.W.2d 518 (1968).

sion, the buyer is entitled to have the taxes prorated as of the actual date of the closing rather than the time specified in the contract.¹³⁶

If the land is subject to a quadrennial reassessment, it would be wise to protect the buyer by providing for reproration when the actual tax bill for the year(s) in question is (are) known. A rider could be attached to the contract that provides that if the taxes for the year in which the deal closes, when finally ascertained, increase by more than x%, then the parties agree that the seller will forward a check to the buyers for the then determined increase in taxes. All of this depends, of course, on the seller's availability and credit-worthiness. Alternatively, money could be placed into an escrow, but brokers, understandably, are reluctant to keep their files open for the time necessary to make this determination. As another alternative, if taxes seem to be constantly on the rise, the buyer and seller might be persuaded to prorate on the basis of 110% of the last known tax bill.

In the recent case of *Batler v. Tapanes*,¹³⁷ the Illinois Appellate Court for the Second District, in a split decision, held that taxes could not be reprorated after closing. Because of the doctrine of merger, whereby all contractual obligations were deemed to have been superseded by sellers' delivery and buyers' acceptance of a deed, the sellers, who mistakenly gave the buyers an extra \$1,500 in tax credit at closing, could not recover the admitted overpayment.

X. EXECUTORY RISKS AND RELIEF

A. Statutory Provisions for Risk of Loss (31)

The Uniform Vendor & Purchaser Risk Act¹³⁸ applies to contracts for the sale of residential property. This Act provides generally that if "all or a material part," of the premises are destroyed prior to the date that either title or possession has been transferred to buyer, then buyer has the right to rescind the contract. It is a buyer's defense to the enforcement of the contract by seller. If the deal was to be closed in escrow and the premises are materially damaged during the escrow then unique rules apply. The attorney should consult the Act itself for operation of its provisions under an escrow.

B. Remedies (32)

As a preliminary note, you will notice that paragraph 5 of the Conditions and Stipulations affords the purchaser no remedy upon termination of the contract when the termination is "without pur-

136. *Flynn v. Wallace*, 271 N.E.2d 919 (Mass. 1971).

137. 164 Ill. App. 3d 427, 517 N.E.2d 1216 (1987).

138. ILL. REV. STAT. ch. 29, ¶¶ 8.1-8.3 (1987).

chaser's fault," except the return of his earnest money. Thus, it appears that the purchaser's only relief is rescission and restitution which would occur when: (1) the contract terminates without fault of either party (e.g., buyer cannot obtain the requisite financing); or even (2) when the seller breaches. In effect, the buyer contracts to elect only one remedy, rescission and restitution. In *Tanglewood Land Co. v. Wood*,¹³⁹ a contract provision, under which the buyer agreed to accept a refund of earnest money as full settlement on the seller's default, was held to constitute a bar to the buyer from obtaining any additional damages.¹⁴⁰

On its face, paragraph 5 of "Conditions and Stipulations" of this form contract appears to be biased in favor of the seller. If such a restriction on the purchaser's potential remedies against the seller seems unfair or undesirable, the paragraph should be amended accordingly.

On the other hand, the seller's remedies upon purchaser's default are not so limited. The paragraph provides that "at the option of the seller" the seller may retain the purchaser's earnest money as liquidated damages. Illinois Courts have held that if the real estate contract contains an optional liquidated damages provision, retention of the earnest money is not the seller's exclusive remedy. If the seller does not exercise that option, then the seller may seek any other remedy that would otherwise be available.¹⁴¹

C. Contract Remedies Available to the Parties Upon Breach

(1) Seller's Remedies

The remedies that the seller has against the buyer in the event of a material breach by the buyer include: rescission of the contract (not to be confused with forfeiture); a suit for damages; a suit for specific performance of the contract; and retention of the buyer's earnest money (liquidated damages).

(a) Rescission and Restitution

If the seller selects rescission, the seller declares the contract to be at an end, and he must surrender all his rights thereunder. Both buyer and seller must be restored, as nearly as possible, to their positions as existed before making the contract. Also, the seller must return all payments made to him by the buyer.¹⁴²

139. 40 N.C. App. 133, 252 S.E.2d 546 (1979).

140. Cf. *Melcer v. Zuck*, 95 N.J. Super 252, 230 A.2d 538 (1967) (buyer also able to collect the loss of his bargain).

141. See *Gryb v. Benson*, 84 Ill. App. 3d 710, 406 N.E.2d 124 (1980). Cf. *Kohenn v. Plantation Baking Co.*, 32 Ill. App. 3d 231, 336 N.E.2d 491 (1975) (where specific liquidated damages provision resulted in denial of additional recovery).

142. For a general discussion of seller's remedies upon buyer's material breach, see *Anderson v. Long Grove Country Club Estates*, 111 Ill. App. 2d 127, 139-41, 249

(b) Damages

In a suit for damages, the seller's measure of damages is the contract price minus the fair market value at the date of breach.¹⁴³ Stated another way, seller's damages are equal to the value of the defendant's unperformed performance less the savings to the plaintiff. This constitutes the loss of the seller's benefit of the bargain.

If the seller sells the property shortly after the buyer's breach at a price equal to or greater than the contract price, the seller, of course, has sustained no loss. Evidence of a resale price within a reasonable time after the buyer's breach is indicative of, but not dispositive of, the fair market value at breach.¹⁴⁴ In a volatile market, establishing fair market value at the date of breach could pose problems for the seller.

The seller could also seek consequential damages flowing from the buyer's breach. These, however, according to the seminal case of *Hadley v. Baxendale*,¹⁴⁵ would have to be reasonably foreseeable by the parties at the time of the contract's execution. Thus, in *Gryb v. Benson*,¹⁴⁶ the court held that the additional costs that the seller sustained in attempting to finance the purchase of a second home were not recoverable.¹⁴⁷

(c) Specific Performance

Although success is unlikely, it is theoretically possible for a seller to seek specific performance. Section 361 of the *Restatement [Second] of Contracts*, seems to permit this as one of the seller's remedies, even if there is a valid liquidated damages clause. Indeed, case law has held that the mere presence in a contract of a valid liquidated damages clause (loss of the 10% earnest money is generally considered a fair and reasonable sum) will not preclude an action for specific performance.¹⁴⁸

The remedy of specific performance would be a feasible remedy for seller if: the seller can tender a marketable title at time of trial; the down payment was minimal; the buyer has ample assets; and the fair market value of the property on the date of breach was roughly equivalent to the contract price, but, since the breach, its value has

N.E.2d 343, 349-51 (1969).

143. *Sheppard v. Fagan*, 94 Ill. App. 3d 290, 418 N.E.2d 876 (1981); *Kemp v. Gannett*, 50 Ill. App. 3d 429, 365 N.E.2d 1112 (1977).

144. *Bachewicz v. American Nat'l Bank & Trust Co.*, 126 Ill. App. 3d 298, 466 N.E.2d 1096 (1984); *Kemp v. Gannett*, 50 Ill. App. 3d 429, 365 N.E.2d 1112 (1977).

145. 9 Exch. 341.

146. 84 Ill. App. 3d 710, 406 N.E.2d 124 (1980).

147. *Id.*

148. See *Rootberg v. Richard J. Brown Assoc. of Del., Inc.*, 14 Ill. App. 3d 301, 302 N.E.2d 467 (1973) (court discusses and resolves the apparent conflict between plaintiff's suit for specific performance in the face of an otherwise valid liquidated damages clause).

dropped dramatically.

(d) Liquidated Damages

The most common remedy selected by the innocent seller is simply to forfeit the buyer's earnest money as liquidated damages.¹⁴⁹ Even though the seller has sustained no damages, if the clause allowing the seller to retain the earnest money is found to be a valid liquidated damages clause, the seller may retain those monies in full.¹⁵⁰ In order to qualify as a valid liquidated damages clause, the prospective harm must be impossible or difficult to ascertain and prove, and the amount provided for that inestimable harm must be reasonable.¹⁵¹

If the seller elects to retain the earnest money following buyer's breach, the seller is not entitled to recover additional damages. Such retention constitutes an election of remedies.¹⁵² The seller may return the earnest money and seek specific performance or even actual damages.¹⁵³

A liquidated damages clause of ten percent of the purchase price has been found enforceable.¹⁵⁴ At some point, of course, a court will find that the "liquidated damages" are really a penalty. Thus, one court held that a seller could not retain \$30,000 on a \$95,000 sale.¹⁵⁵ Even a valid liquidated damages clause—with its validity generally being determined prospectively rather than retrospectively—may not preclude a cause of action for specific performance.¹⁵⁶

The sales contract can provide that a certain remedy will be the sole and exclusive remedy of the seller. In order to do this, the words "at the option of the Seller and" should be stricken, and appropriate language inserted. Unless the seller's remedy is so limited, in case of buyer's default, the seller may pursue any remedy availa-

149. See generally 77 AM. JUR. 2D *Vendor and Purchaser* § 500 (1975); D. DOBBS, *REMEDIES* § 12.11 (1973).

150. *Curtin v. Ogborn*, 75 Ill. App. 3d 549, 394 N.E.2d 593 (1979); *Pruett v. LaSalceda, Inc.*, 45 Ill. App. 3d 243, 359 N.E.2d 776 (1977).

151. *RESTATEMENT (SECOND) OF CONTRACTS* § 356 (1981).

152. *Laksham v. Vecchione*, 102 Ill. App. 3d 629, 430 N.E.2d 199 (1981).

153. *Gryb v. Benson*, 84 Ill. App. 3d 710, 406 N.E.2d 124 (1980).

154. *Swerdlow v. Mallin*, 131 Ill. App. 3d 900, 476 N.E.2d 464 (1985); *Kraft v. Michael*, 166 Pa. Super. 57, 70 A.2d 424 (1950).

155. *Hook v. Bomar*, 320 F.2d 536 (5th Cir. 1963).

156. *Rootberg v. Richard J. Brown Assoc. of Del. Inc.*, 14 Ill. App. 3d 301, 302 N.E.2d 467 (1973). See also *Bauer v. Sawyer*, 8 Ill. 2d 351, 134 N.E.2d 329 (1956) (future medical practice agreement found enforceable); *Rubenstein v. Rubenstein*, 23 N.Y.2d 293, 244 N.E.2d 49 (1968) (liquidated damage clause not in contract as sole remedy); *RESTATEMENT (SECOND) OF CONTRACTS* § 361 (1981).

ble to an innocent plaintiff at common law.¹⁵⁷

(2) Buyer's Remedies

In order to put the materially breaching seller in default, the buyer must first tender the price unless such tender is excused.¹⁵⁸ It has been held that a mere offer to pay contained in a letter to the seller is an insufficient tender.¹⁵⁹ Where the buyer has not materially breached, but the seller has so breached, the buyer has the election of several remedies discussed below.

(a) Rescission and Restitution

The buyer simply declares that the contract has been terminated and he recovers his earnest money. In effect the buyer sues the seller for the value that he conferred on the seller. This remedy would be utilized in those situations where the value of the land decreased between the time the contract was signed and the date set for performance. In such a situation, a suit for damages would yield a negative recovery for the innocent buyer since the fair market value of the land would be less than the contract price.

(b) Vendee's Lien

During the executory period of the contract, via the doctrine of equitable conversion, the buyer acquires a vendee's lien. This gives the buyer the right to extract the value of the benefit he conferred on the seller out of the land itself, which stands as security for the repayment of purchase money paid. This remedy could be used when the seller is unable to convey good title. This may constitute a very effective remedy, since the buyer files a *lis pendens*, which ties up the seller's property and precludes the seller from consummating a subsequent deal.¹⁶⁰

(c) Specific Performance

This remedy is particularly useful when the buyer wants the land for a special purpose. This remedy is frequently more effective than a suit for damages because damages are often difficult to prove and judgments may be hard to collect.

The granting of specific performance, of course, is purely discretionary with the court, and if there is an adequate remedy at law, specific performance theoretically will not be granted.¹⁶¹ Since each

157. See generally Annotation, *Provision in Land Contract for Pecuniary Forfeiture or Penalty by Party in Default as Affecting the Right of the Other Party to Specific Performance*, 32 A.L.R. 584 (1924); 98 A.L.R. 887 (1935).

158. *Cohen v. Kranz*, 12 N.Y.2d 242, 189 N.E.2d 473 (1963).

159. *Ward v. Doucette*, 1 Mass. App. Ct. 842, 301 N.E.2d 256 (1973).

160. See Annotation, *Right of Vendee Under Executory Land Contract to Lien for Amount Paid on Purchase Price*, 33 A.L.R. 2d 1384 (1954).

161. *Bissett v. Gooch*, 87 Ill. App. 3d 1132, 409 N.E.2d 515 (1980); *Estate of*

parcel of land is unique, specific performance is universally available to the buyer. Therefore, where the contract is unambiguous in its terms, and it has been entered into without misrepresentation, overreaching, or other suspect dealings, specific performance is an appropriate remedy.¹⁶²

(d) Specific Performance with Abatement

A suit for specific performance can be coupled with a request that the court reduce the purchase price to compensate the buyer for defects in title he may have to accept.¹⁶³

(e) Damages

In a suit for breach of contract, the measure of damages is the market value of the land at the time of breach, less the amount of any unpaid purchase price. This is called the "loss of the bargain" by some courts. Other courts define the "loss of the bargain" as the difference between the contract price and the market value combined with any refund paid.¹⁶⁴ Also, on an installment contract, for example, improvements made by the buyer may be included in the recovery where the cost of materials and labor has increased the market value of the property.¹⁶⁵ It should be noted that damage suits are very rare in residential deals. They are simply not practical, since a jury demand will frequently delay the trial four or more years.

In conclusion, with regard to contract remedies, it must be remembered that most form contracts are drafted with primarily the seller's interests in mind. Accordingly, the section dealing with remedies in case of breach must be altered in order to protect the buyer in case of his or the seller's breach. It should also be remembered that, consistent with general contract law, attorney's fees, in the event of litigation, are not recoverable unless specifically provided for in the contract. It is frequently somewhat difficult to discuss this section with a client, as he has no intention of backing out of the contract and assumes that the other party is of a like mind. Consequently, he considers your concerns as superfluous. However, forewarned is forearmed.¹⁶⁶

Johnson, 39 Ill. App. 3d 246, 350 N.E.2d 310 (1976).

162. Bliss v. Rhodes, 66 Ill. App. 3d 895, 384 N.E.2d 512 (1978); Hunter v. DeMay, 124 Ill. App. 2d 429, 259 N.E.2d 291 (1970).

163. See R. KRATOVIL, *supra* note 8, at § 11.30(a).

164. Greenberg v. Ray, 214 Ala. 481, 108 So. 385 (1926).

165. Clay v. Bradley, 74 Wis. 2d 153, 246 N.W.2d 142 (1976).

166. For an exhaustive review of either party's remedies, see Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970).

XI. FINAL CONSIDERATIONS

A. Escrow (33)

Cross out the words "divided equally between Seller and Purchaser", and add "paid for by the party requesting the Escrow."

B. Time is of the Essence (34)

Basic contract law states that if a clause in a contract, such as "time is of the essence," is truly intended by the parties as an express condition precedent, then strict and exact compliance is required. "An express condition must be literally performed while a constructive condition need only be substantially performed."¹⁶⁷ If a court, however, were to construe the clause as promissory, and therefore in the nature of a constructive concurrent condition, substantial compliance should suffice.

This clause, therefore, could be a dangerous provision. Without it, the courts would allow the parties some flexibility and require only that performance take place within a "reasonable time." Generally, time is not of the essence unless made so by express stipulation of the parties or by virtue of the exigencies of the transaction itself.¹⁶⁸ The phrase "time is of the essence" means that each act required in the contract must be performed promptly at the time specified, and an unexcused delay of even one day could be later construed by a court to be a material breach of the contract.¹⁶⁹ "The extent to which a 'time of the essence' provision in a contract will be strictly enforced depends upon the intention of the parties as determined primarily by the language used, viewed under the circumstances surrounding the agreement, as they reflect on the meaning of the words."¹⁷⁰

Thus, the parties may make time be of the essence. In such cases, Illinois courts, tending to be strict constructionists, will enforce the clause and hold that a delay of one day is a material breach. For example, in *Hart v. Lyons*,¹⁷¹ even when the parties twice previously agreed to postpone the closing date, the final closing date was held to be "of the essence." However, following Corbin's suggestion and the philosophy enunciated in Section 2-302(c) of the Uniform Land Transaction Act, some courts are reluctant to enforce such a draconian provision unless the parties hon-

167. J. CALAMARI & J. PERILLO, *CONTRACTS* §§ 11-15 (3d ed. 1987).

168. *King v. Stevenson*, 445 F.2d 565 (7th Cir. 1971).

169. *Cf. Johnson v. Riedler*, 395 Ill. 412, 70 N.E.2d 570 (1946) (where plaintiffs must prove their own good faith in performance).

170. *Hart v. Lyons*, 106 Ill. App. 3d 803, 805, 436 N.E.2d 723, 726 (1982) (citing *Cantrell v. Kruck*, 25 Ill. App. 3d 1060, 324 N.E.2d 260 (1975)).

171. 106 Ill. App. 3d 803, 436 N.E.2d 723 (1982).

estly, openly and with full knowledge of the consequences intend that time truly be of the essence.

C. Survey (35)

A current survey is important. Even if buyer is comfortable with a vintage document, buyer's lender is likely to require a new one. To determine such items as the location of easements, land boundaries, and encroachments that the buyer must be aware of and to which the land is subject. Additionally, the buyer should insist, in the contract, on obtaining a recently dated survey. This survey should be delivered to buyer's attorney at least five days prior to closing so that the attorney can peruse it at his leisure.

XII. MISCELLANEOUS ADDITIONAL CLAUSES

Consideration should also be given to adding certain clauses for the protection of the client. Most of the following suggestions are directed towards the protection of the buyer's interests.

First, the buyer may wish to make his offer contingent on an inspection by a third party to be conducted within a few days after his offer has been accepted. This might be especially wise now, given the existence of radon, asbestos, and other environmental hazards. The buyer, of course, would assume the cost. In the event that the inspection report changes the buyer's mind, and the buyer acts in good faith, he would reserve to himself the option of terminating the contract.

Second, the buyers should reserve to themselves the right to reinspect the premises within 48 hours prior to closing, in order to ascertain whether all the items of personalty contracted to be purchased are still on the premises, and to view the general condition of the property.

Third, a provision can be included to the effect that the various contractual covenants undertaken by the parties, which do not pertain to the quality of the title, will survive the closing and will, therefore, not merge into the deed. The doctrine of merger in Illinois, first discussed in *Laflin v. Howe*,¹⁷² provides that when the deed is delivered, the terms of the contract are superseded. Therefore, in order to obviate a seller's later argument that his duties are at an end, a "no merger" provision might be added to the contract. Such a provision is particularly important if the seller has agreed to do certain tasks, e.g., remove a fence or fix the plumbing, which may extend beyond the date set for closing.¹⁷³

172. 112 Ill. 253 (1885).

173. See *Mallin v. Good*, 93 Ill. App. 3d 843, 417 N.E.2d 858 (1981); *Brownell v.*

Next, it should also be remembered that a contract of purchase, once it meets the statutory requirements for recording, may be recorded. Illinois Statutes invalidate any provision contained within a contract that forbids its recording.¹⁷⁴ Once recorded, the contract constitutes constructive notice of the parties' interests in the property and will serve to cloud the title.

Additionally, it must be remembered that the buyer will have to take title subject to the local zoning ordinances. If the buyer desires to change the premises, which change could contravene the present zoning restrictions, an appropriate condition precedent to this effect should be incorporated into the contract.

Also, it would be very beneficial and help to facilitate a smooth closing if copies of all relevant documents were to be delivered to the buyer's attorney at least five days prior to closing. To assure this happening, such a clause could be stated "to be of the essence" of the contract.

Occasionally a buyer may wish to make his purchase of seller's property contingent on buyer being first able to sell, or having a firm contract to sell, his own home. In this case, buyer will be able to avoid the necessity of obtaining a "bridge loan" or interim financing. Sellers, as a general rule, will not agree to such a clause. However, on occasion if a seller is, for example, elderly, retiring, and in no particular hurry to relocate, the seller may be willing to have such a clause in his sales contract. Occasionally, a seller will agree to such a condition on the further understanding that his house will remain on the market and that buyer will have the right to waive that protective condition if seller produces an offer to purchase from a second buyer. A seller's attorney, of course, should never allow his client to accept any subsequent offer from a second buyer until the first buyer has effectively rescinded the initial contract.

Finally, a clause dealing with "severability" might be added whereby the parties expressly agree that if a court of competent jurisdiction were ever to find any particular paragraph unenforceable, the remainder of the contract will still be considered valid and binding on the parties.

XIII. CONCLUSION

The additions, deletions and variations of the clauses found on a preprinted contract are virtually infinite in number. On the one

Quinn, 47 Ill. App. 2d 206, 197 N.E.2d 721 (1964) (the doctrine of merger was held not to pertain). *But see* Biehl v. Atwood, 151 Ill. App. 3d 763, 502 N.E.2d 1234 (1986) (court held that a contractual term of payment, which was to occur over a number of years, was not merged out of existence by the delivery of the deed).

174. ILL. REV. STAT. ch. 29, § 8.12 (1987).

hand, a lawyer who makes no changes in the preprinted contract, in order that the contract will be readily acceptable to the other contracting party, will certainly assure that a deal will be struck. On the other hand, the lawyer who makes numerous or substantial changes runs the risk of being accused of obstructionism. However, since this is probably the most substantial personal undertaking that a client will ever make—second perhaps only to a marriage contract—it is prudent to err on the side of overprotection. There is no perfect contract. Each one should be drafted to suit the client's personal needs.

Real Estate Sale Contract

I, _____ (Purchaser) agrees to purchase at a price of \$ _____ on the terms set forth herein, the following described real estate in _____ County, Illinois:

2

(If legal description is not included herein at time of execution, _____ is authorized to insert it thereafter.) _____ commonly known as _____ and with approximate lot dimensions of _____ x _____, together with the following personal property presently located thereon: (strike items not applicable) (a) storm and screen doors and windows; (b) awnings; outdoor television antenna; (c) wall-to-wall, hallway and stair carpeting; (d) window shades and draperies and supporting fixtures; (e) venetian blinds; (f) electric, plumbing and other attached fixtures as installed; (g) water softener; (h) refrigerator(s); (i) _____ range(s); and also

4

2. _____ (Seller) (Insert names of all owners and their respective spouses)

agrees to sell the real estate and the property, if any described above at the price and terms set forth herein, and to convey or cause to be conveyed to Purchaser or nominee title thereto (in joint tenancy) by a recordable _____ deed, with release of dower and homestead rights, and a proper bill of sale, subject only to: (7) convenants, conditions and restrictions of record; (8) private, public and utility easements and roads and highways, if any; (10) party wall rights and agreements, if any; (11) existing leases and tenancies; (e) special taxes or assessments for improvements not yet completed; (13) installments not due at the date hereof of any special tax or assessment for improvements heretofore completed; (g) mortgage or trust deed specified below, if any; (h) general taxes for the year _____ and subsequent years; and to _____ 3. Purchaser has paid \$ _____ (and will pay within _____ days the additional sum of \$ _____) as earnest money to be applied on the purchase price, and agrees to pay or satisfy the balance of the purchase price, plus or minus prorations, at the time of closing as follows: (strike subparagraph not applicable)

- (a) The payment of \$ _____
- (b) The acceptance of the title to the real estate by Purchaser subject to a mortgage (trust deed) of record securing a principal indebtedness (which the Purchaser [does] [does not] agree to assume) aggregating \$ _____ bearing interest at the rate of _____% a year, and the payment of a sum which represents the difference between the amount due on the indebtedness at the time of closing and the balance of the purchase price.

19 4. This contract is subject to the conditions that Purchaser be able to procure within 20 days a firm commitment for a loan to be secured by a mortgage or trust deed on the real estate in the amount of \$ _____, or such lesser sum as Purchaser accepts, with interest not to exceed 21% a year to be amortized over 21 years, the commission and service charges for such loan not to exceed 22%. If, after making every reasonable effort, Purchaser is unable to procure such commitment within the time specified herein and so notifies Seller thereof within that time, this contract shall become null and void and all earnest money shall be returned to Purchaser provided that if Seller, at his option, within a like period of time following Purchaser's notice, procures for Purchaser such a commitment or notifies Purchaser that Seller will accept a purchase money mortgage upon the same terms, this contract shall remain in full force and effect. (Strike paragraph if inapplicable.)

23 5. The time of closing shall be on _____, or 20 days after notice that financing has been procured if above paragraph 4 is operative, or on the date, if any, to which such time is extended by reason of paragraph 2 of the Conditions and Stipulations hereafter becoming operative (whichever date is later), unless subsequently mutually agreed otherwise, at the office of _____ or of the mortgage lender, if any, provided title is shown to be good or is accepted by Purchaser.

6. Seller shall deliver possession to Purchaser on or before 24 days after the same has been closed. Seller agrees to pay Purchaser the sum of \$ _____ for each day Seller remains in possession between the time of closing and the time possession is delivered.

7. Seller agrees to pay a broker's commission to _____ in the amount set forth in the broker's listing contract as follows: _____

27 8. The earnest money shall be held by _____ for the mutual benefit of the parties.

9. Seller agrees to deliver possession of the real estate in the same condition as it is at the date of this contract, ordinary wear and tear expected.
10. A duplicate original of this contract, duly executed by the Seller and his spouse, if any, shall be delivered to Purchaser within _____ days from the date below, otherwise, at the Purchaser's option, this contract shall become null and void and the earnest money shall be refunded to the Purchaser.

This contract is subject to the Conditions and Stipulations set forth on the back page hereof, which Conditions and Stipulations are made a part of this contract.

Dated _____
Purchaser _____ (Address) _____
28 Purchaser _____ (Address) _____
Seller _____ (Address) _____
Seller _____ (Address) _____

*Form normally used for sale of residential property other than property improved with large multi-family structures.

CONDITIONS AND STIPULATIONS

- 29 1. Seller shall deliver or cause to be delivered to Purchaser or Purchaser's agent, not less than 5 days prior to the time of closing a title commitment for an owner's title insurance policy issued by any title insurance company duly authorized and qualified to do business in Illinois in the amount of the purchase price, covering title to the real estate on or after the date thereof, showing title in the intended grantor subject only to (a) the general exceptions contained in the policy; (b) the title exceptions set forth above, and (c) title exceptions pertaining to liens or encumbrances of a definite or ascertainable amount which may be removed by the payment of money at the time of closing and which the Seller may so remove at that time by using the funds to be paid upon delivery of the deed (all of which are herein referred to as the permitted exceptions). The title commitment shall be paid upon delivery of the deed (all of which are herein referred to as the permitted exceptions). The title commitment shall be conclusive evidence of good title as therein shown as to all matters insured by the policy, subject only to the exceptions as therein stated. Seller shall also furnish Purchaser an affidavit of title in customary form covering the date of closing and showing title in Seller subject only to the permitted exceptions in foregoing items (b) and (c) and unpermitted exceptions, if any, as to which the title insurer commits to extend insurance in the manner specified in paragraph 2 below.
2. If the title commitment discloses unpermitted exceptions, Seller shall have 30 days from the date of delivery thereof to have the exceptions removed from the commitment or to have the title insurer commit to insure against loss or damage that may be occasioned by such exceptions, and, in such event, the time of closing shall be 35 days after delivery of the commitment or the time specified in paragraph 6 on the front page hereof, whichever is later. If Seller fails to have the exceptions removed, or in the alternative, to obtain the commitment for title insurance specified above as to such exceptions within the specified time, Purchaser may terminate this contract or may elect, upon notice to Seller within 10 days after the expiration of the 30-day period, to take title as it then is with the right to deduct from the purchase price liens or encumbrances of a definite or ascertainable amount. If Purchaser does not so elect, this contract shall become null and void without further actions of the parties.
3. Rents, water and other utility charges, fuels, prepaid service contracts, general taxes, accrued interest on mortgage indebtedness, if any, and other similar items shall be adjusted ratably as of the time of closing. If the amount of the current general taxes is not then ascertainable, the adjustment thereof except for that amount which may accrue by reason of new or additional improvements shall be on the basis of the amount of the most recent ascertainable taxes. The amount of any general taxes which may accrue by reason of new or additional improvements shall be adjusted as follows: _____
- 30 All proration is final unless provided otherwise herein. Existing leases, if any, shall then be assigned to Purchaser. Seller shall pay the amount of any stamp tax imposed by State law on the transfer of title, and shall furnish a completed Real Estate Transfer Declaration signed by the Seller or the Seller's agent in the form required pursuant to the Real Estate Transfer Tax Act of the State of Illinois, and shall furnish any declaration signed by the Seller or the Seller's agent or meet other requirements as established by any local ordinance with regard to a transfer or transaction tax. Such tax required by local ordinance shall be paid by the Purchaser.
- 31 4. The provisions of the Uniform Vendor and Purchaser Risk Act of the State of Illinois shall be applicable to this contract.
- 32 5. If this contract is terminated without Purchaser's fault, the earnest money shall be returned to the Purchaser, but if the termination is caused by the Purchaser's fault, then at the option of the Seller and upon notice to the Purchaser, the earnest money shall be forfeited to the Seller and applied first to the payment of Seller's expenses and then to payment of broker's commission; the balance, if any, to be retained by the Seller as liquidated damages.
- 33 6. At the election of Seller or Purchaser upon notice to the other party not less than 5 days prior to the time of closing, this sale shall be closed through an escrow with _____, in accordance with the general provisions of the usual form of Deed and Money Escrow Agreement then in use by _____, with such special provisions inserted in the escrow agreement as may be required to conform with this contract. Upon the creation of such an escrow, anything herein to the contrary notwithstanding, payment of purchase price and delivery of deed shall be made through the escrow and this contract and the earnest money shall be deposited in the escrow. The cost of the escrow shall be divided equally between Seller and Purchaser. *(Strike paragraph if inapplicable.)*
- 34 7. Time is of the essence of this contract.
8. All notices herein required shall be in writing and shall be served on the parties at the addresses following their signatures. The mailing of a notice by registered or certified mail, return receipt requested, shall be sufficient service.
9. Purchaser and Seller hereby agree to make all disclosures and do all things necessary to comply with the applicable provisions of the Real Estate Settlement Procedures Act of 1974. In the event that either party shall fail to make appropriate disclosure when asked, such failure shall be considered a breach on the part of said party.
- 35 10. Seller (_____ shall) (_____ shall not) be required to supply a recent survey of the real estate by qualified surveyor registered in this state before the date of closing showing the location of all improvements on the real estate.