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PITFALLS IN THE STANDARD OFFER TO PURCHASE FORM

Reflection will reveal that the right of a client at the closing of title, and many of his post-closing rights, are entirely dependent upon the provision of the contract. It is uniformly observed however by the thoughtful practitioner that there is a tendency to minimize or overlook the importance to be attached to the function of the contract in the transaction. The outcome of litigation between the vendor and purchaser will depend principally upon the terms of the contract. ①

This tendency to minimize the importance of the interim contract in the purchase of realty is evidenced by the fact that for years non-legal personnel have prepared such documents as a matter of practice. This in turn gives rise to the implication that the legal rights of the public are not seriously affected by such practice.

Recently, the issue came to a head in Wisconsin, resulting in the now widely known case of State ex rel Reynolds v. Dinger. ② By a 4 to 3 decision our supreme court held that although the filling out of certain standard forms constituted the practice of law, brokers might continue the practice as limited by R.E.B. 5.04, which rule prescribes certain standard forms that real estate brokers may use in carrying out their business. ③ However, it should be emphasized that it was the action of the court and not the Real Estate Brokers Board which relaxed the prohibition against the practice of law by such laymen and that the right to withdraw the permission was expressly reserved. ④

It is not the intention of this paper to add to the voluminous legal writings presently available arguing for or against the practice of laymen drafting various legal documents. Since for the present the issue has been settled in Wisconsin, "It is obviously incumbent upon lawyers to accept the supreme court's decision with as much grace as possible." ⑤ Rather it is the purpose of this article to re-examine the offer to purchase form commonly used in Wisconsin and thereby attempt to point

① Bricks, Contracts of the Sale of Realty, p. 11 (1946).
② State ex rel Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W. 2d 685 (1962).
③ Wis. Adm. Code §REB 5.04.
④ "We conclude that Rule, §REB 5.04, includes provisions which permit to a limited extent the practice of the law by certain nonlawyers; that the regulation of the practice of the law is a judicial power and is vested exclusively in the Supreme Court; that the practitioner in or out of court, licensed lawyer or layman, is subject to such regulation; that whenever the court's view of the public interest requires it, the court has the power to make appropriate regulations concerning the practice of law in the interest of the administration of justice, and to modify or declare void any such rule, law, or regulation by whomever promulgated, which appears to the court to interfere with the court's control of such practice for such ends." State ex rel Reynolds v. Dinger, supra note 2, at 206.
out certain potential legal pitfalls which will be encountered if the draftsman relies blindly on the so called "standard forms." Because of the broad scope of the undertaking some areas of difficulty have been ignored or given only cursory treatment. Further this examination is limited exclusively to the conveyance of residential property. Nevertheless, if the article does succeed in raising certain questions in the mind of the draftsman and encourages him to seek an answer, then its purpose will have been fulfilled. There is case law in other jurisdictions imposing civil liability on laymen for the negligent preparation of documents and State ex rel State Bar of Wisconsin v. Keller emphatically warns brokers that they should be careful in filling out such forms. It is hoped that the following observations will aid all such draftsmen in conforming their conduct to the high standards which the Bar and the public have the right to expect.

This article is concerned exclusively with Form No. WB 1, which has been approved by the Wisconsin Real Estate Broker's Board.

PARTIES, THEIR IDENTIFICATIONS AND RELATIONS

In a contract for the sale of land, there must be an identification of the thing sold, an agreement as to the price to be paid, and the consent of the parties. It is necessary for the validity of a written contract that the contracting parties be described. In Kohlbrecker v. Guetttermann, it was held that a written contract was insufficient to satisfy the Statute of Frauds where the written memorandum of the contract failed to make reference to the names of the parties. Our statute of frauds regulating a contract for the sale of realty is §240.08. It provides:

Every contract of leasing for a longer period than one year or for the sale of any lands or any interest in lands shall be void unless the contract or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party by whom the lease or sale is made, or his lawfully authorized agent.

Harney v. Burhans, an early Wisconsin case, held that a memorandum is sufficient to satisfy the statute, if it is definite in respect to the intention of the parties, their identity, their relation to each other, the property, the price and the terms of payment. In that case the plaintiff orally agreed to purchase defendant's land. Plaintiff paid $2,200 down

7 State ex rel State Bar of Wisconsin v. Keller, 16 Wis. 2d 377, 114 N.W. 2d 796 (1962).
10 Wis. STAT. §240.08 (1961).
11 Harney v. Burhans, 91 Wis. 348, 64 N.W. 1031 (1895).
COMMENTS

and defendant gave him a receipt which said "received of Brennan..." and which was signed by the defendant. Brennan, Harney's agent in the purchase of the land, received oral authorization (which is not forbidden under 240.08). But the purchaser, Harney, was not identified in the receipt, and the court held that the memorandum failed to meet the statutory requirements of stating who the parties were and their relationship to each other.

Therefore in approaching the problem of naming the parties and their relationship, the draftsman is seeking to identify the parties who are binding themselves to the purchase agreement. From the memorandum one must be able to see who is selling and who is buying. But there is a difference between naming and identifying a party. The purchaser may not want his identity disclosed (e.g., a corporation buying land would be forced to pay more if people knew they needed the land). So an agent may contract in his own name though using another's money and thus be an agent for a totally undisclosed principal. Or the contract might say "Smith as agent" is the purchaser but fail to disclose the principal. This would constitute a partially disclosed agency—i.e. it is known that there is a principal, but the memorandum doesn't identify him. What will be the effect of an undisclosed principal or partially disclosed principal signing the contract as regards the satisfaction of the requirements of §240.08 regarding the identity of the parties? The rule from Harney v. Burhans is where the contract in fact involves a totally undisclosed principal but where the memorandum fails to even partially disclose the fact of agency, such a memorandum fails to meet the requirements of §240.08 and the contract is void.

In Padol v. Switalski the Wisconsin court held that an extrinsic writing could supply the name of the purchaser. In that case the defendant gave the broker the exclusive right to sell his property. The broker in turn gave plaintiff an option to purchase, subject to the owner's approval. In the option agreement the broker named the purchaser. Defendant later executed a separate agreement with the broker approving the terms of the option. The question presented to the court was whether the two writings satisfied §240.08 even though the defendant's written approval of the option made no mention of who the purchaser was.

The principle of the Padol case was refined by Kelly v. Sullivan where it was held that the mere fact that another memorandum contains the missing element will not itself suffice to satisfy the requirement of §240.08. Rather, in addition there must be satisfactory evidence that both parties were aware of the unsigned extrinsic document and assented to the fact that its content constituted part of their contract. The

12 Padol v. Switalski, 248 Wis. 183, 21 N.W. 2d 375 (1945).
13 Kelly v. Sullivan, 252 Wis. 52, 30 N.W. 2d 209 (1947).
draftsman should see to it that the interim sales contract is explicit to
the identity of the parties and their relationship. It would be foolhardy
to gamble that a court will later supply the essential element from an-
other document and thus save the contract.

But will the rule from *Harney v. Burhans* apply so as to void the
contract where the party signing the memorandum indicates that he is
an agent but fails to disclose the principal? Can you look outside the
four corners of the memorandum to define agent? Under general
agency principles such partial disclosure will bind the principal.14 Fur-
thermore there is the general rule that whenever the memorandum is
indefinite, ambiguous or uncertain to any details, parol evidence may be
admitted to ascertain which alternative the parties intended.15 In both
the *Kelly* and the *Padol* cases two writings were used to satisfy the
Statute of Frauds and only one was signed by the seller or his agent.
In such a situation if the advocate is denied the right to step outside
the four corners of the writing neither oral testimony nor the principle
of using extrinsic document, enunciated in the *Kelly* and the *Padol*
cases could be used to argue for the validity of the contract. So it would
appear that where a memorandum describes the purchaser or seller
as agent without disclosing the principal (and an agency does in fact
exist) there would seem to be an ambiguity which would in that situa-
tion justify the use of extrinsic evidence to determine the intent of
the parties. But if the instrument says nothing about any agency and
there is in fact an undisclosed agency then under the *Harney* rule the
contract is void for failure to identify the principal. Thus the principal
could not be held liable on the contract.

From all of this it becomes evident that there can be serious rami-
fications from the failure to properly designate the parties to the con-
tract. If the draftsman starts off wrong at this point he may as well go
no further, since if the contract is then void any further drafting will
only prove to be a useless exercise.

A further aspect of the problem of proper parties is that involving
interspousal relationships. Must the wife join with her husband in such
a contract in all cases? If not, when must she? In the case of the
purchaser there seems to be no compelling reason why a wife should
join her husband in executing the contract. In most cases it is doubtful
that the purchaser would like to see his wife obligated by the contract
should he die after its execution but before closing. The argument to
have the wife join in the offer is mainly advanced by the brokers. They
maintain that if the offer is contingent upon the buyer securing a mort-

14 *RESTATEMENT, AGENCY 2d*, §144: A disclosed or partially disclosed principal
is subject to liability upon contracts made by an agent acting within his
authority if made in proper form and with the understanding that the princi-
pal is a party.
15 *SIMPSON, CONTRACTS* §66, at 239 (1954).
gage, the wife who is not a party to the offer may refuse to sign the mortgage if financing is needed. They further contend that lenders invariably insist that both husband and wife sign the mortgage. The end result which they fear is that the wife may prove to be stubborn and thus effectively kill the sale. An additional fear is that should the husband decide to back out, all he need do is have his wife refuse to sign the mortgage and turn all his property over to her, thus making him judgment proof. An answer to this is that there is no real reason why a lending institution should insist on both signatures when a purchase money mortgage is involved.\textsuperscript{16} And it may be somewhat presumptuous to say that all or most lenders presently would require both signatures in such a situation before they would lend the money on a purchase money mortgage. This is definitely one area where a potential purchaser having legal counsel would likely refuse to have his wife become a party to the interim contract. But the broker is likely to insist on both parties signing the contract. Here is but one of many instances where the lay draftsman is faced with a serious conflict of interest. He cannot give legal advice and yet the parties deserve to know the possible legal effects of the contract into which they are entering.

Regarding the seller, there are times when it is imperative that both husband and wife join the contract to convey. Sections 235.01(2) and (3)\textsuperscript{17} are relevant in this regard.

235.01 Conveyance, how made, homestead

(2) No mortgage or other alienation by a married man of his homestead, exempt by law from execution, or any interest therein, legal or equitable, present or future, by deed or otherwise shall be valid without his wife's consent, evidenced by her act of joining in the same deed, mortgage, or other conveyance, except a conveyance from husband to wife.

(3) No mortgage or other alienation by a married woman of any interest legal or equitable, present or future, by deed or otherwise, in a homestead held by her and her husband as joint tenants, shall be valid without her husband's consent, evidenced by his act of joining in the same conveyance or mortgage or executing a separate conveyance or mortgage of the same nature as the wife's except a conveyance from wife to husband.

Thus any attempted alienation of the homestead is void if made by the husband alone and in these cases the wife must sign as a party to the contract if it is not to be held void. So the question will arise as to what

\textsuperscript{16} \textsc{Wis. Stat.} §233.05 (1961). Where a husband purchases land during coverture and as a part of the transaction of purchase executes a purchase money mortgage thereon or a portion thereof to secure the payment of all or a part of the purchase money, his widow shall not be entitled to dower out of such mortgaged land as against the mortgagee ... although she did not unite in such mortgagee ...

\textsuperscript{17} \textsc{Wis. Stat.} §235.01 (1961).
constitutes a homestead. Our statutes speak of an exempt homestead and state that it is limited to an interest not exceeding $10,000.00.\textsuperscript{18} §990.01(13) says:

The word "Homestead" means the dwelling and so much of the land surrounding it as is reasonably necessary for use of the dwelling as a home, but not less than \( \frac{1}{4} \) acre (if available) and not exceeding 40 acres.\textsuperscript{19}

Homestead is domicil and it is usually easy to ascertain where the parties are domiciled and thus determine whether homestead property is involved in the sale. But if a person has left his homestead for a special reason and the time of absence is indefinite in duration (e.g. hospitalization, a change between summer and winter domicil, etc.) the problem may be more difficult for the draftsman. The general principle is that the domicil in which the greater portion of the year is spent prevails as the homestead. This homestead may change from time to time by actual physical movement and intent. But the fact remains that an attempt to alienate a homestead by the husband, or by the wife where the property is jointly owned, will be void. A possible exception to this strict statutory rule is that broad principles of estoppel may be applied if the wife partakes in the alienation and actively or passively gives her approval.\textsuperscript{20} The draftsman should be particularly careful to ascertain whether homestead property is involved for it then becomes imperative that both husband and wife join in the contract to convey.

In addition to the problems of homestead the draftsman must be aware of the fact that the surviving wife enjoys dower in all the lands in which her husband was seized of an estate of inheritance during their marriage.\textsuperscript{21} The wife's dower interest is an inchoate right and thus it becomes a factor only where she survives her husband. If the wife in such a situation does not sign the interim land contract she will not be bound to sign the deed at the closing. Thus she would retain her inchoate right of dower. From the purchaser's point of view, he will insist that the offer be directed to both the husband and wife and signed by both of them. Should the offer only be accepted and signed by the husband there would nevertheless be a valid contract. The purchaser could not demand that the wife sign the deed. But he may be able to hold back from the purchase price an amount equal to the value of the wife's potential dower interest.\textsuperscript{22} But how does one arrive at a value of

\textsuperscript{18} Wis. Stat. §272.20 (1961).
\textsuperscript{19} Wis. Stat. §990.01 (1961).
\textsuperscript{20} McBride v. Seney, 192 Ill. App. 18 (1915); Bailey v. Goldberg, 236 Mich. 29, 209 N.W. 805 (1926). The wife could orally authorize her husband to convey away the homestead since 240.08 doesn't require written authorization. He then could in writing authorize the real estate agent by signing for himself and his wife.
\textsuperscript{21} Wis. Stat. §233.01 (1961).
\textsuperscript{22} O'Malley v. Miller, 148 Wis. 393, 134 N.W. 840 (1912).
an inchoate right since it is a right which will be of value only if she survives her husband? Some courts have considered the practical difficulty of measuring the value of this interest as no greater than in other instances where damages are not capable of exact computation. Nevertheless it creates a very difficult problem. To fix an abatement, the present value of an inchoate right of dower must be determined and this invariably can be nothing but pure conjecture. This is true because the right may never vest. As a practical matter then, the purchaser may find that the right to abatement is nothing but a hollow right. Being faced with such a situation the purchaser would have but two alternatives—either accept the deed and hope that the wife's inchoate right never vests or refuse to accept the deed with such a cloud on it. Of course he could probably also sue for breach of contract but the expense involved may well outweigh any damages awarded or recovered.

**Description**

What is a sufficient description of the land and building involved in the interim contract so as to satisfy the Statute of Frauds? The form is set up in the following manner.

... hereby offers to purchase the property known as ——— ——— in the ——— of ———, Wisconsin, more particularly described as: ———

having a frontage of about ——— feet, with a depth of about ——— feet, at the price and on the terms and conditions as follows:

The description of the property to be conveyed is likewise regulated by §240.08 of the Wisconsin Statutes. The basic question presented in this area is when has the draftsman succeeded in describing the property so as to satisfy the statute? From the cases we find that the test evolves on whether the contract permits the court to ascertain to a reasonable certainty what was intended without resort to certain kinds of extrinsic evidence. This statement therefore infers that in a contested case some type of extrinsic evidence will be allowed. The point of distinction, between those cases holding that the contract satisfies the Statute of Frauds and those where it fails, is the kind of evidence which is offered to clarify the memorandum's uncertainties.

In *Graham v. Lamp* the defendant signed, through an authorized agent, a listing contract with the plaintiff who was a broker. The contract began by stating the defendant's name and address. The description in the body of the contract read "2 cottages on this lot 49x126 feet.

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24 Graham v. Lamp, 174 Wis. 373, 183 N.W. 150 (1921).
5 room front cottage; 5 room rear cottage." On the back of the contract the following appeared, "location, 1211 20th Street, size of lot 49x126." By statute all contracts to pay a commission for the sale of realty must be in writing, and among other things, describe the real estate to be sold. The question presented here was whether the description was sufficient. The court felt it was because the description together with the words "this lot" and the parol evidence described the land with sufficient certainty. So here we see the court allowing the use of parol evidence to determine what was to be conveyed. But then is there any limitation on the type or scope of such parol evidence?

In Spence v. Frantz,25 defendant contracted with plaintiff to convey "the following described land contained in Stone's subdivision in sections nine and ten in the town of Greenfield, consisting of 110 acres, more or less, said acreage to be determined by survey." The survey showed there were 110 ¼ acres, 5½ of which were subject to an easement for a public highway. Again the court had to decide whether the description was sufficient and again it decided in the affirmative. The court felt that, although a description of the property is an essential term, parol evidence may be admitted to identify the land IF there is some language in the writing to which parol evidence could be linked and the property identified with reasonable certainty. Since the vendors owned no other land which could answer this description, it was sufficient.

In Thiel v. Johns26 the defendant owned a house in Little Chicago located on 1½ acres of land. The house was enclosed by a fence which did not encompass the full 1½ acres. Defendant agreed to sell and the following memorandum was given in the form of a receipt. "Received of Ernest Thiel, fifty and no/100 dollars. For down payment on house at Little Chicago . . . $50.00. (Signed) William A. Johns. Bal. $2,450." In this instance the court felt that the contract did not sufficiently describe the property. The court pointed out that parol evidence can only be used where some language was expressed in the writing to which parol evidence could be linked and the property identified with reasonable certainty. To allow testimony as to what the parties orally agreed to would be giving an independent effect to the parol understanding as to the land involved. The difficulty here was that in describing the property as "a house" the parties could have meant the house and 1½ acres or the house and the land inclosed by the fence or even less. To have allowed parol evidence the court would have been permitting it to establish which property was intended to be sold and not merely identify the property in the memorandum. Thus we see the line of distinction appears to be a fine, but very real one.

25 Spence v. Frantz, 195 Wis. 69, 217 N.W. 700 (1928).
26 Thiel v. Jahns, 252 Wis. 27, 30 N.W. 2d 189 (1947).
As was pointed out earlier, the distinguishing point in all these cases is in the type of evidence offered to clarify the ambiguity in the memorandum. You can resort to other writings mentioned in the memorandum or rely on outside physical facts such as ownership as shown by the records in the Register of Deed's office. But purely testimonial evidence (the property we agreed upon; the property we looked at) is diametrically opposed to the Statute of Frauds and the purpose for which this statute exists—that of stopping perjury. It makes no difference in fact that the testimonial evidence is convincing. Extrinsic evidence will only be allowed where it can be linked to some language in the written memorandum which will leave the trier of fact reasonably sure which property was intended.

Even in the use of physical facts certain criteria must be met. The physical fact would have to be referred to in the memorandum in some manner—e.g. "my lot." Thus staking the land out would be insufficient unless some reference in the written contract was made such as "the stakes which the parties placed." Then a court could view the land and probably ascertain what the parties intended. Secondly, the physical fact must itself be sufficiently free from ambiguity or tampering by one of the parties so that the trier of fact can be reasonably certain he has the right land as seen from the physical facts. A prime example where the physical evidence was too ambiguous was in Durkin v. Machesky. The contract referred to "Southwest corner 28th and Meinecke, . . ." The seller's wife owned two lots at that location. The court held that lacking a designation "my lot" or "my wife's lot" the writing was insufficient.

From the foregoing it can be seen that proper description of property in a contract, which must conform to the Statute of Frauds, has caused draftsmen problems in the past and will probably continue to do so. If the draftsman has available a correct legal description of the property this may well serve as the best description. If it is not known, and it usually isn't at this stage of the transaction, it will be the draftsman's job to provide as much detail as possible regarding the description of the property to be conveyed. As we have seen, the contract cannot be changed by evidence outside the memorandum, and if it isn't sufficient the contract will be void for failure to satisfy the Statute of Frauds. If there is a recorded plat describing the property it should be used. In the case of city property the street address will suffice in most cases. But providing further details as to what is located on the property and its nature will constitute the better practice and thereby insure that a court will be able to determine what was intended should litigation ever arise. The key purpose of the draftsman in this area is to describe the property intended by the parties in such a manner as will enable a

27 Supra note 24.
28 Durkin v. Machesky, 177 Wis. 595, 188 N.W. 97 (1922).
trier of fact, in any subsequent litigation, to ascertain to a reasonable certainty what was intended, without reliance on purely testimonial evidence. This should be foremost in the draftsman's mind and he should carefully consider whether the words he has used meet this crucial test.

One further point is that the draftsman might do well to ignore filling in the blanks having to do with frontage and depth. The problem that can arise here is that the figures may be in error and then it may subsequently be held that the purchaser was conditioning his offer on the property being in fact that size. Should the dimensions then be actually and significantly different the buyer may be able to avoid the contract, or possibly bring an action for misrepresentation.

Terms of Payment

Here again we are concerned with satisfying the requirements of §240.08 in properly expressing the price and the terms of payment. In Merten v. Koester, the plaintiff and the defendant agreed on the sale of real estate whereby the plaintiff was to receive an apartment and store building in exchange for his assuming the $28,000.00 mortgage and paying an additional $7,500.00 cash and transferring a bungalow to the defendant. The memorandum stated, "Pay to the order of Fred Koester $1,000.00, part payment on the property at 1358-54 27th Street. Balance $6,500.00 and bungalow, (Signed) Peter J. Merten." The court held the memorandum was insufficient to satisfy §240.08 since it failed to express the consideration. It completely omitted any mention of assuming the mortgage and the bungalow was not sufficiently described. In Carlock v. Johnson, the plaintiff agreed to purchase certain property from the defendant. The signed memorandum stated that the vendor agreed that in conveying title he would stipulate in the mortgage, which he held on the premises, for the release of any given lot or lots upon payment to the seller of such a sum as might be thereafter agreed upon as being equitable. The parties later discussed what amount would be equitable, but being unable to agree, the plaintiff sought his money back. The court felt that the agreement as to the amount to be paid for the releases was a condition precedent to the completion of the contract and to its validity under the statute of frauds since this was a material element of the contract. Therefore since the parties didn't agree on the matter, plaintiff was entitled to regain his earnest money, for there was no contract.

The cases indicate that if the contract contemplates any extension of credit by the vendor himself the terms must be stated in the contract

30 Merten v. Koester, 199 Wis. 79, 225 N.W. 750 (1929).
31 Carlock v. Johnson, 165 Wis. 49, 160 N.W. 1053 (1917).
to satisfy the statute of frauds. This principle would need only apply to vendor financing and not to third party financing. There is a distinct difference between the vendor undertaking to finance such a purchase and a condition whereby the parties will not be bound unless finances can be obtained from a third party lender. In vendor financing it is not merely a condition but a material term of the contract since it is concerned with the undertaking of both parties to the contract, whereas third-party financing is related only to the buyer's undertaking to pay the price and not the seller's undertaking to accept it as full payment. In Kovarik v. Vesely\(^2\) the Wisconsin Supreme Court gave indirect credence to this distinguishing point. There the contract provided that the terms of the mortgage financing were left to the discretion of the buyers under a typical "subject to financing" provision. The court in effect converted a contract which contemplated third-party financing into a vendor financing contract. Then after doing so, they hypothesized that the statute of frauds would be satisfied only if the terms were in writing and subscribed by the party to be charged. They supplied these terms by incorporating a loan application of the purchasers into the contract. Regardless of the fact that this case is questionable on a number of points,\(^3\) it does seem to stand for the proposition that the terms of vendor financing are material to the contract and must either be stated in the written memorandum or in another document which may be incorporated. Since it seems to be an essential term, the draftsman should be certain to spell out the details of the financing envisioned by the parties when vendor or installment financing is involved. If he fails in this respect the contract may well be held void for indefiniteness as to a material element.

The draftsman's problems are not automatically solved where third-party financing is contemplated by the contract. An argument might be made that even here the terms of the financing are a material element and therefore they must be stated with some degree of definiteness since such qualifies the purchaser's basic undertaking to buy. The counter argument is that the parties simply did not include any mutual agreement respecting the details of financing. Further, such details are not necessary since the terms of such financing are not matters of contract between the buyer and seller.

Probably the largest single problem in drafting such an interim contract is that of adequately handling the difficulties involved in preparing a satisfactory subject-to-financing clause where third party financing is envisioned, (satisfactory in the sense that its meaning will be clear to a court in the event of litigation). More important it must

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\(^{2}\) Kovarik v. Vesely, 3 Wis. 2d 573, 89 N.W. 2d 279 (1957).

\(^{3}\) See: Alken, Subject to Financing Clauses in Interim Contract For The Sale of Realty, 43 Marq. L. Rev. 265 (1960).
clearly represent the intent of the parties, so that misunderstanding and litigation itself will be avoided. Since most offers to purchase today are contingent on financing, thoughtful consideration should be given to the preparation of this clause. In this area no problem will arise if the sale is duly consummated. But it is when no financing can be obtained by the buyer and he in turn desires his money back, that the possibility of misunderstanding and litigation become a reality. Where the terms are clearly defined, this possibility or difficulty will be greatly eased.

Any doubt which may have existed previously as to whether terms of the condition precedent (getting the financing) have to be mentioned in the contract was partially settled with the case of Gerruth Realty Co. v. Pire. The only problem with Gerruth is that the case was not decided on the basis of the statute of frauds. Therefore it is still not known for certain whether the terms of third party financing must be stated in the written memorandum. The contingency clause used in that contract read "This offer to purchase is further contingent upon the purchaser obtaining the proper amount of financing." Being unsuccessful in securing financing and refusing that offered by the seller, litigation was precipitated. The court was troubled by the vagueness, which would allow sellers to claim that the availability of any amount of financing or any rate of interest would satisfy the condition. Likewise the court felt that any interpretation of a contract which allowed any one party to the contract to determine without limitation and in a subjective manner the meaning of an ambiguous term, came dangerously close to an illusory or aleatory contract. The conclusion of the court was that there was no evidence upon which a reasonable inference could be drawn as to what the parties contracted for. Further, it decided to look to the element of good faith by the purchaser in such cases only where the meaning of the ambiguous financing clause has been determined. Thus, in this case even if the purchaser had made no attempt to secure financing and had been totally in bad faith he nevertheless would have gotten out of his contract. Where the contract cannot be interpreted on the evidence, it will be held void for indefiniteness in the opinion of Wisconsin's supreme court. A fair conclusion then would be that a seller cannot simply rely on the courts to enforce the contract where there is a failure of good faith on the part of the buyer. Based on the Gerruth case, they won't enforce a contract which is vague and indefinite. If a contingency is stated in the contract, the draftsman had better specify, at least broadly, what that contingency is. The question then arises as to how far he must go in this specification. It would

34 Gerruth Realty Co. v. Pire, 17 Wis. 2d 89, 115 N.W. 2d 571 (1962).
35 Ibid.
36 Ibid.
seem to be the better procedure to include at least all of the following details in any subject-to-financing clause:

1. Minimum amount of money which the borrower needs to complete the contract.
2. Rate of interest the buyer will pay.
3. Repayment terms—maximum amortized monthly mortgage payment including principal, interest, insurance and taxes for a minimum term of how many years.
4. Loan procurement charges.
5. Fact of government guarantee if FHA or VA insurance is involved.
6. A special security provision such as mortgage insurance if it is involved and the amount which the buyer will pay for it.
7. Who is to arrange for the loan and procure it—the seller or the buyer.

The court, in the *Gerruth* case, concerned itself only with the necessity of stating the amount of the third party loan. Thus it may be argued that all these other details enumerated above are really unnecessary. But it should be remembered that all specifications involved in financing the purchase of realty are in fact interdependent. Remember, we were told in *Gerruth* that the question of good faith by the purchaser will only be examined where the meaning of an ambiguous subject-to-financing clause has been determined. Will a mere statement of the amount of the mortgage to be sought prevent the contract from being declared void for indefiniteness? Better practice dictates that one should draft the offer to prevent such a question from arising in the first place.

The Wisconsin Supreme Court has made it clear that henceforth, ambiguity of terms of an interim land contract will invalidate it. It may well be that under present law only a total absence of specification of detail in a subject to financing clause will render it void for indefiniteness. Yet it would appear that the prudent course to follow is to spell out at least each of the above mentioned criteria of the acceptability of financing.

In this connection the careful selection of proper language is extremely important. The draftsman should take every precaution to spell out exactly what the parties intend in a clear and concise manner. Ambiguity will only lead to court-made contracts in many instances. The following is an example of such an ambiguous clause, often appearing in such a contract.

"subject to securing a mortgage for $20,000.00 for 25 years...."

This would be unacceptable to the careful draftsman. Literally it suggests a straight note, not an installment note as is most often contemplated by the parties to a real estate sales contract. Therefore, the proper approach would be to simply and concisely specify that repayment shall be by "amortized monthly mortgage payments. . . ."
As a practical matter, providing a time for securing the needed financing, which is different from that time set for the closing, is certainly worth consideration. Basically, it is unrealistic to say that a purchaser may continue in his attempt to secure financing right up to the appointed time for closing or that he should be required to do so in order to remain in good faith. Even if such a purchaser would be successful one week before the time set for closing, he would never be in a position to close on the appointed day. Thus, if time has been stated to be of the essence in the contract, another area of litigation has been created. A party selling real estate has placed it on the market to sell and usually becomes quite impatient while waiting under a cloud of uncertainty as to whether the property will be sold. Further, why should he be required to hold his property off the market until the appointed time for closing has passed, when it is obvious some weeks before, that the purchaser will not be able to close on the appointed day? Likewise, the buyer will probably prefer to have a limited, but sufficient time to secure the necessary financing without running the risk of being held in bad faith if he ceases his efforts before the time for closing has passed.37

It should be pointed out that the financing condition is not the only one which might appear in an interim contract for the purchase of realty. But such a condition is by far the most common. Regardless of the nature of the condition, the draftsman would do well to spell out the details of any such condition precedent, so as to protect against a court later finding that no contract existed because the terms were too indefinite. When any condition is in fact stipulated as part of a contract for the sale of realty, that condition should be at least broadly specified. The court has indicated in the Gerruth case that they would look outside of the memorandum but it would be poor practice to rely on this. Further, there might well be an argument that such a condition fails to satisfy the Statute of Frauds. From Gerruth we are unable to answer that problem since the decision wasn't based on the Statute of Frauds but rested on a purely contractual basis. From other Wisconsin cases the answer to this latter problem still doesn't become clear. But the safe procedure remains to be that of stating precisely and definitely the conditions involved. Concededly, many times it will be hard to state in advance how much financing you will need, what the terms will be, etc. The courts in this area are trying to evolve just rules. But until the rules become more clear and definite, the only safe method is to place all the conditions in the memorandum. The alternative is an unstated condition precedent which will result in the contract hanging in the balance until litigation determines if the condition was performed. If it is a

37 91 C.J.S. Vendor and Purchaser, §110 (Ann. Cum. Part, 1961); Kovarik v. Vesely, supra note 31, pointed out where the seller offered to accept the mortgage in advance the date specified for closing prevented the buyers from rescinding when their attempt to secure financing failed.
condition on a change in zoning or the sale of a house, be certain to specify the time within which this must occur. If you fail to do this the courts will interpret it as a reasonable time. A reasonable time has been found by the Wisconsin Supreme Court to be as short as thirty days in one case and as long as three and one-half years in another.38

Following the space provided for the contingent financing conditions, the following printed clause appears:

Buyer agrees that, unless otherwise specified, he will pay all costs of securing any financing to the extent permitted by law, and to perform all acts necessary to expedite such financing.

The contingency clause would prevail if it provided for any limitation on this printed clause.39 And it was suggested above that the amount of loan procurement charges and prepayment penalties which the buyer is willing to pay be inserted in the subject-to-financing details. Yet, should there be no provisions as to what maximum origination costs the seller would pay, he might be held to have breached the contract where financing was available with, for example, a 5% origination fee or where he objected to a pre-payment penalty in the offered financing.40 Can the draftsman rely on a court not to so find? Why would any draftsman wish to take the chance?

**FIXTURES**

Regarding fixtures the following clause appears:

Included in the purchase price are such of the following items as may be on the premises, which will be delivered free and clear of encumbrance: all garden bulbs, plants, shrubs and trees; screen doors and windows; electric lighting fixtures; window shades, curtain rods and venetian blinds; bathroom assessor fixtures; central heating units and attached equipment; water heaters; linoleum cemented floors; carpeting in living room, dining room, hallway and stairs; awnings; exterior attached antennas, (then space for additions and exceptions)

Obviously, the above provision is an attempt to be as inclusive as possible on a standard type form. The merit in this type of provision is a spelling out of what is covered by the contract as completely as possible so as to avoid misunderstanding which might necessitate court interpretation. Or what may be even worse, if the draftsman is a broker, the souring of a deal might occur. By way of illustration it should become more than clear that the list included in the form is not to-

40 Fuy v. George Elkins Company, 162 Cal. App. 2d 256, 327 P. 2d 905 (1958) held that a purchaser was not entitled to reject offered financing simply because he objected to a 2% pre-payment penalty clause where his contract was conditioned "upon buyer obtaining a $20,000.00 loan at 5% for 20 years."
tally exclusive and therefore cannot be blindly relied on as covering all the items intended to be conveyed. Consideration should be given as to whether any of the following items should be included: fire irons, fire screens, mirrors on walls, disposal units, built in bar and stools, high fidelity or stereo equipment which is built in, kitchen appliances, space heaters, and air conditioners (especially the window models).\textsuperscript{41} Nor is the above list set out as the last word on adding to the list provided for in the form. Rather, it is presented only to point out the danger in failing to consider and to provide for all possible questions which might be raised as obstacles to the successful completion of the transaction. It should be remembered that once an attempt is made to list specific items in a contract, if a court is called upon to construe that contract, it is likely to decide that the intent of the parties was to exclude any item not listed. If, following the above enumeration, the draftsman were to include "and all other fixtures," the question might be asked whether this general clause would prevent such a rule of construction from operating. Here we bump into the rule of construction known as Ejusdem Generis.\textsuperscript{42} In an agreement containing general and special provisions relating to the same thing, as a general rule, the special provisions will control. The theory is that when parties have expressed themselves in reference to a particular matter, since their attention was obviously directed to such matter, it must be assumed that it expressed their intent. Concurrent with this theory is the rationale that reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in mind.\textsuperscript{43} When attempting to determine the value of such a qualifying clause, it is apparent that the draftsman is attempting to draft a document which will avoid discontent and most of all, litigation. If he is a broker, he does not wish to see the sale lost because of misunder-

\textsuperscript{41} The REB manual contains a very extensive coverage of the fixture problem. It should be referred to and understood by the non-lawyer draftsman. REB Manual, Wisconsin Real Estate Law, Ch. 5, (1962); A good discussion of the law of fixtures is also to be found in Brown, Personal Property, Ch. XVI; (2d ed. 1955); also see Leisle v. Welfare Bldg. & Loan Ass'n, 232 Wis. 440, 287 N.W. 739 (1939) and Thomsen v. Cullen, 196 Wis. 581, 219 N.W. 439 (1928).

\textsuperscript{42} In the construction of laws and other instruments the "ejusdem generis rule" is that where general words follow enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. Black's Law Dictionary, 4th Edition (1951).

\textsuperscript{43} A case illustrating this rule is Scullin Steel Co. v. Mississippi Valley Iron Co., 308 Mo. 453, 273 S.W. 95 (1923). There it was held that a smelting company which had agreed to sell and deliver a certain amount of pig iron in installments to a buyer under a contract providing that it would not be liable in damages for failure to deliver because of strikes, accidents or other causes beyond its control is not excused from making deliveries where cold weather and unavailability of the proper kind of coke prevented delivery. The reason given was the contract did not specifically mention this in the exemption clause.
standing over some item which may be worth only fifty dollars. If he is a lawyer, he would hardly wish to see his poor draftsmanship lead to more expensive litigation for his client. Therefore, it appears doubtful that such a clause would be helpful to mitigate the effect of failing to list some item which the purchaser and/or seller thought was to be included. Further, since a contract will be strictly construed against the party drafting it, the latter rule and that of Ejusdem Generis would seem to provide only one other alternative. The draftsman could choose not to mention items which might be classified as fixtures and to simply rely upon the application of property law concepts of what are and are not fixtures. This is an unsatisfactory approach on two counts. First, it is not a realistic appraisal of the usual intent of the parties. The list on the form includes items which might well be held not to be fixtures but rather personal property; yet, the purchaser may well expect them to be included. Secondly, this approach is one which anticipates litigation rather than one which tries to avoid it. It is an approach which is likely to create an atmosphere of misunderstanding rather than understanding. If the draftsman is a broker confusion is even more likely to occur, since a broker may not give advice as to the legal effect of such an instrument. From the foregoing, it can be seen that what the form attempts is a sensible approach to this problem. But the form is good only as far as it goes. The items to be included or excluded will vary with every transaction. Careful work and consideration will tend to eliminate the problems that exist in the area. In this area the will of the parties is more important than fine legal distinctions as to whether a given item is a fixture. Whether it is a fixture or not becomes important only if litigation arises.

**Taxes**

Regarding taxes the form provides:

General taxes levied in the year of closing shall be prorated at the time of closing on the basis of general taxes for the preceding year....

This is an innocent looking provision but may well be one which does not literally mean what most people think it does. For the vast majority of brokers in Wisconsin the clause means that taxes will be prorated as of the day of closing on a daily basis. If this be the correct literal interpretation of this language and the sale is scheduled to be closed on the 16th of the month, the seller would pay the taxes through the

44 Milwaukee Corrugating Co. v. Krueger, 184 Wis. 139, 198 N.W. 394 (1924); Hoffman v. Pfingsten, 260 Wis. 160, 50 N.W. 2d 369 (1951); Megal v. Kohlhardt, 11 Wis. 2d 70, 103 N.W. 2d 892 (1960).

45 Supra note 3 and see State ex rel Reynolds v. Dinger, supra note 2.

46 In fact the REB Manual flatly asserts that such is the case: "First, provides for exact proration to the day, not to the nearest month." REB Manual, Wisconsin Real Estate Law, 5-17 (1962).
15th. But the clause, as phrased, does not demand this. It says, "at the
time of closing" taxes shall be prorated. Literally, the contract requires
only that the parties shall prorate taxes and this should be done on the
day of closing. It does not command that such proration shall be com-
puted on a daily rather than a monthly basis. Nor is this objection mere
flyspecking. In a transaction involving highly taxed property the diffe-
rence could be quite significant. And if before the time for closing the
purchaser should become discontented, it may be that he will raise just
such an objection at closing through his attorney and insist upon the
application of statutory law regarding such proration. Section 74.62 of
the Wisconsin Statutes provides:

As between grantor and grantee of any land, when there is no
express agreement as to which shall pay the taxes assessed there-
on for the year in which the conveyance is made, the grantor
shall be chargeable with and pay to the grantee an amount thereof
equal to one-twelfth of the taxes assessed in the current calendar
year multiplied by the number of months in the current calendar
year which have elapsed prior to the date of the conveyance, in-
cluding the month in which the conveyance is made if such con-
vveyance occurs after the fifteenth day thereof. . . .

With our hypothetical closing date of the 16th of the month, the seller
could be held accountable for the taxes covering the entire month. In
the case of highly taxed realty this could be a significant amount and
could result in a sale falling through where one or both of the parties
refuses to give in. Further support for the position that the present lan-
guage of the form does not provide for proration on a daily basis may
be drawn from the language used in the following clause providing that
proration of insurance, rents, and water shall be "prorated as of the
date of closing." If there is no difference of meaning, why was a differ-
ence in terminology adopted? Is it not conceivable that a court called
on to interpret such language would so reason? The alert draftsman
would do well to protect the parties involved by changing "at" to "as of",
thereby stating what is probably the intent of the parties in most cases
and bringing the contract into conformity with the general real estate
practice existing in Wisconsin. There is no reason why a draftsman
should stubbornly rely on the form as worded and risk possible loss of
the sale or costly litigation.

A final thought regarding the proration of taxes is that when it is
based on the preceding year it is often a poor compromise and should
be avoided wherever practical. Such an instance arises in those sales
which are scheduled to be closed toward the end of the year when the
taxes have been determined, or are determinable but not yet due. An-
other possibility would be to establish an escrow fund or reserve, out of

which the taxes would be paid when they are determined and become due. Thus you would be achieving a proration of taxes after the fact, which type of arrangement may well be the fairest to all concerned. Such a provision will necessitate a change in the wording of the form by the draftsman. Again we see the issue that must be faced in every instance where a printed form is used. Does the particular clause in the printed form suitably accomplish what the parties wish it to accomplish, rather than making every situation fit the form.

**Insurance, Rents, and Utilities**

The clause providing for the proration of insurance, interest, rents and water reads as follows:

> Interest, prepaid insurance, rents, and water shall be prorated as of the date of closing. Accrued income and expenses, including taxes for the day of closing, shall accrue to the seller.

As a practical matter, interest proration is appropriate only where a mortgage is assumed. Insurance proration is probably the exception rather than the rule. Yet the standard form contemplates that the buyer will pay the seller the unearned premium for existing insurance on the premises. The buyer should be made to realize that he thereby accepts the seller's insurance company and agent or will suffer the short rate loss attendant thereto. If the draftsman is a broker, may he advise as to this legal effect without violating his limited privilege to draft such instruments?

**Special Assessments**

Regarding special assessments the form provides a warning that if assessments are contemplated, a special agreement should be made. The pendency of such Kline Law assessments should be specially checked by the draftsman. It is probably all too often the tendency to simply adopt the standard provisions of the contract before checking with the city engineers' office to be certain that an area improvement program is not already underway or about to begin. The standard provision of the form provides:

> Special assessments, if any for work on site actually commenced prior to date of this offer, shall be paid by Seller.
> Special assessments, if any, for work on site actually commenced after the date of this offer, shall be paid by Buyer.

Problems in this area will arise where there is an area improvement underway or contemplated and no special provision is made in the con-

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48 Wis. Stat. §66.60 (1961) provides: (1) (a) As a complete alternative to all other methods provided by law, any city or village may, by resolution of its governing body, levy and collect special assessments upon property in a limited and determinable area for special benefits conferred upon such property by any municipal work or improvement; and may provide for the payment of all or any part of the cost of the work or improvement out of the proceeds of such special assessments.
tract. Then, construing the contract, the parties will immediately question what the words “for work on site” mean. Therefore, the draftsman interested in avoiding litigation or discord among the parties, should, as a matter of course, ascertain whether a special provision will be necessary before obeying the commands of the form.

**Conveyance**

The contract requires a conveyance in the following manner:

The Seller shall, upon payment of the purchase price, convey the property by good and sufficient warranty deed, or other conveyance provided herein, free and clear of all liens and encumbrances, excepting: Municipal and Zoning Ordinances and Recorded Easements for Public Utilities; Recorded Building Restrictions; (blank space for other additions.)

In the form’s margin the draftsman’s attention is called to the following three possible additions: Rights of tenant, existing mortgages, and future special assessments. Quite obviously the warranty should specially except the rights of tenants. In addition it should specify whether such rights are year to year, month to month, etc. Just as important to the buyer is a provision specifying that there shall be no changes in the terms of any such tenancy subsequent to the date of the offer.

What other exceptions should properly be excluded? Brokers and their salesmen are told in the Real Estate Board Manual that the language of the form excepting “…municipal and zoning ordinances and recorded easements of public utilities, recorded building restriction…” adequately provides for the problems of whether zoning ordinances or public restrictions, as represented by official maps, constitute encumbrances on title.49 The conclusions of the manual’s authors are that if the zoning restricts the use, the buyer will be “…stuck, because in the offer he agrees that the seller will deed to him free and clear except for zoning ordinances.”50 Likewise, the question of whether the existence of an official map would constitute an encumbrance on the land is claimed to be provided for in the language “except for municipal ordinances.” As illustrative of the latter proposition, the publication cites by way of example that “the buyer takes the loss when he discovers, after the offer is signed and accepted, that because of the municipal ordinance he can’t build what he planned to on the land he contracted to buy.”51 This is probably good law when read in conjunction with the examples they cite. But it is certainly questionable whether this clause accomplishes all that the broker is led to believe. Does the provision cover the case where there is an existing violation of either the zoning or land map restrictions?

49 Supra note 23, at 5-15.
50 Ibid.
51 Ibid.
Generally, zoning ordinances are not considered encumbrances within the meaning of the terms as used in a real estate contract although the form seems to treat them as such by excluding them. But where there is a present violation of such an ordinance at the time the contract is entered into it may well be considered an encumbrance on the title which would violate the covenant against encumbrances contained in the warranty deed. Although it appears that the Wisconsin Supreme Court has never passed upon the question of whether a zoning violation constitutes an encumbrance on title, it should be noted that in *Miller v. Milwaukee Odd Fellows Temple* the suggestion was made that an existing violation would constitute an encumbrance. And in *Brunke v. Pharo*, Justice Fairchild pointed out in the very first paragraph of the decision, the veiled suggestion contained in the *Miller* case. It might therefore be presumptuous to assume that an existing violation of a zoning ordinance does not constitute an encumbrance by reason of the printed clause in the form. It would appear that the draftsman should again go beyond the printed form and spell out whether or not such violations should be treated as encumbrances. If they are not to be so considered, he should expressly except them. Further, what is meant by the word "violations" itself should be indicated if discontent and litigation are to be avoided. The same reasoning would apply to the case of official maps where there is an existing violation as distinguished from the restriction itself. How Wisconsin would rule on this question is also unknown. But there are decisions in other jurisdictions holding such official maps to be in themselves encumbrances on title. Alert draftsmen exercising a high degree of care would hesitate to take as gospel the printed form in this instance.

Another facet of this problem is the status of existing building code violations. Do they constitute an encumbrance creating a breach of warranty? In *Brunke v. Pharo*, it was held that where official action had been taken before the conveyance, so that enforcement action was imminent when the deed was delivered, such building code violation constituted an encumbrance and thus the warranty was breached. It should

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52 Lasker v. Patrovsky, 264 Wis. 589, 60 N.W. 2d 336 (1952).
53 Where a zoning ordinance required buildings to be set back at least twenty-five feet from the street, but the house was set back only twenty-two feet, the court said, "The title was not marketable not because of an existing ordinance but because a building had been constructed upon the lot in violation of that ordinance." *Moyer v. DeVincentis Construction Company*, 101 Pa. Super 588, 164 A. 111 (1933).
55 There the court alluded to cases which had been cited to it and remarked that the cases cited with one exception related to charges against the premises for violation of ordinances which is an entirely different thing than a limitation upon the use of the premises imposed by a valid zoning ordinance.
57 *Supra* note 32.
be noted that this case stands for a proposition which had not previously been considered to be the law. In this case the court limited the application of the rule to where some official action had been commenced before delivery of the deed. But dare the draftsman trust that the court will not go further next time? This is an especially important consideration in light of the recent activities of our Supreme Court in overthrowing other historical concepts of what the law was.

It is interesting to note that by way of summation to this entire area of the warranty clause the R.E.B. Manual says:

All these rather frightening examples are not meant to suggest any defect in the approved form. No reasonably simple form could cover all the possible situations. That is why the form mentions only a few situations and leaves space for additional provisions. To make the form work, the broker must inform himself fully and then be sure he protects the seller while being fair and honest with the buyer.

I submit that the form is defective in the sense that it breeds false security. The draftsman who is not an attorney, but expected to perform as if he were, would do well to heed the advice of the above quoted passage. The anomaly here, however, is the inherent conflict of interest problem faced by a broker attempting to live up to the command that he protect the seller's interest while being fair and honest with the buyer. Likewise, an attorney is faced with the same problem when a seller and buyer walk into his office and ask him to draw up the necessary papers. The attorney under the Canons of Professional Conduct should advise one of the parties to secure another lawyer. The broker is not subject to any such restriction.

Since the contract requires the delivery of title by warranty deed, it will require certain special care on the part of the draftsman. Technically, the warranties which attach to the warranty deed are not a part of the conveyance proper but constitute separate contracts and title passes independently of them. By giving such warranties the vendor contracts to stand liable and pay damages in the event of later title failure in respect to any of the warranties. In Wisconsin, a warranty deed, by statute, has the effect of a conveyance in fee simple to the grantee with covenants of seisin, right to convey, quiet possession, and freedom from all encumbrances. In light of the effect of such covenants when given, the draftsman must be certain to specify in the

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59 Supra note 23, at 5-16.
60 Canon 6 says: It is unprofessional to represent conflicting interests except by express consent of all concerned given after full disclosure of the facts. . . . AMERICAN BAR ASSN., CANONS OF PROFESSIONAL ETHICS, Canon 6.
interim contract any encumbrance which the buyer will be unable to remove before the time set for closing. The deed is expected to comply with the contract of sale. But should the contract fail to specify any exceptions to the agreement to deliver a warranty deed the purchaser cannot be forced to accept a deed containing exceptions to the warranty. Nor should the buyer accept such a deed in this case since if it is accepted as performance of a contract to convey, the contract itself becomes merged into the deed. In such an instance, where the terms of the deed vary from those contained in the contract, the deed will prevail over the contract. Therefore, since the warranty deed purports to convey "free and clear from all encumbrances whatever," the draftsman had better except all present existing encumbrances if he is to protect the vendor against a future suit for breach of contract. Easements not obviously and notoriously affecting the physical condition of the land, whether private or public, constitute such encumbrances. Outstanding leases, reservations of right to enter the land, and unpaid taxes which have been lawfully assessed have been held to be encumbrances and should be specifically excepted. And as previously pointed out an existing building code violation may under certain circumstances constitute an encumbrance. Any type of lien, such as a mortgage lien, tax lien, judgment lien, or outstanding dower right should also be specifically excepted.

Evidence of Title

Concerning evidence of title the form provides that the seller may provide the buyer with either an abstract or a title insurance policy. If he chooses to present an abstract the procedure is to deliver, a complete abstract of title made by an abstract company, extended within twenty (20) days of the closing, said abstract to show the Seller's title to be marketable and in the condition called for by this agreement. The Buyer shall notify the Seller in writing of any valid objection to the title within ten (10) days after the receipt of said abstract and the Seller shall then have a reasonable time, but not exceeding sixty (60) days, within which to rectify the title (or furnish a title policy as hereinafter provided) and in such case the time of closing shall be accordingly extended.

Since in the expectations of both parties time is usually of prime consideration, is the 60 day title correction extension of closing practical? Considering the ever greater use and availability of title insurance, should such a delay be written into the contract? These are questions which go to the intent of the parties in any given transaction. But unless

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63 See 84 A.L.R. 1008, 1034, 1041-1046 (1933).
64 Chandler v. Gault, 181 Wis. 5, 194 N.W. 33 (1923).
65 Gaslow v. Hunholtz, 160 Wis. 293, 151 N.W. 810 (1915).
67 Supra note 53.
the draftsman acquaints the parties with the alternatives they are not likely to even realize the consequences until after the contract is signed and accepted. Therefore, it is a good practice to fully acquaint the parties with all the alternatives and let them decide rather than let the printed form arbitrarily dictate the choice.

**Time Being of the Essence**

The form provides as follows: "Time is of the essence hereto with respect to occupancy." What then is the legal effect of this clause? Traditionally, before the merger of the law courts with equity, the answer to this question differed depending on which court you were in. Law courts were not liberal about substituting a reasonable time for the time stated in the contract for closing. Equity on the other hand is prone to view the day of performance stated in the contract as not being of the essence and thereby avoid a forfeiture. But equity was opposed to a forfeiture only if it would be both harsh and unjust. In determining whether such a forfeiture might be unjust, the court of equity was likely to consider the impact of its decision on both parties. If the purchaser is tardy in payment the effect on the seller is not necessarily severe; whereas, if the purchaser is deprived of a chance to pay later, he loses his right to purchase and this might be too harsh. Likewise, if the vendor does not have good title on the named date, the impact on the vendee might be slight. But if the purchaser could then defeat the contract the vendor might be harmed. Thus, time of the essence will be determined by the overall effect of the delay on the party who was ready, willing, and able to perform as compared to the amount the non-performing party must forfeit were the contract to be strictly enforced.68

In *Edgerton v. Peckham*69 it is suggested that any of three circumstances may make time of the essence. These circumstances are the rise or depreciation of the value of the premises; the nature of the interest in the property which is to be conveyed; and by express stipulation in the contract itself. Further, this case held that even if it is not expressly stated in the contract the party may make it so by a reasonable notice to the other party.

In the classic case of *King v. Connors*70 plaintiff agreed to sell property to the defendant "on or before May 1st." The court stated that in equity time is not of the essence of a contract unless so implied from the surrounding circumstances or is expressed in the contract. In *Droppers v. Hand*71 the court said the fact that the contract sets a time for closing does not of itself make time of the essence. In *Long Investment Co. v. O'Donnell*72 our court carried this principle to the extreme.

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by saying that time was not of the essence and that a reasonable time had not passed after the passage of three years although the land in question had already been sold to another.

The immediate question relating to the provision in the standard form is, will the expressing that time of occupancy is of the essence make it so in the eyes of a court invoking equity principles? Further, even if they do find that it was of the essence, will they impose a forfeiture? The cases seem to be almost in complete agreement on the proposition that even equity will recognize that time is of the essence where it is expressly stated as such in the contract. The recent Wisconsin case of Rottman v. Endejan alluded to the fact that time could be made of the essence where the parties made it so by the terms of their contract or their conduct.

Nevertheless, the draftsman should be aware that this clause still may not have the effect that he might believe it has. Equity still abhors a forfeiture and where the detriment to the nonbreaching party is not very great, it is likely that equity will not impose such a forfeiture. The court will probably agree that time is of the essence and therefore hold that the contract was breached. But in the next breath they will probably refuse to enforce a forfeiture clause which appears in the contract. Therefore, merely inserting a "time of the essence" clause in the contract will not guarantee, where physical occupancy is not given on the appointed day, that the purchaser will be allowed to cancel the contract forthwith. Likewise, any other stated time which might be made of the essence by a specific provision in the contract will be subject to the same scrutiny by a court applying equitable principles.

**Earnest Money**

In applying earnest money funds to the purchase price the form provides:

all money paid hereon shall be applied on the purchase price if this offer is accepted on or before 19; otherwise, to be returned to the undersigned Buyer no later than and the offer shall be null and void.

But later in the form we find that:

All money paid under this contract shall be retained by Broker, in his authorized trust account in the Bank of Wisconsin, until the consumation or termination of this agreement; however. . . .

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74 Rottman v. Endejan, 6 Wis. 2d 221, 94 N.W. 2d 596 (1959).

It would appear that the application of such funds to the purchase price upon acceptance is inappropriate in light of the trust clause. Further, such application would be especially inadvisable where the contract is subject to a condition precedent, such as acquiring the designated financing. In practice the broker generally retains the funds in his trust account until the day of closing. Nevertheless, the two clauses as they presently exist are contradictory in a sense. It would be entirely sufficient to provide simply that the broker is to return the money if the offer is not accepted by a certain date.

It should be remembered that earnest money is not essential to a valid offer, and an offer made without any earnest money payment would, if accepted by the seller, result in a valid contract. But when an earnest money deposit is given as a down payment to the seller, the purchaser has a vendee's lien for its amount providing the seller owns the property.  

Buyer or Seller Defaulting

In the event that the buyer should default, the contract provides:

... all money paid hereunder shall at the option of the Seller, be forfeited as liquidated damages and shall be paid to or retained by the Seller, subject to deductions of Broker's commission and disbursements, if any.

Such a forfeiture clause operates unless the deposit is returned promptly upon the purchaser's breach. This seriously limits the vendor's options if there is any delay following the breach. The R.E.B. Manual suggests that the broker should bring the matter of default immediately to the attention of the seller and have him consult with an attorney. This is excellent advice and should go a long way toward aiding in the protection of the seller's rights if adhered to. But the able draftsman, whether he be an attorney or broker, might not consider it his duty to create work for the legal profession. Here the draftsman should consider the inclusion of a condition precedent to the activation of the provision for liquidated damages. An example of this would be:

Should the undersigned buyer fail to carry out this agreement, the seller may elect to declare a forfeiture and cancellation of this contract and upon such election being made any payments theretofore made shall be retained by the seller as liquidated damages.

76 Wenzel v. Roberts, 236 Wis. 315, 294 N.W. 871 (1940); Weidner v. Hyland, 216 Wis. 12, 256 N.W. 244 (1934). And see 92 C.J.S. 574, Vendor & Purchaser (1955).
77 Zimmerman v. Thompson, 16 Wis. 2d 74, 114 N.W. 2d 427 (1962).
78 Supra note 39, at 5-23.
79 In Reiter v. Barley, 180 Wash. 230, 39 Pac. 2d 370 the court said in interpreting such a clause: "If no determination of forfeiture is made, the right and liabilities thereunder are not called into operation; in other words it is not agreed that, in all events, the measure of damages for any breach of the contract shall be payments theretofore made, but, that, if the vendors elect to declare a forfeiture, this shall be the measure of damages."
It was the fact that there was no condition precedent in the contract that led our court in the Zimmerman case to the conclusion that mere retention of the funds following a breach constituted an election which effectively cut off any other contractual remedies. A second alternative for the draftsman would be to follow the clue of the court in its decision and drop the clause providing for liquidated damages. A reading of the Zimmerman case indicates that a contract may provide that on the buyer's default the plaintiff may keep the money paid and if it says nothing about it being liquidated damages or in lieu of actual damages such retention may not bar an action for actual damages. As the clause presently stands the seller can recover no more than the amount paid on the contract as of the time of the breach if he chooses to retain such amounts.

**RISK OF LOSS**

In the event of a casualty to the property in question the contract provides:

In the event the premises shall be damaged by fire or elements prior to the time of closing, in an amount of not more than ten per cent of the selling price, the Seller shall be obligated to repair the same. In the event such damage shall exceed such sum, this contract may be cancelled at the option of the Buyer. Should the Buyer elect to carry out this agreement despite such damage, such Buyer shall be entitled to all the credit for the insurance proceeds resulting from such damage, not exceeding, however, the purchase price.

A fire may render the premises untenable and still there may be less than 10% damage. When must the seller repair? Must the buyer close the sale before repairs are made? And if he must, is not the buyer rather than the seller, being required to bear the risk of usable property where the damage does not exceed 10%? Without any provision in the contract the loss would fall on the seller unless the buyer has taken possession or legal title has been transferred to the buyer by deed. Yet, because of the indefiniteness of the clause in the standard printed contract where the damage is material but not more than 10%, the risk of loss may well be shifted to the buyer. In such a case, from the buyer's viewpoint he would be better protected without such a clause in the contract. If the draftsman is a broker, he finds himself in the position of owing a primary duty to the seller and still being expected to render the same service to the buyer that an attorney would. This is but another instance where the broker may be forced to wrestle with a serious conflict of interest problem. It would appear that the fairest course of action regarding both the seller and buyer would be to word the risk of loss clause so as to provide that where the damages are less than 10%.

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the seller shall be obligated to repair before the sale is to be closed. Further provision should be made that any delay in closing, necessitated by such need for repair, shall not exceed a specified period of time unless the buyer so approves.

CONCLUSION

Printed forms that may be purchased at the supply store are veritable traps. They have the wrong things in and the right things out. . . .

The draftsman who allows himself to become a slave to such printed forms may reasonably expect that he is rendering inferior service to his clients and the public. If that draftsman is a non-lawyer who has a limited privilege to practice law, he had best not allow the form to be his master if he wishes to protect this very limited right. The introduction of labor saving forms has been a prolific source of error in the drafting of conveyances and the like but it need not be so. The conscientious draftsman will not allow it to become a fact.

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