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Robert Kratovil

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THE UNIFORM LAND TRANSACTIONS ACT: A FIRST LOOK

ROBERT KRATOVIL^{*}

INTRODUCTION

The Uniform Land Transactions Act (ULTA)¹ is designed to accomplish for real estate transactions what the Uniform Commercial Code (UCC) accomplished for personal property. Work began on this project in 1970. At the August, 1974 meeting of the National Conference of Commissioners, the Committee of the Whole gave its approval to articles I to V of the Act. They are: article I, General Provisions; article II, Contracts and Conveyances; article III, Secured Transactions; article IV, Condominiums; and article V, Construction Liens.² A special committee of Commissioners charged with the task of drafting the ULTA meets periodically to consider materials drafted by Allison Dunham (Chairman), Marion Benfield (Reporter-Draftsman), and Peter B. Maggs (Reporter-Draftsman). Meeting with them is an Advisory Committee composed of representatives of consumers and various interested trade groups, *e.g.*, bankers, mortgage bankers, title insurers, and life insurance companies. When materials are deemed ready for submission to the National Conference, a line-by-line reading takes place in the National Commissioners Committee of the Whole and motions to amend, strike, or approve are voted upon by that Committee. In this fashion articles I to V were finalized.

The stated purposes of the Act are set forth in section 1-102(b) as follows:

(1) to simplify, clarify and modernize the law governing real estate transactions;

^{*} Professor of Law, John Marshall Law School. Until December 30, 1974, the author served as vice president of Chicago Title Insurance Co. and was a member of the advisory committee for the Uniform Land Transactions Act.

¹ A special committee of the National Conference of Commissioners on Uniform State Laws is in charge of preparing the working draft of the Uniform Land Transactions Act. To date, this draft has not been passed upon by the Commissioners on Uniform State Laws. Throughout this article, references and citations to sections and comments of the ULTA are to the February 1975 working draft. Since the entire draft will not be reproduced herein, those wishing to obtain a copy may contact the National Conference of Commissioners on Uniform State Laws, 645 N. Michigan Ave., Chicago, Ill. 60611.

The ULTA is primarily concerned with real estate transactions and hence the acronym is somewhat of a misnomer. This was deemed, however, to be more acceptable than the UREA.

² The articles yet to be approved are: article VI, Statutory Liens and Notices of Pending Proceedings; article VII, Conveyancing, Recording and Priorities; article VIII, Public Land Records; and article IX, Effective Date and Repealer.

- (2) to promote the interstate flow of funds for real estate transactions;
- (3) to protect consumer buyers and borrowers against practices which may cause unreasonable risk and loss to them; and
- (4) to make uniform the law among the states enacting it.

Of course, the ULTA has other objectives. Principal among these, although unstated, is that a code of real estate law should be modeled after the UCC. This objective rests on the possibly questionable assumption that real estate transactions do not differ greatly from chattel transactions. In accordance with this underlying assumption, presumably case law developed in connection with the UCC would be applicable to the ULTA. This observation was often repeated by Professor Dunham.

Another objective was to make possible the development of simple mortgage documents. These simple mortgages could be quickly and inexpensively foreclosed by typical power of sale procedures³ rather than by judicial foreclosure, although the latter would still be permitted. Redemption would be virtually abolished. The philosophy behind this portion of the ULTA is given in the introductory comment to article III, which reads, in part, as follows:

It is not really necessary to remind the reader that this Article covers the portion of real estate law where the need and desirability of uniformity is most pressing. Thus in H.R. 10688 and S. 2507, 93rd Cong. 1st Sess., a federal proposal to establish a uniform foreclosure system for mortgages insured, guaranteed or owned by federal agencies, there is a proposed Congressional finding which sets forth important reasons for uniformity;

CONGRESSIONAL FINDINGS

"SEC. 402. The Congress finds—

(1) that disparate State laws relating to the foreclosure of

³ In the aftermath of *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), there was considerable debate as to whether typical power of sale foreclosures were constitutional in the absence of prior notice and hearing for the benefit of the defaulting mortgagor. See, e.g., Note, *California's Nonjudicial Foreclosure Notice Requirements and the "Sniadach Progeny,"* 9 CALIF. W.L. REV. 290 (1973); Note, *Mortgages—Does Foreclosure Under Power of Sale Violate Due Process Rights?*, 4 CUM.-SAM. L. REV. 507 (1974); Note, *Nonjudicial Foreclosure Under a Deed of Trust: Some Problems of Notice*, 49 TEXAS L. REV. 1085 (1971). The problem, however, has not yet been completely resolved. See *Northrip v. Federal Nat'l Mtge. Assoc.*, 372 F. Supp. 594 (E.D. Mich 1974).

Recent case law, however, has consistently upheld state statutes authorizing nonjudicial power of sale foreclosures against such attacks. See, e.g., *Bryant v. Jefferson Fed. Sav. & Loan Ass'n*, 509 F.2d 511 (D.C. Cir. 1974); *Hoffman v. Dep't of Housing & Urban Dev.*, 371 F. Supp. 576 (N.D. Tex. 1974); *Law v. Dep't of Agric.*, 366 F. Supp. 1233 (N.D. Ga. 1973); *Ruff v. Lee*, 230 Ga. 426, 197 S.E.2d 376 (1973).

real estate mortgages and deeds of trust have inhibited the free flow of mortgage money to homeowners at reasonable rates in many States and regions of the Nation have burdened Federal programs involving real estate mortgages made, owned, insured or guaranteed by the United States;

(2) that delays in completing real estate foreclosures have increased the risks of vandalism, fire loss, depreciation, damage and waste and that resulting losses have burdened Federal programs involving real estate mortgages;

(3) that delays in foreclosure generally and delays in the transfer of title due to redemption periods observed in some States have encouraged the practice known as "equity skimming" with consequent financial loss to the Government, homeowners, and mortgagees generally"⁴

The article on Condominiums⁵ is basically intended to modernize and make uniform the law on this subject. The rapid growth of condominiums during the past ten years and the projection that they are to become the dominant form of home ownership demand that the multiplicity of state condominium acts be brought under a single unified body of law.

The article on Construction Liens⁶ is intended to attract money to the mortgage market by giving a construction mortgage total priority over mechanics' liens arising during the course of construction. This article will most probably generate a good deal of controversy.

Another important objective of the ULTA is to simplify title searching, hopefully making the process less expensive. This is to be accomplished by enactment of a uniform Marketable Title Act and a number of short limitation statutes to cure title defects.⁷ In this regard, the Act anticipates the ultimate utilization of computers in modernizing the entire process of recording and searching titles.

It is quite evident that the ULTA purports to introduce revolutionary change in the law of real property. The discussion of the ULTA herein is limited to articles I and II. Hopefully this will serve to introduce the Act to the bar, which now appears to be largely unaware of the existence of this important proposed legislation. Additionally, an analysis of the thinking which went into the preparation of these two articles should provide an insight into the manner in which the ULTA hopes to achieve its stated objectives. Selected sec-

⁴ ULTA art. 3, Introductory Comment.

⁵ *Id.* art. 4.

⁶ *Id.* art. 5.

⁷ See generally SIMES & TAYLOR, *IMPROVEMENT OF CONVEYANCING BY LEGISLATION* (1960).

tions of the Act will be fully quoted as an aid to placing this commentary in its proper perspective.

ARTICLE I

Construction

The UCC has found application to transactions falling outside of its scope. As early as 1951 the Court of Appeals for the Third Circuit, in *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*,⁸ drawing upon a rule of law stated in the Code, said, in a footnote, “[w]e think provisions of the Uniform Commercial Code which do not conflict with statute or settled case law are entitled to as much respect and weight as courts have been inclined to give to the various Restatements. It, like the Restatements, has the stamp of approval of a large body of American scholarship.”⁹ Thus, like the peasant who was startled to find that he had been speaking prose all his life, we find that large portions of the legislation the Commissioners are struggling to frame are already “on the books,” so to speak.

Since much of the ULTA is taken from the UCC, both the Comments and case law relevant to the UCC are equally relevant to the ULTA. Indeed, this was one of Professor Dunham’s expressed goals.

In those instances where the present draft of the ULTA differs from prior drafts, the inference is warranted that a meaningful change was intended. At one time the UCC contained a provision that “prior drafts of text and comments may not be used to ascertain legislative intent.”¹⁰ This language vanished, no doubt because it was devoid of logic and because legislatures ought not go about telling courts how the latter should perform their functions.¹¹ Accordingly, variations in the various UCC drafts have frequently been utilized in order to construe the UCC.¹²

Originally the UCC provided that the Comments could be con-

⁸ 190 F.2d 817 (3d Cir. 1951).

⁹ *Id.* at 822 n.9. See generally Malcolm, *The Uniform Commercial Code: Review, Assessment, Prospect—November, 1959*, 15 BUS. LAW. 348, 360-65 (1960); Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965).

¹⁰ UNIFORM COMMERCIAL CODE § 1-102(3)(g) (1953 version) [hereinafter cited as UCC]. All further UCC citations are to the 1962 Official Text unless otherwise indicated. See generally Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1953).

¹¹ It has been suggested with respect to the UCC, however, that “lawyers cannot base reliable inferences as to the intended meaning of enacted text on changes made from prior versions of that text.” J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 4, at 10 (1972) [hereinafter cited as WHITE & SUMMERS]. The authors suggest that former § 1-102(3)(g), which appeared in the 1953 version should not have been deleted. *Id.*

¹² See, e.g., Comment, *Future Advance Security Interests and the 1971 Revision of the Uniform Commercial Code*, 1971 U. ILL. L.F. 496.

sulted as an aid to construction of the text, but warned that text controls in the event of conflict between the two.¹³ In the process of revision, this provision was removed.¹⁴ To the extent that the Comments were not laid before legislatures adopting the UCC, they lack official status. And to the extent that they were prepared after the UCC was written, they may or may not be legislative history.¹⁵ In point of fact, however, the courts always consider the Comments.¹⁶ But, it is important to note that the Comments can be misleading at times.¹⁷ In the case of the ULTA, some Comments appear in the August 1974 Draft but others will follow. Because not all legislatures will be in a position to fully review the so-called "Official Comments," it should be emphasized that they are not really official, nor are they part of the statute.

Definitions and General Provisions

As was stated above, a proper understanding of the ULTA requires some familiarity with the UCC. Indeed, much of article I will be seen to follow conceptually the 1962 Official Text of the UCC. However, in keeping with one of its stated objectives, *i.e.*, consumer protection, article I introduces a new concept, that of a protected party. The protected party is one "who contracts to give a real estate security interest in, or to buy, or to have improved residential real estate all or a part of which he occupies or intends to occupy as a residence."¹⁸ Residential real estate is defined so as to limit such real estate to a structure of not more than four dwelling units (an FHA concept) and to land containing not more than three acres.¹⁹ The protected party, as will be seen, receives a number of special safeguards in the ULTA. Favored treatment in the foreclosure process,²⁰ and

¹³ UCC § 1-102(3)(f) (1953 version).

¹⁴ 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD OF THE UNIFORM COMMERCIAL CODE 3 (1957); see Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597 [hereinafter cited as Skilton].

¹⁵ Compare I N.Y. LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 158-60 (1955) (various judicial references to the Comments seen as indication that the courts consider the Comments to be "part of the 'legislative history'"), quoted in Skilton, *supra* note 14, at 604 n.19, with Note, *Warranty Disclaimers and Limitation of Remedy for Breach of Warranty Under the Uniform Commercial Code*, 43 B.U.L. REV. 396, 403 (1963) (suggesting that comments "do not qualify as legislative history").

¹⁶ See, *e.g.*, cases cited in Skilton, *supra* note 14, at 598 n.3.

¹⁷ See WHITE & SUMMERS, *supra* note 11, § 4, at 12-13.

¹⁸ ULTA § 1-203(a)(1).

¹⁹ *Id.* § 1-203(b).

²⁰ *Id.* § 3-506.

prohibitions against certain waivers of warranties²¹ and modification of remedies²² provide immediate examples.

This concept of protected party, however, is likely to provoke some controversy since it will bring within its ambit seemingly unintended individuals. For example, it applies regardless of value. The owner of a million-dollar mansion is a protected party. In addition, it applies not only to one's principal home but to his summer and winter home as well.²³ Finally, since it applies to one who acquires a residence subject to a mortgage placed thereon by a protected party,²⁴ a large corporation acquiring a mortgaged home from an employee in an employee-transfer program is a protected party.

Good Faith and Unconscionability

SECTION 1-201. [*General Definitions.*] Subject to additional definitions contained in subsequent Articles which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act the following definitions apply.

.....
(h) "Good faith" means honesty in fact and the observance of reasonable standards of fair dealing in the conduct or transaction involved.

SECTION 1-301. [*Obligation of Good Faith.*] Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

SECTION 1-311. [*Unconscionable Agreement or Term of Contract.*]

(a) If the court as a matter of law finds that a contract or contract clause was unconscionable at the time it was made, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid any unconscionable result.

(b) Whenever it is claimed or appears to the court that a contract or any contract clause may be unconscionable, the parties in order to aid the court in making the determination, shall be

²¹ *Id.* § 2-311(c).

²² *Id.* § 2-517(d).

²³ *Id.* § 1-203, Comment.

²⁴ *Id.* § 1-203(a)(3).

afforded a reasonable opportunity to present evidence as to

- (1) the commercial setting of the negotiations,
- (2) whether the seller, lessor, or lender has knowingly taken advantage of the inability of the other party reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy, or inability to understand the language or meaning of the agreement, or similar factors,
- (3) the effect and purpose of the contract or clause, and
- (4) if a sale, any gross disparity, at the time of contracting, between the amount charged for the real estate and value of the real estate measured by the price at which similar real estate was readily obtainable in similar transactions.

The definition of good faith in section 1-201(h) will be seen to follow closely that of article II (Sales) in the UCC²⁵ and that of the Restatement of Contracts.²⁶ It is important that the good faith and unconscionability provisions be read in conjunction with one another. Together, they operate with a "push-pull" force on every contract. The good faith definition enables the court to "push" into a contract a provision the court finds necessary to accomplish a fair result. The unconscionability section enables the court to "pull" from the contract provisions that tend to lead to an unfair result. The courts, it is clear, will play a highly activist role in making, remaking, and unmaking contracts.

This is not to say, of course, that the contemplated judicial role is something new. Courts have always done something akin to this. Equity often did so openly, while law courts used imaginative flanking devices. They found failure of consideration, lack of consideration, lack of mutual assent, duress or fraud, or resorted to strained interpretation — all toward the end of achieving a just result. It is almost as if courts were ashamed of their normal and natural role, the seeking of justice. The oddity of this attitude becomes even more apparent when one remembers that in their early struggles with contracts, both law courts and equity courts refused to enforce unfair contracts.²⁷

Corbin recognized this process long ago. In contract law, he said, we must recognize the presence of "constructive conditions." These

²⁵ See UCC § 2-103.

²⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 231 (1972).

²⁷ See Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 923-24 (1974), where the author points out that "[t]he most important aspect of the eighteenth century conception of exchange [was] an equitable limitation on contractual obligation." *Id.* at 923. Courts of equity would not enforce contracts if the consideration was inadequate. *Id.* The law courts arrived at a similar result by the use of a "substantive doctrine of consideration which allowed the jury to take into account not only whether there was consideration, but also whether it was adequate, before awarding damages." *Id.* at 924.

conditions are not to be found in the terms of the contract or any implication therefrom. Rather, they are put there by the courts to make the contract conform to the mores and practices of the community.²⁸ For example, if *V* contracts to sell Blackacre to *P*, and nothing is said about the quality of the title to be furnished by *V*, every court will read into the contract a requirement that seller furnish a marketable title free from encumbrances. Once it is recognized that this process is a timeworn practice, courts will accustom themselves to resorting to it freely. The great contribution of Corbin, the UCC, the Restatement of Contracts Second, and the Restatement of Property Second is that they bring this process out into the open, something the first Restatement of Contracts seemed unwilling to do. The concept of a "constructive condition," however, is to be shelved in favor of the notion of "good faith."²⁹ Nevertheless, it is important to remember that the constructive condition has not disappeared. It has merely acquired a new name. In passing, one notes that the urge to get rid of the word "constructive" is not likely to have much success.³⁰

The unconscionability section, like that governing good faith, follows its counterpart in the UCC.³¹ In addition, it borrows from the Restatement of Contracts³² and the Uniform Consumer Credit Code.³³ Of particular interest is section 1-311(b)(4). This section will create consternation for the real property bar. In chattel transactions, establishing the market value of consumer goods presents few difficulties. But in large-scale real estate transactions the problems are formidable indeed. The results of appraisals can vary greatly. Particularly in land assemblies there is a wild variation in price between the first parcels acquired and those acquired in the last stages after news of the assembly has leaked out.³⁴ Moreover, there is a subjective aspect in land acquisition. The land investor values land differently from the land developer.³⁵ Theoretically, an option given for \$1 can be enforced.³⁶

²⁸ See Corbin, *Conditions in the Law of Contracts*, 28 YALE L.J. 739 (1919); 3A A. CORBIN, *CONTRACTS* § 632 (1963).

²⁹ RESTATEMENT (SECOND) OF CONTRACTS § 252, comment c (1972).

³⁰ See Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 904 (1942). The author analyzes judicial treatment of various implied conditions in contracts and suggests that the term "constructive condition" most aptly describes conditions found in contracts because of overriding legal principles.

³¹ UCC § 2-302.

³² See RESTATEMENT (SECOND) OF CONTRACTS § 234 (1972).

³³ See UNIFORM CONSUMER CREDIT CODE § 5.108.

³⁴ See, e.g., Hellman, *The Fine Art of Assemblage*, 4 REAL ESTATE REV., Summer 1974, at 101.

³⁵ See, e.g., Kern, *The Art of Buying Land*, 3 REAL ESTATE REV., Winter 1974, at 38.

³⁶ It is not the amount of consideration which is important, but "the value of the

It might be preferable to add the following language to subsection 4:

provided however, a disparity between the contract price and the value of the real estate measured by the price at which similar real estate was readily obtainable in similar transactions does not, of itself, render the contract unconscionable.

The subsection would then be more consistent with Professor Corbin's views.³⁷ Options would then be accorded specific performance even though only nominal consideration was given. A parallel commentary, however, could elaborate that gross disparity could well render the contract unconscionable if accompanied by inequalities in the sophistication of the parties or the other circumstance mentioned by Corbin. Land assemblies would have to be separately discussed. These simply do not lend themselves to solution by the phrase "similar real estate was readily obtainable in similar transactions." Each transaction in a land assembly is different from every other transaction. Also, a party paying a grossly inflated price for land because he expects inflation to push the price higher ought not to be relieved of his bargain if deflation occurs. This applies as well to the buyer who guesses wrong as to the existence of a project that would push price upward.

There are two matters this section leaves unaddressed. One is the effect of supervening unconscionability, that is, unconscionability occurring by reason of events taking place after the making of the contract. The ULTA speaks only of unconscionability at the time the contract was made. The other matter is the effect of unconscionability on executed transactions. The language of section 1-311 is couched in terms of defending an action to enforce an unexecuted contract. That executed transactions may later be challenged on grounds of unconscionability is exemplified by a recent decision upsetting a sale that had taken place in 1891. In the final analysis perhaps it is preferable to leave subsequent unconscionability to the law of restitution and unjust enrichment.³⁸

performance to be rendered by the promisee after acceptance." IA A. CORBIN, CONTRACTS § 263, at 501 (1963).

³⁷ Professor Corbin pointed out:

It is the generally prevailing rule that mere inadequacy of consideration, unaccompanied by other facts indicating artifice [*sic*], sharp practice, hardship, advantage taken of misfortune or ignorance, and the like, is not sufficient in itself to prevent specific enforcement.

5A *id.* § 1165, at 223 (1964) (footnote omitted).

³⁸ See generally WHITE & SUMMERS, *supra* note 11, §§ 4-1 to -8, at 112-33, wherein the authors point out that the most frequent remedy accorded upon a finding of unconscionability under the UCC is a refusal to enforce payment of the purchase price. *Id.*

Section 1-311(b) formerly contained a subdivision 5 which read as follows:

- (5) If an extension of credit, any gross disparity between the amount charged for the credit extended and the value of the credit extended measured by the charge at which similar credit is readily obtainable in similar transactions by like parties.³⁹

This provision was ultimately removed. The conclusion may have been that unconscionable mortgage interest terms would be better left to policing under the law of usury.

Course of Dealing and Usage

SECTION 1-303. [*Course of Dealing and Usage.*]

(a) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(b) A usage is any practice or method of dealing having such regularity of observance in a place as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of a usage are to be proved as facts. If it is established that a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(c) A course of dealing between parties and any usage of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(d) The express terms of an agreement and an applicable course of dealing or usage shall be construed wherever reasonable as consistent with each other; but when that construction is unreasonable express terms control both course of dealing and usage and course of dealing controls usage.

(e) An applicable usage in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

Section 1-303, stating the ULTA position on usage and course of

§ 4-8, at 130-33. Indeed, it has been suggested that "[i]t is not ground for damages or for cancellation of the executed contract." D. DOBBS, REMEDIES § 10.7, at 706 (1973). There is, however, at least some authority for the proposition that a court could modify the terms of an executed contract properly made where payments were found to be so inadequate as to be unconscionable, and require that additional payments be made. *See, e.g., Sac & Fox Tribe of Indians v. United States*, 340 F.2d 368 (Ct. Cl. 1964), where the court found that coercion and duress had been used by the Government to force the Indians into taking an "unconscionable" price in exchange for their land, *id.* at 374-76. The case was remanded to the Indian Claims Commission for a determination of the fair market value of the land at the time of sale, the difference between such value and the purchase price to be awarded to the petitioners. *Id.* at 374.

³⁹ ULTA § 1-311(b)(5) (Mar. 1, 1973 proposed draft).

dealing, will again be seen to closely follow its counterpart in the UCC. This provision gives new force to prior course of dealing and usage of trade. Among other things, contractual ambiguity is no longer required — as it was in some states — before admitting evidence of trade usage to contradict the plain meaning of a contract term.⁴⁰ Moreover, general clauses may no longer suffice to divorce a contract from prior course of dealing and trade usage. Section 1-303 gives equal standing to all three factors in interpreting the contract. This means that parties wishing to be governed by the literal language of the contract must state so expressly and, better yet, expressly negate trade usage and prior course of dealing to the extent it conflicts with the express language of the parties.⁴¹

It seems possible, however, that usage and trade practice will play a less significant role in land transactions than in chattel transactions, although cases involving trade usage do indeed occur in land transactions.⁴²

Waivers of Claims

SECTION 1-305. [*Waiver or Renunciation of Claim or Right After Breach.*]

(a) Subject to subsection (b), a claim or right arising out of an alleged breach of contract, including any contract creating a security interest or giving rise to a lien, may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

(b) A waiver or renunciation under subsection (a), whether or not for consideration, by which a party agrees to forego rights given him by this Act or by a contract is invalid if the court as a matter of law finds the waiver or renunciation is unconscionable or that it was secured in an unconscionable manner. The competence of the aggrieved party, any material misrepresentation, failure to disclose, or over-reaching by the other party, and the value of any consideration for the waiver or renunciation are relevant to the issue of unconscionability.

⁴⁰ See Note, *Contract Draftsmanship Under Article Two of the Uniform Commercial Code*, 112 U. PA. L. REV. 564, 575 & n.97 (1964).

⁴¹ The importance of such a provision is exemplified by *Provident Tradesmens Bank & Trust Co. v. Pemberton*, 196 Pa. Super. 180, 173 A.2d 780, *aff'g per curiam* 24 Pa. D. & C.2d 720 (Philadelphia County Ct. 1961), wherein based on evidence of trade usage and course of dealing, the court read into the contract between plaintiff bank and defendant car dealer the requirement that the bank notify the dealer, notwithstanding a security agreement purporting to waive notice, that a customer let his insurance lapse.

⁴² See, e.g., *Chicago Bridge & Iron Co. v. Reliance Ins. Co.*, 46 Ill. 2d 522, 264 N.E.2d 134 (1970).

Initially, this provision was intended to give a protected party relief against a waiver procured from him in an unconscionable manner. The Committee of the Whole added language that subjects the substance and effect of any waiver to examination as to unconscionability. The examination is to be made "by the court as a matter of law."⁴³ The concept that unconscionability is a matter for the court occurs throughout and is certainly not unique to the ULTA.⁴⁴ Since unconscionability is considered a question of law, there is no right to a jury trial on this question. Yet determining unconscionability often involves determining land value,⁴⁵ and in condemnation cases land value is determined by a jury. Historically unconscionability played a larger role in equity cases than in law actions, which no doubt explains the role of the court in this area.

Section 1-305(a) provides that a waiver need not be supported by consideration. As originally drafted it was somewhat unclear whether this applied to a waiver of a mechanics' lien. However, the ULTA is to be construed liberally.⁴⁶ This requires the spirit to prevail over the letter of the law.⁴⁷ Under the ULTA, waiver in its broadest sense need not be supported by consideration. Thus, in the narrow field of mechanics' liens, the rule applicable to the broad field of waiver generally should apply. In the final draft it is specifically recognized that a mechanics' lien waiver need not be supported by consideration.⁴⁸

Parol Evidence and Course of Performance

SECTION 1-306. [*Final Written Expression; Parol or Extrinsic Evidence.*] Terms agreed to by the parties in confirmatory memoranda or terms set forth in a writing intended by the parties as a final expression of their agreement may not be contradicted by

⁴³ ULTA § 1-305(b).

⁴⁴ See, e.g., UCC § 2-302; UNIFORM CONSUMER CREDIT CODE § 5.108; RESTATEMENT (SECOND) OF CONTRACTS § 234, comment f (1972).

⁴⁵ See, e.g., ULTA § 1-311(b)(4).

⁴⁶ *Id.* § 1-102(a).

⁴⁷ See § SUTHERLAND, STATUTORY CONSTRUCTION § 60.01 (4th ed. C. Sands 1974).

⁴⁸ ULTA § 5-214. See generally Kratovil & Rohde, *Mechanics' Lien Waivers and the Requirement of Consideration*, 14 DEPAUL L. REV. 243 (1965). The authors point out that the overwhelming weight of authority supports the proposition "that the waiver of a mechanic's lien must be supported by consideration." *Id.* at 243. The authors go on to suggest, however, that the rule constitutes an impediment to modern construction lending practices. The problem is said to arise because mortgage bankers frequently have such waivers disregarded and thus lose their mortgage lien priority where the primary contractor fails to tender actual consideration therefor. *Id.* at 244. It is suggested that the amount of time and paperwork required in attempts by the mortgage lender to protect its lien are invariably reflected in the increased cost of construction. *Id.* at 245.

evidence of any prior agreement or of a contemporaneous oral agreement, but may be explained or supplemented:

- (1) by course of dealing or usage (Section 1-303) or by course of performance (Section 1-308); and
- (2) unless the court finds the writing to have been intended as a complete and exclusive statement of the terms of the agreement, by evidence of consistent additional terms.

SECTION 1-308. [*Course of Performance or Practical Construction.*]

(a) Whenever a contract involved repeated occasions for performance by either party and the other party has knowledge of the nature of the performance and opportunity to object to it, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the agreement.

(b) The express terms of an agreement and any course of performance, as well as any course of dealing and usage, shall be construed whenever reasonable as consistent with each other, but whenever that construction is unreasonable, express terms control course of performance and course of performance control both course of dealing and usage.

(c) Notwithstanding subsection (b) and subject to the provisions on modification, rescission and waiver, (Section 1-310), course of performance is relevant to show a waiver or modification of any express or other term inconsistent with the course of performance.

In an earlier draft of the ULTA subparagraph (2) of section 1-306 appeared as paragraph (3) and the following appeared as paragraph (2): "by other evidence of the parties intention or understanding, and . . ."⁴⁹

The meaning of the change becomes clear by reference to the concurring opinion in *Smalley v. Juneau Clinic Building Corp.*,⁵⁰ which is, in part, as follows:

The majority opinion returns to the "objective theory" of interpretation of contracts followed by the Restatement of Contracts and Professor Williston and which had been specifically adopted in Alaska prior to the case of *Alaska Placer Co. v. Lee*, 455 P.2d 218 (Alaska 1969). This approach requires the court to view the wording of a contract objectively to ascertain whether it is clear and unambiguous. If it is, then the obligations of the parties must be determined from the contract itself. Only if the contract is ambiguous may parol testimony be taken to ascertain the intention of the parties thereto.

In *Alaska Placer Co.* this court, while citing the previous

⁴⁹ ULTA § 1-207 (May 1973 working draft).

⁵⁰ 493 P.2d 1296, 1305 (Alas. 1972) (Erwin, J., concurring).

Alaska cases, relied upon the opposing theory of contractual interpretation espoused by Professors Corbin and Wigmore. This approach would require a hearing in every case where there is a dispute over contractual terms in order to ascertain the actual intention of the parties on the theory that words can mean different things to different people.⁵¹

When a deal gets into trouble, the documents are examined critically by litigation counsel. A lawyer who can depend on a court to give effect to the plain language of the contract can give his client rational advice. If he must indulge in conjecture as to what a judge might do with testimony by a party as to the meaning the terms of the contract had to such party, the situation becomes murky indeed. Corbin may have logic on his side, but in the catalogue of human values certainty will often rank far higher than logic. The deletion of former paragraph (2) reflects sound thinking.

The ULTA follows the UCC presumption "that even 'final' contracts are only partially integrated and that the extent of the partial integration depends upon the parties' actual intent to include within their agreement additional parol terms consistent with the writings."⁵² Prior course of dealing and usages of the business give color to the terms actually employed in the writing. Even after the writing is signed, course of performance may affect the apparent meaning of the terms used in the writing. However, in case of a clear conflict between express terms and course of performance, the express terms control,⁵³ although course of performance may show waiver or modification. This will undoubtedly lead to extensive use of a merger clause in contract draftsmanship. The clause, moreover is likely to be an elaborate one, revealing a clear intention to detach the transaction from its setting.

Acceptance of the Deed

SECTION 1-309. [*Effect of Acceptance of Deed on Contract Obligations.*] Acceptance by a buyer or a secured party of a deed or other instrument of conveyance is not of itself a waiver or renunciation of any of his rights under the contract under which the deed or other instrument of conveyance is given and does not of itself relieve any party of the duty to perform all of his obligations under the contract.

⁵¹ *Id.* at 1305-06 (footnotes omitted).

⁵² Note, *Contract Draftsmanship Under Article Two of the Uniform Commercial Code*, 112 U. PA. L. REV. 564, 566-67 (1964). See also UCC § 2-202, Comment 1; N.Y. LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 598, 601 (1955).

⁵³ ULTA § 1-308(b).

Section 1-309 abolishes the rule that a contract of sale merges into the deed at closing. This section will result in the routine insertion of merger clauses in deeds, since ULTA permits the parties to "draft around" most of the Code provisions. No doubt the pervasive rule against unconscionable terms will apply to any such merger clause.

A special rule as to marketable title, however, is found in section 2-304(d), to the effect that all questions of marketability of title end at closing. This is declarative of existing law and is an exception to the "no merger" rule of section 1-309.

Description of Real Estate

SECTION 1-312. [*Sufficiency of Description.*] Except as provided in the Article on recording, notice, and priority (Article 7) any description of the real estate is sufficient whether or not it is specific, if it reasonably identifies the real estate.

Since this is an article I definition it applies to all ULTA documents, such as contracts, deeds, and mortgages. Under present law, descriptions may not be totally sufficient for all purposes between the parties to the transaction.⁵⁴ The principal exception to this general provision is in the area of recording, which as the section indicates, will eventually be provided for in article VII.

Assignments and Waivers of Defenses

SECTION 1-313. [*Certain Assignees Subject to Defenses of Protected Party.*]

(a) Notwithstanding agreement to the contrary, with respect to a sale entered into with a protected party by a person in the business of selling real estate, an assignee or holder in due course of the rights of the seller is subject to all defenses of the protected party against the seller.

(b) Notwithstanding agreement to the contrary, with respect to a security transaction entered into with a protected party by a lender whose security interest in the protected party's residential real estate is subordinate to another person's Article 3 security interest in the real estate, an assignee or holder in due course of

⁵⁴ It should be noted in this connection that "[a] description may be sufficient for a contract though inadequate for a deed." M. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* 35 n.31 (2d ed. 1963). It should also be noted that courts will frequently reform a conveying instrument to conform to the actual conveyance intended by the parties but will not do so if the recorded instrument has been relied on to the detriment of intervening parties. *See, e.g., Thorpe v. Helmer*, 275 Ill. 86, 113 N.E. 954 (1916); *Lutle v. Hulen*, 128 Or. 483, 275 P. 45 (1929). *See generally* 1 R. PATTON & C. PATTON, *LAND TITLES* § 61 *et seq.* (2d ed. 1957).

the rights of the lender is subject to all defenses of the protected party against the lender.

SECTION 1-314. [*Agreement Not to Assert Defenses Against Assignee; Modification of Sales Warranties Where Security Interest Exists.*]

(a) Subject to the provisions subjecting an assignee to defenses of a protected party (Section 1-313), an agreement by a debtor who has given a security interest in real estate, or by a buyer or lessee of real estate, that he will not assert against an assignee defenses which he may have against the assignor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a defense, to the same extent as if he were a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3) of the Uniform Commercial Code. A buyer, lessee, or debtor who as a part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

(b) When a seller retains a purchase money security interest in real estate the Article on Contracts and Conveyances (Article 2) governs the sale and any disclaimer, limitation, or modification of the seller's warranties.

Sections 1-313 and 1-314 set forth the ULTA position on defenses to mortgages securing negotiable notes and waivers of defenses. The majority view in this regard has been adopted to the effect that a mortgage which either secures a negotiable note or is accompanied by a waiver of defenses, travels free of any defenses.⁵⁵ Thus, an assignee who takes his assignment in good faith and for value is treated in the same fashion as a holder in due course of a negotiable instrument under article 3 (Commercial Paper) of the UCC.⁵⁶

Section 1-313, however, sets out one notable exception to this proposition, *viz.*, that of the protected party.⁵⁷ As has been discussed above, the protected party is a concept unique to the ULTA. Here, as elsewhere throughout the Act, the protected party is afforded preferred treatment. Therefore, an assignee or holder in due course of the right of a seller is subject to all defenses of the protected party against the seller. It should be noted, as the Comment to this section points out, that "[a] protected party can validly waive defenses as against assignees

⁵⁵ See R. KRATOVIL, *MODERN MORTGAGE LAW AND PRACTICE* § 192 (1972).

⁵⁶ UCC § 3-305.

⁵⁷ ULTA § 1-313(b).

of first mortgagees."⁵⁸ Subdivision (b) of this section is speaking specifically of the transactions between protected parties and lenders whose security interest in the real estate is *subordinate* to that of another. It was felt that to subject assignees of first mortgages to such defenses would unnecessarily dampen their sale by prime institutional lenders. Thus, assignees of a seller or second mortgagee will not take their assignments free of the protected party's personal defenses.

Finally, with respect to the assignment of contracts, the ULTA adopts the minority view that, in the absence of language or circumstance to the contrary, an assignee impliedly promises to perform the duties of the assignor.⁵⁹

On the whole, article I introduces little that is earth-shaking, especially to those familiar with the UCC. The "protected party" provision seems rather generous, but seldom will wealthy homeowners become involved in foreclosures. Unconscionability, as a concept, is already a part of our law. The language needs polishing, but that can easily be done. What is perhaps most significant is that the real property bar will be compelled to begin an earnest study of the UCC.

ARTICLE II

Article II deals with deeds, leases, and contracts for the sale of land.⁶⁰

Statute of Frauds

SECTION 2-201. [*Formal Requirements; Statute of Frauds.*]

(a) Notwithstanding agreement to the contrary and except as otherwise provided in this section, a contract for [*sic*] to convey real estate is not enforceable by judicial proceeding unless there is a writing signed by or on behalf of the party against whom enforcement is sought which describes the real estate and which is sufficient to indicate that a contract to convey has been made by the parties.

(b) A contract not evidenced by a writing satisfying the requirements of subsection (a) but which is valid in other respects is enforceable if:

- (1) it is for the conveyance of real estate for one year or less;

⁵⁸ *Id.* § 1-313, Comment.

⁵⁹ *Id.* § 1-315. See also *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521, 532-34 (1975).

⁶⁰ One complaint that has been raised about ULTA draftsmanship, particularly with reference to Article II, is that its definitions are marked with an ineptitude characteristic of the UCC. Compare, e.g., ULTA §§ 1-201(c), (f) with ULTA §§ 2-103(a), (b).

For a commentary on UCC draftsmanship, see Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185 (1967).

(2) the buyer has taken possession of the real estate and has paid all or a part of the price;

(3) the buyer has accepted an instrument of conveyance from the seller;

(4) either party, in reasonable reliance upon the contract and upon the continuing assent of the party against whom enforcement is sought, has changed his position to such an extent that an unreasonable result can be avoided only by enforcing the contract; or

(5) the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that the contract for conveyance was made.

This Statute of Frauds provision, again, is modeled after its UCC counterpart.⁶¹ Of interest is the fact that the memorandum need not state the contract price. That may be established by parol evidence. Of similar interest is subdivision (b)(5) which provides that an oral contract can be enforced where the party against whom enforcement is sought makes certain admissions. Some discussion arose as to the terminology of this provision. Originally, the third line spoke of "a contract." In the Committee of the Whole a question was asked regarding the possibility that the defendant might be quite willing to admit that he entered into a contract of sale but on terms differing from those set forth in the petition or complaint. Professor Dunham agreed to substitute the phrase "*the contract*" but stated he regarded the change as immaterial. His conclusion seems correct. Once the parties admit that a contract was made, the price and terms can be established by parol evidence.

Another question sought to elicit the form of the damaging admission contemplated by subdivision (b)(5). Assume the plaintiff calls the defendant as a witness, as he can under modern practice acts. The defendant admits in deposition or in court that a contract was made. Would this, the question ran, take the case out of the statute? Professor Benfield answered in the affirmative. This, it is evident, will substantially limit the impact of the Statute of Frauds.

Indefinite Contracts Enforced

SECTION 2-202. [*Indefiniteness; Enforcement of Contract.*] A contract to convey does not fail for indefiniteness if the parties have manifested an intent to make a contract and there is a reasonably certain basis for giving an appropriate remedy, even though the parties have:

(1) left one or more terms for future agreement; or

⁶¹ See UCC § 2-201. ◊

(2) not included in the agreement a term dealing with one or more aspects of the contract.⁶²

In this day and age one learns not to be shocked by a statute giving a judge the power to fill in the contract where the parties have omitted terms. But it is shocking to see this radical concept cloaked in language that speaks of an "appropriate remedy." When the parties have made a contract, the judge can provide a remedy. When the parties have failed to make a complete contract and the judge proceeds to complete it for them, he is doing much more than providing a remedy.

This section is certainly a departure from existing law, where for example, if a contract of sale calls for a purchase money mortgage but fails to state a maturity date, the contract generally cannot be enforced. Similarly, if a contract of sale were contingent upon the purchaser obtaining a mortgage of \$30,100, but did not state the terms of the mortgage, the contract could not be enforced. There are a multitude of similar cases where the parties have stated only part of the contract terms and the courts have declined to supply the balance.⁶³

An earlier draft of this section followed more closely the language of UCC section 2-204. This draft was criticized for being unclear as to whether subjective or objective intention was meant to be controlling. It was felt that the provision should make it clear that the outward, objective manifestations of the parties are determinative. Thus, the term "manifested" was included in the current draft to meet these objections.

⁶² This section was modeled after UCC § 2-204.

⁶³ See, e.g., *Sweeting v. Campbell*, 8 Ill. 2d 54, 132 N.E.2d 523 (1956), where the majority viewpoint was discussed and adopted. *Id.* at 57-59, 132 N.E.2d at 524-25. The court was aware that in some jurisdictions "where a mortgage is to be given as part of the purchase price and the maturity date is not specified, [the minority view will presume it] to be payable on demand and specific performance will be decreed." *Id.* at 58, 132 N.E.2d at 525.

It has also been held that a contract of sale contingent upon the purchaser obtaining a mortgage of a stated sum for terms unstated was too vague to be enforceable. *Kenimer v. Thompson*, 128 Ga. App. 253, 196 S.E.2d 363 (1973). Numerous cases may be found in which courts have declined to supply terms left unstated by the parties. See, e.g., *Roberts v. Adams*, 164 Cal. App. 2d 312, 330 P.2d 900 (2d Dist. 1958) (provision of lease which provided for option to purchase for sum payable "as mutually agreed by both parties" held unenforceable); *Cefalu v. Breznik*, 15 Ill. 2d 168, 154 N.E.2d 237 (1958) (contract which provided for payment of "balance in monthly payments" held unenforceable); *Murphy v. Koll Grocery Co.*, 311 Ky. 770, 225 S.W.2d 466 (1949) (contract calling for a selling price of \$75,000, \$5,000 cash, "[t]ime of possession and balance of payment to be arranged at a later date" held indefinite and unenforceable); *Edward H. Snow Dev. Co. v. Oxsheer*, 62 N.M. 113, 305 P.2d 727 (1956) (binder held unenforceable where it provided for payment of balance "as lots are released at purchaser's convenience"); *Bentzen v. H.N. Ranch, Inc.*, 78 Wyo. 158, 320 P.2d 440 (1958) (contract stating that balance of price was "payable by future agreement on or before [a specified date]" held unenforceable).

*Open Price Terms and Firm Offers*SECTION 2-203. [*Open Price Term.*]

(a) If they so intend, the parties may conclude a contract to convey even though the price is not settled. If the price is not settled, the price is to be determined as stated in subsection (b) if:

(1) the price is left to be agreed by the parties and they fail to agree; or

(2) the price is to be fixed in terms of some agreed market or appraisal as determined by a third person and it is not so determined.

(b) Under the conditions stated in subsection (a), the price of an interest to be conveyed for a fixed term is its fair rental value, and the price of any other interest is its fair market value.

(c) A price to be fixed by the seller or by the buyer means a price to be fixed in good faith.

(d) If a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party, the other may either treat the agreement to convey as cancelled or fix a reasonable price.

(e) Unless the parties have agreed that a price not settled is to be fixed or agreed to in the future, there is no contract.

SECTION 2-205. [*Firm Offers.*]

(a) An offer to buy or convey real estate in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration during the time stated or if no time is stated for a reasonable time.

(b) Notwithstanding agreement to the contrary, a term which, without consideration, gives assurance that an offer will be held open is enforceable against an offer [*sic*] who would be a protected party upon acceptance of his offer, or is an individual offering to sell his residence, only if the term is separately signed by the offeror.

(c) Notwithstanding agreement to the contrary, the period of irrevocability absent consideration may not exceed:

(1) one month if the offeror would be a protected party upon acceptance of his offer or is an individual offering to sell his residence, or

(2) six months if the offeror is any other person.

Section 2-203⁶⁴ was drafted by the Committee of the Whole in such a way as to make it clear that it applies only where the parties have agreed that the price was to be fixed in the future. As one Com-

⁶⁴This section was modeled after UCC § 2-305.

missioner pointed out, placing a value on land is quite different from doing the same with respect to chattels.

Section 2-205 is a firm offer section, modeled after UCC section 2-205, which, however, applies only to offers by merchants. The ULTA provision was frequently redrafted. The objection constantly offered to earlier drafts was that a contract signed only by the seller or only by the buyer is an offer and could be deemed a firm offer if it stated that it is not revocable for a stated period. This could be a trap to an unwary home buyer or seller. In the present draft neither an individual selling his residence nor a protected party is bound unless the firm offer is contained in a separate document. Whether this will really protect unsophisticated persons is an unanswered question.

Substantial Performance

The doctrine of "substantial performance" is explicitly incorporated into the ULTA. Section 2-301(a) specifically provides that "[s]eller's performance of the title obligations of Section 2-304 . . . if applicable, and his substantial performance of other obligations is a condition to buyer's duty to tender the purchase price." Further, failure to perform at a fixed time will not in itself discharge the duties of the other party under the contract unless in the circumstances the failure amounts to a material breach, or the contract specifically provides that such a failure will in fact discharge the other party.⁶⁵ In this regard section 2-302(c) states that "[t]he phrase 'time is of the essence' or other similar general language does not of itself provide specifically that failure to perform at the time specified discharges the duties of the other party." This, of course, will lead to the incorporation of boilerplate clauses reciting such circumstances as sharply rising prices or interest rates in order to satisfy this provision.

Title Obligations: Non-Leasehold

SECTION 2-304. [*Seller's Title Obligation — Other than Leasehold.*]

(a) This section does not apply to contracts to convey a leasehold.

(b) A seller in a contract for conveyance of real estate is obligated that:

(1) the title to the real estate will be marketable at the time for conveyance;

(2) the deed conveying the real estate contracted for will not exclude the warranties specified in Section 2-306; and

⁶⁵ ULTA § 2-302(b)(2).

(3) if the contract is for conveyance of a possessory interest, at the time of delivery of the deed the buyer will be able to enter into possession without judicial action or breach of the peace.

(c) An express contract term which states that the seller is to furnish "good title" or "good and sufficient title" or a title described in similar general terms means that the seller is to furnish a marketable title. Recorded and unrecorded interests and claims which have been extinguished by reason of Article 8 do not prevent a title from being marketable.

(d) If an agreement expressly or by implication provides for the conveyance of real estate as distinguished from whatever interest the seller may have in real estate, a term in the agreement specifying the form of the instrument of conveyance as a "quit-claim" deed or other form of conveyance with less than all of the warranties provided in Section 2-306 does not of itself limit the obligation of the seller under paragraph (1) of subsection (b) with respect to the marketability of title, but does limit the remedy of the buyer on seller's default as to marketability to refusal to accept the deed and restitution and incidental damages as provided in Section 2-510(b), but if the buyer accepts a deed which conforms to the seller's obligation, he may not thereafter make any claim based on the failure of the grantor's title to be marketable except to the extent provided in the deed.

(e) Seller must at his expense arrange for and make available to the buyer, before the date for tender of the deed sufficient evidence and documentation to enable the buyer to determine the prospect of seller's compliance with the title obligations of the contract.

(f) The seller performs his obligation under subsection (e) by furnishing one or more of the following showing the state of the title as of a time no earlier than the time of contracting:

(1) an abstract of the title history of the real estate;

(2) a report of title or a commitment to insure by a title insurance company;

(3) a title opinion certificate or report prepared by an attorney acceptable to the buyer; [and]

[(4) a torrens certificate;]

[(4)][(5)] any other evidence which by usage in the place where the real estate is located is acceptable as title evidence.

(g) Notwithstanding the fact that the seller is obligated to furnish or furnishes evidence for inspection by the buyer as to the state of the title at a time before the time for tender of the deed by the seller, the seller is obligated to tender, at the time for tender of the deed, the title required by the contract.

(h) The buyer is entitled to a reasonable time to inspect the title evidence and documentation before making payment and accepting the deed.

(i) There are no warranties of title in a sale made under a court order unless the order so provides.

Subdivisions (d), (e), and (f) are of interest. At present, "[a]n agreement to convey by quitclaim deed does not require the vendor to convey a good title unless the contract shows that the parties intended to contract for the land and not merely for the vendor's interest, whatever it might be."⁶⁶ The last four lines of section 2-304(d) pose a minor problem. It is hornbook law, of course, that all questions of marketability end with the closing of the transaction. It is not entirely clear whether these four lines restate this general rule or confine it to situations where the contract calls for the type of deed described in this paragraph. In any event a merger clause in the deed should solve this problem.

Section 2-304(e) places the burden and expense of furnishing evidence of title on the seller, which is contrary to the practice on the eastern seaboard. In that area, no doubt, the contracts will continue to require that the purchaser bear this expense.

Subdivision (4) of section 2-304(f) is bracketed because not all states employ the Torrens system.⁶⁷ For those states which do utilize this system, however, the requirement of furnishing a Torrens title will not be truly adequate for the purposes of this subdivision since the official certificate of title must always remain with the registrar of titles. Although the seller can furnish a duplicate certificate he will additionally have to provide other documents relating to such matters as tax and bankruptcy searches and judgment liens which may appear on the official certificate but not on the seller's duplicate. More than likely, contracts of sale will ignore this section and set forth in detail the type of evidence of title to be furnished.

Warranties of Title

SECTION 2-306. [*Warranty of Title in Deed.*] A seller who executes a deed not providing to the contrary impliedly warrants that:

- (1) the real estate is free from all encumbrances;
- (2) the buyer will have quiet and peaceable [*sic*] possession of or right to enjoy the real estate conveyed;

⁶⁶ 92 C.J.S. *Vendor and Purchaser* § 184(d) (1955) (footnotes omitted).

⁶⁷ The Torrens system of land registration provides for the registration of title rather than instruments of conveyance by which title is transferred. Title is transferred only by a surrender of the existing certificate of title to the registrar who in turn issues a new certificate. *See, e.g.,* MINN. STAT. ANN. § 508.01 *et seq.* (1970).

(3) the seller had power and right to convey the title which he purported to convey; and

(4) the seller will defend the title to the real estate conveyed against all persons lawfully claiming it.

Section 2-306 makes all deeds general warranty deeds unless the deed provides to the contrary. Undoubtedly, in areas such as New York City and California, where general warranty deeds are a rarity, the deeds will "provide to the contrary." This provision must be read in conjunction with section 2-304 which provides that unless the seller has specifically contracted to convey a deed with lesser warranty of title obligation, he must give a deed under which the buyer receives the warranties specified in this section.

Title Obligations: Leasehold

SECTION 2-307. [*Obligation as to Title; Leaseholds.*] The seller of a leasehold warrants that

(1) If a possessory interest is being conveyed, the buyer will be able to take possession at the beginning of the term without judicial action or breach of the peace;

(2) if an interest other than a possessory interest is being conveyed, the buyer will be able to enjoy fully the real estate at the beginning of the term;

(3) the buyer will have quiet and peaceable possession or right to enjoy the real estate; and

(4) the seller has power and right to convey the interest being conveyed except that the seller of a term of five years or less does not warrant against the existence of a security interest or lien having priority over the buyers interest.

With regard to leaseholds, section 2-307 provides that the lessor warrants to put the tenant in quiet possession or quiet enjoyment, depending on the possessory nature of the lease at the beginning of the term. This position follows closely that of the proposed Restatement Second of Property.⁶⁸ Specifically omitted, however, are any warranties against encumbrances running against short term leases. As the Comment to this section indicates, the existence of an encumbrance such as a mortgage in the typical short term lease is not generally considered a breach unless under the circumstances the lessee's right to enjoyment would be substantially threatened.⁶⁹

⁶⁸ RESTATEMENT (SECOND) OF PROPERTY § 6.2 (Tent. Draft No. 2, 1974).

⁶⁹ ULTA § 2-307, Comment 3.

*Express and Implied Warranties*SECTION 2-308. [*Express Warranties of Quality.*]

(a) Express warranties by a seller are created as follows:

(1) any affirmation of fact or promise which becomes a part of the basis of the bargain relating to the real estate, its use or rights appurtenant thereto, area improvements which would directly benefit the property, or the right to use or have the benefit of facilities not located on the premises, creates an express warranty that the real estate and related rights and uses will conform to the affirmation or promise;

(2) any sample or model, or description of the physical characteristics of the real estate, including plans and specifications of or for improvements which are part of the basis of the bargain creates an express warranty that the real estate will conform to the sample, model, or description;

(3) any description of the quantity or extent of the real estate including plats or surveys which is part of the basis of the bargain creates an express warranty that the real estate will conform to the description, subject to customary tolerances;

(4) a provision that a buyer may put the real estate only to a specified use is an express warranty that the specified use is lawful.

(b) Neither formal words, such as "warranty", or "guarantee", nor a specific intention to make a warranty are necessary for the making of an express warranty, but a statement purporting to be merely an opinion or commendation of the real estate or its value does not create a warranty.

SECTION 2-309. [*Implied Warranty of Quality.*]

(a) Subject to the provisions on risk of loss (Section 2-406), a seller warrants that the real estate will be in at least as good condition at the time of the earlier of delivery of possession or conveyance, as it was at the time of contracting, reasonable wear and tear excepted.

(b) A seller, other than a lessor, who is in the business of selling real estate impliedly warrants that the real estate is suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by him will be:

(1) free from defective materials; and

(2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

(c) A seller in the business of selling real estate warrants to a protected party that an existing use, continuation of which is

contemplated by the parties, does not, at the earlier of conveyance or delivery of possession, violate applicable law.

(d) Warranties imposed by this Section may be excluded or modified as provided in the Section on exclusion or modification at warranties of quality (Section 2-311).

(e) For the purposes of this section, improvements made or contracted for by a person related to the seller (Section 1-204) are treated as if they were made or contracted for by the seller.

(f) A person who extends credit secured by real estate and acquires real estate by foreclosure of, in lieu of foreclosure of, his security interest, does not become a person in the business of selling real estate by reason of selling that real estate.

SECTION 2-310. [*Lender's Obligation as to Improvements.*] A lender who loans money that is or may be used to finance the design, manufacture, construction, repair, modification or other improvement of real estate for sale or lease is not liable solely by reason of making the loan for any loss or damage caused by any defect in the real estate or for any loss or damage resulting from the failure by another person to use reasonable care in the design, manufacture, construction, repair, modification, or other improvement of the real estate.

SECTION 2-311. [*Exclusion or Modification of Warranties of Quality.*]

(a) Words or conduct relevant to the creation of an express warranty of quality and words or conduct tending to negate or limit the warranty shall be construed wherever possible as consistent with each other; but, subject to the provisions on parol or extrinsic evidence (Section 1-306), negation or limitation is inoperative to the extent that construction is unreasonable.

(b) Except as limited by subsection (c) with respect to a protected party, implied warranties of quality:

(1) may be excluded or modified by agreement of the parties, and

(2) are excluded by expressions of disclaimer such as "as is", "with all faults", or other language which in common understanding calls the buyer's attention to the exclusion of warranties.

(c) With respect to a protected party, no disclaimer of implied warranties of quality in general language or in the language of the warranty as set out in this Act is effective, but a seller may disclaim liability for particular and specified defects or specified failures to comply with applicable law if the defects or failure to

comply entered into and became a part of the basis of the bargain.

(d) Notwithstanding any rule of evidence, written acknowledgement by a protected party that he has contracted to buy after the disclosure of specific defects or failures to comply with applicable law set forth in the writing and which were specifically called to his attention before contracting, creates only a presumption that the particular or specified failures to comply with applicable law set forth in the writing were specifically a part of the basis of the bargain and the parties may offer any evidence relevant to that issue.

(e) Any disclaimer of warranties is also subject to the provisions on unconscionability (Section 1-311) even though the seller has complied with subsections (b) or (c).

(f) If a buyer, other than a protected party, before contracting has examined the real estate or a sample or model as fully as he desired or, after receiving a written request to do so, has failed to make an examination, there is no implied warranty with regard to any defect that an examination by him in the circumstances ought to have revealed.

SECTION 2-312. [*Third Party Beneficiaries and Assignment of Warranty.*]

(a) A seller's warranty of title extends to the buyer and his successors in title.

(b) The benefit of a seller's warranty of quality extends to the following individuals who suffer bodily injury by reason of a breach of the warranty:

(1) successors in title of the buyer;

(2) residents in the household of the buyer or his successors in title.

A seller may not exclude or limit the operation of this subsection.

(c) Notwithstanding any agreement that only the immediate buyer shall have the benefit of warranties of quality with respect to the real estate, or that warranties received from a prior seller shall not pass to the buyer, a conveyance of real estate transfers to the buyer all warranties of quality made by prior sellers, but any rights the seller may have against prior sellers for loss incurred before the conveyance may be reserved by the seller either expressly or by implication from the circumstances.

(d) A seller's warranty of quality to a protected party extends to any successor in title of the protected party unaffected by any disclaimer or limitation of liability of which the successor had no reason to know at the time of the conveyance to the successor.

SECTION 2-313. [*Cumulation and Conflict of Warranties Express or Implied.*] Warranties, whether express or implied, shall be con-

strued as consistent with each other and as cumulative, but if that construction is unreasonable the intention of the parties shall determine which warranty is dominant.

SECTION 2-314. [*Other Liability Not Determined by This Act.*] Nothing in this Act determines or affects the liability or non-liability in tort of a seller to any person including the buyer, arising apart from this Act for injury to the person, death, property damage, or other loss caused by a condition of the real estate including any improvement made or arranged for by the seller of the real estate.

Sections 2-308 through 2-314 deal exhaustively with the subject of warranties.⁷⁰ An undefined phrase that recurs throughout these sections is "basis of the bargain."

One commentator on the law of sales has determined that "basis of the bargain" refers to the entire setting of the transaction, including statements made before and after the sale occurs.⁷¹ This naturally creates a serious problem under the parol evidence rule and may not be entirely appropriate to real estate transactions.⁷² One immediate example of some of the difficulties which can flow from this general proposition is evidenced by section 2-308(a)(3) which speaks of descriptions of the quantity or extent of real estate as part of the basis of the bargain. Under existing law it is arguable that representations as to acreage would not be part of the basis of the bargain if the sale is in gross rather than by the acre.⁷³ It is unclear at this point whether the draftsmen of the ULTA mean to change this rule.

⁷⁰ See generally *S.F. Bowser & Co. v. McCormack*, 230 App. Div. 303, 243 N.Y.S. 443 (4th Dep't 1930), where the court suggests

that the implied warranty, instead of being a part of the contract to which it attaches itself, is the law's contribution to the welfare of the parties beyond the terms of the contract itself. Or, to put it another way, the implied warranty is not read into the contract as part and parcel thereof, but is a legal fiction invented to prevent the seller from loading a fraud onto a contract which, by its terms, would not be able to combat the fraud.

Id. at 306, 243 N.Y.S. at 445.

⁷¹ See R. NORDSTROM, *LAW OF SALES* §§ 66-68, at 203-12 (1970).

⁷² In this regard, it has been suggested that even if a contract of sale includes an express disclaimer of warranties and a standard merger clause a court can nevertheless look to the circumstances surrounding the sale to ascertain whether the parties in fact "intended" the contract in question to be a final expression of their agreement. If the court finds that they (one or the other) did not, evidence can be taken on the question of what else took place which may have constituted a basis for the bargain. *Id.* § 69, at 213-16 (1970).

⁷³ Relying on this distinction, some courts have been more reluctant than others to grant equitable relief based on a mistake as to the quantity of land to be conveyed. Compare *Hunter v. Keightley*, 184 Ky. 835, 213 S.W. 201 (1919) (equitable relief granted where no fraud or misrepresentation was involved), with *Rich v. Scales*, 116 Tenn. 57, 91 S.W. 50 (1905) (equitable relief granted but only because sale was by acre).

The reference to "customary tolerances" in the same section also raises questions. Throughout the country various semi-official standards for land surveys exist. However, there is no uniformity with respect to "tolerances." In general, a higher order of accuracy is required in surveys of valuable urban land than in sales of farm land.⁷⁴

Section 2-311(c) guards the protected party against a general disclaimer of the implied warranty of quality.⁷⁵ However, it should be noted that this provision does not prevent, but in fact anticipates, a contractual modification of remedies. In this regard, the provisions of this section are not to be construed as in any way inconsistent with the use of new home insured warranty clauses which are offered by some home builders.⁷⁶

Contractual limitations of the warranty of quality are further restricted by section 2-312(b) in those cases where a breach has resulted in bodily injury. This section abandons the requirement of *horizontal privity*, in that it extends the protection of the warranty to individuals residing in the household of the buyer, and it abolishes the requirement of *vertical privity*, in that it extends the protection of the warranty to successors in title of the buyer.⁷⁷

Termination and Cancellation: Notice of Breach

Part 4 of article II deals with breach, repudiation, and excuse and will be seen to parallel its counterparts in the UCC.⁷⁸ With regard to notice of breach, however, the ULTA does not impose upon the buyer the same "reasonable time" limitations for notifying the seller that are present in the UCC.⁷⁹ The reason for this distinction rests primarily on the nature of real estate transactions, since claims for small defects are not likely to be asserted unless and until a major subsequent defect is discovered. Similarly, there is no time limitation for notice with regard to major defects, the drafters having felt that there was no way to effectively separate the two within this provision. The seller, however, is not at a total disadvantage since the general obligation of the parties to deal in good faith will effectively serve to limit his liability where the delay in giving notification of a breach can be shown to have been in bad faith.⁸⁰

⁷⁴ See, e.g., *Illinois Land Survey Standards*, 57 ILL. B.J. 327 (1968).

⁷⁵ Cf. UCC § 2-316(2). For a general discussion of the UCC section, see *Ford Motor Co. v. Moulton*, ___ Tenn. ___, 511 S.W.2d 690, cert. denied, 419 U.S. 870 (1974) (general disclaimer upheld in warranty action involving personal injuries).

⁷⁶ See ULTA § 2-311, Comment.

⁷⁷ See generally R. NORDSTROM, *LAW OF SALES* §§ 90-92, at 278-89 (1970).

⁷⁸ Compare ULTA §§ 2-402 and -405 with UCC §§ 2-608 to -611.

⁷⁹ Compare ULTA § 2-401 with UCC § 2-607.

⁸⁰ See ULTA § 2-401, Comment.

Frustration and Impracticability

SECTION 2-407. [*Excuse by Impracticability.*] Delay in performance or non-performance in whole or in part is not a breach of duty under a contract for sale of real estate if performance as agreed has been made impracticable by the occurrence of a contingency the risk of which the parties did not assume would be borne by the party whose performance has been made impracticable.

This section brings into the ULTA the concepts of commercial frustration and impracticability embodied in UCC section 2-615. It has been said that the principle of unjust enrichment, which is the basis of quasi-contractual liability, has its counterpart in the principle of unjust impoverishment as reflected in the impracticability doctrine.⁸¹ Insofar as frustration is concerned, it has been argued that this principle should be used only as a safety valve which is moved only by the pressure of war and other catastrophic events.⁸²

These two concepts are treated at length by both Professor Corbin and the Restatement of Contracts.⁸³ The subject bristles with controversy and obviously there is no room here for an in-depth analysis. One point, however, deserves comment. Both the ULTA and the UCC speak only in terms of future (or "supervening") frustration or impracticability. Not discussed is another type of impracticability and frustration—that which may already have existed, unknown to the obligor, at the time of contracting. Where courts have treated this problem, they have often done so on the theory that the impossibility (or impracticability so extreme that it amounts to impossibility) constitutes a mutual mistake as to the basis of the bargain for which neither party had assumed the risk.⁸⁴ In any event, it will remain for the courts to determine how this special type of impracticability will be read into the ULTA.

⁸¹ See Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 950 (1942).

⁸² *Id.* at 954.

⁸³ 6 A. CORBIN, *CONTRACTS* § 1331 *et seq.* (1964). See also *RESTATEMENT (SECOND) OF CONTRACTS* § 281 *et seq.* and introductory note to ch. 11 (1972).

⁸⁴ See, e.g., *Mineral Park Land Co. v. Howard*, 51 Cal. 356, 156 P. 458 (1916), noted in 4 CALIF. L. REV. 404, 407 (1916). In this case, the defendant contracted to take from the plaintiff's land all the gravel which he would require for a certain construction project. Defendant further agreed to pay for the gravel at an agreed rate per cubic yard. Unknown to both parties at the time of contracting was the fact that a substantial amount of the gravel was below water level. When this condition was discovered by defendant, he began using gravel from another landsite. The court held that the defendant was excused from performance when he showed that he had removed all available gravel above water level and that to take the remainder would cost 10 to 12 times the expected cost.

Remedies

Seller's and buyer's remedies are treated in part 5 of article II. The most significant aspect of these provisions is the virtual elimination of the earnest money concept as it has traditionally existed in the law of vendor and purchaser.⁸⁵ In this regard sections 2-504 and 2-516 must be read in close conjunction with one another:

SECTION 2-504. [*Seller's Resale Including Contract for Resale.*]

(a) Under the conditions stated in Section 2-502(a) on seller's remedies, a seller may resell the real estate concerned. If the resale is made in good faith and in a reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of Section 2-507, less expenses saved in consequence of the buyer's breach.

(b) Unless otherwise agreed, resale may be at public or private sale. Sale may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the sale, including the method, manner, time, place and terms must be reasonable.

(c) If the resale is at private sale, the seller must give the buyer reasonable notification of his intention to resell and of time after which sale will take place.

(d) If the resale is at public sale, the buyer must be given reasonable notification of the time and place of the sale and the seller may buy.

(e) A purchaser who buys in good faith at a resale takes the real estate free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(f) A seller is not accountable to the buyer for any profit made on any resale.

SECTION 2-516. [*Liquidation of Damages; Deposits.*]

(a) Damages for breach by either party may be liquidated in the agreement but only at an amount which is not unreasonable in the light of the anticipated or actual harm caused by the breach, the time the real estate is withheld from the market, the difficulties of proof of loss, and the inconvenience of [*sic*] non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void.

(b) A party entitled to recover under a valid liquidated damages clause has no other remedy for any breach by the other party to which the liquidated damages clause applies.

⁸⁵ Cf. 5A A. CORBIN, CONTRACTS § 1122 *et seq.* (1964).

(c) Whenever a seller justifiably withholds conveyance of real estate because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (a).

(d) The buyer's right of restitution under subsection (c) is subject to offset to the extent of:

(1) the seller's right to recover damages under the provisions of this Article other than subsection (a); and

(2) the amount or value of any benefits received by the buyer under the contract.

(e) If a seller has received payment in property other than money, its reasonable value or the proceeds of its sale shall be treated as payments for the purposes of subsection (c).

The ULTA position looks to contractually determined liquidated damages clauses which cannot be unreasonable in light of anticipated actual harm. The defaulting buyer is specifically given a right to restitution of any payments which exceed this amount. In eliminating the earnest money concept, the drafters have effectively failed to distinguish between installment and cash sale contracts. In cash sale contracts the earnest money concept has worked well. The proof of this lies in the paucity of case law compelling a vendor to disgorge earnest money. The conceptual error of those who choose to treat this as a liquidated damages problem was revealed by Professor Corbin long ago.⁸⁶ When a purchaser defaults, the vendor simply retains earnest money already in his hands. When a contract provides for liquidated damages, the injured party must often sue to recover such damages. To set a court in motion is quite a different matter from leaving the parties where they have voluntarily placed themselves. Since a defaulting purchaser has no right of restitution as long as the vendor has a right of specific performance,⁸⁷ the well-advised vendor will obviously always contract for a right of specific performance.

It is a legitimate inference that the ULTA thinking on earnest money is based on the views of Justice Traynor as set forth in

⁸⁶ Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013, 1028-31 (1931).

⁸⁷ 5A A. CORBIN, CONTRACTS § 1130 (1964). It was pointed out by Corbin that once an enforceable contract for sale has been entered into

[n]either by a repudiation nor by mere failure to pay installments when due, can the vendee terminate the vendor's right to payment of the full price—his right to specific performance [The vendee] cannot recover back money that he has paid if it is money that the vendor could still compel him to pay if as yet unpaid.

Id. (footnote omitted).

Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish.⁸⁸ The *Freedman* court took the position that any measure of damages must be rationally tied to compensating the injured party for actual harm done and not result in forfeitures which are, in effect, unjustifiable penalties for breaching the contract. However, this position has been severely criticized⁸⁹ and is not likely to be well received by the real estate bar.

CONCLUSION

As stated at the outset, the purpose of this article has been to acquaint the bar with the emergence of a proposed uniform state code on real estate transactions. It is hoped that the foregoing brief commentary on the first two articles of the ULTA has helped unveil its fundamentally new approach to the law of real estate transactions. Simply stated, this approach is a general attempt to mold the laws controlling real estate transactions after the UCC. The proposed abolition of the earnest money concept and the reliance on resale as a remedy, which is central to much of the thinking in article II, are just two examples of this attempt to bring commercial and real estate law under one umbrella.

The validity of the assumption that there is a basic similarity between real estate and chattel transactions has yet to be determined. It is certain that many of the provisions contained in the ULTA will not be accepted without much heated debate. In any event, the extension of UCC concepts to real estate transactions through the ULTA will be a revolution within the industry.

⁸⁸ 37 Cal. 2d 16, 230 P.2d 629 (1951).

⁸⁹ See Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729 (1960).