

July 2021

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Edwin J. Wittelshofer

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### Recommended Citation

Edwin J. Wittelshofer, The New Contract of Sale and Purchase, 22 Dicta 19 (1945).

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## The New Contract of Sale and Purchase

BY EDWIN J. WITTELSHOFFER\*

On May 5, 1942, at Memphis, Tennessee, a conference between a standing committee of the American Bar Association and representatives of the National Association of Real Estate Boards, deeming it in the interest of the realtor, the lawyer and the public, passed a resolution containing a statement of principles which define the rights and duties of both the lawyer and real estate broker as related to a real estate transaction, and submitted the same to local bar associations and real estate boards to the end that those principles might be implemented and become effective. One of the most important principles stated in this resolution is the following:

Art. I, Par. (2): The Realtor shall not undertake to draw or prepare documents fixing and defining the legal rights of parties to a transaction. However, when acting as broker, a Realtor may use an earnest money contract form for the protection of either party against unreasonable withdrawal from the transaction, provided that such earnest money contract form, as well as any other standard legal forms used by the broker in transacting such business, shall first have been approved and promulgated for such use by the Bar Association and the Real Estate Board in the locality where the forms are to be used.

Approximately one year ago in furtherance of this resolution a joint committee of the Denver Bar Association, the Denver Real Estate Exchange and the Denver Realty Board was appointed through action of the respective associations for the purpose of putting into practice, so far as possible, the principles set forth in the joint resolution.

The work of this committee has resulted to this date in the formulation of a standard optional contract which now has the approval of the Denver Bar Association and the Denver Real Estate Exchange. The text of this contract is as follows:

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\*Member of the Denver bar and chairman of the real estate title standards committee of the Denver Bar Association, 1943-44. Most of the material herein was contained in Mr. Wittelschofer's report of the work of the joint committee made to the association at its meeting June 5, 1944.

JOE DOE AND COMPANY

Realtor

Denver, Colorado.....19.....

Received from....., purchaser...., (as joint tenants) the sum of \$....., as part payment, for the following described real estate situate in the City and County of Denver, Colorado, to-wit:

with all improvements thereon, if any, in their present condition, ordinary wear and tear excepted, known as No....., which property purchaser agrees to buy upon the following terms and conditions for the purchase price of \$....., payable as follows: \$..... hereby received for, \$.....

Price to include:

An abstract of title to said property, certified to date at seller's expense, shall be furnished the purchaser on or before ..... 19.....

Title shall be merchantable in the seller. Upon payment or tender as above provided and compliance with the other terms and conditions hereunder by purchaser, the seller shall execute and deliver a good and sufficient Warranty..... deed to said purchaser (as joint tenants) on or before ....., 19....., conveying said property free and clear of all taxes, liens, and encumbrances, except Moffat Tunnel Improvement District assessments payable in 19..... and subsequent years, and except the general tax for 19....., payable January 1, 19.....

General taxes and Moffat Tunnel Improvement District assessments for 19..... (based on amount of the previous year's taxes), rents, water rents, insurance premiums, and interest on encumbrances, if any, shall be apportioned to date of delivery of deed.

Time is the essence hereof, and if any payment or any other condition hereof is not made, tendered or performed by purchaser as herein provided, then this contract shall be void and of no effect, and both parties hereto released from all obligations hereunder, and all payments made hereon shall be retained by the undersigned agent as liquidated damages; provided, however, that in event of such forfeiture any payments made hereunder shall be divided between said agent and seller,

one-half thereof to the agent but not to exceed a sum equal to the regular commission and the balance to the seller.

In the event the seller fails to approve this instrument in writing within.....days from date hereof, or, if title is not merchantable and written notice of defects is given to the seller or agent within the time herein provided for delivery of deed and shall not be rendered merchantable within 30 days after such written notice, then this contract shall be void and of no effect, and each party hereto shall be released from all obligations hereof and the payments made hereunder shall be returned forthwith to purchaser upon return of the abstract to seller.

Upon approval hereof by the seller, this agreement shall become a contract between seller and purchaser and shall inure to the benefit of the heirs, successors, and assigns of said parties.

Read and approved:

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JOHN DOE & COMPANY, Agent

By-----  
Purchaser

The above contract is approved this.....day of.....19.....

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Seller.

While this optional contract is not greatly different from some forms now in use, from the standpoint of fair practice and equity, it is greatly superior to many forms presently in vogue.

In order to familiarize the lawyers with this contract, attention is called to the following terms and conditions therein contained, namely:

(1) The contract provides for the sale of the real estate with the improvements, if any there be, in their condition at the time the contract is executed, except ordinary wear and tear. Such provision does not appear in any form of contract in common use that has come to the attention of the writer. It is designed to protect the buyer until the time of consummation from any casualty such as lightning, fire, or even the overflow of a wash bowl. The seller, being in possession of the property and having the opportunity of protecting himself against such casualties by insurance, should bear the burden of any loss that is thus occasioned.

(2) Provision is made in the contract for the insertion of such personal property as stoves, curtains, and so forth, as may, by agreement, be included in the sale.

Experience may show that such provision may not be helpful, for the neglect or oversight in not including all the property intending to go with the sale may result in more disputes and misunderstandings than if no attempt had been made to include such property. Time alone can prove the wisdom of this provision.

(3) The contract provides that in case of forfeiture of the deposit the same shall be divided between the broker and seller, one-half thereof to the broker but not to exceed a sum equal to the regular commission, and the balance to the seller.

Notwithstanding that practically all of the forms of contract now used provide that the broker retain the full deposit in case of forfeiture, many brokers in an attempt to be fair and just have in case of forfeiture divided the deposit equally with the seller. The provision as set forth in the contract simply imposes a legal obligation in furtherance of a fair and proper practice.

(4) The contract provides that if the title is not merchantable a written notice of defects shall be given within the time provided for delivery of deed, and if it shall not be rendered merchantable within thirty days after such written notice the contract becomes void.

With the exception of the requirement of *written* notice of defects and the *time* given to correct the title this provision is usual and customary. That the seller should be apprised of the claimed defects sincere dealing demands. Suggestions with regard to the time within which correction of title may be made ranged from a very few days to one and one-half years. Sound reasoning, however, would lead to the determination that opportunity should be given the seller to remedy such defects as might be cured by a deed or other corrective instrument, but in the event it is necessary to correct title by suit or other court action the buyer should have the opportunity to elect whether to go on with the deal or not.

(5) Most forms of contracts now in use are between the buyer and the broker and bear only the approval of the buyer. For obvious reasons, by expressed terms the proposed contract declares it to be a contract between the seller and the buyer upon the buyer's approval thereof.

The results to be derived from the work of the joint committee will flow not from the approval of its work, but from the use of the contract in those deals for which it is designed. More important, how-

ever, than the contract itself is the fact hereby demonstrated that the lawyer and the real estate broker willingly and readily coordinated their efforts for the benefit of the general public.

On the joint committee representing the Denver Real Estate Exchange were Mr. Cyrus Hackstaff and Mr. Ed Larsen; representing the Denver Real Estate Board was Mr. Anthony Sweetman, and representing the Denver Bar Association were Mr. Harold Popham, Mr. Vernon Ketring and Mr. Edwin J. Wittelshofer.

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**Bar Examinations**

The following persons took the bar examinations December 13th to 16th, 1944:

- Toshio Ando, 2215 South Columbine St., Denver;
- John Raymond Barry, Jr., 1650 Pearl St., Denver;
- Elmer James Brittain, 1617 Lincoln St., Boulder;
- Penelope Moor Griffin, 1351 South Milwaukee St., Denver;
- Helen Butterfield Hodson, 2102 South Milwaukee St., Denver;
- Jack Jenkins, 2415 Third Ave., Pueblo;
- Archibald George Marshall, 513 Broadway, Pueblo;
- Edwin M. Sears, formerly Edwin M. Sieradz, 1378 High Street, Denver;
- Worth Freeman Shrimpton, Jr., 904 Fourteenth St., Boulder;
- Max Clayton Wilson, 1007 Ogden St., Denver.

**IN MEMORY OF COLORADO LAWYERS WHO  
HAVE GIVEN THEIR LIVES IN THE SERVICE  
OF THEIR COUNTRY**



**CHARLES W. DELANEY, JR.  
DONALD J. GILLIAM  
JAMES G. LANG  
ALVIN L. ROSENBAUM**