I. Contracts for Sale of Land

A contract of sale is an agreement to acquire or to dispose of property at some specified date. Both parties are bound by the terms of the contract. An option contract is one by which the owner of property (the optionee) agrees with another person (the optionor) that the optionee shall have the right to buy the optionor’s property at a fixed price within a certain time. The optionor is not bound to make the purchase. Subsequent negotiations and counteroffers do not constitute a rejection of the option by the offeree. When the option is properly exercised, the option contract becomes a contract to sell. The option contract must be recorded to give priority over lien holders and subsequent purchasers for value.

The owner of property may grant preemptive rights to a prospective buyer by contract (called right of first refusal). The owner is not bound to sell, but if he does, he must give the other contracting party the first right to buy. In order to comply with the Rule against perpetuities, the right of first refusal must vest within 21 years or less after the death of a life in being at the time the contract is signed. If it does not, the contract is void even if an attempt at exercise is made earlier than that time. A contract of preemptive rights must contain a reasonable price provision linked to a fair market value or price that the owner is willing to accept from a third party.

Real estate contracts can be classified as either interim or long-term. The interim contract is typically of short duration, maybe several months, and results in a transfer of legal title and possession at a specified future date. Under the Statute of Frauds, a contract for a sale of real property must be in writing to be enforceable. No particular form is required, and the writing will be sufficient for this purpose if it is signed by the party to be charged, there is a description of the subject property (a legal description is not required but is preferred), and all elements of the contract are present. The basic requirements for a real estate contract are described in the Rawls case: "A contract for the sale of real property must meet the following requirements: be in writing; signed by the parties; contain an adequate description of the real property; recite a sum of consideration; and contain all key terms and conditions of the agreement."

As most real property is transferred under general warranty deeds it is necessary that the seller provide marketable title. To ensure this the closing attorney prepares an abstract that is a history of the property complete with any encumbrances or other title defects listed. In general the title is considered to be marketable if a title insurance company will cover the property without significant exceptions. There are two types of title insurance: lenders and owners. The former protects the lender for the balance of the loan remaining and the latter protects the purchaser for the amount of the purchase price. The title insurance company also agrees to pay for the cost of defending the title against a law suit by another claiming title.
If either party fails to perform (breaches the contract), the other has a right of action for specific performance, rescission and restitution, and/or damages. Under the parol evidence rule, evidence outside the four corners of the contract is not admissible unless it is offered to show fraudulent inducement, mutual mistake, or to resolve an ambiguity.

A long-term contract for sale, often called an installment land contract, is used primarily as a financing device. The buyer becomes the beneficial owner and takes possession of the property but the seller retains legal title, usually for many years, until the final installment payment is made. The seller gets the income tax advantage of stretching out his recognition of capital gains. While the land is in the buyer’s possession, he must not allow waste of the property, and he is obligated to pay the property taxes. If the buyer departs substantially from the terms of the contract, the seller can forfeit the buyer’s interest and retake possession of the property.

II. Deeds

A deed is an instrument of writing which has been signed, sealed and delivered and serves to transfer an interest in real property from a grantor to a grantee.

A general warranty deed not only conveys the land but it also contains assurances that the title is free from defects and encumbrances and that the grantor will protect the grantee from any claims that might arise from the grantor’s ownership interest.

A special warranty deed promises that the title is free from defects and encumbrances that may have arisen since the grantor acquired title, but it does not promise that anyone else, other than the grantor, has not caused defects in the title.

A quitclaim deed conveys only the interest of the grantor in a specific property, but it does not convey the land itself. There are no promises made in this deed regarding the title, and it is primarily used to clear titles. All who have even remote interests in the property, even if too small to have value, can relinquish that interest by means of a quitclaim deed.

In order to have a valid deed, there must be a competent grantor and a grantee capable of holding title. In addition to the names of the grantor and the grantee, the deed must also contain a sufficient description of the property, the operative words of conveyance, and a proper execution by the grantor, including his signature and his seal. The final requirement for a valid deed is delivery of the deed to the grantee and his acceptance of it. North Carolina law requires the placement of an excise tax on the deed. The excise tax is assessed at $1.00 for each $500 (or fractional part thereof) of property transferred. This tax is still called the excise stamp tax because the tax, until recently, was assessed through the sale of stamps that were required to be affixed to the deed. The
advent of electronic property records has rendered the use of stamps obsolete and the General Assembly has amended the statute to reflect this.

The promises that can be made by the grantor in a deed include: (1) covenant of seisin and right to convey (the grantor has good title and has the right to transfer the land); (2) covenant against encumbrances (no debts or other encumbrances burden the land except those described in the deed); and (3) covenant of warranty and quiet enjoyment (the grantee can rely on the facts presented by the grantor and the grantee will not be disturbed by a third party’s lawful claim).

III. Security Interests

A mortgage is a security interest in real property that guarantees the payment of a debt. Always in writing, it is a contract between the mortgagor (the borrower/debtor) and the mortgagee (the lender/creditor). The borrower, who owns the land, gives a mortgage to the lender to secure a debt. The underlying debt is evidenced by a promissory note. The security interest is perfected by recording the mortgage in the place where property records are recorded (the office of the register of deeds in the county in which the property is located, in North Carolina).

North Carolina law also recognizes a deed of trust as a real property security instrument. A deed of trust is an instrument by which a debtor transfers title in real property to a disinterested third party (the trustee) to be held in trust for the beneficiary (the creditor) as security for the performance of an obligation (the payment of a debt.). If the debtor defaults on the loan, the creditor can sell the property at a foreclosure sale and can bid on the property at that sale. A deed of trust arrangement is a three party security interest in real property whereas a mortgage is a two party arrangement. North Carolina is a title theory state so the mortgagee holds legal title to the property. The holder of legal title is forbidden to bid at a foreclosure sale so deeds of trust are more commonly used in North Carolina so that the lender can bid at the foreclosure sale.

A mortgage is drafted as either a conveyance of the property to the mortgagee (the title theory) or as a lien to secure payment of a debt (the lien theory). North Carolina law recognizes the title theory, which states that, even though the mortgagee (lender) acquires title, he does not acquire the right of possession until the mortgagor (borrower) defaults. In order to avoid an unfair result, if there is an excess of the property value over the debt when the mortgage retains the property after a default, the mortgagee returns the excess amount to the mortgagor. Under the lien theory, the mortgagee’s interest is limited to the amount of the remaining debt plus interests and costs because the mortgage is considered as merely a lien on the property to secure the debt, rather than a conveyance of legal title. The mortgagor retains title until a foreclosure sale.

In order to avoid the harsh result of a strict foreclosure, the mortgagor has an equity of redemption after he defaults on his debt. This means that a defaulting mortgagor may prevent foreclosure by paying the full amount of the mortgage debt plus interests and costs before the foreclosure sale, including the expiration of any upset bid
period. Once the upset bid period is over, this right is extinguished. Note that, unlike North Carolina, some states extend the equity of redemption for as long as two years after the conclusion of the foreclosure sale. Some of these states also extend the right to redeem the property to persons related to the debtor.

A debt payable in installments usually contains an *acceleration clause* that states that the entire debt (including interest due) will be due and payable immediately if the mortgagor fails to pay any installment when due. Similarly, a *due-on-sale clause* is an acceleration clause that authorizes a mortgagee or deed of trust beneficiary to accelerate the due date of the entire loan balance if the mortgagor transfers the property and the mortgage (or deed of trust) without the permission of the mortgagee.

A foreclosure sale can result from an action brought by the mortgagee or trustee where, if the court finds a default, it orders a judicial sale of the property. (Judicial foreclosures are also called foreclosures by action.) The debt is satisfied from the sale proceeds, and the excess, if any, is paid to the mortgagor. If the proceeds are insufficient to pay the debt, the mortgagee can obtain a personal judgment against the mortgagor for the deficit. (This is called a deficiency judgment.) Another way to foreclosure is through a power of sale clause in the mortgage contract or deed of trust. That clause permits the mortgagee to sell the property without a court proceeding, upon default by the mortgagor. To protect borrowers from overreaching by creditors North Carolina law requires that foreclosures by power of sale be conducted under judicial supervision. However a foreclosure is conducted, NCGS§45-21.38 prohibits a deficiency judgment after foreclosure if the mortgage or deed of trust is part of the purchase price of the property.

IV. Methods of Sale

Buyers and sellers can be brought together in several different ways. For example, a private agreement is a contract between two individuals without the intervention of a third party. The buyer and the seller must decide on a price that is mutually acceptable.

Another method of transferring land is through a licensed broker or agent. Here also the price is determined by mutual agreement of the buyer and seller, but many potential buyers may look at the property and offers from several people may be made. Because of his expertise, the broker can advise the seller about what is a reasonable price.

A typical real estate sales office is supervised by a broker who may employ many agents who work for him as independent contractors. Brokers and agents are licensed and regulated by the North Carolina Real Estate Commission. The real estate agents are, in legal terms, agents of the broker. The arrangements under which a broker works include seller agency, buyer agency, and dual agency. A broker who is a seller's agent works primarily for the seller and is under a duty to inform the seller of any material information that is revealed to him by the buyer. The seller's agent is also under a duty not to reveal such information about the seller to the buyer. With a buyer's agent the situation is reversed and the buyer's agent is representing the buyer. In dual agency, the
broker may not reveal buyer's or seller's confidential information. Detailed discussion of agency arrangements is beyond the scope of the material.

When a property owner uses a broker there are four different types of agency arrangements that may be used. Under an open listing arrangement, the broker receives a commission only if the procuring cause of the sale. Any other broker may also procure a buyer and receive the commission. If the seller procures the buyer there is no commission due. Under an exclusive agency arrangement, the listing broker is the only broker authorized to sell the property and receive a commission. However, if the seller procures a buyer independently of the broker, no commission is due. Under an exclusive right to sell arrangement, the broker is entitled to a commission no matter who sells the property. Multiple listing arrangements are sharing arrangements between brokers that allow all participating brokers to sell each others' listings in return for an agreed-upon share of the commission. Listing arrangements (as with all agency arrangements) are personal service contracts. Where a broker is the procuring cause if a sale, the NC Court of Appeals has held that the broker is entitled to a commission even though the listing contract expired prior to the time that a contract to purchase he listed property was signed. (Sessler v. Marsh, 144 NC App. 623, disc. rev. denied, 354 N.C. 365 (2001).

An auction is a public sale of property to the highest bidder. This is often used when competition for the particular land already exists, when the sale must be made by a certain date, or when the value of the property is difficult to determine. Auctioneers must be licensed. Typically an auction is conducted with ascending bids, with the highest bidder buying the property. Such auctions may be conducted "with reserve" or "without reserve". When an auction is conducted with reserve, the property does not sell unless a minimum reserve price is reached. Whether the auction is with reserve or without reserve must be announced to the bidders in advance. Another type of auction is a reverse, or Dutch auction, where the auctioneer starts with a high price and lowers it until a buyer is obtained.

A final method of bringing together a buyer and a seller is by sealed bid. The potential buyers only bid once and without any knowledge of competitors' bids. Many prospective buyers do not like this method since they are operating without full knowledge.