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COMMON LAW DOCTRINE OF MERGER: THE EXCEPTIONS ARE THE RULE*

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Few common law doctrines are as widely accepted as the doctrine of merger. Indeed, most practitioners routinely draft land sale contracts on the assumption that all contractual representations and warranties will be extinguished by the ensuing deed. Relying upon a comprehensive empirical analysis of the decisional law of Maryland's appellate courts, the authors examine the tortured history of the doctrine in Maryland and discover that the courts have set a trap for unwary draftsmen by repeatedly grasping for exceptions to the rule. The authors conclude that the only areas of judicial consistency and certainty are those where the covenant relates to title, and where the parties have included contractual provisions that address the survivability or merger of representations in the land sale contract. To guide the careful practitioner through the merger maze, sample merger and survival provisions are appended to the article.

I. INTRODUCTION

One of the most firmly established common law doctrines governing real property involves the merger of rights stemming from a land sale contract into the deed that consummates the transaction (the "Doctrine").¹ In essence, because the deed is presumed to supersede all preceding negotiations and agreements,² all rights and remedies of the parties in relation to the transaction must be determined by the deed.³ Most practitioners prepare real estate contracts with the belief that the Doctrine will apply and merge the provisions of the contract in the deed. Few, if any, "standard" realtor forms of residential real estate contracts of sale⁴ include any provisions dealing with merger or sur-

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1. *Howes v. Barker*, 3 Johns. 506 (N.Y. Sup. Ct. 1808).

2. *Millison v. Fruchtman*, 214 Md. 515, 518, 136 A.2d 240, 242 (1957).

3. *Stevens v. Milestone*, 190 Md. 61, 65, 57 A.2d 292, 293 (1948); *Levin v. Cook*, 186 Md. 535, 539, 47 A.2d 505, 507 (1946); *Buckner v. Hesson*, 159 Md. 461, 464, 150 A. 852, 853 (1930); *West Boundary Real Estate Co. v. Bayless*, 80 Md. 495, 507, 31 A. 442, 443 (1895).

4. In Maryland, many practitioners use a form provided by The Greater Baltimore Board of Realtors, Inc.

vival of covenants contained in the contract. Although these forms contain a statement encouraging buyers and sellers to consult attorneys, many home buyers do not seek legal assistance. Thus, most residential, and even many commercial, real estate transactions are entered into without consideration of the issue of merger or survival of the covenants contained in the contract.

This article considers Maryland merger cases to illustrate that, at least in Maryland, the Doctrine has been so riddled with exceptions that it is only applicable in rare circumstances. Because the Doctrine can no longer be relied upon to provide clear guidance, careful draftsmen of real estate sales contracts must analyze the exceptions to protect the interests of their clients.

II. BACKGROUND

The Doctrine raises a *prima facie* presumption that, upon acceptance of the deed, a contract for sale of real property becomes merged in the deed consummating the contract. The deed, therefore, is the final execution of the whole contract.⁵ As a consequence, the Doctrine accords finality to real estate transactions.

The judicially acknowledged purpose of the Doctrine is to maximize the "security or safety in [deeds] or in titles held under them" by preventing a party from raising a claim under an antecedent or accompanying contract after conveyance by deed.⁶ One court has stated that same purpose: "[I]t cannot be a safe, or salutary rule, to allow a contract to rest partly in writing, and partly in parol."⁷ The development of the Doctrine has followed the contours of the parol evidence rule.⁸

5. *Middlekauff v. Barrick*, 4 Gill 291 (1846); *Smith v. Chaney*, 4 Md. Ch. 246 (1847).

6. *West Boundary Real Estate Co. v. Bayless*, 80 Md. 495, 509, 31 A. 442, 444 (1895); *Bladen v. Wells*, 30 Md. 577 (1869), *quoted in* *Levin v. Cook*, 186 Md. 535, 538, 47 A.2d 505, 507 (1946); *see also* R. NORTON, *A TREATISE ON DEEDS* 135 (2d ed. 1928) ("[i]t would be inconvenient that matters in writing made by advice and on consideration . . . should be controlled by the averment of the parties to be proved by the uncertain testimony of slippery memory.") (quoting *The Countess of Rutland's Case*, 77 Eng. Rep. 89 (K.B. 1604)).

7. *Howes v. Barker*, 3 Johns. 506, 509 (N.Y. Sup. Ct. 1808).

8. *See* *Dorsey v. Beads*, 288 Md. 161, 170, 416 A.2d 739, 744 (1980); *Lawson v. Mullinix*, 104 Md. 156, 167, 64 A. 938, 942 (1906); NORTON, *supra* note 6, at 135 ("[T]o add anything to an agreement in writing by admitting parol evidence, which would affect land, is not only contrary to the Statute of Frauds and Perjuries, but to the rule of Common Law, before that statute was in being."). The parol evidence rule prohibits the admission of any evidence, parol or otherwise, of prior understandings or negotiations to vary or contradict a writing when the parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract. *See generally* 3 A. CORBIN, *CORBIN ON CONTRACTS* §§ 573-96 (1960); *RESTATEMENT (SECOND) OF CONTRACTS* § 213 (1981). Both the Doctrine and the parol evidence rule are substantive rules of law, not rules of evidence. *Canatella v. Davis*, 264 Md. 190, 201, 286 A.2d 122, 128 (1972).

In a recent decision by the Court of Appeals of Maryland,⁹ the court indicated that “[g]enerally contract provisions as to *title, possession, quantity, or emblements* of land are conclusively presumed to be merged into the subsequently delivered and accepted deed, even though the contract and deed vary.”¹⁰

Despite this unequivocal statement of the application of the Doctrine, Maryland’s highest court has often recognized exceptions to the Doctrine. For example, the court of appeals has stated that certain contractual provisions are considered independent of, or collateral to, the agreement to convey the real property,¹¹ that no merger should occur because of fraud, mistake, or accident,¹² that merger was not the intent of the parties because the deed was only a partial execution of the contract,¹³ or, finally, that a specific statutory exception prevented a merger.¹⁴ Likewise, when the contract provides that certain provisions shall survive delivery of the deed, the court of appeals has held that no merger results because the parties expressly intended that a merger not occur.¹⁵

Appendix I indicates that of the four criteria (title, possession, quantity, or emblements) recognized in Maryland,¹⁶ and generally recognized throughout the country¹⁷ today, probably only contract provisions involving title will merge with the deed. While Maryland and other courts, notably New York,¹⁸ seemingly recognize these four crite-

9. *Dorsey v. Beads*, 288 Md. 161, 416 A.2d 739 (1980).

10. *Id.* at 170-71, 416 A.2d at 745 (emphasis supplied) (quoting H. TIFFANY, *LAW OF REAL PROPERTY* § 981.05 (B. Berman 3d ed. 1970)). These elements cover a seller’s agreement to convey, for example, a fee simple title to land containing a specified number of acres, possession free of tenancies to be granted at the time of conveyance, along with or subject to emblements. Emblements are a farm tenant’s right to remove growing crops. *BLACK’S LAW DICTIONARY* 469 (5th ed. 1979).
11. *See Rosenthal v. Heft*, 155 Md. 410, 142 A. 598 (1928) (court permitted a contract of sale to be introduced as evidence of the purchase price when the deed, although otherwise unambiguous, recited only nominal consideration).
12. *See Buckner v. Hesson*, 159 Md. 461, 150 A. 852 (1930); *see infra* notes 46-47 and accompanying text.
13. *See Gilbert Constr. Co. v. Gross*, 212 Md. 402, 129 A.2d 518 (1957); *see also infra* note 39.
14. *See infra* text accompanying notes 48-58.
15. *Randolph Hills, Inc. v. Shoreham Developers, Inc.*, 266 Md. 182, 292 A.2d 662 (1972) (discussing explicit survival language in sale contracts); *see also infra* text accompanying notes 59-63.
16. *See Dorsey v. Beads*, 288 Md. 161, 416 A.2d 739 (1980).
17. *See, e.g., City of Westminster v. Skyline Vista Dev. Co.*, 163 Colo. 394, 431 P.2d 26 (1967); *Jolley v. Idaho Sec., Inc.*, 90 Idaho 373, 414 P.2d 879 (1966); *Mueller v. Bankers Trust Co.*, 262 Mich. 53, 247 N.W. 103 (1933); *Hazlett v. Clark*, 652 S.W.2d 135 (Mo. Ct. App. 1983); *Caparrelli v. Rolling Greens, Inc.*, 39 N.J. 585, 190 A.2d 369 (1963); *Chavez v. Gomez*, 77 N.M. 341, 423 P.2d 31 (1967); *Caresk Corp. v. Stephen Schifter, Inc.*, 431 Pa. 550, 246 A.2d 365 (1968); *see also* Annot., 38 A.L.R.2d 1310 (1954); Annot., 84 A.L.R. 1008 (1933).
18. For a discussion of those cases dealing with New York, *see* Comment, *Merger of Land Contract in Deed*, 25 ALBANY L. REV. 122 (1961).

ria, they are reluctant to merge covenants contained in a contract of sale when they relate to anything other than title,¹⁹ or, as on one occasion, when they relate to a restrictive covenant.²⁰ At least one commentator has noted that "each decade of cases presents new instances in which acceptance of the deed did not result in the claimed merger."²¹ Accordingly, attorneys should be wary of reliance on the Doctrine to merge covenants in deeds.

III. ANALYSIS

An analysis of all the decisions rendered by the Court of Appeals of Maryland in this area demonstrates that the court has been retreating from application of the Doctrine in all areas, except when applied to a covenant that relates to title. Appendix I shows that from 1846 to 1980, the court examined the Doctrine in twenty-one cases. During this 135-year span, the court held that a merger occurred in only ten of those cases. In the first seven cases, the court held that a merger occurred, even when the contractual covenant related to matters other than title. Of the fourteen remaining cases, decided between 1928 and 1980, the court of appeals refused to merge the covenants at issue into the deeds in eleven of those fourteen cases. The three cases in which the court found a merger in this later time period involved questions of title or of a restrictive covenant.

The policy goal served by the Doctrine is to ensure security or safety in deeds.²² Other than with respect to title, however, this policy goal has not been achieved in Maryland because of the numerous exceptions the court of appeals has carved out of the Doctrine. The following examination of these exceptions provides a better understanding of the scope and limitations of the Doctrine and illustrates that the Maryland practitioner can no longer assume that the Doctrine will automatically apply to real estate transactions.

A. Collateral Covenants

The major exception to the Doctrine rests on the theory of collateral covenants, which are interpreted narrowly to mean any agreements

19. See *Haviland v. Dawson*, 210 A.2d 551, 554 (D.C. 1965) (delivery and acceptance of deed to lot did not bar claim for failure to convey rights of way over adjacent land); *Baxter v. Stubbs*, 620 P.2d 68 (Utah 1980) (agreement did not merge in deed which granted seller a 25% interest in buyer, a limited partnership, so that seller, in effect, reserved a 25% interest in property); see also N. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 7.2 (3d ed. 1975) (discussing deed as merger of rights of purchaser or seller); Dunham, *Merger by Deed—Was It Ever Automatic?*, 10 GA. L. REV. 419 (1976).

20. *Millison v. Fruchtman*, 214 Md. 515, 136 A.2d 240 (1957) (contractual agreement that use of property to be conveyed would be limited to certain specified commercial uses merged in deed that contained inconsistent restrictions on use).

21. Dunham, *supra* note 19, at 436.

22. See *supra* note 6 and accompanying text.

contained in a contract that are not directly related to the agreement to sell or buy real estate. The court of appeals has long held that collateral agreements or conditions that are not incorporated in the deed, or that are inconsistent with it, do not merge in the deed. For example, in *Dorsey v. Beads*,²³ the court adopted the following rule:

The general rule is that a deed includes all prior negotiations and agreements leading up to its execution and delivery, so that a merger is thereby effected. However, such rule does not apply to real estate contract provisions or other matters not performed or consummated by delivery and acceptance of the deed. In other words, collateral agreements or conditions not incorporated in the deed or inconsistent therewith are not merged in the deed.²⁴

The builder in *Dorsey* claimed that a couple for whom he had built a house had not paid the full purchase price at closing when title was conveyed. In applying the above rule to these facts, the *Dorsey* court held that a contractual provision as to the amount of the purchase price was collateral to, and did not merge with, the deed.²⁵

Perhaps because strict application of the Doctrine may lead to harsh results,²⁶ the court of appeals has readily found a prior or contemporaneous oral or written agreement collateral to, and consistent with, the deed and, therefore, admissible.²⁷ Other examples of covenants which the court has found collateral include provisions for specific improvements,²⁸ the construction of a house,²⁹ and the payment of the purchase price for real estate by means of a mortgage.³⁰

Two categories of collateral covenants deserving special attention are those involving the amount of consideration involved in a transaction,³¹ and those dealing with the construction of a house on a lot con-

23. 288 Md. 161, 416 A.2d 739 (1980).

24. *Id.* at 170, 416 A.2d at 744-45 (quoting *TIFFANY*, *supra* note 10, § 981.05).

25. *Dorsey*, 288 Md. at 170, 416 A.2d at 744-45.

26. *See* *McSweyn v. Musselshell County*, 632 P.2d 1095, 1103 (Mont. 1981) ("Merger by deed, as a legal concept, is so drastic that exceptions to it have grown up which are as old as the concept itself.") (Sheehy, J., dissenting).

27. *See, e.g.*, *Levin v. Cook*, 186 Md. 535, 47 A.2d 505 (1946) (conveyance of a leasehold property with an express warranty as to the efficiency and good condition of a heating plant); *Rosenthal v. Heft*, 155 Md. 410, 142 A. 598 (1928) (failure of deed to mention purchase price allows use of contract).

28. *Stevens v. Milestone*, 190 Md. 61, 57 A.2d 292 (1948) (although deed did not mention the improvements to be constructed by the seller, the court permitted inquiry into the contractual agreement to build a dwelling containing insulation and cellar windows).

29. *Kandalis v. Paul Pet Constr. Co.*, 210 Md. 319, 123 A.2d 345 (1956).

30. *Dorsey v. Beads*, 288 Md. 161, 416 A.2d 739 (1980).

31. In most circumstances, questions about the amount of consideration should not arise in fully executed contracts, because Maryland law provides:

[A] statement of the amount of actual consideration paid or to be paid . . . shall either be included in every instrument taxable under this section offered for record as part of its recitals or as part of the acknowl-

veyed in conformance with plans and specifications contained in the contract of sale, but not incorporated into the deed conveying the lot. With respect to the former category, three cases³² address the question of the proper amount of consideration involved in the transaction. In all of these cases, the court held that no merger had occurred. In *Dorsey*,³³ the court concluded that "[c]ontractual provisions as to the payment of the purchase price are not merged with the deed"³⁴ While no underlying rationale has ever been articulated by the judiciary or by commentators as to why questions involving the amount of consideration have been deemed collateral, from an empirical study this seems one of the more firmly rooted exceptions to the Doctrine.

Seven cases relate to the second category of cases,³⁵ which involve the construction of a house in conformance with plans and specifications contained in the contract of sale, but which were not referred to in the deed. Of these cases, only one³⁶ held that nothing prevented a

edgement, or be contained in a separate affidavit accompanying the instrument, signed under the penalties of perjury by a party to the instrument or by the agent of the party.

MD. ANN. CODE art. 81, § 277(b)(3) (1980); see also *id.* § 278A(b)(3) (requiring that statement of amount of consideration be included in every taxable instrument offered for record).

32. *Dorsey v. Beads*, 288 Md. 161, 416 A.2d 739 (1980); *Safe Deposit & Trust Co. v. Strauff*, 171 Md. 305, 189 A. 195 (1937); *Rosenthal v. Heft*, 155 Md. 410, 142 A. 598 (1928).
33. *Dorsey v. Beads*, 288 Md. 161, 416 A.2d 739 (1980).
34. *Id.* at 171, 416 A.2d at 745 (quoting 8A G. THOMPSON, *THE MODERN LAW OF REAL PROPERTY* § 4458, at 334 (J. Grimes repl. vol. 1963)).
35. *Gilbert Constr. Co. v. Gross*, 212 Md. 402, 129 A.2d 518 (1957); *Kandalis v. Paul Pet Constr. Co.*, 210 Md. 319, 123 A.2d 345 (1956); *Barrie v. Abate*, 209 Md. 578, 121 A.2d 862 (1956); *Laurel Realty Co. v. Himelfarb*, 194 Md. 672, 72 A.2d 23 (1950); *Edison Realty Co. v. Bauernschub*, 191 Md. 451, 62 A.2d 354 (1948); *Stevens v. Milestone*, 190 Md. 61, 57 A.2d 292 (1948); *West Boundary Real Estate Co. v. Bayless*, 80 Md. 495, 31 A. 442 (1895).
36. *West Boundary Real Estate Co. v. Bayless*, 80 Md. 495, 31 A. 442 (1895). *West Boundary* involved specific enforcement of a contract to erect on a certain lot a dwelling costing not less than \$4,000. In consummation of the contract between the parties, the grantor executed and delivered a deed to the grantee for the lot. The deed recited consideration of \$5,200, and it also provided that the grantee could not, within 10 years after the date of the deed, erect on the lot any dwelling costing less than \$3,000, and that the grantee could not construct any improvements within 30 feet from the front building line. *Id.* at 508, 31 A. at 443. The *West Boundary* court refused to admit evidence of the contract because it would directly contradict the deed. For instance, the contract provided that no improvements could be erected within 30 feet from the rear building line, while the deed stated that no improvements could be erected within 30 feet from the front building line. In addition, although the contract declared that a building costing at least \$4,000 must be constructed on the lot, the deed stated that a building costing at least \$3,000 must be erected on the lot. Thus, rather than finding the covenants collateral to the deed, the court found the covenants wholly inconsistent with the deed. The court reasoned that such an obvious inconsistency showed an intent "that the [deed] was to take the place of all antecedent negotiations" *Id.* at 509, 31 A. at 444. This decision is distinguishable from other cases involving the

merger from occurring.³⁷ In the remaining six cases no merger occurred³⁸ substantially for the reasons stated by the court in *Laurel Realty Co. v. Himelfarb*:³⁹ "We have expressly held there is no merger where the contract calls for the construction of a house in accordance with plans and specifications, on land to be conveyed."⁴⁰ The rationale is that the construction aspects of the contract did not directly relate to the agreement to sell real estate and, therefore, should not merge in the deed.

B. *Partial Execution*

Since the Court of Appeals of Maryland has examined the Doctrine, it has insisted that one of the exceptions occurs when "it appears that the execution of the deed is only a *partial execution* of the contract."⁴¹ The distinction between a partial execution and a collateral covenant is a subtle one, with the difference being, in the former case, that one contract covers two items (collateral covenant) and, in the latter case, that a one-item contract is not completed (partial execution). The partial execution exception has never been raised in Maryland independently of the "collateral covenant" exception, and has never been the sole basis of relief.⁴² Furthermore, this exception is only rarely

construction of homes according to plans and specifications in which the court held that the contract had not merged with the deed.

In *West Boundary*, the obvious inconsistency between the documents clearly indicated that the parties had modified their agreement by the deed, and the question whether the covenant was collateral became irrelevant. The other cases in this category did not involve a contradiction between a contract and a deed; more often, the deed was silent as to the specific covenant. See *supra* note 35.

37. *West Boundary*, 80 Md. at 509, 31 A. at 444.

38. See *Gilbert Constr. Co. v. Gross*, 212 Md. 402, 129 A.2d 518 (1957) (covenant to install ductless furnaces in newly constructed homes "in a workmanlike manner and in accordance with the best practice" did not merge into deed); *Kandalis v. Paul Pet Constr. Co.*, 210 Md. 319, 123 A.2d 345 (1956) (covenant to construct dwelling "in substantial compliance with D Home" did not merge into deed); *Barrie v. Abate*, 209 Md. 578, 121 A.2d 862 (1956) (promise to build waterproof brick dwelling on land in accordance with certain specifications did not merge into deed); *Laurel Realty Co. v. Himelfarb*, 194 Md. 672, 72 A.2d 23 (1950) (promise to construct a home in accordance with plans and specifications did not merge into deed); *Edison Realty Co. v. Bauernschub*, 191 Md. 451, 62 A.2d 354 (1948) (allegation of collateral oral agreement to construct house containing all features of sample house not demurrable on the basis of merger); *Stevens v. Milestone*, 190 Md. 61, 57 A.2d 292 (1948) (oral agreement to build house with front cellar windows and insulation in accordance with furnished plans did not merge into deed); cf. *Brummel v. Clifton Realty Co.*, 146 Md. 56, 125 A. 905 (1924) (court of equity may compel vendor specifically to perform construction when the uncompleted work is clearly defined and complainant has no adequate remedy at law).

39. 194 Md. 672, 72 A.2d 23 (1950).

40. *Id.* at 677, 72 A.2d at 24.

41. *Id.* (emphasis supplied).

42. See Appendix I.

raised as such in other jurisdictions.⁴³

In its more recent decisions, the court of appeals has apparently recognized the essentially identical nature of the "partial execution" and "collateral covenant" exceptions, by gradually incorporating the two, even though this incorporation results in a clumsy hybrid.⁴⁴ Thus, what appeared to be two separate, if ambiguous, exceptions is now only one.

C. *Fraud, Accident, or Mistake*

Other than collateral agreements, the other major exceptions to the Doctrine concern transactions involving fraud, accident, or mistake. *Buckner v. Hesson*,⁴⁵ the only Maryland case on the subject, involved a bill for specific performance of a contract to convey property free from ground rent. The bill alleged that the conveyance, by the terms of the deed, subjected the property to ground rent. The deed was prepared by the seller's son-in-law, an attorney, who also had been employed by the buyer, at the seller's suggestion, to represent the buyer in the same transaction. The *Buckner* court could not decide which exception to the Doctrine specifically applied, so it rested its decision on all three (fraud, accident, or mistake). Interestingly, while the buyer had not charged the seller with either fraud, accident, or mistake, the court reasoned that "at least one of these" must have occurred.⁴⁶

D. *Statutory Exceptions for Residential Property*

Because a strict application of the Doctrine may lead to harsh results, courts have readily found a prior or contemporaneous oral or written agreement collateral to and consistent with the deed and, therefore, admissible.⁴⁷ This judicial mitigation of the Doctrine, however, does not extend as far as the statutory remedy provided in the Mary-

43. *See, e.g.*, *Prell v. Trustees of Baird & Warner Mortgage & Realty Investors*, 179 Ind. App. 642, 654 n.1, 386 N.E.2d 1221, 1230 n.1 (1979) ("[D]octrine of merger does not apply where the deed constitutes only part performance of the contract and the unperformed portions of the contract are not merged into the deed."); *Long v. Hartwell*, 34 N.J.L. 116 (1870) ("[The Doctrine] will not apply to cases where two things are to be conveyed by distinct acts. The conveyance of one would purport to be only in part execution, and should not be held to destroy the vitality of the contract so far as it relates to the part executed."); *Witbeck v. Waine*, 16 N.Y. 532, 535 (1858) ("The rule, however, is not applicable where the last contract covers only a part of the subjects embraced in the prior one."); *Harris v. Rowe*, 593 S.W.2d 303, 307 (Tex. 1980) ("A contract of sale, which provides for the performance of acts other than the conveyance remains in full force and effect as to such other acts.").

44. *See, e.g.*, *Gilbert Constr. Co. v. Gross*, 212 Md. 402, 409, 129 A.2d 518, 521 (1957); *Kandalis v. Paul Pet Constr. Co.*, 210 Md. 319, 123 A.2d 345 (1956).

45. 159 Md. 461, 150 A. 852 (1930).

46. *Id.* at 464, 150 A. at 853.

47. *See, e.g.*, *Levin v. Cook*, 186 Md. 535, 540, 47 A.2d 505, 507 (1946); *Rosenthal v. Heft*, 155 Md. 410, 418, 142 A. 598, 602 (1928); *Bryant v. Wilson*, 71 Md. 440, 443, 18 A. 916, 916-17 (1889); *see also supra* notes 26-27 and accompanying text.

land Consumer Protection Act (the "Act").⁴⁸ Further, Maryland statutory law imposes certain express and implied warranties on contracts

48. The Act, originally codified in 1973 in the Commercial Law article of the Annotated Code of Maryland, provides in pertinent part:

§ 13-301. Unfair or deceptive trade practices defined. Unfair or deceptive trade practices include any:

(1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;

(3) Failure to state a material fact if the failure deceives or tends to deceive;

(4) Disparagement of the goods, realty, services, or business of another by a false or misleading representation of a material fact;

(5) Advertisement or offer of consumer goods, consumer realty, or consumer services;

(i) Without intent to sell, lease or rent them as advertised or offered; or

(ii) With intent not to supply reasonably expected public demand, unless the advertisement or offer discloses a limitation of quantity or other qualifying condition;

(6) False or misleading representation of fact which concerns:

(i) The reason for or the existence or amount of a price reduction; or

(ii) A price in comparison to a price of a competitor or to one's own price at a past or future time;

(8) False statement which concerns the reason for offering or supplying consumer goods, consumer realty, or consumer services at sale or discount prices;

(9) Deception, fraud, false pretense, false promise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with:

(i) The promotion or sale of any consumer goods, consumer realty, or consumer service; or

(ii) A contract or other agreement for the evaluation, perfection, marketing, brokering or promotion of an invention; or

(iii) The subsequent performance of a merchant with respect to an agreement of sale, lease or rental;

(14) Any act or omission that relates to a residential building and that is chargeable as a misdemeanor under or otherwise violates a provision of the Energy Conservation Building Standards Act, Article 78, § 54-I of the Code.

§ 13-302. Deception or damage unnecessary. Any practice prohibited by this title is a violation of this title, whether or not any consumer in fact has been misled, deceived, or damaged as a result of the practice.

§ 13-303. Practices generally prohibited. A person may not engage in any unfair or deceptive trade practice, as defined in this subtitle or as further defined by the Division, in:

(1) The sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services;

(2) The offer for sale, lease, rental, loan or bailment of consumer goods, consumer realty or consumer services;

(3) The extension of consumer credit; or

(4) The collection of consumer debts.

MD. COM. LAW CODE ANN. §§ 13-301 to -303 (1983).

for sale of newly constructed homes.⁴⁹ Thus, in residential real estate

49. MD. REAL PROP. CODE ANN. §§ 10-201 to -205 (1981):

§ 10-201. Definitions.

(a) *In general* — In this subtitle, the following words have the meanings indicated unless otherwise apparent from context.

(b) *Improvements* — “Improvements” includes every newly constructed private dwelling unit, and fixture and structure which is made a part of a newly constructed private dwelling unit at the time of construction by any building contractor or subcontractor.

(c) *Purchaser* — “Purchaser” means the original purchaser of improved realty, and the heirs and personal representatives of the original purchaser.

(d) *Realty* — “Realty” includes both freehold estates and redeemable leasehold estates.

(e) *Vendor* — “Vendor” means any person engaged in the business of erecting or otherwise creating an improvement on realty, or to whom a completed improvement has been granted for resale in the course of his business.

§ 10-202. Creation of express warranties; exclusion or modification of express warranty.

(a) *Creation of warranties* — Express warranties by a vendor are created as follows:

(1) Any written affirmation of fact or promise which relates to the improvement and is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the affirmation or promise.

(2) Any written description of the improvement, including plans and specifications of it, which is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the description.

(3) Any sample or model which is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms substantially to the sample or model.

(b) *Formal words unnecessary* — To create an express warranty, it is not necessary to use formal words, such as “warranty” or “guarantee,” or that there be a specific intention to make a warranty. However, an affirmation merely of the value of the improvement or a statement purporting to be an opinion or commendation of the improvement does not create a warranty.

(c) *Exclusion or modification of express warranty* — If an express warranty is made under subsection (a), neither words in the contract of sale, *the deed*, other instrument of grant, *nor merger of the contract of sale* into the deed or any other instrument of grant is effective to exclude or modify the warranty. At any time after the execution of the contract of sale, the warranty may be excluded or modified wholly or partially by a written instrument, signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to exclusion or modification, and the terms of the new agreement with respect to it. [emphasis supplied]

§ 10-203. Implied warranties.

(a) *Warranties which are implied* — Except as provided in subsection (b) or unless excluded or modified pursuant to subsection (d), in every sale, warranties that are implied that, at the time of the delivery of the deed to a complete improvement or at the time of completion of an improvement not completed when the deed is delivered, the improvement is:

(1) Free from faulty materials;

(2) Constructed according to sound engineering standards;

transactions, the Act and the new home warranty statute may lead to different results than would the Doctrine.

The Act, which was amended in 1976 to cover consumer real estate transactions, provides a private cause of action for consumers harmed by several specified unfair or deceptive trade practices consisting of various types of false and misleading statements made in consumer transactions. The Act apparently carves another exception to the traditional Doctrine by declaring that a grantor may later be challenged upon the representations, or lack of them, that produced the transaction.⁵⁰

Maryland's appellate courts have not yet applied the Act to cases in which the Doctrine might otherwise apply. An examination of

(3) Constructed in a workmanlike manner; and

(4) Fit for habitation.

(b) *Exception* — The warranties of subsection (a) do not apply to any condition that an inspection of the premises would reveal to a reasonably diligent purchaser at the time the contract is signed.

(c) *Implied warranty of fitness for a particular purpose* — If the purchaser, expressly or by implication, makes known to the vendor the particular purpose for which the improvement is required, and it appears that the purchaser relies on the vendor's skill and judgment, there is an implied warranty that the improvement is reasonably fit for the purpose.

(d) *Exclusion or modification for implied warranty* — Neither words in the contract of sale, nor the deed, nor merger of the contract of sale into the deed is effective to exclude or modify any implied warranty. However, if the contract of sale pertains to an improvement then completed, an implied warranty may be excluded or modified wholly or partially by a written instrument, signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to exclusion or modification, and the terms of the new agreement with respect to it.

§ 10-204. Breach of warranty; expiration of warranty; limitations of actions.

(a) *Breach of warranty* — If any warranty provided for in this subtitle is breached, the court may award legal or equitable relief, or both, as justice requires.

(b) *Expiration of warranty* — Unless an express warranty specifies a longer period of time, the warranties provided for in this subtitle expire:

(1) In the case of a dwelling completed at the time of the delivery of the deed to the purchaser, one year after the delivery or after taking of possession by the purchaser, whichever occurs first; and

(2) In the case of a dwelling not completed at the time of delivery of the deed to the purchaser, one year after the date of the completion or taking of possession by the purchaser, whichever occurs first.

(c) *Limitation of actions* — Any action arising under this subtitle shall be commenced within two years after the defect was discovered or should have been discovered or within two years after the expiration of the warranty, whichever occurs first.

§ 10-205. Grant to intermediate purchaser to evade liability.

If a vendor grants an improvement to an intermediate purchaser to evade any liability to a user and purchaser imposed by this subtitle, the vendor is liable on the subsequent sale of the improvement by the intermediate purchaser as if the subsequent sale had not been effectuated by the vendor without regard to the intervening grant.

50. See MD. COM. LAW CODE ANN. § 13-301 (1983).

Heckrotte v. Riddle,⁵¹ a typical pre-Act court of appeals decision, may thus be used to illustrate the potential effect of the Act. Factually, the purchasers in *Heckrotte* bought a house that, unknown to them, violated the county zoning set back regulations. The seller had not made any statement in the land sale contract about the dwelling's location or compliance with zoning regulations. In affirming the dismissal of the purchasers' complaint, the court of appeals held that the purchasers should have exercised reasonable diligence to ascertain compliance with the zoning regulations. Moreover, the purchasers' acceptance of the deed created a prima facie presumption that it was in final execution of the contract of sale, thus determining the rights of the parties.⁵² Under the Act,⁵³ failure to state a material fact that "deceives or tends to deceive" may constitute a deceptive practice.⁵⁴ Application of this provision to facts similar to those presented in *Heckrotte*, for example, may lead the court to conclude that the seller's silence with respect to zoning regulations constitutes a deceptive practice. The Act⁵⁵ thus replaces common law in those instances in which the Doctrine might have operated to a consumer's detriment in a real estate transaction.

E. Explicit Survival Language

Every Maryland case discussed above dealt with situations where the contract was silent as to the intent of the parties with respect to whether any representations and warranties in the contract should survive. The presumption of merger "is negated when the contract of sale contains language providing that the agreement shall survive the execution of the deed."⁵⁶ In *Randolph Hills, Inc. v. Shoreham Developers, Inc.*,⁵⁷ the court addressed the rights of the parties in light of a "survivability" clause. In that case, a dispute arose after a seller contracted to sell a 32.61 acre parcel of land to a purchaser. The purchaser filed suit for specific performance and the circuit court directed the seller to specifically perform its contract. After the closing, at which the seller conveyed the parcel to the purchaser, the purchaser filed suit to impose a constructive trust on funds received by the seller between the date of the contract of sale and the closing for a right of way for a sewer across the property. The seller defended on the basis that any rights to these funds were waived by the closing of title to the property and acceptance of a deed to the remaining parcel. The *Randolph Hills* court rejected this contention in stating that the agreement of sale, which

51. 224 Md. 591, 168 A.2d 879 (1961).

52. *Id.* at 595, 168 A.2d at 881.

53. MD. COM. LAW CODE ANN. § 13-301(3) (1983). For the text of this section, see *supra* note 48.

54. *Id.*

55. *Id.* § 13-301.

56. *Erlwine v. Happ*, 39 Md. App. 106, 109, 383 A.2d 82, 84 (1978).

57. 266 Md. 182, 292 A.2d 662 (1972).

contained specific survival language,⁵⁸ prevented the merger of the contract provisions into the deed. The court reasoned that "a line of authority . . . concludes that the acceptance of a deed gives rise to a *prima facie* presumption that the rights of the parties are determined by the deed. Such a presumption is clearly negated by a contract provision that the representations contained in the contract survive the settlement."⁵⁹ Thus, a survival clause will assure the parties to a contract that representations and warranties will remain viable even after execution and delivery of the deed.⁶⁰

IV. DRAFTING MERGER AND SURVIVAL PROVISIONS

Most of the cases and commentary discussed above have dealt with situations in which a land sale contract is silent as to the survival of covenants contained in a contract for the sale of property after the delivery and acceptance of the deed. Maryland courts have expressed a willingness to enforce specific clauses that manifest the parties' intention that certain covenants, representations, and warranties will survive the closing.⁶¹ It follows that courts will likely enforce a clause stating that certain covenants, representations, and warranties will merge in the deed. Accordingly, attorneys representing buyers and sellers must clearly set forth the intentions of the parties with respect to survival or merger of particular provisions contained in the contract of sale. The initial point of analysis should deal with those areas of the contract that may survive, such as the covenants, representations, and warranties contained in the contract of sale.

A. Drafting Covenants, Representations, and Warranties

In drafting contractual covenants, representations, and warranties, the areas of concern must be identified, and may typically include some or all of the following areas.

58. "[T]he provisions hereof shall survive the execution and delivery of the deed aforesaid and shall not be merged therein . . ." *Id.* at 193, 292 A.2d at 668.

59. *Id.* In dictum, the *Randolph Hills* court reasoned that "a purchaser may continue to rely on the covenants in the contract, possibly even when he has knowledge of countervailing facts . . ." *Id.* at 194, 292 A.2d at 668.

60. The statute of limitations for survival language in a contract not under seal is three years from the time of the breach. MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (Supp. 1983); see *Cotham v. Board of County Comm'rs*, 260 Md. 556, 273 A.2d 115 (1971). For a sealed instrument, the statute of limitations is 12 years. MD. CT. & JUD. PROC. CODE ANN. § 5-102 (Supp. 1983). The mere presence of a corporate seal without any other reference in the contract to the seal does not necessarily invoke the 12-year statute of limitations because the seal may have been impressed merely as *prima facie* evidence of corporate authority to execute the contract and not as evidence of the parties' intent to execute the instrument under seal. *General Petroleum Corp. v. Seaboard Terminals Corp.*, 23 F. Supp. 137 (D. Md. 1938).

61. *Randolph Hills, Inc. v. Shoreham Developers, Inc.*, 266 Md. 182, 292 A.2d 662 (1972); *Erlewine v. Happ*, 39 Md. App. 106, 383 A.2d 82 (1978).

1. Title to and Quantity of the Property

A seller is often asked to represent that he owns fee simple marketable title to property containing a certain area, which is usually measured in acres of land.⁶² Many buyers will also insist that title to the property be insurable by a title insurance company at its regular rates without exception for title defects, other than those exceptions specified in the contract. Further, a buyer may require a seller to represent that a survey will not disclose any title defects, such as encroachments of the improvements on the property upon the property of another, or encroachments on the property being acquired by improvements on adjoining property. The parties may agree that if a title defect exists that will not materially impair the buyer's contemplated use of the property, the buyer will have the right to elect to proceed with closing without any adjustment to the purchase price. Then, if a deed to property is accepted in light of a known title defect, there should be no basis for a claim that the title warranty in the contract survived the closing.

2. Zoning and Subdivision

A seller may be asked to warrant that the property complies with all relevant zoning ordinances and subdivision regulations. This may result in an identification of the current zoning and a specific description of the buyer's contemplated use of the property. If a zoning change is required or if subdivision is to be accomplished prior to the closing, the parties should define their respective obligations.

3. Physical Condition of Improvements on the Property

The physical condition of improvements on the property may be

62. The description of the area conveyed may be stated as a certain quantity of land "more or less," or in an "approximate" amount. Maryland cases indicate that, unless the purchase price is calculated upon the number of square feet or acres conveyed, and is not a sale in gross, some variation in area is acceptable and will not provide a ground for a buyer to attack the conveyance if he believes that he has been short-changed. *See, e.g.,* *Witmer v. Bloom*, 265 Md. 173, 288 A.2d 323 (1972) (use of the phrase "more or less" presumptively creates sale in gross, but court will consider rebuttal evidence); *Carozza v. Peacock Land Corp.*, 231 Md. 112, 188 A.2d 917 (1963) (words "more or less" or "by estimation," while not employed in the contract being considered, are merely factors to consider in determining whether a sale was in gross); *Kriel v. Cullison*, 165 Md. 402, 169 A. 203 (1933) (no warranty as to quantity exists in a sale in gross, often evidenced by words "more or less"); *Wagner v. Bing*, 163 Md. 496, 501, 163 A. 199, 200 (1932):

Whenever it appears by definite boundaries, or by words of qualification, as 'more or less' or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed is a mere matter of description, or not of the essence of the contract; the buyer takes the risk of the quantity, if there is no intermixture of fraud in the case.

Id. (quoting 4 KENT'S COMMENTARY 467 (11th ed. 1867)); *Neavitt v. Lightner*, 155 Md. 365, 142 A. 109 (1928) (phrase "more or less" in deed precludes finding that vendor warranted the quantity of land conveyed because these words indicate that the parties assumed the risk).

important to a buyer, and the seller may be asked to represent, for example, that the roof is in a watertight and sound condition, that the basement does not leak, that the property does not lie in a flood plain, that the building is structurally sound, and that the property complies with all laws, ordinances, rules, and regulations of any governmental agency or authority having jurisdiction over the property. A buyer may require that repairs be made prior to closing and may require a warranty as to the condition of the property, especially in newly constructed or renovated improvements.⁶³

4. Financial Status of Buyer

If a seller has agreed to hold a note or otherwise finance a buyer's purchase of the property, the buyer may be asked to make certain representations about his financial ability to repay the debt assumed. For instance, at the time the contract is signed, the buyer may be required to submit current financial statements to the seller. The buyer might also be required to warrant to the seller that no adverse changes in the buyer's financial standing will occur prior to closing and that, if a change does occur, the seller will not be required to consummate the transaction or will have the right to require payment of the purchase price in cash.

5. Power and Authority

Both parties may be required to represent to the other that the entity and the individual executing the contract on behalf of that entity are authorized and empowered to execute and perform the contract. For instance, a corporation will be required to represent and warrant that all necessary corporate action has been taken to authorize its execution and performance of the contract (*e.g.*, consent by the board of directors), and that the individual signing the contract on behalf of the corporation has been duly authorized to do so. Similarly, a partnership may be required to represent and warrant that all necessary actions have been taken to authorize the execution and performance of the contract (*e.g.*, unanimous consent of all or a majority of the general partners), and that the individual signing the contract on behalf of the partnership has authority to do so.

6. Miscellaneous

There are many other areas that the parties may believe are crucial to the bargain, such as the availability of access to and from the property to public roads, the existence and the availability of utilities in

63. Even if express warranties are not made in a contract for sale of newly constructed residential property, the seller may have liabilities arising out of statutory warranties. MD. REAL PROP. CODE ANN. §§ 10-201 to -205 (1981). For the text of these sections, see *supra* note 49.

certain stated capacities at the property, the availability of certain amenities to the property, such as recreation facilities, and the obligation of one of the parties (usually the seller) to pay brokers' commissions. Often, the party who is responsible for paying brokers' commissions will be required to indemnify the other party against any claims for brokers' commissions not paid as required.

There is little question that attempts to restrict a contractual action for fraud in the inducement are ineffectual.⁶⁴ Parties may, however, expressly or impliedly waive any cause of action for fraud if they realized that specific misrepresentations were in fact fraudulent, and that they had a cause of action for the fraud.⁶⁵ Therefore, the effects of fraud may be waived after, but not before, the fraudulent acts have occurred, and after these acts are known by the innocent party, to grant him a cause of action.

Likewise, an attempt to eliminate by contract a cause of action for accident and mistake would probably fail, but for a reason different from that applicable to fraud. When a unilateral material mistake of fact exists, the contract, along with its waiver provision, is voidable by the mistaken party only if the mistake results from the other party's culpable conduct, such as fraud, duress, or undue influence.⁶⁶ In comparison, a mutual mistake of fact with respect to a material matter af-

64. The court in *Pedalty v. George F. Nixon & Co.*, 288 Ill. App. 294, 305-06, 6 N.E.2d 290, 295 (1937), stated:

[T]here is no authority . . . in support of the proposition that a party who has perpetrated a fraud upon his neighbor may nevertheless contract with him, in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it, and bind him never to seek redress.

Id. (quoting *Bridger v. Goldsmith*, 143 N.Y. 424, 425, 38 N.E. 458, 459 (1894)); see *McInnis & Co. v. Western Tractor & Equip. Co.*, 63 Wash. 2d 652, 388 P.2d 562 (1964) ("A cause of action in fraud exists even where there is a merger and disclaimer clause in the contract."); see also *Slater v. KFC Corp.*, 621 F.2d 932 (8th Cir. 1980) (contractual disclaimer does not bar suit based upon fraud in the inducement); *Bankers Trust Co. v. Pacific Employees Ins. Co.*, 282 F.2d 106, 113 (9th Cir. 1960) (parties' rights are not controlled by contract terms in an action for deceit), *cert. denied*, 368 U.S. 822 (1961); *Kraft v. Lowe*, 77 A.2d 554 (D.C. 1950) (party cannot rely upon contract provisions to avoid consequences of misrepresentation which induced other to enter into contract); *Creamer v. Helferstay*, 294 Md. 107, 120, 448 A.2d 332, 338 (1982) (if court finds that party acted fraudulently in making misrepresentation, then "a basis for rescission of the written contract would have existed, *regardless of the terms of that contract*") (emphasis supplied) (dictum); *Bergeron v. Dupont*, 116 N.H. 373, 359 A.2d 627 (1976) (merger clause does not preclude claim of extrinsic fraud); *Hampton v. Sabin*, 49 Or. App. 1041, 621 P.2d 1202 (1980) (rescission of contract granted).

65. See *Holder v. Maaco Enter.*, 644 F.2d 310, 312 (4th Cir. 1981).

66. *Creamer v. Helferstay*, 294 Md. 107, 448 A.2d 332 (1982) (culpable conduct not found); *Gross v. Stone*, 173 Md. 653, 197 A. 137 (1938); see generally CORBIN, *supra* note 8, §§ 608-12; 13 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1573, 1577-80 (3d ed. 1970); RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981).

fecting the substance of the transaction invalidates the contract⁶⁷ and affords a ground for either party to rescind the contract,⁶⁸ provided, of course, that the contract waiver provision is not interpreted as placing on one party the risk of mistake.⁶⁹

Once the parties have clearly defined the areas of concern that might affect the buyer's use and enjoyment of the property after the acquisition or that may affect the seller's security for any deferred portion of the purchase price, the parties will often take the prudent step of establishing a procedure for inspection and review of matters relating to the covenants, representations, and warranties. The contract may thus require the buyer to submit financial statements to the seller and may provide that the buyer will have certain rights of entry onto the property for the purpose of satisfying himself as to matters of survey, the physical condition of the property, the existence of any easements that may be discovered only by an inspection of the property, and to perform other tests and studies. The contract should define the buyer's inspection rights, and the parties may provide that at the conclusion of these studies, tests, and inspections, the buyer will be considered to have waived his right to object to these matters if deficiencies or problems have not been communicated to the seller within a specified time period.

B. Drafting Merger Provisions

If the parties agree that none of the covenants, representations, and warranties will survive closing, the contract should say so clearly. Usually, the seller will be the party most interested in this provision. A sample merger provision is contained in Appendix II.

C. Drafting Survival Provisions

After having defined the respective parties' covenants, representations, and warranties, and having provided both parties with an opportunity to inspect and review these matters, the parties may wish to provide in the contract that these representations shall merge in the deed, except as otherwise expressly set forth in the contract. Usually, the buyer will be the party most interested in this provision. Once the parties agree that certain covenants, representations, and warranties are to survive, they must determine the period of time for which these representations shall remain effective. The parties' attorneys should also consider and define the knowledge that may be imputed to the seller and the buyer, through their respective officers or directors, if a corporation; through their respective general partners, if a partnership; and

67. *Wheat v. Cross*, 31 Md. 99 (1869).

68. *Dood, Inc. v. Universal Realty Co.*, 215 Md. 261, 137 A.2d 651 (1958); *Smith v. Bounds Package Corp.*, 206 Md. 74, 110 A.2d 71 (1954); *Martz v. Jones*, 189 Md. 416, 56 A.2d 30 (1947); *Gross v. Stone*, 173 Md. 653, 197 A. 137 (1938).

69. See RESTATEMENT (SECOND) OF CONTRACTS § 154 (1981).

through their respective agents and employees, in any case. Sample representations, warranties, and survival provisions are contained in Appendix II. If possible, the most specific drafting rules should be followed, with each representation and warranty discussed separately, and separate survival provisions, if any, set forth for each.

V. CONCLUSION

The Doctrine is a long-standing common law principle that operates to close the door on a contract for the sale of real property after the acceptance of the deed consummating that contract. Because strict application of the Doctrine may lead to harsh results, the Court of Appeals of Maryland has adopted several major exceptions, and has, especially in the last fifty years, hesitated to apply the Doctrine mechanically. To avoid the Doctrine's potentially inequitable consequences, reviewing courts will look to the subject matter of collateral covenants, as well as to the presence of fraud, accident, or mistake, and will apply relevant statutory exceptions. Practitioners who are aware of the various statutory and judicially created exceptions can best serve their clients by careful drafting.

In this area of the law, there can be few, if any, virtues to silence in a contract of sale and purchase. Some practitioners may have been content to rely upon the Doctrine, assuming that after the closing no liabilities could arise other than those expressed in the deed. The Maryland courts, however, have shown a willingness to enforce only the expressed intentions of the parties. Absent such an expression, the range of exceptions is substantial enough to require cautious practitioners to set forth either that certain provisions will not survive, or if there will be survival, which provisions survive and for how long.

APPENDIX I

DOCTRINE OF MERGER
(Analysis of all Court of Appeals of Maryland cases which contained no explicit survival language)

Case	Covenant Related To:							Deemed Collateral?	Merger Occurred?	Fraud?	Mistake?	Accident?	Deed Considered Partial Execution of Contract
	Title	Quantity of Land Conveyed	Possession	Emblements	Fixture	Other							
<i>Middlekauff</i> ¹ 1846	✓						No	Yes					
<i>Smith</i> ² 1847		✓					No	Yes					
<i>Worthington</i> ³ 1854	✓						No	Yes					
<i>Bladen</i> ⁴ 1869		✓					No	Yes					
<i>Bryant</i> ⁵ 1889	✓						No	Yes					
<i>West Boundary</i> ⁶ 1895						Construction of house on lot per plans & specifications	No	Yes					No
<i>Lawson</i> ⁷ 1906	✓						No	Yes					
<i>Rosenthal</i> ⁸ 1928						Amount of Consideration	Yes	No					Yes?

1. *Middlekauff v. Barrick*, 4 Gill 291 (1846).
 2. *Smith v. Chaney*, 4 Md. Ch. 246 (1847).
 3. *Worthington v. Bullitt*, 6 Md. 172 (1854).
 4. *Bladen v. Wells*, 30 Md. 577 (1869).
 5. *Bryant v. Wilson*, 71 Md. 440, 18 A. 916 (1889).
 6. *West Boundary Real Estate Co. v. Bayless*, 80 Md. 495, 31 A. 442 (1895).
 7. *Lawson v. Mullinix*, 104 Md. 156, 64 A. 938 (1906).
 8. *Rosenthal v. Hett*, 155 Md. 410, 142 A. 598 (1928).

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Case	Covenant Related To:							Deemed Collateral?	Merger Occurred?	Fraud?	Mistake?	Accident?	Deed Considered Partial Execution of Contract
	Title	Quantity of Land Conveyed	Possession	Emblements	Fixture	Other							
<i>Buckner</i> ⁹ 1930								No	Yes*	Yes*	Yes*	Yes*	---
<i>Safe Deposit</i> ¹⁰ 1937						Amount of Consideration	Yes	No	---	---	---	---	---
<i>Levin</i> ¹¹ 1946					✓	Convergence of heating unit along with premises	Yes	No	---	---	---	---	Yes
<i>Stevens</i> ¹² 1948					✓	Construction of house on lot per plans & specifications	Yes	No	---	---	---	---	Yes
<i>Edison Realty</i> ¹³ 1948					✓	Construction of house on lot per plans & specifications	Yes	No	---	---	---	---	Yes
<i>Laurel Realty</i> ¹⁴ 1950						Construction of house on lot per plans & specifications	Yes	No	---	---	---	---	Yes

9. *Buckner v. Hesson*, 159 Md. 461, 150 A. 852 (1930).

10. *Safe Deposit & Trust Co. v. Strauff*, 171 Md. 305, 189 A. 195 (1937).

11. *Levin v. Cook*, 186 Md. 535, 47 A.2d 505 (1946).

12. *Stevens v. Milestone*, 190 Md. 61, 57 A.2d 292 (1948).

13. *Edison Realty Co. v. Bauernschub*, 191 Md. 451, 62 A.2d 354 (1948).

14. *Laurel Realty Co. v. Himelfarb*, 194 Md. 672, 72 A.2d 23 (1950).

*. The court reasoned that, while it could not pinpoint which had occurred, the transaction involved either fraud, mistake, or accident. *Buckner v. Hesson*, 159 Md. 461, 150 A. 852, 854 (1930).

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	Title	Quantity of Land Conveyed	Possession	Emblements	Fixture	Other							
<i>Barrie</i> ¹⁵ 1956							Construction of house on lot per plans & specifications	Yes	No	---	---	---	---
<i>Kandalis</i> ¹⁶ 1956							Construction of house on lot per plans & specifications	Yes	No	---	---	---	Yes*
<i>Gilbert</i> ¹⁷ 1957					✓		Construction of house on lot per plans & specifications	Yes	No	---	---	---	Yes ²²
<i>Millison</i> ¹⁸ 1957							Restrictive Covenants	No	Yes	---	---	---	No
<i>Hecroite</i> ¹⁹ 1961	✓							No	Yes	No	---	---	---
<i>Canatella</i> ²⁰ 1972	✓	✓						No	Yes	---	---	---	---
<i>Dorsey</i> ²¹ 1980							Amount of Consideration	Yes	No	---	---	---	---

15. *Barrie v. Abate*, 209 Md. 578, 121 A.2d 862 (1956).
 16. *Kandalis v. Paul Pet Constr. Co.*, 210 Md. 319, 123 A.2d 345 (1956).
 17. *Gilbert Constr. Co. v. Gross*, 212 Md. 402, 129 A.2d 518 (1957).
 18. *Millison v. Fruchman*, 214 Md. 515, 136 A.2d 240 (1957).
 19. *Hecroite v. Riddle*, 224 Md. 591, 168 A.2d 879 (1961).
 20. *Canatella v. Davis*, 264 Md. 190, 286 A.2d 122 (1972).
 21. *Dorsey v. Beads*, 288 Md. 161, 416 A.2d 739 (1980).
 22. In *Gilbert*, the court decided, retrospectively, that this case involved a deed which was only a partial execution of the real estate contract. *Gilbert Constr. Co. v. Gross*, 212 Md. 402, 409, 129 A.2d 518, 521 (1957).

*. The court reasoned that, while it could not pinpoint which had occurred, the transaction involved *either* fraud, mistake, or accident. *Buckner v. Hesson*, 159 Md. 461, 464, 150 A. 852, 854 (1920).

APPENDIX II

SAMPLE MERGER PROVISIONS*

BUYER: "This Paragraph — of this Contract shall merge into the deed for the Property at closing, and Seller shall have no right to bring any action against Buyer arising out of the matters set forth in this Paragraph —."

SELLER: "This Paragraph — of this Contract shall merge into the deed for the Property at closing, and Buyer shall have no right to bring any action against Seller arising out of the matters set forth in this Paragraph —."

SAMPLE SURVIVAL PROVISIONS*

BUYER: "All of the covenants and representations and warranties set forth in this Contract shall survive the execution and delivery of the deed of the Property hereunder and shall not be merged in the deed."

SELLER: "Only the actual knowledge of the [general partners/executive officers] of Seller shall be considered to be knowledge of the Seller. The covenants, representations, and warranties contained in this Paragraph — of this Contract shall merge into the deed for the Property at Closing hereunder, except those covenants, representations, and warranties set forth in Paragraphs — and — hereof, which require performance after Closing; provided, however, that such covenants, representations, and warranties shall survive for a period of only one (1) year after the Closing Date, and shall expire at the end of such one-year period."

SAMPLE NEGOTIATED REPRESENTATIONS AND WARRANTIES FOR CONTRACT OF SALE OF UNIMPROVED LAND*

"1. The Buyer shall not have the right to enforce, by suit at law, an action in equity, or otherwise, a representation or warranty of the Seller hereinafter contained (other than the warranties of title appearing in the deed) unless the Buyer shall have given Seller written notice within one (1) year after the Closing Date that Seller has committed a misrepresentation or breached a warranty, or both, with respect to a specified representation or warranty, or both. If the Buyer learns or determines prior to the Closing Date that a breach of warranty or misrepresentation on the part of the Seller exists, Buyer agrees it shall promptly notify Seller in writing. Each representation or warranty, or both, as to which Buyer shall have actual notice prior to the Closing Date that there exists a material breach, shall expire at Closing, the intent hereof being that no such known violations shall survive the Closing should Buyer elect to close notwithstanding such actual notice. Seller repre-

* All capitalized words should be considered to be terms defined in the contract of sale. The transaction is assumed to be commercial.

sents and warrants that both on the date hereof and on the Closing Date:

(a) Seller own good and merchantable title to the Property, in fee simple, free and clear of any Title Defect (except, prior to Closing, the Deed of Trust) and insurable as such (but free and clear of the Deed of Trust) at regular basic rates for the basic coverages under the Title Company's owner's policy (ALTA-Form B 1970). The Seller is not a party to any existing contract for the sale or lease of all or any portion of the Property or any grant of option or right of first refusal to purchase or lease all or any portion of the Property. Seller warrants that it shall not place or permit additional liens or encumbrances other than current real estate tax assessments on the title to the Property between the date hereof and Closing Date.

(b) The Property is located in a WXY District which is a classification under the Zoning Ordinance of Baltimore County for an industrial development district and permits the use of the Property for offices, warehousing, and storage. Said uses are not prohibited by any law, ordinance, regulation, or deed restriction.

(c) To the best of Seller's knowledge, there are no violations of any laws, ordinances, orders, regulations, or requirements of any applicable governmental authority or of any deed restriction affecting any portion of the Property, and no notice of any such violation has been issued by any governmental authority or party to any such deed restriction. Seller warrants that between the date hereof and Closing Date, Seller shall comply at Seller's sole expense with valid violation notices duly given to Seller.

(d) Utility systems for the transmission and transportation of electrical energy, water, and sanitary and storm sewers are available in the bed of the Road, as shown on the Subdivision Plat of the Property.

(e) The Road, the street adjoining the Property, is a public street dedicated to Baltimore County, Maryland, which will maintain said street. The Road and the water, sanitary sewer, and storm water facilities servicing the Property and located in the bed of the Road have been constructed by and at the sole expense of Seller. The cost of development of the Road and the said water, sanitary sewer, and storm water facilities has been paid in full, including all connection and ready-to-serve charges. There are and will be no assessments by any governmental authority against the Property or its owner to pay for the cost of the development of the Road and said utilities. There is no ordinance or law authorizing any other public improvements pertaining to the Property, the cost of which shall be assessed against the Buyer.

(f) The Seller has no knowledge of pending or contemplated condemnation proceedings affecting the Property, any part thereof or interests therein.

(g) The Seller is a general partnership organized and existing under

the laws of the State of Maryland, has the legal power and authority to own the Property, is duly authorized by all requisite partnership actions to sell the Property pursuant to the terms and conditions of this Agreement, and is composed of two (2) partners, Messrs. A and B.

2. Buyer represents and warrants that both on the date hereof and on the Closing Date, if it is a limited partnership, validly organized and existing under the laws of the State of Maryland, is duly authorized by all requisite partnership actions to perform all the terms, covenants, provisions, and conditions imposed on Buyer hereunder, and that this transaction is within the purposes for which Buyer was formed.

3. Buyer represents and warrants that between the date hereof and the Closing Date, there shall have been no material adverse changes in the financial statements of Buyer delivered to Seller simultaneously herewith.”