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The Doctrine of Merger With Respect to Real Estate Transactions: Taking the Bull by the Horns

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Abstract

As I remembered it from law school (Property I, fall semester, 1961), once you closed, that was it! If a purchaser later on discovered a problem for which his seller would unquestionably be responsible under the contract of purchase and sale, forget it!

KEYWORDS: merger, bull, real estate

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I. PROLOGUE

As I remembered it from law school (Property I, fall semester, 1961), once you closed, that was it! If a purchaser later on discovered a problem for which his seller would unquestionably be responsible under the contract of purchase and sale, forget it! That contract died. Something about a "doctrine of merger" that prevented suing on the original contract after the deal had closed.

So when the client walked into my office in 1979 (some eighteen years after my first encounter with "merger" back in Property I) complaining of no access to his recently purchased 4.5 acres of vacant land, my gut reaction (after first giving thanks that I had not represented him on the purchase) was: Forget it! "Merger" will preclude an action against his seller despite the seller's warranty of access under the contract of purchase and sale.

Preliminary research confirmed my recollection about the doctrine of merger, but also revealed that there were of course several exceptions to the doctrine. Maybe we could fall within one of those exceptions. Besides, we might also be of service to the client by obtaining access for his property ("right-of-way of necessity" rang another bell from Property I).

So, we took the case, and not without surprise summary judgment was promptly entered against us on our breach of contract action against the seller: The doctrine of merger barred our action.¹ The appellate court reversed, however, and sustained our claim, finding that we did in fact fall within one of those exceptions to the merger rule;² and the Florida Supreme Court upheld that ruling by denying certiorari.³

Now, another ten years have gone by and, having left private practice for the world of academia, I find myself *teaching* the doctrine of merger in Property class. This has prodded me to re-examine the rule and the growth of exceptions to the rule, and what I see is repeated misuse of the doctrine. If you'll stick with me for a while, I shall hope to adequately convey to you 1) why I conclude that the doctrine of merger has been bastardized, and 2) what I believe is the more legiti-

1. Opler v. LaValle, No. 80-4345 (Fla. 11th Cir. Ct. 1980).

2. Opler v. Wynne, 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981). Author's note: This is, of course, the same case as noted in the previous footnote.

3. Opler v. Wynne, 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 472 (Fla. 1982).

mate conceptual approach to analyzing these cases, namely that while there are a limited number of prescribed circumstances in which the doctrine of merger is the correct rule to apply, the vast majority of the factual situations should be viewed under the rules of accord and satisfaction.

II. INTRODUCTION

The doctrine of merger, as it pertains to real estate transactions, is so easily and clearly stated as to defy its complexity: The covenants of the contract of purchase and sale are merged into the deed of conveyance upon the closing of the transaction, and such covenants are thereafter no longer enforceable.⁴

The *exceptions* to the doctrine, and the circumstances under which the doctrine is "inapplicable," are not so easily or clearly stated: Yet the number of recent Florida cases declining to apply the rule exceeds the quantity of cases in which the rule has been applied;⁵ . . . which causes one to wonder: Have the exceptions overtaken the rule? More importantly, this provokes us to inquire whether the rule and its exceptions are being properly applied.

This article: 1) examines the history of and basis for the doctrine of merger as it applies to real estate contracts; 2) traces the development of the doctrine in Florida; 3) reveals a confusion in the case law in Florida, demonstrated by an attempt to categorize the various cases by those in which the doctrine is adhered to, versus those which fall within various exceptions to the rule; 4) attempts to analyze why the rule has, or has not, been applied in various situations; and 5) concludes that there *is* a rational basis conceptually and under very recent Florida case law for discerning when to apply the rule, and that the more appropriate doctrine to apply in most cases is that of accord and satisfaction.

III. HISTORY AND BASIS OF THE DOCTRINE OF MERGER

A classic statement of the merger doctrine is:

4. RESTATEMENT OF CONTRACTS § 413 (1932); *see also* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 10.12, at 696-97 (1984).

5. *See* APPENDIX OF FLORIDA CASES DEALING WITH THE DOCTRINE OF MERGER, *infra* [hereinafter APPENDIX].

In the absence of fraud or mistake, and in the absence of collateral contractual provisions or agreements which are not intended to be merged in the deed, the acceptance of a deed tendered in performance of an agreement to convey merges the written or oral agreement to convey in the deed, the agreement to convey being discharged or modified as indicated by the deed, and thereafter the deed regulates the rights and liabilities of the parties, and evidence of contemporaneous or antecedent agreements between the parties is inadmissible to vary or contradict the terms of the deed.⁶

Similarly, but more simply stated, the Florida courts have repeatedly stated the rule "that preliminary agreements and understandings relative to the sale of property usually merge in the deed executed pursuant thereto,"⁷ and "acceptance of a deed tendered in performance of a contract to convey merges or extinguishes the covenants and stipulations contained in the contract"⁸

The classic statement of the doctrine of merger (hereinafter sometimes referred to simply as "the doctrine" or "the rule") has been repeated so frequently in essentially the form and substance as quoted above, that the courts and commentators may have lost sight of *why* the doctrine calls for the result of "extinguishing" the covenants of the contract.

The basis of the rule originates in the common law of England: Blackstone, in his *Commentaries on the Laws of England*, states that "whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is sunk or drowned in the greater."⁹ Thus, with regard to the effect of the real

6. RESTATEMENT OF CONTRACTS §§ 240(1)(b), 413 (1932). Because, as above quoted, such evidence is "inadmissible to vary or contradict" the deed, the parol evidence rule is sometimes stated as the basis for the merger rule, or it is said that the two rules are equated to or associated with each other. Professor Corbin disapproves of that connection, because the parol evidence rule is premised on the theory that the document represents the complete integration of the parties' discussions, negotiations and transaction, rather than operating to discharge an earlier agreement (as the deed operates to discharge the earlier contract under the merger rule). See 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1319, at 316 (1962); 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 587, at 506 (1960).

7. *Milu, Inc. v. Duke*, 204 So. 2d 31, 33 (Fla. 3d Dist. Ct. App. 1967).

8. *Id.*

9. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 177 (1966).

property conveyance on the antecedent contract of sale, it is said that “[t]he lesser equitable estate created by the contract is necessarily merged in and swallowed up by the legal estate created by the deed.”¹⁰

As early as 1811,¹¹ and in a series of 1800s cases thereafter,¹² the common law of England had come to recognize this specific aspect of the doctrine of merger relating to real property contracts of sale merging into the deed of conveyance. Foremost among the reasons for application of merger to real estate contracts in the early English cases, was “*functus officio*,”¹³—the need for certainty and finality in land transactions, a point after which buyer and seller could no longer pursue claims under the contract.¹⁴ The *functus officio* rationale is the natural consequence of the court’s recognition that parties to a contract for sale were entitled to (and frequently do) modify the contract (either knowingly, or without conscious act) prior to performance thereof; and—according to the law (and the needs of society)—there must come a point in time when all of these modifications reach fruition and are resolved with finality. That point is signified by the parties’ issuance and acceptance of the instrument of conveyance, which is nothing more than recognition of the elementary principle that a later agreement supersedes an earlier agreement addressing the same subject matter.¹⁵

At the same historical point in time, the early 1800s, American courts were likewise espousing the rule,¹⁶ recognizing that “[a]rticles of agreement for the conveyance of land are, in their nature, executory, and the acceptance of a deed, in pursuance thereof, is to be deemed,

10. *French v. McMillion*, 91 S.E. 538 (W. Va. 1917) (the principle is well settled that a contract of sale is merged into the deed).

11. *Legge v. Croker* 1 Ball & B. 506, 12 R.R. 49 (Ir. Ch.) (1811).

12. *Id.*; see also *Brownlie v. Campbell* 5 App. Case. 925 (H.L. 1880); *Allen v. Richardson* 13 Ch. D. 524 (1879); *Besley v. Besley* 9 Ch. D. 103 (1878); *Mason v. Thacker* 7 Ch. D. 620 (1878); *Wilde v. Gibson* 1 H.L. Case. 605, 73 R.R. 191 (1848).

13. *Functus Officio* is defined as “A task performed. Having fulfilled the function Applied to . . . an instrument . . . which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.” BLACK’S LAW DICTIONARY 606 (5th ed. 1979); and “[O]f no further official authority or legal efficacy” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 921 (1981).

14. “No rule of law is better settled than where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed.” R. DEVLIN, *THE LAW OF DEEDS* § 850a, at 1571 (3d ed. 1911).

15. See Annotation, *Merger of Contract in Deed*, 38 A.L.R.2d 1310 (1954).

16. *Houghtaling v. Lewis*, 10 Johns. 297 (N.Y. Sup. Ct. 1813); *Howes v. Barker*, 3 Johns. 506 (N.Y. Sup. Ct. 1808).

prima facie, an execution of the contract, and the agreement thereby becomes void, and of no further effect."¹⁷ Indeed, in *Howes*,¹⁸ Chief Justice Kent placed such emphasis on the merger rule that he referred to the deed as an insurmountable "impediment" to an action on the earlier contract—the deed being "the highest evidence of the final agreement of the parties."¹⁹

The doctrine of merger is said to be justified on the basis of various, stated reasons²⁰ other than, or in addition to, "functus officio." Nevertheless, no matter what the stated rationale, thorough analysis will always bring us back to the basis for the rule being that property transactions are inherently a "two-act" play²¹ in which the two acts are separated by a lengthy "intermission;"²² that the parties may during the intermission actually or impliedly change their initial agreement ("Act I"); and that whether or not they did in fact evoke a change, the second act (the closing) is deemed to carry out and fulfill the first act (the contract), so that the first act has been "swallowed up"²³ and is of no further legal effect.²⁴

Along with the development of the merger doctrine to extinguish rights and obligations under the initial contract, there grew a series of *exceptions* to the rule that are utilized by the courts in those instances in which it would be inequitable, inappropriate, or simply unfair²⁵ to

17. *Houghtaling v. Lewis*, 10 Johns. 297, 299 (N.Y. Sup. Ct. 1813).

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

19. *Id.* at 528.

20. Other reasons for the doctrine: "Caveat emptor," the purchaser has a duty to investigate the title of the vendor. See Lyn L. Stevens, *The Role Of The Doctrine Of Merger In Contracts For The Sale Of Land—The Canadian Experience*, 8 U.B.C. L. REV. 35, 38 (1973). The right of the parties to modify their agreement during the interval between the contract and conveyance of the deed. See Annotation, *Merger of Contract in Deed*, 38 A.L.R.2D 1310, 1329 (1954); *Snyder v. Roberts*, 278 P.2d 348 (1955). Waiver and release of buyer's rights in the contract upon acceptance of deed. See Annotation, *Merger of Contract in Deed*, 38 A.L.R.2D 1310, 1312 (1954).

21. The contract of sale being "Act I," and the closing document(s) (e.g., the deed of conveyance) being "Act II."

22. The executory period being the "intermission;" i.e., the interval in between the two acts.

23. See *supra* note 10 and accompanying text.

24. *Sun First Nat'l Bank v. Grinnell*, 416 So. 2d 829 (Fla. 5th Dist. Ct. App. 1982). The court explained that the contract has been "fulfilled and exhausted," and it may have "historical, but no legal, significance." *Id.* at 834.

25. See CUNNINGHAM, *supra* note 4, at 697 n.60 (Merger may be so evidently unfair that a court may go to rather astonishing lengths to 'find' evidence that it was not intended by the parties.).

refuse to enforce the antecedent contractual covenants. The early New York case, *Bull v. Willard*,²⁶ for example, acknowledged and confirmed the merger rule, *prima facie*, but also recognized that “cases may arise in which the deed would be regarded as only a part execution of the contract,” and that the “unexecuted” covenants must remain enforceable under exceptions to the rule.²⁷

In theory, the exceptions fall into several categories:

1. Fraud, mistake or accident²⁸
2. Contract provisions that are not necessarily performed by the deed,²⁹ such as
 - a. “Collateral” or “independent” covenants.³⁰
 - b. “Bifurcated” contract; “part performance.”³¹
 - c. Covenants that the parties “did not intend” to merge.³²
3. Covenants that by their own terms inherently cannot be performed until *after* the conveyance.³³

26. *Bull v. Willard*, 9 Barb. 641 (N.Y. Sup. Ct. 1850).

27. The *Bull* court then stated that it is “a nice and difficult question” to determine whether contract covenants are to be deemed executed or not; i.e., whether or not to apply merger, and went on to establish several criteria (referred to hereafter in this article as the “*Bull* criteria”) to answer the question. The *Bull* criteria inquire whether the covenant in question “looks to” or is “connected with” the title, possession, quantity, or emblems of the land; if it is, the covenant is extinguished; if not, the covenant may survive. *Id.* at 645. The *Bull* criteria are discussed further in the text accompanying notes 192-98 *infra*.

28. Rather than being exceptions to the rule, some courts and authors comment that the rule is simply “not applicable” in these situations. *E.g.*, MILTON R. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 7.2, at 649 n.5 (3d ed. 1975).

29. *See Milu, Inc. v. Duke*, 204 So. 2d 31, 33 (Fla. 3d Dist. Ct. App. 1967) (Merger “does not apply to those provisions . . . which are not necessarily performed or satisfied by the execution and delivery of the stipulated conveyance.”).

30. *See Graham v. Commonwealth Life Ins.*, 154 So. 335 (1934) (sustaining the exception to the merger rule relating to independent covenants); *see also Peterson v. Peterson*, 431 So. 2d 672, 673 (Fla. 3d Dist. Ct. App. 1983) (“Where an agreement is collateral to, or independent of, the provisions of a deed, there is no merger.”).

31. *See Milu, Inc. v. Duke*, 204 So. 2d 31 (Fla. 3d Dist. Ct. App. 1967) (provisions regarding consideration to be paid usually do not merge).

32. *See Graham v. Commonwealth Life Ins.*, 154 So. 335 (1934) (exception exists to merger rule concerning provisions not intended to be in the deed).

33. *See Peterson v. Peterson*, 431 So. 2d 672 (Fla. 3d Dist. Ct. App. 1983) (covenant to occupy premises could not be performed until after conveyance of the deed); *see also infra* note 138 and accompanying text.

4. Covenants expressly provided to survive.³⁴

Further discussion of these exceptions appears in Parts V.B. and V.C. of this article.

IV. DEVELOPMENT OF THE RULE IN FLORIDA

Discussion and approval of the doctrine of merger in the case law of Florida is found as early as 1850, in the case of *Hunter v. Bradford*.³⁵ As in the several English and American cases of similar period,³⁶ *Hunter* enunciated the *principle* of merger but did not denominate it as such. In *Hunter*, the purchaser of property prayed to enjoin his seller from collecting sums due on the purchase money indebtedness for the reason that seller's title was defective,³⁷ contrary to the agreement for sale. The court sustained purchaser's defense to the debt (thereby giving life to the seller's contractual covenant to convey good title), notwithstanding that purchaser was, and had been, in possession of the property for several years under a "title bond" (described by the court as a "mere equitable title," an *agreement* to convey at a future date).³⁸ Key to this holding giving life to the original contract, was the court's finding that no deed of conveyance had been made or accepted, and that purchaser was in possession merely under the *agreement* to convey, an *executory* contract. For—continued the court—had the deed been given, the contract would have become executed, and the defense of defective title contrary to the original contract would be of no avail to the purchaser. That is, the covenant of title under the original contract would be deemed extinguished and unenforceable. Thus, the Court distinguished between an *executory* contract, found to be the case here, and an *executed* contract, in which case the defense would not be allowed and the purchaser would be relegated solely to remedies based upon his deed. The court thus stated the doctrine of merger, without calling it by that name:

34. See *Gabel v. Simmons*, 129 So. 777 (Fla. 1930) (seller's covenant to refund purchase price did not merge into the deed because it was independent and not intended to merge).

35. 3 Fla. 269 (1850).

36. See *supra* notes 11, 12, 16 and accompanying text.

37. It is interesting to note that this earliest of Florida cases involved a matter of title to the land, a topic of great importance as appears *infra* at note 65 and accompanying text.

38. *Hunter*, 3 Fla. at 287.

Courts draw a distinction as to claims for equitable interposition between contracts *executed* and *executory* contracts, a distinction, we think, founded upon good sense and justice. "Where the purchaser has taken a deed with covenant of general warranty, under which he has entered, and remains in undisturbed possession of the land conveyed to him, if there be no fraud in the transaction, he cannot, before eviction, on the mere ground of defect of title, obtain relief in equity, or have the contract rescinded, or restitution of the purchase money. In such case, he must seek a remedy upon the covenant of warranty in his deed."³⁹

Perhaps the first Florida case to speak of the merger doctrine by name, and in substance adopt the general rule in the classic sense as recited above,⁴⁰ was the 1930 decision, *Gabel v. Simmons*,⁴¹ wherein the court adopted not only the *doctrine* of merger, but also certain of the major exceptions thereto. It seems that on August 25, 1925, the Simmonses, as purchasers, entered into a contract with Gabel, as seller, for the purchase of three lots for \$30,000, payable \$1500 on execution of the contract, \$6000 at closing, and the balance over a subsequent period post-closing. The contract contained a "special provision" (denominated as such by the court, repeatedly and—as we shall soon see—with good reason) to the effect that "[i]f purchaser is dissatisfied after 90 days from closing, all monies paid shall be returned with 10% interest."⁴² The sale was closed on August 28, 1925, by purchasers paying the \$6000 due at closing, and by seller delivering the agreed-upon closing document. Prior to the expiration of the ninety days, as well as at the expiration of the ninety days, as well as within a reasonable time after the expiration of the ninety days, purchasers verbally and in writing expressed to seller their dissatisfaction with their purchase and requested (nay, demanded) return of the \$7500 that they had paid. Seller refused, and purchasers sued. Seller defended on the basis that the above-quoted special provision in the contract providing for refund was no longer enforceable because it merged into the closing document which was silent regarding any refund rights (and therefore no cause of action could arise from that document). The classic defense of merger! As it turned out, seller was right on the rule, but wrong because of

39. *Id.* (citation omitted); *see also* *Musselwhite v. Oleson*, 53 So. 944 (Fla. 1910).

40. *See supra* note 6 and accompanying quotation.

41. 129 So. 777 (Fla. 1930).

42. *Id.* at 777.

“exceptions” thereto.

The Florida Supreme Court first confirmed its approval of the basic merger by deed rule of law, citing to Williston on Contracts⁴³ and Paige on Contracts,⁴⁴ and quoted with approval from the Pennsylvania Supreme Court:

[t]he general rule is that preliminary agreements and understandings relating to the sale of land become merged in the deed.⁴⁵

The Florida Supreme Court then went on to hold that the merger rule was not applicable to this contract clause in this case for several reasons (“exceptions” to the rule):⁴⁶ The 90-day refund provision was an *independent covenant* that the parties did *not intend* to be incorporated into the closing document; delivery of the closing document was *merely part performance* of the contract, was *not* delivered by seller or accepted by buyer *as full performance* of the contract, so the contract *remains binding* as to its other provisions; and the closing document does *not cover the entire subject matter* of the original contract.⁴⁷ Additionally, and perhaps the court’s most important statement of rationale when analyzing the holding in this case from the viewpoint of the doctrine of merger in its classic sense, merger was held inapplicable here to the special 90-day refund provision because that covenant “constituted a *special agreement* which was *not appropriate* to be included in the [closing document]. . . .”⁴⁸ In other words, merger *is* applicable to contract provisions that are “appropriate” to be included in the closing document; but, merger should not be applicable to a provision that is “not appropriate” to be included in the closing document.⁴⁹

Gabel was but one of four early 1930s Florida cases dealing with the merger rule.⁵⁰ *Graham*,⁵¹ for example, followed *Gabel*, stating that

43. *Id.* at 778.

44. *Id.* (citing 4 PAIGE ON THE LAW OF CONTRACTS § 2568 (2nd ed. 1929)).

45. *Id.* (citing *Caveny v. Curtis*, 101 A. 853, 854 (Pa. 1917)).

46. *Gabel*, 129 So. at 778. The combined usage of several exceptions to the rule, as in *Gabel*, is analyzed further *infra* note 123 and accompanying text.

47. *Id.*

48. *Id.*

49. *Id.* The *Gabel* court’s theory runs parallel to the “*Bull* criteria” discussed later in this article, which as will be seen constitutes substantial underpinning for determining those (limited) situations in which use of the merger rule is conceptually correct (the “true merger” cases), namely where it *would be appropriate* for the closing document to include the subject matter of the earlier contract.

50. The other three cases are: *Graham*, 154 So. 335 (Fla. 1934) (discussed *infra*

“[i]t is a general rule that preliminary agreements and understandings relative to the sale of property usually merge in the deed and mortgage by which the original contract becomes executed.”⁵² The court then again quoted with approval the very same statement from the Pennsylvania supreme court⁵³ as was quoted in *Gabel*, but found the contractual provision *sub judice* (a covenant regarding subordination of the purchase money mortgage to a construction loan mortgage) within several of the exceptions to the rule, and therefore enforceable.⁵⁴

Thus, by the early 1930s the doctrine of merger (and several of its exceptions) had become firmly ingrained in Florida case law. During the next thirty years, however, the appellate courts in Florida were called upon to visit the rule only once.⁵⁵ Nevertheless, during the succeeding twenty-six-year period (from 1965 through current date), not less than twenty-two Florida cases have dealt with the doctrine of merger.⁵⁶ These latter cases, sometimes referred to in this article as the “recent Florida cases,” are summarized in the Appendix to this article and are discussed and analyzed throughout the balance of this article. Analysis of these recent Florida cases gives us pause to look closely at the conceptual basis for the doctrine of merger as stated, for example, in the early case of *Bull v. Willard*,⁵⁷ and here we question whether the recent cases are applying the correct doctrine. Thus, as the balance of this article unfolds, we trace the more recent Florida case law and approach the headline of this article: Taking the Bull by the Horns.

at notes 51 through 54 and accompanying text); *White v. Crandall*, 143 So. 871, 879 (Fla. 1932) (“where the defendant has completed the purchase, accepted his deed, the transaction is closed, and the purchaser is confined to his action for breach of the covenant” contained in the deed); and *Riddle v. Coliver*, 156 So. 880 (Fla. 1934) (provision in original agreement of sale that buyer would assume existing mortgage was not “destroyed” by the fact that the deed of conveyance was only made “subject to” the mortgage).

51. *Graham*, 154 So. at 337 (sustaining the exception to the merger rule, concerning independent covenants and covenants not intended to be incorporated into the deed and whose subject matter is not covered by the deed).

52. *Id.*

53. *See Caveny v. Curtis*, 101 A. 853 (Pa. 1917).

54. *Graham*, 154 So. at 337 (the covenant subordinated a purchase money mortgage to an anticipated construction loan first mortgage).

55. *See Volunteer Sec. Co. v. Dowl*, 33 So. 2d 150 (Fla. 1947).

56. *See APPENDIX infra.*

57. 9 Barb. 641 (N.Y. Sup. Ct. 1850).

V. ANALYSIS OF RECENT FLORIDA CASES: ARE THE EXCEPTIONS OVERTAKING THE RULE?

Of the twenty-two recent Florida cases dealing with the merger doctrine during the period from 1965 through current date, eight applied the rule and refused to enforce the contract provision, two augured applicability of the rule by dicta, while twelve cases found that the subject contract provision fell within some exception to the rule and was therefore still viable and enforceable.⁵⁸ Looking strictly at the last decade, merger was applied twice (maybe twice more, by dicta), while exceptions were found and the rule was rejected in ten cases.⁵⁹ Are the exceptions overtaking the rule? If so, why?

An attempt was made to categorize the decisions based upon the subject matter of the contractual provision. As seen in the Appendix,⁶⁰ this exercise proved worthwhile in certain respects,⁶¹ yet in other respects the results were confusing and futile.⁶² The following sections of this article discuss these decisions in the contexts of:

- A) Analyzing the cases in which the merger rule was applied, and the contract provision was therefore held unenforceable;
- B) Analyzing the cases that found exceptions to the merger rule, declined to apply the rule, and thus allowed enforcement of the antecedent contract;
- C) Analyzing the cases which held that the merger rule was not applicable due to mistake, fraud or accident, and therefore allowed enforcement of the contract;

58. See APPENDIX *infra*.

59. *Id.*

60. *Id.*

61. *E.g.*, *Stephan v. Brown*, 233 So. 2d 140 (Fla. 2d Dist. Ct. App. 1970) (demonstrating a consistent application of the doctrine or of exceptions to the doctrine); *White v. Crandall*, 143 So. 871 (Fla. 1932) (same); see also *Bennett v. Behring*, 466 F. Supp. 689 (S.D. Fla. 1979) (those covenants involving matters of "title" consistently merge into the deed).

62. For example, several cases involved the same subject matter but the appellate courts reached inconsistent results. See *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989) (provision for award of attorney's fees do not merge into deed); *Steinberg v. Bay Terrace Apartment Hotel*, 363 So. 2d. 58 (Fla. 3d Dist. Ct. App. 1978) (seller's covenant regarding compliance with city codes does not merge into the deed). *But see* *Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978) (seller's covenant against city code violations merged into deed); *Gordon v. Bartlett*, 452 So. 2d 1077 (Fla. 4th Dist. Ct. App. 1984) (provision for award of attorney's fees merged into deed).

D) Seeking to discern common threads as to why the merger rule was or was not applied.

A. *Merger Rule Applied; Contract Provision Unenforceable*

1. Title Cases

2. Accord and Satisfaction Cases

The Florida case law has generally followed the majority view⁶³ and the "trend"⁶⁴ in applying the merger rule to those cases involving matters of title.⁶⁵ This conclusion is not only in accord with the dictates of *Bull*,⁶⁶ but also certainly makes sense as a consequence of the "same subject matter" rationale.⁶⁷ For, where the subject matter of the contract (here, a covenant concerning the quality of title) is the same subject matter as covered in the deed (typically, a *Warranty Deed*, warranting the quality of title), then it makes perfect sense to hold that the later instrument superseded the earlier with respect to that subject matter, thereby extinguishing any further legal efficacy of the earlier covenant. The difficulty arises, of course, in discerning what is a "matter of title."

Two fairly early Florida cases⁶⁸ dealt with restrictive covenants ["incumbrances" (sic) on the title, wrote the court]⁶⁹ and in both cases the merger rule was applied. In the first case, *White v. Crandall*,⁷⁰ the antecedent representation was alleged to have been that the land was free from encumbrances. In fact, it was shown that several building restrictions, race restrictions, and easements existed encumbering the land, and it was further shown that the documentation of these burdens

63. Annotation, *Merger of Contract in Deed*, 38 A.L.R. 2d 1310, 1327 (1954); Annotation, *Merger of Contract in Deed*, 84 A.L.R. 1008, 1024 (1932).

64. See CUNNINGHAM, *supra* note 4, at 697-98 nn. 57, 61.

65. See *Volunteer Sec. Co. v. Dowl*, 33 So. 2d 150 (Fla. 1947); *White v. Crandall*, 143 So. 871 (Fla. 1932); *Stephan v. Brown*, 233 So. 2d 140 (Fla. 2d Dist. Ct. App. 1970) (covenants concerning matters of title usually merge into deed); *St. Clair v. City Bank & Trust*, 175 So. 2d 791 (Fla. 2d Dist. Ct. App. 1965).

66. See *infra* notes 192-99 and accompanying text.

67. See *infra* notes 190-91 and accompanying text.

68. See *Volunteer Sec. Co. v. Dowl*, 33 So. 2d 150 (Fla. 1947); *White v. Crandall*, 143 So. 871 (Fla. 1932).

69. *White*, 143 So. at 879.

70. 143 So. 871 (Fla. 1932).

upon the land was of public record when title was conveyed and accepted. The Court held that the antecedent representations of free and clear title merged into the deed conveying this title, and were no longer viable.⁷¹ The second fairly early case, *Volunteer Security*,⁷² involved the opposite situation from *White*.⁷³ Rather than a covenant *against* encumbrances (as in *White*), the contract in *Volunteer Security* affirmatively contained the encumbrances to the land, which were residential, building and race restrictions that the buyer of the property sought to enforce. The deed to the subject property, however, was silent as to any restrictions. The court again held the doctrine of merger to be applicable, and ruled that the restrictions contained in the contract had merged into the (silent) deed, and were therefore unenforceable.⁷⁴

Only one of the "more recent"⁷⁵ Florida cases dealt with restrictive covenants, and that was the Federal district court case, *Bennett v. Behring Corp.*⁷⁶ Similar to the accusation in *White*,⁷⁷ the complaint in *Bennett* was that restrictive covenants of record constituted a breach by seller of its promise under the contract of purchase and sale to deliver title free and clear of all encumbrances. The particular restriction on title complained of in *Bennett* required all homeowners in a certain 31-community development to become lessees under recreational facilities leases and to pay rental fees thereunder. In a class action on behalf of all homeowners, the plaintiffs contended that their seller (the defendant-developer of the communities) breached its contract promise of clear title by virtue of this encumbering restriction. The facts revealed, however, that a reference to this restriction appeared on the face of all of the deeds that were delivered to and accepted by the plaintiff-purchasers. Accordingly, defendant-seller argued—and the court so ruled—that any complaint that purchasers might have had for defective title contrary to the covenants of clear title as contained in their contracts of purchase and sale, was barred by the doctrine of merger. Those contract covenants respecting the quality of title merged away, or more accurately merged into, the deeds by which the original con-

71. *Id.* at 871 (continuing: "The transaction became an executed contract of sale of the land. The purchase was completed and the defendant *accepted the title . . .*") (emphasis added).

72. 33 So. 2d 150 (Fla. 1947).

73. *White*, 143 So. 871 (Fla. 1932).

74. *Volunteer*, 33 So. 2d at 151.

75. The period from 1965 to date. See *supra* notes 55-56 and accompanying text.

76. 466 F. Supp. 689 (S.D. Fla. 1979).

77. See *White*, 143 So. at 871.

tracts became executed. The title covenants of the deeds controlled, and since the deeds were expressly made subject to the restriction, no action could lie thereunder for defective title. The Court went on to espouse that:

The plaintiffs' remedy would have been to refuse to close, [to refuse to] accept the deed, and sue on the contract. Failing this, plaintiffs' sole remaining remedy is to sue for a breach of covenant in the deed which is not possible since the exception to the covenant is clearly stated.⁷⁸

Continuing in the line of "title" cases, the only other recent Florida case involving a covenant against encumbrances on title was *Stephen v. Brown*,⁷⁹ where again the seller covenanted under the written contract of sale that the conveyance of title would be free and clear of all encumbrances. The deed delivered and accepted at closing contained no covenant against encumbrances. Post-closing, purchaser sought rescission alleging that the property was in sub-standard condition contrary to the city code, that this violation constituted an encumbrance on title, and that seller knew of the violation (the "encumbrance") prior to the closing. The trial court's dismissal of purchaser's complaint was affirmed on appeal: The contractual covenant respecting this matter of title was not actionable, it having merged into the (naked) deed.

Another recognizable pattern in the Florida case law is adherence to the merger rule in factual situations evidencing orthodox accord and satisfaction. This pattern is clearly illustrated by a graphic analysis in outline form of the following two recent Florida cases:⁸⁰ In *St. Clair*,⁸¹ there was:

1. *An agreement*: Seller covenanted, in the contract of sale, to convey by warranty deed.
2. *A problem*: During the executory period (between contract and closing), it was discovered that title to a portion of the property (a 15-foot strip on one side) was not insurable.

78. *Bennett*, 466 F. Supp. at 701-02.

79. 233 So. 2d 140 (Fla. 2d Dist. Ct. App. 1970).

80. See *Uwanawich v. Gaudini*, 334 So. 2d 116 (Fla. 3d Dist. Ct. App. 1976); *St. Clair v. City Bank & Trust Co. of St. Petersburg*, 175 So. 2d 791 (Fla. 2d Dist. Ct. App. 1965).

81. *St. Clair*, 175 So. 2d 791.

3. *A resolution*: To resolve the problem, the seller offered and the purchaser agreed to accept a quit-claim deed to the 15-foot strip.
4. *An accord and satisfaction*: In a subsequent action to foreclose the purchase-money mortgage given in connection with the sale, the purchaser-mortgagor raised as a defense that seller had failed to fulfill his covenant to convey by warranty deed. *Held, accord and satisfaction*; the obligation under the subject covenant had been discharged "by merger."⁸²

In *Uwanawich*,⁸³ there was:

1. *An agreement*: Buyer and seller agreed, in the contract of sale, that the purchase-money mortgage would contain a thirty-day default clause.
2. *A problem*: During the executory period, a problem arose concerning the seller's insistence that the purchase-money mortgage be joined in execution by the buyer's wife (a non-signatory to the contract of sale).
3. *A resolution*: To resolve the problem, the seller offered to accept the mortgage without the wife's joinder if the thirty-day default clause were reduced to a fifteen-day period. Buyer agreed and the closing documents (deed and mortgage) were so executed and delivered.
4. *An accord and satisfaction*: In a subsequent action to foreclose the purchase-money mortgage, the buyer-mortgagor attempted to invoke defensive relief under the contracted-for 30-day default clause. *Held, accord and satisfaction*; that agreement had been discharged "by merger."⁸⁴

A variety of particular contractual covenants were involved in the several other recent Florida cases examined in which the doctrine of merger was applied. The various types of covenants under adjudication included an attorney's fee provision,⁸⁵ a representation against code vio-

82. *Id.* at 792. On point is Corbin's commentary:

If the contract of sale required the vendor to convey a perfect title by a warranty deed and the purchaser later accepts a quit claim deed as full performance, he can not enforce the original contract that required more. If this is correct, it should be described as a discharge by accord and satisfaction or substituted contract and not by "merger."

6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1319, at 310-12 (1962).

83. *Uwanawich v. Gaudini*, 334 So. 2d 116 (Fla. 3d Dist. Ct. App. 1976).

84. *Id.* at 118.

85. *See Gordon v. Bartlett*, 452 So. 2d 1077 (Fla. 4th Dist. Ct. App. 1984); *see*

lations,⁸⁶ conditions for releasing property from a purchase-money mortgage,⁸⁷ and terms of payment for a business located on (but payment not directly secured by) associated real property;⁸⁸ and in each of these cases, the antecedent contractual covenant was held unenforceable because of the merger rule. Additionally, dicta in one very recent case⁸⁹ indicated that although the court did not have to reach this issue, merger would have applied and the court would have refused to enforce the contract condition discussed there (a warranty against violation of governmental regulations as of closing) had the plaintiffs' case not fallen for other reasons.⁹⁰ However, contrary to the consistency heretofore noted in the application of the rule to cases involving matters of title⁹¹ and cases involving obvious accord and satisfaction,⁹² no pattern or generalized rule of law can be gleaned from this latter group of miscellaneous Florida cases⁹³ that all applied the merger doctrine.

B. *Exceptions to the Merger Rule; Contract Enforced*

Continuing our review of the recent Florida cases, we now proceed to analyze those in which the court declined to apply the merger rule, and accordingly enforced the provision of the original contract of purchase and sale on the basis that the particular contract covenant fell within an exception to the rule under the facts and circumstances sub judice. A side-by-side analysis of two recent cases, *Fraser*⁹⁴ and

also infra note 141 and accompanying text.

86. See *Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978); see *also infra* note 93 and accompanying text.

87. See *Sun First National Bank of Orlando v. Grinnell*, 416 So. 2d 829, 834 (Fla. 5th Dist. Ct. App. 1982) (the contract for sale was "fully performed when . . . closed." "Such a fulfilled and exhausted contract has historical, but no legal, significance . . .").

88. See *Soper v. Stine*, 184 So. 2d 892, 894 (Fla. 2d Dist. Ct. App. 1966) (A preliminary agreement for the sale of the business merged into the deed. The preliminary agreement was not "outside, collateral to, or independent of" the deed.).

89. *Field v. Perry*, 564 So. 2d 504 (Fla. 5th Dist. Ct. App. 1990).

90. *Id.* at 509-10 (court's decision of reversal was grounded on the lack of substantial evidence of the violation of governmental regulations). Consequently, the court's commentary that the cause of action "was dismissible," for merger reasons was dicta. *Id.* at 506 n.3.

91. See *supra* notes 65-79 and accompanying text.

92. See *supra* notes 80-84 and accompanying text.

93. See *supra* notes 85-90 and accompanying text.

94. *Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978).

Opler,⁹⁶ both decided by the same court⁹⁶ and within three years of each other, demonstrates quite similar fact patterns, with conflicting results—one *applied* the rule and refused enforcement of the contract; the other found an *exception* to the rule and allowed enforcement of the contract covenant. This apparent clash may best be illustrated by comparing the two cases in outline form: In *Fraser*.⁹⁷

1. *Contract provision*: "8. Seller further states that there are no code violations of the City of Miami Beach or the County of Dade."
2. *Facts*: Buyer knew, before closing, that there existed in the property violations of city building and zoning regulations.
3. *Buyer closed*.
4. *Court held*: Buyer could not recover for breach of the above-quoted provision. Buyer was precluded by the doctrine of merger. The contract provision merged into the deed.

In *Opler*:⁹⁸

1. *Contract provision*: "F: *Ingress and Egress*: Seller covenants and warrants that there is ingress and egress to said property."
2. *Facts*: Buyer knew, before closing, that the property was without ingress and egress.
3. *Buyer closed*.
4. *Court held*: Buyer was entitled to recover for breach of the above-quoted contract provision. Buyer was protected by an exception to the merger rule. The contract provision did not merge into the deed.

An attempt to distinguish these two cases from each other provides a springboard to scrutinize various exceptions to the merger rule (which exceptions are not mutually exclusive, but in many cases overlap with each other). Both cases first acknowledged, confirmed, and restated the basic doctrine that as a general rule, all preliminary agreements and understandings relative to the sale of property usually merge

95. *Opler v. Wynne*, 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 472 (1982).

96. The Florida Third District Court of Appeal.

97. 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978).

98. 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 472 (1982).

into the deed of conveyance executed pursuant thereto.⁹⁹ And each decision then went on to consider and dispose of certain of the recognized exceptions to the rule. Succinctly stated, *Fraser* considered but rejected the “no intent to merge” exception and the “not necessarily performed by the deed” exception, while *Opler* sustained the “collateral” or “independent” covenant exception. Perhaps the distinction between the holdings in these two cases, although not specifically so analyzed or discussed in either opinion, stems directly from the inherent fact that in *Fraser* the covenant against code violations was a representation concerning the condition of the property itself (a covenant *on* the property), while the access covenant in *Opler* dealt with a condition not involving the deeded property *per se* but the availability of ingress and egress over lands outside the boundaries of the deeded property (a covenant *off* the property). In other words, consistent with the postulate developed later in this article regarding “true merger”¹⁰⁰ and the crucial common law requirement thereof that the subject matter of the contract must be one that is fundamental to or inherent in the land in question,¹⁰¹ it can well be argued that the access covenant pertained to *terra firma* other than the land under contract and hence the doctrine of merger is out of the question.

The “no intent to merge” exception was stated by the court in *Milu* as follows: “The rule (of merger) . . . does not apply to those provisions of the antecedent contract which the parties do not intend to be incorporated in the deed . . .”¹⁰² The “no intent” exception is often combined with one or more of the other exceptions to the rule. Thus, in *Milu*,¹⁰³ where the seller’s complaint against his buyer for payment of the balance of the sales price (which, per the contract was to be certain shares of stock) was based on the original contract of sale, and the buyer defended on the basis that the contract was no longer a viable instrument on which to base a cause of action because the sale was closed and a deed was delivered to and accepted by the buyer, the court invoked both the “no intent to merge” exception and the “not necessarily performed by the deed” exception¹⁰⁴ in sustaining the complaint

99. *Fraser*, 364 So. 2d at 534; *Opler*, 402 So. 2d at 1311.

100. See *infra* notes 202-07 and accompanying text; see also *Bull v. Willard*, 9 Barb. 641 (N.Y. Sup. Ct. 1850).

101. See *infra* notes 192-98 and accompanying text; see also *Bull*, 9 Barb. 641.

102. *Milu, Inc. v. Duke*, 204 So. 2d 31,33 (Fla. 3d Dist. Ct. App. 1967).

103. *Id.*

104. The merger rule does not apply to contract provisions “which are not necessarily performed or satisfied by the execution and delivery of the stipulated convey-

and holding that the contract provision promising payment (“consideration”) was still enforceable.¹⁰⁵ The same conclusion has been reached by the appellate courts of numerous other states, to the extent that it may be said that there is a general exception to the merger rule that permits enforcement of contract provisions relating to payment of consideration notwithstanding delivery and acceptance of the deed.¹⁰⁶ The reason for this generally recognized exception has been stated that in practice deeds of conveyance do not usually recite the consideration with particularity or accuracy¹⁰⁷ (rather, a typical recitation of consideration is often “Ten dollars and Other Good and Valuable Consideration”), and thus it cannot be concluded that the parties intended to fulfill the earlier consideration covenant by passage of the deed. It would seem, however, that the issue of whether the consideration covenant was or was not fully performed by passage of the deed, is an evidentiary question in the realm of accord and satisfaction rather than merger, a point developed further in Part VI of this article.¹⁰⁸

The “no intent to merge” exception, combined with the “not necessarily performed by the conveyance” exception, also formed the basis of the court’s decision in *Sager v. Turner*.¹⁰⁹ Relying strongly on *Milu*,¹¹⁰ the plaintiff-buyer in *Sager* was allowed to recover against his seller for breach of seller’s contract covenants that 1) buyer would be able to obtain all necessary permits and licenses to operate the property (a mobile home park), and 2) there existed no violations of any licenses, permits, local ordinances, restrictions or easements, notwithstanding the seller’s arguments of merger.¹¹¹ Although at first blush the covenant against violations in *Sager* appears most identical with that in *Fraser*¹¹² and precedent within the same appellate district would be compelling of a merger holding, closer scrutiny reveals factual distinc-

ance.” *Id.*

105. “Contractual provisions as to considerations to be paid by the purchaser are ordinarily not merged in the deed” *Id.* (emphasis added).

106. See Annotation, *Merger of Contract in Deed*, 38 A.L.R.2d 1310, 1334 (1954) (The deed is not conclusive as to the amount of consideration.).

107. *Id.*

108. “Merger” has become just a buzzword; “Accord and Satisfaction” is the more appropriate doctrine in most cases. See *infra* Part VI.

109. 402 So. 2d 1282 (Fla. 3d Dist. Ct. App. 1981).

110. *Milu, Inc. v. Duke*, 204 So. 2d 31 (Fla. 3d Dist. Ct. App. 1967).

111. *Sager*, 402 So. 2d at 1283.

112. *Fraser*, 364 So. 2d at 533.

tions in these two cases. In *Fraser*, it is recalled,¹¹³ the buyer closed with knowledge of and in the face of existing building and zoning violations, and no recovery was allowed under buyer's subsequent action for breach of the contract of sale covenant against such violations, because of the doctrine of merger. In *Sager*, however, as the court pointed out, there was no evidence that this buyer knew of any violations pre-closing, and furthermore the contract covenant sued upon contemplated that *buyers* would obtain all necessary operational licenses and permits, obviously an act that could not take place until *after* closing¹¹⁴ and which was dependent on there being no ordinance violations. Hence, the court extracted the buyers in *Sager* from the fatal consequence of the merger rule by the "no intent to merge" exception and by the additional exception that the breached contractual covenant was "not necessarily performed or satisfied by the execution and delivery of the stipulated conveyance."¹¹⁵

The "collateral covenant" or "independent covenant" exception, relied on in *Opler*¹¹⁶ and other recent Florida cases,¹¹⁷ had its Florida genesis as the basis for the court declining to apply merger in the early 1930s cases of *Gabel*¹¹⁸ and *Graham*.¹¹⁹ The statement of the exception is rather straightforward: "Where an agreement is collateral to, or independent of, the provisions of the deed, there is no merger,"¹²⁰ Nevertheless, the theory behind this exception is really intertwined with the "no intent to merge" and the "not necessarily performed by the deed"

113. See *supra* note 97 and accompanying text.

114. See *Sager*, 402 So. 2d at 1283.

115. The *Sager* court took great pains to distinguish its holding from *Fraser*. *Sager*, 402 So. 2d at 1283. It was the *Sager* court's holding that the language "plainly survived the closing" *because* they contemplated an action (obtaining all necessary permits and licenses) to be taken by buyer *after* the closing. *Id.* The "action after closing" exception is discussed further *infra* notes 135-38 and accompanying text. See also *Steinberg v. Bay Terrace Apartment Hotel*, 363 So. 2d 58 (Fla. 3d Dist. Ct. App. 1978) (no merger found and contract provisions enforced for city code violation contrary to seller's representation as to quantity of units allowable in apartment building).

116. *Opler*, 402 So. 2d at 1311.

117. See *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989); *American Nat'l Self Storage v. Lopez-Aguilar*, 521 So. 2d 303 (Fla. 3d Dist. Ct. App. 1988); *Peterson v. Peterson*, 431 So. 2d 672 (Fla. 3d Dist. Ct. App. 1983).

118. See *Gabel v. Simmons*, 129 So. 777 (Fla. 1930).

119. See *Graham v. Commonwealth Life Ins.*, 154 So. 335 (Fla. 1934).

120. *Peterson v. Peterson*, 431 So. 2d 672, 673 (Fla. 3d Dist. Ct. App. 1983) (separate agreement made to quit claim the property back to transferor if transferee ceased living on the property).

exceptions. These exceptions are akin to each other in that they all go to the heart of the merger rule in recognizing that for there to be a discharge of the antecedent covenant, the parties must have knowingly done so or the circumstances must be such that knowledge of the consequences of their action is imputed to them; and if such knowledge (or imputed knowledge) is absent, then the contract covenant will be saved by an exception to the rule.

For example, the contract covenant sought to be enforced by the buyer of the property in *Gabel*,¹²¹ we recall,¹²² was seller's promise that "[i]f purchaser is dissatisfied after 90 days from closing, all monies paid shall be returned with 10% interest." In denying seller's defense that the promise was unenforceable due to merger, the court relied upon a combination of several of the exceptions to the rule in order to sustain the life of the subject contract covenant:¹²³

1. The covenant was "independent;" it "constituted a special agreement which was not appropriate to be included" in the closing document. Therefore, the covenant survived.
2. The covenant was "not intended" by the parties to be incorporated in the closing document. Therefore, it survived.
3. The delivery of the conveyance was merely "part performance of the contract, which remains binding as to its further provisions." Therefore, the subject promise survived.
4. The closing document did not "cover the entire subject-matter contracted for." Therefore, this promise—being subject-matter not covered by the closing—survived.

The theory thus was emerging, later confirmed by *Graham*,¹²⁴ that for the doctrine of merger to operate, the subject matter of the contract provision that is claimed to be unenforceable must be the same subject matter as was encompassed within (or, as is typically deemed included in) the document delivered and accepted at closing. When that parallelism exists, it may be said that the liabilities under the contract have been "discharged by merger;"¹²⁵ absent that parallelism, the covenant may be said to be one which is "outside of, collateral to, or independent of the provisions of the deed; [and] they survive delivery and accept-

121. 129 So. 777 (Fla. 1930).

122. See *supra* notes 41-49 and accompanying text.

123. *Gabel*, 129 So. at 777-78.

124. 154 So. at 337-38.

125. See 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 310-12 (1962).

ance of the deed of conveyance and remain enforceable."¹²⁶

In pursuance of this line of reasoning, seller's contract representation and warranty that sufficient water, sewer and electric service capacity was available at the property site was clearly seen by the court as an enforceable "collateral agreement" in *American National Self Storage v. Lopez-Aguilar*,¹²⁷ the court explained:

The continued efficacy, then, of collateral agreements which are not usually included in the terms of a deed is not affected by the merger rule [citing *Milu* and *Soper*]. Such collateral agreements call for acts by the seller which go beyond merely conveying clear title and placing the purchaser in possession of the property.¹²⁸

Several general types of contract clauses have become stereotyped as "collateral" or "independent," and thus generally speaking are deemed exceptions to the merger rule almost as a matter of course, without the courts affording much discussion or analysis in the more recent individual cases.¹²⁹ One such type of clause, the seller's warranty concerning availability of water, sewer or other utilities, has already been examined.¹³⁰ Another stereotyped group of clauses, closely akin to the foregoing, is seller's representation about the nature or condition of the property, such as: "Seller warrants air conditioning and heating systems, . . . to be in working order at the time of closing."¹³¹ Holding that this warranty did survive the closing, the court observed: "Our research reveals that the warranty in this case is the type of independent covenant *generally excepted* from the merger doctrine."¹³² The court's prescient 1980 general observation in *Campbell*¹³³ has gained

126. *Opler v. Wynne*, 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981) (seller covenants ingress and egress to the property), *rev. denied*, 412 So. 2d 472 (1982).

127. 521 So. 2d 303 (Fla. 3d Dist. Ct. App. 1988).

128. *Id.* at 305; *see also In re Wildflower Landholding*, 49 Bankr. 246 (M.D. Fla. 1985) (rejecting a claim of merger respecting seller's contract covenants to make water and sewer services available to the property site (as well as additional covenants by seller to grant free golf and tennis club membership and to build a road) on the basis of the "no intent to merge" exception).

129. *See Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989) (attorney's fee provision falls within the collateral agreement exception).

130. *See supra* notes 127-28 and accompanying text.

131. *Campbell v. Rawls*, 381 So. 2d 744, 745 (Fla. 1st Dist. Ct. App. 1980).

132. *Id.* at 746 (emphasis added).

133. *Id.*

virtually universal acceptance in the past ten years.¹³⁴

A natural by-product of the several exceptions already discussed (“no intent to merge,” “not necessarily performed by the deed,” “merely part performance,” “bifurcation,” “collateral” or “independent” covenant, and “not the same subject matter”), is the “action after closing” exception. It would seem only logical that where a party was without the legal power, capacity or ability to perform a contractually required act until *after* the closing, then inherent in that contract is not only the parties’ intent but a mandatory legal conclusion that the covenant survives the closing. This was part of the court’s reasoning, we recall, in *Sager*,¹³⁵ where the contract covenants sought to be enforced contemplated post-closing action (obtaining operating permits and licenses in a violation-free property), and thus it was the court’s holding that the covenants must be deemed to survive closing, must be enforceable or else the parties’ obvious intent could not be fulfilled.

This “action after closing” exception also formed the basis for allowing enforcement of the antecedent contract covenant in *Peterson*,¹³⁶ where the covenant sought to be enforced was grantee’s promise to reconvey the residence to grantor (grantee’s brother) if grantee should ever cease to occupy the property. In striking down grantee’s defense that his contract covenant to reconvey was no longer enforceable because it had merged into the deed, the court noted:

Here the agreement by its very terms reflects the intent of the parties that it be independent of the deed [citation omitted]. Moreover, the agreement, again by its very terms, could not become effective until *after* the delivery of the deed, since prior to that time Jack would have no life estate to forfeit by ceasing to occupy the property.¹³⁷

The conclusion was obvious, therefore, that a covenant that could not possibly be performed until after delivery of the deed, must be “collateral to” and “independent of” that deed; and so held the two out-of-

134. See *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989); *Durden v. Century 21 Compass Points*, 541 So. 2d 1264 (Fla. 5th Dist. Ct. App. 1989); *American Nat’l Self Storage v. Lopez-Aguilar*, 521 So. 2d 303 (Fla. 3d Dist. Ct. App. 1988); *Kidd v. Fowler*, 498 So. 2d 969 (Fla. 4th Dist. Ct. App. 1986); *Sager v. Turner*, 402 So. 2d 1282 (Fla. 4th Dist. Ct. App. 1981).

135. See *supra* notes 114-15 and accompanying text.

136. See *Peterson v. Peterson*, 431 So. 2d 672 (Fla. 3d Dist. Ct. App. 1983).

137. *Id.* at 673 (emphasis added).

state cases¹³⁸ cited in *Peterson* in support of this proposition.

Another stereotypical clause has produced conflicting results and confusing analysis in the recent case law of Florida, and that is the "prevailing party attorney's fees" clause.¹³⁹ The conflict and confusion concerning the applicability of the doctrine of merger to this type of clause is glaring, as illustrated by comparing the holdings in following five cases. In each of these cases, an attorney's fee provision was contained solely in the particular contract of sale, and in each case enforcement of the contract clause was sought after the transaction had closed and the deed had changed hands. The holding in each of these cases was as follows:

1. *Campbell*:¹⁴⁰ Attorney's fees properly awarded to the prevailing party. No merger.
2. *Gordon*:¹⁴¹ Prevailing party not entitled to attorney's fees, because that contractual provision merged into the deed.
3. *Fleischer*:¹⁴² Attorney's fees denied on other grounds (namely, that the action was in *tort*, not "arising out of this *contract*"); however, substantial dicta approving and reaffirming the denial of attorney's fees in *Gordon*, based upon merger.
4. *Burkett*:¹⁴³ Prevailing party is entitled to attorney's fees. No merger.
5. *Field*:¹⁴⁴ Prevailing party is entitled to attorney's fees, the amount to be determined on remand. No merger.

138. The cited cases were: *Industrial Development Foundation v. United States Hoffman Machinery Corp.*, 171 N.Y.S.2d 562 (1958) (agreement forfeiting life estate is not effective until after delivery of deed because there is no life estate to forfeit until delivery); *Chicago Title & Trust Co. v. Wabash Randolph Corp.*, 51 N.E.2d 132 (Ill. 1943) (agreement creating easement is not valid until deed is delivered).

139. The contract clause provided for the payment of attorney's fees:

Attorney fees and costs: In connection with any litigation arising out of this contract, the prevailing party whether Buyer, Seller or Broker, shall be entitled to recover all costs incurred including reasonable attorney's fees for services rendered in connection with such litigation including appellate proceedings and post judgment proceedings.

Fleischer v. Hi-Rise Homes Inc., 536 So. 2d 1105-06 (Fla. 4th Dist. Ct. App. 1988).

140. *Campbell v. Rawls*, 381 So. 2d 744 (Fla. 1st Dist. Ct. App. 1980).

141. *Gordon v. Bartlett*, 452 So. 2d 1077 (Fla. 4th Dist. Ct. App. 1984).

142. *Fleischer v. Hi Rise Homes Inc.*, 536 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1988).

143. *Burkett v. Rice*, 542 So. 2d 480, 481 (Fla. 2d Dist. Ct. App. 1989) ("[T]his contract provision is not merged into the warranty deed.").

144. *Field v. Perry*, 564 So. 2d 504 (Fla. 5th Dist. Ct. App. 1990).

Part of the confusion in the cases involving attorney's fee provisions stems from the fact that in some of the cases the courts focus on the contract's attorney's fee provision itself in determining the merger issue, while in other cases the courts consider the attorney's fee clause an appendage of the primary contractual provision that formed the gravamen of the action or the defense to the action in answering whether or not merger should apply.¹⁴⁵ Nevertheless, even with the recognition of this dichotomy, there is still no consistency in the holdings, as illustrated by the five cases outlined above. Based upon the criteria approved in *Fleischer*¹⁴⁶ (the "*Bull* criteria" as hereinafter discussed),¹⁴⁷ it would seem that a sterile prevailing party attorney's fee provision, standing by itself, would be "collateral" and would not merge, since it does not involve title, possession, quantity, or emblements of the land. However, if the life of the attorney's fees provision is dependent upon the survival of the substantive contractual provision on which the action or defense was based,¹⁴⁸ then the attorney's fee provision must be viewed as "a bird riding on a wagon,"¹⁴⁹ so that the substantive provision must first be subjected to the *Bull* test, and then "as goes the substantive provision, so goes the attorney's fees."¹⁵⁰

C. *Mistake, Accident, Fraud; Contract Enforceable*

It has been said that "[t]he execution and acceptance of the deed does not affect the rights of the purchaser to relief against the vendor on the ground of fraud or mistake, if the purchaser was laboring under its influence at the time of his acceptance of the deed."¹⁵¹

145. See *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989).

146. 536 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1988).

147. *Bull v. Willard*, 9 Barb. 641, 645 (N.Y. Sup. Ct. 1850). See *infra* notes 192-98 and accompanying text. The four *Bull* criteria cited in *Fleischer* are title, possession, quantity, and emblements. *Fleischer*, 536 So. 2d at 1107.

148. For example, when the attorney's fee provision is "piggy-backed" onto the substantive provision, as the court seemed to imply in *Gordon*. See *Fleischer v. Hi-Rise Homes Inc.*, 536 So. 2d 1101, 1104 (Fla. 4th Dist. Ct. App. 1988) (as to "possession").

149. This metaphor was used by Professor Powell to descriptively analogize a covenant that runs with the land. See 5 RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 670.2 (rev. ed. 1986).

150. "As goes Maine, so goes the nation." JOHN BARTLETT, *BARTLETT'S FAMILIAR QUOTATIONS* 1101(a) (14th ed. 1968).

151. SAMUEL WILLISTON, *WILLISTON ON CONTRACTS* § 926, at 784-87 (3d ed. 1963).

Thus, in two of the recent Florida cases,¹⁵² the injured parties were able to avert the deadly decree of the merger rule by relying on the excuse of mistake. And it is significant to note that the contractual subject matters that thus survived passage of the deeds in these two cases involved 1) the title to the property, and 2) the quantity of land conveyed, which are both bastions of merger edict under the "*Bull* criteria"¹⁵³ and under recognized general rules, as developed elsewhere in this article.¹⁵⁴

In *Southpointe*,¹⁵⁵ the first of these cases, the contract of sale provided for seller to sell to buyer the "Sunrise Golf Course Club House, cart sheds, and maintenance sheds."¹⁵⁶ After the closing of the sale, the buyer discovered that the deed of conveyance failed to include the maintenance shed property. Buyer sued seller for breach of its contract covenant to convey that (maintenance shed) property. Viewed in the language of *Bull*, the gravamen of buyer's cause of action was that there was a shortage in the *quantity* and *title* of the land actually conveyed versus the *quantity* and *title* of land that the seller had contracted to convey. Seller defended on the basis of merger, and seemingly he could not have been more correct in light of *Bull* and the long line of cases following *Bull*.¹⁵⁷ However, the buyer was saved from merger mortality by the court's finding that the omission of the maintenance shed property from the deed may well have been caused by a mistake (a factual issue to be determined on remand); and if in fact the omission was by mistake then the doctrine of merger would not apply. The court quoted *Corbin*¹⁵⁸ with approval:

This doctrine of merger by deed does not purport to apply primarily to cases of mistake, whether as to title or as to other facts
If the case is one in which there was a real mistake as to title, or as to some fact on which title depends, and is a case in which the grantee did not intend to assume the risks of failure of title, there

152. *Southpointe Dev., Inc. v. Cruikshank*, 484 So. 2d 1361 (Fla. 2d Dist. Ct. App. 1986); *Kidd v. Fowler*, 498 So. 2d 969 (Fla. 4th Dist. Ct. App. 1986).

153. See *infra* notes 193-94 and accompanying text.

154. See *supra* notes 65-79 and accompanying text.

155. *Southpointe Dev., Inc. v. Cruikshank*, 484 So. 2d 1361 (Fla. 2d Dist. Ct. App. 1986).

156. *Id.* at 1362.

157. See *infra* notes 195-98 (Merger operates automatically without parallel covenants in contract and deed in matters of 1) title, 2) possession, 3) quantity, and 4) emblements).

158. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 604 (1960).

is now no good reason for refusing the appropriate form of relief that would be given in other mistake cases.¹⁵⁹

Title and the quantum of estate conveyed were the subjects at issue in *Kidd*,¹⁶⁰ the other recent Florida case in which the plaintiff successfully invoked mistake as his excuse to the otherwise fateful blow of merger. In most of the merger cases, we have observed,¹⁶¹ the complainant is the buyer who post-closing discovers a situation that is contrary to the representations or warranties of seller under the contract of sale. In *Kidd*, however, the injured party was the seller of an apartment building who had reserved to himself, in the contract, a right to occupy one of the apartments rent-free for the rest of his life. The deed executed at closing, however, which had been prepared by a closing agent, failed to reserve the life estate. The issue arose when seller, having lived in the apartment rent-free for thirteen months, was evicted at the behest of his buyer, and the court below found that no life estate existed because the covenant providing for it was contained only in the agreement of purchase and sale which had been extinguished by merger. The appellate court reversed, however, holding that seller's conveyance at closing of a quantum of estate larger than had been contracted for was a mistake, and

[w]hile the doctrine (of merger) is a viable one, we will not apply it where a mistake has clearly been made and equity demands reformation We choose to find a mutual mistake which permits the reformation of the deed so as to make it express the real agreement and intention of the parties.¹⁶²

Situations involving fraud or mistake are most often not labeled by the courts as "exceptions" to the merger rule; rather, it is said that the doctrine of merger simply "does not apply" to these situations.¹⁶³ Thus,

159. *Southpointe*, 484 So. 2d at 1362-63.

160. *Kidd v. Fowler*, 498 So. 2d 969 (Fla. 4th Dist. Ct. App. 1986).

161. See APPENDIX *infra*.

162. *Kidd*, 498 So. 2d at 970.

163. See *Kidd v. Fowler*, 498 So. 2d 969, 970 (Fla. 4th Dist. Ct. App. 1986); *Southpointe Development Inc. v. Cruikshank*, 484 So. 2d 1361, 1363 (Fla. 2d Dist. Ct. App. 1986); 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 604 (1960); MILTON R. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 7.2, at 649; CUNNINGHAM, *supra* note 4, at 697 n.59. "[Merger] is said to be inapplicable to cases of fraud or mistake." *Pryor v. Aviola*, 301 A.2d 306, 309 (Del. 1973). The reason for the rule (that merger is inapplicable in cases of fraud) could not have been more aptly

it would seem that the real art to survival of the injured party's claim in these cases involves the characterization of the facts. The very same factual situation may be characterized to appear as 1) pre-closing fraud or mistake, in which case the merger rule simply "does not apply;" or 2) guiltless pre-closing activity, in which case the injured party searches (sometimes with success; other times not) post-closing for an "exception" to the rule. For example, why was it that (what turned out to be) an erroneous statement by a seller concerning ingress and egress,¹⁶⁴ or the absence of municipal code violations,¹⁶⁵ was actionable by the purchaser as an *exception* to the merger rule in each of those cases,¹⁶⁶ while (what turned out to be) an erroneous statement concerning the nature of a tenant's tenancy¹⁶⁷ was there actionable by the purchaser as fraud or misrepresentation?¹⁶⁸ We could suggest an intellectual answer to this question based upon scienter; i.e., whether the perpetrator knew or should have known pre-closing of the false or erroneous facts or circumstances.¹⁶⁹ Another answer, intellectually unsatis-

stated than: "A contrary rule would work the absurd result of a fraudulent vendor being insulated from legal liability by his very success in obtaining consummation of the sale." *Id.*

164. *Opler v. Wynne*, 402 So. 2d Fla. 1309 (Fla. 3d Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 472 (1982) (the contractual covenant warranting ingress and egress to the land is collateral or independent of the deed).

165. *Sager v. Turner*, 402 So. 2d 1282 (Fla. 4th Dist. Ct. App. 1981) (seller's warranty against code violations did not merge into the deed because it was not intended to merge and it is not necessarily fulfilled or satisfied by the conveyance).

166. *Opler*, 402 So. 2d at 1311; *Sager*, 402 So. 2d at 1283.

167. *See Durden v. Century 21 Compass Points*, 541 So. 2d 1264 (Fla. 5th Dist. Ct. App. 1989) (seller's representation that the tenants in possession at the time of contract were on a month to month lease was independent of the contract and "not the type that merges in a deed").

168. *See id.* at 1266 (A seller's (mis)representations "are *not the type* that merge in a deed at closing . . . because clearly they would be of no value or legal effect unless they did survive the closing and acceptance of deed which act they were *given to induce.*") (emphasis added).

169. *See, e.g., Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978) (The merger doctrine was held applicable to preclude recovery where plaintiff admittedly knew of code violations existent in the property before closing and nevertheless closed in face of them. The court took pains to point out however that this was a case for breach of contract and *not* an action for fraud, thereby indicating that if it were sounding in fraud then merger would be inapplicable); *see also Sager v. Turner*, 402 So. 2d 1282 (Fla. 4th Dist. Ct. App. 1981) (court emphasized the absence of any pre-closing knowledge by plaintiff of the code violations, and sustained the plaintiff's right to recover under an exception to the doctrine of merger).

fyng, was suggested by the court in *Steinberg*,¹⁷⁰ that it really doesn't matter whether the plaintiff's cause of action is grounded in fraud, mistake or breach of contract; the merger defense simply will not be available where seller's written representations later turn out to be erroneous.¹⁷¹

D. *Why Was the Merger Rule Applied, or Not Applied; An Attempt at Pigeon-holing*

Having traced the history of the merger rule from English common law, having looked at the reasons for the rule from its origination, having noted the adoption and development of the rule and its exceptions in early Florida case law, and having exposed some confusion and inconsistencies in recent Florida case law regarding applicability of the rule, we now address the perplexing question of why was the rule either applied or not applied in these various cases?¹⁷²

One hypothesis in attempting to answer this question might be that the type of contractual clause involved dictates whether or not the merger rule should be applied. In pursuance of this hypothesis, all of the Florida cases since 1930 were chronologically charted and notated by 1) the nature of the contract clause involved, and 2) whether merger or not the merger rule was applied.¹⁷³ This exercise revealed that:

1. Merger applied in all of the title cases.¹⁷⁴

170. *Steinberg v. Bay Terrace Apartment Hotel*, 363 So. 2d 58 (Fla. 3d Dist. Ct. App. 1978) (holding, without stated rationale or analysis, that a complaint brought after closing and after discovery that apartment building could legally house only ten tenants under city code, and not twenty-three tenants as represented in contract, does state a cause of action either in fraud, or mistake, or for breach of contract representation, notwithstanding the defense of merger by acceptance of deed).

171. Of course, the conclusory holding in *Steinberg* allowing the cause of action is an intellectual void, and causes us to wonder why the opposite result was reached in *Stephan v. Brown*, where merger did apply to sustain the dismissal of plaintiff's complaint in a cause of action for breach of contract due to violation of city code provisions, where notification of such violations had been given to seller prior to closing. 233 So. 2d 140 (Fla. 2d Dist. Ct. App. 1970).

172. Perhaps the more worthwhile question is: Why *should* the rule either be applied or not be applied in future cases? And even more thought provoking is the query: Is the merger rule the "right" rule for analysis and adjudication of these types of cases? These questions are addressed *infra* in part VI of this article.

173. See APPENDIX *infra*.

174. *Id.* (numbers two, five, nine, and thirteen).

2. Merger applied in the obvious (!??) accord and satisfaction fact patterns.¹⁷⁵
3. Merger did not apply to covenants regarding the physical condition of the property; those clauses survived.¹⁷⁶
4. Merger did not apply to covenants that (inherently) were to be performed post-closing; those covenants survived.¹⁷⁷
5. Merger did not apply to covenants involving payment of consideration; those covenants survived.¹⁷⁸
6. Merger did not apply to covenants concerning the priority status of mortgages; those covenants survived.¹⁷⁹
7. The Florida decisions¹⁸⁰ appear to be following the national trends¹⁸¹ with respect to the subject matter of the several different clauses summarized in paragraphs 1 through 6, above.
8. There is no consistency in the cases involving covenants against code violations.¹⁸²
9. There is no consistency in the cases involving attorneys fee provisions.¹⁸³

The problem with attempting to divide the cases into neat piles of

175. *Id.* (numbers six and ten).

176. *Id.* (numbers 14, 20, and 23).

177. *Id.* (numbers one, eight, and eighteen).

178. See APPENDIX *infra* (number eight); see also Annotation, *Merger of Contract in Deed*, 38 A.L.R.2D 1310 (1954).

179. See APPENDIX *infra* (numbers three and four).

180. See *supra* notes 174-79.

181. As to the national trend respecting "title" cases, see CUNNINGHAM, *supra* note 4, at 597 ("[Merger] is now largely limited to title provisions of the contract."). See also Annotation, *Merger of Contract in Deed*, 38 A.L.R. 2D 1310 (1954) (covenants regarding matters of title usually merge into the deed). As to the national trend respecting "merger and accord and satisfaction," see 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS (1962). As to the national trend respecting the subject of "physical condition of the property," see Annotation, *Defective Home-Vendor's Liability*, 25 A.L.R.3D 383, 432 (1968) ("[E]xecutory covenants collateral to the passing of title do not merge in a deed."). See also Annotation, *Merger of Contract in Deed*, 38 A.L.R. 2d 1310, 1325 (1954) ([I]t is generally held . . . that provisions to make improvements or repairs; although not incorporated in the deed are collateral thereto and survive it."). As to the national trend respecting "post closing covenants," see *Wiley v. Berg*, 578 P.2d 384 (Or. 1978) (those covenants to be performed post closing survive merger). As to the national trend respecting "priority of a mortgage," see *Snyder v. Roberts*, 278 P.2d 348 (Wash. 1955) (covenants concerning the priority of mortgages usually do not merge into the deed); Annotation, *Vendee's Obligation—Deed—Merger*, 52 A.L.R.2D 647 (1955).

182. See APPENDIX *infra* (numbers nine, eleven, and twelve).

183. *Id.* (numbers 19, 24, 26, and 27).

1) “yes, merged,” or 2) “no merger,” based upon the type of contractual clause involved, is that the decisions in these cases generally do not rise or fall strictly on the clause, itself; so many other facts and circumstances bombard the court. So, while it would be convenient and orderly to pigeon-hole the various types of contract clauses so that determination of survival is simply a function of checking our master list to see whether the subject clause falls in the “merged” or the “no merger” column (and, in fact, certain types of clauses do lend themselves to such easy disposition),¹⁸⁴ the vast majority of the cases involve more complicated circumstances to the extent that the ultimate decision really turns on rationale *other than* the merger rule per se (although merger is cited by the court to substantiate its conclusion).¹⁸⁵ In other words, either applying merger or an exception to merger becomes the justification for the court’s result-oriented decision, a determination reached on other grounds. Thus, the consistencies revealed by a sterile survey of the recent Florida cases,¹⁸⁶ and the conformity of the Florida cases to “national trends,”¹⁸⁷ is simply fortuitous with respect to documenting patterns or general rules in the applicability of the merger doctrine, because the preponderance of cases are not “true merger” cases at all but instead involve some form of accord and satisfaction.

VI. “MERGER” HAS BECOME JUST A BUZZWORD; “ACCORD AND SATISFACTION” IS THE MORE APPROPRIATE DOCTRINE IN MOST CASES

The notion of applying the doctrine of merger to terminate obligations arising under real estate contracts developed, we recall, from the

184. The “Title” cases.

185. See the discussion of *Opler*, *supra* notes 98-101 and accompanying text, as a case in point. In *Opler* a buyer’s action for breach of the contract covenant of access was sustained, the court holding that “[t]he buyer’s acceptance of the seller’s deed as well as his acquiescence to the remainder of seller’s performance did *not constitute a merger because the seller’s covenant expressly warranted that there was ingress and egress to the land.*” 402 So. 2d at 1311 (emphasis added). This circuitous statement not only begs the question of merger, but sidesteps the true issue of the case, whether the parties intended that the covenant be released at closing. The court in essence resolved that issue in the negative, by allowing the contract action under the guise of several recognized exceptions to the merger rule.

186. See, e.g., APPENDIX *infra*.

187. See *supra* note 181.

common law precepts involving the merger of estates.¹⁸⁸ It is the thesis of this section of this article that although the theory is doctrinally correct and although the application of the theory in the early cases was correct, its employment in more recent years—both affirmatively, as well as negatively (through the growth of “exceptions” to the rule)—has deviated so far from the basic tenets of the merger doctrine that its use in current cases is for name recognition value only, and its true analytical worth has been bastardized. Furthermore, this article postulates that the theoretically correct doctrine applicable in most of these cases today is that of accord and satisfaction.

Applying the strict tenets of the common law doctrine of merger to the real estate transaction, the theory maintains that the conveyance of legal title at closing (such title being the “greater estate” as expressed in the classic common law statement of the doctrine) absorbs, annihilates and extinguishes the equitable title and rights under contract of sale (the “lesser estate”).¹⁸⁹ Since the tenets of the common law doctrine of merger further dictate that merger shall occur *only* when the two estates coincide in one and the same person, at one and the same time, in one and the same right, and for one and the same purpose,¹⁹⁰ then *a fortiori* the only time that the merger rule should apply in real estate transactions is where there exists identity in the content and substance of the contested contract clause and the instrument of conveyance. This identity requirement may be looked at as the need for “parallelism” between the contract and the deed, whereby the separate contract and deed provisions must address one and the same, identical, substantive subject matter in order that merger pertain.¹⁹¹ This parallelism may be found to exist either 1) in actuality in the content of the two separate instruments, or 2) by implication because the subject at hand is so fundamental to real property that the law deems it embodied

188. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1966).

189. *See supra* notes 9-10 and accompanying text.

190. *Id.* See also the very recent Florida case where the court, speaking of the doctrine of merger in a trust context, stated that, “merger applies *only* when the legal and equitable interests are held by one person and are coextensive and commensurate—i.e., the legal estate and the equitable estate are the same.” *Contella v. Contella*, 559 So. 2d 1217 (Fla. 5th Dist. Ct. App. 1990) (emphasis in original). “Coextensive” is defined as having the same scope or boundaries. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 439 (1981). “Commensurate” is defined as equal in measure or extent; corresponding in size, extent, amount or degree. *Id.* at 456.

191. 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1319, at 310 (1962).

within the content of both instruments.

Carefully adhering to the common law roots of the merger doctrine, the early cases (e.g., *Bull*)¹⁹² seized upon four specific facets of any real estate transaction as appropriate for operation of the rule even if actual parallelism was missing: 1) title, 2) possession, 3) quantity, and 4) emblements (these four aspects being sometimes referred to in this article as the “*Bull* criteria”).¹⁹³ Why? If the subject matter of the contract covenant sought to be enforced involves the title to the land, or the possession of the land, or the quantity of land conveyed, or the emblements of the land,¹⁹⁴ then—reasons *Bull*—merger must certainly, above all, be deemed to apply and the succeeding deed must be deemed to extinguish the earlier contract covenant because each of these four aspects are so basic, so essential in every real estate transaction that the law infers the necessary parallelism even if the parties’ documents did not expressly manifest it. Simply put, these four aspects are inherent in the land.

The “*Bull* criteria” emerged as the answer to the basic question in these cases, which was phrased by the *Bull* court as being “a nice and difficult question, to determine whether covenants contained in an agreement for the sale of land are collateral to those providing for the execution of the deed, or are so connected with it, as to be at an end and become merged or satisfied in the execution of the deed.”¹⁹⁵ The *Bull* court and the plethora of cases that followed and approved *Bull* thus analyzed and ruled that these four legal aspects, title, possession, quantity and emblements, are so basic to real property, are so “connected with it,”¹⁹⁶ that the law supplies their existence to Act II¹⁹⁷ of the real estate transaction play even when the parties themselves were silent in that Act, thereby fulfilling the common law requirement of identity and allowing the doctrine of merger to operate. And to complete the equation, *Bull* further states the corollary to the rule, that absent actual parallelism the lesser estate (the contract) will *not* be deemed merged into the greater estate (the deed) if the contract covenant *sub judice* involves some subject *other than* the title, possession,

192. *Bull v. Willard*, 9 Barb. 641 (N.Y. Sup. Ct. 1850).

193. *Id.*

194. *Id.* at 645.

195. *Id.*

196. *Id.*

197. “Act II” being the closing document(s); e.g., the deed of conveyance, that follows—after the intermission—Act I of the play, the contract of sale. *See supra* notes 21, 22 and accompanying text.

quantity or emblements of the land (i.e., if the contract covenant does not involve a "*Bull* criterion").¹⁹⁸

Unfortunately, as the years passed, application of the doctrine of merger to decide real estate transaction cases was extended well beyond situations involving the title, possession, quantity or emblements of the land, and far into situations in which the two sets of provisions (those in the contract, and those in the deed) lacked identity and did not address the same subject.¹⁹⁹ The once clear and carefully circumscribed doctrine became a hackneyed rule of law, a buzzword or "handy phrase"²⁰⁰ for the courts to invoke as justification for result-oriented decisions denying post-closing enforcement of the contract of sale. Demanding equal if not more time and attention, and perhaps a product of modernization (could *Bull* have envisioned contract covenants warranting the sound mechanical condition of the air conditioning equipment, or that water, sewer and electric service are available with sufficient capacity for a 45,000 square foot office building?),²⁰¹ the courts also found it necessary to develop a whole series of ad hoc exceptions to their supposed body of merger doctrine case law in order to justify result-oriented decisions allowing enforcement of the contract after the closing. Having lost its common law historical rudder, the classic doctrine of merger as applied to real estate transactions was bastardized and left floundering as an overextended rule, which resulted in cultivation of a multitude of exceptions as an attempt to maintain direction, but in reality served only to keep the "doctrine" on a circuitous course. Sadly, the once noble and useful doctrine is being swallowed by its exceptions.

Fleischer v. Hi Rise Homes, Inc.,²⁰² a December 1988 Florida case, however, steers us back to *Bull* to straighten our course in the application of the doctrine of merger. Whether knowingly or fortuitously, *Fleischer's* unnecessary reference²⁰³ to *Bull* planted the seed

198. *Bull*, 9 Barb. at 644-45.

199. See, e.g., *Soper v. Stine*, 184 So. 2d 892 (Fla. 2d Dist. Ct. App. 1966) (applying the doctrine of merger to buyer's covenants to make deferred payments for inventory, fixtures and goodwill).

200. 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1319, at 310 (1962) ("The phrase 'discharged by merger' . . . is merely a 'handy' phrase, of convenient uncertainty and obscurity, that is used so as to avoid the necessity of clear thinking and accurate analysis.").

201. *Campbell v. Rawls*, 381 So. 2d 744 (Fla. 1st Dist. Ct. App. 1980).

202. 536 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1988).

203. *Id.* at 1107.

that prompts re-evaluation of the merger rule from a refreshing doctrinal viewpoint, reminding us of the common law roots and requirements of the rule. Hearken to the common law identity requirement, proclaims *Bull*, and recall that merger may occur *only* if the greater and lesser estates coincide in the same person, in the same right, and for the same purpose. Recall further that the identity requirement may be fulfilled in actuality (by parallel content),²⁰⁴ or by implication (by the *Bull* criteria). But since all four *Bull* criteria may not necessarily be the salient property characteristics appertaining today,²⁰⁵ most importantly recall the underlying philosophy of *Bull*, that the law will inject the deed with the parallelism needed to fulfill the identity requirement where the subject matter of the contract clause is a type that is inherent in all real property. These are the cases of "true merger," allowing for (nay, demanding) analysis and determination based on the doctrine of merger in its purest form. In any other situation, that is in the absence of either 1) actual parallelism of covenants in both the contract and the deed, or 2) parallelism inferred under the *Bull* umbrella of those covenants so inherently connected to the land, the issue of whether the covenant remains enforceable must be analyzed and decided based on the theory of accord and satisfaction.²⁰⁶

Thus, the facts of any case seeking enforcement of a real estate contract covenant after the closing must be critically analyzed in a two-step process (which is sometimes hereinafter referred to as the "Two-Step" analysis):²⁰⁷

1. Does the requisite parallelism exist (either in actuality, or by

204. Merger operates to discharge contractual obligations, much as accord and satisfaction, novation, or substitute contracts discharge, executory covenants. See 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1293, at 185 (1962).

205. Whether these particular four categories are still the only or the appropriate areas that fulfill the identity requirement, is a separate issue; e.g., does anyone know what an "emblem" is? However, identifying the specific areas of true merger is not as important as understanding that the principle of "sameness" or identity of right and purpose must apply to have a "true merger" situation; for once that element is taken into account, identifying specific areas will naturally follow.

206. "The actual use of the merger rule can often be explained as a way of regarding the delivery and acceptance of the deed as a sort of accord and satisfaction." *Reed v. Hasell*, 340 A.2d 157, 161 (Del. Super. Ct. 1975) (interestingly, merger was claimed by the purchaser to disallow seller's use of an exculpatory clause contained in the contract).

207. Not to be confused with the "Texas Two-Step," a popular country-western dance.

implication through a *Bull* criterion) to invoke operation of true merger?

—If yes (a “TRUE MERGER” case), the covenant is deemed extinguished and is unenforceable (absent fraud or mistake).

—If no (a “NON-MERGER” case), we are *not* dealing with an “exception” to the doctrine of merger. Merger should not even be a topic of discussion. For want of parallelism, merger cannot be called upon to decide the case. Does this mean, therefore, that the covenant is automatically enforceable? Absolutely not! We need to proceed to step number two, and ask

2. Has an accord and satisfaction occurred under this same set of facts (in this “NON-MERGER” case)?

The topic of accord and satisfaction, and its various ramifications, is justifiably the subject of numerous separate law review articles²⁰⁸ and no pretense is here made to invade that territory. It is sufficient to say that the term is used in this article in its generally accepted sense, to identify that certain recognized method of discharging and terminating an existing obligation by the obligor rendering some performance different from that originally obliged and the obligee accepting the substituted performance as full satisfaction of his rights;²⁰⁹ or, more simply put—a settlement.²¹⁰

Applied to contract and deed in real estate transactions, the theory is that parties may—by this method called accord and satisfaction—discharge (or be deemed to have discharged) obligations existing under their contract for the sale of property by fulfilling substituted agreements or by rendering some performance acceptable to the other party even though different from that originally contracted for. The “accord” is the agreement (and therefore must be duly supported by consideration) to give on the one hand, and to accept on the other hand, something different from that originally and rightfully due, in full discharge of the original rights and liabilities. The “satisfaction” is

208. See Scott J. Burnham, *A Primer On Accord & Satisfaction*, 47 MONT. L. REV. 1 (1986); Joseph C. Sleeth, Jr., Comment, *Executory Accord, Accord and Satisfaction, and Novation - The Distinctions* 26 BAYLOR L. REV. 185 (1974); Note, *Contracts, Accord & Satisfaction, Liquidated Debt*, 14 TEMP. L.Q. 279 (1940).

209. 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1276, at 115 (1962).

210. *Id.* at 115. Settlement is defined as “Act or process of adjusting or determining” BLACK’S LAW DICTIONARY 1231 (5th ed. 1979).

the execution or performance carrying out the substituted agreement,²¹¹ evidenced in the real estate transaction typically by the delivery and acceptance of the deed.

Hence, in the "NON-MERGER" case (which now more accurately should be called a "POSSIBLE ACCORD-SAT." case), the parties have delivered and accepted closing document(s) that are different (either by silence, or by some degree of conflict) from their original contract. The issue for analysis in terms of a possible accord and satisfaction becomes whether the parties by their manifested intentions and actions during the executory period or at closing arrived at a substituted understanding—or by law must be deemed to have reached such substitution—so that the delivery and acceptance of the closing document constitutes fulfillment of that understanding and a discharge of the original contract.

It is interesting to stop a moment and take note at this point that the presumptions of result are exactly opposite each other in the operation of the two theories under discussion (although this consequence should be of no influence in determining which theory is applicable under a specific set of facts). The presumption under the merger rule is that the contract covenant died; under accord and satisfaction, it is presumed to live. Under the doctrine of merger, the contract is deemed extinguished and therefore unenforceable, unless fraud or mistake can be shown. Under the theory of accord and satisfaction, the contract covenant is presumed to survive and thus be enforceable, unless it can be shown that the parties agreed otherwise. This theme weaves its way through the following analysis of several recent Florida cases, and we return to this topic and its significance, *infra*,²¹² at the conclusion of this section.

Not surprisingly, if we analyze some of the recent Florida "merger" cases²¹³ through the Two-Step process we expose that what have heretofore been labelled as the familiar "exceptions" to merger, are actually misapplications of the doctrine and its body of departures. Because parallelism is lacking, the cases are not submissive to true merger. Thus, these "exceptions" should be cast aside, and these cases should be viewed more clearly and honestly in the context and theorem of accord and satisfaction. As an example of this strategy, let us re-

211. RESTATEMENT OF CONTRACTS § 417 cmt. a (1932); 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1276 (1962).

212. See *infra* notes 274-75 and accompanying text.

213. The cases listed in APPENDIX *infra*.

examine several of the recent Florida cases that involved sellers' covenants negating code violations in the property,²¹⁴ and analyze whether the parties expressly or impliedly agreed during the executory period that the particular seller's liability under said covenant would terminate at closing (for otherwise, his liability carries on).

In each of these cases, *Steinberg*, *Fraser*, and *Sager*,²¹⁵ the respective seller represented or warranted in the contract of sale, but not in the deed of conveyance, that there existed no violations of city codes or ordinances in the property; and in each case, the purchaser closed and later brought suit for breach of the contract covenant. In *Steinberg* and *Sager*, the contract was held enforceable; in *Fraser*, the contract was held unenforceable.

Under the Two-Step analysis, we first probe for parallelism, either actual or by implication.²¹⁶ The reported facts in all three cases disclose no covenants against code violations contained in any of the deeds,²¹⁷ and such silence is typical.²¹⁸ Hence, there is no actual parallelism. Can parallelism be inferred under the *Bull* fundamentals?²¹⁹ Covenants against code violations fall neither within any of the four specific *Bull* criteria nor within the "inherent-in-the-land" rationale of *Bull*;²²⁰ hence, the facts and logic compel a negative response to the inquiry of Step One—these three cases are *not* candidates for "true merger." We now proceed to Step Two.

Studied from the viewpoint of accord and satisfaction, the cardinal facts in *Fraser* are that the purchaser discovered the code violations during the executory period, confronted his seller with them, and stated his intention not to close.

However, after the seller threatened suit, the purchaser did close the transaction and he accepted the deed and possession of the prop-

214. See *Sager v. Turner*, 402 So. 2d 1282 (Fla. 4th Dist. Ct. App. 1981); *Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978); *Steinberg v. Bay Terrace Apartment Hotel*, 363 So. 2d 58 (Fla. 3d Dist. Ct. App. 1978).

215. *Sager*, 402 So. 2d at 1282; *Fraser*, 364 So. 2d at 533; *Steinberg*, 363 So. 2d at 59.

216. See *supra* note 207 and accompanying text.

217. See *Sager*, 402 So. 2d at 1283; *Fraser*, 364 So. 2d at 533; *Steinberg*, 363 So. 2d at 59.

218. See, e.g., FLA. STAT. § 689.02-03 (1990) (statutorily prescribed form of warranty deed).

219. See *Bull v. Willard*, 9 Barb. 641, 645 (N.Y. Sup. Ct. 1850); see also *supra* notes 192-98 and accompanying text.

220. *Id.*

erty. This interaction between purchaser and seller during the executory period and the resolution of their confrontation could well be seen as an accord, and of course closing the purchase and accepting the deed constituted the satisfaction. By his actions, the purchaser in *Fraser* is deemed to have agreed to acceptance of the property "as is," as he saw it with his own eyes.²²¹ Therefore, the contract covenant was correctly held unenforceable, *not* by the operation of merger but by an accord and satisfaction.²²²

However, in *Steinberg*²²³ and *Sager*²²⁴ there was no evidence of an accord during the executory period. Again, analyzing these cases from the viewpoint of accord and satisfaction, we start with the presumption that the seller's liability under his contract warranty against present code violations remains viable until exhausted by the statute of limitations.²²⁵ Was there any action by purchaser and seller between the contract signing and the passage of the deed in either of these cases to evidence an understanding that seller's liability should end any earlier? Combing the facts in both cases, we find none. Significantly, although not singularly controlling, knowledge of the code violations came to light *after* the respective closings in both *Steinberg* and *Sager*,²²⁶ thus, there could be no justification for supposing an accord based upon purchaser's resolution of he had been personally aware of prior to closing such as the purchaser in *Fraser*.²²⁷ Moreover, there are no other facts apparent in either *Steinberg* or *Sager* to indicate any other intention by the parties to amend, modify or substitute their original agreement. There being no evidence of an "accord," the closing cannot be viewed as a "satisfaction" in either of these cases, and the earlier contract covenant lived on to be enforced in both cases.²²⁸

Any number of the other recent Florida "merger" cases²²⁹ could likewise be analyzed from the Two-Step viewpoint suggested above.²³⁰ Hopefully, a few more examples will be illustrative of the thesis sug-

221. *Fraser*, 364 So. 2d at 534 (purchaser who closes with knowledge of a breach of a contractual covenant is barred, by merger, from suing under the contract).

222. *Id.*

223. *Steinberg*, 363 So. 2d at 58.

224. *Sager*, 402 So. 2d at 1282.

225. *Id.* at 1283; *Steinberg* 363 So. 2d at 59.

226. *Sager*, 402 So. 2d at 1283; *Steinberg* 363 So. 2d at 59.

227. *See supra* note 221.

228. *Sager*, 402 So. 2d at 1283; *Steinberg* 363 So. 2d at 59.

229. *See APPENDIX infra.*

230. *See supra* note 207 and accompanying text.

gested herein, that merger has become just a buzzword and that these cases clamor for deeper analysis. In *Campbell v. Rawls*,²³¹ for instance, plaintiffs-purchasers' cause of action brought after the closing was based on seller's breach of that part of the contract of sale that provided: "Seller warrants air conditioning and heating systems, . . . to be in working order at time of closing."²³² The court affirmed enforcement of the contract, stating that "the warranty in this case is the type of independent covenant *generally excepted* from the merger doctrine."²³³ Under the Two-Step analysis, was the topic of merger even germane to the court's consideration of the case? That is, was this case a potential "true merger" situation? The deed was apparently silent (as is typical)²³⁴ with respect to the condition of the air conditioning and heating systems, so there was no actual parallelism. The only remaining inquiry, then, is whether the mechanics of heating and cooling systems "look to," or are so "connected with" the land²³⁵ as to be deemed inefaceable to the real estate transaction. Assuming a negative response to this inquiry (the answer suggested by *Bull*, its legacy, and the dictates of common law),²³⁶ there cannot possibly be true merger. Step Two, then, calls for scrutiny of the facts in search of possible accord and satisfaction. Interestingly, the seller's airconditioning warranty quoted above²³⁷ went on to provide that "Buyer, at his expense, may inspect such systems [three] days prior to Closing, and in the event discrepancies exist, Seller will repair same at Seller's expense." Buyers (plaintiffs) did *not* inspect prior to closing, for had they done so their action could well have been viewed as the same "accord" as our previous analysis imputed to the purchaser in *Fraser*.²³⁸

The court in *Campbell* specifically addressed the question of whether the above-quoted "three-day" clause made it incumbent on the buyers to critique the equipment prior to closing, and the court re-

231. 381 So. 2d 744 (Fla. 1st Dist. Ct. App. 1980).

232. *Id.* at 745.

233. *Id.* at 746.

234. *See, e.g.,* FLA. STAT. § 689.02-.03 (1990) (statutorily prescribed form of warranty deed).

235. *See supra* notes 194-96 and accompanying text.

236. *See Bull v. Willard*, 9 Barb. 641 (N.Y. Sup. Ct. 1850); *see also supra* notes 194-96 and accompanying text.

237. *See supra* note 232 and accompanying text.

238. *See supra* notes 221-22 and accompanying text. The court achieved the same results with a merger analysis as it would have using an accord and satisfaction paradigm.

sponded in the negative, stating: “[W]e construe the plain language of the agreement to mean that the [buyers] were not required to inspect the premises three days before closing and report discrepancies [in order] to *preserve their rights* under the warranty.”²³⁹ The reported facts in *Campbell* reveal no other suggestion of a superseding agreement or mutually agreed substituted performance.²⁴⁰ Hence, since the contract is presumed to live unless an accord and satisfaction be shown, the plaintiffs’ cause of action for breach of contract should justifiably be sustained under this analysis. Same result; different theory. The court reached its conclusion to enforce the contract through *exceptions* to the merger doctrine;²⁴¹ our audit through the Two-Step process and the context of accord and satisfaction, which we proffer as the more intellectually honest approach, reaches the same result.

*American National Self Storage v. Lopez-Aguilar*²⁴² can well serve as another of the recent Florida cases to be looked at from the new Two-Step perspective. The plaintiff-buyer there sued his seller, we recall,²⁴³ for breach of the seller’s representations and warranties under the contract of sale “that water, sewer and electric service are presently available at the property line or lines of the premises with sufficient capacity to accommodate a 45,000 sq. ft. office/warehouse building;”²⁴⁴ and the cause of action was allowed, over the objection of merger, by virtue of several of the recognized *exceptions* to the merger rule.²⁴⁵ The reported facts specifically state that the deed contained no warranty regarding the availability of water, sewer or electric service. Testing for true merger, there surely was no actual parallelism. The inquiry once again then becomes whether these covenants (about the availability of water, sewer and electric service) are sufficiently inbred, intrinsic and deep-rooted in the land so as to justify an implication of the identity necessary for true merger.

The *American National* court was certainly on the right track when it reviewed and recited roughly fifteen cases from Florida and other jurisdictions that demonstrated the dichotomy between the types of clauses that are “usually included in the terms of a deed” and there-

239. *Campbell*, 381 So. 2d at 746.

240. *Id.* at 744.

241. *Id.* at 746.

242. 521 So. 2d 303 (Fla. 3d Dist. Ct. App. 1988).

243. *See supra* note 127 and accompanying text.

244. *American Nat’l*, 521 So. 2d at 304.

245. *Id.* at 305-06.

fore merger is mandated, versus those types of clauses that “call for acts by the seller which go beyond merely conveying clear title and placing the purchaser in possession of the property” in which cases merger does not apply.²⁴⁶ Indeed, the court’s conclusion negating merger with regard to this seller’s warranty of utilities availability was somewhat reminiscent of *Bull* when it reasoned that covenant “is not an agreement usually contained in a deed, related to the condition of the title to property, or satisfied by the execution and delivery of the deed.”²⁴⁷ The court thus closely approached the “true merger” concept, but did not quite reach it. All that was missing at this point was an analysis of *why* merger did or did not apply in the fifteen or sixteen instances summarized, namely because the requisite identity in “right” and “purpose,” as required by the common law for the merger of estates,²⁴⁸ either did or did not exist in the respective sets of contract and deed covenants. Instead, the *American National* court swerved to the “exceptions” sidetrack to overcome the merger defense.

The court, having reached the correct conclusion in Step One that true merger was unavailing, was then ready for analysis under Step Two, as to whether plaintiff’s cause of action on the contract might have been precluded by reason of accord and satisfaction. Again, the court was on the right track, and did in fact recognize that the parties might have intended to reach an accord and satisfaction but sufficient facts simply were not in the record.²⁴⁹ Accordingly, the court remanded the case for further evidentiary hearing, at which time defendant-seller might “[attempt] to prove, by evidence other than the deed itself, that the parties intended that the warranty of the contract of sale was to be extinguished by the conveyance of the property;”²⁵⁰ i.e., that the parties intended and reached an accord and satisfaction.

Another of the recent Florida cases, *Southpointe Development, Inc. v. Cruikshank*,²⁵¹ serves to illustrate that true merger is alive and well, as is a “true exception” to true merger, and that modern-day cases may scrupulously be resolved through analysis that extends only through Step One of the Two-Step process. Although it does not cite *Bull*, *Southpointe* clearly supports the *Bull* criteria. As recalled from

246. *Id.*

247. *Id.* at 306.

248. *See supra* note 190 and accompanying text.

249. *American Nat’l*, 521 So. 2d at 306.

250. *Id.*

251. 484 So. 2d 1361 (Fla. 2d Dist. Ct. App. 1986).

earlier discussion,²⁵² the seller in *Southpointe* agreed to sell to the purchasers the "Sunrise Golf Course Club House, cart sheds, and maintenance sheds,"²⁵³ and after closing it was discovered that the deed failed to convey the maintenance shed property; the purchasers sued.

At first blush this would appear to be a modern-day, open-and-shut case absolving defendant on the basis of true merger since it involved one of the four specific criteria of *Bull*, the quantity of land conveyed. Accordingly, the answer to the Step One question²⁵⁴ is "yes," and it would seem that the trial court's summary judgment for defendant-seller should be affirmed without much ado: Covenants respecting the quantity of land to be conveyed merge into the deed and are extinguished.²⁵⁵ However, just as there exist limited situations of true merger, so too are there limited situations that constitute legitimate exceptions to true merger,²⁵⁶ and one of those situations happens to be in the case of mistake.²⁵⁷ Thus, the court in *Southpointe* correctly reversed the summary judgment for seller grounded on merger and remanded the case for trial on the "unresolved material issues of fact relating to the parties' intention to convey the property in question and to *whether the omission was a mutual mistake.*"²⁵⁸ The doctrine of merger thus remains viable to factual situations that embrace the requisites of "true merger," but so too is at least one rightful exception thereto, mistake—even with respect to such core *Bull* elements as "quantity" and "title."²⁵⁹

Nevertheless, and of most significance to analyzing the "merger" cases from the Two-Step viewpoint, *Southpointe* teaches by example that a true merger case may properly be resolved wholly at Step One. Having fulfilled the requisites to qualify as a case of true merger, the *Southpointe* real estate transaction must be steadfastly viewed as func-

252. See *supra* notes 155-59 and accompanying text.

253. *Southpointe*, 484 So. 2d at 1362.

254. See *supra* note 207 and accompanying text.

255. See *supra* notes 192-95 and accompanying text.

256. See *supra* note 163 and accompanying text. The classic exceptions to true merger are mistake, accident and fraud. The courts generally (and correctly) do not refer to these as exceptions, but instead simply say that merger "does not apply" here. See, e.g., *Southpointe Dev. Inc. v. Cruikshank*, 484 So. 2d 1361, 1362 (Fla. 2d Dist. Ct. App. 1986) ("[T]he principle of Merger *does not apply* in cases of mistake.") (emphasis added).

257. See *supra* notes 162-63 and accompanying text.

258. *Southpointe*, 484 So. 2d at 1362 (emphasis added).

259. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 604 (1960).

tus officio, and it would be doctrinally unsound to consider accord and satisfaction, if it is factually determined on remand that there was no mistake. *Southpointe* further illustrates, however, that progression to Step Two may nevertheless be warranted in a true merger case if in fact the omission in the deed was due to mistake, for even though the plaintiff is saved from the doom of merger by reason of the mistake, it is still conceivable that the actions of the parties during the executory period might evidence an accord that was fully satisfied by the delivery and acceptance of the deed.

In bringing this section to a close, it could not be more fitting than to harken back to the earliest Florida merger case of this century, *Gabel v. Simmons*,²⁶⁰ as the bellwether of the Two-Step thesis propounded herein. With regard to Step One (whether the requisite parallelism exists to permit the operation of true merger),²⁶¹ *Gabel* warned us, 'tho superficially, not to become engulfed in the merger rule where "not appropriate."²⁶² Yet *Gabel* itself and at least twenty-six subsequent Florida appellate cases became so mired,²⁶³ and it was not until *Fleischer v. Hi Rise Homes, Inc.*²⁶⁴ in December, 1988—by its reference to *Bull*—that we are directed out of our quag.

In rejecting defendant's contention that plaintiffs' action on the contract of sale was barred by merger (*i.e.*, in finding "exceptions" to the merger rule), the court in *Gabel* took pains to point out that it was "not appropriate" for a closing document to include a clause of the type on which the *Gabel* breach of contract action was based²⁶⁵ (the provision for refund of buyers' purchase price if they were dissatisfied with the property). Conversely, if it *was* appropriate for the closing document to include such a provision, then it follows that merger *would* apply. This initial stage of the court's analysis concurs in theory with *Bull* and with Step One of the Two-Step thesis: If the requisite parallelism does not exist in order to invoke true merger, the contract covenant is *prima facie* enforceable. The court then could have set about Step Two, checking for an accord and satisfaction, but it didn't. Rather, the court adjudicated the "merger" issue straightforward on

260. 129 So. 777 (Fla. 1930).

261. See *supra* note 207 and accompanying text.

262. *Gabel*, 129 So. at 778.

263. *Id.* at 778; see also APPENDIX *infra*.

264. 536 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1988).

265. *Gabel*, 129 So. at 778.

the basis of several of the well-known "exceptions" to merger.²⁶⁶ Nevertheless, we can advance our analysis to Step Two and scrutinize the facts of *Gabel* to see if the elements of an accord and satisfaction were fulfilled.

Recall,²⁶⁷ that plaintiff-buyer here sued his seller for refund of all monies paid (deposit and down payment at closing) based on a contract covenant by seller that "[i]f purchaser is dissatisfied *after 90 days from closing*, all monies paid shall be returned with 10% interest."²⁶⁸ Purchasers requested (and then, demanded) return of their money on numerous occasions: Before, at, and after expiration of the ninety days. About a month after the expiration of the 90 days, defendant-seller attempted to mollify plaintiffs and attempted to delay return of the money so as "to allow them (plaintiffs) to dispose of the property at a profit to themselves," and promised to return the money at an extended date "if plaintiffs were still dissatisfied with their purchase."²⁶⁹ Was there an accord and satisfaction under these facts? Impossible. The covenant contemplated performance *after* closing,²⁷⁰ and all of the conversations and interaction of buyer and seller regarding the requested refund took place *after* closing. None of the activity or the conversations took place during the executory period, so there is nothing to support an accord, respecting which the closing might have in any fashion constituted a satisfaction. Perhaps the more relevant question is whether the parties' post-closing activities constituted a novation,²⁷¹ and while the court didn't actually raise this question, it answered it by ruling that the "new promise" to return the money at the extended date, which promise was made approximately 120 days after the closing, "did not affect the plaintiffs' right to a return of the money."²⁷²

The above discussion of several recent Florida cases not only illuminates the more honest and clear thinking of the "Two-Step" analysis, but also suggests why the modern trend of the cases is "pro-life" to the contract, favoring the enforceability of more and more contract

266. See *supra* note 123 and accompanying text.

267. See notes 41-49 and accompanying text.

268. *Gabel*, 129 So. at 777 (emphasis added).

269. *Id.*

270. *Id.*

271. The "first cousin" of accord and satisfaction. See 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1300, at 228 (1962) ("A novation is like accord and satisfaction . . .").

272. *Gabel*, 129 So. at 778.

provisions.²⁷³ For while the predominant number of recent decisions has been in favor of sustaining enforceability of the contract provisions through “exceptions” to merger, what these statistics really demonstrate is a shift in presumptions corresponding with the shift in theories suggested above—the shift from merger to accord and satisfaction. Under the doctrine of merger, of course, the contract covenant is presumed to have perished, but under the accord and satisfaction theory, the “more appropriate” theory in most cases as suggested above, the covenant is presumed mortal, viable and enforceable.²⁷⁴ The recent statistics overwhelmingly bear out the trend towards enforcement of the contract covenants.²⁷⁵ So in the shift of doctrines, and in the shift of presumptions, the burden of proof also changes from he who seeks to enforce the contract, to he who seeks to prevent enforcement. And perhaps, as touched on in the next section,²⁷⁶ this is how it “should be” from a policy standpoint.

VII. CONCLUSION

So now we reach the point where we lean back, acknowledge the problem, the confusion and the misapplication of the doctrine, and ask what can we do to rectify this situation.

More specifically, our travels have revealed that real estate buyers and sellers are repeatedly confronted with post-closing legal problems that could have been resolved by their contract covenants if raised pre-closing, but weren't. So the issue at this point in time (after passage of the deed) becomes: Is it too late? Not because of a statute of limitations; not because of laches; not because of caveat emptor or the parol evidence rule (although there certainly is overlap);²⁷⁷ but because of a notion that all good things must (at some point in time) come to an end.²⁷⁸

From a broad, social policy perspective, we can view the problem thusly:

273. See APPENDIX *infra*; see also *supra* notes 58-59 and accompanying text.

274. 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1276 (1962).

275. See APPENDIX *infra*; see also *supra* notes 58-59 and accompanying text.

276. See *infra* note 313 and accompanying text.

277. See 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 573-76, at 356 (1960).

278. “Some time an end there is of every deed.” CHAUCER, THE KNIGHTS TALE, 1 (1778); BURTON E. STEVENSON, THE HOME BOOK OF QUOTATIONS 538 (10th ed. 1967).

Bestowing effect upon the doctrine of merger is typically a boon to the seller.²⁷⁹ He stands released and discharged from otherwise enforceable contractual obligations. He got away with it, to the detriment of his buyer.

Refusing to recognize merger allows survival of contract covenants past the closing, and is typically a boon to the buyer.²⁸⁰ He made his bed; he slept in it; and he gets a chance to re-make the bed if his slumber is disturbed. He gets a second bite at the apple, to the detriment of his seller.

Several ideas are posed as possible resolutions to the problem: 1) Statutory legislation; 2) Adoption of a "standard" provision on merger in widely used form contracts; 3) Educated and tailored contract preparation; and 4) Enlightened judicial construction.

A. *Statutory Legislation*

Legislate a hard and fast rule by statute. For example, all covenants of the contract of sale shall survive delivery of the deed. Or, all covenants of the contract shall be deemed extinguished by merger into the deed. Or, should the statute carve out particular contract covenants that shall always survive closing, and specify other contract covenants and subject matters that shall always be deemed extinguished and unenforceable? And if so, then which type of covenants shall survive, and which shall be extinguished? And, can statutory language be crafted to clearly identify the particular subject matters that shall always fall into one category or the other?²⁸¹ Perhaps this short series of questions demonstrates the futility of seeking to resolve the problem by statute.

Nevertheless, the National Conference of Commissioners on Uniform State Laws did propose resolution of the merger problem by statute, in its adoption of the Uniform Land Transaction Act (ULTA).²⁸²

279. The deed typically contains fewer seller covenants than the contract. *See, e.g.,* FLA. STAT. § 689.02-.03 (1990) (statutorily prescribed form of warranty deed). Strict merger reduces the number of covenants, by operating to enforce only the covenants in the deed. The seller then by the operation of merger emerges burdened with fewer obligations when he is freed from the contract covenants.

280. The buyer, conversely, typically wants all of the contractual covenants enforceable.

281. *See infra* notes 282-85 and accompanying text.

282. The act was approved by the Conference in 1975. *See* UNIFORM LAND

Proposed Section 1-309 of the ULTA essentially would have eliminated the doctrine of merger, in that it provided as follows:

Acceptance by a buyer or a secured party of a deed or other instrument of conveyance is not of itself a waiver or renunciation of any of his rights under the contract under which the deed or other instrument of conveyance is given and does not of itself relieve any party of the duty to perform all of his obligations under the contract.²⁸³

For whatever reasons (certainly going beyond the sole issue of merger), the ULTA was never adopted by even one state,²⁸⁴ and as of June, 1991 "the ULTA is a dead horse."²⁸⁵ Perhaps this too demonstrates the futility of endeavoring to resolve the merger issue through legislation.

B. *Form Contracts*

Adoption of a standard position on merger by inclusion of an appropriate paragraph in the "standard form" real estate contract(s) in prevalent use by the bar and by real estate agents in the state, is another suggestion to resolve the merger problem.

Certainly, the courts respect the parties' manifested intent that the contract covenants shall, or shall not, survive the closing of the transaction.²⁸⁶ Several popular printed-form contracts are in use in Florida today, and all of them are silent with regard to whether the covenants thereof survive passage of the deed.²⁸⁷ Inclusion of a "standard"

TRANSACTIONS ACT, 13 U.L.T.A. 472 (1977) (history of the Act); Dunham, *Merger by Deed—Was It Ever Automatic* 10 GA. L. REV. 419 (1976) (comprehensive examination by a Commissioner on Uniform State Laws and the Chairman of the Special Committee which drafted the Uniform Act).

283. UNIFORM LAND TRANSACTIONS ACT § 1-309, 13 U.L.T.A. 500-01 (1977) (repealing the doctrine of merger for realty just as the U.C.C. made merger inapplicable for goods). See generally UNIFORM COMMERCIAL CODE § 2-607 (buyer can still sue for breach of contract after acceptance of tender); UNIFORM COMMERCIAL CODE § 2-608 (buyer can revoke acceptance of goods).

284. UNIFORM LAND TRANSACTIONS ACT, 13 U.L.T.A. 469 (1977 and Supp. I 1991); see also U.L.T.A. DIRECTORY OF ACTS (1991 Pamph.).

285. Telephone interview with John McCabe of the *National Conference of Commissioners on Unification of State Laws* (June 19, 1991).

286. See *Campbell v. Rawls*, 381 So. 2d 744 (Fla. 1st Dist. Ct. App. 1981) (contract covenants were implicitly deemed to survive the closing).

287. An examination of ten prevalent form contracts used in Florida revealed no mention of any provisions for the survival or the discharge of contract covenants upon

merger provision would fill the void of this silence.

For example, The Florida Bar and the Florida Association of Realtors have for many years jointly prepared and utilized a standard, printed-form Contract for Sale and Purchase,²⁸⁸ and a joint committee comprised of members from both of those associations continually reviews, revises and expands the form contract.²⁸⁹ In its present form (latest revision, January, 1991) the contract contains no provision regarding merger. Similar to the proposal expressed above with regard to statutorily legislating the answer to the merger question, the proposition here is to "legislate" the answer by an omnibus clause in the printed-form contract, addressing survival *vel non* of all of the covenants, warranties, representations and other agreements of the parties as contained in that "standard" contract. As with the above statutory proposal, however, the same series of questions come to mind. Should the "standard" be that all covenants survive? Or, that all covenants are merged? Or, that some particular covenants concerning specified areas are deemed merged, but other specified covenants are deemed to survive? And, if so, which shall merge, and which shall survive? Could the bar and the Realtors ever concur on answers to the foregoing questions sufficiently to reach a "standard" acceptable to the real estate industry in our state? And, can we draft adequate language that will clearly identify those types of covenants intended to fall within either of the specified categories, or are the subject matters inherent in any real estate transaction of such nature as to defy clear expression in this type of dichotomy? Again, perhaps these questions demonstrate the futility of attempting to resolve the question of merger by a standard-form contract.

Nevertheless, the real estate professionals of the state of New York did just that in their latest, very recently revised standard-form Residential Contract of Sale,²⁹⁰ providing that:

delivery of the deed. Among those surveyed were, the Florida Association of Realtors and The Florida Bar (FAR/BAR) Contract for Sale and Purchase, the *Miami Board of Realtors* Contract for Sale and Purchase, and the *Coral Gables Board of Realtors* Contract of Purchase and Sale.

288. *Florida Association of Realtors and The Florida Bar, FAR/BAR Contract for Sale and Purchase* (1991).

289. *See generally FAR/BAR Contract Preparation Manual* (1988). This manual describes the Realtor-Attorney Joint Committee responsible for creating and updating the form contract, and generally explains the purpose of, and methodology for, the preparation of the *FAR/BAR* real estate Contract for Sale and Purchase.

290. *See N.Y. L.J.*, Mar 13, 1991, at 40. The article describes the creation of

Except as otherwise expressly set forth in this contract, none of Seller's covenants, representations, warranties or other obligations contained in this contract shall survive Closing.²⁹¹

The "except as otherwise expressly set forth" introductory phrase to this omnibus provision borders on the humorous (were it not that multi-thousands or millions of dollars in real estate value rides on this form) when it becomes apparent by combing through this New York form contract that at least seven separate contractual covenants of this document are "excepted out" and are expressly stated to survive Closing.²⁹² On the other hand, this revelation may well reflect admirably upon the diligence of the members of the four committees that jointly prepared this latest revised form document,²⁹³ for they obviously gave serious thought and consideration to determining on a subject-by-subject basis which provisions shall live and which shall die. Nevertheless, it must be noted that their *general* conclusion as evidenced by the omnibus provision quoted above²⁹⁴ was to sustain the doctrine of merger, while the conclusion of the Commissioners on Uniform State Laws under the ULTA section quoted above²⁹⁵ was to "repeal" the doctrine of merger.

C. *Contract Preparation; Draftsmanship*

The reported facts in the Florida cases analyzed in this article²⁹⁶ reflect that each of the respective contracts of sale was silent as to whether the covenant *sub judice* was meant to survive; specifically, the contracts did not contain survival or merger provisions.²⁹⁷ Of course, had those contracts addressed the merger issue it is doubtful that we would have had the benefit of the case law generated by their litigation,

Form A-125, Residential Contract of Sale by a joint committee chaired by Bernard M. Rifkin, consisting of representatives from the *Real Property Section of the New York State Bar Association*, the *New York State Land Title Association* and the *Committees on Real Property Law of the Association of the Bar of the City of New York* and of the *New York County Lawyer's Association*. *Form A-125* is available through Julius Blumberg Publishers, Inc., New York City.

291. Paragraph 11(c), *Form A-125, Residential Contract of Sale*, (New York).

292. Paragraphs 16(c), 17, 18(e), 21(c), 27, 28(f), 28(g), *Form A-125, Residential Contract of Sale*, (New York).

293. See *supra* note 290 for a list of the four committees.

294. See *supra* note 291 and accompanying text.

295. See *supra* note 283 and accompanying text.

296. See APPENDIX *infra*.

297. *Id.*

because as noted earlier²⁹⁸ the Florida courts have given assurance that if the parties do state their intent regarding survival or merger in the original agreement, the court will respect that expression.²⁹⁹ Thus, another suggestion to resolve the merger problem is that the contract preparer handcraft the parties' intentions into the original contract of sale by 1) expressly stating which covenants shall survive and which shall not,³⁰⁰ or 2) more realistically, setting forth an omnibus survival or merger clause with specifically identified exceptions.³⁰¹ This obviously requires substantial attention to detail in the drafting of the agreement of purchase and sale.

In any particular real estate transaction, there will be various provisions that—if the buyer and seller were to stop and think about them—they would wish to have survive closing; and likewise, there will be other provisions that—upon thoughtful consideration—the parties would choose to have extinguished as of the time of closing. Careful consideration and draftsmanship at the time of preparing the contract would avoid subsequent litigation by resolving which provisions will survive, and which will die by merger.³⁰² The difficulty with this proposal is that typical real estate buyers, sellers and agents are not aware of, much less would they stop and think about, the doctrine of merger when negotiating a purchase and sale of real property, and most contracts of sale are entered into without the advice of counsel and are signed before the attorney ever sees the agreement. The real estate industry (buyers, sellers, brokers, and even many attorneys) is simply not educated to the doctrine of merger, so that the likelihood of considering the impact of merger and providing for it in the original contract is diminutive except in the more sophisticated and high dollar-volume transactions. Moreover, even if the parties or their representatives were aware of the merger issue pre-contract, it would merely add one more stumbling block to the negotiation process, pervading virtually every paragraph of the contract. Naturally, every buyer would like most (if not all) of his seller's representations, warranties and covenants to survive closing; and the typical seller wants to stand released of as much

298. See *supra* note 286 and accompanying text.

299. See *supra* note 286.

300. For example, "[t]he provisions of this paragraph shall [or shall not] survive the closing of the transaction contracted for hereunder and the delivery of the deed conveying the subject property."

301. *E.g.*, an omnibus provision similar to the New York standard form contract provision (paragraph 11 (c), thereof) as quoted *supra* note 291 and accompanying text.

302. See *supra* notes 300-01.

liability as possible once he has closed and "walked away."

Notwithstanding, silence on the issue of merger is no virtue since, as emphasized by the review of cases in this article, there can be no reliance on the courts for consistency in either upholding or circumventing the doctrine of merger. Thus, given the opportunity,³⁰³ there can be no excuse for counsel failing to tailor appropriate merger and survival provisions into careful real estate contract preparation. This is especially so in recognition of 1) the conflicting presumptions that result from applying either the merger doctrine or the theory of accord and satisfaction,³⁰⁴ and 2) the conflicting predilections of typical buyers and sellers of real property.³⁰⁵ Recognizing the various consequences conceivable from the several juxtapositions of these two sets of conflicts, it is incumbent on the prudent real property attorney to protect his client through advice, counsel and documentation concerning merger and survival provisions.

D. *Enlightened Judicial Construction*

When all is said and done, the real merger problems will rear their heads in controversies *in judicium venire*.

The likelihood of merger legislation is remote, if at all.³⁰⁶ Complete resolution by express contract provisions, whether standard-form³⁰⁷ or tailor-made,³⁰⁸ is optimistic utopia but not a practical reality. Thus, the ultimate resolution of the veritable merger problems will remain in the hands of the courts, and the most productive and rewarding accomplishment of this article will be to suggest that the courts discard tunnel-vision merger rules and instead analyze potential merger cases through the Two-Step process formulated,³⁰⁹ discussed,³¹⁰ and justified³¹¹ above. Apply the doctrine of merger (and its resultant

303. I.e., assuming that counsel has been engaged prior to the parties having executed their contract of sale (which is generally not the case in the realities of the real estate industry).

304. See *supra* notes 212, 273-74 and accompanying text.

305. See *supra* notes 279-80 and accompanying text.

306. See *supra* notes 282-85 and accompanying text (description of the quiet demise of a similar proposal).

307. See *supra* notes 290-92 and accompanying text.

308. See *supra* notes 300-01 and accompanying text.

309. See *supra* note 207 and accompanying text.

310. See *supra* notes 207-12 and accompanying text.

311. See *supra* notes 213-76 and accompanying text.

discharge of contractual obligations) only in cases of “true merger;” in all other cases, enforce the contractual obligations as covenanted by *sui juris* parties until terminated by the applicable statute of limitations, unless a substituted agreement—an accord and satisfaction—can be proven. This procedure comports with the basic common law tenets of the merger doctrine; it comports with the strong trend of recent decisions bent on contract enforcement; and this enlightened process of analysis and construction also conforms with our “current notions of justice, equity and fair dealing” as well as the current needs of our society.³¹²

312. See, e.g. *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) (court would not allow the doctrine of caveat emptor to shield a seller because to do so would fly in the face of society’s needs). This article does not propose the frustration of society’s needs by a rigid application of merger. Rather, this paper proposes a legally correct application of merger which will fulfill society’s need for equity as well as judicial consistency. See *Contos v. Lipsky*, 433 So. 2d 1242, 1247-48 (Fla. 3d Dist. Ct. App. 1983) (Schwartz, C.J., dissenting) (misinterpretation of the merger doctrine can be highly inequitable).

APPENDIX OF FLORIDA CASES DEALING WITH THE DOCTRINE
OF MERGER*

1. Seller's covenant to refund purchase price if buyer is dissatisfied with property after ninety days. *Gabel v. Simmons*, 129 So. 777 (Fla. 1930) (merger rule not applied).

2. Seller's oral** representations of good right to convey, freedom from adverse claims and encumbrances, market value and development prospects, and covenant to resell at a profit. *White v. Crandall*, 143 So. 871 (Fla. 1932) (merger rule applied).

3. Seller's covenant subordinating the purchase money mortgage to an anticipated construction loan first mortgage. *Graham v. Commonwealth Life Ins.*, 154 So. 335 (Fla. 1934) (merger rule not applied).

4. Buyer's covenant to assume existing mortgage. *Riddle v. Collier*, 150 So. 880 (Fla. 1934) (merger rule not applied).

5. The contract contained restrictive covenants regarding the use of the land; e.g., only residential use, size and cost of structure, and race restrictions. *Volunteer Sec. Co. v. Dowl*, 33 So. 2d 150 (Fla. 1947) (merger rule applied).

6. Seller's covenant to convey by warranty deed. *St. Clair v. City Bank & Trust*, 175 So. 2d 791 (Fla. 2d Dist. Ct. App. 1965) (merger rule applied).

7. Buyer's covenants to make deferred payments for the inventory, fixtures, and good will of a business. The business was located on certain real property also sold to same buyer, regarding which buyer gave seller a purchase money note and mortgage. *Soper v. Stine*, 184 So. 2d 892 (Fla. 2d Dist. Ct. App. 1966) (merger rule applied).

8. Buyer's covenant to pay balance of purchase price in shares of stock. *Milu Inc. v. Duke*, 204 So. 2d 31 (Fla. 3d Dist. Ct. App. 1967) (merger rule not applied).

9. Seller's covenant that the property is free and clear of all encumbrances. *Stephan v. Brown*, 233 So. 2d 140 (Fla. 2d Dist. Ct. App. 1970) (merger rule applied).

* The cases are listed in chronological order. The 22 cases listed at Numbers six through 27 are those referred to in the article as the "recent Florida cases." See *supra* note 56 and accompanying text. Of these 22 recent Florida cases, the merger rule was applied eight times—dicta indicated that it would have been applied two more times—while the courts declined to apply the merger rule in the remaining twelve cases.

** The court did not deal with any statute of frauds issues, but ruled under the doctrine of merger.

10. Contract provision that the purchase money mortgage would contain a 30-day grace period. *Uwanawich v. Gaudini*, 334 So. 2d 116 (Fla. 3d Dist. Ct. App. 1976) (merger rule applied).

11. Seller's representation as to compliance with city code respecting the quantity of rentable units in subject apartment building property. *Steinberg v. Bay Terrace Apartment Hotel*, 363 So. 2d 58 (Fla. 3d Dist. Ct. App. 1978) (merger rule not applied).

12. Seller's covenant against any city code violations. *Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978) (merger rule applied).

13. Seller's covenant to convey title free and clear of all encumbrances. *Bennett v. Behring*, 466 F. Supp. 689 (S.D. Fla. 1979) (merger rule applied).

14. Seller's warranty as to condition of air conditioning and heating system and provision for awarding attorney's fees to the prevailing party. *Campbell v. Rawls*, 381 So. 2d 744 (Fla. 1st Dist. Ct. App. 1980) (merger rule not applied in either situation).

15. Contingency clause regarding purchaser obtaining all necessary operating permits, and seller's covenant against violations of ordinances, easements, and deed restrictions. *Sager v. Turner*, 402 So. 2d 1282 (Fla. 4th Dist. Ct. App. 1981) (merger rule not applied in either situation).

16. Seller's covenant of ingress and egress. *Opler v. Wynne*, 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 472 (1982) (merger rule not applied).

17. Contract provisions specifying the terms and conditions for partial release of the purchase money mortgage. *Sun 1st Nat. Bank v. Grinnell*, 416 So. 2d 829 (Fla. 5th Dist. Ct. App. 1982) (merger rule applied).

18. Buyer's covenant to reconvey the property to seller if buyer ever ceased using the property as his permanent residence. *Peterson v. Peterson*, 431 So. 2d 672 (Fla. 3d Dist. Ct. App. 1983) (merger rule not applied).

19. Provision for awarding attorney's fees to the prevailing party. *Gordon v. Bartlett*, 452 So. 2d 1077 (Fla. 4th Dist. Ct. App. 1984) (merger rule applied).

20. Seller's covenants to provide water and sewer services, grant one year free golf and tennis club membership, and build a road for access to certain parts of the property. *Georskey v. Wild Flower Landholding Assoc.* 49 Bankr. 246 (M.D. Fla. 1985) (merger rule not applied).

21. Seller's covenant to convey additional property; i.e., property that was not included in the deed. *Southpointe Dev. Inc. v. Cruikshank*, 484 So. 2d 1361 (Fla. 2d Dist. Ct. App. 1986) (merger rule not applied).

22. Seller's reservation of a life estate in a portion of the property. *Kidd v. Fowler*, 498 So. 2d 969 (Fla. 4th Dist. Ct. App. 1986) (merger rule not applied).

23. Seller's covenants regarding the availability and capacity of water, sewer, and electric services to the property. *American Nat'l Self Storage v. Lopez-Aguilar*, 521 So. 2d 303 (Fla. 3d Dist. Ct. App. 1988) (merger rule not applied).

24. Provision for awarding attorney's fees to the prevailing party. *Fleischer v. Hi Rise Homes Inc.*, 536 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1988) (merger rule applied in dicta).

25. Seller's representations concerning the tenancy of parties in possession. *Durden v. Century 21 Compass Points*, 541 So. 2d 1264 (Fla. 5th Dist. Ct. App. 1989) (merger rule not applied).

26. Provision for awarding attorney's fees to the prevailing party. *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989) (merger rule not applied).

27. Seller's covenant negating any violation of governmental restrictions. *Field v. Perry*, 564 So. 2d 504 (Fla. 5th Dist. Ct. App. 1990) (merger rule applied in dicta).