I have been asked to speak briefly concerning the doctrine of merger in real property law.

At common law the doctrine is that whenever a particular estate and a subsequent greater estate become vested in the same person, with no intervening estate in another person, the smaller particular or preceding estate becomes merged in the greater subsequent estate. For example if a person is a tenant of a particular property and then becomes the owner in fee simple of the property a merger would take place and the lease would disappear in the fee simple.

There are exceptions to the doctrine. For instance if there is an intervening interest between the earlier lesser estate and the subsequent greater estate merger would not take place. An example would be if a tenant of a particular property was conveyed the remainder interest in the property but another had a life estate in the property merger would not take place until the end of the intervening life estate.

Also, of course, there is no merger if the person entitled to the various estates holds them in different capacities for example one estate is owned by a person in his or her own capacity and the other estate as a personal representative.

Now having given a brief outline of the doctrine of merger at common law I turn to the doctrine of merger as it relates to the sale of land.

In Anger and Honsberger Law of Real Property second edition at page 1214 the doctrine is described as follows:

"The doctrine of merger is that, upon completion of an agreement for the sale of land, the agreement and the parties' rights thereunder are merged in the deed, so that thereafter they can no longer rely on the terms of the contract, but must look to the deed for any remedy." The basis of the doctrine is that there must be finality and certainty in business affairs and has over the years been applied to contracts for the sale of land. In the case of Fraser-Reid et al v. Droumtsekas et al (1979) 103 D.L.R. (3d) 385 Dickson, J., as he then was, in giving the decision of the Supreme Court of Canada said at page 397:

"There is no presumption of merger. The proper inquiry should be to determine whether the facts disclose a common intention to merge the warranty in the deed; absent proof of such intention, there is no merger:" And further stated at page 394:

"Although it is the general rule that the acceptance of a deed is prima facie full execution of the agreement to convey, and preliminary agreements and understandings relating to the sale of land become merged in the conveyance, such a rule is not applicable to independent covenants or collateral stipulations in an agreement of sale not intended by the parties to be incorporated in the conveyance. Delivery and acceptance of the conveyance in such circumstances is merely a part performance of the obligations of the vendor under the contract."

The above decision follows the case of Hashman et al v. Anjulin Farms Ltd. (1972) 31 D.L.R. (3d) 490 where Martland, J., in giving the decision of the Supreme Court of Canada said at page 496:

"It appears, therefore, that it is not in every case, where an agreement for the sale of land is followed by the execution of a conveyance of the land, that the provisions of the agreement must, of necessity, be merged in the conveyance. What the Court must do, in the words of Bowen, L.J. is to 'endeavor to see what was the contract according to the true intention of the parties'." Mr. Justice Martland in answering an argument that reference could not be made to extrinsic evidence but only to the written instruments stated at page 498:

"The extrinsic evidence introduced in this case did not seek to contradict or vary the meaning of the written instruments, but related to the issue of the intention of the parties when the building restrictions agreement was made."

It is clear from the foregoing that there is no longer a presumption of merger concerning warranties arising with regard to the sale of real property, but whether a particular

warranty is merged or not depends on the intention of the parties. In the absence of an intention to merge, merger does not take place. From a practical point of view the solicitor dealing in real estate conveyances cannot leave it-to chance but must be very careful in drafting agreements of purchase and sale or other documents to see that the intention of the parties that the particular warranty will or will not merge is expressly stated. This is a situation where the solicitor drafting the original documents can take chance out of the transaction by very deliberately expressing the intentions of the parties. For example with the warranties concerning the absence of urea formaldehyde,foam insulation (UFFI) from dwellings which are being conveyed, while I think it is clear that the parties would intend for these to survive the closing,it is prudent for a solicitor to put in writing the fact that the parties intend the warranty to survive the closing and not merge.

In addition to considering the doctrine of merger with regard to survival of warranties in terms of agreements of purchase and sale after closing there may be additional considerations which may give rise to obligations on behalf of the vendor and remedies to the purchaser. In First City Developments Limited v. Central Mortgage and Housing Corporation and Atlantic Trust (No. 2) (1985) 68 N.S.R. (2d) 207 Mr.Justice Hallett in dealing with a case in which there were damages suffered between the date of the foreclosure sale and the closing held that a purchaser could claim damages even after paying the purchase price and taking delivery of the deed. He stated that the vendor in the period between the execution of the agreement of purchase and sale and closing really held the property as a trustee for the purchaser and had obligations to the purchaser pending closing which were not contractual in nature but rather based on the imposition of a trust obligation found by the Court against the vendor.

The Judge stated at page 223:

"While the contract between the Sheriff and the purchaser can be said to be merged in the conveyance, that too depends on the intention of the parties as it is not in every case where there is a contract for the sale of land that there is a merger... First City's right to bring an action for damages under the circumstances where it raised the claim before closing survives the delivery of the conveyance because First City has not waived its claim for damages and that claim is grounded in either breach of trust or in tort rather than contract."

It therefore appears that, under certain circumstance, a vendor can be liable for damages at the suit of a purchaser for damages or deficiencies caused between agreement and closing even though such were known to the purchaser before closing and that the basis for such liability would be for breach of trust or tort. I would recommend that a solicitor be very cautious and if he or she is in the position of closing a transaction where known defects exist and cannot be dealt with prior to the closing that responsibility for the same be clearly agreed upon in writing. I would also recommend that a solicitor acting for a vendor warn the client of the client's responsibility.

EXCEPTIONS TO THE DOCTRINE OF MERGER

The classic exceptions to the doctrine of merger are as follows:

1. Fradulent misrepresentation - Where one party to a contract makes a fradulent misrepresentation upon which the other relies the innocent party may claim damages either in tort or for breach of contract and in appropriate cases, recision or rectification and this is so whether the contract is executed by deed or not. Fraud is proved when it is shown that a false representation has been made (a) knowingly or (b) without belief in its truth or (c) recklessly, careless whether it is true or false.

2. Innocent misrepresentation - Traditionally no action lies for innocent misrepresentation after the closing unless there has been a complete failure of consideration or an error in substantialibus. However it may be under certain circumstances there might be an action in tort on the basis of the principles in Hedley Byrne & Co., Ltd. v. Heller and Partners, Ltd.

3. Collateral warranties and contractual terms that survive closing - Collateral warranties and contractual terms can avoid merger and survive closing if it can be shown that the warranty was given in circumstances which must be said to have been collateral to the main contract and as part consideration therefor. Whether a collateral warranty or contractual term exists depends upon the parties' intention and is a question of fact. As stated earlier one should be careful in drafting the terms of agreements of

purchase and sale and if it is intended that a warranty survive closing that intention should be stated clearly in the contract.

4. Mutual mistake as to subject matter of the contract A contract can be regarded as void if there is a mutual mistake as to the fundamental subject matter of the contract. Such is the case if the parties have agreed to sell a certain property and in fact convey a different property or if the subject matter of the contract did not exist at the time of the contract or if it was already owned by the purchaser.

5. Error in substantialibus - Recision or damages will be granted if an error in substantialibus has taken place. Such an error exists when there is a complete difference in substance between the thing bargained for and that actually obtained so as to constitute a failure of consideration. When dealing with a difference in acreage for example, the difference in size must be such that the property cannot be used for the purpose for which is was intended. A Nova Scotia case in which error in substantialibus was considered and rejected is Aberg v. Rafuse (1979) 36 N.S.R. (2d) 56 where Chief Justice Glube held that the rule did not apply although the actual acreage was substantially less than in the deed description as the purchaser was able to use th property for the purpose for which he bought the land.