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Property

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PROPERTY

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This year, the courts decided many property law issues of interest to the general practitioner. Section I discusses cases from the federal district and circuit courts, as well as the Virginia Supreme Court and the Virginia Court of Appeals.

The 1987 session of the General Assembly resulted in several changes affecting property laws in Virginia. Section II lists the most significant statutes.

I. JUDICIAL DECISIONS

A. *Condominiums, Breach of Warranty and Statute of Limitations*

In *Harbour Gate Owners' Association v. Berg*,[1] the Virginia Supreme Court reversed the trial court's determination that the plaintiffs' (unit owners) cause of action against the condominium developer was barred by the statute of limitations. The court applied the two-year warranty on common elements in a condominium imposed by section 55-79.79(b) of the Code of Virginia (the "Code").[2] Furthermore, the court applied the three-year statute of limitations period for implied contracts.[3]

Central to the case was the court's determination that owners who purchased condominiums before the October 1, 1977 effective date of Code section 8.01-230[4] were not barred from bringing suit. Section 8.01-230 provides that the statute of limitations for damage to property shall begin to run from the date when the breach occurs, *not* when the resulting damage is discovered.[5] This author must echo Justice Russell's comment:

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1. 232 Va. 98, 348 S.E.2d 252 (1986).
2. VA. CODE ANN. § 55-79.79 (Repl. Vol. 1986).
3. *Id.* § 8.01-246(4) (Repl. Vol. 1984).
4. *Id.* § 8.01-230.
5. *Id.*

> Code § 8.01-230 was enacted in 1977 as a part of a thorough revision of laws pertaining to civil procedure. It seems unlikely that the revisors intended the harsh result dictated by its clear language: in a property damage case where the breach of duty precedes the resulting injury or damage, the property owner's right to sue may be barred before his property suffers any injury or damage. Indeed, as here, any right of action may be barred before he becomes an owner of the property. It is not our function to amend the law, however, and we must leave to the General Assembly any consideration of change.[6]

The result of the decision was that those who purchased condominiums after the effective date of the revision to section 8.01-230 were barred from bringing their suits. The 1987 legislature answered Justice Russell's challenge in part, by amending the condominium act to provide for a five-year statute of limitations for breach of warranty.[7]

B. *Contracts*

In *Duggin v. Williams*,[8] the Virginia Supreme Court ruled that loss of an assignment fee on breach of the assigned contract was not within the contemplation of the parties when the contract was made. Therefore, it is not a proper measure of damages for breach.

The action in *Presidential Gardens/Duke Street Limited Partnership v. Salisbury Slye, Ltd.*[9] was based upon the refusal of the purchaser to settle a real estate contract. The purchaser claimed title was unmarketable because a recorded deed of vacation existed for certain streets and lots in the subdivision which were included in the description of the subject property to be conveyed. The vendor, upon the purchaser's refusal to settle, sold the property to another and sought to retain the earnest money deposit. The Fourth Circuit Court of Appeals affirmed the federal district court's holding that the deed of vacation was a nullity because it failed to comply with the statutory requirements of the Code of Virginia. Therefore, title was marketable and the purchaser had no valid basis for refusing to close. The vendor retained the deposit.[10]

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6. *Harbour Gate Owners' Ass'n*, 232 Va. at 107 n.3, 348 S.E.2d at 258 n.3.
7. VA. CODE ANN. § 55-79.79(c) (Supp. 1987).
8. 233 Va. 25, 353 S.E.2d 721 (1987).
9. 802 F.2d 106 (4th Cir. 1986).
10. *Id.* at 109-11.

In *Taylor v. Sanders*,[11] the court considered whether a promissory note given upon execution of a sales contract was enforceable as liquidated damages or was unenforceable as a penalty. The parties executed two documents. The first document was a sales contract providing that the note would constitute full damages if the parties failed to settle. The second document was an occupancy agreement granting the purchasers immediate possession of the property. The occupancy agreement also provided that actual damages to the property would be deducted from the note placed in escrow.

The Virginia Supreme Court reasoned that the note served a dual purpose. First, the note represented an earnest money deposit to become damages on breach of the sales contract. Second, the note constituted a security deposit under the occupancy agreement. Upon finding that the suit before the court was based upon the sales contract, and viewing the sum of the note as not disproportionate to probable loss, and therefore not a penalty, the court ruled for the vendor.[12]

C. *Deeds*

The sole issue addressed in *Goodson v. Capehart*[13] was the proper construction of a deed. The preamble expressed an intent to convey a life estate and the granting clause expressed an intent to convey a fee simple absolute. Although this was the first time the court had been asked to consider a conflict between a granting clause and a preamble, numerous conflicts have been resolved in the past between granting clauses and *habendum* clauses.[14] In following this line of precedent, the Virginia Supreme Court ruled that the granting clause prevails when the intent of the parties can not be ascertained within the four corners of the deed. The court also found support in Code section 55-11 providing that "the grant shall be construed to convey the fee simple, . . . unless a contrary intention appears in the deed."[15]

In *Cumbee v. Myers*,[16] the Virginia Supreme Court ruled that a

11. 233 Va. 73, 353 S.E.2d 745 (1987).
12. *Id.* at 76, 353 S.E.2d at 747.
13. 232 Va. 232, 349 S.E.2d 130 (1986).
14. *See* 2 R. MINOR, THE LAW OF REAL PROPERTY § 1032, at 1336 (2d ed. 1928).
15. VA. CODE ANN. § 55-11 (Repl. Vol. 1986).
16. 232 Va. 371, 350 S.E.2d 633 (1986).

notary public's certification that a deed was "subscribed and sworn to" by the grantor satisfies the acknowledgment requirement of Code section 55-113.[17]

In *Johnson v. Buzzard Island Shooting Club*,[18] the Virginia Supreme Court held that the statute of limitations did not bar a suit challenging a void deed. Justice Cochran wrote that if the plaintiffs owned the property at the time the Commonwealth conveyed the property to the defendants, the deed was void *ab initio*. The plaintiffs were entitled to notice when the defendant sought to acquire title of alleged "waste and unappropriated" lands. Notice was not given. Neither Code sections 8.01-113 nor 8.01-238 can therefore be used to divest one who was not a party to the suit of ownership brought by one holding a void deed.[19]

D. *Rescinding Deeds for Inadequate Consideration*

In a decision that should be included in every law school property casebook, as well as delight its first-year student readers, the supreme court in *Payne v. Simmons*[20] ordered rescission of a deed where the defendants took advantage of their recluse cousin of diminished legal capacity. The defendant grantees befriended the plaintiff, persuading him to convey his property for a fraction of market value. In return, the grantees agreed to reserve a life estate for the plaintiff. However, the defendants omitted the life estate. When an altercation arose between the parties, the defendants had the plaintiff evicted. The defendants then proceeded to improve the property.[21]

Justice Russell delivered the opinion of the court, declaring that the chancellor's conclusions of law are not given the same conclusive effect as his findings of fact. The chancellor found that the plaintiff had a diminished mental capacity and that he received grossly inadequate consideration for the property. Under these facts, the chancellor should have concluded as a matter of law that the transaction constituted both constructive and actual fraud.

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17. VA. CODE ANN. § 55-113.

18. 232 Va. 32, 348 S.E.2d 220 (1986).

19. *See* VA. CODE ANN. § 8.01-113 (Repl. Vol. 1984) (imposing a twelve-month limitation period for actions to disturb title of a purchaser at judicial sale); *id.* § 8.01-238 (requiring that bills in equity to repeal grants made by the Commonwealth be brought within ten years).

20. 232 Va. 379, 350 S.E.2d 637 (1986).

21. *Id.* at 380-82, 350 S.E.2d at 638-39.

The supreme court further reasoned that when the fraud justifying recission of a contract is merely constructive, the parties are to be placed in *status quo*. But when actual fraud is shown as in this case, the defendants are entitled to neither reimbursement for the purchase price nor to compensation for improvements.[22]

E. *Deed of Trust Note*

In *Lambert v. Barker*,[23] the defendant claimed that he had satisfied a deed of trust by making payment to the original noteholder. The original noteholder fraudulently testified that he lost the note but was still the noteholder. In fact, he assigned the note secured by the deed of trust to the plaintiff. The trial court ruled for the maker on the basis that the debt was satisfied for failure of the endorsee-plaintiff to give notice to the maker of the pledge of the note as required by Code section 8.9-318(3).[24] The Virginia Supreme Court reversed the trial court, holding that section 8.9-318(3) does not apply to notes secured by real property. Payment in satisfaction of an instrument must be made to the holder in possession and no notice is required. The maker, said the court, should have protected himself by refusing to make payment until the instrument was produced, or proof of ownership was made in a law suit.[25]

F. *Easements*

At issue in *Burks Bros. of Virginia v. Jones*[26] was whether either the public or private adjacent landowners had acquired rights of access over an old mountain trail and a portion of an abandoned public road. The Virginia Supreme Court held that the general public had acquired, by implied dedication or prescription, a right to use the road. Part of the decree affirmed that adjacent landowners acquired a right by prescription, reinforcing the long-standing rules of presumed adverse use and exclusiveness.[27]

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22. *Id.* at 385-87, 350 S.E.2d at 641-42.

23. 232 Va. 21, 348 S.E.2d 214 (1986).

24. VA. CODE ANN. § 8.9-318(3) (Added Vol. 1965 & Cum. Supp. 1987).

25. *Lambert*, 232 Va. at 24-25, 348 S.E.2d at 215-16; *see* VA. CODE ANN. § 8.3-804 (remedy for owner of last note).

26. 232 Va. 238, 349 S.E.2d 134 (1986).

27. The use [is] exclusive when it is proprietary, not a use by the public generally, and is exercised under some claim which is independent of and does not depend for enjoyment upon similar rights by others. It is not necessary, however, that the claimant be

In *Brown v. Haley*,[28] the court was faced with two issues: (1) was the present suit, asking the court to establish an implied or quasi easement, barred by a prior suit which determined that the defendant held title to subject lands; and (2) did the plaintiffs have an easement across subject lands. Both actions were based on the deed from the defendant to the grantee-plaintiff. The deed description provided for the grantee's boundary to be the 800 foot contour line, the estimated water level of Smith Mountain Lake. However, the water level of the lake when filled generally remains within the 790-foot to 795-foot contours. As a consequence, the plaintiffs' land was separated from the lake water by a narrow strip of land determined in the first lawsuit to be owned by the defendants. The plaintiffs sought a declaration by the court that the plaintiffs had an easement across the defendant's land in order to reach the water. The court found that the first suit was not *res judicata* to the second proceeding because the first suit dealt with the issue of title to the land. The second suit dealt with the existence of an easement.[29]

On the second issue, the court found that the plaintiff's evidence established a quasi easement or an implied easement from prior use. The plaintiff met the burden of proof by presenting clear and convincing evidence that the use was a reasonable necessity.[30] A key finding of fact was that the defendants knew that the plaintiffs' sole purpose in purchasing the tract was to provide water-related recreation for themselves and their tenants.

In a third suit to come before the Virginia Supreme Court this year dealing with implied and prescriptive easements, the court again outlined the requisite elements of prescriptive and implied easements, affirming long-standing hornbook law principles.[31] However, the court adopted the same burden of proof for ease-

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> the only one to enjoy the right of way, as other persons may acquire a prescriptive right to use it. When a way has been so used for a period of more than twenty years, the origin of the way not being shown, the *bona fides* of the claim of right is established and a presumption of a right to the use arises from the long acquiescence of the owner of the servient estate, and the burden is on him to rebut that presumption by showing permission or license from him or those under whom he claims.

Totten v. Stuart, 143 Va. 201, 203-04, 129 S.E. 217, 218 (1925).

28. 233 Va. 210, 355 S.E.2d 563 (1987).

29. *Id.* at 212-16, 355 S.E.2d at 565-67. The test used by the court "to determine whether claims are part of a single cause of action is whether the same evidence is necessary to prove each claim." *Id.* at 216, 355 S.E.2d at 567.

30. *Id.* at 219-20, 335 S.E.2d at 569-70.

31. Pettus v. Keeling, 232 Va. 483, 352 S.E.2d 321 (1987).

ments by prescription as it had previously adopted for easements by necessity. Both must be proved by clear and convincing evidence.

The dispute in *Pettus*, centered on whether the use was permissive. Defendant landowners claimed that the roadway was used by the general public in a neighborly reciprocal manner with no evidence of anyone using it under a hostile claim of right. The court rejected the defendants' argument and upheld the trial court's opinion that the plaintiffs used the roadway as the only access to their property and they did not lose their claim of right simply because the road was also used by the general public.[32]

G. *Escheat; Eminent Domain*

In *United States v. 198.73 Acres of Land, More or Less*,[33] the Fourth Circuit ruled that there can be no partial or piecemeal escheat, as the Commonwealth of Virginia claimed. The court also rejected the Commonwealth's claim that the heirs abandoned the property based on the Commonwealth's position that the heirs were entitled to only six percent of the condemnation proceeds. Because the Commonwealth is estopped to claim abandonment, the court concluded that the heirs were entitled to all the proceeds.[34]

H. *Landlord/Tenant*

In *Neale v. Jones*,[35] the Virginia Supreme Court reaffirmed the rule that rescission will not be granted for breach of contract unless it is of such a substantial character as to defeat the object of the parties.

In *Appalachian Power Co. v. Sanders*,[36] the supreme court reversed in part the trial court which had allowed a jury instruction based upon section 359 of the Restatement (Second) of Torts. The Restatement provides that a lessor is liable for injuries to the lessee's invitees under the "public use" exception to the general

32. *Id.* at 486, 352 S.E.2d at 324.
33. 800 F.2d 434 (4th Cir. 1986).
34. *Id.* at 436.
35. 232 Va. 203, 349 S.E.2d 116 (1986).
36. 232 Va. 189, 349 S.E.2d 101 (1986).

rule of non-liability of the landlord for the condition of the premises.[37]

In rejecting this exception, the court adhered to the old rule that a landlord is liable only for latent defects absent a covenant in the lease agreement for warranty or repair. Additionally, the lease contained a provision for indemnity by the lessee for any loss suffered by the lessor. The court ruled that the provision was valid and the lessor was entitled to recover reasonable attorney fees and expenses of litigation in defending the suit.[38]

The court perhaps was impressed by the fact that the lessor leased two vacant lots to Patrick County-Stuart Chamber of Commerce for the consideration of one dollar in order for the Chamber to conduct a Harvest Festival. During the four-day term of the lease, one of the lessee's invitees stepped into a hole overgrown by vines. The invitee suffered a broken ankle. The jury awarded $125,000 damages against both the lessor and the lessee, jointly and severally. The court affirmed the judgment of $125,000 against the defendant Chamber of Commerce but not the lessor.[39]

The Fourth Circuit held that an alleged sublease was in fact an assignment in the case of *Tidewater Investors v. United Dominion Realty Trust*.[40] Therefore, the subtenant had standing to sue the landlord for improper eviction. The court overturned the district court's finding that the subtenant had no privity of contract or estate under a sublease, and therefore lacked standing to sue the landlord.[41]

In *Northfield Investment Co. v. United Way of America*,[42] the Supreme Court of Virginia ruled that a tenant was liable for rent payments only for the two weeks the tenant occupied the premises

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37. A lessor who leases land for a purpose which involves the admission of the public is subject to liability for physical harm caused to persons who enter the land for that purpose by a condition of the land existing when the lessee takes possession, if the lessor

(a) knows or by the exercise of reasonable care could discover that the condition involves an unreasonable risk of harm to such persons, and

(b) has reason to expect that the lessee will admit them before the land is put in safe condition for their reception, and

(c) fails to exercise reasonable care to discover or to remedy the condition, or otherwise to protect such persons against it.

RESTATEMENT (SECOND) OF TORTS § 359 (1965).

38. *Appalachian Power Co.*, 232 Va. at 195-96, 349 S.E.2d at 105-06.

39. *Id.* at 191, 196, 349 S.E.2d at 102-03, 106.

40. 804 F.2d 293 (4th Cir. 1986).

41. *Id.* at 295-96.

42. 233 Va. 124, 353 S.E.2d 774 (1987).

after expiration of a term lease. The tenant occupied the premises pursuant to an oral agreement between the parties for an extension. The landlord claimed contract rent for a full month. The court, in rejecting the landlord's argument, declared that Code section 55-223 is inapplicable when a holding over occurs pursuant to an express agreement with the landlord.

In *Pantry Pride Enterprises v. Stop & Shop Cos.*,[43] the landlord had a first right of refusal for the assignment of the remainder of a leasehold. The Fourth Circuit affirmed a grant of specific performance to the landlord, enabling him to exercise his right. The court, however, remanded the cause to the district court for a determination of the price at which the lessor could exercise the refusal right. The trial court had adopted the artificial price allocated by the tenant for the sale of both the leasehold and equipment to a third party.[44]

The issue in *Kesler v. Allen*[45] was whether a landlord, who employs an independent contractor to make repairs or improvements, is liable to the tenant for injuries resulting from the contractor's negligence.[46] The Virginia Supreme Court ruled in favor of the landlord, holding that the tenant had neither alleged that the landlord was negligent in selecting the contractor, nor established one of the exceptions to the general rule that a landlord "who employs an independent contractor is not liable for injuries to third persons caused by the contractor's negligence."[47]

I. *Priority of Liens*

In *Hausman v. Hausman*,[48] the Virginia Supreme Court considered whether the lien of a child support judgment docketed after the couple's divorce has priority over a recorded deed of trust executed solely by the husband prior to the divorce, when the subject property was held by the husband and wife as tenants by the entirety. The bank claimed that under the doctrine of after-acquired title,[49] when the divorce decree was entered converting the title to

43. 806 F.2d 1227 (4th Cir. 1986).
44. *Id.* at 1231-32.
45. 233 Va. 130, 353 S.E.2d 777 (1987).
46. *Id.* at 132-33, 353 S.E.2d at 779.
47. *Id.* at 134, 353 S.E.2d at 780.
48. 233 Va. 1, 353 S.E.2d 710 (1987).
49. The doctrine of after-acquired title, also known as the equitable doctrine of estoppel by deed, codified at VA. CODE ANN. § 55-52 (Repl. Vol. 1986), reads:

tenancy in common, its lien became effective. The divorce decree was entered before the child support judgment was docketed.[50] In rejecting the bank's argument, the supreme court ruled that the argument was based upon an erroneous reading of Code section 55-52.[51] The proper reading, according to the court, does not prejudice the rights of third parties. Therefore, the deed of trust was void as to the wife and children, giving the child support judgment priority over the deed of trust.[52]

At issue in *Cavalier Service Corp. v. Wise*[53] was the priority between a *lis pendens* and a federal tax lien docketed after the time of filing of the *lis pendens* but before it was reduced to judgment. The court, following the rationale of *United States v. Security Trust & Savings Bank*,[54] held that a *lis pendens* is an inchoate right that becomes a lien against the property upon its being reduced to judgment. The court expressly rejected the argument that the judgment lien relates back to the time of filing the *lis pendens*, and declared that the filing of the *lis pendens* simply gives notice of a potential lien but does not affect the creditors of the defendant. Further, the court declared that as between creditors, under Code section 55-96,[55] priority is established by the one who first records the judgment.

J. *Marital Property Upon Divorce*

The Court of Appeals of Virginia in *Morris v. Morris*[56] held that the wife did not have to convey her interest in jointly owned property upon the husband's payment of a monetary award pursuant to a property settlement in a divorce action. The trial court only had

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> When a deed purports to convey property, real or personal, describing it with reasonable certainty, which the grantor does not own at the time of the execution of the deed, but subsequently acquires, such deed shall, *as between the parties thereto*, have the same effect as if the title which the grantor subsequently acquires were vested in him at the time of the execution of such deed and thereby conveyed. Any such deed, which shall have been executed by the consort of the grantor, shall bar the contingent right of dower or curtesy of such consort of the grantor therein.

Id. (emphasis added.)

50. VA. CODE ANN. § 8.01-460 (Cum. Supp. 1987). A child support judgment does not become a lien on real estate until the judgment is docketed.

51. *Id.* § 55-52 (Repl. Vol. 1986).

52. *Hausman*, 233 Va. at 4, 353 S.E.2d at 711.

53. 645 F. Supp. 31 (E.D. Va. 1986).

54. 340 U.S. 47 (1950).

55. VA. CODE ANN. § 55-96 (Repl. Vol. 1986).

56. 3 Va. App. 303, 349 S.E.2d 661 (1986).

authority to order partition of the property, as well as order payment of a monetary award. However, the trial court could not condition one upon the other.

K. *Mechanics' Liens*

In addition to holding that due process requires that the beneficiary of a deed of trust be a necessary party to enforce a mechanic's lien, the court in *Walt Robbins, Inc. v. Damon Corp.*,[57] reaffirmed that a deed of trust recorded before land is improved constitutes a first lien on the land but is subordinate to a mechanic's lien on subsequent improvements. The result is that a "mechanic's lien is a first lien on the improvements and a subordinate lien on so much of the land as is necessary for the use and enjoyment of the improvements."[58]

L. *Partition*

In *Sensabaugh v. Sensabaugh*,[59] the Virginia Supreme Court held that when one party seeking sale of the property in lieu of partition fails to prove that the land cannot be conveniently partitioned in kind, it is error for the trial court to order the sale of the subject property.

M. *Real Estate Closings*

In *Pickus v. Virginia State Bar*,[60] the Virginia Supreme Court affirmed an order of the Virginia State Bar Disciplinary Board suspending the license of a closing attorney who failed to satisfy existing liens on the subject property. Instead, the attorney delivered loan funds, which were to be secured by a first deed of trust, to his client who promised to satisfy the prior liens but failed to do so.

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57. 232 Va. 43, 348 S.E.2d 223 (1986). It is not expressly required that the trustee and beneficiary of a deed of trust be made parties. VA. CODE ANN. § 43-22 (Repl. Vol. 1986). In *Monk v. Exposition Deepwater Pier Corp.*, 111 Va. 121, 68 S.E.2d 280 (1910), it was held that the beneficiary of a subsequent deed of trust is not a necessary party to a suit to enforce a mechanic's lien. In *Loyola Fed. Sav. & Loan Ass'n v. Herndon Lumber & Millwork, Inc.*, 218 Va. 803, 241 S.E.2d 752 (1978), it was held that a trustee under a deed of trust is not an "owner" within the meaning of VA. CODE ANN. § 43-4 (Repl. Vol. 1986). Therefore, failure to name the trustee in a memorandum for a mechanic's lien does not render the mechanic's lien defective.

58. *Walt Robbins*, 232 Va. at 47, 348 S.E.2d at 226.

59. 232 Va. 250, 349 S.E.2d 141 (1986).

60. 232 Va. 5, 348 S.E.2d 202 (1986).

The court found the necessary scienter for misrepresentation because the attorney certified to the title insurance company that the prior liens had been satisfied. Further, the court found that the Code of Professional Responsibility protects third parties as well as clients when an attorney handles monies on behalf of clients or third parties.[61]

N. *Recording*

The federal district court in *Village Savings Bank v. Willey (In re Willey)*[62] overruled the bankruptcy court which had declared that a deed of trust was null and void as to the land sales contract of the debtors as purchasers. The district court ruled that the debtors/purchasers were on constructive or record notice of a prior lien on the property. Even if the contract purchasers were not on notice, they would not be *bona fide* purchasers as to the remaining unpaid purchase price but would only be protected for amounts already paid. The court affirmed the bankruptcy court's finding that the lender had waived the "due on sale" clause by previously transferring title to the subject property to the vendors of the land sales contract.[63]

O. *Rule Against Perpetuities; Construction of Option Contract*

In *Layne v. Henderson*,[64] the court considered whether an option agreement allowing the survivors to purchase the interests of their deceased brother violated the rule against perpetuities. The trial court ruled that the agreement did violate the rule. The Virginia Supreme Court overruled the trial court, determining that proper construction of the words "survivor or survivors" in the option agreement referred to the brothers themselves, not their estates, successors or assigns. Therefore, the option would have to be exercised, if at all, by a surviving brother - a life in being at the time the executory interest was created.[65]

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61. VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1986).

62. 65 Bankr. 832 (E.D. Va. 1986).

63. *Id.* at 840.

64. 232 Va. 332, 351 S.E.2d 18 (1986).

65. The "wait and see" statute, VA. CODE ANN. § 55-13.3 (Repl. Vol. 1986), effective July 1, 1982, significantly modified the harsh rule against perpetuities. It did not apply to this suit which was filed April 27, 1982. The enactment specified that the provisions of the section did not apply to or affect pending litigation. 1982 Va. Acts 399; *see also Layne*, 232 Va. at 336 n.*, 351 S.E.2d at 21 n.*

P. *Subdivisions; Vacation of Plat*

In *Dotson v. Harman*,[66] the Virginia Supreme Court ruled that a suit filed by lot owners, not parties to a prior suit filed by a neighboring lot owner against the same defendants, was not barred by *res judicata*. The trial court erred in upholding the *res judicata* defense based on the belief that the defendant, Board of Supervisors, adequately represented the same interest as the present plaintiffs in the closure of a road by vacation of a subdivision plat. The vacation of the plat was based on fraudulent statements made by the developer that no lots had been sold.[67]

Q. *Zoning*

In *National Memorial Park, Inc. v. Board of Zoning*,[68] the Virginia Supreme Court reaffirmed a long-standing and frequently cited rule that the decision to grant or deny a special use permit is a legislative, not an administrative, function. The decision carries with it a presumption of validity. Zoning board actions are only disturbed upon a showing that the action is arbitrary, capricious and a clear abuse of the board's discretion.

In *Masterson v. Board of Zoning Appeals*,[69] the Virginia Supreme Court affirmed the trial court's determination that the proposed new conforming construction to a lawfully non-conforming use under the zoning acts does not increase the non-conformity so as to make the new construction prohibited. The trial court erred however, in placing the burden of proof upon the plaintiffs to show that the use was not a lawful non-conforming use. Challengers need only show the use is not permitted in the zoning district. The burden then shifts to the landowner to show his use is a lawful non-conforming use.[70]

In *Board of Supervisors v. Booker*,[71] the Virginia Supreme Court upheld a zoning amendment which made the landowners' previously approved use as a junkyard illegal.

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66. 232 Va. 402, 350 S.E.2d 642 (1986).
67. *Id.* at 404, 350 S.E.2d at 644.
68. 232 Va. 89, 348 S.E.2d 248 (1986).
69. 233 Va. 37, 353 S.E.2d 727 (1987).
70. *Id.* at 47, 353 S.E.2d at 734.
71. 232 Va. 478, 352 S.E.2d 319 (1987).

II. LEGISLATION

A. *Condominiums*

Section 55-79.79(c) is changed to provide for a five year statute of limitations for breach of warranty.[72]

Section 55-79.94 is amended to require inclusion in the public offering statement the results of an inspection for presence of asbestos in a conversion condominium building. The requirement applies to construction substantially completed prior to July 1, 1978.[73]

B. *Deeds and Conveyances*

A lien creditor must now record a satisfaction within ninety days after notice that payment has been made. The amendment to section 55-66.3 also increases the forfeiture penalty for failure to comply within the recording requirement.[74]

Deeds wherein a grantor conveys to himself, or himself and another person, are valid if made prior to July 1, 1986.[75]

Section 55-49.1 adds to the Code a provision that adopted persons and persons born out of wedlock are presumptively included in certain class gift generic terms in the interpretation of deeds while presumptively excluded from other generic terms.[76] By enacting this provision, the General Assembly upset the holding in *Hyman v. Glover*.[77] In that case, the Virginia Supreme Court held that the term "issue" did not encompass adopted children in the construction of wills.[78]

Attorneys' fees and costs may now be assessed against the holder of a satisfied mortgage or deed of trust if the holder has unjustifiably failed to release the lien.[79]

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72. VA. CODE ANN. § 55-79.79(c) (Supp. 1987).
73. *Id.* § 55-79.94(a)(6).
74. VA. CODE ANN. § 55-66.3(A)(1) (Supp. 1987).
75. *Id.* § 55-9.
76. *Id.* § 55-49.1.
77. 232 Va. 140, 348 S.E.2d 269 (1986).
78. *Id.*; *see also* Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 21 U. RICH. L. REV. 855 (1987).
79. *Id.* § 55-66.5(c).

C. *Deeds and Recording*

Section 55-101 is amended to provide that if two instruments are recorded on the same day and in the same place, and are stamped with identical times, the instrument number shall determine priority, unless other Code sections provide otherwise.[80]

D. *Landlord and Tenant*

1. Rental Property

Section 55-218.1 is amended to clarify and expand the definition of nonresident landlords who must maintain an agent and business office within the Commonwealth.[81]

2. Residential Landlord and Tenant Act

Section 55-248.13 is amended to include in the landlord's duty to "maintain fit premises" the requirement that the landlord supply reasonable air conditioning unless air conditioning is within the exclusive control of the tenant.[82]

The 120-day notice provision of conversion or rehabilitation of apartments cannot be waived through a term of the lease.[83] Section 55-248.13 now provides that the landlord "keep all common areas in . . . clean and *structurally* safe condition."[84] Sections 55-248.21 and 55-248.31 are amended to provide that either the landlord or tenant may terminate the rental agreement after 30 days notice if the other commits nonremediable breach or intentionally recommits previously remedied breach.[85]

E. *Mechanics' Liens*

The notice of sales to enforce mechanics' liens must be advertised in a "public place."[86]

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80. VA. CODE ANN. § 55-101 (Supp. 1987).
81. VA. CODE ANN. § 55-218.1 (Supp. 1987).
82. VA. CODE ANN. § 55-248.13(a)(6) (Supp. 1987).
83. *Id.* §§ 55-222, -248.9.
84. *Id.* § 55-248.13.
85. *Id.* §§ 55-248.21, -248.31.
86. VA. CODE ANN. § 43-34 (Cum. Supp. 1987).

F. *Mobile Home Lot Rental Act*

Section 55-248.45 is amended to provide that a mobile homeowner may now be restricted in his choice of vendors from whom he purchases his mobile home. The restriction may apply if the purchase is made in connection with the initial leasing or renting of a newly constructed lot not previously leased to any other person. Otherwise, a mobile homeowner may freely choose from whom he may purchase his mobile home.[87]

G. *Wet Settlement Closings Act*

A settlement agent may not disburse any loan funds prior to recordation of any instrument.[88] Section 6.1-2.10 is also amended to include in the definition of settlement agent "any individual, corporation, partnership, or other entity conducting the settlement and disbursement of loan proceeds."[89] Also, drafts issued by state or federally chartered credit unions are now included in the list of acceptable "loan funds" sources which the settlement agent may disburse without waiting for the draft to clear the agent's trust account.[90]

H. *Zoning*

Several amendments now clarify and distinguish a "special exception" from a "variance."[91]

Section 15.1-503.2 grants local governments the authority, through zoning ordinances, to extend historic districts to protect approaches to historic sites.[92]

Sections 15.1-15 and 15.1-19.2 authorizes local governments to adopt building regulations including off-street parking requirements, minimum set-backs and minimum lot sizes.[93]

Vacation of a plat may now be accomplished by the following alternative methods: (1) by the owners with consent of the governing body; or (2) by ordinance of the governing body.[94]

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87. VA. CODE ANN. § 55-248.45(C) (Supp. 1987).
88. VA. CODE ANN. § 6.1-2.13 (Cum. Supp. 1987).
89. *Id.* § 6.1-2.10.
90. *Id.*
91. VA. CODE ANN. §§ 15.1-430(p), -491(a), -495(b) (Cum. Supp. 1987).
92. *Id.*
93. *Id.* §§ 15.1-15(1), -19.2.
94. *Id.* § 15.1-481.