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Survey of the Virginia Law of Landlord and Tenant

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SURVEY OF THE VIRGINIA LAW OF LANDLORD AND TENANT

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I. Introduction

No aspect of the law of real property affects more people as pervasively as the law of landlord and tenant. A recent study undertaken by the Virginia Housing Study Commission showed that almost fifty percent of the Commonwealth’s population are tenants.1

Reflecting the high priority that the ownership of land had at early common law and the relative power of the landlord to the tenant, it is not surprising that the law has traditionally favored the landlord. Until recently this tradition had remained virtually unchanged. There has been a growing realization that the present state of the law as it has evolved from its feudal origins has become in many respects an anachronism in an urbanized and mobile society. The fact that the traditional principles have been unable to resolve equitably the problems of the modern landlord-tenant relationship has generated a significant movement for reform. In 1973 the Commissioners on Uniform State Laws approved a Uniform Residential Landlord and Tenant Act.2 The objective of the Act is to clarify and delineate specifically the rights, duties, and remedies of the landlord and tenant.

The Virginia General Assembly in its 1974 session enacted the Virginia Residential Landlord and Tenant Act. The Virginia Act with several significant exceptions is patterned after the Uniform Act. As its stated purpose, the Virginia Act attempts to “. . . simplify, clarify, modernize, revise the law . . .”3 governing the landlord-tenant relationship in the Commonwealth. Whether the Act achieves its avowed purpose is open to serious question, but it does mark an important step forward in a neglected area of the law.

The purpose of this survey is to provide the practicing Virginia attorney with a comprehensive treatment of the problem generating areas of the law of landlord and tenant. Additionally, the article will address those aspects of the newly enacted Virginia Residential Landlord and Tenant Act that have materially affected the law.

† The Review would like to acknowledge the assistance of Professor J. Rodney Johnson in the preparation of this article.

II. PRE-LEASING PRACTICES

A. Discrimination

Discrimination in the rental of housing on the basis of race, color, religion, or national origin is no stranger to Virginia. Traditionally, it occurs in the soliciting and showing of dwellings for sale or rental and most often it is aimed at blacks. Civil rights advocates urged federal open housing legislation in the 1960's as the only viable solution to this discrimination. The violent race riots that scorched our cities during the mid-1960's awakened many, both in and out of Congress, to the fact that the continued de facto policy of segregation would perpetrate further social disruption.

With this turmoil as background, the year 1968 witnessed the launching of two major assaults against discrimination in housing: (1) Congress enacted the Civil Rights Act of 1968 with its Fair Housing Title (hereinafter referred to as the 1968 Act) which made it unlawful to refuse to sell or rent housing because of race, color, religion, or national origin; (2) the Supreme Court ruled in *Jones v. Alfred H. Mayer Co.*, that the refusal to sell or rent housing because of the race of the buyer or tenant was unlawful. This decision was based on a federal statute, 42 U.S.C.§1982 (hereinafter referred to as section 1982) enacted in 1866. A final attack against housing discrimination occurred in 1972 when Virginia became the first southern state to enact open housing legislation. The Virginia Fair Housing Law (hereinafter referred to as the Virginia Law), like its two federal counterparts, makes discrimination in the sale or rental of a dwelling unlawful.

One might assume that the 1968 Act, section 1982, and the Virginia Law all cover the same ground. While the three laws are similar in many respects, they differ substantially in scope of application, methods of enforcement, and available remedies. An examination of these three pieces of legislation reveals that it is much more beneficial for an aggrieved party

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2. 392 U.S. 409 (1968). The petitioner charged that defendant's refusal to sell him a home because he was black violated 42 U.S.C. § 1982. The Supreme Court held that the 1866 statute bars all racial discrimination, private as well as public, in the sale or rental of property, and that thus construed, it is a valid exercise of the power of Congress to enforce the thirteenth amendment's prohibition against slavery and involuntary servitude.
3. The statute at the time of the decision was 42 U.S.C. § 1982 (1964). It was originally enacted in the Civil Rights Act of 1866, as part of ch. 31, § 1, 14 Stat. 27, and re-enacted in the Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144. The present statute is 42 U.S.C. § 1982 (1970) and it reads as follows:
   All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.
to bring his action under the federal statutes than under the Virginia Law. Thus, an understanding of section 1982 and the 1968 Act is essential to an attorney representing a complaining prospective tenant.

As between the two federal statutes, the 1968 Act offers a broader umbrella of protection. It prohibits designated types of discriminatory conduct based on race, color, religion, and national origin. Thus, the protection of the 1968 Act reaches discriminatory acts against not only blacks, but also against Jews or Puerto Ricans. Section 1982, on the other hand, prohibits racial discrimination only. The 1968 Act is also broader than section 1982 in the types of discrimination proscribed. While both federal statutes declare that discrimination in the sale or rental of a dwelling is unlawful, the 1968 Act goes on to forbid: (1) discrimination in "the terms, conditions, or privileges of a dwelling, or in the provision of services or facilities in connection therewith;" 6 (2) the making, printing, or publishing of any notice or advertisement regarding the sale or rental of a dwelling which indicates any discrimination based on race, color, religion, or national origin; 7 (3) false representations made to any person because of race, etc., that a dwelling is not available for sale or rental; 8 (4) inducing for profit, any person to sell or rent a dwelling by representations that persons of a particular race, etc., are about to enter the neighborhood. 9

The far-reaching coverage of the 1968 Act is limited by a number of exemptions. The 1968 Act exempts an owner who sells or rents his single family house if that owner does not use a brokerage service, does not violate the prohibitions on advertising, 10 and does not own more than three such single family houses at any one time. 11 Also, the 1968 Act does not apply to the rental of multiple family dwellings occupied by four or fewer families if the owner occupies one of these units. 12 Other exemptions provided in the 1968 Act include those for religious organizations selling or renting to members of their association and private clubs which provide housing for

5. 42 U.S.C. § 3604(a) (1970) states that it shall be unlawful:
   To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale, or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.
6. Id. § 3604(b).
7. Id. § 3604(c).
8. Id. § 3604(d).
9. Id. § 3604(e). The practice deemed unlawful by this section is commonly referred to as "blockbusting."
10. Id. § 3604(c).
11. Id. § 3603(b)(1). This exemption will apply to a dwelling sold or rented only once within a twenty-four month period.
12. Id. § 3603(b)(2).
their members as an incident to their primary purpose. Section 1982 provides no similar exemptions which allow certain classes to discriminate in the sale or rental of housing; however, it is imperative to remember that section 1982 only protects against racial discrimination.

The methods by which these statutes are enforced and the remedies available are of prime importance to an aggrieved prospective tenant. Section 1982 does not specify any remedies that are available to an injured party, but is merely a declaration of affirmative rights. However, the Supreme Court, in Jones v. Alfred H. Mayer, stated that the fact that section 1982 provides no method of enforcement will not prevent a federal court from granting relief. Such relief could include: (1) a preliminary injunction; (2) a permanent injunction; (3) compensatory damages where monetary loss occurs as a result of a discriminatory refusal to rent or buy; (4) punitive damages in extreme cases of malicious misconduct; (5) attorney’s fees where appropriate.

13. Id. § 3607.
14. The owner of a single-family dwelling is allowed to discriminate against a black in the sale or rental of his dwelling under the 1968 Act. However, this same practice would be unlawful under section 1982 because no exceptions are provided. The owner of a single family dwelling who refuses to sell or rent to a party because of that party’s religion or national origin is engaged in an unlawful act under the 1968 Act or section 1982. Thus, one can only fill some of the gaps in the 1968 Act by applying section 1982. See Brooke, Smedley, Kinoy, Ervin, Non-Discrimination in the Sale or Rental of Real Property: Comments on Jones v. Alfred H. Mayer Co. and Title VIII of the Civil Rights Act of 1968, 22 Vand. L. Rev. 455, 459-73 (1969) which offers an excellent comparative analysis between 1982 and the 1968 Act. The format of presentation employed by the authors was used as the structural basis for this article.
15. See note 4 supra.
16. 392 U.S. at 414 n.13. In Jones, the complaining party sought injunctive relief.
18. This could prohibit the defendant from denying to the plaintiff the right to buy or lease the dwelling because of his race. It could also require the defendant to sell or rent the property in question to the plaintiff or provide other housing of similar quality. Harris v. Jones, 296 F. Supp. 1082, 1084 (D. Mass. 1969).
20. Punitive damages are rarely awarded. The court in Wright v. Kaine Realty, 352 F. Supp. 222, 223 (N.D. Ill. 1972) stated that punitive damages have never been favored in the law and should be awarded with great caution and within narrow limits.
21. The court in Brown v. Ballas, 331 F. Supp. 1033, 1037 (N.D. Tex. 1971) in quoting from Lee v. Southern Home Sites Corp., 429 F.2d 290, 295 (5th Cir. 1970), stated that an award of attorney’s fees was appropriate “especially so when one considers that much of the elimination of unlawful racial discrimination necessarily devolves upon private litigants and their attorneys.”
In contrast, the 1968 Act offers a variety of statutory procedures and remedies to an aggrieved party. Section 361022 of the 1968 Act allows an aggrieved party to file a complaint with the Secretary of the Department of Housing and Urban Development within 180 days after the alleged discriminatory act has occurred.23 If the Secretary determines that an unlawful discriminatory act has in fact occurred, he must attempt to eliminate the practice by conference and persuasion. If satisfactory results cannot be attained, the aggrieved party may institute a civil action in a United States district court, subject to the proper time limits.24 Upon a finding of guilty, the court is empowered to issue injunctive relief "or order such affirmative action as may be appropriate."25 Where substantially equivalent judicial remedies exist on the state or local level, the complaining party is required to commence his action there.26

As an alternative to the administratively initiated procedure above, an aggrieved party may bring a civil action directly in a United States district court, or in a state or local court of general jurisdiction, under section 3612 to enforce rights granted by the 1968 Act. Remedies available to a complaining party under this section include:27 (1) a preliminary injunction to maintain the status quo pending a final hearing of the merits of the claims;28 (2) actual damages;29 (3) up to $1,000 in punitive damages;30 (4) attorney's fees in the proper case.31 An action under section 3612 may

23. Id. § 3610(a)(b).
24. Id. § 3610(d). This subsection states that if within thirty days after the complaint is filed with HUD, the Secretary is unable to obtain voluntary compliance, the complaining party may file suit in federal district court within thirty days thereafter. Where an action instituted by blacks alleging that they were not permitted to rent apartments because of their race was commenced more than sixty days after charges were filed with HUD, action could not be maintained under this section. Young v. AAA Realty Co., 350 F. Supp. 1382 (M.D.N.C. 1972).
26. Id.
27. 42 U.S.C. § 3612 (1970). The action must be brought within the 180 day period provided for in § 3612(a). See, e.g., Trafficante v. Metropolitan Life Ins. Co., 446 F.2d 1158, 1161 (9th Cir. 1971).
31. 42 U.S.C. § 3612(c) (1970) states that only reasonable attorney's fees may be granted, and only where the plaintiff, in the opinion of the court, is not financially able to assume the burden of paying such fees. See, e.g., Sanborn v. Wagner, 354 F. Supp. 291, 297 (D. Md.
always be brought directly in a United States district court. The existence of a substantially equivalent state or local fair housing law is immaterial.\textsuperscript{32}

A third alternative provided by the 1968 Act allows the Attorney General to bring a civil action in any appropriate United States district court. The action may be brought when there is cause to believe that there is an individual or group "pattern or practice" violative of the Act or whenever any group has been denied any rights granted under the Act and "such denial raises an issue of general public importance."\textsuperscript{33} The remedies enumerated for a suit by the Attorney General are a "permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights."\textsuperscript{34}

Two other practices are also made unlawful by the 1968 Act. The first of these forbids one from intimidating or threatening anyone exercising the rights granted under the Act. This provision may be enforced by "appropriate civil action."\textsuperscript{35} Forcible interference with persons exercising rights granted by the 1968 Act is made a criminal offense by section 3631. The severity of the interference determines the degree of the penalty.\textsuperscript{36}

\textsuperscript{32} Brown v. Lo Duca, 307 F. Supp. 102, 103-05 (E.D. Wis. 1969) declared that section 3612 offers an alternative to the procedures and remedies offered in section 3610. Thus, it is not necessary to question whether state or local law provides an equivalent judicial remedy. No prerequisite of seeking administrative relief from HUD is imposed under section 3612. One may proceed directly into federal court. Crim v. Glover, 338 F. Supp. 823, 825 (S.D. Ohio 1972) declared that a clear majority of cases have held that sections 3610 and 3612 are alternative remedies. See, e.g., Young v. AAA Realty Co., 350 F. Supp. 1382, 1384-85 (M.D.N.C. 1972); Johnson v. Decker, 333 F. Supp. 88, 91 (N.D. Cal. 1971).

\textsuperscript{33} 42 U.S.C. § 3613 (1970). There is no simple definition of "pattern or practice." The court in United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971) stated that the words "pattern or practice" were intended to encompass more than an isolated event. See, Annot., 13 A.L.R. Fed. 285 (1972). What constitutes "an issue of general public importance" has been left to the determination and discretion of the Attorney General. See, e.g., United States v. Bob Laurence Realty, Inc., 474 F.2d 115 (5th Cir. 1973). Because most fair housing litigation conducted by the Attorney General is handled by the very small Housing Section of the Civil Rights Division, the number of actions brought is quite limited. See, e.g., Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972).

\textsuperscript{34} 42 U.S.C. § 3613 (1970). The court in United States v. Real Estate Dev. Corp., 347 F. Supp. 776, 785 (N.D. Miss. 1972) stated: "In cases of this kind, injunctions should not be granted grudgingly and their scope should be sufficiently broad to assure non-discrimination."


\textsuperscript{36} Id. § 3631(c). Penalties consist of a fine up to $1,000 or imprisonment of not more than one year, or both. If bodily injury is involved, the penalty shall be a fine of not more than $10,000 or imprisonment of not more than ten years, or both. If death occurs, the penalty shall be imprisonment for any number of years or life.
The Virginia Law is patterned almost exclusively after the 1968 Act. It forbids discrimination in the sale or rental of a dwelling on the basis of race, color, religion, or national origin. However, unlike the 1968 Act, the Virginia Law extends its coverage to discrimination in the sale or rental of a dwelling on the basis of sex. It also makes it unlawful to: (1) discriminate in the terms of the sale or lease; (2) publish any advertisement which indicates any preference with respect to the sale or rental of a dwelling; (3) deny to anyone access to a listing service; (4) make false representations to any person, for reasons of discrimination, that a dwelling is not available for sale or rental; (5) induce any person to transfer an interest in real property by representations that persons of a particular race, etc., are about to enter the neighborhood. The Virginia Law provides exemptions to the same parties and transactions as the 1968 Act.

The major difference between the Virginia Law and its two federal counterparts is in the area of remedies offered to an aggrieved party. The Virginia Law provides for injunctive relief, court costs, attorney’s fees, and actual damages limited to $250. Unlike section 1982 and the 1968 Act, it offers no provision for punitive damages. An aggrieved party may also file a complaint with the Attorney General, who is empowered to commence a civil action “to preserve the status quo or to prevent irreparable harm.”

What conclusions can be drawn from this multitude of state and federal legislation which will aid the Virginia attorney who represents an aggrieved prospective tenant? Because of the limited amount of damages attainable under the Virginia Law, it would be beneficial to bring the action in federal court under section 1982 or under the appropriate section of the 1968 Act, or both. This maneuver will take the complaining prospective tenant...

39. Id. § 36-88. A 1973 amendment extended the coverage to discrimination in the sale or rental of housing due to sex.
40. Id. § 36-88(2).
41. Id. § 36-88(3).
42. Id. § 36-88(5).
43. Id. § 36-88(4).
44. Id. § 36-89. For an analysis of this section, see 7 U. Rich. L. Rev. 416 (1972).
47. Id. § 36-95.
48. The court in Wright v. Kaine Realty, 352 F. Supp. 222, 223 (N.D. Ill. 1972) stated that “the victim of racial discrimination in private housing has a claim under both the 1866 Act and Title VIII of the 1968 Act.” If both federal statutes are available, almost all cases are litigated under both. See, e.g., Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970);
from under the Virginia law's $250 limit on actual damages and place him in the position to recover unlimited actual damages and punitive damages in federal court. The federal courts have jurisdiction in actions brought under section 1982 or under section 3612 of the 1968 Act. The fact that a substantially equivalent state statute exists is of no consequence. Not unsurprisingly, there has been no litigation in the state courts under the Virginia Law. The limitations on damages and the fact that many housing discrimination cases are settled before they reach court are two factors contributing to its nonuse. If the state wishes to gain judicial control over housing discrimination in Virginia, the remedies available to an injured party must be made, at the least, equivalent to the federal remedies offered in the 1968 Act and section 1982.


49. 42 U.S.C. § 3612(c) (1970) provides for not more than $1,000 punitive damages. However, in an action under section 1982, there is apparently no limit on the amount of punitive damages. Wright v. Kaine Realty, 352 F. Supp. 222, 223 (N.D. Ill. 1972).

50. The Supreme Court in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238 (1969) declared that the federal courts have jurisdiction to grant "relief under any Act of Congress providing for the protection of civil rights." This conclusion was based on 28 U.S.C. § 1343(4).

51. See note 34 supra. It is conceivable that an aggrieved party might be able to bring an action directly into federal court under section 3610. Any action under section 3610 must be commenced in a state court if that state offers substantially equivalent judicial remedies. It is arguable that because there is a limit placed on actual damages in Virginia and that there is no provision for punitive damages, Virginia does not offer substantially equivalent judicial remedies. Thus, one could proceed directly into federal court under section 3610. But see McLaurin v. Brusturis, 320 F. Supp. 190, 191 (E.D. Wis. 1970) which concluded that a state law was substantially equivalent even though it provided for less actual damages, did not permit punitive damages, and did not allow permanent or temporary injunctions.

52. Are the rights of aggrieved prospective tenants being successfully protected in Virginia? Some claim that in almost all southern cities a black family has virtually no chance of moving into a white neighborhood unless the family takes legal action. Thus, many acts of discrimination in housing are never reported. Subsequent to the passage of open housing legislation, many fair housing organizations have sprung up across the country. Private in nature, these groups offer their services to aggrieved parties as an alternative to the HUD proceeding. They serve as an investigator in housing discrimination cases and provide legal aid when necessary. There are several of these open housing organizations operating in Virginia and one of the most successful, Housing Opportunities Made Equal (HOME), is located in Richmond. The members of HOME feel that the organization is more effective than HUD in obtaining results for aggrieved parties, and they attribute their success to the use of "checkers". A "checker" is a white person who attempts to rent the same dwelling that was denied to the complaining black. If the "checker" is successful in his attempt, this could be strong evidence of discrimination. HUD is not authorized to employ this technique. These local fair housing groups also attribute their effectiveness to the fact that they are trusted by the black community and are easily accessible. HOME investigated thirty complaints in Richmond in 1973. (Telephone interview with Dr. James L. Hecht, President, Housing Opportunities Made Equal (HOME), January 15, 1974.)
B. Security Deposits

It is a common practice for a landlord to require his prospective tenant to advance a certain amount of money as security for the performance of the contract. This sum of money is referred to as a security deposit. Within the last few years, several states have enacted legislation or rewritten existing statutes dealing with security deposits. Generally, these statutes provide time limits for the return of the security deposit after lease termination. Most place a limit on the amount of the security deposit and require some form of interest payment to be made to the tenant. Many of these statutes require itemized statements of deductions to be presented to the tenant. The most stringent prohibit the landlord from commingling the security deposit funds with his personal funds, and prescribe penalties for a late return or for the willful retention of a security deposit.

The 1974 session of the General Assembly ventured into the area of security deposit regulation with the passage of the Virginia Residential Landlord and Tenant Act. This legislation is the outgrowth of the Report of the Virginia Housing Commission. The Report noted that numerous complaints concerning the handling of security deposits were aired at the

53. Note, Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography, 26 Vand. L. Rev. 689, 694 (1973) provides a list of those states that enacted legislation regulating the handling of security deposits in addition to other references concerning the subject.

54. See, e.g., Colo. Rev. Stat. Ann. § 58-1-28 (1) (Supp. 1971) which permits the parties to specify in the lease any amount of time up to sixty days in which the security deposit may be returned. If not specified, the security deposit must be returned within thirty days after the termination of the lease. Fla. Stat. Ann. § 83.261(4) (Supp. 1972) requires that the security deposit be returned within fifteen days after the termination of the lease. Pa. Stat. Ann. tit. 68 § 250.512(c) (Supp. 1973) requires the landlord to return the security deposit within thirty days after the termination of the lease.


56. See, e.g., Del. Code Ann. tit. 25, § 5112(b) (Supp. 1970) which requires payment to the tenant of all interest earned on the security deposit. Ill. Rev. Stat. ch. 74 § 91 (Supp. 1972) requires payment of 4% interest on security deposits of six months or more.


Commission's public hearings. Most of the comments dealt with concern over the amounts charged and whether interest should be paid. Others complained of the untimely return of the deposit and the absence of requirements that landlords itemize deductions. Noting that one Virginia locality had been granted the power to enact an ordinance dealing with security deposits, the Commission recommended the enactment of a statewide law.

Disregarding the fact that the Virginia Residential Landlord and Tenant Act applies only to landlords who own more than ten dwelling units, the section concerning security deposits might be considered slight in strength. It specifically provides for: (1) the equivalent of two months rent as the maximum security deposit; (2) the return of an itemized notice of any charges against security deposits together with the amount of the deposit due within forty-five days of lease termination; (3) recovery by the tenant of the security due him together with actual damages and reasonable attorney's fees for landlord noncompliance with this section. Additionally, the Act requires the landlord to: (1) pay 3% interest on all security deposits held for periods of more than thirteen months; (2) maintain records for two years of all deductions against security deposits; (3) submit a record to the tenant within five days of occupancy, of the existing damages to the dwelling unit which record shall be deemed correct unless the tenant objects in writing within five days after receipt. The Act also allows a tenant to be present when the landlord inspects the dwelling for damages if the tenant so advises the landlord in writing. The landlord is required to notify the tenant of the time of inspection which must be during business hours and within seventy-two hours of lease termination.

From the tenant's point of view, several of these provisions will bring welcome changes without placing too great of a burden on the landlord. Whether the Commission's recommendations have been sufficiently implemented by this legislation, however, is open to question. The require-

62. Id. at 7-8.
63. VA. CODE ANN. § 55-222.1 (Cum. Supp. 1973) granted Arlington County the power to enact a local ordinance dealing with security deposits. The passage of the Act repealed this section.
64. Id. § 55-243.5 (9).
65. Id. § 55-248.11 (a).
66. Id.
67. Id.
68. Id. § 55-248.11 (b)(1).
69. Id. § 55-248.11 (b)(2).
70. Id. § 55-248.11 (b)(3).
71. Id. § 55-248.11 (c).
ment of a 3% interest payment on a deposit held by the landlord for more than thirteen months will be criticized by both sides. Tenants will assert that their deposits should draw interest irrespective of their length of stay in the dwelling unit. Landlords will argue that these interest payments will be so small as to be inconsequential when compared to the amount of administrative time and costs these payments will require. Further criticisms of this security deposit section will center around the absence of a provision prohibiting the landlord from commingling the security deposit funds with his personal funds. Thus, landlords will continue to draw interest on tenant’s deposits if in a savings account or continue to invest these funds in personal business ventures.

It is also arguable that the damages available to an aggrieved tenant under the Act are not sufficient to insure landlord compliance. If a landlord has wrongfully withheld a portion of the security deposit, there is little monetary incentive for the tenant to bring a court action. To most tenants, the amount of a security deposit is not worth fighting for when weighed against the payment of attorney’s fees in an unsuccessful action. This possibility of an unsuccessful action will sufficiently discourage many tenants initiatives. Other jurisdictions have given the tenant greater incentive to take his case to court by providing for double or triple the amount in controversy as damages for landlord noncompliance.72

There is a trend in the regulation of practices surrounding the security deposit, and this trend seems to follow a pattern. As a state’s urban population grows, the number of tenants grows, the number of abuses grows, and the need for regulatory legislation increases. The urban growth in Virginia, particularly in Tidewater and Northern Virginia, has made security deposit regulation desirable even though the majority of landlords have never abused tenant’s rights. Despite the fact that some of the provisions seem to lack punch, the enactment of this section by the General Assembly might be considered by some to be a bold move. The vast majority of states have no regulatory laws dealing with security deposits. Because of this legislation, the number of landlord and tenant misunderstandings surrounding the security deposit in Virginia should be reduced.

### III. The Lease

Ideally, a lease should mirror the intentions of two parties who occupy equal bargaining positions and possess the necessary foresight to anticipate every possible problem and it should set forth their rights and liabilities

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72. See note 59 supra.
relative to these situations in clear and unassailable language. Realistically, however, one or more of these conditions is not met and disputes arise. Where litigation results, the court is called upon to interpret or construct the ambiguous terms and, where the lease is silent on the contested issue, apply rules designed to channel the rights and duties arising from the relationship.

Many of the interpretive problems relating to the existence or nonexistence of the landlord-tenant relationship arise where a lease has been prepared without the aid of counsel. While there are no prescribed words necessary to form a rental agreement in Virginia, the well-drafted lease should include both the rental period and a clear description of the leased property. However, the former is not an essential element; and any uncertainty in a general description does not void the agreement where extrinsic evidence can identify the property. The threshold question in the examination of a lease involves the determination as to whether a writing is required under the Virginia Statute of Frauds. To do this, it is necessary to distinguish between the executed lease and the executory contract to enter into a lease. By statute, a lease for more than five years must be by deed or will. However, where the instrument is an agreement to enter into a lease, it must be in writing only if the lease will not be executed within one year or if the executory contract to lease contemplates a term of more than one year.

A. Contract v. Conveyance

The real estate lease has evolved in circular fashion to its present state of uncertainty. Its early significance was in the area of contract law, but

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1. The lease should be distinguished from an assignment of property; the distinction being that a landlord grants an interest less than his own by a lease and by assignment he parts with the whole property. 11 M. J., Landlord and Tenant § 7 (1950). The lease must also be distinguished from the contract for a lease. The determination is a question of intent but, as a general rule, words of present demise indicate the former. Id. A special problem arises with regard to farm leases where the lack of legal acumen on the part of the draftsmen present the question of whether or not a lease was intended as opposed to a cropper or employment contract. See Oakwood Smokeless Coal Corp. v. Meadows, 184 Va. 168, 34 S.E.2d 392 (1945).
6. See Trends in Landlord-Tenant Law Including Model Code, 6 Real Prop., Prob. & Tr. J. 550, 551 (1971). The lease emerged as a contract and was promptly turned into a conveyance. As a result of social pressures, courts are now returning to their former position.
it soon came to be governed by the law of conveyances which is based on the premise that a lease is a conveyance of an estate in the demised land to the tenant. In this century, the circle has begun to close as contract principles have demanded increasing recognition in the resolution of disputes between the landlord and the tenant. Many of the problems discussed in this note have been precipitated by a failure of our judicial system to replace common law conveyancing rules which do not fit the contemporary landlord-tenant situation with more judicious contract principles. In today's environment, the theory that rent is paid in exchange for an interest in land is out of place. For example, the present common law rule does not relieve the tenant of his obligation to pay rent if the premises are totally destroyed before the end of the term. This harsh result reflects the prevailing view that covenants in a lease are independent and that a breach of any one by the landlord does not excuse the tenant's duty to pay rent. In sharp contrast, if contract principles were applied, the tenant might escape this liability since the lease would be viewed as a true bilateral agreement and the covenants seen as being mutually dependent.

A number of courts have shifted to an application of contract principles in leases and many legislatures have enacted statutes in piecemeal fashion to achieve similar results. The Virginia Supreme Court has not squarely faced the issue of whether a lease is a contract or conveyance. Some authorities believe, however, that Virginia recognizes the dual nature of the lease. Because of this uncertainty, it is speculation to predict


8. See Moynihan at 69. Today the tenant bargains for office or living space and services rather than a mere interest in land. There is considerable merit in the contention that a part of this rent is in consideration of these services. The lease as a grant of an estate in land must give way to the concept of the lease as a business contract. See Bennett, The Modern Lease—An Estate in Land or a Contract, 16 Texas L. Rev. 47 (1937).

9. See 1 American Law of Property, supra note 7, at 3.103. The reason is that the lease is primarily a conveyance, the covenants being merely incidental thereto.

10. 6 A. Corbin, Contracts § 1252 (1951). An application of contract principles would also prove to be beneficial to the landlord as he could be afforded the privilege of invoking the doctrine of anticipatory breach allowing an action against the tenant who abandons the lease without waiting until the term has ended.


13. Smith v. Payne refers to the lease as both a contract and a conveyance without drawing a distinction. 153 Va. 746, 151 S.E. 295 (1930).
how Virginia would hold on the issue if it were to come before the court today. One advocating the contract theory might succeed if he could convince the court to adopt the approach being taken by a growing minority.\textsuperscript{14} Acceptance of the contractual viewpoint is not improbable in Virginia. The doctrine of constructive eviction has been a part of our law for some time and its existence would indicate judicial support for the proposition that the covenants of a lease are mutually dependent; the breach of one providing the injured party with a defense to the promisor's suit for performance of the remaining obligations.\textsuperscript{15} In addition, the legislature has relieved the tenant of his common law duty to pay rent where the premises are totally destroyed during the term of the lease; a fact which lends support to the argument for mutual dependence.\textsuperscript{16}

The newly enacted Virginia Residential Landlord and Tenant Act responded to this problem area by providing the tenant with a defense in an action for rent or possession where the landlord has breached a covenant in the rental agreement or an obligation imposed by statute.\textsuperscript{17} This Act not only interjects certainty into the Virginia Law surrounding this controversy, but it also moves our courts toward an acceptance of the contract oriented theory.

\subsection*{B. Exculpatory Provisions}

In many cases, particularly in the residential context, the prospective tenant must agree to a lease that includes an exculpatory provision which relieves the landlord of liability "for damage to person or property arising from any cause whatsoever."\textsuperscript{18} The Virginia Residential Landlord and Ten-

\begin{enumerate}
\item<sup>14</sup> See cases cited note 11 supra.
\item<sup>15</sup> See Section VI, RENT, infra.
\item<sup>16</sup> VA. CODE ANN. § 55-226 (Cum. Supp. 1973). This section does away with the rule developed by the common law courts which placed liability on the tenant when the premises were completely destroyed. See National Motels, Inc. v. Howard Johnson, Inc., 373 F.2d 375 (4th Cir. 1967). The rent is reduced where buildings were destroyed without the fault of the tenant. See Powell v. John E. Hughes Orphanage, 148 Va. 331, 138 S.E. 637 (1927). The section loses most of its potential effectiveness by excepting those cases governed by an express provision in the contract. Stieffen v. Darling, 158 Va. 375, 163 S.E. 353 (1932). The tenant in cases decided under section 55-226 bears the burden of proving his freedom from negligence in the cause of the destruction. See Warehouse Distrib., Inc. v. Prudential Storage & Van Corp., 208 Va. 784, 161 S.E.2d 86 (1968).
\item<sup>17</sup> VA. CODE ANN. § 55-248.27 (effective July 1, 1974).
\item<sup>18</sup> Taylor v. Va. Constr. Corp., 209 Va. 76, 161 S.E.2d 732 (1968). In Taylor the validity of the following exculpatory clause was at issue:

\begin{quote}
Lessor shall not be liable to Tenant, his family, servants or invitees for any damages to person or property arising from any cause whatsoever. Tenant agrees for himself, his family, servants and invitees not to hold Lessor liable in any way. Lessor is not liable for loss or damage of property stored in company-owned storage buildings. \textit{Id.} at 78, 161 S.E.2d at 733.
\end{quote}
\end{enumerate}
ant Act denies the exculpatory clause of its effectiveness by rendering any attempt to limit the landlord's liability unenforceable. Additionally, a landlord who wilfully enforces such a clause against his tenant will subject himself to liability for actual damages suffered by the tenant as well as reasonable attorney fees. The Act, which specifies the prohibited rental provisions, does much in the way of reducing the advantages afforded the landlords through their widespread use of adhesion contracts, but it falls short of completely eliminating the problem. Because of the limitation placed on the Act by the General Assembly, the plight of indigent tenants who must deal with slumlords owning fewer than eleven rental units is still governed by the applicable case law. This limitation is unfortunate since it combines with the disparity of bargaining positions at this lowest level of the landlord-tenant relationship, to produce a situation which increases the likelihood of the insertion of exculpatory clauses. For this reason, a discussion of Virginia law surrounding the subject is in order.

Generally, American courts uphold such clauses as effective means of exempting not only the landlord but his servants from liability for negligent acts. These courts cling to the remnants of the doctrine of freedom of contract which still lingers in the law surrounding exculpatory provisions and prevents the casual deletion of portions of a contract freely entered into by consenting parties. In effect, these courts have selectively incorporated contract theory in this context which benefits the landlord while, as already noted, they are reluctant to apply contract principles where they might prove helpful to a tenant seeking redress. Other jurisdictions giving effect to such clauses regard the landlord-tenant relationship

19. VA. CODE ANN. § 55-248.9 (effective July 1, 1974). This section also eliminates the effectiveness of any provisions which provide that the tenant waives rights and remedies granted by the Act, authorizes any person to confess judgment on a claim arising out of the lease, or agrees to pay the landlord's attorney fees.

20. Id.

21. See Annot., 49 A.L.R. 3d 321 (1973). The Restatement of Contracts allows a landlord to contract away liability for future negligence, but does not grant this same right with regard to willful or wanton misconduct. The pertinent section provides:

A bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm is legal except in the cases stated in § 575 RESTATEMENT OF CONTRACTS § 574 (1932).

Through the use of such provisions, a landlord can avoid many of his common law duties, e.g., the duty to use reasonable care to inspect and repair in common areas. See 51C C.J.S. Landlord and Tenant § 366 (1968); PROSSER, TORTS § 63, at 400 (4th ed. 1971). He may also avoid the duty to reveal latent defects known to him at the time the lease was executed. PROSSER, TORTS § 63 (4th ed. 1971).

as essentially a private one, not subject to public policy considerations as proponents of the minority would have them believe.23

The Virginia Supreme Court has not ruled on whether an exculpatory clause can limit the landlord's liability to a tenant. However, in Taylor v. Virginia Construction Corporation,24 the court considered an exculpatory provision by which a landlord attempted to bar the recovery by a member of the tenant's family for injuries sustained in a common area. The landlord argued that the rights of the plaintiff were derived from his father, the tenant, who had agreed to exculpation.25 The court rejected this "tenant's shoes" argument giving the plaintiff independent rights based on the landlord's duty to maintain common areas in a reasonably safe condition.26 It appears that the court, by dictum, validated the exculpatory clause as an effective bar to the recovery of a similarly situated tenant but by no means removed all doubt; indeed, one could easily interpret the language in the opinion as leaving the question open.27

A landlord not subject to the Virginia Act who desires to exculpate himself should make certain that something passes to his tenant in return for the privilege of being relieved of liability for his torts. Generally, courts have found that a reduced rental payment provides sufficient considera-

24. 209 Va. 76, 161 S.E.2d 732 (1968). This was a case of first impression in Virginia and represents the only authority on the subject. The tenant's child, an infant plaintiff, was injured when his hand was caught in a negligently maintained door situated in a common passageway of the apartment building. The defect had been in existence for a considerable length of time and the landlord was found to have had actual notice of it.
25. The landlord attempted to use the "tenant's shoes" argument, i.e., "the landlord is liable to persons on leased premises by right or consent of the tenant only to the same extent as he is liable to the tenant; and where the tenant has no redress against the landlord, the members of his family are likewise barred." Id. at 78, 161 S.E.2d at 733.
27. One trying to exculpate a landlord based on the wording of the Taylor decision would be equipped with, at best, mild dictum:

Since the plaintiff's injury occurred in a common area reserved and controlled by the defendant, its liability to him was unaffected by the fact that, because of the exculpatory clause, it may not have been liable to the father for some injury occurring to the latter. 209 Va. at 80, 161 S.E.2d at 735.

The Taylor decision does not respond to a situation where a family member has been injured while on the premises controlled by the tenant. While the landlord is not normally liable for injuries occurring in areas beyond his control, a latent defect known to the landlord and unknown to the tenant would result in liability if an injury occurred. See, e.g., Candill v. Gibson Fuel Co., 185 Va. 233, 38 S.E.2d 465 (1946); Jacobs v. Carter, 154 Va. 87, 152 S.E. 332 (1930). At least one commentator feels that in the latent defect situation the exculpatory clause might shield the landlord from liability for injuries to the tenant as well as an invitee who was not a party to the agreement. See Spies, Property, 54 Va. L. Rev. 1244, 1252 at n. 50 (1968) citing 209 Va. at 79, 161 S.E.2d at 734.
tion for these protective covenants. These holdings suggest that courts look upon the passing of consideration as evidence of the fact that the parties have bargained for the clause.

On the other hand, a tenant seeking to avoid the effect of an exculpatory provision should couch his argument in terms of unequal bargaining position, unconscionability and public policy. Other jurisdictions have recognized that the standard form lease drafted by the landlord's attorney in his client's best interest does not embody the true intentions of both parties. In effect, these leases amount to contracts of adhesion. Virginia courts have recognized the inability of a negligent party to exculpate his liability where public policy demands that responsibility for fault be placed on him. To this end, an injured tenant should stress the increasing number of Virginians affected by the landlord-tenant relationship as an indication of the need to move such disputes out of the realm of private concern into the area of public interest. If met with the freedom of contract argument, the tenant might proceed into the law of contracts calling upon the Restatement for assistance. The attorney challenging such a clause must cross the undefined line into the area of gross negligence. The Restatement of Contracts declares exculpating provisions void to the extent that they seek to exonerate the exculpator from gross negligence. In accordance with this view, courts have refused to exempt a party seeking to avoid liability where his conduct approached recklessness.

29. McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971). The court recognized that because residential leasing had become a major enterprise the use of such clauses was no longer a private matter but was the concern of a large segment of the public. See Weaver v. American Oil Co., ___ Ind. ___, 276 N.E.2d 144 (1971) (declaring such a covenant to be unconscionable under U.C.C. 2-302); Cardona v. Eden Realty Co., 118 N.J. 381, 288 A.2d 34 (1972); Mayfair Fabrics v. Henley, 48 N.J. 483, 226 A.2d 602 (1967).
31. The Virginia Housing Study Commission has determined that some 1.9 million Virginians now live in rental dwellings. A majority of housing in urban areas is rental units: Alexandria (71%), Arlington (65%), Norfolk (55%), Richmond (48%), Petersburg (47%). See REPORT OF THE VIRGINIA HOUSING STUDY COMMISSION, November, 1973, p. 5. See case cited note 29 supra.
32. See note 21 supra.

Many courts try to avoid application of such provisions by a strict construction of the
An additional argument might be based on statutory law. Counsel for the tenant should always explore the possibility of having the clause voided where, if enforced, it would nullify the effect of a statute or local ordinance designed to place an affirmative duty on the landlord. For example, a Virginia court would most likely invalidate an exculpating provision which is being asserted to relieve the landlord from liability for an injury caused by breach of a duty imposed by the Fire Hazards Law.

Probably the best tactical approach for the tenant in Virginia would be to urge the court to construe the rental agreement most harshly against the landlord who drafted the lease. By interpreting the lease in this strict manner, courts have invalidated an exculpatory provision where a landlord has covenanted to repair and, at the same time, sought to exculpate himself from negligence. As a practical matter, Virginia courts should be receptive to this approach since it would permit them to hold for the tenant in an unconscionable situation without barring the use of such provisions by landlords in the proper case.

C. Rent Acceleration

A landlord may possess the power to compel performance of conditions in the lease by having reserved the right to accelerate rent. Under the usual provision, if a tenant is in default on any of the covenants in the clauses while others prefer judicial interpretation. The two processes have unnecessarily confused this approach as can be exemplified by the following cases. Kay v. Cain, 154 F.2d 305 (D.C. Cir. 1946); Plaza Hotel Corp. v. Fine Prods. Corp., 87 Ga. App. 460, 74 S.E.2d 372 (1953).


36. Similar cases in other jurisdictions have nullified the effect of the exculpatory clause where it would exempt the landlord from his duty to comply with a building code or fire provisions. Virginia has such a Fire Hazards Law which covers apartment buildings in Sections 27-63 to 85.1 of the Virginia Code. See note 16 supra.

37. Virginia courts construe leases favorably to the tenant and against the landlord. See Davis v. Wickline, 205 Va. 166, 135 S.E.2d 812 (1964); Parrish v. Robertson, 195 Va. 794, 80 S.E.2d 407 (1954).


39. The typical rent acceleration clause provides that:

Lessor may likewise at lessor's option and in addition to any other remedies which lessor may have upon such default, failure or neglect, give to lessee written notice of such default, failure or neglect and advise lessee thereby that, unless all the terms, covenants and conditions of the lease are fully complied with within thirty (30) days after giving of said notice, the entire amount of rent herein reserved or agreed to be paid and then remaining unpaid shall immediately become due and payable upon the expiration of said thirty days. . .

agreement, a landlord may declare that the term of the lease has acceler-
ated and demand payment of the outstanding rent for the remainder of the
rental period. Courts are not in accord on the validity of such provisions. Many that have upheld them realize the landlord could have required
full payment in advance and should not be precluded from making this
demand upon the occurrence of specified contingencies. The jurisdictions
that have invalidated these clauses declare such provisions void as penal-
ties. Others void the clause where it is called into operation by the breach
of a multiplicity of insignificant conditions.

Although no rent acceleration clause has come before the Supreme Court
of Virginia, one might speculate as to the possible outcome of such a case. Assuming that the court could be persuaded to interpret the lease in a
contractual setting, the need for the protection afforded the landlord by
acceleration will have been removed. He would be allowed, upon an antic-
ipatory repudiation of one of the mutually dependent promises to elect to
(1) rescind the contract (2) treat the repudiation as a breach by immedi-
ately bringing suit or changing his position (3) bring suit after the time of
performance has arrived. Without the aid of this assumption, one is rele-
gated to the law of conveyances where the validity of the clause will be-
come a question of its status as a penalty or provision for liquidated dam-
ages. A party seeking to strike the provision might argue that damages
resulting from breach of a rental agreement are ascertainable and therefore
not the subject of a liquidated damage provision but void as a penalty.

40. See, e.g., Maddox v. Hobbie, 228 Ala. 80, 152 So. 222 (1934); Abel v. Paterno, 245 App.
42. See, e.g., Richer v. Rombough, 170 Cal. App. 912, 261 P.2d 328 (1953); Gentry v.
Recreation, Inc., 192 S.C. 429, 7 S.E.2d 63, 65 (1940). Several factors are often considered by
courts when determining if a monetary award is for liquidated damages or a penalty: (a) the
reasonableness of the stipulated sum in relation to the damages (b) the difficulty in ascertain-
ing the actual damages (c) the importance of the breaches covered by the same forfeiture.
43. See, e.g., 884 West End Avenue Corp. v. Pearlman, 201 App. Div. 12, 193 N.Y.S. 670,
673 (1922).
44. Acceleration clauses were designed to circumvent the older rules that prevented the
landlord from treating the tenant’s default in rental payments as an anticipatory breach of
the contract (contract v. conveyance argument). 1 American Law of Property § 3.74 (Casner
ed. 1952).
45. See Taylor v. Wood, 201 Va. 615, 112 S.E.2d 907 (1960); Simpson v. Scott, 189 Va. 392,
53 S.E.2d 21 (1949).
46. Virginia authority which permits advance agreements for payment in case of breach
limits this right to situations where damages are uncertain or unascertainable when the
contract is made (the final figure being dependent upon extrinsic facts) and where the stipu-
lated amount bears some relation to the probable loss. Crawford v. Heatwole & Hedrick, 110
However, a court that wishes to give effect to a rent acceleration clause might draw support from *Gay Manufacturing Company v. Camp* which voided a penalty that was in addition to the amount of rent, but required that the tenant pay the back rent as well as rent that had accrued since the time of the breach.\(^4\)

An interesting problem that arises in connection with rent acceleration clauses is the duty of the landlord to mitigate damages after the breach has occurred.\(^4\) Obviously, if one tenant leaves and another enters under a comparable lease, the landlord has suffered only minor inconvenience. In Virginia, the landlord under an executed lease has no such duty to relet to minimize damages but may allow the rental unit to remain vacant.\(^4\) However, if he should re-enter and terminate the lease, he is entitled to recover only the rent then due.\(^5\) In light of the rights and duties imposed by the tenant's breach, a landlord might do well to question the utility of the rent acceleration clause. If he accepts the rental payments at an accelerated date, he may not also be entitled to possession and, by doing so, could be incurring the additional cost of having to restore premises that become deteriorated during the remainder of the term.\(^5\)

*D. Conclusion*

A growing number of courts have begun to mix practicality with law realizing that the bargaining position of the landlord and tenant has become so imbalanced that the tenant is forced to accept terms most favorable to the landlord.\(^5\) Response to pressures demanding changes in residen-

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328 (1953) (holding that the rent clause was void since damages could be easily ascertained and providing a formula to do so).

47. 65 F. 794 (4th Cir. 1895)
   And whenever it appears that damages occasioned are easily estimated in money, the covenant is construed as a penalty. A fortiori is this construction applied to a case like the present, when the only breach established is the nonpayment of rent within the stipulated period, accompanied by proof that the rent then due and all rent subsequently accruing has been paid to the lessors, and accepted by them. *Id.* at 799-800.

49. See 127 Va. at 304, 103 S.E. at 579.
50. *Id.*
tial urban leases has been twofold. First, landlords have been delegated additional responsibilities by both the courts and legislatures. Second, there has been a greater tendency to apply contract principles to disputes between parties to the lease. While this latter approach is needed, one should be cautioned that a complete and unqualified acceptance of contract theory, while eliminating many of the present hardships, would foster some inequities of its own. It is submitted that a workable solution will only be reached when the lease is placed on the continuum between the law of contracts and conveyances.

IV. Possession And Use

A lease contains an implied covenant by the lessor that the tenant shall have peaceable possession and quiet enjoyment of the demised premises. This covenant protects the possessory interest of the tenant and is breached by any act of the landlord which amounts to a deprivation of the tenant’s possession of the premises. Conduct on the part of a landlord sufficient to constitute a breach can take the form of a failure to deliver possession or a disturbance of possession after it has been obtained by the tenant. Virginia has embraced the covenant for quiet enjoyment by case law and the new Virginia Residential Landlord and Tenant Act has made statutory, many of the duties imposed on the landlord by this covenant. The new Act also imposes affirmative duties on the tenant in the use and possession of the leased premises.

A. Duty To Deliver Possession

As a part of his implied covenant for quiet enjoyment, Virginia case law has always obligated the lessor to give possession of the premises to


54. The commissioners of Uniform State Laws have adopted this concept which underlies the proposed Uniform Residential Landlord and Tenant Act. See note 52 supra.

55. Unqualified acceptance of the contract theory would make it unnecessary for a landlord to insert a rent acceleration clause in his leases. He would have the same rights as any other promisee in a contractual setting who finds that the promisor has abandoned the contract. If this were the case, courts would be unable to protect tenants from the effects of rent acceleration using the public policy and unconscionability arguments that have been developed in other jurisdictions.


the lessee upon the commencement of the term.5 However, the word "pos-
session" in the context of this duty has had a limited meaning in Virginia.
Absent an express covenant of quiet enjoyment, the landlord has not been
required by the implied covenant to put the tenant into actual possession
of the premises but merely to acknowledge his right to possess.6 The Vir-
ginia Supreme Court has reasoned that to imply a covenant to place the
lessee into actual possession would be to make a contract for the parties
in regard to a matter which is equally within the knowledge of both the
lesser and lessee.7 Essentially, all that is required of the lessor in Virginia
is that neither he nor anyone acting through him interfere with the tenant's
right to possession when the term of the lease begins. The tenant's right
under the covenant of quiet enjoyment is limited to a legally enforceable
right to possess and he has the burden of evicting a holdover tenant or
anyone else in possession of the premises who was not under authority of
the lessor.8

Since the landlord has no effective "power or process" to evict a holdover
after he has signed a subsequent lease9 and transferred the immediate right
to possession to the new tenant, Virginia has been unwilling to construe
the implied covenant of quiet enjoyment as requiring the landlord to de-

6. Id. In Hannan a landlord leased premises to a lessee for a term of fifteen years which
was to begin on a designated date. When time came for the lessee to take possession, the
property was occupied by former tenants, and the landlord refused to take legal action to oust
them or compel their removal from the property. The lessee brought an action for damages
against the landlord, based on alleged breach of contract. There was no express covenants as
to delivery of premises or for quiet enjoyment. The landlord contended that he was under no
duty to see that the premises were open for entry by lessee. The court agreed and held that
the lessee was the proper party to oust the holdover.

Where the parties expressly covenant for quiet enjoyment the landlord has a duty to deliver
actual possession:
A covenant by a lessor "for the lessee's quiet enjoyment of his term" shall have the
same effect as a covenant that the lessee, his personal representative and lawful as-
signs, paying the rent reserved, and performing his or their covenants, shall peaceably
possess and enjoy the demised premises, for the term granted, without any interruption
or disturbance from any person whatever. VA. CODE ANN. § 55-78 (1972).
7. Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930). The only previous authority in
Virginia was dictum in McGhee v. Cox, 116 Va. 718, 82 S.E. 701, (1914) where the court held
that the plaintiffs were not bound to put the defendants into actual possession of the leased
premises. They were only bound to put them into legal or constructive possession.
8. Id.
9. The court in Hannan v. Dusch, 154 Va. 356, 364, 153 S.E. 824, 832 (1930) said that:
A lessor, having made a lease to take effect immediately upon termination of an
expiring lease, appears to have been left without power or process to himself evict a
tenant under the expiring lease, who tortiously holds over on the day succeeding the
termination of his lease . . . the power to evict (the tenant) being denied by law to
the lessee. . . .
The Supreme Court of Virginia observed that such a duty is a unique exception which stands alone in implying a contract of insurance on the part of the lessor to save his tenant from the flagrant wrong of another person. Such an obligation is so unusual and the prevention of such a tort so impossible as to make it certain . . . that it should always rest upon an express contract.\\n
Virginia stands among a minority of jurisdictions in following this rule; most jurisdictions favor the English rule which requires the lessor to place the new tenant in actual possession of the demised premises.\\n
The Virginia Residential Landlord and Tenant Act fails to “simplify, clarify, modernize and revise the law” governing the issue of whether a landlord has a duty to deliver possession. The Virginia Act began its legislative history as a diluted version of the Uniform Residential Landlord and Tenant Act which was proposed by the Commissioners on Uniform State Laws. What emerged after legislative devitalization and compromise is a model of poor draftsmanship and confusion. The problems of uncertainty and vagueness in this supposedly comprehensive legislation are compounded by the fact that one cannot be sure whether Virginia case law or the Uniform Act should “fill the holes” left by our Virginia legislators. Any analysis of the new Act must necessarily involve a discussion of our case law and the Uniform Act.

Section 55-248.22 of the new Act deceptively provides that if a landlord willfully fails to deliver possession (emphasis added), rent abates until

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10. The remedy of ejectment is inadequate since it serves primarily to try title. Va. Code Ann. § 8-799 (1972); and because the landlord no longer has the right of possession, an action for unlawful entry and detainer also is unavailable. Va. Code Ann. § 8-799 (1972 Repl. Vol.). Self-help measures executed by the landlord might violate due process rights of the holdover tenant, see the section on Eviction: Repossession of the Leasehold, infra.


13. For example, in King v. Reynolds, 67 Ala. 229 (1880) an action brought by the lessee against the lessor for failure to deliver rented meadow land, the plaintiff alleged that as a part of the implied covenant for quiet enjoyment the lessor was bound to put him into possession. The court agreed with the plaintiff and held that there shall be no impediment to the taking of possession by the lessee.

possession is delivered and the tenant may: (1) terminate the rental agreement by giving five days written notice and recover all pre-paid rent and security; or (2) demand performance of the rental agreement, and, if he so elects, bring an action for possession against the landlord or any person in possession. In such an action the injured tenant may recover damages and, where the failure to deliver is willful and not in good faith, reasonable attorney's fees.

Where the landlord or his agent is "willfully" withholding possession, the tenant has an alternative which parallels that available under case law. Thus, the Act's remedy where a landlord willfully fails to deliver possession is analogous to that afforded after an actual or constructive eviction at common law which gave the tenant the right to terminate. 15 Also, previously, the tenant, having the right of possession, could have elected to proceed against the landlord in a tort action or an action on the covenant of quiet enjoyment to recover his damages. Significantly, section 55-248.22 of the new Act does not affect our prior law which permitted the new lessee to bring an action of unlawful entry and detainer against a holdover or trespasser since in such a case the landlord would not be willfully failing to deliver possession. Additionally, a new tenant who is faced with a holdover or trespasser occupying the premises cannot terminate the rental agreement under the new Act since a willful withholding by the landlord is a condition precedent to the remedy in section 55-248.22. 16

The greatest shortcoming of the new legislation is that it fails to affirmatively obligate the landlord to put the tenant into actual possession. 17 The

15. MINOR ON REAL PROPERTY §§ 384, 403 (2d ed. 1923) states in § 403:

Upon the eviction of the tenant, three important consequences follow: (1) the lessee is entitled to sue the landlord upon his covenant of quiet enjoyment; (2) the lessee's possession is thereby terminated as to the land so taken, and he ceases to be estopped to deny the landlord's title as to that land; and (3) there is an abatement of the rent.

16. Similarly, under the Virginia approach to the duty to deliver possession, the new tenant can not terminate the rental agreement unless the landlord willfully fails to deliver, that is, an actual or constructive eviction.

17. However, the new Act allows a landlord, after termination of a rental agreement, to enforce his claim for possession against the tenant "without limitation, by the institution of an action for unlawful entry or detainer." Va. Code Ann. § 55-248.35 (effective July 1, 1974). Such broad language could be construed as allowing a landlord in Virginia to evict a holdover even though another tenant has a lease to begin immediately. Previously a landlord had no power to evict a holdover where a new tenant was entitled to possession. Hannan v. Dusch, 153 Va. 356, 154 S.E. 824 (1930). The Act, by allowing a landlord to enforce his right to possession "without limitation" may provide such power. In the landmark case in this area of landlord-tenant law, Hannan v. Dusch, supra, Justice Epes in his concurring opinion stated:

If at any time the statutes of Virginia be so amended as to permit the lessor after the moment of the expiration of the prior lease to evict his tenant tortiously holding over
new Act seems to require only that the landlord transfer the right of possession to the tenant. Such a construction is supported by the fact that Virginia failed to adopt a section, found in the Uniform Act, which obligated the landlord to actually deliver the premises to the tenant at the beginning of the term.

Unfortunately, there is room for confusion and debate on this point especially since section 55-248.22 of the new Act provides a remedy for the tenant where the “landlord willfully fails to deliver possession.” This section of our Act parallels section 4.102 of the Uniform Act; the principle difference being the insertion of the condition of willfulness in the Virginia Act. There is no legislative history which can explain what, if anything, was going through our legislators’ minds in making this adulteration to the Uniform Act. The original section in the Uniform Act was intended to supplement the landlord’s duty to deliver actual possession by causing an abatement of the rent and allowing the tenant to recover possession or terminate the lease without regard to whether the failure to deliver was willful.

The insertion of the willfullness condition into section 55-248.22 of the Virginia Act probably reflects a poor job of draftsmanship in an attempt to “fix up” the legislation after the deletion of the provision for delivery of actual possession. Thus, the addition of the word “willfully” in our Act effectively insured that the tenant did not receive a remedy for a right carefully denied. In conclusion, the new Act does not obligate the landlord to deliver actual possession of the dwelling unit at the beginning of the term.

Where there is a holdover tenant prior case law remedies must be pursued. Section 55-248.22 only applies where the landlord or his agent willfully deny the tenant access to the dwelling unit. To say that the word “possession” here, means only the right to possess rather than actual possession is senseless. Such construction amounts to saying that the landlord did not agree to enter into a lease, that is, the “landlord willfully failed to

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18. Uniform Residential Landlord and Tenant Act § 2.103 (duty to deliver possession).
19. Under the Uniform Act the landlord is obligated to put the tenant into actual possession and is given the right, not the obligation, to bring an action to oust anyone wrongfully in possession even though he may have transferred his right to possession to a new tenant. If the landlord fails to deliver possession rent abates and the tenant may elect to terminate without regard to the willfulness of the landlord’s failure to deliver possession. Thus, under the scheme of the Uniform Act, the abatement of rent until possession is delivered gives the landlord a push to evict any trespasser occupying the premises. Id.
deliver [the right to possession]." Thus, this section simply codifies previous law of actual or constructive eviction at the inception of the tenancy.

Section 55-248.22 is contra both to sound reason and justice. A tenant entering a rental agreement bargains for a place to live not a lawsuit. As between the landlord and prospective tenant, the former is in a better position to know whether or not a tenant in possession will holdover or whether a stranger has entered the premises. It is more practical to put the burden on the lessor, the one who has knowledge of the facts. The cost of this problem should rest with the landlord who can spread it among all his tenants, especially since the Act exempts smaller landlords.

B. The Holdover Tenant

One of the most troublesome problems of the landlord-tenant relationship occurs when a tenant, whose term has ended, refuses to vacate premises which have been let to another tenant who is entitled to immediate possession. As noted earlier, the new Act appears to have left intact those remedies previously available to the new tenant against such a holdover.

At common law, prior to the lessee’s actual entry onto the premises, the lessee only had a contract right to an estate for years and thus, without an actual property right, no action for trespass could be maintained. In Hannan v. Dusch, the Virginia Supreme Court held that the new lessee’s property right becomes perfect at the commencement of the term, and therefore the tort action for trespass is appropriate in Virginia to recover damages from a holdover tenant.

The incoming lessee, who is entitled to immediate possession of the premises also has available the simple and summary remedy provided by Virginia’s unlawful entry and detainer statute. Proceeding against the wrongful holdover under this statute is preferable in light of four significant characteristics that arise when an action is brought under it: it takes

If any forcible or unlawful entry be made upon lands, or if, when the entry is lawful and peaceable, the tenant shall detain the possession of land after his right has expired, without the consent of him who is entitled to the possession, the party so turned out of possession no matter what right or title he had thereto, or the party against whom such possession in unlawfully detained may, within three years only after such forcible or unlawful entry or the commencement of such unlawful detainer, file in the clerk’s office of the circuit of the county, or the circuit court or corporation court of the city in which the land, or some part thereof is, a motion for judgment alleging that the defendant is in possession and unlawfully withholds from the plaintiff the premises in question.
precedence over all other civil actions on the docket;\textsuperscript{23} it settles immediately the right to possess; it is not a bar to other actions the new lessee may wish to bring against the holdover; and it has been held that the statute should be liberally construed in order to favor the person entitled to possession of the premises.\textsuperscript{24} Notwithstanding the adequacy of this remedy, it is advisable, from the lessee's standpoint, to bargain for an express covenant in the lease that the lessor will deliver actual possession—thereby shifting the burden of removing the holdover onto the lessor.\textsuperscript{25}

Another situation which presents problems is where a tenant in possession under a lease continues in possession after the expiration of his term, but no new tenant has a lease which begins immediately. Since the tenant is bound to surrender possession at the end of his term,\textsuperscript{26} holding over by the tenant without agreement of the landlord puts the tenant in the position of being in wrongful possession against the landlord. At common law, in such a case the landlord is put to an election. He may treat the holdover as his tenant,\textsuperscript{27} thus renewing the lease on the same terms as the one which expired, or he may treat the the holdover as a trespasser.\textsuperscript{28}

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\item Shorter v. Shelton, 183 Va. 819, 33 S.E.2d 643 (1945) (action under unlawful entry and detainer statute for wrongful eviction).
\item Allen v. Gibson, 25 Va. (4 Rand.) 468 (1826). In this action by a mortgagee using the 1814 detainer statute to oust a mortgagor upon default of payment, the court stated that a plaintiff need not show he ever did have possession of the premises which he now claims and that one co-tenant can pursue this remedy against the other.
\item The statutory remedy of ejectment is not the proper method of gaining possession because it serves primarily to try title to the property. VA. CODE ANN. § 8-799 (1972). Whether the new tenant has a right to self-help is questionable since the holdover's duty to surrender possession at the end of his term inures to the lessor rather than the new lessee. This remedy may be effectuated if commenced by a peaceable entry because Virginia places the right to possess in the new lessee as against any third person, including a holdover tenant. See the section on EVICTION: REPOSESSION OF THE LEASEHOLD, infra.
\item VA. CODE ANN. § 55-248.20 (effective July 1, 1974).
\item Rubin v. Gochrach, 186 Va. 786, 44 S.E.2d 1 (1947). This was an action by plaintiff to compel specific performance of an option to purchase land leased to the plaintiffs. The lease was for a year's term and contained a right of renewal as well as an option to purchase at any time during the lease or any renewal period. The court held that when a landlord allows a tenant for a term of years to hold over after his term, there arises a rebuttable presumption that a renewal of the original lease arises with a continuance of all terms found in the original lease. Therefore, the plaintiffs were entitled to specific performance.
\item Grice v. Todd, 120 Va. 481, 91 S.E. 609 (1917). This was an action by the plaintiff for rent. The defendant had leased premises with a termination date of August 31. Defendant gave three months notice that he would vacate on that date. Because he could not get wagons to move his belongings he held over for three days. The plaintiff attempted to hold the defendant as a tenant from year to year, thus liable for rent. The court stated that when a tenant, who had previously rented for a term holds over, without more, the landlord has the election of treating him as renewing his lease. The court further stated that this contract of renewal is implied in law from the voluntary acts of the parties. Here the holding over was not voluntary and therefore the defendant was not held liable for rent.
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The new Act continues the doctrine of election. If a tenant remains in possession as a holdover, the landlord is entitled to bring an action for possession. Where the tenant's holdover is willful and not in good faith, the landlord may recover actual damages and reasonable attorney's fees. If the landlord consents to the tenant's continued occupancy, a new tenancy is created with the new Act providing guidelines for determining the term of that tenancy.

C. Interference With the Tenant's Right to Possess

Absent any express provision in the lease, a tenant is entitled to the exclusive possession of the leasehold and may use the premises for any lawful manner consistent with the character of the premises. To protect the tenants' possessory rights the law implies in every landlord-tenant relationship a covenant of quiet enjoyment. Under this implied covenant the landlord must refrain from interfering with the tenants' use and possession of the premises. Such interference will occur in Virginia and the majority of states from:

[any wrongful act of the landlord; either of commission or omission, which may result in a substantial interference with the tenant's possession or enjoyment, whole or in part. Actual force is not essential.]

Thus, a breach of the implied covenant of quiet enjoyment occurs where there has been a wrongful eviction of the tenant by the landlord; whether actual or constructive.

When the landlord actually excludes the tenant from possession of the demised premises there is no question that the tenant has been evicted. However, whether a tenant has been "constructively" evicted by some act or omission by the landlord is often not as clear. Constructive eviction involves: (1) an intent by the lessor to evict the tenant or to deprive him

30. Id.
35. Buchanan v. Orange, 118 Va. 511, 88 S.E. 52 (1916). The court held that where the lessor stipulated that she would furnish heat and then refused, that fact constituted a constructive eviction when tenant vacated the premises. The tenant was released from paying rent from the time of his eviction.
36. For a comprehensive discussion of the rights and liabilities of the parties under an actual eviction situation see Eviction: Repossession of the Leasehold, infra.
of the enjoyment of the premises; (2) some act or omission on the part of the lessor amounting to a material and substantial deprivation of the tenant’s possession and enjoyment; (3) notice by the tenant of the condition; (4) abandonment of the premises within a reasonable time.

The intent requirement will rarely be found in the form of an express desire of the landlord, but is usually inferred from the facts. This inference is based upon the rule that every man is presumed to intend the natural consequences of his actions; therefore it is not necessary to find a motive on the part of the lessor to oust the tenant.

To justify his vacating the premises under the doctrine of constructive eviction, a tenant must give the lessor notice of the condition and an opportunity to remedy it. Upon the failure of the landlord to remedy the condition, the tenant must abandon the premises within a reasonable time in order to claim a constructive eviction. By retaining possession or abandoning after undue delay the tenant will be held to have waived his right to assert a constructive eviction.

Just what constitutes a reasonable time

37. Buchanan v. Orange, 118 Va. 511, 517, 88 S.E. 52, 54 (1916). Justice Harrison, who delivered the opinion, stated:

I am satisfied that under the more modern doctrine in cases of this character, the intention of the landlord should be held to be a matter of law or of fact, to be inferred from the acts, so that if the acts of the landlord as a matter of fact resulted in disposing the tenant by giving him justifiable cause to vacate the premises, then the law imputes the intention to the landlord on the general principle that every man must be held to intend the proximate consequences of his act.

38. 2 Powell, Real Property § 225 (3) (Rohan ed. 1973); Purvis v. Silva, 94 Ariz. 62, 381 P.2d 596 (1963); Stillman v. Youman, 266 S.W.2d 913 (Tex. Civ. App. 1954). This court held that conduct of a landlord in repeatedly asking the tenant for accrued rent for a period of about thirty minutes in the presence of the tenant’s customers did not constitute constructive eviction.

39. Pague v. Petroleum Products, Inc., 461 P.2d 317 (Wash. 1969). This court stated that in order to claim constructive eviction, the tenant must notify the landlord of the act or condition complained of, and give him time to correct it.

40. Herstein Co. v. Columbia Pictures, 4 N.Y.2d 117, 172 N.Y.S.2d 808, 149 N.E.2d 328 (1958). This court held that in an action for damages for breach of the covenant of quiet enjoyment the tenant must show ouster, or abandonment of the premises where the eviction is constructive.


42. Minor on Real Property § 384 (2d ed. 1923).

43. Pague v. Petroleum Products, Inc., 461 P.2d 317 (Wash. 1969). In Milheim v. Baxter, 46 Colo. 155, 103 P. 376 (1909) the court held that a notice requirement was unnecessary and the landlord will be held to have knowledge of the condition where an adjoining apartment was used for immoral purposes for a long time.


45. Thompson v. Shoemaker, 7 N.C. App. 687, 173 S.E.2d 627 (1970). In an action by a tenant against the owner of the rental dwelling to recover the amount paid in rent for premises
will generally be determined by looking at the facts and circumstances of each case.\endnote{16}

Most importantly, constructive eviction relieves the tenant of the obligation to pay rent for the unexpired term.\footnote{17} The evicted tenant may also bring an action against the lessor for damages either in contract upon the covenant of quiet enjoyment\footnote{18} or in tort for the landlord’s interference with his possessory rights.\footnote{19}

The recently enacted Virginia Residential Landlord and Tenant Act provides the tenant with comprehensive remedies for interference with his peaceful use and possession of the demised premises.\footnote{20} Whether the Act is meant to provide the exclusive remedy displacing the availability of the doctrine of constructive eviction is unclear. One of the stated purposes of the Act is “to establish a single body of law relating to the landlord and tenant throughout the Commonwealth.”\footnote{21} In meeting this goal of uniformity it is arguable that an aggrieved tenant can only utilize the remedies of the new statute. Such an interpretation would be unfortunate because even though the tenants’ remedies under the Act are extensive, whether the Act provides the tenant with a remedy for every interference that could constitute a constructive eviction is open to question.

Under Section 55-248.26 of the new Act a tenant may recover possession or terminate the rental agreement if the landlord wrongfully ousts or excludes the tenant from possession. Additionally, where a landlord willfully diminishes essential services the tenant may terminate the rental agreement. In either case the tenant may also recover damages and reasonable attorney’s fees. Significantly the section requires that the diminution of

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\item that allegedly were substantially unfit for habitation, the plaintiff was held not entitled to recover rent voluntarily paid where the plaintiff continued to occupy the defendant-owner’s property.
\item Kennedy v. Nelson, 414 P.2d 518 (N. Mex. 1966). This court held that the evidence presented a jury question as to the reasonableness of the tenant’s delay in vacating the premises after notification to the landlord of untenantable conditions.
\item The defense of constructive eviction is a complete bar to any action brought by the lessor for rent or otherwise for the enforcement of the lease. 2 Powell, Real Property § 225 (3) (Rohan ed. 1973); 49 Am. Jur. 2d Landlord and Tenant § 575 (1970); See the section on Rent, infra.
\item 49 Am. Jur. 2d Landlord and Tenant § 323 (1970). In Hannan v. Harper, 189 Wis. 588, 208 N.W. 255 (1926), the court granted an injunction to restrain a constructive eviction. The plaintiff alleged that the defendant-lessee was going to lease an upper apartment for the purpose of accommodating a college fraternity, thus causing annoyance and inconvenience to plaintiff’s use and occupation of the lower apartment.
\item Va. Code Ann. §§ 55-248.21, .23, .26 (effective July 1, 1974).
\item Va. Code Ann. § 55-248.3 (effective July 1, 1974).
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essential services by the landlord must be willful in order to proceed under this section. Under the doctrine of constructive eviction the interference by the landlord must be intentional but there is no requirement that the interference be done with a motive to oust. Under Section 55-248.26 the term "willful" may comprehend an intent to evict by diminution of essential services.

Section 55-248.21 permits the tenant to terminate the rental agreement where there is a material non-compliance by the landlord of the rental agreement or those provisions of the Act which affect safety and health. However, this section will not operate unless the tenant delivers written notice specifying the non-compliance. The landlord has twenty-one days after such notice to remedy the condition and if he fails the tenant may terminate thirty days after notice was delivered.

The tenant can not terminate the agreement if the defective condition was created by the tenant or one under his control. This requirement raises the question of whether the tenant may proceed under this section where the condition is caused by a fellow tenant. Since the section expressly precludes a remedy if the tenant or one under his control creates the condition, by negative implication it would appear that the remedy against the landlord would be available for the acts of another tenant. This would be a significant departure from the prior law where under the implied covenant of quiet enjoyment the breach occurs only where the interference was caused by the landlord or some person acting as his agent.

As an alternative to termination of the rental agreement, the new Act provides the tenant with additional remedies where the landlord wrongfully fails to provide essential services in controversion of the rental agreement or the provisions of the Act. Section 55-248.23 provides that where a landlord fails to correct such a condition within a reasonable time after written notice the tenant may (1) recover damages based upon the diminution in the fair rental value of the dwelling unit or (2) procure substitute housing during the period the condition exists. Where the tenant elects to procure substitute housing he is excused from the duty to pay rent for the period. If a tenant chooses to proceed under this section, the Act provides that he may not terminate the agreement pursuant to Section 55-248.21.

52. In Buchanan v. Orange, 118 Va. 511, 88 S.E. 52 (1916), the Virginia Supreme Court held that if in fact the tenant was dispossessed because of the acts of the lessor, then the law would impute the "intention" to the landlord. It is not at all clear whether the addition of the word "willful" now places a burden on the tenant to actually show a motive to oust.
53. Additionally, a tenant proceeding under this section may pursue injunctive relief.
55. These two sections of the new Act are mutually exclusive. By their wording, proceeding
The remedy provided by Section 55-248.23 is significant in that it provides an aggrieved tenant with a viable remedy for diminution of an essential service where terminating the agreement and relocating is not a realistic alternative.

D. Use of the Premises

The tenant is entitled to the exclusive possession of the entire demised premises during the term of the lease.\(^56\) He has the right and responsibility to control the premises and put them to any use which does not amount to waste\(^57\) or destruction and which is not illegal.\(^58\) The tenant must use the premises in a manner for which they are suited and for purposes consistent with the covenants of his lease.

The tenant in Virginia has always been subject to tort liability for any misuse of the premises amounting to waste.\(^59\) If an express covenant to maintain the premises is breached by the tenant, contract liability arises;\(^60\) moreover, the landlord may exercise his right to forfeiture where the lease expressly provides such a right.\(^61\) The new Act expands the rights of the landlord by delineating certain obligations which the tenant must fulfill regarding the maintenance of the dwelling unit\(^62\) as well as the manner in which any rules or regulations of the landlord may be enforced.\(^63\) The

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56. Clark v. Harry, 182 Va. 410, 29 S.E.2d 233 (1944). The court discussed the definition of a lease in Virginia and the rights of a lessee thereunder. The particular case involved a determination of the relationship of the parties and the court held it was that of master-servant or owner-cropper and not that of landlord-tenant.

57. VA. CODE ANN. §§ 55-211, -216 (1972). As a practical matter, waste can result from affirmatively doing something to the property such as punching a hole in the wall of the rented apartment or removing manure from a leased field. Waste can also result from omitting to perform a duty such as allowing a field capable of cultivation to erode away or, in a residential lease, failure to close a window or door when it rains, resulting in a warped floor or wall.

58. Davis v. Wickline, 205 Va. 166, 135 S.E.2d 812 (1964) (action for declaratory judgment construing a lease); Stonegap Colliery Co. v. Kelly, 115 Va. 390, 79 S.E. 341 (1913) (construction of a mining lease and determination of rights of lessee under such a lease).

59. VA. CODE ANN. § 55-211 (1972).

60. Id. § 55-216. See Kavanaugh v. Donavan, 186 Va. 85, 41 S.E.2d 489 (1947). The plaintiff-lessee elected to sue defendant-lessee in tort for damages rather than on breach of covenant to keep in reasonably good condition. The court held that plaintiff-lessee must show negligence on the part of lessee; lessee would be responsible for his voluntary and willful acts; double damages could be awarded for wanton waste; and conduct of lessee's servants and agents can be taken into consideration in determining liability.

61. The only limitation to such a right of the landlord's is found in Davis v. Wickline, 205 Va. 166, 135 S.E.2d 812 (1964) where the court stated that the right to forfeiture will be strictly construed against the lessor.


63. Id. § 55-248.17.
landlord has adequate measures under the new Act to enforce reasonable regulations and code obligations. He must give notice to the tenant of any misuse, and in the absence of any remedial action by the tenant, he can exercise his right of forfeiture, obtain injunctive relief, and in either case he may recover damages. For willful breach the landlord may recover reasonable attorney's fees. Additionally, where the misuse by the tenant materially affects health and safety the landlord, after written notice and fourteen days, may enter the premises, repair the condition and charge the tenant for the cost of repairs. The Act, unfortunately, does not specify who determines when a situation endangers health and safety. It is submitted that the landlord should not be the one making that determination because of the very great potential for abuse.

Under Section 55-222 of the Code of Virginia, which remains in effect, the tenant from month to month must give written notice of his intention to terminate thirty days prior to the end of the month. This statute is a codification of case law recognizing that termination should occur at the end of the rental period, and only at such time. Section 55-248.37 of the new Act provides that thirty days notice in a month to month tenancy is required "prior to the termination date specified in the notice." There appears to be a conflict here in that the new Act allows a tenant to terminate on any date he desires so long as the requisite notice of thirty days prior to termination is given. The thrust of these notice requirements is the time frame in which the notice must be given; therefore, the new Act appears to place the tenant in the favorable position of determining his own termination date without the necessity of waiting until the rental period ends.

64. Id. § 55-248.31.
65. Id.
67. Va. Code Ann. § 55-222 (1972), which states:

A tenancy from year to year may be terminated by either party giving notice, in writing, prior to the end of any year of the tenancy, for three months of his intention to terminate the same. A tenancy from month to month may be terminated by either party giving thirty days notice in writing, prior to the end of the month, of his intention to terminate the same. When such notice is to the tenant it may be served upon him or upon anyone holding under him the leased premises, or any part thereof. When it is by the tenant it may be served upon anyone who, at the time, owns the premises in whole or in part, or the agent of such owner, or according to the common law. This section shall not apply when, by special agreement no notice is to be given; nor shall notice be necessary from or to a tenant whose term is to end at a certain time.

69. Inasmuch as the two statutes are in conflict it can be argued that the new Act's notice requirement should apply to residential leases, while the current Virginia Code notice requirement would be applicable in the commercial area.
Although not always reflected in the case law, the physical condition of residential rental property is a frequent source of controversy in the landlord-tenant relationship. It is an area where the early common law rigidly applied a strict *caveat emptor* doctrine with predictably harsh results. As with most other areas of landlord-tenant law, Virginia has consistently adhered to settled common law principles. Increased urbanization, however, has placed a great burden on the existing Virginia case law to deal effectively with the modern landlord and tenant. Therefore, it is not surprising that a statutory reform movement has sought to balance the equities as well as codify an emerging trend in the cases seeking to do the same. For example, the newly enacted Virginia Residential Landlord and Tenant Act attempts to establish clear criteria for the maintenance of quality housing, although it may have the perhaps unintended effect of usurping judicially developed methods which deal with the situation.

For the practicing attorney, the future has become more complex. The statutory transformation of Virginia's landlord-tenant law means asserting new remedies available to the tenant and serving a landlord with increased responsibilities. However, since the law exempts natural persons owning ten or less units, the Virginia attorney is still left with a great challenge regardless of which party he represents. With the exempted landlord, the attorney must seek either to overturn the *caveat emptor* doctrine or to preserve its common law characteristics in the face of the modern trend to imply a warranty of habitability in the maintenance of rental premises. For either purpose, an understanding of the existing law as well as the implications of the legislation is a necessary starting point.

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1. For example, from January 3, 1972, to December 29, 1972, Arlington County's Tenant-Landlord Commission's staff handled 2,326 calls, 35% of which concerned maintenance problems, a percentage twice that of any other category.

2. A notable exception is VA. CODE ANN. § 55-226 (Repl. Vol. 1969) which reverses the common law rule and makes the liability of the tenant for damage to the premises dependent upon whether or not there was fault or negligence on the part of the lessee.

3. VA. CODE ANN. §§ 55-248.2 to-248.40 (effective July 1, 1974) [hereinafter cited as the Virginia Act]. The Virginia Act is basically an adoption of the UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT, the text of which can be found at 2 R. POWELL, THE LAW OF REAL PROPERTY § 260.1[4] (1973). Interestingly enough, criticism of the adoption of a uniform act at this time emerges from tenant as well as landlord groups. The tenants' interest groups believe additional and more extensive reforms can be achieved by court decisions than the proposed Act would include. Report of Subcommittee on the Model Landlord-Tenant Act of Committee on Leases, Proposed Uniform Residential Landlord and Tenant Act 8 REAL PROP., PROBATE & TRUST J. 104, 123 (1973).
A. The Requirement of Habitability

Consistent with the vast majority of jurisdictions, Virginia courts hold that there is no implied warranty or covenant in the lease of an unfurnished dwelling or apartment house as to its fitness for habitation or suitability for the purpose the lessee intended. The general rule is thus stated:

In the absence of warranty, deceit or fraud on the part of a landlord, the rule of caveat emptor applies to leases of real estate, the control of which passes to the tenant, and it is the duty of the tenant to make examination of the demised premises to determine their safety and adaptability to the purposes for which they are hired.

A review of the leading Virginia cases indicates that caveat emptor has been routinely applied since its adoption to leases of real property without historical analysis of its origin nor question of the principle's adaptability to the contemporary landlord-tenant relationship. Under the doctrine of caveat emptor the tenant assumes the risk of patent defects in the demised premises at the time of the lease. In order to avoid application of the "buyer beware" doctrine, the tenant must show an express warranty, fraud or duress, or qualify under another limited exception allowed at common law. Thus, an express warranty or covenant by the lessor can create a duty in himself to warrant the habitability of the demised premises. To constitute fraud there must have been a fraudulent misrepresentation or concealment of a material defect which the lessee could not have discovered in the exercise of due diligence. Though never expressly adopted or rejected in Virginia, some jurisdictions exempt from the operation of the caveat emptor rule the lease of furnished premises for a temporary purpose.


6. Historically, leases were used to demise land for agrarian purposes and were regarded as equivalent to a sale of the premises for a term. Inspection of land as to suitability for the lessee's purposes was far easier than an inspection of an apartment or other dwelling unit for habitability. Only in rare instances can the tenant be said to have knowledge of all defects and conditions which a reasonable inspection could reveal. See Annot., 40 A.L.R.3d 650 (1971); Note, The Implied Warranty of Habitability in Landlord-Tenant Relations: A Proposal for Statutory Development, 12 WM. & MARY L. REV. 580, 580-88 (1971).

7. See 51C C.J.S. Landlord and Tenant § 303 (1968).

reasons which have been given for abandoning *caveat emptor* in this instance are threefold: a) the contemplation by the parties of immediate occupancy without alteration; b) the difficulty of inspecting a furnished dwelling prior to leasing; and c) the finding of an implied warranty is equitable and in line with modern business practices. Nevertheless, only a few states have granted this variant to the general rule by case law, although some states impose a similar statutory relief.

Taking a more advanced stance, many other jurisdictions have rejected the idea of *caveat emptor* by finding an implied warranty of habitability in a regular lease by case law development. In some respects, the general implication of a warranty of habitability by the lessor differs only slightly from the reasoning supporting an exception to *caveat emptor* for leases of furnished premises. Regardless of possible precedent, the modern trend is a marked departure from earlier common law rules. The rationale of the modern cases vary but they all stress the contractual nature of the modern lease agreement as a basis for their decisions.

New Virginia legislation would place a duty upon the landlord to put

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10. These statutes impose a general obligation to put the premises in a tenantable condition. For a listing and discussion of the statutes see Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. Rev. 1279, 1286 n.43, 1287 nn.50, 53 (1960).
12. Often a future tenant's inspection of a rental unit is conducted, if at all, when the unit is still occupied and, therefore, furnished. Likewise, alteration is never contemplated while the move-in date immediately follows the expiration date of the previous tenancy. Also mitigating against the narrowness of this exception is the prevalent practice of leasing an apartment based upon examination of a "model" unit without inspection of the actual premises leased.
13. The court may emphasize the changing conditions of society or analogize to consumer protection law or find in the existence of housing codes an implied duty to the tenant to keep the premises in conformity. See 2 R. Powell, *The Law of Real Property* § 225[2] (1973); 49 N.C. L. Rev. 175, 179-87 (1970).
and keep the premises in a fit and habitable condition. Where housing
codes place a greater duty upon the landlord than those duties enum-
bered, the landlord's compliance with the applicable building and housing
codes becomes the standard of habitability. Like the Uniform Residential
Landlord and Tenant Act, the Virginia Act can be viewed as a codification
of the recent trend requiring the landlord to maintain habitable premises
throughout the term of the lease.

However, because of subtle changes and omissions in the Virginia Act,
as well as the original weakness of the Uniform Act, the tenant's protection
clearly rests with his local building and housing codes. The landlord may
contract away by written agreement specified duties enumerated in the
Act leaving only the requirements of compliance with applicable building
and housing codes: the general duty to keep premises in a fit and habit-
able condition, and the specific obligation to keep mechanical and plumb-
ing facilities supplied to the tenant in good and safe working order. The
Virginia Act contains no provision requiring each such agreement to be by
"separate" agreement or to be supported by separate consideration. Of
significant import in the Virginia Act is the provision for transferring the
landlord's responsibility over common areas to the tenant in probable
contradiction of the common law. Without the inclusion of this provision,
the statute's effect would be identical to the Uniform Act. That is, all
maintenance work necessarily connected with the landlord's obligation to
provide habitable premises is specifically prohibited from becoming the
tenant's responsibility, even by agreement. Apparently, the Virginia Act

15. VA. CODE ANN. § 55-248.13 (effective July 1, 1974).
16. The section follows the warranty of habitability doctrine now recognized by case law
in the jurisdictions of California, Colorado, Georgia, Hawaii, Illinois, Michigan, New Hamp-
shire, New Jersey, Washington D.C., and Wisconsin. UNIFORM RESIDENTIAL LANDLORD AND
TENANT ACT § 2.104, Comment.
17. The good faith requirement expressed in the Virginia Act can only be as strong as a
particular court wishes to make it; therefore, it is a nebulous standard of protection.
18. Compare VA. CODE ANN. § 55-248.16(c) (effective July 1, 1974) with UNIFORM
RESIDENTIAL LANDLORD AND TENANT ACT §§ 2.104(c), (d), and (e). The Uniform Act would
operate to prevent 1) use of the rental agreement to transfer responsibilities of the landlord
and 2) use of reduced rent as sufficient consideration for such an agreement, in that it
prohibits such a tie-in to the rental agreement. Subcommittee on the Model Landlord-Tenant
Act of Committee on Leases, Proposed Uniform Residential Landlord and Tenant Act, 8 REAL
PROP. PROBATE & TRUST J. 104, 112 (1973). This article is reprinted in 2 R. POWELL, THE LAW
19. Compare VA. CODE ANN. § 55-248.13(c) (effective July 1, 1974) with UNIFORM RESIDEN-
tIAL LANDLORD AND TENANT ACT § 2.104(c). The law currently requires a special contract to
transfer the landlord's duty to exercise ordinary care in maintaining common areas; whereas,
the Virginia Act, unlike the language of § 2.104(c) of the Uniform Act, does not clearly state
that a separate writing is necessary for the transfer of this obligation.
20. Subcommittee on the Model Landlord-Tenant Act of Committee on Leases, Proposed
seeks to avoid this safeguard and accept the landlord’s argument for limitation of his liability.\textsuperscript{21}

If relegated by the landlord’s use of the landlord-tenant statute to the protection afforded by local ordinances and state housing code provisions, the Virginia residential tenant has varying degrees of assurance of habitability, depending upon his locale.\textsuperscript{22} The Virginia housing statutes offer but a single source of reasonable protection, a provision for the maintenance of toilets.\textsuperscript{23} However, this housing statute represents a possible answer to the inadequacies of Virginia landlord-tenant law in the form of a comprehensive statewide housing code. Undoubtedly, even under the Virginia Act, the reliance on local ordinances for standards of habitability will suffer from much of the same criticism as did case law development in that results are often obtained in a random and somewhat haphazard manner.\textsuperscript{24}

For the benefit of the landlord, the Virginia Act includes a provision, directly adopted from the Uniform Act, for tenant obligations in maintaining the dwelling unit.\textsuperscript{25} The Act satisfies a previous vacuum in this area of the law by imposing specific affirmative duties on the tenant. In a way, this provision corresponds to the landlord’s newly enacted warranty of habitability in that it attempts to insure landlords of “habitable” tenants. Its basic theme is that the tenant use the premises in a reasonable manner and comply with applicable housing code provisions primarily imposed upon tenants. The purpose is to establish minimum duties of tenants,


\textsuperscript{21} The reason for such a limitation is:

In any sensible and equitable method of ensuring the maintenance of habitable dwelling units, there must be some limitation on the liability of the landlord if the ownership, construction and maintenance of these dwelling units are to be encouraged. Strum, \textit{Proposed Uniform Residential Landlord and Tenant Act: A Departure from Traditional Concepts}, 8 REAL PROP. PROBATE & TRUST J. 495, 500 (1973).

\textsuperscript{22} Virginia localities have taken various approaches to landlord-tenant conflicts, such as establishment of a quasi-judicial commission or a Certificate of Compliance program. For a discussion of these methods of seeking quality housing see \textit{The Indigent Tenant}, Section X. infra.

\textsuperscript{23} VA. CODE ANN. § 32-64 (Repl. Vol. 1969). Under this provision the landlord must provide a sanitary privy or closet or the tenant shall supply the same and deduct the cost from his rent.

\textsuperscript{24} A detailed statewide housing code with adequate remedy and notice provisions is one suggested solution. Such a code would not be subject to disclaimer, but incorporated into the lease agreement by operation of law. Note, \textit{The Implied Warranty of Habitability in Landlord-Tenant Relations: A Proposal for Statutory Development}, 12 WM. & MARY L. REV. 580, 600-01 (1971).

\textsuperscript{25} VA. CODE ANN. § 55-248.16 (effective July 1, 1974); \textit{Uniform Residential Landlord and Tenant Act} § 3.101.
although some think the common law is well suited in its present state to deal with irresponsible tenants.\textsuperscript{26}

Virginia formerly recognized the right of a landlord to transfer many of his duties to the tenant by express covenants. However, as to responsibility for common areas, a landlord could not contract away his implied duty of ordinary care at least with respect to third persons.\textsuperscript{27} Courts of other jurisdictions have not always allowed these exculpatory clauses to take effect when public policy would be violated, the public policy involved being the applicable housing code which is made a part of the lease by an implied warranty.\textsuperscript{28} Basically, the public policy argument depends on the court’s responsibility to protect the general welfare, which includes the avoidance of \textit{caveat emptor} where it results in poor rental housing that fosters urban blight.\textsuperscript{29} Formerly, Virginia appeared to uphold the idea of freedom of contract between the landlord and the tenant when dealing with exculpatory clauses.\textsuperscript{30}

The new Act appears to continue the policy of freedom of contract with respect to an exculpatory agreement between a landlord and tenant. Section 55-248.9 of the Act prohibits any provisions whereby a tenant “agrees to the exculpation or limitation of any liability of the landlord to the tenant arising under law.” However, Section 55-248.13, which, among other things, obligates a landlord to maintain the common area in a clean and safe condition, permits a landlord and tenant to agree in writing that the tenant perform certain of the landlord’s duties imposed therein. These sections are not necessarily inconsistent and a court in construing the Act can harmonize them. The former section forbids exculpation from a \textit{liability} arising under law, while the latter imposes a duty on the landlord

\textsuperscript{26} Uniform Residential Landlord and Tenant Act § 3.101, Comment. This is not to say tenants should be relieved of such obligation; rather, heretofore landlords have had sufficient remedies to use against destructive tenants. The indigent tenant is an exception by virtue of being judgment proof and unable to compensate his landlord for damages to the premises.

\textsuperscript{27} In Taylor v. Virginia Constr. Corp., 209 Va. 76, 161 S.E. 2d 732 (1968), the court held a landlord liable where a tenant’s child was injured in a common area despite a broad exculpatory clause in the tenant’s lease. The opinion is not conclusive as to whether the exculpatory clause would have effectively barred recovery by the tenant. \textit{See} Section III, \textit{Lease supra}.

\textsuperscript{28} Note, \textit{Implied Warranty of Habitability in Housing Leases}, 21 Drake L. Rev. 300, 312 (1972).

\textsuperscript{29} The test of whether a landlord can shift his liability would rest on the relative bargaining positions of the parties; that is, the lessee must be shown to have had some bargaining power. A shortage of good housing, racial or class discrimination, or a standardized form lease all show a lack of bargaining power. \textit{Id.} at 312-13.

\textsuperscript{30} 11 M.J., \textit{Landlord and Tenant} § 37 (1950). However, the tenant cannot contract away the right of a member of his family to recover for personal injuries in a common area. Taylor v. Virginia Constr. Corp., 209 Va. 76, 80, 161 S.E.2d 732, 735 (1968).
except where the landlord and tenant otherwise agree. Thus, such an agreement is not an exculpatory provision which transfers a landlord’s “liability . . . arising under law” since the Act permits the landlord to shift the underlying duty which would give rise to that liability to the tenant by agreement.

Section 55-248.13 limits the scope of these exculpatory provisions by permitting only those entered into in good faith which do not affect the landlord’s obligation to other tenants in the premises. Therefore, an agreement between a landlord and tenant that the tenant keep a common area in a clean and safe condition would be binding between the immediate parties but could not diminish the landlord’s obligation or responsibility to other tenants or strangers using the common area.

Interestingly, the Virginia Act altered the Uniform Act in two significant passages. First, Virginia limited the landlord’s duty to “common areas shared by two or more dwelling units.” Second, under the Uniform Act a landlord could not transfer his statutory duty with respect to a common area to the tenant. Unfortunately, this departure from the substance of the Uniform Act creates a loophole in an area in which reform was needed—especially since Virginia also failed to enact the “unconscionability” provision found in the Uniform Act.

B. Maintenance of the Premises

1. Repair of the Demised Premises

Virginia adheres to the common law rule that, absent a covenant to the contrary, the lessor is under no obligation to keep the demised premises in repair. On the other hand, the lessee’s duty, unless there is a covenant to repair, extends only to those ordinary repairs necessitated by his own fault or negligence. Even though the tenant has this duty, it is the landlord who is the guardian of his own premises and it is his responsibility to keep the premises fit, either by utilizing common law sanctions or enforcing the lease provisions.

33. Uniform Residential Landlord and Tenant Act § 1.303.

Much of the landlord-tenant litigation in Virginia courts concerns injuries arising from defective conditions in common areas, and the law in this area has been quite favorable to the landlord. See 7 U. Rich. L. Rev. 557 (1973).

Where the tenant has undertaken an express obligation to repair, Virginia still requires a showing of the tenant’s negligence before the landlord can recover, in sharp contrast to the older common law view, although the burden is somewhat surprisingly on the lessee to prove the absence of negligence. Thus, by statute, destruction of the premises by a fire of unknown origin would not obligate the tenant to rebuild the premises, despite the existence of a covenant to repair or to leave in good repair. For a covenant to have a greater effect requires a clear and express intention by the parties.

Where the terms of the lease require the tenant to erect buildings, the improvement becomes a part of the freehold unless there is an agreement allowing the tenant to remove such improvement. In general then, the intention of the parties governs the removal of property within the contractual classification set forth in the agreement. Such problems seldom face the typical residential tenant, although long-term renters of apartment units are perhaps likely to make significant alterations and additions to their apartments over a period of time.

Occupancy of a rental unit imposes a duty on the tenant not to commit waste, unless he has a license to do so. This obligation has generated only a few cases which have reached the Virginia Supreme Court; although, to the landlord, utilization of the waste statutes seems to be an attractive alternative to retaining the tenant’s security deposit for damage to the premises. By statute, the wanton wasting of the leased premises subjects

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37. In contrast West Virginia imposes a burden on the landlord to show the damage was the result of the fault or negligence of the tenant. McKenzie v. Western Greencrier Bank, 146 W.Va. 971, 124 S.E.2d 234 (1962). See W. VA. CODE ANN. § 36-4-13 (1966).

38. Nothing should be left to vague inferences or doubtful construction. Willis v. Wrenn’s Ex’x., 141 Va. 385, 393, 127 S.E 312, 314 (1925) quoting Maggort v. Harnsberger, 35 Va. (8 Leigh) 532, 538 (1837). Where an obligation to rebuild is found, the measure of damages is, “[t]he cost of replacing upon the lot a building of equal size, character and construction, deducting therefrom a proper and just amount for the age and depreciation of the destroyed building, and any amount which the plaintiff has received or should receive from the sale of the material salvaged from the building less such expense as the plaintiff has been put to in producing such salvage.” Vaughan v. Mayo Milking Co., 127 Va. 148, 161, 102 S.E. 597, 601 (1920).


the lessee in possession to liability for double damages. It should be noted that an injunction against waste may be obtained while a suit is pending, even though the statutes provide for a remedy at law.

By case law the Virginia landlord has no responsibility to maintain in safe condition any part of the leased premises under the tenant's control. An exception exists to this general rule when an injury results from the existence of some latent defect in the premises known only to the lessor and not reasonably discoverable by the tenant. In such situations a duty arises for the lessor to disclose the existence of the defective condition; the failure of any notice constitutes negligence should an injury result.

The new Act increases the landlord's potential for liability by obligating him to maintain the premises in a fit condition; specifically, the landlord must comply with building and housing codes materially affecting health and safety, keep the premises in a habitable condition, and maintain in safe condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning facilities supplied by him.

The presence of a covenant by the lessor to repair the leased premises does not affect the case law rule of caveat emptor. Even though an unknown defect in the premises is attributable to a failure to repair, the existence of a covenant to repair does not impose tort liability upon the lessor. However, once repairs are undertaken on the demised premises, the lessor must use reasonable care in making the repairs whether he enters by virtue of a covenant to repair or voluntarily.

2. The Common Area

A lessor is liable in tort for his negligence in caring for common areas, a subject which accounts for a substantial percentage of Virginia's appellate cases. Here the court deals with the double objective of holding the person who has exclusive control of the property responsible for its condition and

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42. The burden is on the plaintiff to show that waste has been committed to his injury and the amount of damage. Whether the waste amounts to wanton waste is a jury question. Va. Code Ann. § 55-214 (1969); See Kavanaugh v. Donovan, 186 Va. 85, 91, 94, 41 S.E.2d 489, 492, 494 (1947).
preventing the landlord from being the insurer of the tenant's safety. To this end the court defines the landlord's obligation as an implied duty to use ordinary care to keep the common areas in a reasonably safe condition. In order to recover damages the tenant must show either that the lessor had knowledge of an existing defect or that the premises had been in an unsafe condition for such a length of time that he should have known of the hazardous status of the property. The parameters of the reasonable care obligation upon the landlord as to common areas are not clear in Virginia case law, although the Virginia Supreme Court states that the obligation encompasses the duty to make reasonable inspections to determine when and if repairs are needed. Conversely, a careful inspection by the landlord or his agent which fails to disclose a defect will relieve the landlord from liability.

A landlord's duty under the new legislation is to "keep all common areas shared by two or more dwelling units of the premises in a clean and safe condition." At first glance this obligation does not differ in any significant way from a landlord's common law duty. It is safe to assume that the court will construe the Act as requiring the landlord to maintain the common area in a "reasonably" clean and safe condition and as requiring knowledge or notice on the part of the landlord before liability could attach. Additionally, it appears likely that the court will continue to impose the common law duty where a common area is not shared by two or more units. However, it is arguable that the new Act has materially altered the state of the law with respect to the landlord's liability for patent defects existing at the time of the letting.

The Supreme Court of Virginia in Aragona Enterprises v. Miller, held that the landlord is not liable to the tenant or the tenant's family for injuries from an open and obvious dangerous condition on the land which the tenant knew or should have known existed at the beginning of the tenancy. A broad principle limits the lessor's duty to maintain common areas at that point in which the court believes the landlord is being an insurer of the tenant's safety, including the safety of the tenant's children. This rationale underlies the harsh decision in Aragona Enterprises v.

51. VA. CODE ANN. § 55-248.13 (effective July 1, 1974).
Miller and exemplifies the difficulty the Virginia court has had in settling on a rule reasonable enough to fall within its stated objectives. The rule which emerged from Aragona is increasingly difficult to rationalize in view of the popularity of the large rental complex. The landlord in such a situation can correct the defect and spread the cost among a large number of tenants through increased rent. A more reasonable view shared by a large number of jurisdictions removes any distinction as to when the defect occurred which would alter the landlord's duty of reasonable care in maintaining areas under his control.

It is contended that the new Act adopts the view that the landlord can be liable for injury caused by an unsafe condition in the common areas irrespective of the fact that it existed at the time of the letting. Such an approach avoids the harsh result of Aragona without taking away the landlord's defenses of contributory negligence and assumption of the risk. Thus, it would take more affirmative conduct on the part of the tenant than the mere leasing of the premises to constitute an assumption of the risk on his part. This construction seems to complement the provision in §55-248.13 which allows the landlord and tenant to agree in writing that the tenant will perform the landlord's duty to keep the common area clean and safe. Absent an agreement by the tenant to assume the landlord's duty to keep a safe common area, a tenant could still be held to have been contributorily negligent or to have assumed the risk of a dangerous condition because of affirmative conduct that goes beyond the mere leasing of the dwelling unit. Finally, 55-248.13(b) provides that where the requirements of applicable building and housing codes materially affecting health and safety impose a greater duty than that of keeping the common area clean and safe, that higher duty shall control. To hold that a tenant assumes the risk of a patent defect existing in a common area at the inception of the tenancy by the mere letting of the dwelling unit, would amount to a denial of protection to a member of the class an applicable housing code intended to protect.

When the defect in the common area is the result of natural forces, such

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53. 213 Va. 298, 191 S.E.2d 804 (1972). The dissent noted that the effect of the ruling would place the bar of the assumption of the risk upon children who are incapable of knowing or appreciating the risk. Therefore, the duty of the landlord to his tenant's children for unreasonably dangerous conditions should reflect the degree of foreseeability of danger to the children. Id. at 305-06. For a discussion of the case see 7 U. Rich. L. Rev. 557 (1973).


55. For example, a tenant who leases a unit in a garden type apartment complex that has a common swimming pool under construction would not automatically assume the risk of any open excavation. However, he could be held to be guilty of contributory negligence or to have assumed the risk by conduct on his part which manifests a willful and knowing disreguard of any safety warning or barriers erected by the landlord for the tenant's safety.
as the accumulation of snow, the courts have sometimes had difficulty in finding a duty in the landlord to remedy the situation. However, the Virginia Supreme Court in *Langhorne Rd. Apartments v. Bisson* found no difficulty in the logical extension of the landlord’s duty of reasonable care to the removal of a natural accumulation of snow and ice. The landlord is required to remove the snow and ice from walkways reserved for the common use of his tenants within a reasonable time after the storm ceases. In such a situation the contributory negligence of the tenant is usually pleaded. In most cases it cannot be said as a matter of law that a tenant will be contributorily negligent or have assumed the risk in traversing a snow-covered walkway; rather, such a finding is for the jury. A similar situation should exist under the new Act.

The landlord’s liability for personal injury as well as the tenant’s responsibility for his own safety have been clouded by the historic landlord-tenant relationship. Less rigidity in applying these standards cannot be easily drawn from the Virginia Supreme Court in a short period of time. Therefore, the Virginia Residential Landlord and Tenant Act by its revision and clarification of the rights and obligations of the landlord and the tenant denotes an important demarcation from the existing legal structure. What the Virginia Act may accomplish in its present form is necessarily unknown; the minimum should be legislative recognition of the present-day, landlord-tenant relationship founded on the principles of contract and sale of services rather than the feudal concept of land rental.

VI. **Rent**

The landlord-tenant relationship consists of two parties with opposing interests. The landlord is a businessman interested in making a profit on his rental property and protecting his investment; the residential tenant is a consumer interested in a decent place to live at the lowest possible cost. Joining these opposing parties is that magical fist full of dollars which makes the whole relationship possible—rent.

Rent is defined as the return made by the tenant to the landlord for the use and occupation of the demised premises. It can be in either money,
service, or specific property. Rent usually relates to real property, but it may also relate to personalty on the premises.

A. Theory of Liability for Rent and The Landlord's Lien

The tenant's liability to the landlord for the payment of rent can arise by express agreement or by implication due to the tenant's use and occupation of the premises. A lease usually contains an express covenant to pay rent which binds the tenant when signed thereby contractually obligating him for the payment of rent. Where the tenant has expressly covenanted to pay rent and has entered into possession of the premises, his liability is based upon privity of contract and privity of estate. Due to his privity of contract the tenant's liability for rent continues until discharged even though he parts with the premises, thus terminating his privity of estate.

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1. 49 AM. Jur. 2d Landlord and Tenant § 514 (1970); 52 C.J.S. Landlord & Tenant § 462 (1968). See Newton v. Wilson, 13 Va. (3 Hen. & M.) 470, 483 (1808). A modern definition of rent is: "... [T]he total amount charged to the tenant under a rental agreement...", FAIRFAX COUNTY, VA. CODE § 15E-1(G) (1973). The Uniform Act defines rent as "... [A]ll payments to be made to the landlord under the rental agreement..."; UNIFORM LANDLORD AND TENANT ACT § 1.301 (10) (1972) (found in the HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 210 (1972)). The Uniform Act was adopted by Arizona in 1972, ARIZ. REV. STAT. §§ 33-1301 et seq. (Supp. 1973). This definition was adopted by the drafters of the recently enacted Virginia Residential Landlord and Tenant Act, VA. CODE ANN. § 55-248.4 (i) (effective July 1, 1974).

2. Wickham & Northrop v. Richmond Standard Steel, Spike & Iron Co., 107 Va. 44, 57 S.E. 647 (1907). The lessee leased a mill site and sufficient water to operate the mill, and although different values were fixed for the use of the land and the use of the water the covenants for their use were held to be interdependent and the whole was recoverable by distress. Minor says:

A rent can only issue out of lands and tenements corporeal, or from the personal property necessary for their proper enjoyment, as for example where a house or lodging is let already furnished. 1 MINOR ON REAL PROPERTY § 82 (2d ed. F. Ribble 1928).

3. The Virginia Residential Landlord and Tenant Act provides:

[A]cceptance of rent without reservation by the landlord gives the rental agreement the same effect as if it had been signed and delivered by the landlord. ... [A]cceptance of possession or payment of rent without reservation gives the rental agreement the same effect as if it had been signed and delivered by the tenant. VA. CODE ANN. § 55-248.8 (effective July 1, 1974).

4. VA. CODE ANN. § 55-76 (1969) (which provides a definition of "lessee's covenant to pay rent"). The Virginia Residential Landlord and Tenant Act adopts this view:

A landlord and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter or other rule of law, including rent. ... VA. CODE ANN. § 55-248.7 (a) (effective July 1, 1974).

See Eason v. Rose, 183 Va. 359, 32 S.E.2d 66 (1944) (the tenant is liable for rent in accordance with the intent and agreement of the parties).

See generally 11 M.J. Landlord and Tenant § 13 (1950) (liability for rent); 1 MINOR ON REAL PROPERTY § 397 (2d ed. F. Ribble 1928) (covenant of rent).
An express covenant to pay rent runs with the land.\(^5\)

Where the tenant's agreement to pay rent is not by deed under seal but is by parol or other written memorandum, the landlord's remedy is statutory, and he may recover from the tenant a reasonable compensation with interest for the use and occupation of the premises. The landlord may use this parol agreement or written memorandum as evidence of the amount of rent owed.\(^6\) This statute has been held to presuppose the relationship of landlord and tenant.\(^7\)

At common law and in Virginia, where a lease contains no covenant to pay rent, a tenant may be held liable on an implied obligation to pay a reasonable sum for the use and occupation of the premises, and where such a promise is implied, the courts will allow a reasonable recovery.\(^8\) The recently enacted Virginia Residential Landlord and Tenant Act adopts this view.\(^9\) This implied obligation to pay rent can arise from the \textit{mere} relation of landlord and tenant;\(^10\) in fact, usually there will be no implied obligation to pay rent absent a relation of landlord and tenant existing between the parties.\(^11\) Absent an express covenant, the tenant's liability for the payment of rent is based on privity of estate and if he parts with the estate, with the lessor's consent, his obligation to pay rent ceases since the termination of the privity of estate leaves nothing upon which to base an obligation to pay rent.\(^12\)

In Virginia the implied obligation to pay for the use and occupation of

\(^5\) 11 M.J. \textit{Landlord and Tenant} § 13 (1960) (liability for rent). \textit{See} 1 \textit{Minor on Real Property} § 397 (2d ed. F. Ribble (1928) (covenant of rent).

\(^6\) VA. CODE ANN. § 55-227 (1969) (remedy for rent and for use and occupation). This statute appears to be based in part on the case of Eppes v. Cole, 14 Va. (4 Hen.&M.) 161 (1809) which held that assumpsit for use and occupation would lie where the defendant was on the premises by permission of the plaintiff and there was an express promise to pay by parol or memorandum in writing other than a deed under seal. As to interest on rent due see Johnson v. Johnson, 183 Va. 892, 33 S.E.2d 784 (1945) which cited the code section \textit{supra} and held that the tenant should be charged with interest on the rent found to be due from him for the use and occupation of an apartment and storeroom, the interest to be charged from the last day of each calendar year on the rent due for that year.

\(^7\) Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946). "This entire section presupposes the relation of landlord and tenant." \textit{Id.} at 540, 39 S.E.2d at 234.

\(^8\) Sutton v. Mandeville, 15 Va. (1 Munf.) 407 (1810) held that assumpsit for use and occupation of the premises by permission of the plaintiff lies on an implied as well as an express promise to pay.

\(^9\) VA. CODE ANN. § 55-248.7 (b) (effective July 1, 1974). "In the absence of agreement, the tenant shall pay as rent the fair rental value for the use and occupancy of the dwelling unit."

\(^10\) \textit{See} 1 \textit{Minor on Real Property} § 397 (2d ed. F. Ribble 1928) (covenants for rent).

\(^11\) 3 H. TIFFANY, \textit{Real Property} § 914 (3d ed. 1939).

\(^12\) 11 M.J. \textit{Landlord and Tenant} § 13 (1950) (liability for rent); 1 \textit{Minor on Real Property} § 397 (2d ed. F. Ribble 1928) (covenants for rent).
the premises has been carried even further. It has been held that there is an implied obligation to pay for the use and occupation of the premises on the part of a trespasser where he has received some benefit from the landlord's property.\textsuperscript{13}

The tenant's liability for rent is personal to the extent that the landlord can recover a money judgment in personam in an action at law for the rent in arrears.\textsuperscript{14} Additionally, while at common law the landlord had no lien prior to levy of distress or attachment, the Virginia Supreme Court has held that the Virginia Code gives a landlord a fixed and specific lien on the tenant's personal property found on the rental premises to the extent of the rent due. This lien is choate and not inchoate as was previously thought.\textsuperscript{15} It extends only to the extent of the tenant's equity in goods that

\begin{itemize}
\item Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946).
\item De Camp v. Bullard, 159 N.Y. 450, 54 N.E. 26, 28 (1899):
\begin{quote}
If a man's house is vacant with no prospect of a tenant and no intention on his part of occupying it himself, and a trespasser occupies it, he must pay as damages for the trespass the value of the use and occupation, for this would be the duty of a tenant contracting upon a quantum meruit for the use, by consent, of that which the trespasser uses without consent. \textit{Id.} at 549, 550, 39 S.E.2d at 239.
\end{quote}
\item Winborne v. Doyle, 190 Va. 867, 59 S.E.2d 90 (1950). In finding from the undisputed facts an implied contract to pay rent by a wrongful user or an easement the court quotes Raven Red Ash Coal Co. v. Ball, \textit{supra}:
\begin{quote}
"... the gist of the action is to prevent the unjust enrichment of a wrongdoer from the illegal use of another's property, such wrongdoer should be held on an implied promise . . . ." \textit{Id.} at 874, 59 S.E.2d at 94.
\end{quote}
\item VA. CODE ANN. § 55-227 (1969) (landlord may recover rent by action or distress).
\item VA. SUP. CT. R. 3:1 et seq. (1950) found in VA. CODE ANN. vol. 2 (Cum. Supp. 1973) abolished the common law forms of action previously used to recover rent in courts of record and provides: "These Rules apply to all civil actions at law in a court of record seeking a judgment in personam for money only . . . . actions for . . . unlawful detainer, . . . ." An action for rent can be brought in a court not of record. VA. CODE ANN. 16.1-77 (Cum. Supp. 1973). The language pertaining to common law forms of action abolished by the Rules of Court were removed from this section in 1954.
\item United States v. Waddill, Holland & Flinn, Inc., 182 Va. 351, 28 S.E.2d 741 (1944) while recognizing that at common law the landlord had no lien on any of his tenant's property as security for rent prior to the levy of a distress warrant, the Virginia Supreme Court held that VA. CODE ANN. §§ 55-227, 231 & 233 combine to give the landlord a fixed and specific lien on the tenant's personalty found on the premises stating:
\begin{quote}
We agree . . . that the Virginia statutes, by clear implication, give the landlord a lien which is fixed and specific, and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment, which are merely remedies for enforcing it. \textit{Id.} at 363, 28 S.E.2d at 746.
\end{quote}
\end{itemize}

This holding repudiates that portion of the holding in American Exch. Bank v. Goodlee Realty Corp., 135 Va. 204, 216, 116 S.E. 505, 509 (1923) to the effect that these Code sections do not give the landlord a lien for rent until his right had been perfected by the levy of a distress warrant and that until that time his lien is merely inchoate.
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are brought upon the premises with a prior lien on them. However, with a few exceptions, where the personality is subjected to a lien after it is brought onto the premises or within thirty days after its removal therefrom, the landlord's lien has priority over these other liens to the extent necessary to satisfy the rent obligation.

B. Who Is Liable For and Who May Recover Rent

The Virginia Code expressly provides that: "Rent may be recovered from the lessee or other person owing it..." This includes any assignee of the lessee or the personal representative of either. The heirs or devisees are liable for rent owed by their ancestors or devisors to the same extent that they are liable for other debts of the decedent.

By statute any person to whom rent or compensation is due, whether he has the reversion or not, may recover rent regardless of the estate or interest of the person owing the rent, and whether or not the lessee's estate has terminated. The Code also allows the lessor's assignee or personal representative to recover rent. The provisions for the amount of rent to be paid, when it is due and where it is to be paid are generally set out in the rental agreement, but if not, the landlord can recover a reasonable rent on implied promise.

20. Id.
22. See note 4 supra. The Virginia Residential Landlord and Tenant Act, VA. CODE ANN. § 55-248.7 (c) (effective July 1, 1974) provides:

Rent shall be payable without demand or notice at the time and place agreed upon by the parties. Unless otherwise agreed, rent is payable at the place designated by the landlord and periodic rent is payable at the beginning of any term of one month or less and otherwise in equal installments at the beginning of each term.

See generally 1 MINOR ON REAL PROPERTY § 389 (2d ed. F. Ribble 1928) (place and time for payment of rent).
23. See notes 8 & 9 supra.
C. The Landlord’s Remedies For The Nonpayment of Rent

1. Distress and Attachment: Prejudgment Remedies

Distress is the taking of personal property out of the possession of a wrongdoer into the custody of an injured party to procure a satisfaction for the wrong committed. Originally, distress was a self-help method of recovering rent in arrears, whereby a landlord or his servant by warrant from him would distress the tenant’s personalty as satisfaction for the rent due.

Today, in Virginia, distress is a wholly statutory remedy. It presupposes the relation of landlord and tenant and is dependent on it, except in the case of a subtenant whose liability is fixed totally by statute; and the rent must be reserved by contract. In the case of a residential dwelling it can be used to recover a maximum of six months’ rent due at or after the time when the landlord’s lien is asserted. The statute of limitations for distress is five years from the time the rent is due, regardless of whether or not the lease has terminated. Distress, like attachment, does not de-


27. Church v. Goshen Iron Co., 112 Va. 694, 72 S.E. 685 (1911). “The principle is elementary that distress for rent will not lie unless the relation of landlord and tenant exists between the parties. The right is not only incident to that relation, but is dependent upon it.” Id. at 695, 72 S.E. at 685.


The distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. . . [N]or shall the goods of the undertenant be liable to a greater amount than such undertenant owed the tenant at the time the distress was levied. Id. (emphasis added).

Property of a third person is not liable to distress even if found on the premises. Davis v. Payne’s Adm’r, 25 Va. (4 Rand.) 332 (1826).

29. VA. CODE ANN. § 55-230 (1969). “. . . [T]he amount of money or other thing to be distrained for . . . is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed.” Id. See generally BURKS § 399.

30. VA. CODE ANN. § 55-231 (1969). “. . . [F]or not more than six months’ rent if the premises are in a city or town, . . . or of premises anywhere used for residential purposes. . . .” Id.

31. VA. CODE ANN. § 55-230 (1969). “Rent may be distrained for within five years from the
To institute the distress procedure a landlord must present a signed affidavit to a magistrate or the clerk or judge of the general district court stating that his tenant owes him a certain amount for rent reserved upon a contract for certain premises. Upon receipt of this affidavit, the magistrate, clerk or judge issues a distress warrant for rent to the sheriff or

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33. Although distress is a wholly statutory remedy in Virginia, the procedure is not altogether clear, and consequently is subject to some degree to local variation. An example of local variation in distress procedure can be found in Chesterfield County, Virginia.

An indemnification bond is provided for by statute but normally it is not a condition precedent to instituting distress procedure. However, in view of the drastic nature of distress with its potential for abuse, the landlord in instituting distress procedure in Chesterfield County is required to post an indemnifying bond to protect the levying sheriff in the event of a wrongful distress action.

In Chesterfield County in levying the distress the sheriff merely goes to the premises and lists the property levied upon, and he may use words such as "I hereby levy on this property." If the landlord wants the property physically removed he is required to provide a truck and movers or some other method of moving the property to the court house or wherever else it is to be held. It would be economically infeasible and an undue burden upon the Sheriff's Department to require it to provide a moving service for the benefit of landlords.

In Chesterfield County distress warrants, forthcoming bonds or affidavits of valid defense are not returned to the Circuit Court (which only has a session every two months) as provided for in the Code. They are returned to the General District Court. Civil warrants are returned in not less than five days nor more than thirty days from the date of issuance. The Clerk of the General District Court sets the date for the court hearing if there is to be one.

While under the Code the tenant's property can be sold without judgment in favor of the landlord or even a hearing, Chesterfield County usually will not allow the tenant's property to be sold without a judgment first being given in favor of the landlord even if it is only a default judgment.

It is advisable before dealing with distress procedure to check with the local clerk of the general district court to find out the exact distress procedure used in your locality. The preciseness of the distress procedure may tend to vary with the volume of distress warrants issued in a given locality—the more warrants issued the more settled the procedure. Chesterfield County has averaged issuing about six to eight distress warrants a year over the past ten years; however the volume would probably be much greater in a more urban area, such as the city of Richmond. The procedure used most often in Chesterfield County to recover rent due is the unlawful detainer procedure which utilizes the five day pay or quit notice.

(Interview with Mr. Richard M. Crump, Jr., Clerk of the General District Court of Chesterfield County, Virginia, March 8, 1974) (Note: During this interview a distress warrant was in the process of being contested by a tenant, the first to be contested in Chesterfield County in the past ten years).
sergeant of the situs of the rented premises or wherever the goods liable to
distress may be found, and pursuant thereto the officer levies the distress.
This levy is made without prior notice being given to the tenant or any
prior judicial proceeding. In levying distress the officer takes legal posses-
sion of the distrainable property, either by actual levy or constructively by
listing the distrained property. If the tenant does not contest the dis-

34. VA. CODE ANN. § 55-230 (1969) (when and by whom distress made). See generally
Burks § 400. By statute in Virginia, an officer with a distress warrant or an attachment for
rent, if necessary, may enter by force during the daytime wherever the goods liable to distress
or attachment may be found, and if the goods have been fraudulently or clandestinely removed
from the rented premises he may enter the place the goods are to be found by force during
the night or day. He may also levy on property found in the personal possession of the tenant
35. See note 33 supra. See generally Berry § 257 (the levy); Burks § 400. Distress cannot
be levied upon property which has been removed from the rented premises more than thirty
uncontested distress warrant see Babbitt v. Miller, 192 Va. 372, 64 S.E.2d 718 (1951).
37. VA. CODE ANN. § 8-429 (1957) (officer receiving money to make return thereof and pay
net proceeds).
38. VA. CODE ANN. § 8-424 (1957) (when money received by officer under execution to be
repaid to debtor).
39. VA. CODE ANN. § 55-237 (1969) (return of distress warrants; process of sale thereun-
der).
40. VA. CODE ANN. § 8-450 (1957) (when forthcoming bond taken; property then remains
in debtor’s possession).
41. VA. CODE ANN. § 8-453 (1957) (when taken under distress warrant, what defense may
be made).
42. VA. CODE ANN. § 55-232 (1969) (procedure when distress levied and tenant unable to
give forthcoming bond). For a discussion of this procedure see Hancock v. Whitehall Tobacco

The tenant can contest the distress by posting a forthcoming bond with
the officer making the distress and thus he can retain possession of his
property. Where a tenant is unable to post bond he can achieve the same
results by presenting the levy officer with an affidavit stating that he
cannot post bond but that he has a valid defense to the landlord’s claim
for rent. The sheriff will return the warrant and the tenant’s forthcoming

34. VA. CODE ANN. § 55-230 (1969) (when and by whom distress made). See generally
Burks § 400. By statute in Virginia, an officer with a distress warrant or an attachment for
rent, if necessary, may enter by force during the daytime wherever the goods liable to distress
or attachment may be found, and if the goods have been fraudulently or clandestinely removed
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be made).
42. VA. CODE ANN. § 55-232 (1969) (procedure when distress levied and tenant unable to
give forthcoming bond). For a discussion of this procedure see Hancock v. Whitehall Tobacco
bond or affidavit of valid defense to the circuit court on the first day of the next session. Thereafter, the landlord, after first giving the tenant ten days’ written notice, may file a motion for judgment on the bond or for rent due. Where the tenant has posted a forthcoming bond the landlord is usually satisfied to await the adjudication of the matter; however, if the tenant has merely filed an affidavit of valid defense the landlord may still want to have the tenant’s property distrained. He can do so by posting a double indemnifying bond, in which case the sheriff will return to the premises and again make a levy on the tenant’s property. The property will remain in the possession of the sheriff until the matter has been adjudicated at which time it will be either sold or returned to the tenant.  

If the tenant’s liability for rent is based on an express covenant there is privity of contract, and the tenant is liable for rent due on that contract until it is discharged. This means that he can be held presently liable for future rent. Where a landlord is apprehensive about recovering future rent because he reasonably believes that the tenant is about to “skip town,” taking his property with him without paying this rent, he can resort to what appears to him to be a simple and inexpensive remedy—attachment for rent. This statutory remedy is treated differently from other forms of attachment and is procedurally similar to distress. Like distress, it is not dependent on a pending action at law for rent, but is a wholly independent remedy for recovering rent.

To initiate attachment for rent, a landlord must present an affidavit to the clerk or judge of the district court, or the clerk of the circuit court stating that he believes the complaint to the effect that a person liable to him for rent accruing in the future has removed within thirty days, is removing, or intends to remove his personalty from the rented premises, is true; that the rent is reserved by contract and will be payable within one year (setting forth the times it is payable); and that if the attachment is not issued there will be insufficient property liable to distress left on the premises with

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44. A general treatment of attachment for rent as it relates to Virginia may be found in Burks §§ 393-96.
45. VA. CODE ANN. § 8-566 (Cum. Supp. 1973) (attachment for rent against a tenant removing his effects from leased premises).

... [A]ttachment was good as a remedy for the collection of rent to become due under a contract, whether there was an action at law to recover it or not, since the right to sue out an attachment for rent is not dependent upon a pending action at law to recover the same. Id. at 460, 79 S.E. at 1061.
which to satisfy the rent. Once the landlord has filed this affidavit the clerk will issue a writ of attachment for the rent against those goods which would be subject to distress if the rent was presently due and against any other property of the tenant who is liable for the rent. The attachment for rent is levied by the sheriff or sergeant the same as in distress, and the attachment acts as a summons requiring the tenant to appear to answer the attachment.\textsuperscript{47} The officer will levy the attachment on the tenant's property, however he will not take actual possession of it unless the landlord posts a double indemnifying bond.\textsuperscript{48} Where the tenant files an affidavit of substantial defense, the clerk will notify the landlord that unless he posts this bond within ten days of the service of such notice the attachment will be dismissed ipso facto.\textsuperscript{49} However, the tenant can retain possession of his property thus reversing the effect of the landlord's bond by posting a double forthcoming bond of his own.\textsuperscript{50} An attachment is returnable within thirty days of its issuance to the court that has jurisdiction over the subject matter, and thereafter it is proceeded upon as any other attachment.\textsuperscript{51}

While distress and attachment seem to be completely landlord oriented the tenant in Virginia is afforded some protection where the distress or attachment is wrongful or excessive. The right to distrain or attach for rent is regarded by the courts as a most drastic one; fortunately, the Virginia Code provides the tenant with an action for damages in the event the distress or attachment was wrongful or excessive.\textsuperscript{52}

\textsuperscript{47} See note 45 supra.  
\textsuperscript{49} VA. CODE ANN. § 8-539 (1957) (bond is required of the plaintiff when defendant makes affidavit of substantial defense).  
\textsuperscript{50} VA. CODE ANN. § 8-540 (1957) (bonds for retention of property or release of attachment).  
\textsuperscript{51} VA. CODE ANN. § 8-567 (1957) applies if the attachment for rent is for twenty dollars or more. If the attachment for rent is less than twenty dollars it is returnable before a judge of a general district court not more than ninety days from the date of issue. VA. CODE ANN. § 8-568 (1957).  
\textsuperscript{52} VA. CODE ANN. § 8-651 (1957). An action for wrongful distress or attachment lies against the party suing out the warrant of distress or attachment where the tenant's personality is distrained for rent not due or for more than is due, or the attachment is for rent when none is accruing or for more than is accruing. Gurfein v. Howell, 142 Va. 197, 128 S.E. 644 (1925).
In some cases distress and attachment for rent are the landlord’s only effective remedies for recovering rent, especially where the tenant is a scoundrel and has either skipped out only leaving a few clothes on the premises or is otherwise judgment proof. However, even in these situations the effectiveness of these remedies is doubtful since such a tenant usually has little of value which the landlord could distrain or attach. Another reason for advising against the use of distress or attachment for rent is the fact that the constitutionality of these prejudgment remedies is presently under attack, and the landlord who uses them may be subjecting himself to more time and expense than he would have incurred had he utilized a summary proceeding such as unlawful entry and detainer.

Both the Model Code and the Uniform Act abolish the common law right to distress for rent, however, Virginia’s recently enacted Residential Landlord and Tenant Act specifically includes distress for rent as an action available to the landlord. The Act does not, however, otherwise effect Virginia’s distress statute.

2. Constitutionality of Distress and Attachment for Rent

Distress and attachment for rent are prejudgment remedies that can be initiated without regard to any corresponding action at law pending for the recovery of rent. These remedies can be used by the landlord to deprive the tenant of his personal property without notice or a hearing before an appropriate court. This is the very reason that similar prejudgment remedies in other jurisdictions have been successfully attacked as violative of the fourteenth amendment by failing to afford procedural due process.

the amount of his tenant's indebtedness and ignorance on his part will not relieve him from compensatory damages for a mistake committed by him. Id. at 204, 205, 128 S.E. at 646.

53. Model Landlord and Tenant Code § 3-403; Uniform Residential Landlord and Tenant Act § 4-205 (1972) found in the Handbook of the National Conference of Commissioners on Uniform State Laws (1972).


55. See notes 32 & 46 supra.

Procedural due process requires that no person be deprived of property by government action without notice and a hearing.\(^5\)

Several recent Supreme Court cases have paved the way for this assault on the constitutionality of distress and attachment. In the landmark case of *Sniadach v. Family Finance Corporation*,\(^3\) Wisconsin's prejudgment garnishment procedure was held unconstitutional. More recently in *Fuentes v. Shevin*,\(^5\) prejudgment replevin statutes in Florida and Pennsylvania were held unconstitutional. In *Fuentes* the Court said that due process demanded an opportunity for a hearing before state agents can seize property in the possession of a person upon the mere application of another.\(^4\)

Since *Fuentes* all of the distress statutes, as well as a number of attachment statutes, which have been challenged have been held unconstitutional.\(^6\) West Virginia's distress statute was declared unconstitutional first by the Supreme Court of Appeals of West Virginia in *State ex rel Payne v. Walden*,\(^2\) and one day later by a three judge federal court in *Shaffer v. Hollbrook*,\(^6\) in which the court stated:

The complete absence of an opportunity to be heard prior to seizure deprives the West Virginia tenant of his property without due process of law as required by the Fourteenth Amendment, and any post-seizure remedies available to an aggrieved tenant can in no way be a substitute for a prior meaningful hearing.\(^4\)

The Virginia and West Virginia distress statutes are inseparably wed by heritage, growing out of the same statute; they remain substantively similar and virtually unchanged today from what they were in 1863 when West

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\(^{59}\) 407 U.S. 67 (1972).

\(^{60}\) 407 U.S. 67, 80 (1972).

\(^{61}\) See note 34 supra.

\(^{62}\) 190 S.E.2d 770 (W. Va. 1972). The court held that the distress:

. . . [P]rocedure constitutes only a legitimized form of harassment to bring the tenant to the landlord’s outstretched hand. . . . [S]uch a procedure is unnecessary in that landlords have other adequate statutory remedies. . . . [S]uch procedure is unwarranted in that the tenant is denied his basic right to protest or defense before his property is taken. No special state interest of overriding significance can be demonstrated which will protect and preserve the statutory defect. *Id.* at 778.


\(^{64}\) *Id.* at 766.
Virginia seceded from Virginia. In fact, the present distress statutes of each state are so strikingly similar that with the exception of a difference in statute of limitations and some minor wording, they are completely interchangeable. In Virginia as in West Virginia, a distress warrant is in the nature of an execution against the goods of the tenant and is issued without judgment or other judicial investigation into the liability of the tenant for the amount claimed. Consequently, if West Virginia's distress statute cannot withstand constitutional scrutiny it seems doubtful that our distress statute will withstand a similar constitutional attack. In fact, Virginia will not have a long wait to find out, because the unconstitutionality of her distress statute will soon be put to the test.

3. Actions at Law To Recover Rent

Historically, certain common law actions were available to a landlord faced with a tenant who refused or was unable to pay rent. In Virginia the landlord's right to recover rent by an action at law is wholly statutory. The Code merely provides that a landlord may recover rent by distress or action (emphasis added). The common law forms of action previously used in Virginia for the recovery of rent were debt, covenant, and assumpsit. These common law forms of action have been abolished in Virginia, and now the landlord can recover rent in arrears by a civil warrant or by motion for judgment.

At common law, the landlord wishing to recover rent was left solely to

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66. See Burks § 400 (issuance of distress warrants in Virginia—levy by officer).

67. Interview with Mr. Ronald Tweel, Esq., chief attorney for the Charlottesville-Albermarle Legal Aid Society, who is representing a plaintiff in a suit not yet docketed alleging the Virginia distress statute, Va. Code Ann. §§ 55-227, 31, 33, is unconstitutional as violative of the fourteenth amendment due process clause because it allows the tenant's personal property to be seized without notice or any hearing. (Interview January 24, 1974 in Charlottesville).


69. For a discussion of recovering rent by the action of debt see 3 Tiffany § 911; Burks § 74. See also 1 Minor § 397 (covenant for rent); Berry § 107. As to covenant see 3 Tiffany § 912; Burks § 80. See also 1 Minor § 397; Berry § 121. As to assumpsit see Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946). See generally 3 Tiffany § 913; Burks § 89. See also Minor § 397; Berry § 121.

an action for money damages absent reservation of the right of re-entry.\textsuperscript{71} In Virginia, a landlord of residential premises has the right to re-enter and terminate the tenant’s estate for failure to pay rent either by the terms of the lease or by statute. By express stipulation in the lease the landlord may acquire the right to re-enter when the tenant defaults in paying rent.\textsuperscript{72} However, such covenant has been divested of its importance as to residential premises by a statute which provided, independent of any covenant, that a residential tenant in default of the payment of rent shall forfeit his right to possession if he remains in default for five days after notice in writing to pay or quit the premises.\textsuperscript{73} The landlord’s remedy where the tenant abandons the premises owing rent as distinguished from unlawful detainer, is also dictated by statute.\textsuperscript{74} Where the tenant deserts without paying the rent due and without leaving sufficient goods upon the premises liable to distress (both being conditions precedent) the landlord may post a written notice in some conspicuous place on the premises requiring the tenant to pay the rent due within thirty days\textsuperscript{75} or forfeit his right to possession. Where the tenant fails to pay the rent due within the thirty days his right to possession of the premises is terminated, and the landlord is entitled to enter and take possession of the premises. However, the landlord may still recover any rent due from the


\textsuperscript{72} Va. Code Ann. § 55-79 (1969) (effect of provision for reentry by lessor). In Johnston v. Hargrove, 81 Va. 118 (1885) the Supreme Court states:

A stipulation in a deed of lease of re-entry for default in the payment of rent for a given period, is made by statute equivalent to an agreement that upon the happening of such event, the lessor may reenter ‘... and the same may again have, repossess and enjoy as of his former estate.’ Id. at 120. (emphasis added) (this wording of the statute is the same today).

A condition precedent to the exercise of this right is that the landlord make an actual demand upon the tenant for the rent. Id. at 121. An exception is found in Va. Code Ann. § 55-239 (1969) dealing with ejectment which states “... [S]hall be in lieu of a demand and re-entry. ...” In ejectment the tenant can prevent forfeiture by paying all rent in arrears, interest and costs before the trial date. Va. Code Ann. § 55-243. After forfeiture for nonpayment of rent the tenant has a one year statute of limitations within which he can be restored to possession by paying all rent in arrears, interest and expenses. Va. Code Ann. § 55-247 (1969).


\textsuperscript{74} Va. Code Ann. § 55-224 (1969) (when the tenant deserts premises, how the landlord may enter).

\textsuperscript{75} Where a tenant abandons the premises the landlord in order to terminate the tenant’s right to possession must post (1) if the tenancy is from year to year, thirty days notice to pay or forfeit the right to possession or (2) if the tenancy is from month to month, ten days notice to pay or forfeit the right to possession. Id.
Virginia's newly enacted Residential Landlord and Tenant Act provides that where a tenant abandons, the landlord may elect to accept the abandonment as a surrender. Such an acceptance by the landlord terminates the rental agreement as of the date the landlord has notice of the abandonment. Additionally an unexpired rental agreement is terminated where the landlord rents the abandoned premises to a new tenant, the date of the termination being the date the new tenancy begins.

Where a residential tenant in possession has defaulted in the payment of rent unlawful detainer is available to the landlord as a relatively quick and inexpensive remedy for recovery of both the rent in arrears and possession. To institute this procedure the landlord must serve or have served by a sheriff or sergeant upon the tenant a notice in writing to pay or quit within five days. If the tenant remains in possession and fails to pay within five days he will have forfeited his right to possession. In that case the landlord at his option may deem the tenant's possession unlawful and proceed to recover possession, rent and damages. The statute of limitations for bringing this action is three years from the time the possession is deemed unlawful.

The recently enacted Virginia Residential Landlord and Tenant Act adopts this procedure.

If a tenant’s possession was indeed wrongful the landlord can obtain an affirmative judgment or verdict for possession of the premises, any damages shown, and any rent owed to him at the time the action was instituted.

The Virginia Residential Landlord and Tenant Act provides the landlord with several additional statutory remedies in the area of rent. First, at the termination of the tenancy the landlord may apply the security deposit towards the payment of accrued rent. Second, where the tenant has

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76. "... the lessor may enter thereon and the right of such tenant thereto shall thenceforth be at an end; but the landlord may recover the rent up to that time." Id.
77. VA. CODE ANN. § 55-248.33 (effective July 1, 1974).
78. See note 74 supra. Where the lease does not exceed two years or the jurisdictional amount does not exceed five thousand dollars the unlawful detainer action may be brought in a general district court by summons or by motion for judgment. Otherwise the action can be brought in the circuit court. There a jury may be empanelled to try the case, and the action will be given precedence over all other civil cases on the docket of the circuit court. VA. CODE ANN. §§ 8-791 & 792 (Cum. Supp. 1973).
79. VA. CODE ANN. § 8-793 (1957).
80. VA. CODE ANN. § 55-248.31 (effective July 1, 1974) adopts the pay or quit notice. VA. CODE ANN. § 55-248.35 (effective July 1, 1974) provides for the use of unlawful entry or detainer after the rental agreement is terminated.
81. VA. CODE ANN. § 8-793 (1957).
82. VA. CODE ANN. § 55-248.11(a) (effective July 1, 1974) (security deposits).
breached his statutory obligation to maintain the dwelling unit or a provision of the rental agreement which materially affects health and safety (and he fails to remedy the situation within the required time) the landlord may remedy the situation himself and charge the cost or value thereof to the tenant's rent. Finally, if a tenant fails to vacate after termination of the term "... leaving the premises in good and clean order, reasonable wear and tear expected ... the landlord may bring an action for possession and damages, including reasonable attorney's fees." 84

D. The Tenant's Defenses for Nonpayment of Rent

1. Defenses Recognized in Virginia: Equitable Defenses

Historically, the residential tenant has had few defenses against a landlord demanding his rent. Virginia allows the defendant in an action at law on a contract to plead any defense which would entitle him to relief in equity against an obligation on that contract. This includes any condition existing before the contract is executed, any mistake in the execution of the contract, or in the contents of the contract itself, or any matter which would entitle him to relief in equity. This equitable recoupment allows the tenant to recover affirmatively from the landlord if the amount which he is entitled to by virtue of his defense exceeds the amount of the landlord's claim.85 Such an equitable defense is allowed where the landlord has breached an express covenant to make repairs. Thus, in an early case it was held that a tenant could set-off the damages accrued by the failure of the lessor to make repairs when he had covenanted to do so.86 It should be noted however, that set-off is allowed only where a landlord had expressly covenanted to make repairs.

The recently enacted Virginia Residential Landlord and Tenant Act greatly expands the tenant's defenses. It allows the landlord's noncompliance with the statutory warranty of habitability, express rental agreements, or other provisions of law affecting health and safety to be used by the tenant as a defense to an action for rent and for possession due to nonpayment of rent. Further, the Act permits the tenant to bring his own action for material noncompliance by the landlord.87

83. VA. CODE ANN. § 55-248.32 (effective July 1, 1974) (failure to maintain). See VA. CODE ANN. § 55-248.16 (effective July 1, 1974) (tenant to maintain dwelling unit).
84. VA. CODE ANN. § 55-248.20 (effective July 1, 1974) (tenant to surrender possession of dwelling unit).
87. VA. CODE ANN. § 55-248.25 (effective July 1, 1974) (landlord's noncompliance as a
2. Eviction and Constructive Eviction

At common law a lease unless otherwise expressed contained an implied covenant of quiet enjoyment which promised that the landlord or anyone acting through or under claim of paramount title would not materially interfere with the tenant's possession of the leased premises.\(^8\) Normally unless the parties expressly intended otherwise, a landlord's covenants are independent of the tenant's covenant to pay rent.\(^9\) However, in Virginia as at common law, a breach of the implied covenant of quiet enjoyment which amounts to an eviction relieves the tenant of his duty to pay rent.\(^9\) Where the landlord without justification physically evicts the lessee, there is no question that the lessee's obligation to pay rent is discharged.\(^9\)

Virginia also recognizes the doctrine of constructive eviction which allows a similar defense to the landlord's action for rent. To constitute a constructive eviction there must be: (1) an act or omission by the landlord, (2) which results in a substantial interference with the tenant's possession or enjoyment, and (3) the tenant must vacate the premises within a reasonable time after such interference. Where these elements are present, a tenant is relieved of his duty to pay rent coming due after the premises are vacated.\(^9\) Note however, that this is a defense to an action for rent due in the future and not a defense to any action for rent past due.

Virginia's newly enacted Residential Landlord and Tenant Act codifies defense to action for possession of rent) VA. CODE ANN. § 55-248.21 (effective July 1, 1974) allows the tenant to bring an action for the landlord's noncompliance.


89. 1 MINOR § 404. “Normally . . . the covenants in the lease are considered independent promises, so that the tenant cannot escape the payment of rent because of a breach by the landlord.” Id.

90. M.M. Rowe Co. v. Wallerstein, 145 Va. 191, 133 S.E. 669 (1926) (held that to discharge the tenant from payment of rent, the tenant must have been evicted from part or all of the premises for which he pays rent, or have been deprived of enjoyment of the demised premises).

Upon the eviction of the tenant, three important consequences follow: (1) The lessee is entitled to sue the landlord upon his covenant of quiet enjoyment, (2) The lessee's possession is thereby terminated as to the land so taken, and he ceases to be estopped to deny the landlord's title as to that land; and (3) There is an abatement of the rent. 1 MINOR § 403.

91. Id.

92. In Buchanan v. Orange, 118 Va. 511, 514, 88 S.E. 52 (1916) (the landmark constructive eviction case in Virginia) the Supreme Court held that the landlord does not have to use actual force to constitute a wrongful eviction nor does he have to intends to drive the tenant from the premises by his acts; any wrongful act or omission which renders the premises unfit for occupancy for the purposes for which they were leased is sufficient to constitute an eviction.
and expands the present remedies available to the tenant who is evicted or constructively evicted by the landlord. In either case the tenant may recover actual damages and reasonable attorneys fees, and recover possession of the premises or terminate the rental agreement. The tenant may also obtain injunctive relief or terminate the rental agreement if the landlord demands or makes unlawful or unreasonable entry upon the premises.

3. Destruction of the Premises

At common law the tenant remained liable for the whole rent where the demised premises were destroyed or partially destroyed. The harshness of this common law rule has been eased in Virginia by statute. The Code provides that where the premises are destroyed through no fault or negligence of the tenant, or where the tenant is deprived of possession of the premises by the public enemy, rent will be reasonably reduced in proportion to the extent of the tenant’s deprivation, and the rent abatement will last as long as the deprivation lasts. Destruction or partial destruction of the premises vitiates any covenant to repair or pay rent made by the tenant unless there is an express intention of the parties to the contrary.

The Virginia Residential Landlord and Tenant Act also adopts and expands the above mentioned statute, by giving the tenant the option to terminate the rental agreement when the enjoyment of the dwelling unit is substantially impaired by fire or casualty damage. There are two conditions precedent to termination. First, the tenant must immediately vacate the premises and second he must give written notice to the landlord within fourteen days informing him of his intention to terminate. Where these two

   [A]t common law a covenant to pay the rent and leave the premises in good repair, natural wear and tear excepted, imposes upon the tenant, in the absence of a stipulation to the contrary, the duty of paying the rent and rebuilding the structures on the leased premises even though they be destroyed without fault on his part. Id. at 154, 102 S.E. at 599.
conditions are fulfilled the rental agreement will terminate as of the date of vacating.\textsuperscript{28}

4. Other Defenses

Another statutory defense in Virginia to the payment of rent is an obscure health statute requiring a landlord of residential premises to provide an adequate sanitary privy or closet. Upon his failure to do so, the tenant is required to supply the same and may deduct the cost from any sum due the landlord for rent.\textsuperscript{29} Unfortunately this is the only provision in the Code which allows a tenant to repair and deduct. The Virginia Residential Landlord and Tenant Act fails to add any repair and deduct provisions to this lone statute.

Other situations may arise which relieve the tenant of the liability to pay rent. For example, in \textit{Brookman v. Cavalier Court, Inc.},\textsuperscript{100} the Virginia Supreme Court held that where the landlord breached a covenant binding him not to use the other premises in a specified way, the tenant could rescind the contract and surrender possession of the premises, without further liability for rent.

5. Defenses Not Previously Recognized in Virginia: Implied Warranty of Habitability

Until recently Virginia had remained under the spell of \textit{caveat emptor} and the view that a covenant to pay rent was independent of any covenant made by the landlord. Additionally, Virginia had not recognized the doctrine of implied warranty of habitability as it applies to residential dwellings.\textsuperscript{101} Jurisdictions that have rejected the doctrine of \textit{caveat emptor} and the rule of independent covenants have recognized that an implied warranty of habitability and the covenant to pay rent are mutually dependent and consequently a breach by the landlord will relieve the tenant of liability on his covenant to pay rent.\textsuperscript{102} The Virginia Residential Landlord and Tenant Act codifies the implied warranty of habitability doctrine, and also adopts the doctrine of dependent covenants.\textsuperscript{103}

In a number of other jurisdictions, statutes create a warranty of habitability.

\begin{itemize}
\item \textsuperscript{28} \textit{Va. Code Ann.} § 55-248.24 (effective July 1, 1974) (fire or casualty damage).
\item \textsuperscript{100} 198 Va. 183, 93 S.E.2d 318 (1956).
\item \textsuperscript{101} Powell v. John E. Hughes Orphanage, 148 Va. 331, 138 S.E. 637 (1927).
\item \textsuperscript{102} An excellent example of the modern view of landlord-tenant relations which views the landlord's implied warranty of habitability and the tenant's covenant to pay rent as mutually dependent is \textit{Boston Housing Authority v. Hemingway}, 293 N.E.2d 831 (Mass. 1973).
\item \textsuperscript{103} \textit{Va. Code Ann.} § 55-248.13 (effective July 1, 1974) (landlord to maintain fit premises) codifies the implied warranty of habitability.
\end{itemize}
bility in all residential leases, while in others the statutes place upon the landlord the duty to put and maintain the premises in a habitable condition, the difference being the tenant's remedies available under each. The statutes can generally be placed in three categories. First is the rent abatement type of statute which relieves the tenant of the obligation to pay rent for the duration of the breach. Second, are the statutes which authorize a tenant to make repairs when the landlord breaches his duty to do so and to deduct the cost of such repairs from the rent.

The third type of statute allows the tenant to withhold the rent by depositing it in a judicial escrow until the landlord remedies the breach. The Virginia Legislature was aware of the deficiency in this area of Virginia's landlord-tenant law, and in response it included a rent escrow provision in the Virginia Residential Landlord and Tenant Act. This provision permits a tenant to pay his rent into a district court as escrow when a landlord allows conditions to exist which constitute a breach of his duty under the rental agreement, under provisions of law, or when conditions constitute a fire hazard or a serious threat to the life, health, or safety of the occupants. However, there are conditions precedent which must be met before this rent escrow provision is available to the tenant. First, the tenant must notify the landlord of the condition by certified mail or the landlord must have otherwise been notified by a violation or condemnation notice, and he must have failed to remedy the condition within a reasonable time. Second, the tenant must pay into court within five days of due date the amount of rent due under the lease unless abated. Third, the tenant must show that he has not received more than three pay or quit notices or civil warrants or a combination thereof for unpaid rent within a year from that time. The Act also gives the court broad remedial powers

108. Id.
110. Id. § 55-248.28(b).
111. Id. § 55-248.28(c).
to fashion appropriate relief for aggrieved tenants such as rent abatement.\footnote{112}

6. Other Defenses Not Previously Recognized: Landlord's Duty to Deliver Possession

Where a landlord fails to deliver possession to the tenant most jurisdictions allow the tenant to raise this as a defense to an action for rent.\footnote{113} These jurisdictions adhere to the English rule which maintains there is an implied covenant in the lease which requires the landlord to put the tenant in actual possession of the premises on the first day of the term.\footnote{114} However, under the minority view which Virginia had followed, the landlord was not bound to put the tenant in actual possession but only into legal possession.\footnote{115} Consequently, under this view the tenant had no such defense to an action for rent.

As was observed in the section on Possession and Use, it is arguable that the recently enacted Virginia Residential Landlord and Tenant Act changes Virginia's position and gives the landlord a duty to deliver actual possession to the tenant. Where the landlord breaches this duty the rent abates and the tenant may terminate the rental agreement or demand specific performance. He may also maintain an action for possession against anyone wrongfully in possession.\footnote{116}

7. Relief From Liability For Rent: Mitigation of Damages

Generally, it is held that a non-breaching party to a contract must mitigate damages when he can do so at small expense or with reasonable exertion.\footnote{117} However, in Virginia this argument cannot be used by a defaulting tenant as a defense to his liability for rent when he has abandoned the premises. The rule in Virginia is that the landlord is under no duty to mitigate his damages by reletting when a tenant has abandoned the premises.\footnote{118} The Virginia Residential Landlord and Tenant Act does not change

\footnote{112. Id. § 55-248.29.}
\footnote{114. King v. Reynolds, 67 Ala. 229 (1880).}
\footnote{115. Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930).}
\footnote{116. VA. CODE ANN. § 55-248.22 (effective July 1, 1974) (failure to deliver possession).}
\footnote{117. Crowder v. Virginia Bank of Commerce, 127 Va. 299, 103 S.E. 578 (1920).}
\footnote{118. Id. \textit{See} 51C C.J.S. \textit{Landlord and Tenant} § 125(7) (1968) (the fact that the landlord attempts to relet the premises after an abandonment does not of itself amount to acceptance of surrender).}
existing law.\textsuperscript{119}

E. Conclusion

The recently enacted Virginia Landlord and Tenant Act provides the landlord with several new remedies in the area of rent and it clarifies some others. However, it does not address the two most drastic and somewhat dubious remedies of distress and attachment. It will be left to courts to deal with them.

The area where the Virginia Residential Landlord and Tenant Act makes the most changes is the tenant’s defenses for the nonpayment of rent. Of these changes one of the most important is the interdependence of the tenant’s covenant to pay rent with the landlord’s covenants, especially the landlord’s implied warranty of habitability.

Hopefully this Act will help propel Virginia out of antiquity in the law of landlord and tenant and into a more contemporary position of greater equality not only in rights and bargaining position but liabilities as well. The Virginia Residential Landlord and Tenant Act is a step in the right direction.

VII. The Assignment and Sublease

Much of the substantive law involving assignments and subleases has been surplanted by express covenants between the lessor and lessee. The typical lease in Virginia today provides that “the lessee will not sublet, rent or assign the said lease or transfer possession of the premises or any portion thereof to any person or persons without written consent of the lessor or lessor’s agent.” If and when consent is given by the lessor, a new agreement known as a tripartite is generally entered into by the three parties (the lessor, the lessee and assignee or sublessee) which determines the rights and liabilities of the parties involved.

There are still, notwithstanding the customary practice of including such provisions, cases where a return to the substantive law of assignments and subleases is necessary. The small urban landlord may not provide for the covenants prohibiting assignments or subleasing. Further, provisions restricting the right to assign or sublease are the subject of strict construc-

\textsuperscript{119} Va. Code Ann. § 55-248.33 (effective July 1, 1974) (remedies for absence, non use and abandonment).
tion¹ and a court may refuse to recognize the covenant in full or in part.² Even where the court recognizes the covenant, unless a tripartite is entered into, the substantive law of assignments and subleases will be applicable to establish the rights and liabilities of the parties.³

A. Assignment and Sublease Distinguished

The pivotal question in distinguishing an assignment from a sublease is whether the lessee has demised all of his interest in the term.⁴ If the lessee has demised his entire interest in the term, the transferee is regarded as an assignee of the lease.⁵ On the other hand, where the lessee retains a reversionary interest, the transferee is a sublessee.⁶ The test is one of quality of the term demised and not the extent of the premises transferred. Therefore, a transfer of the lessee’s interest for the entire term of part of the premises is considered an assignment.⁷

While this test appears to be simple, sometimes difficulty is encountered

² See Wainwright v. Banker’s Loan & Inv. Co., 112 Va. 630, 72 S.E. 129 (1911). The court would not allow the lessor to prohibit the lessee from assigning the lease where the covenant in the lease only mentioned that the lessee may not sublease without the consent of the lessor.
⁵ In the construction of a lease such as the one under consideration, the polar star is, Has the lessee parted with his entire interest in the premises? Moskin Stores, Inc. v. Nichols, 163 Va. 702, 706, 177 S.E. 109, 110 (1934).
in its application. In *Moskin Stores, Inc. v. Nichols* the lessor brought an action to recover rent due against the assignee of a lease. The question presented was whether the fact that additional rent was contracted for and a right of re-entry was reserved by the original lessee in the event that the additional rent was not paid prevented the transfer from becoming an assignment. The Virginia Supreme Court held that neither the reservation of additional rent nor the right of re-entry prevented the demise from being an assignment.\(^9\)

### B. Lessee's Right to Assign or Sublease

1. **In the Absence of a Provision Prohibiting Assignment or Subleasing**\(^10\)

   The common law rule is well established in Virginia that, in the absence of an express covenant to the contrary, all leases are assignable without the consent of the lessor as a right incidental to the leasehold estate.\(^11\) Transfer of the leasehold is sufficient consideration for the assignment to be valid.\(^12\) Generally, no particular form is required to constitute a valid assignment or sublease;\(^13\) but if the term transferred is five years or more,.

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8. 163 Va. 702, 177 S.E. 109 (1934).
9. *Id.* at 705-06, 177 S.E. at 110.

The fact that the lessee, in making the transfer to another, reserves a rent greater or less than he himself has stipulated to pay the landlord for the premises, or that he reserves a right of re-entry for breach of new conditions imposed by him, does not prevent the transfer from being treated as an assignment, at least so far as concerns the original landlord, if the interest transferred by the lessee is his whole interest in either the entire land or in part thereof. *Id.* quoting *1 MINOR ON REAL PROPERTY* § 405 (2d ed. Ribble 1928).

*Accord,* Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N.E. 920 (1889); Craig v. Summers, 47 Minn. 189, 49 N.W. 742 (1891); Behr v. Hurwitz, 90 N.J.Ed. 110, 105 A. 486 (1918); Stewart v. Long Island Ry., 102 N.Y. 601, 8 N.E. 200 (1886); Weander v. Claussen Brewing Ass'n, 42 Wash. 226, 84 P. 735 (1906). This position is based on the theory that a right of re-entry is not an estate in land but merely a chose in action. *Contra,* Dunlap v. Bullard, 131 Mass. 161 (1881); Davis v. Vidal, 105 Tex. 144, 151 S.W. 230 (1912). This position is based on the idea that a right of re-entry is a contingent reversionary interest. See generally *49 AM. JUR. 2D Landlord and Tenant* § 395 (1970).

10. For an annotation concerning the right of the lessee in the absence of a covenant not to assign or sublease, see *Annot.*, 23 A.L.R. 135 (1923), supplemented in 70 A.L.R. 486 (1931). See also *49 AM. JUR. 2D Landlord and Tenant* §§ 398-401 (1970); 51 C.C.J.S. *Landlord and Tenant* § 31 (1968).

11. "In the absence of express prohibition all leases are assignable." Taylor v. King Cole Theatres, 183 Va. 117, 120, 31 S.E.2d 260, 261 (1944). *Accord,* Wainwright v. Bankers' Loan & Inv. Co., 112 Va. 630, 72 S.E. 129 (1911); Rees v. Emmons Coal Mining Co., 88 W. Va. 4, 106 S.E. 247 (1921). As discussed in the preface this is not the usual case and most leases contain provisions which prohibit the assignment or subleasing of the premises without the express consent of the lessor.

13. This was the common law approach until the *Statute of Frauds and Perjuries,* 29 Car.
it must be embodied in a deed.\textsuperscript{14}

Whenever a lessee transfers his interest in the leasehold, the threshold question is whether the transfer is an assignment or sublease. Where the transfer is an assignment, privity of estate exists between the lessor and assignee;\textsuperscript{15} while if it is a sublease, no such privity exists.\textsuperscript{16} Privity of estate is an important factor in establishing the rights and liabilities of all parties concerned, because such privity gives the parties a right of action against each other for the breach of any covenant that runs with the land.\textsuperscript{17} The rights and liabilities imposed by privity of estate do not, however, extinguish those created by privity of contract.\textsuperscript{18}


\textsuperscript{14} See VA. CODE ANN. § 55-2 (1969). "No estate of inheritance or freehold or for a term of more than five years in land shall be conveyed unless by deed. . . ." It would seem that a sublease for less than five years would not have to be in writing. See Smith v. Payne, 153 Va. 746, 151 S.E. 295 (1930). "In Virginia, . . . leases for more than five years must be by deed, but there is no statutory provisions in this state which in terms declares that other actual leases be in writing." Id. at 756, 151 S.E. at 298. But see Cooke v. Wise, 13 Va. (3 Hen. & M.) 463, 469 (1809) stating that a writing appears necessary to properly assign a lease.


\textsuperscript{16} Davis v. Vidal, 105 Tex. 444, 151 S.W. 290 (1912); Cato v. Silling, 137 W. Va. 694, 73 S.E.2d 731 (1952).

\textsuperscript{17} See, e.g., Moskin Stores, Inc. v. Nichols, 163 Va. 702, 177 S.E. 109 (1934). It becomes a necessary prerequisite, to determine whether the assignee is liable upon the covenant, to ascertain whether the covenant runs with the land. There are generally four requirements which must co-exist:

(1) There must be a covenant in the original lease.

(2) The covenant must touch and concern the land or affect the nature, quality or value of the land. See Burton v. Chesapeake Box & Lumber Corp., 190 Va. 755, 57 S.E.2d 904 (1950).

(3) There must be privity of estate. This is always present between a lessor and an assignee of the lease once possession has been taken.

(4) There must be an intention that the covenant run with the land. In Virginia this is automatic if in the lease the covenant provides that the lessee covenants that . . . . See VA. CODE ANN. § 55-67 (1969).

When a deed uses the words "the said . . . covenants," such covenant shall have the same effect as if it were expressed to be by the covenantor, for himself, his heirs, personal representatives and assigns and shall be deemed to be with the covenantee, his heirs, personal representatives and assigns. Id. (emphasis supplied).

It would appear, at least in Virginia, that the only requirement for the covenant to run with the land under an assignment is for it to touch and concern the land. See, e.g., Burton v. Chesapeake Box & Lumber Corp., 190 Va. 755, 57 S.E.2d 904 (1950) (holding that a covenant to purchase insurance on the property was personal and did not run with the land because there was no counter provision applying the proceeds of the insurance to restore the premises); Taylor v. King Cole Theatres, 183 Va. 117, 31 S.E.2d 260 (1944) (holding that a covenant containing the right to renew the lease runs with the land).

\textsuperscript{18} See Powell v. John E. Hughes Orphanage, 148 Va. 331, 138 S.E. 637 (1927) which held
2. Where an Express Provision Prohibits Assignment or Subleasing Without the Lessor's Consent

Despite the fact that a prohibition against assignment and subleasing is a restraint on alienation, courts will enforce such a provision against the lessee. However, because the law favors free alienation of estates in land, these provisions are not favored and are strictly construed. To be enforced the covenant must be phrased in special and precise language, and the courts will not infer anything. The Virginia Supreme Court in Wainwright v. Bankers' Loan & Investment Co. held that a covenant which prohibited the subleasing of the premises without the consent of the lessor did not prevent the lessee from assigning his interest. While there is no Virginia case on the matter, the converse is recognized; and a lease which contains a provision against assignment may be subleased.

If the lessee attempts to assign or sublease in violation of the covenant, the lessor has several remedies available. A court of equity will enjoin the lessee from violating this negative covenant against assigning or subleasing. Where the lease provides for a forfeiture of the leasehold for breach of covenant, the lessor may recover possession after giving proper notice. Finally, the lessor may elect to bring an action at law for damages sustained as a result of the breach.

Once the lessor becomes aware that the covenant has been violated, he must act seasonably. If he accepts rent from the assignee or sublessee with knowledge of the breach, he will no longer be permitted to enforce the covenant. The court considers such action as conclusive evidence of consent or a waiver of the covenant because it amounts to a recognition of the lessee liable on a covenant to leave the premises in good repair after assignment.

assignee or sublessee. The right to enforce the covenant is also lost as to subsequent assignments when the lessor consents to an assignment without expressly imposing restrictions as to future assignments. This doctrine was first espoused in Dumpor's Case, and the rule is followed today in Virginia and in most jurisdictions.

The right of the lessor to withhold consent of a proffered sublessee or assignee has been recognized almost universally by the courts. The motives of the lessor are immaterial, and he may withhold consent on purely arbitrary or unreasonable grounds. Many courts which have adopted this position have done so without justification other than the fact that the law has been long settled. A few courts have questioned the soundness of the rule but have refused to abrogate it. Even where the lease contains a provision that the lessor will not unreasonably withhold consent, there have been a few courts which have allowed the lessor to do so.

While this position has been the subject of severe criticism, only a few

29. See Franklin Plant Farm, Inc. v. Nash, 118 Va. 98, 86 S.E. 836 (1915).
33. Gruman v. Investors Diversified Servs., 247 Minn. 502, 78 N.W.2d 377 (1956). "We feel that we must adhere to the majority rule." The court based this on the fact that many leases were carefully prepared by competent counsel in reliance on the rule.
34. The threshold question is whether this provision is a covenant of the lessor or merely a qualification of the lessee's covenant. While most courts have concluded it is a covenant made by the lessor, there is authority to the contrary. See Fairchild Realty Co. v. Spiegel, Inc., 246 N.C. 458, 98 S.E.2d 871 (1957); Hedgecock v. Meddel, 146 Wash. 404, 263 P. 543 (1928). See generally Annot., 54 A.L.R.3d 679 (1974).
courts have been bold enough to abrogate this feudal concept and adopt a
rule which conforms to the realities of modern life. There have been a few
courts which have in dictum indicated their discontent with the rule.

It is generally recognized that the right of the lessor to consent to an
assignment or sublease is valuable and necessary. The lessor may control
occupancy of his premises, and he can insure himself of the general and
financial responsibility of the new tenant. However, while a valuable right,
the present state of the law lends itself to abuse. It provides the lessor with
a means to drive an unconscionable bargain. For this reason it is believed
that when the lessor refuses to accept the lessee's offered sublessee or
assignee, the lessor should be prepared to state a reasonable basis for his
decision.

An example of the lessor's ability to drive an unconscionable bargain is
_Dress Shirt Sales, Inc. v. Martinque Associates._ The tenant under a ten
year lease was unable to continue his business. He presented a prospective
assignee to the lessor for his consent in accordance with his lease. The
lessor refused to consent to the assignment. After several attempts, all of
which had been unsuccessful, the lessee was desperate; and the lessor
agreed to allow the lessee to be discharged from his obligations by the
payment of $30,000. Shortly thereafter the lessor rented the premises to the
original party offered by the lessee. The court denied recovery on the
grounds that the lessor may rightfully refuse or withhold consent even if
his actions are deemed unreasonable.

What Virginia's position is, is uncertain. The Supreme Court of Virginia
has not been confronted with the precise issue, and for this reason one
should analyze the reasons and policies for and against such a rule.

The majority bases its position on the following syllogism—a lease is a
conveyance, and as such there is no contractual duty on the lessor to
mitigate his damages. There being no duty on the lessor to mitigate his

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36. See Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d 135 (7th Cir. 1967); Scheinfeld
v. Muntz T.V., Inc. 67 Ill. App. 2d 8, 214 N.E.2d 506 (1966); Shaker Building Co. v. Federal
368, 10 P.2d 826 (1932).
38. 12 N.Y.2d 339, 190 N.E.2d 10, 239 N.Y.S.2d 660 (1963). While it is recognized that this
case involves a commercial lease, it is used to illustrate the harshness of the rule and the
extreme to which courts have carried it.
W.C. Hines Co. v. Angell, 188 Minn. 387, 247 N.W. 387 (1933). While this statement is true,
it does not bolster the conclusion that the lessor may unreasonably withhold consent.
damages, he is at liberty to unreasonably and arbitrarily refuse a proffered assignee or sublessee. While the reasons are sometimes phrased slightly differently, in substance they follow the above rationale. It is sometimes said that the lessor, having personally selected the tenant and expressly prohibited an assignment or subleasing, has no obligation to look to anyone but the lessee for the rent. This statement while true is a nonsequitur because even if the lessor consents, he does not relieve the original lessee from his contractual liability; and the lessor may if he desires look only to the original lessee for rent if it is not paid.

Is this approach logical? Is a lease a conveyance of an interest in real property, or is the estate incidental to the lease? Assuming a lease is a conveyance, should this conclusion alone override the social policies behind the duty to mitigate damages? Does the fact that the lessor has no duty to mitigate damages allow him to become unreasonable and not act in "good faith"? These are but some of the questions that should be answered before the courts continue to follow a common law rule established during an era of feudal tenure.

The prevailing view is founded on the premise that a lease is a conveyance. Therefore, the lessor has parted with his right to control the land. While the loss of control may affect one's ability to mitigate damages, how does it warrant the right to unreasonably refuse a proffered assignee or sublessee? Has the lessor really given up completely his right to control the leasehold when he can prevent its free alienation? While the necessities of feudal tenure may have required this approach, under modern circumstances it is an anachronism. This criticism of the majority has been adopted

43. See Powell v. John E. Hughes Orphanage, 148 Va. 331, 138 S.E. 637 (1927). The effect of this is that the lessor may still look only to the lessee for the rent if it is not paid.
by several courts\textsuperscript{45} and the Uniform Residential Landlord and Tenant Act.\textsuperscript{46}

Approaching the problem from a realistic viewpoint and recognizing that a lease is both a contract and a conveyance, the question arises: Which is predominant under the given facts? At early common law a covenant not to assign or sublease without the consent of the lessor was thought to be a personal covenant. In Dumpor's Case,\textsuperscript{47} which is followed in Virginia,\textsuperscript{48} the lessor's consent to an assignment, required by a provision in the lease, once given waives his right to subsequently enforce the covenant. This would appear to indicate that the covenant does not run with the land and is personal in nature. Therefore, the principles of contract law should apply in a case involving such a covenant; and the lessor should have a duty to mitigate damages.

Focusing on the issue of whether the lessor has a duty to mitigate damages, the judicial cleavage is deep.\textsuperscript{49} The majority, based upon the general

\begin{footnotes}
\footnotetext{45}{See, e.g., Weinstein v. Griffith, 241 N.C. 161, 84 S.E.2d 549 (1954); Wright V. Baumann, 239 Ore 410, 398 P.2d 119 (1965); United States Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E.2d 403 (1956).}
\footnotetext{46}{UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT (1972), found in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1972).}
\footnotetext{47}{76 Eng. Rep. 1110 (K.B.).}
\footnotetext{48}{See Franklin Plant Farm v. Nash, 118 Va. 98, 86 S.E. 836 (1915).}
\end{footnotes}
theory that a lease is a conveyance, holds that the lessor has no duty to mitigate damages. The tenant has purchased a vested interest in realty, the contract has been executed and the tenant's obligation to pay rent is absolute. Furthermore, the tenant should not be permitted to impose a duty on the lessor through his own wrongdoing.

The minority has countered these arguments and added others which strongly urge the abandonment of the majority rule. First, they reject the view that a lease is predominantly a conveyance and hold that it is an exchange of promises, to which a sale of an estate is incidental. While the tenant is not to be permitted to impose a duty on the landlord through his own wrongdoing, the courts are able to impose such a duty under the general concept of mitigation of damages. The burden imposed does not seem to be any greater than that imposed on the promisee of any other contract. Such a rule is simply just and reasonable. Finally, public policy dictates that it would be better for the parties, as well as for the public, to have the property put to some beneficial use rather than be vacant. This policy should be given careful consideration in view of the present housing shortage.

Virginia has taken a unique position on the question of mitigation of damages and straddles the majority and minority rules. In *James v. Kibbler's Administrator*, the Virginia Supreme Court held the lessor under a duty to mitigate damages. Some twenty years later in *Crowder v. Bank of Commerce*, the Virginia Supreme Court noted that the lessee never took possession.
possession in *James* while in the instant case the premises were abandoned after the lessee had taken possession. The fact that possession was not taken prevented the relationship of landlord and tenant from existing in *James*. Therefore, the principles of contract law applied; and the duty to mitigate damages imposed. But where, as in *Crowder*, the premises are abandoned after the tenant has once taken possession, there is no duty to mitigate. This distinction has not been followed in other jurisdictions.

Returning to the initial question: May the lessor unreasonably and arbitrarily refuse to accept a proffered subtenant; it would appear that in the minority jurisdictions which require the lessor to mitigate damages, he may not. Several other arguments have also been successful.

One court has applied the universally recognized principle of contract law that where a contract is ambiguous, it is construed against the drafting party.\(^9\) Because the lease does not state that the lessor may on arbitrary grounds withhold his consent, an inherent ambiguity exists. Therefore, reasonableness should be implied in the absence of express language to the contrary.\(^6\) While this argument does not directly confront the foundation of the rule, it is appealing. It is peculiar that the courts have universally looked upon covenants restricting the right to assign or sublease with disfavor and have strictly construed them, but have not applied this rule of construction. In *Granite Trust Building Corp. v. Great Atlantic & Pacific Tea Co.*,\(^41\) the court said:

> It is settled law that unless restricted by the terms of the lease, a lessee may assign or sublet. A covenant permitting such assignment with the consent of the lessor, therefore is a covenant for his benefit and is to be construed more strongly against him. . . . It would seem to be the better law that when a lease restricts a lessee's rights by requiring consent before these rights can be exercised, it must have been in the contemplation of the parties that the lessor be required to give some reason for withholding consent.\(^1\)

Under strict construction and the rule requiring that ambiguities be construed against the drafting party, should not reasonableness be implied in the absence of express language to the contrary?

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60. 28 Ohio Misc. 246, 277 N.E.2d 584 (1971). For Virginia cases applying this rule of construction in contract cases, see Lipscombe v. Security Ins. Co., 213 Va. 81, 189 S.E.2d 320 (1972); Jackson v. North America Assurance Soc'y, 212 Va. 177, 183 S.E.2d 160 (1971). This rule is based upon the principle that where a contract is unclear and subject to different interpretations, it should be construed against the one who had it within his power to make the meaning clear.
A final basis for abrogation of the rule is that while the provision is a restraint on alienation which the courts will enforce, where consent is unreasonably withheld, the restraint on alienation becomes unreasonable and, therefore, void as a matter of public policy.  

C. Rights, Liabilities and Remedies

1. Rights and Liabilities Between Lessor and Lessee

The obligations of the original lessee are not extinguished by an assignment of the lease or a sublease of the premises. While an assignment of the lease extinguishes privity of estate between the lessor and lessee, privity of contract remains. If the transfer is a sublease, both privity of estate and privity of contract remain between the lessor and original lessee. The effect of this is that the lessor may still consider the original lessee as his tenant and look solely to him for compliance with the lease.

The lessor may relieve the lessee from his obligation under the lease by novation, implication or waiver of a right. Furthermore, where the lessor and assignee make a modification of the lease, the original lessee will not be liable thereunder because the modification creates a new tenancy. Where liability is based solely upon privity of contract, the lessee is discharged from liability which arises by implication from the relationship of landlord and tenant. However, where the covenant is express, the lessee...
is not discharged by the lessor's acceptance of the assignee or acceptance of rent from the assignee.\textsuperscript{71} Even the institution of an action by the lessor against the assignee does not constitute an election, and the original lessee is not discharged from his liability until there is satisfaction.\textsuperscript{72}

In Virginia, the lessor has various remedies available to enforce his rights against the lessee. Where there is a breach of the covenant to pay rent, he may proceed at law for damages.\textsuperscript{73} Such action does not terminate the lease, and the lessor would still have the problem of regaining possession. Also, the lessor may select unlawful detainer,\textsuperscript{74} which provides the lessor with a means of recovering possession as well as the collection of rent.\textsuperscript{75} Since in most cases the lessee has moved from the premises, distress and attachment would probably be unavailing.\textsuperscript{76}

If the breach is of a general restrictive covenant, the lessor may maintain an action for the damages sustained or bring a suit in equity to enjoin the lessee from further breaching the covenant. In most cases the lease will provide that upon a breach of any covenant contained therein, the lessee will forfeit his interest in the leasehold. The lessor derives still another remedy from this provision. After giving the proper legal notice,\textsuperscript{77} he may maintain the action of unlawful detainer.\textsuperscript{78}


\textsuperscript{72} See generally Burkes, Pleading and Practice (4th Ed. T. Boyd 1952). See Va. Code Ann. § 55-225 (1969), which requires that a notice in writing be given requesting the payment of rent (pay or quit). After five days and the rent not having been paid, the lessor may proceed to recover possession. For the procedure to recover possession and damages see Va. Code Ann. § 8-789 (1950) and the section on Forcible Entry and Detainer infra.

\textsuperscript{73} See Va. Code Ann. § 8-793 (1950) (verdict and judgment; damages). See also section on Forcible Entry and Detainer, infra.


\textsuperscript{75} Notice to quit must be given. Johnson v. Goldberg, 207 Va. 487, 151 S.E.2d 386 (1966); Pettit v. Cowherd, 83 Va. 20, 1 S.E. 392 (1887). Under the recently enacted Virginia Residential Landlord and Tenant Act, the landlord is required to give notice of the breach to the tenant. He must wait 30 days before he may maintain a possessory action. The lease terminates only if the breach has not been remedied within 21 days of notice of the breach. Va. Code Ann. § 55-248.31 (effective July 1, 1974). Since this Act is not applicable to natural persons who own 10 single family dwellings or less, the old law, which merely requires notice without imposing a time limit, is applicable in such cases. Va. Code Ann. § 55-248.5 (10) (effective July 1, 1974).

\textsuperscript{76} See Va. Code Ann. §§ 8-789 to -795 (1950). See also section on Forcible Entry and Detainer, infra.
The lessee may enforce the covenants contained in the original lease against the lessor after an assignment or sublease is made. While the lessee would not generally be desirous of maintaining an action because he has not personally suffered, the right to maintain such an action is present. If the lessee is inclined to bring an action, an injunction would seem to be the best remedy. Where, however, the lessee has previously been subjected to a judgment by his sublessee, then an action at law would be appropriate.

2. Rights and Liabilities Between Lessor and Assignee

The assignee of a lease succeeds to all the interest of the lessee in the leasehold and to the benefits of all covenants which run with the land. He may maintain an action at law to recover damages sustained as a result of a breach by the lessor or possibly enjoin the lessor from violating a covenant. In many jurisdictions an assignee may not sue for a breach which occurred prior to the assignment because the cause of action is a choses in action which is not assignable. In Virginia, by statute, such a cause of action is assignable.

While the assignee succeeds to all the benefits that run with the land, he is obligated to assume all burdens of the lease which run with the land, but not personal covenants unless he expressly promises to undertake them.

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83. See VA. CODE ANN. § 55-6 (1969). "Any interest in or claim to real estate . . . may be disposed of by deed or will. . . ."
84. Burton v. Chesapeake Box & Lumber Corp., 190 Va. 755, 57 S.E.2d 904 (1950); Taylor v. King Cole Theatres, 183 Va. 117, 31 S.E.2d 260 (1944); Gauley Coal & Coke Co. v. Sharp, 73 W. Va. 427, 80 S.E. 781 (1914). He is liable to pay rent notwithstanding the fact that the lease was assigned in violation of covenant. McGhee & Co. v. Cox, 116 Va. 718, 82 S.E. 701 (1914).
85. Burton v. Chesapeake Box & Lumber Corp., 190 Va. 755, 765, 57 S.E.2d 904 (1950) (holding that a covenant by original lessee to insure, without provision for proceeds to be used to restore the property, was personal and did not run with the land).

That the words "subject to all the terms and conditions of said lease" do not impose contractual liability on an assignee under a lease seems to be the well supported rule. Id. at 679, 146 S.E.2d at 209.
The lessor generally has all the remedies available to enforce his rights against the assignee that he would have had against the original lessee. If rent is not paid he may distrain the personal property of the assignee. Alternatively, he may choose to recover possession by an action for unlawful detainer after giving proper notice to pay or quit. If he is fearful that the assignee is not going to pay the rent and will remove his personal property, he may have the chattels of the assignee attached. If the lessor desires, he may maintain an action at law for damages. Where there is a breach of covenant other than to pay rent, the lessor may avail himself of the common remedies of an action at law or a suit to enjoin the assignee from breaching a covenant.

3. Rights and Liabilities Between Lessor and Sublessee

At common law a sublease created an estate separate and distinct from the original leasehold. The relation of landlord and tenant did not exist between the lessor and sublessee, and as a consequence all rights and liabilities of the sublessee were derived from the lease executed with the lessee/sublessor. These rights could rise no higher than those of the original lease. The lessor could maintain an action for unlawful detainer if the sublessee held over after the lessee's estate had terminated. As a general rule the sublessee may not look to the lessor personally for a breach of

See 83 C.J.S. Subject p. 555 (1953). "The expression 'subject to' . . . normally connotes, in legal usage, an absence of personal obligation, and as ordinarily used does not create affirmative rights."

87. See Va. Code Ann. § 55-231 (1969). This section provides, "the distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises. . . ." (emphasis supplied).


89. There appears to be no case in Virginia directly on point, however, it seems clear that the Virginia Supreme Court would so hold. In Bernard v. McClanahan, 115 Va. 453, 79 S.E. 1059 (1913), the court held that attachment was a proper remedy against an undertenant because § 55-231 expressly made him liable for distress and under the court's interpretation of § 55-566 any property which was the proper subject for distress was the proper subject of attachment. Applying the same reasoning, the property of the assignee would be subjected to attachment since it is expressly the subject of distress under § 55-231. See note 110 infra.


covenant, nor may the lessor look to the sublessee for violations of the original lease. There is authority in other jurisdictions to the effect that the lessor may in equity enjoin the sublessee from violating any covenant of which the sublessee has notice.

Virginia has retained the common law approach with respect to covenants other than for the payment of rent. The covenant to pay rent while not enforceable as a covenant may be enforced by the statutory remedy of distress. Furthermore, in *Bernard v. McClanahan* the Virginia Supreme Court held that the chattels of the sublessee behind in his rental payments were the proper subject for attachment.

99. *See 1 Minors on Real Property* § 407 n. 6 (2d ed. Ribble 1928). This position would appear to be based on the concept that a person who takes with notice of a restriction cannot in good conscience be permitted to violate it.
101. See *Va. Code Ann.* § 55-231 (1969). This section of the code provides: "the distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises..." (emphasis supplied). *See also* Bernard v. McClanahan, 115 Va. 453, 79 S.E. 1059 (1913).

The liability of an undertenant of leased premises, as in this case, does not arise out of contractual relations between him and the lessor, but by virtue of statute, whereby he, upon entering the leased premises as undertenant subjects his property carried thereon to liability for the rent contracted to be paid by the lessee of the premises. ... *Id.* at 457-58, 79 S.E. at 1060.

103. The court interpreted § 8-566 and § 55-231 of the Virginia Code together and concluded that: "[t]he statute (sec. 2791 supra) [now § 55-231] plainly makes the goods of the undertenant liable for the rent, just as though they were the goods of the tenant himself; and by section 2962 [now § 8-566] it is provided that if the goods are liable to be distrained, they may be attached." *Id.* at 458, 79 S.E. at 1060.

To obtain a writ of attachment, the lessor must file an affidavit which states:

1. The truthfulness of the complaint;
2. The rent which is reserved and payable within one year; and
3. Grounds for a belief that unless the property is attached there will not be sufficient property for distress.

4. Rights and Liabilities Between Assignor and Assignee

Any express covenant contained in the instrument creating the assignment may be enforced against the assignor. This is generally the extent of his liability because no covenants are implied against him. Exceptions to this rule include the accountability of the assignor to the assignee for misrepresentations to the lessor’s consent to assign, or where a forfeiture of the leasehold results due to a previous breach by the lessee/assignor of which the assignee has no notice. When either situation occurs, the assignee may maintain an action to recover damages or bring a suit to rescind the assignment. An assignment which is violative of a provision against assignment is not void but merely voidable at the election of the lessor. Therefore, the assignee should not be permitted to maintain an action for misrepresentations unless the lessor exercises his election and makes the assignment void.

The relationship between the assignor and assignee is basically that of a surety. The law implies a promise on the part of the assignee to fulfill the duties imposed by the original lease. If the lessor at his election maintains an action against the lessee/assignor, for the assignee’s breach, the assignor may indemnify his losses by bringing an action against the assignee.

5. Rights and Liabilities Between Sublessor and Sublessee

The relationship between the sublessee and the sublessor is basically that of landlord and tenant. The rights and liabilities of that relationship attach.

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111. Howard v. Lovegrove, L.R. 6 Ex. 43.
D. Conclusion

The Virginia General Assembly has enacted a Residential Landlord and Tenant Act. Unfortunately the Act does not address any of the problems of assignments and subleases heretofore discussed. Under the new legislation a landlord still has no duty to mitigate damages. He may continue to arbitrarily and capriciously refuse to recognize a sublessee or assignee. This area needs serious re-evaluation and reform.

England in 1927, decided that it could no longer tolerate the judicial interpretation that a lessor could withhold his consent to an assignment on unreasonable grounds and by statute incorporated into every lease the condition of reasonableness. Included in the 1969 American Bar Foundation Model Residential Landlord-Tenant Code is a provision requiring the landlord to act reasonably in regard to subleases but not to assignments. Under this provision the tenant is required to notify the landlord in writing of his intention to sublease and to identify the sublessee. If the tenant is not notified within ten days or the landlord gives no grounds for rejecting the sublessee, the tenant may terminate his lease by giving thirty days notice. If a legal proceeding arises, the burden of establishing the reason-

114. VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT, VA. HOUSE BILL 220 (enacted Mar. 9, 1974), codified at VA. CODE ANN. §§ 55-248.2 to 248.40 (effective July 1, 1974).
115. Id. § 55-248.33.

. . . If the landlord rents an abandoned dwelling unit for a term beginning prior to the expiration of the rental agreement, it is deemed to be terminated as of the date the new tenancy begins. The rental agreement is deemed to be terminated by the landlord as of the date the landlord has notice of the abandonment if the landlord elects to accept the abandonment as a surrender. . . . (emphasis supplied).

In all leases whether made before or after the commencement of this Act containing a covenant, condition or agreement against assigning, underletting, changing or parting with the possession of demised premises or any part thereof without license or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject—

(a) to a provision to the effect that such license or consent is not to be unreasonably withheld, but this provision does not preclude the right of the landlord to require payment of a reasonable sum in respect to any legal or other expenses incurred in connection with such license or consent. . . .

A written rental agreement may restrict the tenant's right to assign the rental agreement in any manner. The tenant's right to sublease the premises may be conditioned on obtaining the landlord's consent, which shall be withheld upon reasonable grounds as specified in subsection (5); no further restriction on sublease shall be effective. Id. § 2-403 (2).

118. Id. at § 2-403 (4)
Within [10] days, . . . the landlord may reject the prospective subtenant by delivering or mailing [by certified mail] to the tenant a written reply signed by the landlord
ableness of the rejection is on the lessor. Under the Uniform Residential Landlord and Tenant Act there is a duty to mitigate damages upon the aggrieved party.

There is no reason for a distinction between assignments and subleases. Under either, the original lessee remains personally liable. By placing the burden of proof on the lessor, it might subject him to harassment suits. It is hoped that the Virginia Legislature in its next session will amend the Virginia Law and include a provision similar to that of the American Bar Foundations' but which does not exclude assignments.

VIII. EVICTION: REPOSSESSION OF THE LEASEHOLD

The following treatment of eviction does include some treatment of the notice to quit requirements for termination of the lease by the landlord. The bulk of this discussion presupposes that for one reason or another the landlord has a right to possession of the premises—a right which the tenant is abridging by wrongfully holding over. Faced with this familiar landlord-tenant confrontation, what is the Virginia landlord to do; what procedural guarantees does the tenant have? Like his counterpart in most jurisdictions, the landlord is presented with three alternatives: he may invoke the statutory version of that age-old relic, ejectment; he may avail himself of the summary remedy explicitly fashioned for his use, unlawful entry and detainer; or he may turn to what is certainly the oldest of landlord remedies, and one that looms as something of a bogeyman to the loyal advocate of tenants' rights—self-help.

which shall contain one or more specific grounds for the rejection.

If the landlord fails to reply within the [10] days, or if his written reply fails to give reasonable grounds for rejecting the prospective tenant, the tenant may, at his option, terminate the rental agreement by giving written notice to the landlord. . . .

[Thirty] days after such notice is delivered or mailed [by registered mail] to the landlord, the rental agreement shall terminate. . . .

119. Id. at § 2-403 (6).

In any proceeding in which the reasonableness of the landlord's rejection be in issue, the burden of showing reasonableness shall be on the landlord.

120. Uniform Residential Landlord and Tenant Act (1972), found in Handbook of the National Conference of Commissioners on Uniform State Laws (1972).

121. Id. at § 1.105(a).

The remedies provided by this Act shall be so administered that an aggrieved party may recover appropriate damages. The aggrieved party has a duty to mitigate damages. (emphasis added).

122. See note 74 supra.

A. Ejectment

The Virginia Code provides, "the [common law] action of ejectment is retained," yet an examination of the fifty-eight odd provisions dealing with this action\(^2\) reveals that today it is almost entirely a statutory remedy. While at one point in its early history the action's main object was the recovery of the possession of land, it now serves primarily as a method to try title.\(^3\) According to the Virginia Code, it is the action whereby one asserts "a subsisting interest in the premises claimed and the right to recover the same"\(^4\) from another.

The chief requisites for a successful action of ejectment and also those which render it more expensive than unlawful entry and detainer are: (1) ejectment \textit{must} be brought in a court of record;\(^5\) (2) the plaintiff must recover on the strength of his own title—thus requiring not only proof of the superiority of his own claim to the defendant's claim, but as to the whole world;\(^6\) (3) the plaintiff must trace his chain of title to the Commonwealth.\(^7\) The burden imposed by the last two requirements on the landlord is muted by the fact that the tenant is estopped to deny the landlord's title.\(^8\) This suggests that ejectment in the landlord-tenant context may be less complicated and expensive than in the classic adverse possession situation. However, because proceedings in a circuit court usually require retention of counsel, ejectment is seldom used when attempting to possess the residential tenement at the termination of the lease. Usually the more expeditious remedy of unlawful entry and detainer more adequately meets the landlords' needs.\(^9\)

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1. VA. CODE ANN. § 8-796 (1957).
5. Id. § 8-798.
8. Suttle v. R.F. & P.R.R., 76 Va. 284 (1882) (dictum); Miller v. Williams, 56 Va. 213 (1859) (dictum); Alderson v. Miller, 56 Va. 279 (1859) (dictum). While none of the foregoing cases specifically decide the point, their dictum appears to establish the principle in Virginia that the tenant may not deny the landlord's title.
9. It must be pointed out that where the tenant has been unlawfully detaining against the landlord for three years or more, the action of unlawful entry and detainer will be unavailable to the landlord. VA. CODE ANN. § 8-789 (1957). Consequently he will have no choice but to use ejectment.
The only time that ejectment appears to be profitable, if not prescribed, would be where the leasehold involved substantial value, as in commercial property. An unlawful entry and detainer action only settles the question of immediate right to possession. Its finding is not res judicata, and the winner in such an action remains open to another suit to test his rights, that is, ejectment. This unsettled state of affairs is of little consequence to the typical residential landlord who can usually assume that his ousted tenant has found quarters elsewhere; however, this is not acceptable to the owner of commercial property, particularly where the lease in question is long or the dollar amounts involved are substantial. In such a case, the landlord will want to settle his right to possession with finality, thus insuring future marketability of a lease interest or the land itself.

B. Unlawful Entry and Detainer

Unlawful entry and detainer, unlike its more formal counterpart ejectment, is an action of wholly statutory origin. It was first enacted in England as a criminal statute aimed directly at preventing the use of self-help as a method to recover land. As such it made no provision for damages or the return of possession of the tenement, but instead, provided only for punishment of the wrongful entrant. Ultimately the English law developed to the point that the tenant could get limited civil redress by being put back into possession. It was at this level of development of the unlawful entry and detainer action that Virginia in 1789 virtually adopted the English statutes. Virginia's statutory action has since developed into a

11. See generally cases cited note 10 supra.
12. See generally cases cited note 10 supra.
13. The action is known equally well under the alias "forcible entry and detainer" (the Virginia Code refers to it as unlawful entry and detainer). The statutory provisions for unlawful entry and detainer are: VA. CODE ANN. §§ 8-789 to -795 (1957), as amended, (1973 Cum. Supp.). General treatment of the action of unlawful entry and detainer as it relates to Virginia may be found in: C. Berry, CIVIL PRACTICE IN MUNICIPAL AND COUNTY COURTS §§ 231-45 (1961); Burks Pleading and Practice §§ 103-10 (4th ed. T. Boyd 1952); 8 M.J. FORCIBLE ENTRY AND DETAINER §§ 1-28 (1949); VIRGINIA STATE BAR & VIRGINIA STATE BAR ASSOCIATION, THE VIRGINIA LAWYER 6.5.6, 6.14 (1969); A. Phelps, HANDBOOK OF THE VIRGINIA RULES OF PROCEDURE IN ACTIONS AT LAW 21-26 (2d ed. 1961).
14. 5 Rich. 2, stat. 1, c. 7 (1881).
15. Id.
remedy whereby a residential landlord can expeditiously recover the rental unit, back rent, and damages from the holdover tenant.\(^8\)

In order for this action to lie the landlord must be entitled to possession. The conditions which give the landlord this right generally fall into three categories; (1) the tenant has heldover beyond the termination date of the lease without the consent of the landlord; (2) the tenant is in arrears for rent and the landlord has given the tenant five days notice to quit or pay as required by statute;\(^2\) (3) the tenant has broken some covenant of the lease, and the landlord has exercised his right of forfeiture thereunder by giving a notice to quit.

The third category mentioned above has been a source of some controversy and is one of the areas that has been significantly altered by the recently enacted Virginia Residential Landlord and Tenant Act.\(^2\) Virtually every residential rental agreement contains a provision for forfeiture at the discretion of the landlord for a breach of any of the tenant's covenants. By case law it is clear that in order for the landlord to exercise the right of re-entry, he must give the tenant notice to quit.\(^2\) However, unlike the statutory provisions concerning forfeiture for arrearage in rent,\(^2\) there is no grace period in which the tenant may make repair for breach of covenant. Where rent is in arrears the landlord must give the tenant at least five days notice to pay before he brings action. But before passage of the new Act he could bring an unlawful entry and detainer action the instant the notice to quit was given, no matter how inconsequential the breached covenant. The Virginia Residential Landlord and Tenant Act attempts to remedy what was in effect a harsh inconsistency by providing:

\[\text{the landlord may deliver a written notice to the tenant specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice if the breach is not remedied in twenty-one days, and the rental agreement shall terminate as provided in the notice.}\]

\(^{18}\) This action also serves as the method by which the tenant who has been forcibly ousted recovers his possession of the land—the purpose for which unlawful entry and detainer was originally designed.

\(^{19}\) An example of a possible format of such a quit or pay notice may be seen in Virginia State Bar & Virginia State Bar Association, The Virginia Lawyer 16.1 (1969).

\(^{20}\) Va. Code Ann. § 55-225 (1969). A more detailed treatment of this code section may be found in the section of this note dealing with rent.

\(^{21}\) Va. Code Ann. § 55-248.31 (effective July 1, 1974).


\(^{24}\) Va. Code Ann. § 55-248.31 (effective July 1, 1974).
No doubt, there will be complaints that standing alone this provision confers upon the tenant the power to breach the rental agreement at will; so long as the tenant remedies each breach within twenty-one days after complaint by the landlord. Presumably he could remain until the lease expires. If this is an accurate reading of the statute, the landlord is at an unfair disadvantage relative to an undesirable tenant who, through such abuse of the notice-grace period requirement, could negate the force behind valid covenants in the lease. However this section somewhat lessens such a possibility by providing that a court can enjoin the tenant's non-compliance with the rental agreement and award the landlord damages, and where the breach is willful, reasonable attorney fees.

Virginia's unlawful entry and detainer statute, apart from possible hardship in the forfeiture itself, is fair and equitable to both the landlord and tenant. The typical eviction problem is handled quickly, with no real paper work problems, and no need for retention of counsel. The landlord's first task is to give notice to quit or notice to pay or quit to the tenant. This failing, the landlord must swear out an affidavit (generally before a clerk of a district court). This affidavit results in a summons being issued to the sheriff (or appropriate officer) for service on the tenant. Depending upon the locality, the summons is issued by either the local magistrate or the district court judge.

Generally where the landlord's action is justified, service of the summons is enough to prod the reluctant tenant into leaving or remedying the breach. Even where the appearance of the officer does not produce this result, the Code provides that an unlawful entry and detainer action is placed at the head of the docket. This at least insures the landlord speedy action. In most instances the case will be disposed of before the district court judge immediately upon the return of the summons either by entry of judgment upon the tenant's failure to appear or by trial should he contest the eviction. In either case judgment for possession of the premises in a justified claim by a landlord is speedy.

The action of unlawful entry and detainer further facilitates the needs of the landlord in that he can recover past due rent as well as any damages

27. Va. Code Ann. § 8-792 (Cum. Supp. 1973). This provision is applicable when the unlawful entry and detainer action has been commenced by a motion for judgment, since the trial in district court usually occurs on the return date of the summons.
suffered because of the wrongful holdover.\textsuperscript{29} However, the landlord must include his claims in the affidavit and show them on the summons.\textsuperscript{30} The amounts involved must not exceed the jurisdictional amount of the court.\textsuperscript{31} Even though a judgment in the district court is subject to an appeal to a court of record, the landlord is insulated against spurious appeals by a requirement that the tenant first post security to cover rent and damages.\textsuperscript{32}

Does the unlawful entry and detainer statute provide adequate protection to the tenant who has been wrongfully evicted? The answer apparently is yes. Similar statutes, more stringent and summary in nature, have recently been held to pass the muster of constitutional standards of due process.\textsuperscript{33} In Virginia the summary nature of the proceeding does not preclude a hearing of all material evidence directly bearing upon the tenant’s right to possession.\textsuperscript{34} Additionally, the tenant is provided with minimum procedural safeguards. He is afforded at least five days in which to vacate or appeal since the return day must be at least five days after service;\textsuperscript{35} and where there is an arrearage of rent, he must be given five days notice (additional time in which to make good the back rent) before his possession is deemed unlawful.\textsuperscript{36}

Should the tenant fail at the district court level, he has a right to a trial de novo in a court of record if he acts within ten days after judgment.\textsuperscript{37} In the circuit court the tenant can have a jury trial\textsuperscript{38} by posting appeal security to cover any rent and damages.\textsuperscript{39} While this may pose a burden to the indigent tenant, it does not seem inequitable since the security is for no more than the amount for which the tenant was found liable in the district court.

In short, unlawful entry and detainer more than adequately protects the tenant during the eviction process. Not only is he given a chance to tell his side of the story to the district court judge, but he is given a ready

\textsuperscript{29} Id. § 8-793 (1957).
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id. § 8-794.
\textsuperscript{34} See, e.g., Olinger v. Shepherd, 53 Va. (12 Gratt.) 462 (1855), where the court even allowed evidence of title which is not normally admissible in an unlawful entry and detainer action.
\textsuperscript{36} Id. § 55-225 (1969).
\textsuperscript{37} Id. § 8-794 (1957).
\textsuperscript{38} Id.
\textsuperscript{39} Id.
appeal to a circuit court with the usual right to trial by jury. Thus, even if the tenant does suffer in certain substantive areas of the law in Virginia, he is given ample procedural protection of whatever substantive rights he does have.

Besides the notice to quit provision previously discussed, the newly enacted Virginia Residential Landlord and Tenant Act enlarges the bounds of judicial inquiry in an unlawful entry and detainer action. Heretofore, the tenant was unable to set up a breach of covenant by the landlord as a defense in an unlawful entry and detainer proceeding; generally, the court was confined to the narrow issue of right to possession which, under the typical lease, necessarily devolved upon a question of whether the tenant had paid rent or had broken a covenant, resulting in forfeiture. Because the new landlord-tenant act allows just about any landlord failure to be brought into question, the court’s potential scope of inquiry is greatly broadened. With this widening of the scope of permissible inquiry, much of the summary nature of the unlawful entry and detainer action will probably be lost.

C. Self-Help

There are certainly occasions when a landlord is tempted to take matters into his own hands, particularly where the local official responsible for serving the summons and expelling the tenant is less than enthusiastic in the exercise of his duty. And frequently there are bound to arise situations where the landlord will go beyond a simple notice to quit and possibly push into those uncharted grounds of self-help. At the risk of some informality one might conceive of a confrontation something like the following dialogue:

LANDLORD. All right, I told you a week ago to pay up or get out; besides you know good and well you’re not allowed animals in here. On top of that I told you I was renting this place to you, your wife, and kids not half the city. Now you and the rest of this crew get your stuff and move! Now!

TENANT. Now? We can’t go right this second. Where’ll we go?

LANDLORD. You’ve got friends, right?

TENANT. Sure I have friends...

LANDLORD. Well, move in with them like these deadbeats moved in with you.

TENANT. I’ve got no way to move all this stuff now.

LANDLORD. I’ll move it for you. (Motioning to some strongarms close by). Start loading this junk up boys, and when it’s all out, I want you to dump it.

40. See Davis v. Mayo, 82 Va. 97 (1886); Pannill v. Coles, 81 Va. 380 (1886); Power v. Tazewells, 66 Va. (25 Gratt.) 786 (1875).

41. VA. CODE ANN. § 55-248.21-.30 (effective July 1, 1974).
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wherever he tells you (motioning to tenant).

TENANT. Man, I don't wanna . . .

LANDLORD. You, shut up and get a move on it!

(With nothing else said the eviction proceeds to completion).

Has there been a forcible entry? If yes, what remedies does the tenant have, and to what extent is the landlord liable? If this is not a forcible entry, and only a voluntary removal, how much further would the landlord had to have gone to have committed the extralegal sin of self-help?

The question of whether there has been sufficient "force" to constitute a forcible entry is difficult. While actually pushing in a door,\(^4\) removing a lock,\(^3\) or moving of tenant's possessions without permission\(^4\) all amount to a forcible entry,\(^4\) it is not clear when, as posed in our dialogue, acquiescence to a landlord's intimidating exhortations becomes a forcible eviction.

While not dealing directly with a landlord-tenant relationship, the cases of Grundy v. Goff\(^4\) and Southern Railway Co. v. Lima Wood & Coal Co.\(^4\) shed substantial light on just when a tenant has suffered enough intimidation to sustain an action of unlawful entry and detainer in Virginia. These cases suggest that the essence of a forcible entry is dispossession of the tenant against his will coupled with an apparent willingness of the landlord to use force. It is unnecessary that there be actual violence or that the landlord come to the brink of such violence, or even that there be threats of force. There is a forcible entry where the tenant foregoes possession in the reasonable belief that the landlord intends to take possession by whatever means necessary.

Where does that leave us in our hypothetical dialogue? It could be argued either way. The tenant may urge that the words and actions of the landlord reasonably suggested an "at all costs" intent, while the landlord may argue that his was but the administration of strong doses of prodding, and that the tenant never unequivocally said no. Certainly it would end in a jury question, and at the risk of speculation, a sympathy verdict for the tenant.

When lawyers are asked by a landlord/client if he can evict the tenant himself, most would advise strongly against it. Yet as one observer noted:

Whether this advice is prompted by an unconscious adversion to nonjudicial


\(^{43}\) E.g., California Prods. Inc. v. Mitchell, 52 Cal. App. 312, 198 P. 646 (1921).

\(^{44}\) E.g., Phelps v. Randolph, 147 Ill. 335, 35 N.E. 243 (1893).

\(^{45}\) See generally Annot., 6 A.L.R.3d 177 (1966) (this annotation gives an excellent overview of landlord self-help, but unfortunately without treatment of underlying jurisdictional statutes important to an understanding of the cases noted).

\(^{46}\) 191 Va. 148, 60 S.E.2d 273 (1950).

\(^{47}\) 156 Va. 829, 159 S.E. 69 (1931).
remedies or a conscious desire to avoid . . . violence, it is highly unlikely that it was prompted by a clear understanding of the client’s civil and criminal liabilities in such situations.\(^4\)

It is abundantly clear that force cannot be used by the landlord to regain possession of his premises—the illegality of such action is the very essence of Virginia’s unlawful entry and detainer statute. But what sanction or remedy does the unlawful entry and detainer statute provide where a forcible entry has been committed by the landlord?

If . . . the plaintiff was forcibly or unlawfully turned out of possession, . . . the verdict or judgment shall be for the plaintiff for the premises, . . . [and] for such damages as the plaintiff may prove to have been sustained by him by reason of such forcible or unlawful entry. . . . (emphasis added).\(^4\)

Although it appears that a tenant forcibly ousted can recover both possession and any damages he may have suffered, apparently no court has ever awarded the aggrieved tenant damages. In three cases ranging from 1925 to 1966, the courts have made it clear that the tenant could recover damages only where there had been “unreasonable force.”\(^5\)

Assuming that the object of the unlawful entry and detainer statute was to prevent self-help, consider the effect of these three cases upon this legislative goal. We observe a series of barriers as the tenant seeks redress for his “reasonably forcible” eviction. Needing a place to stay, the tenant might have been satisfied with an immediate return of possession, but in the lawyer’s office he is told that the very earliest he could recover possession would be five days or so. Even then he is liable to be ousted by the landlord legally in a very short period, assuming the landlord has been entitled to possession all along. Faced with this state of affairs and the fact that civil damages have been inaccessible, the Virginia tenant has been quite likely to abandon all attempts at redress and seek shelter elsewhere. Considering this lack of incentive for the tenant to pursue his remedy, one cannot help but wonder how often confrontations like the one above have gone untested, particularly where there have been no legal aid services readily available to assert an indigent tenant’s cause.

Doubtless some landlords will suggest that this is not a harsh result since a tenant who is wrongfully holding over has no right to complain of force that is not excessive and certainly should recover no damages. However,


\(^5\) VA. CODE ANN. § 8-793 (1957).

the statute was designed to discourage those face to face confrontations between landlord and tenant which run a substantial risk of violence. A possible way to give the unlawful entry and detainer statutes teeth and thereby avoid the use of force is to give the tenant an incentive to seek redress, but our courts’ insistence upon following the common law immunity of the landlord to civil damages makes it necessary to set forth even more unequivocal language.

Such language has found expression in the Virginia Residential Landlord and Tenant Act. In a section specifically designated “Tenant’s remedies for landlord’s unlawful ouster,” the drafters provided that:

If the landlord unlawfully removes or excludes the tenant from the premises . . . the tenant may recover possession or terminate the rental agreement and . . . recover actual damages sustained by him and a reasonable attorney’s fee. (emphasis added).

This recently enacted provision should give the unlawful entry and detainer statute the teeth it needs to be effective. In contemporary society there is clearly no room for the rough and tumble risks that self-help presents. Anyone who would consider the use of Neanderthal methods to recover possession rather than turn to duly appointed officials needs more admonition than a remote chance that a tenant may seek return to temporary possession. It is commendable that the Virginia Assembly has recognized this need and has added the risk of a sympathetic jury awarding substantial damages as a deterrent to landlord self-help.

IX. Fixtures

Frequently a dispute arises between a landlord and his tenant at the end of the term when the tenant attempts to remove a chattel which he has affixed to the realty and which the landlord claims as his because it has become part of the realty. It is to this controversy that the law of fixtures addresses itself. A fixture is personal property which by its attachment to the realty becomes a part of the fee.\(^1\) The English courts regarded any chattel attached to the realty with apparent permanence as becoming a fixture and not subject to removal by the tenant, despite the fact that it

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51. VA. CODE ANN. § 55-248.26 (effective July 1, 1974).

could be severed without serious injury to the freehold.\textsuperscript{2} The American courts, however, disenchanted with the harsh attachment test, adopted a more flexible test of intention.\textsuperscript{3} Virginia and most American jurisdictions apply the following criteria in determining whether a chattel becomes a fixture: (1) actual annexation to the realty, (2) appropriation to the use of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make a permanent accession to the freehold—this intention being inferred from the mode of annexation, the relation of the annexor to the realty, the nature of the chattel affixed, and the purpose of the annexation.\textsuperscript{4}

It is important to understand that the intention referred to is not the subjective intent of the annexor, but an objective or imputed intent inferred from the factors listed above.\textsuperscript{5} Although modern opinions often indicate that the mode of annexation is no longer the single criterion for determining if a chattel has become a fixture,\textsuperscript{6} it still plays a crucial role since it serves as a basis from which to infer intent. For example, if the tenant personally intends to remove certain chattels attached by him, he may lose his right of removal despite his intent if the articles are attached so firmly that severance would cause "substantial damage" to the realty.\textsuperscript{7} Thus, as a practical matter the chief criterion by which intent is judged is the amount of damage that would be inflicted upon the freehold were the property severed.\textsuperscript{8}

Another important factor in the determination of objective intent is the relation to the realty of the party making the annexation. Where the person

\begin{footnotes}
\item[2] The justification for this rule was to protect the inheritance of the heir; however, it was applied uniformly to all fixture cases, including situations involving divided ownership as in the landlord-tenant relationship. 5 \textit{AMERICAN LAW OF PROPERTY} § 19.2 (A.J. Casner ed. 1952).
\item[6] \textit{E.g.}, \textit{Danville Holding Corp. v. Clement}, 178 Va. 223, 16 S.E.2d 345 (1941).
\item[8] Substantial damage to the freehold is evidence of a strong indication that the tenant intended to permanently annex the chattel. 5 \textit{AMERICAN LAW OF PROPERTY} § 19.11 (A.J. Casner ed. 1952); 34 \textit{CHI. L. REV.} 617 (1967).
\end{footnotes}
attaching the chattel is the owner of the realty, the courts presume that it was his intention to make a permanent accession to the freehold, reasoning that his design is to improve the property and enhance its rental value. On the other hand, if it is the tenant who has affixed the chattel, there is a general presumption that he did so for his own benefit and not to enrich the freehold.10

Finally, intent is inferred from the nature of the chattel affixed and the purpose for which it was annexed. Under the prevailing view, articles which the tenant has attached for his own domestic comfort are considered personal in nature since they are not primarily adapted to the purpose of the realty.11 For example, tenants have been permitted to remove furniture and refrigerators,12 venetian blinds,13 window shades,14 and ordinary mirrors15 even though they were attached to the realty. Where a proper exercise of the tenant's right to remove a chattel causes damage to the realty, the tenant must compensate the landlord for the injury because he is obligated to return the premises in the same condition in which they were received. Since a tenant has no intention of making a gift to the landlord, there is no reason to allow a landlord to be unjustly enriched by retaining the chattel. In such cases there is a strong policy for not treating the property as fixtures.

Where, however, there is a stronger policy on the other side, for example, protecting the landlord's freehold from serious injury, such leniency

9. E.g., Transcontinental Gas Pipe Line Corp. v. Prince William County, 210 Va. 550, 172 S.E.2d 757 (1970); Danville Holding Corp. v. Clement, 178 Va. 223, 16 S.E.2d 345 (1941). Although these cases involved commercial leases the logic would also apply to the residential situation.


11. Teaff v. Hewitt, 1 Ohio St. 511 (1853). The second criterion of a fixture, namely appropriation (or adaptation as it is called in Virginia) to the use of that part of the realty with which it is connected, is important in trade fixture cases since the chattel may become as essential part of a plant or mill; however, it is not relevant in residential cases as domestic fixtures are usually capable of use in any residence and do not often become essential to the freehold. See also Plough v. Petersen, 140 Cal. App. 2d 595, 295 P.2d 549 (1956).


13. Kelieher v. Gravois, 26 So. 2d 304 (La. App. 1946) (venetian blinds attached by brackets screwed to window frames were held to be primarily intended for the use of the occupant and not for the improvement of the building and therefore did not pass with sale of realty).


15. Cranston v. Beck, 70 N.J.L. 145, 56 A. 121 (1903). Contra, Strain v. Green, 25 Wash. 2d 692, 172 P.2d 216 (1946) (because mirror was attached in such a manner that removal would leave wall in rough state, it was considered part of the realty and passed with sale of house).
is not found. Thus, chandeliers, wall-to-wall carpet, doors and windows, and other articles which are more permanently attached and less easily removed, have been held to be fixtures. Due to the fact that intention is inferred from the mode of annexation, the relation of the annexor to the realty, the nature of the chattel, and the purpose of the annexation (factors which are quite often in conflict with one another), each case is ultimately decided on its own particular facts and circumstances.

An agreement between a landlord and tenant is controlling on the question of whether or not a chattel was intended to become a fixture. Thus, the parties can guarantee that their true intention will prevail unaffected by the rules discussed above. By such an agreement it is possible to ensure that an article, which otherwise would be considered a fixture, will remain the personal property of the tenant. Conversely, a chattel which ordinarily would be removable by the tenant may, by an agreement, be retained by the landlord as a part of the realty. When the express intent of the parties is contained in the lease, any possible dispute is taken out of the law of fixtures and is resolved by the law of contracts. In such a situation the question is not one of intention as such, but one of construction, i.e., whether the article falls within the contractual provision preventing or permitting removal.

Agreements controlling the disposition of fixtures are subject to the important limitation that no absurdity or general inconvenience result from the arrangement. Thus, despite the apparent desire on the part of the

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19. Slane v. Curtis, 41 Wyo. 402, 286 P.372 (1930), reh. denied, 41 Wyo. 417, 288 P.12 (1930) (doors and windows are considered a part of the realty when affixed and are not removable by tenant).
23. Sharlin v. Neighborhood Theatres, Inc., 209 Va. 718, 167 S.E.2d 334 (1969) involved a dispute concerning the interpretation of a provision in the lease allowing the tenant to remove "all such equipment, fixtures or furniture of whatsoever kind so installed or brought upon the premises by the lessee..." The court admitting that the agreement entitled the tenant
judiciary to have the parties settle their fixture disputes in the lease, courts will construe such clauses to prevent an absurd or harsh result. This limitation has been applied extensively to commercial leases, and there seems to be no reason why it could not be used to prevent unfair results in a residential context. For example, if a tenant signs a standard form lease containing a clause to the effect that any article attached to the realty passes to the landlord upon termination of the term, he may be forfeiting valuable property despite the fact that removal would cause only slight damage to the freehold. To prevent such an unjustified loss to the tenant, the courts could construe the clause as being applicable only to those chattels so permanently attached as to become a part of the realty. The same end could have been reached under the proposed draft of the Virginia Residential Landlord and Tenant Act, but the section providing for the unenforceability of unconscionable provisions was not included in the enacted legislation. Of course, if the clause had been a bargaining point in the negotiations for the lease, the parties should be held to a strict adherence to the terms of their contract.

Even where a tenant may properly remove chattels affixed by him to the realty, he must exercise this right within the time prescribed by law (or the lease) or he will forfeit the fixtures to the landlord. Under a tenancy for a fixed period the tenant is required to remove his fixtures before he surrenders possession of the premises. Where the term is indefinite, the removal must take place within a reasonable time after the termination of the tenancy. The strict rules concerning the time for removal of fixtures grew out of an ancient English concept that the tenant’s fixtures, due to attachment, belonged to the landlord subject to a limited right of removal in the tenant. However, under the modern, and better view, which recognizes that a tenant’s removable fixtures remain his personal property, the rule seems incongruous. Unless his actions constitute abandonment, a

24. HOUSE BILL NO. 220 § 55-248.6 (offered Jan. 28, 1974).
tenant does not lose ownership in ordinary chattels in this manner. The justification given for the forfeiture rule is the inconvenience to the landlord if the tenant were allowed to return to the property and remove his annexations. However, in many cases forfeiture will unduly punish the tenant and give the landlord a windfall.

A.J. Casner cites two Arkansas cases as offering a more flexible solution. In the first, the court held that a tenant's mere delay in removing his fixtures, without consequent injury to the landlord, would not justify a forfeiture. The other suggested that a tenant who left removable fixtures on the land could later remove them if he compensated the landlord for any damage or inconvenience caused by the delayed removal. Although these cases involved commercial leases, the concepts would be even more adaptable to the residential situation where the tenant's fixtures usually increase the rental value of the premises. This approach appears more reasonable in that it fulfills the original purpose of the forfeiture rule by adequately protecting the landlord, while avoiding an unfair loss to the tenant.

Where a tenant wrongfully removes fixtures the landlord may recover damages for the value of the fixtures removed and for any injury to the premises caused by the removal. If the remedy at law is inadequate, the landlord may obtain an injunction to prevent such removal. So too, where the landlord is wrongfully retaining chattels, the tenant has an action for the fixtures or their value and for any damage incurred due to his being deprived of their use. A tenant may also obtain an injunction

29. Id.
30. McLean v. Wells, 207 Ark. 303, 180 S.W.2d 325 (1944) (although the lease in this case allowed the tenant a reasonable time in which to remove his fixtures, the concept of no injury—no forfeiture warrants recognition by other courts).
31. Hoing v. River Valley Gas Co., 196 Ark. 1165, 121 S.W.2d 513 (1938) (despite the fact that a trade fixture was left on premises for seven years, tenant was allowed to remove it upon payment of a rental fee to compensate the landlord for his inconvenience).
34. Beebe v. Richards, 115 Cal. App. 2d 588, 252 P.2d 688, 20 Cal. Rptr. 422 (1953) (where tenant who operated beauty salon was prevented by the landlord from removing her equipment, tenant recovered possession of some fixtures, the value of those disposed of, and damages for lost income due to being deprived of her tools of trade); Mullins v. Sturgill, 192 Va. 653, 66 S.E.2d 483 (1951) (plaintiffs as mine operators under lease agreement put equip-
to protect his interest if the legal remedy is inadequate.\textsuperscript{35}

Cases involving commercial fixture disputes are numerous due to the great value of many trade fixtures. On the other hand, many disputes in the residential landlord-tenant area do not mature into cases because they involve only a nominal dollar amount when compared to the cost of litigation. In effect, an aggrieved tenant or landlord is left without a practical judicial remedy. Thus, one of the greatest shortcomings of the judicial system in Virginia and in other states is the lack of any mechanism for handling small disputes such as those involving domestic fixtures. A possible solution to this problem is the creation of a commission armed with quasi-judicial authority to handle disputes between a landlord and tenant. Such an organization already exists in Fairfax County, Virginia.\textsuperscript{36} In addition, a similar course of action was recommended under the proposed Virginia Residential Landlord and Tenant Act, but this section was deleted from the final draft.\textsuperscript{37} This approach, which avoids placing an additional burden on the juridicary system, would be an important step in the solution of one of the problem areas in the landlord-tenant relationship.

The most glaring weakness in the present system of resolving fixture disputes is the lack of flexibility. Although the intention test takes into consideration the circumstances of the particular case, a finding that removal of a chattel attached by the tenant would cause "substantial damage" to the freehold results in the landlord owning the fixture, despite the fact that the landlord may be getting an unmerited windfall.\textsuperscript{38} In addition, the possibility of reimbursement by the tenant is not considered relevant in determining whether damage to the realty is substantial.\textsuperscript{39} Another example of inflexibility arises in the situation where a tenant loses

\textsuperscript{35} Hershberger v. Johnson, 37 Ore. 109, 60 P. 838 (1900) (where boiler, engine, and sawmill were placed on land under lease providing they would not become part of the realty and plaintiff's assignor purchased them as personalty, plaintiff might enjoin sheriff from levying on the property under a subsequent attachment against the property as realty). \textit{See also} Mullins v. Sturgill, 192 Va. 653, 66 S.E.2d 483 (1951) (where defendant's demurrer to bill praying for injunctions was sustained on the ground the remedy at law was adequate).

\textsuperscript{36} \textsc{fairfax county, va. code} § 15 E (1973). This body is empowered to investigate the facts and attempt a conciliation between the parties. If settlement fails, it then presides over a public hearing and reaches a decision. Failure to comply is deemed a violation of the ordinance.

\textsuperscript{37} House Bill No. 220 § 55-248.40 (offered Jan. 28, 1974).

\textsuperscript{38} Roberts v. Yancey, 209 Va. 537, 165 S.E.2d 399 (1969) (where removal of fixtures attached by tenant would cause material injury to premises, it was not error to instruct jury that the landlord was entitled to the improved value even though it might result in returning the building to the landlord in better condition than when it was received by the tenant).

\textsuperscript{39} 34 U. Chi. L. Rev. at 624 (1967).
his chattels by not removing them in the time allowed by law. Here again
the landlord may be unjustly enriched if the value of the fixture outweighs
the inconvenience suffered by the landlord. An alternative to the tradi-
tional rules, which merely establish which party shall own the fixture,
would be to allow removal conditioned upon the tenant reimbursing the
landlord for any inconvenience due to delay or damage caused by sever-
ance. This system would accomplish the desired result of avoiding a loss
to the landlord and at the same time prevent an unfair forfeiture from
being worked on the tenant. Where money damages would be insufficient
to protect the landlord's interests, he could obtain suitable equitable relief.

X. THE INDIGENT TENANT

In Virginia, the indigent tenant has gone largely unnoticed by case and
statutory law. Invariably he is trapped where he resides, in substandard,
deteriorating, and oft-times uninhabitable housing. Although able to fer-
ret out the money to pay the rent, he cannot afford to move away and find
better lodging.

A. Tenant Remedies

Traditionally, common law and state legislatures have sought to protect
the landlord, to the point of ignoring the plight of the indigent. The indi-
gent tenant has always had to accept the demised premises in their present
condition. All too often the dwelling is simply uninhabitable, and the
indigent has been forced to remain rather than to take to the streets. The
heart of the problem lies in the acute shortage of low-income housing
available to the indigent. Unscrupulous landlords have taken advantage
of this situation in that they have not been required to warrant the habita-
ility of the premises, and have been content to sit by while once-suitable
housing stock deteriorates. If the indigent was assured habitable low-
income housing, the labors of his predicament would be less strenuous.

Although warranty of habitability has been created in Virginia by the
newly enacted Virginia Residential Landlord and Tenant Act,¹ this legisla-
tion cannot be fully appreciated without an understanding of the case law
development under this doctrine.

Bolstered by the doctrine of caveat emptor, common law declared that

40. See text accompanying note 28 supra.

¹. VA. CODE ANN. §§ 55.248-55.248.40 (effective July 1, 1974).
there was no implied warranty of habitability at the beginning of the tenancy. Important exceptions have arisen however, and today the doctrine of caveat emptor as it is applicable in a landlord/tenant relationship may be said to be somewhat eroded. As a result, although many jurisdictions have not yet adopted the notion that the landlord impliedly warrants the habitability of the rented premises throughout the tenancy, an increasing number of courts have found sound bases for support of such a warranty.

Where a doctrine of implied habitability is recognized, the indigent who is faced with condemnable housing may be allowed to withhold partial payment of the rent in an effort to induce the landlord to make needed repairs. In Pines v. Persson, the court authorized such a procedure by declaring that the landlord’s implied warranty of habitability and the tenant’s covenant to pay rent were mutually dependent. Expanding on the contractual concept of a lease, Marini v. Ireland held that the tenant need


7. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).


In a modern setting, the landlord should, in residential letting, be held to an implied
not always interpret the landlord's breach of his "contractual" obligation as constructive eviction, giving him the right to vacate and cease paying rent. Under the Marini view, the tenant might prefer to put his rent payments toward restoring the housing to habitable standards. On the other hand, Javins v. First National Realty Corp.,\(^9\) and to some extent Pines before it, derived a warranty of habitability from legislative and social policy as evidenced by applicable housing and health codes.

Prior to the Residential Landlord and Tenant Act's passage, various Virginia municipalities had taken the initiative in establishing health and/or housing ordinances, which have to some extent regulated the landlord/tenant relationship, while at the same time founding a legislative basis from which to infer that an implied warranty of habitability indeed did exist. It is arguable, however, that such a warranty, whether implied from local ordinances or as set forth in the Residential Landlord and Tenant Act, does not solve the indigent's problems, but rather serves to confuse them. It does not help the indigent to tell him that he can vacate under the guise of constructive eviction and not have to pay the rent, for he will have nowhere else to go. It does not help the indigent to know he can withhold rental payments and put the money toward repair, for the amount of rent withheld may not suffice to accomplish the major repairs necessary to make the premises habitable.

How then is the indigent tenant to proceed in raising the condition of his lodging to a habitable standard? The Code of Virginia previously offered minimal aid; there was only one statute that pertained to housing regulations, and it addressed itself exclusively to the installation of a suitable toilet.\(^10\)

There are, however, enforcement provisions in the different municipal
covenant against latent defects, which is another manner of saying, habitability and livability fitness. It is a mere matter of semantics whether we designated this covenant one "to repair" or "of habitability and livability fitness." Actually it is a covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further it is a covenant that these facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain these facilities in a condition which renders the property livable.


10. If any landlord shall fail to supply any house of his with a sanitary privy or closet as required by this section, his tenant shall supply the same in conformity with the orders of a health officer or health inspector and may deduct the cost thereof from any sum due the landlord for rent.

VA. CODE ANN. § 32-64 (1950).
ordinances throughout the state, and the indigent can pursue these possible remedies. Housing ordinances have taken either of two basic approaches promulgated to cope with the situation. Several of the larger, more populated counties in northern Virginia have established Tenant-Landlord Commissions to supervise the maintenance of minimum housing standards. The Certificate of Compliance, an alternative method adopted by the city of Portsmouth, and more recently Richmond, seeks to preserve the cities' deteriorating housing stock as well as to insure habitable standards in rental units.

Prior to the Virginia Residential Landlord and Tenant Act, the "Commission" method was based upon a complaint being filed with that body, alleging a violation of a health or housing ordinance. Now, both parties to the dispute must desire mediation from the Commission before any reconciliation of the problem can be achieved. The "Certificate of Compliance" route, however, requires an inspection at the beginning of every new ten-

11. FAIRFAX COUNTY, VA., CODE art. VIII, § 15E-32 (1973). This particular section sets forth the conduct of Fairfax’s landlord/tenant Commission. The Commission receives complaints, and its executive director is charged with making inspections. Emphasis is directed at mediation and conciliation. However, if no agreement can be voluntarily reached, the Commission will schedule a public hearing to determine whether or not a violation of the housing ordinances exists. Upon such determination, the Commission, in a quasi-judicial manner, may take the proper enforcement action.

Arlington County, although leaving the duties of inspecting to the County Manager, has also established a landlord/tenant Commission to serve as a clearinghouse of information on rental problems. The Commission has played an active mediatory role, seeking informal conciliation of rental disputes.

The Virginia Residential Landlord and Tenant Act has clouded the future of the "Commission approach." Although it allows local ordinances to remain in effect, the act strips the Commission of its quasi-judicial power in solving rental disputes. See VA. CODE ANN. § 55-248.3 (effective July 1, 1974).

12. The focus of the Certificate of Compliance concept is on the landlord’s legal requirement of obtaining the certificate, thus demonstrating that the rental premises meet the housing regulations of that locale. A new tenant cannot take possession until such a certificate is awarded to the landlord.

A Certificate of Compliance ordinance has been in effect in Portsmouth since February of 1972, and has been a burden or boon, depending upon to whom one talks. A key feature of the Portsmouth law is the stipulation that the compliance be made and the certificate be awarded before the Virginia Electric and Power Company be allowed to turn on the electricity for that unit. Some landlords have been able to circumvent this by obtaining one electric meter to serve the entire apartment dwelling, rather than deploying one meter to service one apartment unit.

Richmond's plan, patterned after the Basic Housing-Property Maintenance Code (published by Building Officials and Code Administrators International, Inc., a non-profit municipal service organization) is brand new. Introduced in January of 1974, the Richmond ordinance is a comprehensive effort to effectively preserve urban Richmond's housing stock. Richmond chose the Certificate of Compliance concept as the best means of enforcing the minimum housing standards embodied in the ordinance.
ancy. While the Certificate of Compliance ordinance removes from the tenant the burden of reporting a violation, and to that extent diminishes the spectre of the landlord's retaliatory action, opponents assert that its result will be a drastic decline in available housing for the low-income tenant.

Both approaches are based upon a comprehensive Minimum Housing Standards Law, and such ordinances are ordinarily so detailed as to cover items ranging from proper specifications of a mandatory vertical bolt deadlock to the permissible lead percentage in the paint used. Most areas of the state do not have such a comprehensive housing ordinance, but are contented with a hodgepodge of health and building ordinances. Thus, the tenant, especially the indigent, finds that many of his grievances are not legitimate in a legal sense. The need for statewide housing standards and regulations is glaring.

But just how beneficial are housing ordinances to the indigent? The cause of action against the landlord is in the appropriate governmental

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13. Most Certificate of Compliance ordinances also call for a periodic inspection (every five years under the Richmond ordinance, if there is a light tenant turnover).
14. Fear of retaliatory action from the landlord is generally thought to be the most inhibiting factor in the indigent's quest for habitable housing. See generally Annot., 40 A.L.R.3d 753 (1971).
15. Opponents of the Certificate of Compliance method have always contended that the typical landlord would prefer to close down his operation rather than finance such major repairs as might be called for in a compliance inspection. Richmond City Councilman Wayland Rennie argues that the compliance ordinance is flexible enough to cope with this potential problem. Mr. Rennie cites a provision (Ordinance No. 73-294, § 24.1-5) which allows less than full compliance, "when immediate or full compliance will cause undue hardship upon the owner or occupant."
16. Often in a discussion of the relative merits of each to enforce that housing law, one tends to overlook the significance of a municipality's having such an ordinance in the first place.
17. ARLINGTON COUNTY, VA., CODE, ch. 29, § 5.8 (1972).
19. The Metro Richmond Housing Coalition (a network of Richmond area civic groups organized by HOMEWORK, a body formed for the betterment of all housing in Richmond) states in Section III of a report issued on June 24, 1973, in support of adoption of a certificate of compliance law:

. . . while the present code requires an owner to eradicate vermin and rodent infestation in dwellings occupied by two or more people, there is presently no requirement that the owner provide adequate trash receptacles and removal which may be a prime cause of such infestation. In addition to lacking the comprehensiveness of the proposed ordinance, the existing law provides nothing more than a bandaid approach to the inspection of housing to insure the maintenance of minimum living conditions.
20. The Virginia Residential Landlord and Tenant Act only regulates the legal relationship between a tenant and the landlord; it does not address itself to the qualitative standards of the housing, beyond the requirement that the landlord maintain fit premises.
agency, not the tenant. The indigent tenant can literally not afford the
delays involved in the series of public hearings, inspections, and appeals
which normally follow a housing complaint. The indifferent treatment
with which such complaints are received further serves to discourage the
indigent from crying out. Additionally, there is the underlying fear that
the landlord will pay his fine and risk condemnation of the dwelling rather
than spend the larger amount of money needed for the prescribed repairs,
thereby threatening to deprive the indigent of his already meager shelter.

If a civil action were available to the indigent tenant, he might stand a
better chance of improving the condition of his housing. Although the so-
called tort of slumlordism is foreign to Virginia courts, the concept has
emerged in several other jurisdictions. The leading case of Quesenbury v. Patrick determined the elements of such a tort:

1. existence of a valid housing code;
2. provision in the code for criminal liability;
3. notice of the defects to the landlord;
4. failure of the landlord to make repairs within a reasonable time; and,
5. damage to the victim as a result of the failure to repair.

Quesenbury is also notable in that it considers the economical and educa-

21. ARLINGTON COUNTY, VA., CODE, ch. 29, § 11 sets forth the enforcement procedure for
that county. Once a violation of the housing ordinance has been established, the landlord has
a reasonable time within which to make the repairs. After that, there will be a second
inspection to validate the repair job. But, if the landlord had wanted to object to the first
violation notice, all he need do was petition for a public hearing. One envisions weeks going
by before the tenant derives any satisfaction from his initial complaint.

22. Housing disputes in Richmond are currently nestled in with the regular Police Court
docket on Thursday mornings, and from casual observation one would tend to think the judge
pays closer attention to crime than overflowing toilets.

Ct., El Paso County, June 8, 1972); Littlefield v. Rice, [1968-1971 Transfer Binder] CCH
POV. L. REP. ¶ 10,524, 3 CLEARINGHOUSE REV. No. 2568, at 239 (Me. Super. Ct., complaint
undated); Rose v. Hewes Co., 3 CLEARINGHOUSE REV. No. 2410, at 142 (No. 393347, Cal. Super.
Ct., Alameda County, Sept. 16, 1969).

24. 6 CLEARINGHOUSE REV. No. 7683, at 352 (No. 68942, Colo. Dist. Ct., El Paso County,
June 8, 1972).

25. An almost philosophical justification for the establishment of just this type of slumlord
tort has been offered:

. . . one who undertakes to perform a service for his own economic benefit, but who
performs it in a way both inconsistent with those standards which represent minimum
social goals as to decent treatment and in a manner that itself is violative of the law,
under circumstances where the victim had no meaningful alternative but to deal with
him, commits a tort for which substantial damages ought to lie. Sax & Hiestand,
Slumlordism as a Tort, 65 MICH. L. REV. 869, 890 (1967).
tional background of the tenant in figuring the proper measure of dam-
ages. The tort of slumlordism is not envisioned as one founded upon
negligence, or even negligence per se, but rather one which imposes strict
liability.

Slumlordism represents the legal frontier in offering the tenant innova-
tive means by which to encourage enforcement of housing codes, and at
this point has been discussed in more law review articles than courts.
Such a tort remedy has, however, been actively pursued on several differ-
ent grounds; complaints have alleged that the landlord's violation of the
housing code constitutes actionable nuisance, or intentional infliction of
mental distress. Although the mental distress theory introduces the as-
pect of punitive damages, there remains the problem of proof and the
establishment of proximate cause. An action in nuisance would appear
well founded, but remains largely untried.

The tort of slumlordism is a controversial concept, and there is yet
insufficient case law from which one could predict a secure future. But
slumlordism does offer a possible alternative in attempting to enforce
housing codes, and close examination by Virginia courts as to its develop-
ment is warranted.

26. Listed in Quesenbury v. Patrick, 6 CLEARINGHOUSE REV. No. 7683, at 352 (No. 68942,
Colo. Dist. Ct., El Paso County, June 8, 1972), as elements influencing the amount of dam-
ages are:
   (a) plaintiff's lack of education or financial ability to move
   (b) widespread practice of the landlord's rental policy
   (c) financial loss suffered by the victim.
27. See Comment, Housing Codes and a Tort of Slumlordism, 8 Houston L. Rev. 522, 540
(1971).
28. See Blum & Dunham, Slumlordism as a Tort—A Dissenting View, 66 Mich. L. Rev.
451 (1968); Falick, A Tort Remedy for the Slum Tenant, 58 Ill. B.J. 204 (1969); Sax,
Slumlordism as a Tort—A Brief Response, 66 Mich. L. Rev. 465 (1968); Sav & Hiestand,
29. Ball v. Tobeler, 6 CLEARINGHOUSE REV. No. 4988, at 353 (No. 2 Civ. 38424, Cal. Ct. App.,
filed March 27, 1972).
   See Restatement (Second) of Torts § 46 (1966), which states: "One who by extreme and
outrageous conduct intentionally or recklessly causes severe emotional distress to another is
subject to liability for such emotional distress . . . ."
32. Although the tort of slumlordism seems to attract attention in more liberal jurisdic-
tions, it offers some advantages which Virginians should not ignore. Slumlordism is a tenant
initiated remedy, and it would give the indigent an opportunity to recover for past wrongs
done to him. Even if such a tort is ultimately unworkable, it may spark legislative reforms
aimed at the true slumlandlord.
Aside from the constant worry of finding money to meet the rent, the indigent’s biggest problem is coping with the landlord who seeks to evict him or increase his rent in some retaliatory action. It can be of minimal satisfaction to the indigent to finally bring the deficient landlord to justice on one day and receive an eviction notice the next.

The tenant’s best defense to retaliatory activity laid in two distinct directions prior to the passage of the Virginia Residential Landlord and Tenant Act. Following the lead of Edwards v. Habib, many jurisdictions upheld a defense of retaliatory eviction on grounds of public policy and interpretation of housing ordinances. To allow a landlord’s retaliatory action, Edwards reasoned, would frustrate the effectiveness of the housing code to upgrade the quality of housing. An abuse of process action, with the allurement of punitive damages, might serve the tenant well. And at least one court has said that the doctrine of retaliatory eviction can be used affirmatively to support a cause of action for intentional infliction of mental distress. Other courts had based the defense upon constitutional grounds. Now, the new Act has specifically made such retaliatory practices illegal, and the Virginia tenant is uniformly protected.

33. “Faced with the prospect of summary eviction in retaliation for their efforts, tenants have been reluctant to seek enforcement of housing and sanitary code provisions or other legal rights arising under the lease or the laws of the municipal, state or federal government. Accordingly, the effort to eliminate substandard conditions and uninhabitable dwelling units from the urban housing market has been seriously inhibited.” Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography, 26 Vand. L. Rev. 689, 707 (1973).

34. 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1968).


But regardless of the legal protection made available to the tenant, anxiety and apprehension as to retaliation still provide the vengeful landlord with a powerful psychological weapon.

B. **Landlord Problems**

Heretofore the landlord has been couched in terms connoting the true slumlord, one in the business of exploiting the indigent status of others. However, an emphasis on the problems of the tenant should not obscure the very real problems of the landlord in the indigent situation. It is the landlord, not the tenant, who is responsible for the condition of the building he rents, and a tenant's utter disrespect for property can cause the landlord severe financial headaches. It is very difficult for the landlord to keep the premises in proper statutory repair, if the day after the repair, a tenant, for some unascertainable reason, creates by his irresponsible action another batch of housing violations.9

Back at his office Miller showed me his accountant's report for the year. For the building just inspected, taxes, mortgage payments and repairs totaled $10,425. His income: $7,206.

"If I'd had no vacancies, of course, I would at least have broken even. But they just come and go and they don't give a damn about the building. I pray every day that the city will condemn all three of these buildings for a housing project and maybe I'll get my money back. . . ."

. . . All over the country owners of slum buildings recite the same litany: "The day after I plaster a wall the hole is back again. . . . The tenants toss garbage out of the widow. . . . Kids break windows for kicks. . . . I have to pay off the cops and inspectors. . . ."

Many of these people inherited one, two, three dwellings. The value of their property kept falling, and now a lot of the buildings can't be sold at all. Many of the slum tenements are owned by people who live in them. Some put up their savings years ago to buy a "safe" long-term investment—and got caught by declining values, high mortgages, and repair bills that never stop.

Far from being a cigar-smoking Daddy Slumbucks living in splendor off the misery of the poor, the next slum owner you meet may offer to give you a building.0

Presumably, the landlord has a civil remedy against a tenant who destroys his property, but only rarely would the landlord collect on his judgment against the genuine indigent.41 It is clear that landlords should not take

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40. Id., at 509.
41. For example, a Certificate of Compliance ordinance (note 12 supra) would seem to give the landlord the legal advantage of proclaiming for all to see that the premises were indeed
advantage of indigent tenants, and certainly rented premises should be maintained in habitable condition, but it is important to remember that the landlord himself may well be a victim of low-income housing.

C. Virginia Residential Landlord and Tenant Act

Broadly speaking, the Virginia Residential Landlord and Tenant Act structures and regulates the landlord-tenant relationship. Although the Act's provisions are obviously meant to include the indigent, there has been some criticism suggesting that the Act does not take a realistic view of the indigent's problems.  

Some fear that it will promote litigation where a more effective means of redress might be a more informal mediation of the dispute. Although the Act would protect the indigent from landlord retaliation, often he cannot afford a lengthy court struggle, and it seems likely that he will remain frustrated if relief is not readily available.

An escrow provision seeks to coerce the landlord to make the necessary repairs to upgrade the quality of the housing, and this does tend to offer the middle-income tenant a real remedy. But if the housing is substandard and in need of major repair, the landlord may prefer to get out of the renting business altogether. The indigent's plight can only be worsened if less low-income housing is on the market in the future.

Whether or not the indigent is the forgotten man of the Virginia Residential Landlord and Tenant Act remains to be seen. What is clear, however, is the basic need for more and better low-income housing. If the newly enacted law helps to alleviate this problem, then the indigent's condition will be improved.

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42. A Charlottesville landlord commented at the public hearing concerning the Virginia Residential Landlord and Tenant Act that under the proposed law, "tenants have better rights than squatters." This testimony is representative of a dissenting feeling that the bill seeks to impose too high a standard on the landlord in a low-income housing situation. Presently, only a certain percentage of one's welfare check is allotted to housing. If, to maintain his premises in statutory fitness, the lessor of sub-standard housing has to raise his rent to meet the costs of repairs, the low-income tenant might well find himself priced right out of the available housing market. It is just this kind of backfiring potential that has led opponents to assert that the Virginia Residential Landlord and Tenant Act does not treat the indigent situation in a realistic fashion.

D. The Public Sector

If the Virginia Residential Landlord and Tenant Act is unsuccessful, and the private sector indeed cannot cope with the problem of providing adequate housing for the low-income category of tenant, the public sector appears structured to undertake the task. The United States Housing Act of 1937 established a federally-assisted public housing program to be administered on a local level. In addition, the federal government furnishes mortgage insurance and interest subsidy payments in a program designed to construct low-income housing. And in 1972 the legislature in Virginia created its own housing agency, the Virginia Housing Development Authority.

It would indeed be a shame if the public sector were to take over landlord responsibilities by default, for such would indicate a lack of flexibility in the private enterprise system to get the job done. While the root of this inflexibility is difficult to discern, if the proper economic incentive were provided, perhaps in the form of a tax benefit, the private sector might respond by making low-income housing more plentiful.

XI. The Virginia Residential Landlord and Tenant Act

On the last day of the 1974 session of the General Assembly, the Virginia

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44. 42 U.S.C. § 1401 et seq. (1970). Section 1401 provides:
    It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to approval of the Authority), with due consideration to accomplishing the objectives of this chapter while effecting economies.

45. 12 U.S.C. § 1715z-1 (1970). This is better known as the "§ 236 program."

    It is further declared that in order to provide a fully adequate supply of sanitary and safe dwelling accommodations at rents, prices, or other costs which such persons or families can afford the legislature finds that it is necessary to create and establish a state housing development authority for the purpose of encouraging the investment of private capital and stimulating the construction and rehabilitation of residential housing to meet the needs of such persons and families through the use of public financing, to provide construction and mortgage loans and to make provision for the purchase of mortgage loans and otherwise.

47. One hopefully feasible theory has the owner of an apartment complex benefitting from a substantial tax break in return for his offering low-income tenants a certain percentage of his dwelling units at an affordable price. Such a plan would have the dual effect of providing more and improved housing for the indigent, while accomplishing a kind of economic integration of tenants in the same process.
LANDLORD AND TENANT

Residential Landlord and Tenant Act passed both Houses.\(^1\) Its passage is particularly significant for three reasons: (1) presently almost 50% of Virginia’s population resides in rental dwellings, (2) our antiquated laws fail miserably to provide a system capable of adequately defining the rights and duties of landlords and tenants in today’s increasingly urban context and (3) the new Act is the first substantial step in clarifying and modernizing our laws.\(^2\)

The Virginia Residential Landlord and Tenant Act is the product of a comprehensive study of the Virginia Housing Study Commission.\(^3\) The Commission’s report accurately depicted the realities of the rental situation in Virginia from the perspective of both landlords and tenants, and concluded that definitive standards were needed by which the parties to the lease could determine their rights and obligations.

In light of these findings, but cautious of the landlord’s disproportionate influence in the General Assembly, the Commission introduced a watered down version of the Uniform Residential Landlord and Tenant Act, a tenant oriented act promulgated by the Commissioners on Uniform State Laws. Even though the Commission was aware of the proposed Virginia Act’s shortcomings, it was satisfied that the legislation would at least clarify and to some extent modernize the rights, duties, and remedies of both parties to the lease. Appreciating the inevitable, many landlords initially supported the Act as a reasonable compromise between the past and what the future would bring in alternative legislation or case law. However, when the proposed Act emerged from the House Committee in amended form, it appeared that the landlord’s proffered support waned. A local option had been added and landlords feared the relative advantage of those landlords who would operate in localities that did not adopt the Act. Despite this apprehension, the Act miraculously emerged from the Senate Committee on the last day of the session without the local option and passed both Houses.\(^4\)

Fear that the Virginia Residential Landlord and Tenant Act threatened too radical a departure from the safe and traditional concepts in this area of law nearly caused its death. In actuality, the Act is an overdue and

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4. The preceding analysis of the new Act’s progress through the General Assembly is based on The Review’s conclusions from numerous discussions with persons who were directly involved in its passage.
moderate response to the widespread demands of both landlords and ten-
ants to further protect and clarify their respective interests. Nonetheless,
the new law is indeed a product of compromise and, unfortunately, some
of its expedient solutions to our old problems may engender unanticipated
new ones. With this in mind, the following analysis of the more important
aspects of the Virginia Residential Landlord and Tenant Act is under-
taken.

A. The Rental Agreement

One of the most confusing aspects of landlord-tenant law concerns the
nature of the rental agreement. What underlying principles govern the
relationship and to what extent the parties can except themselves from
those principles by express agreement often determines the true flavor of
the law. Virginia case law offers no clear cut answer to the key question of
whether a lease is a contract or a conveyance.\(^5\) The few cases which peri-
pherally deal with the issue appear to take the law of property's view that
a lease is a conveyance of an estate; however, the essential question of just
what principles govern has not been squarely confronted and resolved.

The newly enacted legislation falls short of fully rectifying this ambigu-
ity; nevertheless, it departs significantly from the law of conveyances in
specific areas where those principles formerly governed. The most notewor-
thy change is a provision sounding in contract law which makes the receipt
of rent dependent upon the fulfillment of the landlord's obligations as
expressed in the rental agreement or imposed by the new Act.\(^6\) On the other
hand and of equal significance, the Act does not alter the rather harsh law
relative to mitigation of damages. The landlord still has no duty to miti-
gate damages, and he may refuse to treat abandonment of the premises
as a surrender and arbitrarily turn down substitute tenants.\(^7\)

Thus, the central contract principle of mutual dependency of obligations
has replaced old conveyancing rules as the basis in some specific aspects
of the new Act, while the law of conveyances has continued to prevail over
contract principles at least on the issue of mitigation of damages. One can
only conclude that the Act does not adopt contract as opposed to property
law as the controlling principle for landlord-tenant relations, but rather

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5. Authorities are not in agreement on whether the lease should be governed by contract
or conveyance principles although there is some authority which places Virginia among those
jurisdictions which recognize the dual nature of the rental agreement. Compare James v.
S.E. 74 (1924).


7. Id. at § 55-248.33. Under this section the landlord may elect not to accept abandonment
as a surrender and thereby avoid any duty to mitigate damages.
frees the court to apply general principles of statutory construction in achieving the legislative intent. However, if the purpose of the Act is to create a single body of law governing all aspects of the landlord-tenant relationship, then looking to legislative intent alone, divorced from any body of substantive law, affords an insufficient basis from which to accomplish this result. Since the Act does not have a single thread of theory woven through it upon which to rely when dealing with problems which go beyond the obvious implications of specific Code sections, the court may have no choice but to supplement the Act by looking to the very case law—with all its confusion and harshness—that the drafters of the Act were attempting to avoid.

The drafters of the Uniform Residential Landlord and Tenant Act realized that conveyancing principles are inappropriate to modern conditions and resolved the issue in favor of contract law. In addition to providing for its specific application, such as the landlord's duty to mitigate damages upon abandonment of the premises, the Uniform Act generally recognizes the modern tendency to treat all material obligations as interdependent, a key to the conceptual bases of contractual theory. With due respect to the practical difficulties of passing legislation which departs from the traditional concepts of landlord-tenant law, Virginia's failure to go as far as the Uniform Act in defining what underlying principles are applicable will cause the uncertainty of the past to continue in the future in the aspects of the law outside the limited scope of the new Act.

A significant problem relating to the rental agreement is the extent to which a landlord can avoid the obligations the law imposes upon him. In the past, Virginia's position on the use of exculpatory clauses, which relieve the landlord from liability or compel the tenant to indemnify the landlord for attorney's fees, has not been entirely clear. The trend in other jurisdictions has been to invalidate such provisions on the basis of unconscionability, unequal bargaining positions, or public policy considerations.

Recognizing that such provisions are found mostly in form leases provided by the landlord and that the tenant is without a real choice in accepting these terms, the Virginia Residential Landlord and Tenant Act expressly prohibits provisions in the rental agreement wherein the tenant:

9. The General Assembly deleted § 55-248.10 which appeared in the first proposed version of the new Act. This section would have separated rents and obligations, making the breach of one such covenant a defense to any action brought to enforce the other.
10. The court's only encounter with the problem was in Taylor v. Virginia Constr. Corp. which voided such a clause to the extent that it would have barred the recovery of a member of the tenant's family. 209 Va. 76, 161 S.E.2d 732 (1968).
(1) agrees to waive his rights under the Act, (2) authorizes any person to confess a judgment on a claim arising out of the lease, and (3) agrees to pay the landlord’s attorney’s fees, or (4) agrees to exculpate the landlord from all liability. Where the landlord attempts to enforce any of these provisions the tenant may recover actual damages and reasonable attorney’s fees.

The new Act remains consistent with old law in allowing a landlord to include in the rental agreement those terms and conditions not prohibited by the Act governing the rights and obligations of the parties. Yet, the Act qualifies the landlord’s right to include a provision for terminating the tenancy upon the tenant’s breach of specified terms and conditions by requiring that such a breach amount to a material noncompliance with the rental agreement and that the landlord follow certain procedural steps. The landlord may still bring an action for damages no matter how insignificant the breach, and if it be willful, recover reasonable attorney’s fees. Presumably, the drafters gave the meaning of material-noncompliance the flexibility of judicial construction by not defining it in the Act. However, the absence of definition may permit a landlord to decide what is material and what is not by merely including an appropriate provision.

A particularly puzzling provision permits the landlord to transfer certain of his duties specified in the Act to the tenant if the transaction is entered into in good faith, not for the purpose of evading the obligations of the landlord and if the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises. One of the transferrable duties is to keep all common areas shared by two or more dwelling units in a clean and safe condition. It is difficult to envision the mechanics of how a landlord could exculpate himself from his duty to maintain common areas with common boundaries as to individual tenants without affecting his obligation to other tenants in the same rental complex. The thought of appropriating responsibilities and liabilities under such circumstances is quite confusing. The landlord could eliminate this confusion by exculpating himself from this duty as to all the tenants in a rental complex but the argument that such was not in good faith and for the purpose of evading the landlord’s responsibility would be more than convincing.

In review, prohibiting the landlord from completely exculpating himself of liability reflects sound legislative behavior in light of the realities of

12. Id. at § 55-248.9(b).
13. Id. at § 55-248.7.
14. Id. at § 55-248.31.
15. Id. at § 55-248.13(e).
16. Id. at § 55-248.13(a)(3).
today's rental situation. Giving the parties freedom of contract relative to the rights and liabilities not prohibited by the law also appears reasonable when considering the need for flexibility to provide for the particular exigencies of a multitude of unique rental situations. Yet it seems pointless to specify duties in the Act and at the same time allow the landlord to contract them away without additional consideration only conditioned on the illusive criteria of good faith and the prohibitions against adversely affecting other tenants and evading one's obligations. After all, for what reason would one contract away his obligations other than to avoid them.

B. Landlord Obligations

The Virginia Housing Study Commission Report disclosed that at least a small minority of landlords take advantage of tight housing markets by treating tenants unfairly. Consequently, the new Act details landlord obligations for the dual purpose of providing landlords with clear guidelines as to the scope of their duties and to insure fair treatment of tenants.

1. Tenant's Right to Possession

One not familiar with prior case law may read the new Act as obligating a landlord to deliver actual possession of the demised premises to the tenant. Such a reading is probably incorrect. The Act provides that upon a landlord's willful failure to deliver possession of a dwelling unit, rent abates until possession is delivered; the tenant has an option to either terminate the rental agreement by proper notice and collect all prepaid rent and security or to demand performance by bringing an action for possession against the landlord for the premises withheld. The key words "landlord willfully fails to deliver possession" severely limit this deceivingly substantial tenant right. Under Virginia case law the words "deliver possession" have a rather restrictive meaning in the context of the implied covenant of quiet enjoyment. This covenant obligates the landlord to deliver possession of the premises to the tenant at the beginning of the term. However, the Virginia Supreme Court has interpreted "delivery of possession" to mean mere recognition of the tenant's right to possess. The landlord cannot interfere with the tenant's efforts to inhabit the premises, but he has no positive duty to put the tenant into actual possession.

Unfortunately, the new Act does not significantly abandon the harsh

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18. VA. CODE ANN. § 55-248.22 (effective July 1, 1974).
result of our prior case law. The landlord has not been given an affirmative
duty to place the tenant in actual possession. A tenant who desires to
enforce the rental agreement has the same remedy under the new Act as
before—an action for unlawful entry and detainer against the person
wrongfully in possession. Similarly, statutory termination under the new
Act where a landlord willfully withholds possession offers the tenant noth-
ing more than did common law in the case of an actual or constructive
eviction.

The new Act's codification of pre-existing case law is a disappointment.
It would be decidedly more equitable to shift the burden of obtaining
actual possession from the tenant to the landlord. In contracting for the
lease, the real basis of the bargain is possession of the premises not the
mere right to possess. The landlord does not intend to sell nor does the
tenant intend to buy a lawsuit. Moreover, the landlord, who is provided
with specific remedies against the holdover tenant by the new Act, is in
a better position to handle the expense of ousting the holdover tenant and
spreading it among tenants as a class, than is the individual tenant who
is in all likelihood low on funds and temporarily without a place to live.

2. Security Deposits

Prior to the adoption of the Virginia Residential Landlord and Tenant
Act, the Commonwealth had no law regulating security
deposits. The Housing Commission Report noted several problems in this area: (1) the
amount demanded as the deposit, (2) whether interest should be paid, (3)
undue delay in return of security deposits, (4) failure of landlords to report
the nature of deductions from the amount on deposit. The Virginia Act
attempts to respond to these needs in a manner that is not altogether
satisfactory. The pertinent sections of the Act provide for: (1) interest
payments of 3%, (2) itemization of deductions, (3) a duty to return the
amount due the tenant within 45 days after the term ends, (4) a maximum
deposit of two months rent, (5) prior notice of any inspection which must
be made within 72 hours of termination of the tenancy, (6) maintenance
for two years of the records which reflect any deductions against security
deposits, (7) upon termination of the tenancy, use of the security deposit
for the payment of accrued rent or towards the landlord's damages result-
ing from the tenant's failure to fulfill his obligations.
Two major shortcomings deserve attention. If the landlord willfully violates this section, the tenant's remedy consists of recapturing any security with interest due him plus actual damages and attorney's fees.\(^{24}\) Realistically, actual damages in such instances are apt to be small or nonexistent. A landlord who operates on a large scale has little to lose and much to gain through repeated abuse of this section. The remedy for breach should include some limited amount of punitive damages in order to deter landlords from abuse and give tenants an incentive to bring an action where necessary. Another partial solution ignored by the Act is to require the landlord to hold the security deposit in a separate account.\(^{25}\) Although this would not insure against false claims by the landlord, it would at least prevent him from misusing these funds during the rental period and guarantee that sufficient funds would be available for the deserving tenant to claim at the end of the term.

The second major disappointment is that the Act imposes no duty upon the landlord to pay interest unless the security has been held for a period in excess of 13 months.\(^{26}\) Since a large number of residential leases are for a term of one year or less, this stipulation substantially limits the number of tenants who qualify for obtaining interest on their security deposits. There appears to be no justification for excluding tenants who rent for a year or less from this benefit. The Act as initially proposed had no such provision; it was added on as the Act traveled through the Assembly, and is more likely the result of political compromise than legislative reasoning.

3. Duty to Maintain Fit Premises

Virginia courts have not recognized the implied warranty of habitability advanced by some jurisdictions.\(^{27}\) The newly enacted legislation has departed from our case law by codifying the landlord's duty to maintain habitable premises throughout the period of the lease.\(^{28}\) The standard of habitability is, in part enumerated by the Act and includes compliance with local housing codes. Questionable conditions existing on the premises not covered by the Act nor local housing codes are left to the courts to decide on the issue of habitability.

This statutory warranty of habitability is a positive step forward because it serves to insure safe and healthy living conditions for Virginia's 1.9

\(^{24}\) Id. at § 55-248.11(a).

\(^{25}\) The General Assembly killed House Bill 773 which would have provided for the maintenance of the fund in a separate interest bearing account.

\(^{26}\) VA. CODE ANN. § 55-248.11(b)(1) (effective July 1, 1974).


\(^{28}\) VA. CODE ANN. § 55-248.13 (effective July 1, 1974).
million inhabitants of rental dwellings. Yet, in fairness to both the landlord and tenant, the General Assembly should consider the adoption of a state-wide, comprehensive Housing Code so that there would be no uncertainty surrounding the landlord's duties and tenant's rights relative to maintaining habitable premises under the new Act.

C. Tenant Obligations

Aside from statutory provisions pertaining to waste, Virginia prior to the new Act had not articulated the tenant’s obligations. The Housing Commission study revealed that the particular areas of controversy have been: (1) the extent to which tenants are responsible to maintain their unit, (2) the types of rules and regulations that landlords may enforce and (3) the ability of tenants to deny access to landlords. In establishing minimum standards for tenant behavior, the Act attempts to solve these related problems.

The new law establishes that the essence of the tenant’s duty is: (1) to occupy the premises as a “dwelling unit” only, (2) to maintain the premises in as clean and safe condition as it permits, and (3) to use the premises in such a manner so as not to disturb the neighbors’ peaceable and quiet enjoyment. The tenant must also acquiesce to the landlord’s regulations providing they are clearly explained, uniformly applied and designed for the welfare of tenants or protection of the landlord’s property. Finally, the tenant cannot unreasonably withhold consent from the landlord to enter the premises if the landlord gives reasonable notice and has a legitimate reason.

The tenant’s obligations under the Act fills what the Commission found to be a troublesome void in the law and, on the whole, appears fair, reasonable and sufficiently articulate, yet still flexible enough to handle the variable problems for which it will be called into use. However, there remains one gray area which may lead to future controversy over the dividing line between the tenant’s obligation to keep the premises clean and safe and the landlord’s obligation to keep the premises in a fit and habitable condition. The Act specifies certain particulars which come under these respective obligations, but beyond this any serious problems will have to be resolved through judicial interpretation.

29. Id. at § 55-211, -216 (1950).
31. VA. CODE ANN. § 55-248.19 (effective July 1, 1974).
32. Id. at § 55-248.16(2).
33. Id. at § 55-248.16(7).
34. Id. at § 55-248.16(a)(1), (3).
35. Id. at § 55-248.8(a).
D. Tenant's Remedies

Among the needs most vocalized by tenants at the Housing Commission's Public Hearings, was the need for an adequate means to insure landlord compliance with rental agreements, particularly provisions relating to the tenant's life, health and safety. Other jurisdictions have followed one of three approaches in remediing the landlord's material breach in this area. Prior to the new Act, Virginia might have been counted with those states that allow the tenant to make repairs resulting from the landlord's breach and deduct the expense from rent since an obscure health statute requires the landlord to provide an adequate privy closet, and upon failure to do so, allows the tenant to supply one and deduct the expense from rent. The new Act does not extend the tenant's remedies along these lines, but on the contrary, allows the landlord to add to rent the cost of certain repairs and services for which the tenant is responsible. Some states have traditionally used rent abatement statutes as a tenant remedy, but the new Act permits the tenant to abate rent only when the landlord fails to deliver possession at the beginning of the term.

The Virginia Residential Landlord and Tenant Act emphasizes the rent escrow approach to the problem, a concept completely new to the Commonwealth. The Act allows the tenant to pay rent into a judicial escrow account. Such payment constitutes a valid defense to an action by the landlord for rent providing he has breached a material obligation under the lease or implied by law, or a threat to life, safety or health exists for which he is responsible. In order for the tenant to avail himself of this remedy, he must have notified the landlord of the breach by certified mail and allowed him a reasonable time in which to rectify the situation. The Act gives the court wide discretion in disposing of rent escrow cases. In accordance with its findings, it may: (1) terminate the lease, (2) order all moneys in escrow to the landlord or tenant as deserved, (3) disburse the money to a contractor chosen by the landlord to make repairs or (4) continue the account until the complained of conditions are remedied. Notwithstanding the above, if the landlord makes no reasonable attempt to remedy the condition within six months, all the money in the escrow ac-

37. See the section on Rent supra.
38. VA. CODE ANN. § 32-64 (1950).
39. Id. at § 55-248.32.
40. Id. at § 55-248.22.
41. Id. at § 55-248.27. See generally the section on Rent supra.
42. VA. CODE ANN. § 55-248.25 (effective July 1, 1974).
43. Id. at § 55-248.25(1).
In addition to the escrow remedy, the tenant, upon meeting certain conditions precedent, can respond to the landlord's breach by terminating the rental agreement. The tenant must give the landlord written notice to cure the breach or quit. In thirty days from receipt of such notice the term will automatically end unless the breach is cured within the first twenty-one days of the notice period.\textsuperscript{45} Where the breach is cured within such time, the tenant may not terminate, but he is still allowed actual damages, and reasonable attorney's fees if the breach is willful.\textsuperscript{46}

The tenant is also provided with ample remedies to protect himself from unlawful eviction from the premises, either actually or constructively through interruption of essential services.\textsuperscript{47} The tenant can not only regain possession but recover actual damages and reasonable attorney's fees which is new to our law.

The Act's provisions relating to tenant remedies supply at least minimal means to secure the rights and protect the well being of tenants. Moreover, it gives protection to tenants who rightfully take advantage of these remedies. Landlords cannot increase rents, decrease services, seek possession or cause the tenant to quit for a period of six months after the tenant has complained to or filed suit against the landlord for failure to maintain fit premises.\textsuperscript{48} It deserves mention that the Act also provides safeguards against tenant abuse of these remedies.

\textbf{E. Landlord Remedies}

A point which is often insufficiently emphasized is that landlords too have problems with their tenants. Two of the difficulties most often aired by Virginia landlords are their inability to readily reacquire the leased premises when it is within their right and to collect overdue rent.\textsuperscript{49} Alternatively, tenants have complained of harsh remedies which enable the landlord to take unfair advantage of minor breaches of the rental agreement.\textsuperscript{50}

One of the areas in which there has been controversy is where the tenant breaks a covenant in the lease and the landlord exercises his right to terminate the tenancy by giving notice to quit. Prior to the newly enacted

\begin{itemize}
\item[44.] \textit{Id.}\ at \texttt{§ 55-248.29(h)}.
\item[45.] \textit{Id.}\ at \texttt{§ 55-248.21}.
\item[46.] \textit{Id.}\ at \texttt{§ 55-248.31}.
\item[47.] \textit{Id.}\ at \texttt{§ 55-248.26}.
\item[48.] \textit{Id.}\ at \texttt{§ 55-248.39}.
\item[50.] \textit{Id.}\end{itemize}
legislation, the landlord could exercise his right immediately upon giving such notice.\textsuperscript{51} This worked a hardship on the tenant who could be ousted in summary fashion without an opportunity to correct the situation no matter how insignificant the breach. The new Act attempts to remedy this problem by giving the tenant a twenty-one day grace period after receiving notice of the landlord’s intent to terminate in which to correct the breach and thereby preclude termination.\textsuperscript{52} If the tenant fails to remedy the problem within this time, the landlord, upon expiration of thirty days after the written notice, may have a claim for possession, for past due rent and a separate claim for actual damages.\textsuperscript{53}

In its effort to protect the tenant from an unwarranted eviction, the Act may have gone too far. Since the tenant can save his tenancy by timely cure of the breach, he is less apt to be concerned about compliance with his obligations even though he may run the less inhibiting risk of paying damages and attorney’s fees when the landlord is not left whole after the tenant’s cure. Thus, if the twenty-one day grace period becomes common knowledge to tenants, landlords may be burdened with perpetual abusers who repeatedly take advantage of this provision. A solution may be to allow use of the grace period only a limited number of times. As it is, the new Act appears to have overcompensated for the tenant’s previous undesirable position to the unfair disadvantage of the landlord.

Noteworthy is the fact that the twenty-one day grace period is not a condition precedent to termination of the lease for failure to pay rent. The newly enacted legislation reiterates the old law allowing the landlord to terminate the rental agreement upon failure to pay rent within five days after written notice.\textsuperscript{54} This lack of change is somewhat understandable. Failure to pay rent when due is probably the most frequently occurring tenant abuse. Allowing repeated abusers a three week grace period time and again in which to pay overdue rent would be patently unfair to the landlord who too has monetary deadlines to meet and often relies on timely rental payments therefore. But one must also consider the law’s effect, for instance, on the old timer whose social security check is late as usual and whose unscrupulous landlord is anxious to be rid of him knowing that market conditions are such that he can substantially hike the rent on the next lease. The landlord in such a case may dutifully hand-deliver notice to quit the day after rent is due and have the old timer out and the premises ready to be re-rented by the end of that same week. Perhaps it

\textsuperscript{52} Va. Code Ann. § 55-248.31 (effective July 1, 1974).
\textsuperscript{53} Id.
\textsuperscript{54} Id.
would have been wiser if the grace period for paying overdue rent was codified as a "reasonable time" with a statutory presumption that beyond five days would be unreasonable. This would not only be fair to the landlord who is entitled to prompt payment of rent in the majority of cases, but would also protect the tenant in the occasional hard case.

In general, the new Act provides the landlord with ample means to right the tenant's wrong. He can, upon giving the tenant written notice, recover actual damages, obtain injunctive relief or directly require the tenant to remedy any material non-compliance with the rental agreement at the risk of forfeiture plus damages for failure to do so. If the breach is willful, reasonable attorney's fees may be recovered. The landlord can take additional measures if the tenant's misuse of the premises creates a serious health or safety hazard. Where the tenant fails to rectify the situation within fourteen days of the landlord's notice, or sooner in case of an emergency, the landlord may enter the premises, repair the dangerous condition and add the cost or value of services to the tenant's rent. These additional measures appear fair considering that the health and safety of all the tenants and their neighbors are at stake. However, the act does not define nor say who is to decide what is a serious health or safety hazard and when an emergency situation exists. If the discretion in these matters is to be left to the landlord, it is at once obvious that potential for abuse and harassment exists.

F. Conclusion

The stated purpose of the Act is to (1) simplify, clarify and modernize landlord-tenant law, (2) encourage landlords and tenants to maintain and improve the quality of housing and (3) to establish a single body of law relating to landlord-tenant relations throughout the Commonwealth. One would not likely take issue with the soundness of these objectives; indeed any discussion thereon would ultimately lead to an irresolvable question of values. Whether or not the intended purpose has been carried out is the important and more objectively answerable question. Unfortunately, the answer is a qualified no; qualified because the Act has taken some significant steps forward in revising the law to insure and improve quality housing in rental dwellings. The provisions relating to habitability of the premises, rent escrow and retaliatory eviction are prime examples. However, too many archaic laws have remained unchanged and too many gray areas have remained gray. To some extent this is a reflection of unpromising

55. Id.
56. Id.
57. Id. at § 55-248.32.
political realities. Two of the Act's more critical problem areas have resulted from changes made in the General Assembly. First, the proposed Act was amended to exclude from its application natural persons owning ten or less single family residences. Maintaining two bodies of law not only frustrates the express purpose of the Act, but inequitably denies the advantages of the new law to a group of landlords and tenants who in some instances may be the most apt to need its protection. Second, deleted in the Assembly was a provision in the proposed Act requiring that the rental agreement be conscionable. This is particularly unfortunate because demanding the requirement of conscionability would have given the court an equitable basis upon which to resolve the many aspects of the landlord-tenant relationship to which the Act does not address itself.

A problem which plagues the new Act is poor draftsmanship. The very fact of codification, by virtue of generally categorizing the parties' obligations and remedies aids in clarifying and simplifying the law, but beyond this the Act does little to set aside, and in some instances, adds to the confusion of prior case law. Its imprecise language creates unnecessary difficulty in gleaning the legislative intent and interpreting its affect on technical areas of prior law.

The Act does have saving grace. It would not be accurate to say that it has modernized the law because a substantial part of the Act is a mere codification of pre-existing law. Yet, as pointed out in the previous analysis, there have been a number of significant changes. More important, the Act represents a starting point for further progress. Landlord-tenant law has at least broken away from the shackles of common law conveyancing principles and the door is now open from which to leave ancient history and align the law with the contemporary realities of an urban oriented society.