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Annual Survey of Virginia Law: Property Law

W. Wade Berryhill
University of Richmond

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PROPERTY LAW

*W. Wade Berryhill**

I. INTRODUCTION

As legal years go, action on the 1996 legislative and judicial fronts was relatively quiet in the area of property law. The legislative activity which spawned most of the interest was bills addressing the definitional limits of the unauthorized practice of law in real estate closings. These bills were not enacted and have been carried over for the next legislative session.

Several judicial decisions, although none could be described as landmark determinations, are of interest and clarify points of law. These cases, as well as selected items of legislation which are believed to be of the most practical interest to the practitioner, are what follow.

II. LEGISLATION

A. *Recordings and Closings*

Virginia Code sections 17-83.1:1 to -83.1:4 were added to provide for the electronic filing of documents in those counties where a circuit court clerk has established a system for receiving electronically transmitted information.¹ Interestingly, the statute provides that its provisions expire on July 1, 1998.²

* Professor of Law, T.C. Williams School of Law, University of Richmond. B.S., 1967, Arkansas State University; J.D., 1972, University of Arkansas; LL.M., 1976, Columbia University. The author wishes to thank Duane Deskovich (J.D., 1996, T.C. Williams School of Law, University of Richmond) and Stephen M. Faraci (Candidate, J.D., 1998, T.C. Williams School of Law, University of Richmond) for their generous assistance on this article.

1. VA. CODE ANN. §§ 17-83.1 to -83.1:4 (Repl. Vol. 1996).

2. *Id.*

Virginia Code sections 6.1-2.13 and 6.1-2.13:1 were amended to provide for the disbursement of funds prior to recordation of documents if such funds were: (a) overpayments; (b) recordation fees; or (c) funds which the provider, by separate instrument, has directed disbursement prior to recordation.³

Further, Virginia Code section 38.2-4614 was amended to prohibit the receipt of or payment of kickbacks or rebates by real estate agents, attorneys, settlement agents or lenders incident to real estate settlement.⁴ Title insurance companies are similarly prohibited from paying or receiving such kickbacks, rebates or commissions.⁵

The procedure for the release of deeds of trust and liens has been simplified by amendment to section 55-66.3. One need only to file an affidavit, which states that the debt has been paid, together with the certificate of satisfaction.⁶ It is no longer necessary to produce the canceled note before the circuit court clerk to provide evidence of a lost note.

Notice to potential purchasers of a lien against the property for a local assessment, fee, rent or charge (other than real estate taxes) may now be provided by recording in either the judgment lien book in the circuit court clerk's office, or in the records maintained by the local treasurer for real estate tax liens pursuant to section 58.1-3930.⁷

Broker's liens for any unpaid rents are now limited to the lesser of either the rent to be paid during the term of the lease or the amount of rent to be paid during the first twenty years of the lease.⁸

Virginia Code section 17-59 was amended to provide that the clerk of the circuit court may refuse to record any document

3. VA. CODE ANN. §§ 6.1-2.13, -2.13:1 (Cum. Supp. 1996).

4. VA. CODE ANN. § 38.2-4614 (Cum. Supp. 1996).

5. *Id.*; see also W. WADE BERRYHILL, VIRGINIA REAL ESTATE CLOSINGS WITH FORMS § 1-3 (2d ed. Supp. 1996), (Supp. 1996).

6. VA. CODE ANN. § 55-66.3 (Cum. Supp. 1996). The suggested form in the statute for the certificate of satisfaction was also modified. See VA. CODE ANN. § 55-66.4:1 (Cum. Supp. 1996).

7. VA. CODE ANN. § 15.1-37.3:13 (Cum. Supp. 1996).

8. VA. CODE ANN. § 55-527 (Cum. Supp. 1996). The former limit could not exceed the lesser of the amount paid during the term of the lease or the amount paid during the first five years under the lease. VA. CODE ANN. § 55-527 (Repl. Vol. 1995).

unless the first page of the instrument bears the name of the person or entity who drafted the instrument.⁹ Documents prepared outside of the Commonwealth may be recorded without the notation.¹⁰

B. *Conveyances and Foreclosures*

Two bills enacted by the general assembly changed the manner and time for accounting after a sale, and one item of legislation expanded the validity of conveyances made by foreign executors.

Virginia Code section 26-15 was amended to increase from four months to six months the time in which a trustee under a recorded deed of trust must file an account of sale to the commissioner of accounts.¹¹

Section 64.1-184 was amended to permit distribution of sale proceeds within a one-year period after the decedent's death upon the posting of a bond with surety to secure any potential claims against the decedent's property.¹²

Sections 64.1-149 and 64.1-150 were amended to validate conveyances of real estate made in the Commonwealth prior to and after June 30, 1986 by foreign executors.¹³ The sections previously affected only conveyances made prior to or after June 30, 1960.¹⁴

An amendment to section 17-79.3 added Fauquier, Montgomery and Spotsylvania to the list of counties where the clerk of the circuit court may require that deeds and other real estate documents bear the tax map references in the left margin of the first page of the instrument.¹⁵

9. VA. CODE ANN. § 17-59 (Repl. Vol. 1996).

10. *Id.*

11. VA. CODE ANN. § 26-15 (Cum. Supp. 1996).

12. VA. CODE ANN. § 64.1-184 (Cum. Supp. 1996).

13. VA. CODE ANN. §§ 64.1-149, -150 (Cum. Supp. 1996).

14. VA. CODE ANN. §§ 64.1-149, -150 (Repl. Vol. 1995).

15. VA. CODE ANN. § 17-79.3 (Repl. Vol. 1996).

C. *Disclosure and Disclaimer Forms*

The disclosure and disclaimer forms required to be furnished to residential real estate purchasers must now contain a notice to purchasers that the vendor makes no representations as to any parcels adjacent to the subject parcel.¹⁶ The notice must also advise purchasers to exercise whatever due diligence that the purchaser deems necessary with respect to adjacent parcels.¹⁷

D. *Fixtures*

Now included in the definition of items deemed permanently annexed to the freehold are underground or field-constructed above-ground storage tanks and connected dispensing equipment.¹⁸

E. *Condominiums*

Two bills amended the requirements for public offering statements and expressly authorized the power of condominium unit owners' associations to limit the number of persons who may occupy a condominium unit.¹⁹

Public offering statements must now contain a statement of any limitation on the number of persons who may occupy a unit and a statement listing the facilities or amenities which are defined as common elements.²⁰ Such statements must be found in the condominium instruments which are available for a purchaser's use.²¹ Further, such statements must include whether any charges or fees are required for use of facilities.²²

16. VA. CODE ANN. § 55-519 (Cum. Supp. 1996).

17. *Id.*

18. VA. CODE ANN. § 43-2 (Cum. Supp. 1996).

19. *See* VA. CODE ANN. § 55-79.80:3 (Cum. Supp. 1996).

20. VA. CODE ANN. § 55-79.90(a)(10), (11) (Cum. Supp. 1996).

21. *Id.*

22. VA. CODE ANN. § 55-79.90(a)(10) (Cum. Supp. 1996).

F. *Building Code*

The period of time for discovery of violations under the Uniform Statewide Building Code has been increased from one year to two years from the date of initial occupancy or use after construction of the building or structure, or the issuance of a certificate of use and occupancy for the building or structure, whichever is later.²³ However, the time to commence prosecutions under section 36-106 relating to the maintenance of existing buildings or structures as contained in the Uniform Statewide Building Code has been reduced from two years to one year after the discovery of the offense.²⁴

III. JUDICIAL DECISIONS

A. *Zoning*

The Supreme Court of Virginia reaffirmed its longstanding rule of the presumptive validity given to legislative action of a city when dealing with zoning decisions in *City Council of Salem v. Wendy's of Western Virginia, Inc.*²⁵ In *Wendy's of Western Virginia*, the supreme court considered whether the reasonableness of the existing zoning on the subject property was fairly debatable. The supreme court reversed the trial court, holding that the City of Salem's legislative action in denying the rezoning petition was reasonable, and not arbitrary and capricious.²⁶

In *Donovan v. Board of Zoning Appeals*,²⁷ the supreme court rejected a decision by the Board of Zoning Appeals of Rockingham County which had determined that Donovan's failure to screen his automobile graveyard invalidated the non-conforming use of his property. The county code provision at

23. VA. CODE ANN. § 19.2-8 (Cum. Supp. 1996); see VA. CODE ANN. 36-106 (Repl. Vol. 1996).

24. VA. CODE ANN. § 19.2-8 (Cum. Supp. 1996); see VA. CODE ANN. 36-106 (Repl. Vol. 1996).

25. 252 Va. 12, 471 S.E.2d 469 (1996).

26. *Id.* at 17-18, 471 S.E.2d at 472-73.

27. 251 Va. 271, 467 S.E.2d 808 (1996).

issue did not specifically provide for the loss of a non-conforming use for the failure to screen an automobile graveyard. The supreme court refused to extend the county code provision by implication, finding that "a provision requiring that a particular nonconforming use be screened from public view is not the same as a provision invalidating the nonconforming use itself for failure to comply with the screening requirement."²⁸

Virginia Code sections 15.1-491.1 to -491.2 empowers a locality to enact a zoning ordinance that "may include and provide for the voluntary proffering . . . by [a zoning applicant] of reasonable conditions."²⁹ At issue in *Board of Supervisors v. Reed's Landing Corp.*³⁰ was whether the Board of Supervisors' demand of a cash proffer violated the code section by imposing an unlawful restriction on the developer. The supreme court affirmed the trial court's holding that the Board imposed an unlawful condition on the developer, because the clear, unambiguous language of the code section states that proffers of conditions must be made voluntarily.³¹

B. *Dedication*

The issue in *McNew v. McCoy*³² was whether an access road to the plaintiff's property was dedicated as a public road. The supreme court held that where no dedication is declared, acceptance of the land by the public could be formal and express, as by the enactment of a resolution by the appropriate governing body, or by implication arising from either an exercise of dominion by the governing authority or from long continued public use of requisite character.³³ In *McNew*, there was neither a formal enactment of a resolution by the governing body nor an implied dedication arising from exercise of dominion over the road by the governing body. The supreme court, in rejecting the plaintiff's implied dedication argument, noted that the "doctrine

28. *Id.* at 275, 467 S.E.2d at 811.

29. *Board of Supervisors v. Reed's Landing Corp.*, 250 Va. 397, 398, 463 S.E.2d 668, 668 (1995); VA. CODE ANN. §§ 15.1-491.2, -491.2:1 (Repl. Vol. 1989 & Cum. Supp. 1996).

30. 250 Va. 397, 463 S.E.2d 668 (1995).

31. *Id.* at 400, 463 S.E.2d at 670.

32. 251 Va. 297, 467 S.E.2d 477 (1996).

33. *Id.* at 299-300, 467 S.E.2d at 478.

of implied acceptance only applies in urban areas. "[A] formal acceptance or express assertion of dominion over the road by public authority is required before dedication of a rural road is complete."³⁴

C. Premises Liability

At issue in *Burns v. Johnson*³⁵ was whether a gasoline station, as an owner of a parcel of land, owed a duty to protect the plaintiff from a third party's criminal act. In holding that the plaintiff had failed to establish that the defendant owed her a duty, the supreme court reaffirmed the well-settled rule that "the owner or occupier of land ordinarily is under no duty to protect an invitee from a third person's criminal act committed while the invitee is upon the premises."³⁶ The supreme court determined that the facts did not show "notice of a specific danger just prior to the assault," so as to fit it within the limited exception to the general rule established in *Wright v. Webb*.³⁷

D. Easements

1. Express Easements

In *Collins v. Fuller*,³⁸ the supreme court reversed the trial court's decree that limited the Collins' use of a right of way to the laying of a pipeline across the Fuller's land in order to access a spring.³⁹ The supreme court cited *Cushman Corp. v. Barnes*⁴⁰ for the proposition that an express easement that makes no limitations, at the time of the grant, as to the method to be employed may be used for any purpose to which the dominant estate may be devoted.⁴¹

34. *Id.* at 300, 467 S.E.2d at 479 (quoting *E.S. Chappell & Son, Inc. v. Brooks*, 248 Va. 571, 574, 450 S.E.2d 156, 158 (1994)).

35. 250 Va. 41, 458 S.E.2d 448 (1995).

36. *Id.* at 44, 467 S.E.2d at 450 (quoting *Gupton v. Quicke*, 247 Va. 362, 363, 442 S.E.2d 658, 658 (1994)).

37. *Id.* (quoting *Wright v. Webb*, 234 Va. 527, 533, 362 S.E.2d 919, 922 (1987)).

38. 251 Va. 70, 466 S.E.2d 98 (1996).

39. *Id.* at 72, 466 S.E.2d at 99.

40. 204 Va. 245, 129 S.E.2d 633 (1963).

41. 251 Va. at 72, 466 S.E.2d at 99 (citing *Cushman*, 240 Va. at 253, 129 S.E.2d

2. Prescriptive Easement

To establish an easement by prescription, a party must show that his use of a right of way has been adverse, under a claim of right, exclusive, continuous, uninterrupted, with the knowledge and acquiescence of the owners of the land, and that such use has continued for at least twenty years.⁴² The key issue in *Chaney v. Haynes*⁴³ was whether use could be shown to be adverse by a claimant's mistaken belief of a recorded right. The claimants in *Chaney* were holders of an express easement across a lot adjacent to Chaney's land. Mistakenly, they had used the land now owned by Chaney to access a public road and the York River. The Supreme Court of Virginia denied the claim, holding that use of the right of way under a mistaken belief cannot be adverse.⁴⁴ The claimants therefore failed to establish an easement by prescription.

3. Express Easements

In *Buxton v. Murch*⁴⁵ the supreme court held: (1) an express easement could be and was created by a 1939 court decree ordering the sale of lots in a subdivision owned by an incompetent;⁴⁶ (2) the location of the easement could be changed by the consent and acquiescence of the lot owners;⁴⁷ and (3) although the 1939 decree stated that the easement was for owners of lots along three streets in the subdivision for access to the river, the easement was ruled to be for the benefit of all of the owners of lots along these streets without regard to whether the lots were waterfront or non-waterfront lots.⁴⁸

In *Davis v. Henning*,⁴⁹ the supreme court considered the issue of the supposed revival of an extinguished express ease-

at 639-40).

42. *Ward v. Harper*, 234 Va. 68, 70, 360 S.E.2d 179, 181 (1987).

43. 250 Va. 155, 458 S.E.2d 451 (1995).

44. *Id.* at 159, 458 S.E.2d at 453.

45. 249 Va. 502, 457 S.E.2d 81 (1995).

46. *Id.* at 507, 457 S.E.2d at 84.

47. *Id.* at 508, 457 S.E.2d at 84.

48. *Id.* at 510, 457 S.E.2d at 85.

49. 250 Va. 271, 462 S.E.2d 106 (1995).

ment. In *Davis*, a tract of land that had been previously divided into two parcels was joined and then divided again into the same two previously separate parcels by deed containing the language: "subject to [an] easement [in a prior] deed."⁵⁰ The supreme court held that the language in the deed did not create an express easement by those words, but instead referred to a former easement which had been extinguished by the merger of the tract when the two parcels were joined as one.⁵¹ The division did not revive the earlier, now extinguished, easement.⁵²

The supreme court further held that an easement by necessity, for a right of way, was created at the time of the division since the interior parcel would have been landlocked.⁵³ The fact that the claimant of the easement was a purchaser of the interior parcels under an installment sales contract and not yet the title holder, did not prevent the claimant from claiming an easement by necessity.⁵⁴

E. *Fraudulent Conveyances*

Twice in the past year, the Supreme Court of Virginia was asked to determine the validity of a conveyance of real property by deed when creditors sought to have the transfer declared void. An existing creditor may seek to void a transfer of property by the debtor under either of two theories: (1) transfers made for the purpose of defrauding creditors; and (2) transfers made without receipt of valuable consideration where the debtor is insolvent or becomes insolvent as a result of the transfer. Under the second theory, fraud or malicious intent need not be proved.⁵⁵ In the first case, *Hudson v. Hudson*,⁵⁶ relief sought under Virginia Code section 55-81 was denied because the plaintiff did not establish that the decedent was rendered insolvent at the time of the transfer.⁵⁷

50. *Id.* at 274, 462 S.E.2d at 107.

51. *Id.* at 275, 462 S.E.2d at 108.

52. *Id.*

53. *Id.* at 276, 462 S.E.2d at 108-09.

54. *See Id.* at 273, 276, 462 S.E.2d at 107, 109.

55. VA. CODE ANN. §§ 55-80 to -82 (Repl. Vol. 1995 & Cum. Supp. 1996).

56. 249 Va. 335, 455 S.E.2d 14 (1995).

57. *Id.* at 341, 455 S.E.2d at 17-18.

In the second case, *Balzer & Associates v. Lakes on 360, Inc.*,⁵⁸ the supreme court reversed the trial court, distinguishing the two theories by saying that although proof of fraud is necessary under Virginia Code section 55-80, under section 55-81 fraud is not a required element of proof.⁵⁹ The case was then remanded to determine whether the transfer rendered the debtor insolvent.

F. *Eminent Domain*

Generally, when a portion of a tract of land is taken by eminent domain, the owner is entitled to recover damages to the remainder of that land, but is not entitled to damages to separate, independent tracts. An exception to this general rule is the unity of lands doctrine, which requires that three factors be shown: (1) unity of use, (2) physical unity, and (3) unity of ownership.⁶⁰ In *Bogese, Inc. v. State Highway & Transportation Commissioner*,⁶¹ a case of first impression, the supreme court rejected the authority in jurisdictions which hold that "two parcels, each owned by a different entity, may be considered as a single parcel to establish unity of ownership when the entities are integrated by family ownership, business purpose, and actual practice."⁶² Instead, the supreme court held that the transfer of a portion of the property, after notice of intent to condemn by the Virginia Department of Transportation,⁶³ did not satisfy the unity of ownership factor so as to fall within the exception.⁶⁴ In *Bogese*, the transfer was from a corporation to a partnership, where the partners were also the sole stockholders of the corporation.

58. 250 Va. 527, 463 S.E.2d 453 (1995).

59. *Id.* at 531, 463 S.E.2d at 455; see also *Consolidated Tramway Co. v. Germania Bank*, 121 Va. 331, 335-36, 93 S.E. 572, 573 (1917) (distinguishing fraudulent and voidable deeds in relation to prior and subsequent creditors); *Witz, Beidler & Co. v. Osburn*, 83 Va. 227, 299, 2 S.E. 33, 34-35 (1887) (distinguishing fraudulent and voidable voluntary transfers).

60. See *Virginia Elec. and Power Co. v. Webb*, 196 Va. 555, 566, 84 S.E.2d 735, 741-42 (1954).

61. 250 Va. 226, 462 S.E.2d 345 (1995).

62. *Id.* at 229, 462 S.E.2d at 347.

63. *Id.*

64. *Id.* at 231, 462 S.E.2d at 348.

In *Wammco, Inc. v. Commonwealth Transportation Commissioner*,⁶⁵ the Supreme Court of Virginia affirmed the decision of the trial court to exclude proffered evidence of adjustment costs necessary to permit the development of remaining property, in its changed condition, as a result of the taking.⁶⁶ The majority of the supreme court agreed with the trial court that the off-site improvements and acquisition of adjacent lands necessary to develop the land were too speculative.⁶⁷ The three justice dissent reflected the view that the proffered evidence exhibited conditions reflecting the impact of the taking on the remaining property and conditions necessary to adapt the property to its highest and best use.⁶⁸

G. Deeds

1. Covenants of Title

Pursuant to Virginia Code section 8.01-83, when partition cannot be conveniently accomplished, a grantee is permitted to take the entire property by allotment and pay the other parties and owners such sums of money as they may be entitled to based upon their respective interests.⁶⁹ The Supreme Court of Virginia applied this statute to the facts in *Richmond v. Hall*.⁷⁰ In this case, the grantee had in reality only purchased a one-tenth interest and four life estates instead of the fee simple as he believed. The grantee sued the grantor for breach of warranties in the general warranty deed. The supreme court awarded offsets of the value of the remaindermen's interests, for which the grantee had to pay, against a purchase money deed of trust given to the grantor/vendor by the grantee/purchaser.⁷¹

65. 251 Va. 132, 465 S.E.2d 584 (1996).

66. *Id.* at 136, 137, 465 S.E.2d at 586.

67. *Id.* at 136, 138, 465 S.E.2d at 586, 587.

68. *Id.* at 140, 465 S.E.2d at 588.

69. VA. CODE ANN. § 8.01-83 (Cum. Supp. 1996).

70. 251 Va. 151, 466 S.E.2d 103 (1996).

71. *Id.* at 161, 466 S.E.2d at 108.

2. Rescission

In *Virginia Natural Gas Co., Inc. v. Hamilton*,⁷² the supreme court refused to rescind a utility easement that was alleged to have been obtained through fraud, misrepresentation and mistake.⁷³ The Virginia Natural Gas Co., Inc. ("VNG") sought an easement from the trustees of the land in question. A survey was conducted and the line of the proposed easement was delineated. At a public meeting, Hamilton attempted to determine which portions of the trust land would be affected by the easement and the value of the land affected. During negotiations, VNG employees represented that the easement would lie in the flood plain and as a result, \$2,450 was paid for the easement. Shortly thereafter, a surveyor's error was discovered and VNG sought reformation of the deed. The trustees sought rescission of the deed based upon mutual mistake of fact, fraud and misrepresentation. The supreme court overturned the trial court's grant of partial rescission for mutual mistake of fact because it was impermissibly beyond the scope of the pleadings.⁷⁴ In addition, the supreme court held that the trustees failed to carry their burden for fraud and misrepresentation as there was no evidence that VNG knowingly and intentionally misrepresented the location of the easement.⁷⁵ Although the value of the easement and the consideration paid were grossly disproportionate, the supreme court gave no remedy because the trustees could have, through the exercise of reasonable care, protected themselves.⁷⁶

3. Construction

In *Vicars v. First Virginia Bank-Mountain Empire*,⁷⁷ a deed described in detail seven tracts, by reference to deed book and acreage.⁷⁸ The deed further stated that "the intention of this

72. 249 Va. 449, 457 S.E.2d 17 (1995).

73. *Id.* at 457, 457 S.E.2d at 22.

74. *Id.* at 454, 457 S.E.2d at 20.

75. *Id.* at 455, 457 S.E.2d at 21.

76. *Id.* at 456, 457 S.E.2d at 21-22.

77. 250 Va. 103, 458 S.E.2d 293 (1995).

78. *Id.* at 106, 458 S.E.2d at 295.

deed is to convey all the rights, title and interest acquire[d] by [the grantor] from the wife and heirs of Milburn Gilliam's estate."⁷⁹ The supreme court held that this language did not include other tracts, also acquired from the heirs of Gilliam, which were not described in the deed.⁸⁰ The supreme court further held that the plaintiffs were prevented from claiming trespass because the plaintiff's attorney had sent a letter to the defendants stating, in part, "my clients do not wish to impede the mining on the tract while these title questions are being reviewed," notwithstanding the fact that the plaintiffs prevailed on the issue of title.⁸¹

H. *Inverse Condemnation*

In *Richmond, Fredericksburg & Potomac Railroad Co. v. Metropolitan Washington Airports Authority*,⁸² the plaintiff, R, F & P, asserted that its property, which fell into the "clear zone" at the end of a runway for Washington National Airport, had been taken due to the overflight of the property by aircraft, coupled with height restrictions on the property and the prohibition of developments in the clear zone. The supreme court, quoting *United States v. Causby*,⁸³ rejected the inverse condemnation claim by reaffirming the long-standing rule that overflights constitute a taking only when those overflights are "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of land."⁸⁴ Furthermore, the supreme court found that the plaintiff abandoned its plans for an office building development in the clear zone due to market conditions and physical problems, rather than interference by the Airports Authority's restrictions.⁸⁵

79. *Id.* (first alteration in original).

80. *Id.* at 107-08, 458 S.E.2d at 296.

81. *Id.* at 108, 458 S.E.2d at 296.

82. 251 Va. 201, 468 S.E.2d 90 (1996).

83. 328 U.S. 256, 266 (1946).

84. *Richmond, Fredericksburg & Potomac R.R.*, 251 Va. at 213, 468 S.E.2d at 97 (quoting *Causby*, 328 U.S. at 266).

85. *Id.* at 214, 468 S.E.2d at 97.

I. *Landlord and Tenant*

The supreme court declared in *Johnson v. Marcel*⁸⁶ that a landlord committed a common law trespass when he changed the locks, removed the telephone wall socket, and blocked his tenants' driveway.⁸⁷ The supreme court stated that the landlord had no right to enter the premises without the plaintiffs' consent, as the tenants had the right to possession.⁸⁸

J. *Restrictive Covenants (Group Homes)*

In *Trible v. Bland*,⁸⁹ the Supreme Court of Virginia held that Virginia Code section 15.1-486.3⁹⁰ is not a cap on the number of people who could live in such a dwelling.⁹¹ A more expansive definition of a group home is permitted by localities.⁹² In this action, the Town of West Point had issued a certificate of occupancy for no more than twenty-one residents. The supreme court stated that occupancy was not limited by the zoning enabling act to authorize homes of only eight persons in a group home.⁹³ A dissent by the Chief Justice stated that the majority's holding violated the statute by allowing group homes of more than eight disabled persons in a residential district.⁹⁴

Although, as a matter of principle, statutes are generally presumed to be prospective in application, the supreme court in *Sussex Community Services Ass'n v. Virginia Society for Mentally Retarded Children, Inc.*⁹⁵ held that Virginia Code section 36-

86. 251 Va. 58, 465 S.E.2d 815 (1996).

87. *Id.* at 60, 465 S.E.2d at 817.

88. *Id.*

89. 250 Va. 20, 458 S.E.2d 297 (1995).

90. Virginia Code § 15.1-486.3 provides in pertinent part that a residential facility in which no more than eight mentally ill, mentally retarded or developmentally disabled persons reside for the purposes of local zoning ordinances shall be considered residential occupancy by a single family. VA. CODE ANN. § 15.1-486.3 (Cum. Supp. 1996).

91. *Trible*, 250 Va. at 24, 458 S.E.2d at 299.

92. *Id.* at 24-25, 458 S.E.2d at 299.

93. *Id.* at 24, 458 S.E.2d at 299.

94. *Id.* at 26, 458 S.E.2d at 300.

95. 251 Va. 240, 467 S.E.2d 468 (1996).

96.6 applies retroactively.⁹⁶ The supreme court applied the current version of section 36-96.6(C), as amended in 1991, to covenants recorded in 1975.

K. *Real Estate Contracts*

In *High Knob Associates v. Douglas*,⁹⁷ the supreme court held the Virginia Subdivided Land Sales Act of 1978 ("SLSA"),⁹⁸ which would have required the transfer of common areas to lot owners' association when seventy-five percent of the subdivision lots were sold, did not apply to the subdivision in question.⁹⁹ The contracts for the sale of the lots of the subdivision were not within the definition of a land sales installment contract pursuant to the SLSA.¹⁰⁰ In this instance, title was transferred to purchasers before the completed performance of payments under the contracts. In the classic definition of an installment contract, the vendor retains title until payment is completed under a series of installments for the purchase of the property.

The supreme court also addressed several other issues. First, the supreme court held the Housing and Urban Development Statements ("HUD Reports"), given to prospective purchasers pursuant to the (Federal) Interstate Land Sales Full Disclosure Act,¹⁰¹ were incorporated into the contracts of the purchasers.¹⁰² The HUD Reports provided for the transfer of the common areas upon the sale of seventy-five percent of the subdivision lots. Therefore, a vendor's amendment to the bylaws changing the required transfer of common areas upon seventy-five to ninety percent of lots sold was ineffective.¹⁰³ Second, the supreme court held that the landowners' contractual claims were not barred by the five-year statute of limitations since the time of performance under the contract did not occur until

96. *Id.* at 244, 467 S.E.2d at 469.

97. 249 Va. 478, 457 S.E.2d 349 (1995).

98. VA. CODE ANN. §§ 55-337 to -351 (Repl. Vol. 1995 & Cum. Supp. 1996).

99. *High Knob*, 249 Va. at 483, 457 S.E.2d at 352.

100. *Id.* at 484, 457 S.E.2d at 352.

101. 15 U.S.C. §§ 1701-1720 (1994).

102. *High Knob*, 249 Va. at 486, 457 S.E.2d at 354.

103. *Id.* at 487-89, 457 S.E.2d at 354-55.

seventy-five percent of the lots were sold.¹⁰⁴ The statute cannot begin to run until the time of performance has passed.¹⁰⁵ Third, the supreme court held that the HUD Report statement that the common areas were to be transferred to the owners' associations free and clear of encumbrances constituted a contractual obligation of the vendor/developer.¹⁰⁶ Fourth, since the transfer of the common areas was not yet required, there was no adverse impact on the present lienholder, and the trial court correctly determined the lienholder was not a necessary party to this suit.¹⁰⁷ Finally, the calculation of the seventy-five percent threshold of transfer should be based upon the initial transfer of lots, and lots subsequently re-purchased by the vendor should not be used in the calculation.¹⁰⁸

In *Price v. Taylor*,¹⁰⁹ Supreme Court of Virginia upheld the trial court's finding that mutual promises are adequate to constitute consideration for a contract for the sale of land.¹¹⁰ However, the supreme court reversed the trial court on the issues of: (1) whether the evidence produced by the vendor was sufficient to support jury instructions on the issue that the contract was obtained by fraud; and (2) whether admitting the testimony of three attorneys as witnesses was error.¹¹¹ The supreme court stated that admission of the testimony of the attorneys was improper because their statements were conclusions of law in violation of Virginia Code section 8.01-401.3.¹¹²

L. Suretyship

In *Courson v. Simpson*,¹¹³ the Supreme Court of Virginia, in a case of first impression, rejected the decision by the majority in *Colonial American National Bank v. Kosnoski*,¹¹⁴ where the

104. *Id.* at 486-87, 457 S.E.2d at 354.

105. *Id.*, 457 S.E.2d at 353-54.

106. *Id.* at 489, 457 S.E.2d at 355.

107. *Id.* at 489-90, 457 S.E.2d at 355-56.

108. *Id.* at 490-91, 457 S.E.2d at 356.

109. 251 Va. 82, 466 S.E.2d 87 (1996).

110. *Id.* at 84, 466 S.E.2d at 88.

111. *Id.* at 85-86, 466 S.E.2d at 88-89.

112. *Id.* at 86, 466 S.E.2d at 89.

113. 251 Va. 315, 468 S.E.2d 17 (1996).

114. 617 F.2d 1025 (4th Cir. 1980).

Fourth Circuit held that a creditor, upon receiving notice under Virginia Code section 49-26, must sue all solvent, resident debtors and sureties.¹¹⁵ The majority in *Courson* set forth the rule that a creditor need only sue solvent resident principal debtors.¹¹⁶ The supreme court opined that the term "every party" in section 49-26 means only debtors.¹¹⁷ Furthermore, the majority deemed that the debtor was insolvent, which rendered suit unnecessary.¹¹⁸

A three-justice dissent disagreed, based upon the fact that the surety had assigned sums sufficient to cover the debt which were also secured by a deed of trust on the surety's home.¹¹⁹ In addition, the dissent reasoned that "every party" in section 49-26 includes sureties. Thus, the surety should be discharged due to the creditor's failure to sue either the principal debtor or the surety, as is required under the statute after notice is given by the surety.¹²⁰

In *Janus v. Sproul*,¹²¹ the Supreme Court of Virginia held that a letter written to the creditor, on the debtor's corporate letterhead, was an insufficient memorandum under the Statute of Frauds to make the president of the corporation liable as a surety.¹²² Under the Statute of Frauds, promises to pay the debt of another must be expressed in writing.¹²³ Here, the president's oral personal promise was not clearly indicated, as the letter merely acknowledged that a commission owed by the corporation would be paid.¹²⁴

115. *Courson*, 251 Va. at 321, 468 S.E.2d at 21.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 323, 468 S.E.2d at 22.

120. *Id.*

121. 250 Va. 90, 458 S.E.2d 300 (1995).

122. *Id.* at 91-92, 458 S.E.2d at 301.

123. *Id.* at 91, 458 S.E.2d at 301.

124. *Id.* at 92, 458 S.E.2d at 301.

