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CONTRACTS AND SALES

Joseph Curtis*

Legislation

The major legislation enacted in the 1964 regular session of the General Assembly in the field of contracts and sales was, of course, the adoption of the Uniform Commercial Code, to become effective January 1, 1966.¹ The Virginia version will have relatively few changes from the provisions of the 1962 Official Text promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. While there may have been surprisingly few changes, for a common-law sales jurisdiction which had not adopted the Uniform Sales Act, close adherence to the official text was of course especially important to achieve the primary objective of national uniformity. In addition to enactment of the new uniform provisions, numerous related sections throughout the Virginia Code were amended to subordinate them to the uniform provisions where there might be conflict.

Noteworthy contracts and sales legislation outside of the scope of the comprehensive Uniform Commercial Code dealt with jurisdictional matters, licensing requirements, and false and misleading advertising.

New Code sections 8-81.1 through -81.5² confer personal jurisdiction over persons and other legal or commercial entities in actions arising from their transacting business within the state, contracting to supply services or things in the state, breach of warranty resulting in personal injury, and other matters with state nexus. Service of process may be made on an in-state agent, or on the Secretary of the Commonwealth, or as otherwise provided for by law. Additionally, the statute provides that one of the alternative venues is the county where the plaintiff resides.

Code sections 38.1-735 through -745 now provide that any legal entity engaged "in financing the cost of premiums for insurance on subjects of insurance resident, located or to be performed" in Virginia is required to be licensed in the state.³

Numerous forms of false or misleading advertising are made misdemeanors by new Code sections 18.1-131.1 through -131.8.⁴

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1. Va. Acts of Assembly 1964, ch. 219.

2. VA. CODE ANN. §§ 8-81.1 through -81.5 (Supp. 1964).

3. VA. CODE ANN. §§ 38.1-735 through -745 (Supp. 1964).

4. VA. CODE ANN. §§ 18.1-131.1 through -131.8 (Supp. 1964). For further discussion see Ritz, *Criminal Law, 1963-1964 Annual Survey of Va. Law*, 50 VA. L. REV. 1287, 1300 (1964).

*Decisions**A. Acceptance of Check Marked "Paid in Full" Does Not Always Constitute Accord and Satisfaction*

Words sometimes speak louder than actions and proverbs. A check marked "paid in full" was received for an unliquidated and disputed claim, accompanied by a letter making it clear that defendants did not intend to pay any more than that. Plaintiffs, however, made their position equally clear to defendants that they were not accepting the check as full payment, and then deposited it with a self-serving endorsement that it was accepted only as partial payment on account. The Supreme Court of Appeals held in *Atkins v. Boatwright*⁵ that the check was not "expressly accepted by the creditor in satisfaction" as required to constitute accord and satisfaction under section 11-12 of the Virginia Code.⁶ Thus, the payee's act of depositing a check is not necessarily acceptance of a condition stated thereon, at least not when he makes it known to the maker that the condition will not be observed. Perhaps the fact that the makers did not demand return of the check when informed that it would not be treated as full payment, mentioned but seemingly not stressed by the Court, was more decisive than indicated.

B. And Neither, in Some Circumstances, Is Acceptance of "Final Payment"

In *Day v. Abernathy*,⁷ a road contractor was allowed to recover from the state for materials purchased by him and unused by reason of modifications of the road and bridge specifications subsequently made by the state engineers. Although the primary issue was the interpretation of a specific provision of the contract relating to "eliminating items," the Court also discussed the consequences of the contractor's acceptance of a final payment which did not include reimbursement for the cost of the unused material. Since there was no discussion of the contractor's claim at the time of the final payment, and since the Highway Department was then fully aware that the claim had been filed and that it had not been acted upon, the Court found no waiver, accord and satisfaction, breach, or any other defense arising out of the contractor's acceptance.

C. Unliquidated Contract Claims May Bear Interest

Section 8-223 of the Virginia Code provides that "in any action whether on contract or for tort, the jury may allow interest on the sum found by the verdict, or any part thereof, and fix the period at which the interest

5. 204 Va. 450, 132 S.E.2d 450 (1963).

6. VA. CODE ANN. § 11-12 (1964).

7. 204 Va. 723, 133 S.E.2d 299 (1963).

shall commence.”⁸ In *Beale v. King*,⁹ an action to recover the reasonable value of an attorney’s services, the Court held this provision to be applicable to an unliquidated as well as to a liquidated contract claim and restored the jury’s verdict allowing interest from the time at which the services had been concluded.

Doctors and lawyers frequently work on a *quantum meruit* basis, and their demands for payment are more conservative in accord with the ethics of their professions. They are sometimes regarded as “fair game” by reluctant debt payers, and the impetus of this decision allowing interest from the time of conclusion of the services may make such game less fair or at least a lot less fun. In the *Beale* case the services had been concluded in 1943; thus the interest recovery would exceed the principal sum.

D. Limitations Period for Open Account

Section 8-223, discussed in the preceding section, also permits allowance of interest in any suit in equity, or in an action or motion founded on contract, when no jury is impanelled. In *Columbia Heights Section 3, Inc. v. Griffith-Consumers Co.*¹⁰ the Supreme Court of Appeals found no abuse of the discretion given by the statute to the trial court in allowing interest from the date of the last payment made on an open account.

Perhaps of greater significance was the issue of when the statute of limitations begins to run upon an open account. Is it from the date of the last item furnished or service performed, drawing with it all of the other items, or does a separable cause of action arise from the date of each item so that each item is barred upon the running of its respective period? The choice has usually depended upon whether the account was a mutual one, with goods or services flowing both ways, in which case the last item proved on either side commenced the running of the period, or a single account, with goods or services furnished by only one of the parties and the right to payment arising upon the billing for each transaction, albeit the unpaid balance for prior items is carried forward.¹¹ However, in *Columbia Heights*, although a single account with bills rendered monthly was involved, it was not shown that the parties treated the items charged as severable. Payments had been made in round figures which bore no relation to the individual items or the existing balance, and the Court found no intention to treat the contract as other than entire with final payment due upon its termination. The furnishing of a thirty-nine dollar item a few days less than three years before commencement of the action was held to draw with it, for

8. VA. CODE ANN. § 8-223 (Supp. 1964).

9. 204 Va. 443, 132 S.E.2d 476 (1963).

10. 205 Va. 43, 135 S.E.2d 116 (1964).

11. See 1 AM. JUR. 2d *Accounts and Accounting* § 15 (1962); Annot., 57 A.L.R. 201 (1928).

measurement of the period, an unpaid balance of more than \$8,400 for prior items, the Court stressing the rule that the burden of showing that the statutory period had expired was on the defendant.

E. Covenant Not To Sue Distinguished from Release

The distinction between a release and a covenant not to sue, in composition and consequences, was explored by the Court in *Lackey v. Brooks*.¹² A lease of vehicular equipment provided that the lessee should not be liable for any damage to the equipment, whether or not the fault of the lessee or its employees. The lessor was to carry insurance to protect itself against the risks and name the lessee as coinsured so that no right of subrogation might arise in favor of the insurer against the lessee. Damage occurred to a leased vehicle as a result of a collision allegedly caused by the negligence of the lessee's driver and the lessor sued the driver.

If the nonliability provision were to be construed as a release of the lessee, the Court said that it would operate also to release the lessee's employee on the theory that the release of one joint tort-feasor releases the others jointly liable, and its corollary that the release of a master for the tortious act of the servant also releases the servant. On the other hand, a covenant not to sue one joint tort-feasor does not discharge the others; nor does a covenant not to sue the master free his servant. The Court construed the provision to be a covenant not to sue, as at the time of the lease there was no claim in existence to be released, and held that the covenant was no defense to the driver-employee.

The lower court had also construed the provision to be a covenant not to sue, but one encompassing the lessee's employees. The Supreme Court of Appeals could find no such intent of the parties that the covenant should benefit the lessee's employees and accordingly reversed.

F. Absolute Promisor Not Excused by Third Party's Disabling Act

In *Gunnell v. Nello L. Teer Co.*,¹³ defendant had contracted to buy fill dirt, known by the plaintiff seller as intended to be used in fulfillment of defendant buyer's contract for state highway construction. Subsequently, the State Highway Commission had refused to allow the soil on seller's land to be used in construction of the highway as it failed to meet certain content specifications. Buyer then had refused to take and pay for the fill dirt, asserting in defense to seller's subsequent suit impossibility and mutual mistake.

The Court found only a unilateral mistake on defendant's part in supposing that the soil would be suitable without subjecting it to comprehensive tests,

12. 204 Va. 428, 132 S.E.2d 461 (1963).

13. 205 Va. 28, 135 S.E.2d 104 (1964).

and ruled that no impossibility stems from the inability of an absolute promisor to control the actions of a third party. A promise may, of course, be conditioned upon obtaining the act or consent of a third party, but the condition is not implied solely because the promisee knows that such act or consent is necessary.¹⁴ More concisely, the buyer's promise is absolute.

A failure of consideration due to frustration of purpose is sometimes confused with, or supposedly encompassed within, a defense of impossibility. The latter envisages impossibility of the promisor's performance, whereas the former involves the worthlessness of the consideration therefor upon the occurrence or nonoccurrence of a circumstance beyond the control of either party. But for either defense to prevail, it must be shown that such circumstance formed the basis of the contract between the parties.¹⁵ In the *Gunnell* case, the Court appears to have passed only upon the aspect of impossibility and not frustration of purpose. The result should be the same, however, so long as the Court finds, as it did in effect, that acceptance of the dirt by the Highway Commission was not a condition of the contract merely because the seller understood that it was buyer's intention to use the dirt in construction of the road building project.

G. Provision Construed in Light of Contract Objectives

Under section 43-21 of the Virginia Code, deeds of trust given for construction loans prior to commencement of construction are subordinated to mechanics' liens to the extent of the value added to the encumbered property by the new construction.¹⁶ The priorities may, of course, be reversed by agreement of the mechanics' lienors, and in *Northern Virginia Savings & Loan Association v. J. B. Kendall Co.*,¹⁷ the lienholders agreed to serve as trustees to complete and sell the unfinished houses of the financially insecure developer and to apply the proceeds of sales first to the subsequently incurred costs of completion and then to the "payment of construction loans to the . . . [creditors] upon the settlement of the sale of any house." Prior to this contract the construction loan creditors had advanced substantial sums to the developer for construction of the houses on the security of deeds of trust, and unpaid mechanics and materialmen had filed mechanics' liens. Induced by the contract, the construction loan creditors advanced additional

14. See *Foreman v. E. Caligari & Co.*, 204 Va. 284, 130 S.E.2d 447 (1963), discussed in Curtis, *Contracts and Sales, 1962-1963 Annual Survey of Va. Law*, 49 VA. L. REV. 1402, 1405-06 (1963).

15. 6 CORBIN, CONTRACTS §§ 1320-22 (1962).

16. VA. CODE ANN. § 43-21 (1953); see *W. T. Jones & Co. v. Foodco Realty, Inc.*, 206 F. Supp. 878, 881-83 (W.D. Va. 1962), *aff'd*, 318 F.2d 881 (4th Cir. 1963). This section does not give similar priority to liens arising out of the "repair or improvement" of existing buildings. VA. CODE ANN. § 43-21 (1953).

17. 205 Va. 136, 135 S.E.2d 178 (1964).

sums to enable completion and sale of the houses and contended that the quoted provision gave them priority over the previously filed mechanics' liens for the funds advanced by them prior to, as well as after, the date of the contract. Construing the provision in the light of the whole of the contract and its objectives, the Court of Appeals, affirming the chancellor's decree, found no intention of the mechanics' lienors to subordinate their prior liens to the prior deeds of trust, but only to the repayment of subsequent advances, and that the subsequent advances were made as a means of salvaging a portion of the prior advances.

H. Creditor's Taking Absolute Title Consumes His Security Interest

A conditional vendor, or his assignee, has many alternatives for redress upon the purchaser's default in payment. He may enforce his lien by petition to a trial judge or a bill in equity pursuant to section 55-91 of the Virginia Code;¹⁸ he may institute an action at law for recovery of the purchase price; or he may repossess and sell the property at public auction, and not lose his right to a deficiency judgment if he complies with the procedures set forth in section 55-93.¹⁹ He may also take the absolute title to the property with the consent of the purchaser, but if an assignee does so without the knowledge of the assignor-endorser of the note, the security interest may merge into the legal title so acquired and the liability of the endorser discharged for impairment of the security. So held the Court in *Joyner v. Graybeal*²⁰ on finding that the assignee did not intend to preserve the lien upon the purchaser's transfer to him of the certificate of title to an automobile.

The liability of the purchaser was not in issue since only the endorser took action to set aside a judgment by confession obtained by the assignee against the maker and the endorser of the note. Nothing is said in the opinion as to transfer of possession of the automobile to the assignee as well as the certificate of title. Is there a "repossession" discharging any further liability of the purchaser if not followed by public sale where absolute title, but not physical possession of the property, is surrendered by the purchaser? Or is the purchaser's voluntary execution of the certificate of title in favor of the assignee a "new contract in writing" between them? These are interesting questions regarding the applicability of section 55-93 which were posed by the circumstances in the case but were not in issue before the Court.

18. VA CODE ANN. § 55-91 (1959). This section was repealed, effective January 1, 1966, by Va. Acts of Assembly 1964, ch. 219, which enacted the Uniform Commercial Code.

19. VA. CODE ANN. § 55-91 (Supp. 1964). This section was also repealed pursuant to the enactment of the Uniform Commercial Code. See note 18 *supra*.

20. 204 Va. 543, 132 S.E.2d 467 (1963).

I. Obligations and Not Names Determine Contract Parties

During the past year construction of section 8-223 of the Virginia Code, regarding the allowance of interest on claims, occupied some of the time of the United States Court of Appeals for the Fourth Circuit as well as that of the Virginia Supreme Court of Appeals. The decisions of both courts support the view that the section permits great latitude in the allowance or disallowance of interest on claims, liquidated or unliquidated, in contract or in tort, litigated with or without a jury. A jury's allowance of interest on an unliquidated contract claim and a judge's allowance on an open account were upheld by the Supreme Court of Appeals.²¹ In the Fourth Circuit case of *Newton v. American Surety Co.*,²² the district court's disallowance of interest was upheld on the ground that, although interest may be allowed under the Virginia statute even on an unliquidated claim, the plaintiff failed to provide clear proof of some date earlier than judgment from which it could be computed.

The action was one against the surety for a manufacturer to recover for the manufacturer's breach of a contract made in name between the plaintiff construction contractor and a building supply company. Despite the manufacturer's not having been named as a party to the contract, the court found that all of the parties understood that the goods were to be manufactured by it in accordance with certain plans and specifications, and in fact the purchase order was rewritten to show that it was issued to the manufacturer when the supply company was unable to obtain bond. Recovery from the surety was permitted for the difference between the contract price and that paid to a third party for the materials upon the manufacturer's default.

J. Conflict of Statutes of Frauds

Under the Virginia statute of frauds, no action may be brought on an oral contract which cannot be performed within one year.²³ The North Carolina statute contains no such provision, and the oral employment contract in *Stein v. Pulaski Furniture Corp.*²⁴ was made in that state. However, suit for its breach was brought in a federal district court in Virginia. The court, acknowledging the conflict of laws rule that the validity of a contract is determined by the law of the state where made, explored the nature of the Virginia statute to ascertain whether it was procedural, and thus controlling in the forum state, or substantive, and thus subordinate to the

21. *Beale v. King*, 204 Va. 443, 132 S.E.2d 476 (1963), discussed in paragraph C; *Columbia Heights Section 3, Inc. v. Griffith-Consumers Co.*, 205 Va. 43, 135 S.E.2d 116 (1964), discussed in paragraph D.

22. 329 F.2d 299 (4th Cir. 1964).

23. VA. CODE ANN. § 11-2(7) (1964).

24. 217 F. Supp. 587 (W.D. Va. 1963).

law of North Carolina. Tracing the origin of the Virginia statute, and considering the wording of section 11-2, "no action shall be brought," as distinguished from the "shall be void" wording of section 11-1,²⁵ Judge Michie decided that section 11-2 was procedural or remedial and, accordingly, applied it in dismissing the action.

25. VA. CODE ANN. § 11-1 (1964).