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VIRGINIA SECTION

THE ANNUAL SURVEY OF VIRGINIA LAW

CONTRACTS AND SALES

*Joseph Curtis**

RELEVANT LEGISLATION

The Uniform Commercial Code, which was enacted in the 1964 legislative session and which became effective in Virginia on January 1, 1966, provided enough changes in the substantive law of contracts and sales to occupy the Virginia bar for a long time to come. The General Assembly may well have been conscious of this in promulgating few substantive enactments in this area in the 1966 regular session.

The bulk of the statutory provisions emanating from this session were directed at conforming previously existing Code sections with the new Uniform Commercial Code. Thus Code section 11-1, declaring certain oral contracts void as to creditors and purchasers, was amended to provide that if the contract or bill of sale creates a security interest as defined in the Uniform Commercial Code, its validity should be governed by the UCC.¹ Similarly, the validity of certain recorded contracts as against creditors and purchasers, which had been governed by Code section 55-95 is now to be controlled by the pertinent UCC sections if the contract creates a security interest as contemplated by the UCC.² Numerous other such amendments were made to give decisive effect to the UCC provisions where they might otherwise conflict with pre-UCC applications of the older Code sections.³

Also worthy of note is new Code section 11-20.1⁴ which permits a preference to be accorded to a resident bidder on a public contract when the home state laws of a lower nonresident bidder would allow such a preference to its residents.

CONTRACTS

Broker's Right to Commission for Unconsummated Sale

In *Reiber v. James M. Duncan, Jr. & Associates*⁵ the Supreme Court

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¹ VA. CODE ANN. § 11-1 (Supp. 1966).

² VA. CODE ANN. § 55-95 (Supp. 1966).

³ See, e.g., VA. CODE ANN. §§ 8.9-302 & 55-96 (Supp. 1966).

⁴ VA. CODE ANN. § 11-20.1 (Supp. 1966).

⁵ 206 Va. 657, 145 S.E.2d 157 (1965).

of Appeals applied the general rule that a broker is entitled to his commission upon procuring a purchaser ready, willing and able to buy a listed property on the owner's terms even though the sale is not consummated, unless the failure of the transaction is the fault of the broker. The Court held the rule controlling notwithstanding (1) that the defendant's wife, whose signature was necessary to convey the absolute title to the property, had not joined in either the listing agreement or the contract of sale, since the defendant was indebted to the agent for personal services rendered regardless of his interest in the property; (2) that there was a delay in settlement, since time was not of essence in the contract; (3) that the sale was contingent upon inspections of the property by the purchasers and the city inspector, since the contingency was wholly for the benefit of the purchasers and the evidence indicated either that the inspections had been made or that the purchasers had waived their right thereto; and (4) that no tender of payment had been made by the purchasers, since the defendant had already made it known before the settlement date had been fixed that he was not going to consummate the sale.

Commission Denied Because of Agent's Conflict of Interest

An agent authorized to sell may not sell to himself, except with full knowledge and consent of his principal, regardless whether the agent pays the price fixed by the principal or as much or more than anyone else would pay.⁶ In *Bell v. Routh Robbins Real Estate Corp.*,⁷ an action by the seller to recover the commission paid to the agent, the trial court found that although there were many respects in which the agent was closely associated with the purchaser, there was no breach of his duty to the seller since none of the ties between the agent and the purchaser gave the agent an interest in the subject property or an ownership interest in the buyer corporation. The Supreme Court of Appeals, reversing and rendering final judgment for the plaintiff seller, held that the agent's duty of loyalty to the seller-principal demanded more than a mere absence a concealed ownership interest in the buying entity. In *Bell* the subagent, who was acting in the transaction for the agent real estate corporation, was one of the signatories to the buyer's articles of incorporation, had participated in the initial incorporation meeting and in the election of the buyer's directors, was elected a director and vice-president of the buyer, and could expect to earn a subsequent commission upon resale of the property by the buyer.⁸ The nondisclosure of

⁶ See MECHEM, AGENCY §§ 504-07 (4th ed. 1952).

⁷ 206 Va. 853, 147 S.E.2d 277 (1966).

⁸ Although the defendant real estate corporation had no knowledge of its subagent's

the agent's substantial interest in the consummation of the sale to the buyer corporation was in the Court's view as much a breach of the agent's fiduciary duty to the seller as his nondisclosure of a personal ownership interest in the buyer corporation would have been.

*Contract Voidable When Agent Acts for Both Parties
Without Their Knowledge*

In *Price v. Martin*⁹ a vendor sued for a declaratory judgment to void a contract of sale of real property and to enjoin the purchaser from asserting any rights thereunder. The agent involved in the case had, at the request of a prospective purchaser on a previous occasion, asked the plaintiff if she was interested in selling certain property. Although the plaintiff expressed an interest in selling this property, the price offered was apparently too low, and no sale was accomplished as the result of this conversation. Moreover, the plaintiff declined the agent's invitation to place her property on his list. Subsequently, the defendant contacted the agent about the possibility of purchasing the plaintiff's property, and the agent obtained the plaintiff's agreement to sell the property to the purchaser at a price satisfactory to both parties. This agreement was made subject to a condition, attached by the plaintiff, that a third party was to have the right of first refusal, but the printed sales contract did not recite this condition, nor did the agent inform the defendant of it when he presented the contract for the defendant's signature. When the third party accepted the plaintiff's offer, the question of the defendant's rights in the property arose, and the declaratory judgment action was instituted.

The Supreme Court of Appeals affirmed the judgment entered in favor of the plaintiff vendor. The apparent ground for the decision was that although the defendant had no actual knowledge of the condition to the sale, the knowledge of the real estate broker, who unquestionably was the defendant's agent, was imputed to the defendant. However, the decision is not entirely clear and contains language which seems to suggest an alternative holding that the contract of sale was voidable because the real estate broker was acting as the agent of both parties without their intelligent consent. It appears from the statement of facts that the Court justifiably found that the broker did become the agent of the vendor as well as of the purchaser during the course of the transaction, because the printed provision of the sales contract stated that the purchaser should make the down payment to the broker as the agent for the vendor and because

connections with the buyer-corporation, the Court said that under familiar agency principles the defendant's right to retain the commission could rise no higher than the right of its subagent, who was acting within the scope of his employment. *Id.* at 861, 147 S.E.2d at 282.

⁹ 207 Va. 86, 147 S.E.2d 716 (1966).

the vendor agreed to pay the broker his commission. However, it also appears that both parties were quite aware that the broker was acting as the agent for both parties. Thus it is submitted that the firmer ground for the Court's decision is that the agent's knowledge of the condition to the sales contract should be imputed to the defendant as one of the agent's principals.

Ambiguity Resolved Against One Who Creates It

The question presented in *Graham v. Commonwealth*¹⁰ was whether the plaintiff contractor was entitled to immediate payment of fifteen dollars per cubic yard for certain extra excavation work which it performed, or whether the amount of payment was still open to negotiation between the parties. Several different parts of the contract, which were in apparent conflict, were relevant to this issue. The specifications provided that "any additional excavation and fill will be paid for in accordance with unit prices agreed upon." Seemingly the prices referred to in this clause were set in the "Form of Agreement," which stated that the unit price for any change in the work was to be fifteen dollars per cubic yard. However, the "General Conditions" provided that the defendant should have a choice between three methods of paying the plaintiff for extra work. The second method set forth was to estimate "the number of unit quantities" and to multiply this number "by the applicable unit price (if any) set forth in the contract or other mutually agreed unit price." The defendant contended, and the lower court held, that this provision in the General Conditions section was not inconsistent with the specifications clause and the Form of Agreement, and that the price set in the Form of Agreement was merely one method of payment which the defendant could follow at its option. Support for this position was drawn from the fact that the General Conditions provision mentioned not only a "unit price . . . set forth in the contract," which presumably referred to the price set forth in the Form of Agreement, but also an "other mutually agreed unit price." Thus it was argued that the defendant was free to choose under the contract to pay either the fifteen dollars per cubic yard or to negotiate a new price. The defendant sought to reconcile this interpretation with the specifications clause by arguing that that clause should be read to mean "unit prices [to be] agreed upon." The Supreme Court of Appeals did not accept this reasoning, but concluded that the language of the specifications clause was clear and that its plain meaning should not be changed by inserting the words "to be" as the defendant urged. Thus the Court held that the specifications clause referred to the price set forth in the Form of Agreement and that the

¹⁰ 206 Va. 431, 143 S.E.2d 831 (1965).

plaintiff was entitled to a payment based upon this figure. Supporting the Court's position was a provision in the contract which stated that in the event of conflict the specifications clause should take precedence over the General Conditions, and the Form of Agreement should take precedence over both the specifications clause and the General Conditions. Moreover, the Court relied upon the proposition that an ambiguity in a contract is to be strictly construed against the party who wrote the contract.

This latter principle was also applied by the Court in *Hutchison v. King*.¹¹ The issue presented in that case was whether the obligation of a subcontractor was to place sod "to the satisfaction of the Contracting Officer," or whether the work had to be "accepted by the Engineers [for payment by the Federal Aviation Agency]." If the former interpretation were to prevail, since the sod had been placed with approval of the contracting officer, the subcontractor-plaintiff would not be responsible for subsequent maintenance and the washing away of the sod in later storms. However, if the subcontractor's work had to be accepted in the same manner as for payment by the Agency, the loss of the sod in the wash of the storms would have to be borne by the plaintiff since that condition had not been met. The lower court gave to the defendant's letter confirming the oral agreement the latter construction and entered judgment for the defendant. In reversing and rendering final judgment for the plaintiff, the Supreme Court of Appeals could find no justification for implying the bracketed term, and furthermore noted that even if the provisions were ambiguous, they must be construed against the defendant, who wrote the confirming letter. Also of note is the Court's holding that it was not bound by the trial judge's interpretation of the intent of the confirming letter.

Effect of a Seal on Revocability

In *Humble Oil & Refining Co. v. Cox*¹² the Supreme Court of Appeals was presented with the question whether a seal is sufficient, in the absence of any other consideration, to preclude the revocation of an offer. In this case the lessor executed under seal an indenture lease agreement. The agreement was then given to an agent of the lessee for processing and, if it was approved, the signature of the lessee. However, before he signed the instrument, the lessee was informed by the lessor that the offer was cancelled. The lessee nevertheless signed the lease agreement and sought to hold the lessor to its terms, alleging that since the offer was executed under seal it was an irrevocable option. The

¹¹ 206 Va. 619, 145 S.E.2d 216 (1965).

¹² 207 Va. 197, 148 S.E.2d 756 (1966).

Supreme Court of Appeals acknowledged that in *Watkins v. Robertson*¹³ it had held that an offer was made binding by the mere presence of a seal. However, the Court distinguished *Watkins* from the case before it on the ground that whereas the instrument in *Watkins* had been intended to operate as an option, the one which it was presently considering was intended to be a bilateral contract imposing mutual rights and obligations. Thus, the Court reasoned, the rule that an option is made irrevocable by a seal was not applicable since it was not an option contract which was in issue. The Court pointed out that to hold that the lessor was precluded from revoking his offer because he signed the lease agreement under seal would be "to enforce an implied promise that was never intended by giving to a seal an effect that was never intended."¹⁴ Accordingly, the Court held that the lessor had justifiably cancelled his offer before it had been accepted, and that he was therefore not bound by the lease agreement.

Liability on Contractor's Payment Bond

*Noland Co. v. West End Realty Corp.*¹⁵ involved the question whether a contractor and its surety were liable on their bond to the plaintiff for payment for materials which the latter had supplied to a subcontractor. The contractor had previously paid the subcontractor in full, but the subcontractor was adjudicated bankrupt before the plaintiff collected from him. The plaintiff cited to the Court cases in which it was held that liability on a bond is not extinguished by the fact that the general contractor has paid to the subcontractor the full subcontract price. These cases were not themselves dispositive, however, since, as the defendants contended, they were distinguishable on the ground that in the instant case the defendant-contractor had paid to his subcontractors, who were within the class of persons who could be claimants under the bond, a total in excess of the amount of the bond. The Court acknowledged that the defendants' liability on the bond could be no greater than the sum of the bond. Thus the question was narrowed to whether the defendants' liability on the bond was extinguished simply by payment to potential claimants under the bond of an amount in excess of the sum of the bond or whether their liability on the bond could be extinguished only by payment of claims actually made pursuant to the bond. In holding that the defendants' liability had not been extinguished, the Court followed the general rule that an obligation on a bond is independent of the contractor's liability to his subcontractors, because it is

¹³ 105 Va. 269, 54 S.E. 33 (1906).

¹⁴ 207 Va. at 202, 148 S.E.2d at 760.

¹⁵ 206 Va. 938, 147 S.E.2d 105 (1966).

derived from the contract between the contractor, the surety and the owner of the project, and not from the subcontract itself. The Court found crucial for its decision a provision in the bond which stated that "payment by Surety of mechanics' liens . . . , whether or not claim for the amount of such lien be presented under and against this bond" would reduce the amount of the bond. The Court reasoned that the singling out of the payment of mechanics' liens in this manner clearly implied that payment of claims other than mechanics' liens would reduce the amount of the bond only if the claims were filed against the bond.

SALES

Processor's Implied Warranty Not Terminated by the Fact That Retailer Has Opened Package

The landmark 1959 case of *Swift & Co. v. Wells*¹⁶ linked Virginia with the increasing number of jurisdictions which have eliminated the requirement of privity in a consumer's action for breach of an implied warranty of fitness for human consumption against a remote seller of foodstuffs. In *Brockett v. Harrell Bros.*,¹⁷ decided during the past term, the Supreme Court of Appeals was confronted with a situation which was distinguishable from *Swift* on the ground that the defective product had not been sold in a sealed package, but had been handled directly by the retailer before being sold to the plaintiff. The Court recognized that in an action against a remote seller or the manufacturer the plaintiff might have more difficulty in proving that the goods were defective before being placed in the hands of the retailer if the retailer has opened the package than if the package has remained sealed. However, the Court held that the trial court had erred in striking the plaintiff's evidence relating to the implied warranty of a remote seller, because the question whether the goods were defective when they left the hands of this seller was one for the jury. It is to be noted that the Court was not required to extend the doctrine of *Swift* in making its decision since in 1962 the General Assembly enacted a statute which eliminated lack of privity as a defense in all actions for breach of warranty.¹⁸

In *Brockett* the Court also discussed the question whether contributory negligence is a defense to an action for breach of warranty. Acknowledging the conflict of authority on this issue, the Court stated that since a warranty action is *ex contractu*, the contributory negligence of the plaintiff is not material. However, the Court took care to note that

¹⁶ 201 Va. 213, 110 S.E.2d 203 (1959).

¹⁷ 206 Va. 457, 143 S.E.2d 897 (1965).

¹⁸ See VA. CODE ANN. § 8.2-318 (1965).

"if the condition of the ham of which the plaintiff complains was known, visible or obvious to her, there was no liability on an implied warranty of fitness . . ." ¹⁹ This language appears to suggest that assumption of risk can be a defense to a warranty action. On the other hand, the Court seemed to limit the availability of assumption of risk as a defense by rationalizing the doctrine in contract terms. Thus the Court stated that the reason that the plaintiff could not recover for breach of warranty if she had known of the existence of the defect was that "the presumption is that the plaintiff contracted to buy this food product in its obvious or known condition." ²⁰ If this is in fact the rationale of the rule, it would appear that the defense could not be invoked in the situation where an injured consumer has bought a defective product concealed in a closed package and later, before using the product, discovers the defect. Although such a result would preserve the conceptual integrity of a warranty action as *ex contractu*, it would seem to be otherwise unjustifiable.

Restaurateur Sells Food With Implied Warranty

Another case decided this term involving the implied warranty of fitness in the sale of foods was *Levy v. Paul*.²¹ The only question before the Supreme Court of Appeals in that case was whether a restaurateur is deemed to "sell" food for the purpose of determining whether he impliedly warrants its fitness for human consumption. A substantial minority of jurisdictions have held that a restaurant proprietor only *utters* food and that no warranty attaches since the transaction with the consumer does not constitute a sale.²² There was some reason to believe that Virginia would align itself with this minority in view of the holding of the Supreme Court of Appeals in *O'Connor v. Smith*²³ that a restaurateur does not buy and sell merchandise so as to come within the scope of the Bulk Sales Act.²⁴ However, the Court held in the instant case that whatever might be the status of the restaurant business for purposes of the Bulk Sales Act,²⁵ there is no good reason to hold that the serving of food and drink by a restaurateur is not a sale for purposes of the

¹⁹ 206 Va. at 463, 143 S.E.2d at 902.

²⁰ *Ibid.*

²¹ 207 Va. 100, 147 S.E.2d 722 (1966).

²² See, e.g., *Nisky v. Childs Co.*, 103 N.J.L. 464, 135 Atl. 805 (Ct. Err. & App. 1927); *Walton v. Guthrie*, 50 Tenn. App. 383, 362 S.W.2d 41 (1962).

²³ 188 Va. 214, 49 S.E.2d 310 (1948).

²⁴ Va. Code Ann. § 55-83 (1959). This statute was repealed as of January 1, 1966, and replaced by the UCC provisions on bulk transfers. See VA. CODE ANN. §§ 8.6-101 to -111 (1965).

²⁵ It is to be noted that the restaurant business is still excluded from the coverage of the bulk transfer law. See VA. CODE ANN. § 8.6-102, comment 2 (1965).

law of warranty. Accordingly, it reversed the lower court which had sustained the defendant's demurrer to the plaintiff consumer's motion for judgment. It is to be noted that the question raised by *Levy* is moot as to any transaction arising after January 1, 1966, the effective date in Virginia of the Uniform Commercial Code, which expressly brings within the scope of the implied warranty of merchantability "the serving for value of food or drink to be consumed . . . on the premises. . . ." ²⁶

Proof of Damages on Breach of Implied Warranty

Still another aspect of the law of implied warranties of quality in sales transactions was considered by the Supreme Court of Appeals in *Holz v. Coates Motor Co.*²⁷ This case involved the plaintiff's burden to establish his damages in a warranty action. It was not disputed that the measure of damages was the difference between the value of the goods sold with and without the defect warranted against. The Court stated that the sales price of the product in question could be taken as the value of the product without defects, but that there must be some evidence submitted as to the value of the product with its alleged defects.²⁸ Since the plaintiff had submitted no such evidence, the Court affirmed the trial court's action in setting aside the jury's verdict against the manufacturer. In dictum, however, the Court noted that the plaintiff could have avoided this burden of proof by electing the alternative remedy of rescission.

State Statute Gives Federal Court a "Long-Arm"

In *Etzler v. Dille & McGuire Manufacturing Co.*²⁹ a federal district court upheld the paragraph of Virginia's "long-arm" statute³⁰ encompassing actions for breach of warranty. The court first found that the personal jurisdiction conferred by the statute extended to the federal courts. It then held that the application of the statute does not deny the defendant due process of law, even when it is applied retroactively to cover a cause of action which arose before the statute became effective.

Regarding the federal jurisdiction question, whatever conflict there may once have been regarding the use by a federal court of a state long-arm

²⁶ VA. CODE ANN. § 8.2-314(1) (1965).

²⁷ 206 Va. 894, 147 S.E.2d 152 (1966).

²⁸ The plaintiff attempted to prove that the defect was such as to render the automobile in question totally valueless in order to bring his case within the ambit of such cases as *Gertler v. Bowling*, 202 Va. 213, 116 S.E.2d 268 (1960). The Court, however, discredited the plaintiff's statement that the car was valueless in light of the fact that it had been driven more than 8,000 miles within twelve months.

²⁹ 249 F. Supp. 1 (W.D. Va. 1965).

³⁰ VA. CODE ANN. § 8-81.2(5) (Supp. 1966).

statute is now resolved by new federal rule 4(e),³¹ which expressly authorizes service of federal process in the manner prescribed by a state statute directed at service on nonresidents. On the issue of constitutionality, the court found that the Virginia provision relating to breach of warranty, which provides for service on a defendant who has engaged "regularly" in "persistent" conduct within the state, was similar in scope to the Washington statute which was upheld by the Supreme Court of the United States in *International Shoe Co. v. Washington*.³² Moreover, the court pointed out that there is strong indication that the Supreme Court would uphold the constitutionality of a "single-act" provision in a long-arm statute,³³ which leads a fortiori to the conclusion that Virginia's breach of warranty provision is valid. The retroactive application of the statute raised a more serious constitutional problem, but the court held that since the Virginia statute was intended to be procedural and since a party has no vested rights in matters of procedure, such application of the statute was not unconstitutional. However, the court stated that there was a "substantial ground for difference of opinion" on this issue, and therefore granted the defendant a right to an immediate appeal from the order denying his motion to dismiss for lack of personal jurisdiction.

³¹ FED. R. CIV. P. 4(e).

³² 326 U.S. 310 (1945).

³³ 249 F. Supp. at 5. In support of this statement the court cited *Rosenblatt v. American Cyanamid Co.*, 86 Sup. Ct. 1 (Goldberg, Circuit Justice, 1965), in which an application for a stay of judgment pending appeal from a decision of the New York Court of Appeals sustaining the trial court's denial of the defendant's pre-trial motion to dismiss the complaint for lack of personal jurisdiction was denied. In that case Mr. Justice Goldberg concluded that the defendant's argument against the constitutionality of a provision in New York's long-arm statute conferring jurisdiction on the basis of the commission of a tortious act was insubstantial.