

October 1957

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Robert C. Vaughan, *Comments Concerning Examination and Evaluation of Titles to Real Property in Virginia*, 1 Wm. & Mary L. Rev. 139 (1957), <https://scholarship.law.wm.edu/wmlr/vol1/iss1/20>

COMMENTS CONCERNING EXAMINATION AND EVALUATION OF TITLES TO REAL PROPERTY IN VIRGINIA

EDITOR'S NOTE: The following papers are the product of independent research conducted by the Property II class during the 1956-1957 academic year. As such, these papers cover those points which the individual writers believe to be the main problems associated with the examination and evaluation of titles to real property in Virginia.

1—THE MECHANICS OF TITLE EXAMINATION

A. *The Grantor-Grantee Index*¹

The initial step to be taken in a search of title is to examine the records to insure that the prospective seller's chain of title is complete and regular; that is, he can convey what the client desires to purchase. The examiner's first act must be to find the instrument by which the vendor acquired his title.² Since the search of the deed books themselves, page by page, would be an economically impossible task from the viewpoint of time to the examiner and cost to the client, the usual and customary practice of title examiners is to check the Grantor-Grantee Index which is found in the clerk's Office of the county or city wherein the land is situated.³

This index gives the examiner citations to all documents pertaining to the land and required to be recorded. It is composed of two parts: an alphabetical listing of Grantees and an alphabetical listing of Grantors. In addition to the names of the Grantees and their Grantors and vice versa, the Index provides the following information: the date of reception in the Clerk's Office; a brief description of the property (sometimes woefully inadequate from the examiner's viewpoint); and the page and volume of the Deed

¹ The Grantor-Grantee Index, the Deed Books, the Probate Records, the Judgment Lien Books, and the Miscellaneous Lien Books are all found in the clerk's office of the county or city.

² If any grantee in the chain of title has acquired the property by devise or descent, there will be a gap in the chain of title which will necessitate a search of the Probate records or other search to fill. For coverage of this problem, see Sections 2, Deeds, and 4, Unrecorded Interests, *infra*.

³ Save for the period 1919-1922, the Grantor-Grantee Index is not considered a part of the records. See *Jones v. Folks*, 149 Va. 140, 140 S.E. 126 (1927). See also Va. Code §17-79 (1950), where a positive requirement of law is imposed on the Clerk to maintain at all times a Grantor-Grantee Index. And see Minor, *Real Property*, §§1293 et. seq. (2d ed. Ribble, 1928).

Book in which the deed of conveyance or other instrument has been copied for record purposes.

1. *The Grantee Index.*

Institution of the Grantee Index search is the first step of the title examiner in building a chain of title to the property. Starting with the latest Grantee Index, usually the Daily Index, and with the last entry under the alphabetical heading conforming to the first initial of the seller's surname, the examiner must work backwards in time until he finds the entry of the transaction by which the seller acquired title to the property. A notation of the information supplied by the entry should be made at this point and then the deed to which he has been cited should be checked to ascertain that the property description embraced therein is the same as that which his client desires to purchase. Each deed should be examined also to insure that the deed is valid in all respects.⁴

Having found the seller's grantor, the examiner by following the same process of search and check can find his grantor, his grantor's grantor, etc. How far back the search should be carried is a question of judgment which will vary with the value of the land, the value of its anticipated use, and the value the client has put on the legal services of the examiner. A rough guide under most circumstances would be 'sixty years to a warranty deed'.⁵ Once the stopping point the examiner has set for himself has been reached, the examiner will have established a chain of title to the property, similar to the following example:

<i>Date Recorded</i>	<i>Parties</i>	<i>Instr.</i>	<i>Pg.</i>	<i>Deed Book</i>	<i>Date of Deed</i>
6/8/46	N.C. to seller	Deed	1874	#40	6/8/46
22/4/13	L.T. to N.C.	Deed	886	#18	16/12/12
26/7/12	P.N. to L.T.	Deed	402	#17	18/7/12
2/9/1890	J.S. to P.N.	Deed	1380	#12	2/9/1890
11/5/50	K.A. to J.S.	Deed	2214	# 7	11/5/50

He will now be ready to test the validity of his work by an examination of the Grantor Index.

2. *The Grantor Index.*

By use of the Grantor Index, the examiner will be able to

⁴ For a detailed discussion of the requirements of a valid deed, see Section 2, *Deeds, infra.*

⁵ The legal liabilities imposed by a warranty deed are discussed in Section 2, *infra.*

ascertain whether any particular owner of property, as established by the Grantee Index search, has made any conveyances inconsistent with the chain of title previously formulated. That is, any conveyance which might prevail over the conveyance under which his client will claim should he purchase the property. Such conveyances may be other prior deeds,⁶ mortgages,⁷ tax liens,⁸ judgment liens,⁹ foreclosures under such mortgages and liens, leases,¹⁰ and other miscellaneous liens.¹¹

The search of the Grantor Index must begin with the first known grantee in the chain of title as established by the grantee index search. Using the example above, it can be seen that the search must begin under the name of J.S. The examiner must search the Grantor Index from the date of the recordation of the deed (11/5/50) by which such grantee (J.S.) acquired title to the date (2/9/90) he, as grantor, transferred title to the grantee identified by the Grantee Index Search (P.N.)¹² This search must be conducted with extreme care to insure that J.S. has done no act of partial or total prior conveyance or encumbrance of the property which would prevail over P.N.'s rights under this deed. Assuming for the sake of simplicity that the examination of the Grantor Index under the name of J.S. for the period 11/5/50 to 2/9/90 disclosed no prior deeds and that any and all mortgages and/or liens upon the property were paid and disposed of before a subsequent transfer to P.N., the next examination must be of the Grantor Index under the name of P.N. from 2/9/90 to 26/7/12. The reason the search must be conducted under the name of P.N. after the time of actual deed to L.T. of 18/7/12 to 26/7/12 is that the recordation statute in Virginia is a race-notice statute, as respects mortgages and deed of trust, which protects a BFP without notice if he records first. As to deeds, the Virginia statute is a notice statute which will protect the bona fide purchaser without notice and the

⁶ Section 2, Deeds, *infra*.

⁷ *Ibid*.

⁸ Section 7, Tax Liens, *infra*.

⁹ Section 5, Judgment Liens, *infra*.

¹⁰ Section 5, Judgment Liens, *infra*. And see *Great Atlantic etc., Tea Co. v. Cofer*, 129 Va. 640, 106 S.E. 695 (1921).

¹¹ Section 6, Miscellaneous Liens, *infra*.

¹² See note 14, *infra*. By statute, the examiner's work has been lightened by not requiring him to examine for instruments made by persons under whom the title is not derived nor for instruments made by any person under whom title is derived before he acquired title of record. See also *Pillow v. Southwest Improvement Co.*, 92 Va. 144, 23 S.E. 32 (1895).

same search is necessary. Thus it is possible for P.N. to deed the same land or any portion thereof on the day following his transfer to L.P. to a BFP without notice, and, if such BFP were to record his deed before 26/7/12, he would be protected and L.T. would take nothing by his conveyance.¹³ Assuming that P.N. has not acted so cavalierly and that the property transferred to L.T. had never been encumbered prior to L.T.'s recordation, the examiner is ready now to check the Grantor Index under the name of L.T. from the date he recorded his title (26/7/12) to the date N.C., the grantee, discovered by search of the Grantee Index, recorded the deed from such L.T. to himself (22/4/13). Virginia has also provided by statute that no search need be made of the records for deed or contracts made by any person under whom the title of the purchaser is derived before such person acquired the legal title of record.¹⁴ Thus, no examination need be made under the name of L.T. for the period 18/7/12 to 26/7/12. By reason of the above-mentioned recordation statute, the search under the name of L.T. must be conducted for the period embraced between the date of the deed to N.C. and the date that N.C. recorded. This basic rule applies to all parties in the chain of title as evidenced by the Grantee Index Search. When the examiner has determined that N.C. has good and complete title, he must continue his search of the Grantor Index under the name of N.C. from the date of recordation (22/4/13) to the date of recorded transfer to seller (6/8/46). Assuming that the land is still unencumbered, the examiner is on the final lap of his check of the Grantor Index. He must search the Grantor Index under the name of the vendor from the date of recordation (6/8/46) up to the present day, including the Daily Index. Assuming that as of the date the examiner completes his search the

¹³ Va. Code §55-96 (1950), which states: "Every such contract in writing, and every deed conveying any such estate or term, . . . , when the possession is allowed to remain with the grantor, shall be void as to all purchasers, for valuable consideration without notice not parties thereto and lien creditors, until and except from the time it is duly admitted to record . . . , but the mere possession of real estate shall not of itself constitute notice to purchasers thereof for value of any interest or estate therein of the person in possession."

¹⁴ Va. Code §55-105 (1950), which states: "A purchaser shall not under this chapter, be affected by the record of a deed or contract made by a person under whom his title is not derived; nor by the record of a deed or contract made by any person under whom the title of such purchaser is derived, if it was made by such person before he acquired the legal title of record."

records show no encumbrance by the vendor, the examiner, if he advises his client that the title is marketable and the client desires to close the transaction, must insure that right up to the minute the deal is closed, preferably in the Clerk of Court's Office, the Daily Index shows no encumbrance by the seller. Once the payment and deed have switched hands, the examiner should insure that the deed is promptly recorded. In so doing, he will have completed his search and insured that subsequent transfers and searches will be proportionately easier for himself and other examiners.

B. Estoppel by Deed, After Recorded Conveyances, and Interests Outside of the Chain of Title.

Certain problems incident to the extent to which the search of the Grantor-Grantee Index must be extended have not been clearly resolved as yet by either Virginia decisions or by statute. Thus there is at present a vacuum in the law in these areas. The problem of estoppel by deed, after recorded conveyances, and interests outside of the chain of title will be discussed below with an analysis of such case law as has arisen in light of the authorities in other states and Virginia legal writers and authorities. Tentative solutions will be suggested which must, of necessity, be merely an attempt on the part of this writer at clairvoyance.

1. Estoppel by Deed.

Estoppel by Deed arises when a grantor, who has no present title but merely an expectation of future acquisition of title, transfers such expectation as actual title and subsequently acquires such title. By statute in Virginia,¹⁵ as between the parties, the grantee will prevail for the statute treats the title as vesting in the grantor as of the time of the transfer by him. The real problem arises, however, when, after acquiring title to the property, the grantor transfers to another party the interest he had conveyed before such acquisition. Who will prevail, the first grantee assuming he has recorded, or the second grantee, assuming also that he has recorded but at a later date? Tied in with the above question, is an ancillary

¹⁵ Va. Code §55-52 (1950), which states: "When a deed purports to convey property, real or personal, describing it with reasonable certainty, which the grantor does not own at the time of the execution of the deed, but subsequently acquires, such deed shall, as between the parties thereto, have the same effect as if the title which the grantor subsequently acquires were vested in him at the time of the execution of such deed and thereby conveyed."

question: Is the title examiner required to search for transfers by the grantor before he has acquired legal title of record?

The statutes, the decisions, and the eminent authority, Minor, are in conflict, not only as to who will prevail but also as to whether the title examiner must check the records to determine if the possibility of estoppel by deed exists. It would appear that the legislature¹⁶ as early as 1849 had resolved the point by providing that a purchaser will be protected against any person in his chain of title who attempts to transfer any interest prior to his actual acquisition of legal title of record.¹⁷ Minor treats the situation as the passage of equitable title to the first grantee, which automatically becomes legal title when the grantor acquires legal title.¹⁸ The Virginia Supreme Court of Appeals quote with approval from Minor in the case of *Rose v. Agee*.¹⁹ However, in *Reynolds v. Cook*,²⁰ the Virginia Supreme Court of Appeals held that the estoppel would work upon the estate and *binds an after-acquired title as between parties and privies*.²¹ The question would seem to be unsettled in Virginia

¹⁶ V.C. 1849, c. 118, Sect. 12, now Va. Code §55-105 (1950).

¹⁷ See *Pillow v. Southwest Improvement Co.*, 92 Va. 144, 23 S.E. 32 (1895); Notes, 12 Va.L.Rev. 173 (1925); 26 Va.L.Rev. 385 (1940); 26 Va.L.Rev. 831 (1940).

¹⁸ 2 Minor, *Real Property*, §1350, Note 3 (2d ed. Ribble, 1928).

¹⁹ 128 Va. 502, 104 S.E. 827 (1920).

²⁰ 85 Va. 817, 3 S.E. 710 (1887).

²¹ The argument that such a search is necessary acknowledges that though it would appear that the legislature as early as 1849 had resolved the point, this statute has been more honored in the breach than in the application. As early as 1880, the Supreme Court of Appeals in construing that portion of the Virginia Code [Code of 1873, ch. 114, Sect. 4, now Va. Code §55-95 (1950)] which provides: "Any contract in writing, made in respect to real estate . . . shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as if the contract was a deed conveying the estate or interest embraced in the contract", held: "that there are no words, either expressly or by implication, excluding contracts in respect to after acquired property. And as to notice, the register would furnish the same information of the dealing with future as with existing property. . . we are of the opinion the articles of agreement in this case was such an instrument as the statute authorizes to be recorded, and that it was recorded; which must be regarded as constructive notice to creditors and subsequent purchasers." *First Nat. Bank of Alexandria v. Turnbull & Co.*, 32 Grat. (73 Va.) 695, 705 (1880). And see 18 L.R.A. 303, note (1892). This construction was cited with approval in *Braxton v. Bell*, 92 Va. 229, 23 S.E. 289 (1895), where it was stated that recordation of a contract required to be recorded under the statute as aforementioned was constructive notice to creditors and subsequent purchasers. In the *First National Bank of Alexandria* case, this interpretation was *obiter dictum*.

and, as a tentative solution, it would appear that a search for estoppel by deed need not be instituted, due to the dictates of time and expense.

2. *After Recorded Conveyances.*

The same disagreement exists among the authorities as to the necessity of examining for conveyances by a grantor after he has

In the Braxton case, the court had to determine whether a contract was in the purview of the statute and the effect of the statute if within the act and if without the act. It is true that the contract was held to be outside the act and thus the interpretation put upon the act was again mere *obiter dictum*. But the Supreme Court of Appeals of Virginia has never held against this interpretation either directly or by implication. If one grants that the above construction is the law, then an *a fortiori* case as regards deeds exists. If the recordation of a contract to convey or transfer an interest in real estate is constructive notice to subsequent purchasers, then *a priori* a recorded deed, which is the actual conveyance or transfer of the interest, would be constructive notice to such subsequent purchaser. And thus the first grantee would have the paramount interest and the title examiner would be under a duty to search the records for evidence of such interest. Va. Code §§55-96 (1950). And see *Edison v. Huff*, 29 Gratt. (70 Va.) 338; which states that this section effectually abrogates the rule laid down in *Withers v. Carter*, 4 Gratt. (45 Va.) 407 (1848), so far as executory contracts in writing for the sale of land are concerned, and places them on the same footing as conveyances of the legal title. Thus conveyances and contracts to convey are placed on the same footing.

It is, however, unnecessary to rely entirely upon the above, for the Virginia Supreme Court of Appeals has come to the same result by their decision in *Reynolds v. Cook*, 83 Va. 817, 3 S.E. 710 (1887). In reaching its decision, the Court replied on *Rensselaer v. Kearney*, 11 How. 297, 325 (1850), in which it was stated: "The principle deducible from these authorities (English and American) seems to be, that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, *the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privies.*" (Emphasis added.) The court further quoted from *French v. Spencer*, 21 How. 228, 241 (1858), "The estoppel works upon the estate and binds an after-acquired title as between parties and privies." The Supreme Court of Appeals then said "These principles apply to the present case and are decisive of it." 83 Va. 817, 824, 3 S.E. 710, 714 (1887). Thus, the provision in the statute has been rendered nugatory. A search must be conducted to ascertain if any such interest exists under the name of each grantor in the chain of title. Although in the

conveyed title of record. According to Tiffany,²² the majority of jurisdictions require a search down to date of every grantor. There has been only one decision²³ in Virginia and its interpretation has been the subject of violent dispute.²⁴ It is doubtful that this case could be considered as authority for holding that Virginia is either in the majority or the minority. An example of such a situation is as follows: A conveys to B on June 1st. A then conveys to C, who has notice of the prior conveyance, on July 1st and immediately C records. On August 1st, B records. C then conveys to D on September 1st and D records immediately, having no actual notice of B's claim to title. As between B and D, who wins? The argument that B should win is that as between C and B, C took with notice, and, therefore, C does not come under the protection of the Virginia statute.²⁵ Thus since B recorded before D, B has won the race. The argument that D should win is based on an interpretation of the *Bowman* case, *supra*, wherein it is stated: "It would be of no avail to appellees to prove notice, actual or constructive, . . . for no proposition of law is better settled than a purchaser for value without notice takes a good title from a purchaser for value with notice."²⁶ However, the court did not discuss the effect of a subsequent recordation of a prior conveyance as affording constructive notice. Whether they considered that it was implied in the above quotation and it was therefore unnecessary to spell it out is the question presented by this argument. The advocate of this argument assures the reader that the title examiner in Virginia does not conduct such a search at present and will likely not do so until a direct decision makes it mandatory. If such is the case, then

words of Minor, "this rule is to say the least highly inconvenient" and "the labor of title examination is thereby greatly magnified", it would appear that recordation of an interest of this nature is constructive notice to prospective purchasers requiring an examination of all the records if such purchaser is to be denominated a bona fide purchaser. 2 Minor, *Real Property*, §1255 (2d ed. Ribble, 1928). Minor, citing the *Reynolds* case states "that it would seem that title by estoppel binds the land not only as between the parties, but as to a subsequent purchaser from the grantor [after acquiring title], that is, it is binding upon the grantor or his privies. 2 Minor, *Real Property*, §1255, Note 7, p. 1690 (2d ed. Ribble, 1928).

²² Tiffany, *Real Property*, (2d Ed.) Sect. 567(g), Note 70 (1920).

²³ *Bowman v. Holland*, 116 Va. 805, 83 S.E. 393 (1914).

²⁴ See Notes, 26 Va.L.Rev. 385 (1940); 26 Va.L.Rev. 831 (1940).

²⁵ Va. Code §55-96 (1950).

²⁶ *Bowman v. Holland*, 116 Va. 805, 810; 83 S.E. 393, (1914).

an examiner is protected if he declines to conduct such a search since even the examiner, as a doctor, is only required to possess the skill and learning which is possessed by the ordinary prudent member of the legal profession in his locality in good standing, and to apply that skill and learning with ordinary reasonable care. If the norm accepted by the practitioner in his area is such that a search of this nature is not attempted, then it would appear that he would be safe in also not conducting such a search.²⁷ As a tentative solution, it would appear that until a definite case or statute defines this area more definitively, such a search for after recorded conveyances is unnecessary.

3. *Interest Outside the Chain of Title.*

Another problem, which it has been argued remains unsettled in Virginia, is whether a deed, not in the chain of title, containing restrictive covenants or easements, if recorded, is constructive notice of such encumbrance.²⁸ In at least two Virginia decisions,²⁹ it has been stated that the established rule is that for a deed and its recitals to operate as constructive notice to a bona fide purchaser, it must be a link in the purchasers chain of title. Thus, the examiner is under no duty to search the records for any such reservations. The *Bowman* case, *supra*, would appear to rest at least partially on this same rule.

It would be good experience for the beginning examiner to conduct at least once a complete title search including a search for the above three interests. Thus, in the event that subsequent cases or legislation make such a search mandatory, he will be prepared. As a general rule, however, it is submitted that such a search at present is unnecessary in most cases.

N. A. C.

2—DEEDS

Circumstances under which deed required:

- (a). "No estate of inheritance or freehold or for a term of more than five years in lands shall be conveyed unless

²⁷ See Notes 26 Va.L.Rev. 831 (1940); 26 Va.L.Rev. 385 (1940).

²⁸ See Letter to Client, Section 9, *infra*.

²⁹ *Claiborne v. Holland*, 88 Va. 1046, 14 S.E. 915 (1892); *Providence Forge Fishing & Gun Club v. Gills*, 117 Va. 557, 85 S.E. 404, (1915). And see *Bowman v. Holland*, *supra*.

by deed or will, nor shall any voluntary partition of lands by coparceners, having such an estate therein, be made except by deed; nor shall any right to a conveyance of any such estate or term in land accrue to the donee of the land or those claiming under him, under a gift or promise of gift of the same not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming through him."¹

(b). "No action shall be brought in any of the following cases . . . (6) Upon any contract for the sale of real estate, or for the lease thereof for more than a year . . . unless the promise, contract, agreement, representation, assurance or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby or his agent; but the consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence."²

Basic types of deeds

Deeds in general fall into two main subdivisions; deeds indented and deeds poll.

(1). Deed indented (or indenture) contains a mutual agreement between two or more persons, whereby each stipulates for something on his part.³

(2). Deed poll contains stipulations which are all on one side, without any reciprocal stipulations on the other. It is therefore "not an agreement between two or more persons, but a declaration under seal by some one or more particular persons respecting an agreement or stipulation made by him or them with some other person or persons."⁴

Statutory form of deed⁵

"Form of a deed: A deed may be made in the following form, or to the same effect. "This deed, made the . . .

¹ Va. Code §55-2 (1950).

² Va. Code §11-2 (1950) (Statute of Frauds).

³ Crookshanks v. Ransbarger, 80 W. Va. 21, 92 S.E. 78 (1917). See also 2 Minor, *Real Property*, §1027 (2d ed. Ribble, 1928). "A deed beginning 'this indenture' is a deed indented to every legal purpose" [Currie v. Donald, 2 Wash. (2 Va.) 58, 63 (1795)].

⁴ 2 Minor, *Real Property*, §1026 (2d ed. Ribble, 1928).

⁵ Va. Code §55-48 (1950).

⁶ See also *Gregory's Forms*, No. 1722, 4th ed. (1952).

day of . . . in the year . . . , between (here insert names of parties), witnesseth: that in consideration of (here state the consideration) the said . . . , doth (or do) grant unto the said . . . , all (here describe the property and insert covenants or any other provisions). Witness the following signature and seal (or signatures and seals).”

The common form of deed is divided into five major sections: (1) Introduction; (2) Granting part; (3) Description; (4) Covenants; (5) Conclusion.

(1) *Introduction:*

(a) Date: The deed takes effect from the time of delivery and therefore a date is not essential to the validity of an instrument.⁷ An incorrect or impossible date will not invalidate the deed.⁸

(b) Names of Parties: It is elementary that every deed must have a grantor,⁹ and it is therefore essential that the deed sufficiently designate the grantor. It is sufficient however if the description is accurate enough to identify him, even though not actually named in the instrument.¹⁰ The attorney should also be sure that the deed states whether or not the grantor is married, as a conveyance by the husband without the participation of the wife would not bar the wife’s inchoate right of dower. The statement that the grantor is not married is prima facie evidence of the fact.¹¹

“No particular degree of mental acumen is to be prescribed as the measure of one’s capacity to execute a deed. The question is answered when it is determined whether, at the time of the execution of the instrument, the grantor had sufficient mental capacity to understand the nature of the transaction he was entered into and to assent to its provisions.”¹² Those persons incompetent to execute a deed

⁷ *Skipwith v. Cunningham*, 8 Leigh (35 Va.) 271, 281, 31 Am. Dec. 642, 646 (1837).

⁸ *Colquhoun v. Atkinsons*, 6 Munf. (20 Va.) 550 (1820).

⁹ *American Net, etc., Co. v. Mayo*, 97 Va. 182, 33 S.E. 523 (1899).

¹⁰ 2 *Minor Real Property*, §1031 (2d Ed. Ribble, 1928). See also *Jenkins v. Jenkins*, 148 Penn St. 216, 23 Atl. 985 (1892); *Houx v. Battcen*, 68 Mo. 84 (1878).

¹¹ *Cox, Titles to Land in Virginia*, Section 99. See also *Harman v. Stearns*, 95 Va. 58, 27 S.E. 601 (1898).

¹² *Lohman v. Sherwood*, 181 Va. 594, 607, 26 S.E. (2d) 74, 80 (1943). See also *Carrigan v. Davis*, 84 W. Va. 473, 100 S.E. 91 (1919); Note, 32 W. Va. L.Q. 59 (Circa 1926).

include: infants, lunatics, persons under duress, and enemy aliens.

The immediate grantee must be in existence when the deed is delivered, and if there is more than one grantee, each should be so named or described in the deed as to enable identification. It is sufficient if the identity of the grantee is made certain by the instrument as a whole, even though not specifically named.¹³ In the event of existence of latent ambiguity as to the name of the grantee, it may be explained by parol testimony.

(2) *Granting part:*

(a) Consideration: A consideration is not necessary as between the parties, but as respects subsequent purchasers, the deed should show the payment of a valuable consideration in order to negative the possibilities of (1) a gift intended by the grantor to the grantee, or (2) a resulting trust in the grantee in favor of the grantor. A recital of such payment is prima facie evidence of the fact until fraud is shown.¹⁴ Mere inadequacy of consideration, in the absence of fraud, will not invalidate a conveyance, except where the inadequacy is so great as to shock the moral sense of mankind.¹⁵ An example of such inadequacy would be where there is inequality between the parties and their relation is such as to warrant the presumption that the defendant took advantage of the plaintiff's illiteracy or ignorance.

(b) Parties: A deed regular in other respects has been held not to be invalid because the grantor or the grantee is not named or referred to in the granting clause, effect being given to the plain intent shown by the deed.¹⁶

(c) Technical words: The word "grant" is not indispensable, since intent to convey is sufficient. Other words deemed acceptable are; "convey", "give", "sell", "transfer", and in some situations "assign", "confirm", "set over", "surrender", have been held sufficient.

¹³ *Lagorio v. Dozier*, 91 Va. 492, 22 S.E. 239 (1895). See also 2 Minor, *Real Property* §1031 (2d Ed. Ribble, 1928).

¹⁴ 2 Minor, *Real Property*, §1082 (2d Ed. Ribble, 1928).

¹⁵ *Mayo v. Carrington*, 19 Gratt. (60 Va.) 74 (1869).

¹⁶ *Lagorio v. Dozier*, 91 Va. 492, 22 S.E. 239, (1895). See also 2 Minor, *Real Property*, §1031 (2d Ed. Ribble, 1928).

(3) *Covenants of the grantor:*

The usual express covenants for title by the grantor are: (1) seisin, (2) right to convey, (3) against encumbrances, (4) quiet possession, (5) further assurances, (6) general and special warranty.¹⁷ The first five covenants are the so-called English covenants of title and with the covenant of general warranty may be subdivided further into present covenants (seisin; right to convey; against encumbrances) and future covenants (quiet possession; further assurances; general warranty). Present covenants do not run with the land, and if breached, the breach occurs at the time when the conveyance is made, while future covenants, which run with the land, are breached only at the time that peaceful possession is disturbed.

The statute of limitations is applied differently, running immediately once the present covenant is made and breached; but with respect to future covenants, not running until paramount interest is asserted.

The covenants of general and special warranties, used as substitutes for the more verbose English covenants, are most popular in America as a whole and in Virginia in particular. The deed which contains the warranty takes its name from the type of warranty—thus a general warranty deed is one in which the grantor warrants the title against defects arising at any time, either before or after the grantor became connected with the land, and as a result is, in effect, substantially the same as a covenant for quiet enjoyment. A special warranty deed on the other hand is one in which the grantor warrants the title against defects arising after he acquired the land, but not against defects arising before that time.¹⁸

A third type of deed—the quitclaim deed—contains no warranties whatsoever, the grantor warranting nothing but rather merely transferring what title he has, if any.¹⁹ This type of deed is the least desirable form of conveyance, since by the English and Virginia view, “. . . a quitclaim deed is *in itself* notice of a possibly defective title. Hence under this view, a party who bases his claim of title wholly or in part, upon a quitclaim deed occupies a precari-

¹⁷ Va. Code §§55-68 and 55-74 (1950).

¹⁸ 2 Minor, *Real Property* §§1053-1055 (2d Ed. Ribble, 1928).

¹⁹ Va. Code §55-75 (1950).

ous position.”²⁰ It is apparant therefore that a claim under a quitclaim deed will be subordinated to a prior unrecorded deed.²¹

As to the measure of damages for the breach of covenant or warranty, it has been held that the true measure is the “value of the land at the time of the warranty, that is, at the time of the conveyance; and the best standard of such value is in general the price agreed upon at the time of sale, or so much thereof as has been paid (with interest from the date of eviction) and the legal and taxable costs expended in the action in which the eviction occurs. But nominal damages only will be recoverable if no actual loss has been sustained by reason of the breach.”²²

(4) *Description*:²³

The title examiner should insist upon a description which will be clearly valid, not only between the parties to the deed, but also against adverse purchasers for value without notice. The description to be effective must be sufficient to identify the same with reasonable certainty,²⁴ and if it does not, the deed is void. If the deed is not completely certain, extrinsic evidence is admissable to indicate the land described.²⁵

The following methods of description are considered to be legally sufficient if the county, city and state are stated.²⁶

(a) By courses and distances with a starting point that can be identified.²⁷

(b) As bounded by natural or artificial objects or by the lands of named persons.²⁸

²⁰ Bohannon, *Quitclaim Deeds under the Recording Acts*, 32 Va. L. Rev. 190, 191 (1945). See also *Johnson v. Williams*, 37 Kan. 179, 14 P. 537 (1887)—Va. in accord, See 2 Minor, *Real Property*, §1131 (2d Ed. Ribble, 1928).

²¹ For further discussion, see Section 4, Unrecorded Interests, *infra*.

²² 2 Minor, *Real Property*, §1057 (2d Ed. Ribble, 1928). See also *Threkeld v. Fitzhugh*, 2 Leigh (29 Va.) 489 (1830); *Morgan v. Haley*, 107 Va. 337, 58 S.E. 564 (1907); *Stuart v. Pennis*, 100 Va. 615, 42 S.E. 667 (1902); *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S.E. 58 (1899).

²³ Generally, see Cox, *Titles to Land in Virginia*, Section 101.

²⁴ *Whealton v. Doughty*, 112 Va. 649, 72 S.E. 112 (1911).

²⁵ *French v. Williams*, 82 Va. 462, 4 S.E. 591 (1887); *Midkiff v. Glass*, 139 Va. 218, 123 S.E. 329 (1924).

²⁶ Cox, *Titles to Land in Virginia*, Section 101.

²⁷ *Merritt v. Bunting*, 107 Va. 174, 57 S.E. 567 (1907).

²⁸ 2 Minor, *Real Property*, §1076 (2d Ed. Ribble, 1928).

(c) By reference to a recorded map, plat survey, deed or other writing.²⁹

(d) By number or letter on a recorded subdivision.³⁰

(e) By house number and named street where there is an established plan of numbering.³¹

(f) By any name by which the land is generally known and can be identified.³²

(g) As occupied by or acquired by a named person at a definite time.³³

(h) As being all the land of the grantor in a designated place or acquired in a specific way.³⁴

Construction of the description should carry out the intent of the parties, and in case of conflict between different parts of the description, the intent of the parties will govern. If the intent cannot be ascertained, the order of preference given to methods of description is:³⁵

(1) Natural monuments and landmarks.

(2) Artificial monuments and established lines, marked and surveyed.

(3) Adjacent boundaries or lines of adjoining land.

(4) Calls for courses and distances.

(5) Measure and quantity.

²⁹ Mathews v. Gillespie, 137 Va. 639, 120 S.E. 324 (1923); Richardson v. Hoskins Lumber Co., 111 Va. 755, 69 S.E. 935 (1911).

³⁰ 2 Minor, *Real Property*, §1075 (2d Ed. Ribble, 1928).

³¹ 2 Minor, *Real Property*, §1077 (2d Ed. Ribble, 1928). See also Harper v. Wallerstein, 122 Va. 274, 94 S.E. 781 (1918); 4 Va. Law Reg. (NS) 177.

³² 2 Minor, *Real Property*, §1073 (2d Ed. Ribble, 1928).

³³ Cox, *Titles to Land in Virginia*, Section 101.

³⁴ 2 Minor, *Real Property*, §1788 (2d Ed. Ribble, 1928). See also Florence v. Morien, 98 Va. 26, 34 S.E. 890 (1900).

³⁵ 2 Minor, *Real Property*, §§1072-1079 (2d Ed. Ribble, 1928). See also Cox, *Titles to Land in Virginia*, Section 101; Whitehead v. Ragan, 106 Mo. 231, 17 S.W. 307 (1891); Whitehead v. Atchison, 136 Mo. 485, 37 S.W. 928 (1896).

(5) *Conclusion:*

The conclusion is comprised of the signatures and seals of the parties thereto with an affirmation clause substantially similar to, "Witness the following signature and seal."³⁶

In Virginia it seems that signing the deed is indispensable to its validity. The signature, however, may be made by adopting one written by another, or by making a mark, or by impressing some other sign or symbol on the paper by which the signature may be identified.³⁷ An actual seal is unnecessary since if a person or partnership makes a writing, and in the body refers to the writing as a deed or indenture, or uses other words importing a sealed instrument, the writing shall be considered to be actually sealed by the person or partnership, although no seal or scroll be actually attached.³⁸

Corporate acts must be done under the fixed corporate seal;³⁹ therefore, a different rule applies to corporations and natural persons with respect to affixing scrolls and seals. A natural person may affix a scroll as his seal,⁴⁰ but a corporation is not permitted to follow this practice.⁴¹

(6) *Acknowledgement:*

Acknowledgements may be made by the clerk of the circuit court, corporation court of any city other than the city of Richmond, Chancery Court of the City of Richmond, or any court of record within the United States or Porto Rico or any dependency or territory or possession of the United States, or his deputy; a commissioner in chancery, justice of the peace or notary public. Acknowledgement may also be made in foreign countries by the designated United States government officer or foreign officer.⁴² Acknowledgement is necessary for recordation but not to pass title.

³⁶ 2 Minor, *Real Property*, §1059 (2d Ed. Ribble, 1928).

³⁷ 2 Minor, *Real Property*, §1062 and footnote (2d Ed. Ribble, 1928).

³⁸ Va. Code §11-3 (1950). See 2 Minor, *Real Property*, §1064 (2d Ed. Ribble, 1928) for statutory doctrine in Virginia as to nature of seal.

³⁹ *The Covington Virginian v. Woods*, 182 Va. 538, 29 S.E. 2d 406 (1944).

⁴⁰ Va. Code §11-3 (1950).

⁴¹ 2 Minor, *Real Property*, §1064 (2d Ed. Ribble, 1928).

⁴² Va. Code §55-114 (1950).

"Title passes by execution and delivery of the deed."⁴³ Where the acknowledgement of a deed is void, the recordation is invalid, and as a result the attorney should be extremely cautious in checking the date of expiration of the notary public's commission.

Delivery, Acceptance and Recordation.

Delivery:

Delivery is an indispensable requisite of the validity of a deed; it may be actual or constructive, and fundamentally depends upon the intent of the parties.⁴⁴ "Intent" does not mean that the grantor must give directly to the grantee—he may give to a third party, not to be delivered to the grantee until the happening of an uncertain event. This constitutes conditional delivery, or delivery in escrow, and no estate will vest in the grantee until the condition is satisfied. It has been held in Virginia that delivery in escrow may be made by the grantor directly to the grantee.⁴⁵

Acceptance:

Acceptance by the grantee is necessary to the validity of the deed, since it is apparant that no grantor may force his property upon an unwilling grantee. If the grantee refuses to accept, it is not a perfected deed and passes no title. There does not have to be express acceptance however, as "the law naturally presumes that every estate is beneficial to the party to whom it is given, and therefore that he assents to it until and unless he renounces it."⁴⁶

P. G. D.

3—WILLS

With the exception of the family of deeds, title to more real property appears to be transferred by means of wills than by any other form of instrument. Wills represent a unique class of instru-

⁴³ *Peatross v. Gray*, 181 Va. 847, 861, 27 S.E. 2d 203, 210 (1943).

⁴⁴ 2 Minor, *Real Property*, §§1065-1068 (2d Ed. Ribble, 1928).

⁴⁵ *Barnett v. Rhudy*, 137 Va. 67, 119 S.E. 97 (1923); *Whitaker v. Lane*, 128 Va. 317, 104 S.E. 252, 11 ALR 1157 (1920). Accord, *Lerner Shops of North Carolina Inc. v. Rosenthal*, 225 N.C. 316, 34 S.E. 2d 206 (1945).

⁴⁶ 2 Minor, *Real Property*, §1027 (2d Ed. Ribble, 1928). See also *Skipwith v. Cunningham*, 8 Leigh (35 Va.) 271, 281 (1837).

ments to which the practitioner's knowledge of the law regarding deeds has little application. The unusual element presenting itself when a will is found in the chain of the title has to do with the fact that, unlike the relatively self-sufficient deed, the will is, for a time, subject to a multitude of influences calculated to modify its effect or to invalidate it entirely.

Normally, the presence of a will in the chain is indicated by a reference in a subsequent deed, or it is suspected when the searcher is unable to locate a particular grantor in a prior capacity as grantee in a deed. In this latter case other possibilities exist, such as passage of title by intestate succession, but for our purposes, a will will be assumed to exist. Wills are normally recorded in the will book in the Clerk's Office of the county where the land in question is situated.¹ In this connection it should be noted that the probate procedure is available for properly authenticated copies of wills executed in another state and that, when so probated, the foreign will is effective in transferring title to local real property of the decedent if it was so executed as to be a valid will of real estate as measured against the Virginia requirements.² A major difficulty is presented by the fact that the will book is indexed by the testator's name and not by the devisee's name. Thus, unless the search can ascertain the name of the decedent from whose estate the last-found grantor took title, the only means of locating this grantor in a capacity as devisee lies in an unguided, general search through the will book. As will appear, this search may have to cover an extremely broad span of time and, in all likelihood, will not be feasible. As a means of reducing this burden an obvious approach which suggests itself is that the title examiner look for a testator whose name is the same as that of the last-found grantor. If this is unsuccessful, it will be necessary to turn to other local sources of information in an effort to obtain clues to the identity of the unknown testator.³

¹ Va. Code §§17-63, 64-73, 64-90 (1950). Observe that the will is effective without probate, but that to be protected from purchasers from the decedent's heirs it is essential that the purchaser under a will insure that it be probated and recorded. To this effect see: 2 Minor, *Real Property*, §1187 (2d. Ed. Ribble, 1928); Va. Code §64-91 (1950).

² Va. Code §64-88 (1950). See *Horn v. Horn*, 195 Va. 912, 81 S.E. 2d 593 (1954).

³ Note the additional difficulties which may be involved for the examiner if the will is one originally probated in a foreign jurisdiction where he is not familiar with local affairs.

Although the name of the testator will be the primary objective of this collateral search, it is also very desirable to ascertain the date of his death, or better still, the time at which his will was probated. This is because, even though the name is known, the unlocated will may have been probated at any point within the very wide span of time and, without a date upon which to rely, the searcher may have to do an appreciable amount of unnecessary work in locating it. This time period normally begins, at the earliest, with the date at which the last-found grantor conveyed the property.⁴ From this point it would appear to extend back into time, in theory at least, to a date to be computed, if at all, by the determining of the most distant point in time prior to the grantor's birth date at which application of the "Rule Against Perpetuities" would have permitted the probate of a will vesting an interest in land *in futuro*. In other words, the grantor's interest in the property is required by the rule to have vested within a certain prescribed period⁵ and reverse application of this concept, starting with his birth date, should indicate the most remote time at which a will vesting an estate in him could have qualified for probate. As a practical matter, it is impossible to compute this period with any degree of accuracy. Knowledge of the concept, however, should be valuable in that it keeps before the examiner the full potential extent of a thorough will search. It may well be that the customary search of local attorneys is less extensive than has been indicated by the foregoing and that, in the average situation, the examiner may be able to reduce his activities accordingly.⁶

If a will cannot be located, the next step will presumably be to initiate a search for some other form of conveyance. Assuming that this is not successful, the recordation to the client will be based upon this fact as evaluated in the light of all of the circumstances. If a will is located, other problems are then presented.

As suggested previously, a will standing alone is often a poor risk insofar as it provides any solid assurance as to the state of the

⁴ The will could have been probated after he made his deed. This later acquisition of the property involves the problem of estoppel by deed. For a discussion of the Virginia law on this subject, see Section 1, *supra*, *Mechanics of a Title Examination*.

⁵ Generally stated as: "A life or lives in being plus twenty-one years plus a period of gestation (ten months). Obviously, an extended period of time may be involved. See 2 Minor, *Real Property*, §809 (2d Ed. Ribble, 1928).

⁶ See Section 9 Appendix of Forms, *infra*.

title to a piece of real estate. Of course, its weaknesses may be cured to all intents and purposes by the passage of extended periods of time. However, as will be seen, there is a period during which its susceptibility to attack and effective modification by external influences will be of critical importance.

The first general area of instability is primarily applicable to wills of recent date—perhaps so recent as the will under which the would-be vendor with whom you are dealing took the property. This is the type of attack in which the validity of the will and its proper execution are in question. Typical situations are those in which the attempt to establish conclusively a will by means of the probate procedure is contested on the grounds that undue influence was exerted upon the testator; that the testator was mistaken as to the nature of the instrument which he signed; that he lacked the requisite capacity to make a will (either in that he did not have the mental capacity necessary or that he did not meet the prescribed statutory requirements⁷); that the testator was misled in drawing the will by the fraudulent acts of some interested party or that the will is invalid due to some mechanical or procedural error in its preparation. The will may also be wholly invalid by reason of a later-dated, revoking will, or by reason of the subsequent marriage of the testator. Initiation of most of these actions is confined by statute to a period of one year following the date on which the purported will was finally admitted to probate⁸ with certain exceptions created to protect the interests of persons under disabilities.⁹ Once these periods have run, the will, having been officially probated, is thus established as the true last will and testament of the decedent and is no longer subject to a true attack on that basis.¹⁰ Because it has the effect of an attack, qualification of this statement must be made in order to cover the case of a later-found, subsequently-dated will. This later-found will can be admitted to probate at any time inasmuch as no period of limitation runs against it. The time limit upon attacks on the previously probated “will” is not

⁷ See Va. Code §§64-48, 64-49 (1950), and annotations thereto.

⁸ See Va. Code §64-74 (1910) (Appeal from order of clerk admitting will to probate; §64-80 (Effect of Judgment in the preceding proceedings); §64-84 (Bill in equity to establish or impeach will probated in ex parte proceedings and not appealed by parties); §64-85 (Period of limitation restricting exercise of rights under §64-84).

⁹ Va. Code §64-86 (1950).

¹⁰ Va. Code §§64-74, 64-85 (1950).

invoked because it is reasoned that the admission to probate of the subsequent will is merely a recognition of the true state of affairs and is not an attack within the meaning of the statute.¹¹ The drastic possibility that a contradictory, later-dated will may appear some day to defeat the rights of the purchaser is minimized somewhat by a statutory provision to the effect that no will submitted for probate more than one year from the date of testator's death shall affect the title of a bona fide purchaser of real estate from a devisee (or heir) of decedent.¹² Again, the effect of these provisions is diminished by the fact that a saving feature is incorporated which protects persons under the disabilities of insanity or infancy in their right to assert their interests under this later will until one year has elapsed subsequent to removal of their disabilities.¹³ If the attorney for the prospective purchaser can establish the identity of persons in these protected classes and can satisfactorily bind them so as to protect his client, the statutes appear to be beneficial. It is, however, easy to visualize a situation in which the identity of the persons having outstanding rights will be virtually impossible to ascertain. Since this is a situation in which, in order for the purchaser to be adversely affected, it is necessary that a later-dated will be found and that one or more of the devisees named in that will be a person under a disability, the statistical improbability that such a combination of circumstances will come to pass is to be considered and, depending upon the nature of the use and the value of the land, may or may not be sufficient justification for disregarding this potential event. A somewhat similar situation may arise where a person presumed dead by reason of the absence of seven years reappears after his will has been probated and his estate administered. Here, however, a statute provides protection for the bona fide purchaser under the previously probated will.¹⁴

A second type of problem is presented by the existence of certain statutory rights which take precedence in the distribution of a decedent's estate even as to the rights of specific devisees named in a valid, probated will. Among these are included such interests as the surviving spouse's right to dower or curtesy; the rights of creditors of the decedent or of his estate; the homestead exemption in

¹¹ *In re Will of Bently*, 175 Va. 456, 9 S.E. 2d 308 (1940).

¹² Va. Code §§64-91 and 64-92 (1950).

¹³ *Ibid.*

¹⁴ Va. Code §64-109 (1950).

favor of the surviving spouse and/or children; certain tax claims and the rights of the pretermitted child. In some of these cases, as with creditors' claims,¹⁵ there are limitation periods which afford a measure of protection for the purchaser of real estate. In others the only safeguard lies in careful detective work or in the effects of the passage of time from which, for example, it can be assumed that a surviving spouse is no longer living.¹⁶

The third and least definable area of uncertainty arises when the attorney searching a title must determine for himself just what estate, if any, was passed by a will and to whom. Examples of this type of difficulty will occur frequently when the will under consideration is of recent date and the estate passing under it is still being administered although similar problems can arise under an older will.

A typical situation is where a devisee is given a particularly desirable property in which your client is interested. Under these circumstances, it may well devolve upon the title examiner to analyze the will, the procedure by which it was executed and is being administered and the related circumstances which have to be considered in order to determine the operative effect of the will.¹⁷ All of this must be done with the objective of determining the effect of the will; of anticipating the likelihood that the personal representative may have to submit some questionable part of the will in which the examiner is interested to the court for interpretation and

¹⁵ Va. Code §§8-142, 8-143, 64-173 (1950). "The effect of the statutes is interpreted to be the creation of a quasi-lien on decedent's real property for a period of one year subsequent to his death. During this period there can be no such thing as a bona fide purchaser of the real estate." Also: "After the expiration of that time, the creditor is remitted to his rights under the other provisions of the section which declare that: 'the estate conveyed shall not be liable, if the conveyance was *bona fide*, and at the time of such conveyance no suit shall have been commenced for the administration of such assets, nor any report have been filed as aforesaid of the debts and demands of those entitled,' and even a pending suit would not preserve the right of such creditor as against a *bona fide* purchaser, unless a *lis pendens* was docketed as required by Va. Code §8-42 (1950)." *Heeke v. Allan*, 127 Va. 65, 70, 102 S.E. 655, 656 (1920).

¹⁶ Being a life interest, the consummate interest of the surviving spouse is terminated at death even though it may have been assigned to another.

¹⁷ The problems are more complex when the will is one originally probated in a remote jurisdiction. This is because of the greater difficulties in learning anything about the surrounding circumstances where the examiner is not a local citizen.

if it is concluded that this is likely, of anticipating the decision of the court. This represents an extreme example, but does point up the fact that in dealing with wills in the chain of title, it will generally be necessary to have an adequate knowledge of the law of wills. Knowledge of the order in which gifts by will abate in order that funds may be available for the payment of creditors' priority claims is typical of the type of information which will be required in order to properly evaluate the status of a parcel of real estate.

Similar problems of interpretation arise under older wills, for instance, the last-found grantor may have indicated that he was conveying an estate in fee. The will under which he took may, in unclear terms, present him with a life interest and another person with the remainder in fee. Worse still, this other person may be or may have been aware of this situation and may have acted accordingly in that he too has made conveyances. It is the duty of the title examiner to ascertain what interest was devised to whom, and to make appropriate recommendations.¹⁸

F. V. E.

4—UNRECORDED INTERESTS

Conveyances of real estate which are not recorded are void as to all purchasers for valuable consideration without notice.¹ The reason for this rule is to give purchasers notice of encumbrances on property.² Recordation, in effect, is constructive notice of all prior, recorded interests in the property.

Certain unrecorded rights in land may, in spite of the recordation statute, defeat the interests of subsequent purchasers. In many instances such rights, by their nature, are incapable of being recorded; in other instances recordation may not be required immediately upon transfer, thus leaving a period of time in which

¹⁸ Since the title to property passed by will vests immediately in the devisee subject to his divesting himself of it, it would appear that no application of *res-adjudicata* is involved and that until barred by the general statutes of limitation, the rightful devisee can assert his interest at any time. See 2 Minor, *Real Property*, §1155 (2d Ed. Ribble, 1928).

¹ Va. Code §55-96 (1950).

² *McCormack v. James*, 36 F. 14 (1886).

a purchaser is given no record notice. In fact, recordation in some instances is not required at all.

The rights of a subsequent purchaser are generally defeated if he has actual or constructive notice of prior interests in the land. While recordation is, by statute, constructive notice of prior, recorded interests in land, the common law doctrine of constructive notice is applied to most interests which are unrecordable or are not required to be recorded. Hence, the effect given the doctrine of constructive notice by judicial decision is of primary importance in Virginia.

Constructive Notice—Inquiry Notice

Constructive notice has been defined as "evidence of notice, the presumptions of which are so violent that they may not be controverted."³

It has been held that to affect a party with constructive notice of the fact with which he is sought to be charged, he must have had knowledge of facts naturally calculated to excite suspicion in the mind of a person of ordinary care and prudence.⁴ Mere suspicion which incites inquiry is insufficient. The circumstances which give rise to constructive notice must be clear and strong, and such as to impute bad faith to a purchaser in his failure to heed them.⁵ The general test appears to be that the facts in question were so clear and strong, imputing bad faith, and of such overwhelming evidentiary value that they will not be controverted by the courts.

In Virginia those circumstances sufficient to put a person of common prudence and ordinary diligence and experience upon inquiry will charge him with actual knowledge of those facts which an inquiry would have disclosed.⁶

The broad conclusion from these considerations of the doctrines of constructive notice and inquiry notice is that a purchaser is held merely to a comfortable standard or duty in ascertaining prior, adverse interests in land—that of ordinary diligence as it may be

³ 2 Minor, *Real Property*, §1318 (2d Ed. Ribble, 1928).

⁴ Great Atlantic, etc., Tea Co. v. Cofer, 129 Va. 640, 106 S.E. 695 (1921).

⁵ Hutton v. Wood, 101 Va. 54, 43 S.E. 186 (1902).

⁶ Fisher v. Borden, 111 Va. 535, 69 S.E. 636 (1910).

incited to inquiry by definite and clear facts. By this test, if it were the only test, a purchaser could forego all conscious effort to discover unrecorded interests affecting his title and suffer no loss in most of his purchases. If it were not for the doctrine of inquiry notice, a purchaser would frequently be placed in a better position by his failure to investigate the possibility of unrecorded interests than by a bona fide attempt to disclose them. It has been held, however, that one who purposely abstains from inquiry to avoid notice or fails to obtain it by gross negligence will be charged with notice.⁷ In every conveyance there is a possibility that title will prove defective as a result of some unrecorded interest which is overlooked and of which the purchaser has constructive notice. The conveyancer should direct his client-purchaser to these possibilities in the report of his search of title.⁸

*Easements—Adverse Possession—
Possession By The Grantor*

Unrecorded easements are typical of that class of interests which are unrecordable by their nature. They may be created by implication, estoppel or prescription.⁹ They will prevail over the interest acquired by a subsequent purchaser only if he purchases with actual notice of the easement or at the time of purchase was cognizant of such facts as would give him constructive notice of the easement.¹⁰

It is a well-established principle governing the purchase of servient tenements that an easement therein is extinguished unless the purchaser has either actual notice of the existence of the easement, or constructive notice from the recordation of the express grant or reservation creating it, or from the fact that its use and enjoyment is open and visible.¹¹ In order for the purchaser to be charged with constructive notice of an easement by other than recordation, the use and enjoyment of the easement must be apparent, visible and continuous.¹²

⁷ Fisher v. Lee, 98 Va. 159, 35 S.E. 441 (1900).

⁸ See Section 9, Appendix of Forms, *infra*.

⁹ 1 Minor, *op. cit. supra*, §§97-105.

¹⁰ Bowman v. Holland, 116 Va. 805, 83 S.E. 393 (1914).

¹¹ 1 Minor, *op. cit. supra*, §113.

¹² Hammond v. Ryman, 120 Va. 13, 90 S.E. 613 (1916).

Interests arising by adverse possession are closely related to easements created by prescription. Both are unrecordable interests distinguished by the nature of the interests acquired—only interests in incorporeal property may be created by prescription while adverse possession gives title to tangible property.¹³ Easements by prescription are acquired by the “lost grant” fiction by which, after the peaceful enjoyment of an interest for a long period of time, the enjoyment is presumed to be founded upon a lost grant. Title by adverse possession, on the other hand, is acquired by the acquiescence of the original owner in a notorious possession which is adverse to his own.¹⁴ While prescriptive easements will be enforced against a subsequent purchaser only if the easement was apparent and visible,¹⁵ adverse possession vests title in the possessor which is paramount to and good against that of all other persons, no matter how or when such other title was obtained or asserted.¹⁶ Since their use and enjoyment must be apparent and visible, the circumstances are usually such as to justify a finding of constructive notice of the existence of prescriptive easements.¹⁷ Although possession by a claimant under the doctrine of adverse possession must be notorious, justifying a similar finding of constructive notice, the enforcement of his claim is unlimited, and title by adverse possession is absolute.

Since interests which arise by easements and adverse possession are, as a rule, discerned by an inspection of the premises, the conveyancer should advise his clients of their nature and suggest an inspection designed to disclose them.

Effect of Quitclaim Deed

Frequently the rights of a purchaser are determined by more specific tests than that provided by the general doctrine of constructive notice.

The grantee under a quitclaim deed takes in subordination to claimants by prior unrecorded deeds since the grantee in a quit-

¹³ 2 Minor, *op. cit. supra*, §984.

¹⁴ *Ibid.*

¹⁵ 1 Minor, *op. cit. supra*, §113.

¹⁶ *McCanahan v. N. & W.*, 112 Va. 705, 96 S.E. 453 (1911).

¹⁷ *Burby, Real Property*, (Hornbook Series), 116 (1943).

claim deed is not considered a bona fide purchaser within the meaning of the Virginia recording acts.¹⁸ This rule is based upon the theory that the purchaser is charged with notice of outstanding claims since a quitclaim deed only purports to convey the grantor's interest.¹⁹

Only if the grantee were the first to receive and record the *whole* interest by quitclaim is he considered a bona fide purchaser.²⁰ In this situation the claimant by quitclaim gains good title—his recordation of the quitclaim provides notice to subsequent purchasers and forecloses the assertion of prior unrecorded deeds.

Death of Landowner

If the owner of land dies intestate in Virginia, his realty passes directly to his heirs by operation of law. This interest is unrecorded and vests immediately in the heirs.²¹ Since the title to such land does not pass through the decedent's estate, no interest therein is obtained by a purchaser from the administrator of the estate. It should be noted that in Virginia an heir includes issue born within ten months of the father's death.²²

If a landowner dies testate his will need not be admitted to probate until one year after his death.²³ Within this period no adverse interest may be acquired in the land.

An existing will will be re-opened if adoption of a child²⁴ or birth of a child after the date of the will occurs.²⁵

Errors in Recordation

Except for the period between 1919 and 1922 the grantor-grantee indexes have not been part of the record in Virginia.²⁶ Hence, it

¹⁸ *Virginia and Tennessee Coal & Iron Co. v. Fields*, 94 Va. 102, 20 S.E. 426 (1896). For a more complete discussion of the effect of quitclaim deeds see 32 Va. L. Rev. 190 (1945).

¹⁹ *Tiffany, Real Property*, p. 1091 (1912).

²⁰ *Clark v. Sayers*, 55 Va. 512, 47 S.E. 312 (1904).

²¹ *Broaddus v. Broaddus*, 144 Va. 727, 130 S.9. 794 (1925).

²² Va. Code §§64-8, 64-69 and 64-70 (1950).

²³ Va. Code §64-91 (1950).

²⁴ 2 *Minor*, *op. cit. supra*, §926.

²⁵ *Id.* at §1178.

²⁶ *Jones v. Folks*, 149 Va. 140, 140 S.9. 126 (1927).

is technically necessary for a search of title to include an examination of each deed book. Any omission or error in entering a conveyance in the indexes will not prevent a subsequent purchaser from being charged with notice from other books of record.²⁷

Errors which appear in the deed of conveyance will defeat the effect of recordation as notice, however, unless the property is so described and identified that a subsequent purchaser would, by the description, be given a means to determine all adverse rights which were intended to be created by the deed.²⁸ In case of error in the record itself, marginal corrections are part of the record and will constitute notice of the interest as correctly set forth in such corrections.²⁹

Periods During Which Recordation Not Required

A. Condemnation Proceedings

When land has been made the subject of condemnation proceedings action thereunder is only required to be immediately recorded in the county where most of the land is located. The condemnation of portions of the same lands situated in other counties is not required to be recorded until the proceedings are completed.³⁰ When the proceedings are completed title to all condemned lands vests in accordance with the directions of the court. No interest therein may be acquired by one who purchases prior to recordation. It has been held in Virginia that the condemnation proceeding itself provides notice of a prior right in all the land affected.³¹

B. Leases

A lease for five years, or less, is not required to be recorded or in writing if the lessee takes possession of the premises.³² Such a lease is valid against an innocent purchaser for value of the premises.³³

²⁷ 2 Minor, *op. cit. supra*, §1308.

²⁸ Merritt v. Bunting, 107 Va. 174, 57 S.E. 567 (1907).

²⁹ Blair v. Rorer, 135 Va. 1, 116 S.E. 767 (1923).

³⁰ Va. Code §§25-2 and 25-38 (1950).

³¹ Robinson v. Crenshaw, 84 Va. 348, 5 S.E. 222 (1888).

³² Smith v. Payne, 153 Va. 746, 151 S.E. 295 (1930).

³³ Great Atlantic, etc., Tea Co. v. Cofer, 129 Va. 640, 106 S.9. 695 (1921).

Breach of Condition Subsequent

Although there appears to be no case in point, it is provided in Virginia that "Any person who shall have a right of re-entry into lands by reason . . . of the breach of any . . . condition subsequent, may serve a declaration in ejectment on the tenant in possession" ³⁴ The phrase "tenant in possession" logically includes purchasers from the grantee. The grantor of land is thus enabled to maintain an action of ejectment against his grantee's purchaser even though such purchaser bought the premises without knowledge of a breach of the condition.

West Virginia decisions tend to support this view except that that jurisdiction distinguishes express from implied conditions. The grantor's right of re-entry prevails in the case of express conditions but is subordinated to the interests of the grantee's purchaser in the case of implied conditions. ³⁵ While such a distinction might be desired in Virginia as well, the authority for making it is limited.

J. A. L.

5—JUDGMENT LIENS

A judgment lien is defined as a lien of a statutory nature created by the judgment itself which is placed upon the real property of the judgment debtor. ¹ The judgment lien is of purely statutory origin for a judgment at common law imposed no lien whatsoever upon the realty of the judgment debtor, and the lands of a judgment debtor could not be seized to satisfy a judgment unless the judgment was in favor of the king. In 1285, a statute ² was passed whereby an election was allowed to the judgment creditor to sue out a writ commanding the sheriff to make the debt or the damages from the goods or chattels of the debtor or to deliver to the creditor all the chattels of the debtor with certain exceptions and a moiety of his land until the debt should be satisfied. The former method was accomplished by a writ of *feri facias*; the latter alternative came

³⁴ Va. Code §55-239 (1950).

³⁵ 1 Minor, *op. cit. supra*, §519.

¹ Ballantine *Law Dictionary*, 2d Ed., 1948.

² West. II, 13 Edw. I, ch. 18 (1285).

to be nominated an *elegit* since it required an election of the judgment creditor that the lands of the judgment debtor be subjected to the payment of the debt. The lien created by the writ of *elegit* was incidental to it and dependent upon it for its existence. The writ of *elegit* has been abolished in Virginia.³

Today in Virginia the judgment rendered against a defendant creates a legal statutory lien on all the real property of the judgment debtor.⁴ Although the judgment creates the lien, it is necessary that it be docketed with the clerk of the court in the city or county where the land is situated before it will be considered perfected against a purchaser for valuable consideration without notice.⁵ The lien includes not only the real property of which the judgment debtor is possessed as of the date of judgment, but it includes any real property that he becomes entitled to or possessed of after the date fixed by the statute for the commencement of the lien. It is of considerable importance to note that the judgment creditor is not to be treated as a purchaser in any sense but acquires only a lien on whatever interest the judgment debtor had in the estate unless there is a statutory enactment which makes the creditor's interest paramount. Therefore if a parcel of real estate is held by a judgment debtor in trust for another, the beneficial interest in such third party would be superior to the rights of the judgment creditor.⁶

The lien attaches not only to the legal estate of the judgment

³ Va. Code §8-400 (1950).

⁴ Va. Code §8-386 (1950). Every judgement rendered in this State by any state or federal court, other than by confession in vacation, shall be a lien on all the real estate of or to which the defendant in the judgment is or becomes possessed or entitled, at or after the date of the judgment, or if it was rendered in court, at or after the commencement of the term at which it was so rendered, if the cause was in such condition that a judgment might have been rendered on the first day of the term. But if from the nature of the case judgment could not have been rendered at the commencement of the term, it shall be a lien only on or after the date on which the judgment or decree is rendered; provided, however, that the foregoing shall not prevent the lien of a judgment or decree from relating back to the first day of the term merely because the case is set for trial or hearing on a later day of the term, if the case was matured and ready for hearing at the commencement of the term.

⁵ Va. Code §8-390 (1950).

⁶ *Dingus et al v. Minneapolis Improvement Company, et al*, 98 Va. 737, 37 S.E. 353 (1900).

debtor but also to any equitable interest that he may have in real property. Under this reasoning, the equity of redemption is subject to the lien, as is also a contingent remainder at the moment that it becomes vested.⁷ A lease for a term of years is regarded as a chattel real subject to a writ of execution, and therefore not land that will be bound by the judgment. Contracts for the sale of land create in the vendee an equitable interest in the land by the process of equitable conversion. A Court of equity regards the vendee as having acquired property in the land and the vendor as having acquired property in the price. The vendee may devise or encumber it; if he dies intestate, it passes to his heirs at law. His wife is entitled to dower in it, and specific performance may be enforced against his heirs.⁸ This is an equitable doctrine and does not determine all legal rights, for a judgment against the vendor which is docketed before his conveyance to the vendee is recorded continues to be a lien upon the land.⁹ In order for the contract for the sale of land to constitute notice to both purchasers and creditors, it must be recorded¹⁰ in the office of the clerk of the court of the county wherein the real estate lies; if it is situated in more than one county or corporation, recordation must be made in each such county or corporation.¹¹ The contract for such sale of land is recorded in the deed book.¹² An exception to be noted is the situation which arises when the purchase money is paid by one person with the title taken in another. In this instance, it has been held that the title holder is a mere trustee with no beneficial interest in the property, and the land is not bound by a judgment against him.¹³

The Virginia statute prescribing the time for the commencement of the lien provides that a judgment rendered in a court for money constitutes a lien on all the real property of the judgment debtor when it is recorded in the clerk's office of the court of the county or corporation wherein the land is located. It is further provided that such lien is to run from the first day of the term of court at which the judgment was rendered if there could have been a

⁷ *Wilson v. Langhorne*, 102 Va. 631, 47 S.E. 871 (1904).

⁸ *Sale v. Swann*, 138 Va. 198, 120 S.E. 870 (1924).

⁹ *Miller v. Kemp*, 157 Va. 178, 160 S.E. 203 (1931).

¹⁰ Va. Code §55-96 (1950).

¹¹ Va. Code §55-97 (1950).

¹² Va. Code §55-95 (1950).

¹³ *Stratley v. Esser*, 117 Va. 135, 83 S.E. 1075 (1915).

judgment rendered on that day.¹⁴ The interpretation placed upon this statute by the Supreme Court of Appeals is that if the case was ready for trial on the first day of the term at which it was rendered, the lien is to run from that date; otherwise, it will attach from the date that it was rendered.¹⁵ There is a question in Virginia today whether or not this statute has any effect. Courts of record in Virginia now have continuing terms. Under this interpretation, it would seem to be impossible to say which is the first day of the term. Therefore it is uncertain whether a judgment placing a lien upon the real property of the judgment debtor would relate back.

A further point to be noted is the application of Rule 3:21¹⁶ which allows the trial court to notify or vacate a judgment within twenty-one days after the entry thereof. The problem in this connection is what would be the result if the day after the judgment is rendered and recorded, the judgment creditor brings a suit to foreclose his lien? One way to solve this dilemma is to interpret Rule 3:21 as having the effect of postponing the bringing of the suit. It is doubtful that a court of equity would entertain a suit to foreclose the judgment lien within the twenty-one day period after the entry of the judgment when it is provided by statute¹⁷ that the clerk of court is not to issue a writ of *feri facias*. Since the purpose of both the judgment lien and the writ of *feri facias* is to collect a money judgment, and both are interrelated insofar as the statute of limitations is concerned, it is submitted that the better result would be not to entertain such a suit until the expiration of the twenty-one day period when the trial court loses all jurisdiction.¹⁸ Applying this reasoning to the doctrine of relation back, it would follow that since there are no terms of court as such, the doctrine would have no application further back than twenty-one days from the time the judgment became final. Therefore the judgment would become a lien as of the date that it is rendered.

With either this reasoning or applying the presently used doctrine of relation back, the subsequent purchaser will take precedence over a lien creditor who has failed to record. Virginia has

¹⁴ Va. Code §8-386 (1950).

¹⁵ *Yates v. Robertson*, 80 Va. 475 (1885).

¹⁶ Rules of Court, 1950.

¹⁷ Va. Code §8-399 (1950).

¹⁸ *Harvey v. Chesapeake and Potomac Telephone Co.*, 198 Va. 213, 93 S.E. 2d 309 (1956).

what may be characterized as a "race-notice" statute¹⁹ as concerns mortgages and deeds of trust. By this is meant that whichever party records first has the superior right as far as the land is concerned, provided that he did not have actual notice previous to that time. In other matters, Virginia has a "notice" statute. Once the judgment or the conveyance has been recorded, it constitutes constructive notice to all the world as to an encumbrance or a conveyance. A judgment creditor will be accorded priority against a purchaser who has failed to record even though the purchaser has entered upon the land and is making improvements.²⁰ It has been held that possession in Virginia is not sufficient notice to put a subsequent purchaser on inquiry.²¹ The result would be the same although the judgment creditor had actual notice of the conveyance provided that the purchaser had failed to record.²² If, however, the conveyance is recorded prior to the rendering of the judgment, the date of the commencement of the lien is immaterial for rights of a third party have intervened.²³ If the judgment is confessed, the lien dates from the time of day that it is confessed. The time of confession is the controlling factor and not the time that the ministerial act of recordation is performed by the clerk.²⁴ This has no application to a purchaser for value without notice who would have priority against an undocketed judgment.

The object and purpose of docketing a judgment is to give the required notice to subsequent purchasers for value. The docketing of a judgment gives no preference among creditors. Priority among the various creditors is fixed as of the date of judgment.²⁵ As to subsequent purchasers for value without notice, it is required by statute²⁶ that the judgment be indexed in the judgment lien book before it is considered to be docketed. This varies the procedure from that required for a purchaser to be protected from a prior inconsistent conveyance. In that instance it is sufficient if the deed

¹⁹ Va. Code §55-96 (1950).

²⁰ *Flannary v. Kane*, 102 Va. 547, 46 S.E. 312 (1904).

²¹ *Thomas v. Lee*, 144 Va. 523, 132 S.E. 307 (1926).

²² *Flannary v. Kane*, *supra*.

²³ 1 Minor, *Real Property*, §665 (2d ed. Ribble, 1928).

²⁴ *American Bank & Trust Co. v. National Bank of Suffolk*, 170 Va. 169, 196 S.E. 693 (1938).

²⁵ *Gurnee v. Johnson*, 77 Va. 712 (1883).

²⁶ Va. Code §8-378 (1950).

has been delivered to the clerk of the court. Recordation is considered a ministerial duty and the grantee is protected if the deed is duly admitted to record by the clerk of the court wherein the land is situated without indexing it. When indexing a judgment, initials may be used instead of the full name. Whether or not the omission of a middle initial in the index will invalidate a judgment lien is dependent upon the circumstances of the particular case. If the name that is used is sufficient to put a reasonable man on notice, an omission will not be fatal to the lien. It has been held in Virginia that a judgment docketed in the name of *Mrs. T. Frank Simmons* will not constitute notice to a purchaser for value of property from *Mrs. May M. Simmons* even though she is the same person.²⁷ When examining the judgment lien, it is not necessary that one search every possible designation of the person whose title he is examining. The title examiner must search the name as it is ordinarily used by its possessor. The omission of a Christian name is fatal to the lien.²⁸

When the judgment has been docketed, the judgment creditor acquires the right to subject the land of the judgment debtor to the satisfaction of his lien. The condition in which the creditor finds the property at the time of the enforcement of the lien is the controlling factor. There is no allowance made for any improvements placed upon the land by a purchaser subsequent to the docketing of the judgment since the statute²⁹ providing for such an allowance has no application. The reasoning behind this rule is that the purchaser has constructive notice of such a lien, and therefore the judgment creditor is free to subject both the land and the improvements to the satisfaction of his judgment.³⁰ Against judgment creditors of the debtor, the unrecorded conveyance is a nullity, and both the land and the subsequent improvements are subject to the lien. Until the judgment has been recorded, it is void as against a subsequent purchaser for value without notice. It has been held in this type of situation that

²⁷ 7 Va. Law Reg. 253 (1901-1902). The case comment noted that the entry of the judgment against Mrs. Simmons in her husband's Christian name was done according to social rather than legal or business custom.

²⁸ *Richardson v. Gardner*, 128 Va. 676, 105 S.E. 225 (1920).

²⁹ Va. Code §8-242 (1950). But see Section 6, *Mechanic's Liens, infra*, for priorities accorded to such liens.

³⁰ *Nixdorf v. Blount*, 111 Va. 127, 68 S.E. 258 (1910).

whoever records first, the purchaser for value or the judgment creditor, has priority as between the parties.³¹

The judgment lien endures so long as a writ of *fiery facias* may be issued or a writ of *scire facias* for the revival of the action may be brought. This period of time, as fixed by statute,³² is twenty years. In the case of a personal representative of a decedent, a writ of *scire facias* must be brought against him within five years from the date of his qualification in order to revive a judgment rendered against his decedent.³³ The time between the death of a decedent and the qualification is not counted as part of the limitation if the period of time does not exceed two years.³⁴ If the person to whom the right of action belongs is under a disability such as infancy or insanity, the statute of limitations does not begin to run until the disability is removed provided that in no case will it extend beyond a period of twenty years from the time that the right of action accrued.³⁵ An exception to the twenty year limitation statute is the provision which does not allow a suit to be brought to enforce a lien against the lands of a judgment debtor which have been conveyed to a grantee for value unless such a suit is brought within ten years from the recordation of the deed from the judgment debtor to the grantee.³⁶

By statute,³⁷ a judgment rendered in a federal court in Virginia is accorded the same force and effect as a judgment rendered in a Virginia court when such judgment has been docketed in the clerk's office of the county where the land is situated. Foreign judgments, however, have no effect outside the jurisdiction until an action has been maintained thereon in a Virginia court. A domestic judgment must be rendered in order to be docketed.³⁸

The proper method to enforce a judgment lien is to bring a bill in equity to foreclose the lien. If it appears to the court that the

³¹ Fooshee v. Snively, 58 F. 2d 772 (1931).

³² Va. Code §8-396 (1950).

³³ Spencer v. Flannary, 104 Va. 395, 51 S.E. 849 (1905).

³⁴ Va. Code §8-32 (1950).

³⁵ Va. Code §8-30 (1950).

³⁶ Va. Code §8-393 (1950).

³⁷ 28 U.S.C. §1962.

³⁸ Aetna Casualty & Surety Co. v. Whaley, 173 Va. 11, 3 S.E. 2d 395 (1939).

judgment will not be satisfied within five years from the rents and profits produced by all the land subject to the lien, the court may direct a foreclosure sale of the whole or any part of the property in question.³⁹ This statute is applicable only to suits to enforce judgment liens and has no application whatsoever to an expressed vendor's lien. Implied vendor's liens have been abolished by statute.⁴⁰ To enforce a vendor's lien, the court may decree a sale of the land without any previous accounting of the rents and profits.⁴¹

J. E. M.

6—MECHANIC'S LIENS

a) *General*

The Virginia statute concerning mechanic's liens provides:

All persons performing labor or furnishing materials, of the value of ten dollars or more, for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold . . . shall have a lien, if perfected as hereinafter provided, upon such building, or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof . . . for the work done and material furnished. But when the claim is for repairs or improvements only, no lien shall attach to the property repaired or improved unless such repairs or improvements were ordered by the owner, or his agent.¹

Mechanics' liens are the creature of statute and were unknown to the common law. Like all statutory liens, the statutes creating them must be substantially complied with. However, the rule of construction in Virginia is that they should be liberally construed,² although there is considerable diversity of opinion as to whether they should be liberally or strictly construed.³ Nevertheless, those portions of the statute which relate to the right to the existence of the lien should be strictly construed since they are in derogation of

³⁹ Va. Code §8-391 (1950).

⁴⁰ *Ibid.*

⁴¹ *Neff v. Woodling*, 83 Va. 432, 2 S.E. 731 (1887).

¹ Va. Code §43-3 (1950).

² 1 Minor, *Real Property*, §684 (2d Ed. Ribble, 1928).

³ Annotations to Va. Code §43-3 (1950).

the common law, and this rule of construction is maintained in spite of Section 43-15⁴ which provides:

No inaccuracy in the memorandum field, or in the description of the property to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given and the memorandum conforms substantially to the requirements of Sections 43-5, 43-8 and 43-10 respectively, and is not willfully false.

The labor performed or materials furnished must be either (1) for the construction, (2) for the repair, or (3) for the improvement of buildings or structures, and the lien does not arise in case of the furnishing of labor or material for other purposes connected with the land, such as cultivating the soil, planting trees, etc.⁵ But it has been held that furnishing of machinery essential to a building is within the statute.⁶

b) *Property Affected*

Property belonging to the Commonwealth or to any municipality is exempt from the statute unless expressly covered by a statute.⁷ But church property has been held to be included by the statute.⁸

If under one contract, material is to be furnished for two or more buildings and the material for each is specified, a lien can be taken out only against the buildings for which the material was used. However, if the material for each building is not specified, and the contract is not divisible as regards such material, then the lien will be a joint lien upon all the buildings for the whole amount.⁹ Where separate buildings are constructed under separate contracts no lien can attach to all the buildings.¹⁰ But all machinery and apparatus of a permanent character and essential to the purposes of the build-

⁴ *Clement v. Adams Bros-Paynes Co.*, 113 Va. 547, 75 S.E. 294 (1912).

⁵ 1 Minor, *Real Property*, §685 (2d Ed. Ribble, 1928).

⁶ *Haskin Wood, etc. Co. v. Cleveland*, 94 Va. 439, 26 S.E. 878 (1897).

⁷ *Manly v. Broaddus*, 94 Va. 547, 27 S.E. 438 (1897); *Phillips v. University of Va.*, 97 Va. 472, 34 S.E. 66 (1899).

⁸ *Cain v. Rae*, 159 Va. 446, 166 S.E. 478 (1932).

⁹ *Sergeant v. Denby*, 87 Va. 206, 12 S.E. 402 (1890).

¹⁰ *Gilman v. Ryan*, 95 Va. 494, 28 S.E. 875 (1898).

ing, although severable without lasting injury to it or to the buildings, may be subjected to a valid mechanic's lien.¹¹

c) *Estate or Interest Subject to Lien*

If the person who shall cause a building or structure to be erected or repaired owns less than a fee simple estate in the land, then only his interest therein shall be subject to liens created under this chapter.¹²

The interest of a lessor in a lot upon which the leasee has erected a building cannot be subjected to the liens of mechanics for erecting the buildings unless the lessor or his duly authorized agent caused the building to be erected.¹³ And if the lessee under a lease covenants that he will erect a building on the leased land, and after erecting the building fails to pay the contractor, the lessor, under this section, has not "caused" the building to be erected as to allow a mechanic's lien to foreclose his interest in the land.¹⁴

A personal decree may be entered against a person who, having ordered improvements or repairs upon the land without authority, has no interest in the land, providing he be made a party to the suit in equity to enforce the mechanic's lien.¹⁵

A mechanic's lien may be perfected on an equitable as well as on a legal estate¹⁶ but when entered against an equitable estate, its value depends upon that particular estate, and it survives or perishes with it.¹⁷

As to prior encumbrances, if the grantor under an unrecorded conveyance causes a building to be erected after a judgment is recovered against the grantor, the judgment creditor has a superior encumbrance upon the land, to the extent of the value of the land, and this encumbrance would take priority over a mechanic's lien. However, if the judgment was recovered after the commencement of the work, the mechanic's lien would have priority.¹⁸

¹¹ Haskin Wood v. Cleveland, *supra*.

¹² Va. Code §43-20 (1950).

¹³ Atlas Portland Cement Company v. Main Line Realty Corp., 112 Va. 7, 70 S.E. 536 (1911).

¹⁴ *Ibid*.

¹⁵ Carter v. Keeton, 112 Va. 307, 71 S.E. 554 (1911).

¹⁶ Wallace v. Brumback, 177 Va. 36, 12 S.E. 2d 801 (1941)

¹⁷ Feuchtenberger v. Williamson, 137 Va. 578, 120 S.E. 257 (1923).

¹⁸ 1 Minor, *Real Property*, § 694 (2d Ed. Ribble, 1928).

d) *Perfecting Mechanic's Liens*

Section 43-4 of the Code prescribes the method for perfecting the lien by a general contractor. The memorandum required must include (1) the name of the owner of the property, (2) the claimant, (3) the amount and consideration of the claim, (4) the time or times the claim is or will be due and payable, (5) verified by the oath of the claimant, (6) including a statement declaring his intention to claim the benefit of the lien and (7) a brief description of the property.

In general the memorandum must be filed at any time after the work is done and the material furnished and before the expiration of sixty days after the building is completed or the work otherwise terminated. The date from which the sixty days will begin to run may be at a time other than when the building is completed, for instance, when the contractor's job is completed or when the owner orders the work to be stopped.

The time of the actual completion of the structure is the time intended by the statute; however, if the contract provides that the building will be considered completed before the "finishing touches" are completed, then the claim will begin to run before the completion of the "finishing touches."¹⁹

It is not necessary for notice to be given by the general contractor to the owner of the filing of the lien. The filing in the clerk's office is considered sufficient notice.²⁰

e) *Perfecting Liens by Subcontractors*

If a subcontractor wishes to secure the benefit of a lien upon the building, the statute provides methods by which he can do so: (1) He may acquire an independent lien of his own by much the same procedure as is required of the general contractor;²¹ or (2) he may secure the benefit of the lien already obtained by the general contractor.²²

In order to secure an independent lien, the subcontractor must do one thing more than is necessary for a general contractor.

¹⁹ *Trustees v. Davis*, 85 Va. 193, 72 S.E. 245 (1888).

²⁰ *Coleman v. Pearman*, 159 Va. 72, 165 S.E. 371 (1932).

²¹ Va. Code §43-7 (1950).

²² Va. Code §43-18 (1950).

Written notice must be given to the owner of the filing of the lien. It has been held that written notice is required even if the owner had knowledge of the filing unless it appeared that written notice had been waived.²³

This section of the statute was designed for the protection of the subcontractor so *a fortiori* if the general contractor is not indebted to the subcontractor, the subcontractor is not entitled to a lien.²⁴

The owner's liability to a subcontractor is limited to the amount owed by the owner to the general contractor at the time the notice is given. But the owner cannot defeat the claim of a subcontractor by giving his negotiable notes to the general contractor in payment of labor and materials.²⁵

If the subcontractor has furnished labor or materials for one who is only a subcontractor, the statute provides that the person claiming the lien shall also give notice to the general contractor (as well as the owner), the notice being similar to that given to the owner, but the amount to be claimed in such case shall not exceed the amount for which the debtor subcontractor may himself claim a lien.²⁶

The lien secured by the general contractor inures to the benefit of the subcontractor, if the subcontractor gives written notice to the owner before the lien is discharged.

There is still a third protection afforded to subcontractors by the statute; however, this is against the owner or the general contractor in their individual capacities.²⁷

f) *Waiver or Destruction of Mechanic's Liens*

Minor states:

The mechanic's lien, it is believed follows the general rule applicable to other liens, and is not to be regarded as lost or waived by the taking of other and additional

²³ Coleman v. Pearman, *supra*.

²⁴ Wilson Co. v. McManus, 162 Va. 30, 173 S.E. 361 (1934).

²⁵ Kinnier Co. v. Cofer, 13 Va. Law Reg. (N.S.) 238 (1927).

²⁶ Va. Code §43-9 (1950).

²⁷ Va. Code §43-11 (1950).

security by lien or otherwise, unless the intention to waive or abandon is manifest.²⁸

If the contractor abandons the contract, or if the building is destroyed, because the lien is upon the building, the lien is lost.²⁹

W. T. P.

7—TAX LIENS

For the purpose of the title examiner, tax liens on real estate arise from: county and municipal taxes, special assessments for local improvements, state gift taxes, state inheritance taxes and federal taxes.

The title examiner must determine for each category what taxes, assessments and liens have been levied and assessed against the property and are liens on it at the time of the search. He must note all unpaid installments of any assessment previously levied and in force, whether due or not. Finally, he must obtain all pertinent information, if any, regarding tax sales of the property which might constitute a cloud on the title.

The sources from which the necessary information can be obtained are as follows:

County and Municipal Taxes

- a.) *Delinquent Tax List*—for outstanding taxes more than two years old.
- b.) *Assessment Roll in Treasurer's Office*—for taxes assessed within the past two years.

Local Improvement Assessments

- a.) *Special Assessment Roll in Treasurer's Office.*

State Gift Taxes

- a.) A bona fide purchaser for value of the property takes free from these taxes. Therefore, a search does not

²⁸ 1 Minor, *Real Property*, §698 (2d Ed. Ribble, 1928).

²⁹ *Ibid.*

appear to be necessary. The only available source of information seems to be the State Department of Taxation.

State Inheritance Taxes

- a.) *The Tax Certificate*—received by the decedent's estate or by the person who paid the taxes.
- b.) *Probate Records*—for discharge in a probate proceeding.
- c.) *State Department of Taxation*

Tax Sale

- a.) *List of Delinquent Land Sales in Treasurer's Office*—if search is made within sixty days of the tax sale.
- b.) *Delinquent Land Book (in office of Clerk of Court where deeds are recorded)*—if search is made after sixty days from time of tax sale.

Federal Taxes

- a.) Grantor-Grantee Index for the Deed Books

In addition, it is necessary to check the Judgment Lien Book to ascertain whether any of the governmental bodies have reduced an outstanding tax obligation to a judgment.

County and Municipal Liens

In Virginia, taxable real estate has been segregated and made subject to local taxation only.¹ The owner of real estate on January first of each year is assessed for the taxes for the year beginning on that day.² A lien then arises against the real estate for the payment of taxes and levies,³ which also become personal charges against the owner.⁴

"Due process of law" demands that the property to be taxed be properly and accurately listed in the landbooks. In conjunction

¹ Virginia Constitution, §171; Va. Code §58-9 (1950).

² Va. Code §§58-4, 58-796 (1950).

³ Va. Code §§58-762, 58-1023, 58-1024 (1950).

⁴ Va. Code §§58-850, 58-1001, 58-1014 (1950). And see *Kinchloe v. Gibson*, 115 Va. 119, 78 S.E. 603 (1913); *Richmond v. Monument Ave. Develop. Corp.*, 184 Va. 152, 34 S.E. 2d 223 (1945).

with this, the word "owner" as used in the statute⁵ relating to the assessment of real estate has been determined to be any person who has the usufruct, control or occupation of the land, whether his interest in it is an absolute fee, or an estate less than a fee.⁶ Also, the listing is valid if the name in the landbook is the true name of the freehold owner, or so nearly like it as to make it impossible to mistake for whom the name is intended.⁷

Erroneous Assessment

If a mistake is made in assessing taxes, within two years from December 31st of the year in which the court may increase, reduce or otherwise correct it; and the owner may apply to the court for relief within two years after the year in which the assessment was made.⁸

Liability for Taxes

Generally, the liability for taxes of parties to transactions affecting the interest in assessed land is as follows:

Sale of Land—the payment of taxes by either vendor or vendee constitutes full satisfaction of the taxes legally chargeable upon the land.⁹ Also, a vendee of land has a right to apply his purchase money towards the payment of taxes on the land, and the fact that the taxes for the current year in which the property is sold have not been paid is not a valid objection to the title.¹⁰

Death of Owner—when the owner dies intestate, the land may be charged to his heirs or to his estate until transferred from it.¹¹ The failure to charge land to his estate upon the landbooks will not invalidate an assessment of taxes in his name instead of that of his estate, and a sale of the land for delinquent taxes will

⁵ Va. Code §58-796 (1950).

⁶ *Stark v. Norfolk*, 183 Va. 282, 32 S.E. 2d 59 (1944).

⁷ 2 Minor, *Real Property*, §1263 (2d Ed. Ribble, 1928); *Stevenson v. Henkle*, 100 Va. 591, 42 S.E. 672 (1902).

⁸ Va. Code §58-1145 (1950).

⁹ *Lohrs v. Miller*, 12 Gratt. (53 Va.) 452 (1855); *Sturns v. Fleming*, 26 W. Va. 54 (1885).

¹⁰ *Clark v. Hutzler*, 96 Va. 73, 30 S.E. 469 (1898).

¹¹ Va. Code §58-771 (1950).

pass title.¹² When he has devised land, it may be charged to the devisees; but, if under the will the land is to be sold, it is charged to the decedent's estate until transferred.¹³ In any event, a lien for taxes on the lands of a decedent can never be enforced so long as there is personal property. The latter must first be exhausted.¹⁴

Life Estate and Remainder—the burden of paying taxes is on the life tenant rather than upon the remainderman.¹⁵ If the life tenant refuses to pay the taxes, the remainderman may have the rents appropriated to that purpose.¹⁶ But the rule is modified where the life tenant is allowed to encroach on the principal and the principal itself is liable for such taxes.¹⁷ In any event, in the absence of statute there can be no apportionment of the taxes between the life tenant and the remainderman.¹⁸

Mortgage—a mortgagee not in possession and not receiving the rents and profits of the land may pay the taxes or not as he chooses, but is not bound to do so.¹⁹

Deed of Trust—when the owner simply gives a deed of trust to secure the payment of money, the land remains on the landbooks in the name of the owner and is taxed in his name.²⁰ By statute,²¹ the purchaser at a sale under a deed of trust must see that the proceeds are applied to the payment of all taxes and levies assessed on the real estate, the provisions of Section 55-59²² to the contrary notwithstanding.

¹² *Coles v. Jamerson*, 112 Va. 311, 71 S.E. 618 (1911).

¹³ Va. Code §58-771 (1950).

¹⁴ *Pugh v. Russell*, 27 Gratt (68 Va.) 789 (1876).

¹⁵ *Glenn v. West*, 106 Va. 356, 56 S.E. 143 (1907); *Richmond v. McKenny* 194 Va. 427, 73 S.E. 2d 414 (1952).

¹⁶ *Downey v. Strouse*, 101 Va. 226, 43 S.E. 348 (1903).

¹⁷ *Haythe v. Patteson*, 2 Va. Law Reg. 563 (1896).

¹⁸ *Comm. v. Wilson*, 141 Va. 116, 126 S.E. 220 (1925).

¹⁹ *Harvie v. Banks*, 1 Rand. (22 Va.) 408 (1823).

²⁰ Va. Code §58-797 (1950). And see *Stevenson v. Henkle*, 100 Va. 591, 42 S.E. 672 (1902).

²¹ Va. Code §58-762 (1950).

²² Va. Code §58-762 (1950). And see Va. Code §55-59 (13) (1950): The trustee shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, and apply the same, first, . . . , secondly, to discharge all taxes, levies, and assessments, with costs and interest. . . .

Lease—as a general rule the landlord under an ordinary lease is responsible for the taxes on the property leased, but this rule has no application to the case of a perpetual leaseholder who is in effect the virtual owner of the property and entitled to its use forever.²³

Priority of the Lien

The tax lien is a first claim on the property, with precedence over any other lien or encumbrance. It continues in force until actual payment is made to the proper officer of the taxing authority.²⁴

Duration and Release of the Lien

It has been provided by statute that: liens delinquent for twenty years or more are deemed to have expired;²⁵ liens for taxes due prior to 1937 upon realty acquired for lodge purposes by any benevolent or charitable association are released for any year(s) in which no rents and profits or income whatever were received from the realty;²⁶ real estate purchased by the Commonwealth or a subdivision thereof at a delinquent land sale, or which is delinquent for taxes and levies and has been sold in a suit in which the Commonwealth or the subdivision thereof is a party, or becomes a party by proving a debt in the suit, is not liable for any taxes or liens which could have been proven in the suit or on account of which it was sold.²⁷

Penalty and Interest For Failure To Pay Taxes

A penalty of 5% of the amount due is added to the taxes and levies if not paid on or before August 15 of each year for real

²³ *Norfolk v. Perry Co.*, 108 Va. 28, 61 S.E. 867 (1908).

²⁴ Va. Code §58-762 (1950).

²⁵ Va. Code §58-767 (1950). According to Cox *A Manual For Title Examiners in Virginia* (2d Ed.) §191: "The Claim that (this) statute is in violation of sections 174 and 183 of the Virginia Constitution has never been decided by our Court of Appeals. It is contended that they do not release any claims of the State for taxes, or set up a bar to the collection of taxes, but simply release the tax lien on the land (120 Va. 835, 843 (1917); 137 Va. 542, 551 (1923); 4 Va. Law Reg. (N.S.) 161, 169)." Cf. *Jennings v. Norfolk*, 198 Va. 277, 93 S.E. 2d 302 (1956).

²⁶ Va. Code §15-669 (1950).

²⁷ Va. Code §15-676 (1950).

property situated in a county with a population density of two thousand inhabitants per square mile. For all other real property assessed the penalty attaches as of December 5th of the same year.²⁸

Interest accrues against the delinquent land at the rate of 6% per year from February 15th of the year next following the assessment year for taxes required to be paid by August 15th of the assessment year and from June 30th of the year next following the assessment year for taxes required to be paid by December 5th of the assessment year. But the provision does not apply to local levies in any city or town otherwise regulated by its charter or other special provisions.²⁹

Delinquent Tax List

Not later than August 1 of each year the treasurer of each county or city must prepare a list of lands delinquent as of June 30th of the year following the assessment year. Copies of the list must be submitted to the governing body of the county or city and to the clerk of courts in whose office deeds are admitted to record—for recording in “The Delinquent Land Book”.³⁰

Until town taxes returned delinquent are entered in the record, the real estate is not liable for town taxes as against purchases for value and without notice.³¹

Delinquent Tax Sale

Taxes and levies are still collected for one year following June 30th of the year in which they are recorded in “The Delinquent Land Book”.³² At the end of that period, the lists, with changes recorded, are resubmitted to the governing body of the county or city. At that time the decision is made either to continue collections or to sell the lands included on the list.³³

For lands to be sold, the sale occurs on the second Monday in

²⁸ Va. Code §58-963 (1950).

²⁹ Va. Code §58-964 (1950).

³⁰ Va. Code §§58-978, 58-979, 58-983 (1950).

³¹ Va. Code §58-1110 (1950).

³² Va. Code §58-989 (1950).

³³ Va. Code §58-990 (1950).

the following December.³⁴ The sale must first be preceded by proper advertisement and notice, without which it is void.³⁵

It is expressly provided by statute that the sale of country lands shall be of each tract separately, or of such quantity or part of it as shall be sufficient to satisfy the taxes and levies on it, with interest and charges; and that the sale of city and town lots shall be of each lot separately, or of such undivided interest therein as shall suffice for the same purpose.³⁶

While this statute requires each tract or lot to be sold separately, thus prohibiting the sale of several lots en masse, sale, it would seem, must follow the assessment list, and if several adjacent tracts are used and occupied together, and are so assessed, they may be considered as one tract for purposes of sale.³⁷

The illegality of any part of the taxes for which the land is sold taints the whole transaction and renders the sale void.³⁸ Also, the safer and better rule is that the sale is void for any excess (tax) whatever.³⁹

The county or city treasurer makes the tax sale.⁴⁰ But the power to sell ceases with his official term, and a sale made by him thereafter is void.⁴¹

The Virginia statutes⁴² are generally construed to provide that the sale is to be made to the highest bidder, i.e., the bidder who will pay the taxes, costs and charges for the least quantity of land, leaving the balance of the delinquent tract to the owner.⁴³

The Private Purchaser at the Tax Sale

In general, any person who may purchase land in a private transaction may purchase at a tax sale. But there are certain well

³⁴ Va. Code §58-1029 (1950).

³⁵ Va. Code §58-1030 (1950); *Attkisson v. Moore*, 159 Va. 643, 167 S.E. 367 (1933).

³⁶ Va. Code §58-1033 (1950).

³⁷ See footnote 34.

³⁸ 2 Minor, *Real Property*, §1270 (2d Ed. Ribble, 1928).

³⁹ *Ibid.*

⁴⁰ Va. Code §58-1029 (1950).

⁴¹ *McCullough v. Hunter*, 90 Va. 699, 19 S.E. 776 (1894).

⁴² Va. Code §§1029-1032 (1950).

⁴³ *Kinney v. Beverly*, 2 Hen. & M. (12 Va.) 318, 319 (1808).

defined cases in which a tax sale will be rendered invalid by reason of the character of the purchaser, or at least the purchaser will be considered in equity as holding the legal title only as a constructive trustee.⁴⁴

One whose duty it is to pay the taxes on a tract of land not belonging entirely to him, cannot, by neglecting to pay them and thus causing the land to be sold to the detriment of others interested, add to or strengthen his own title by purchasing the land at a tax sale. Such a purchase operates merely as a payment of the taxes, leaving the title in precisely the same situation as if the taxes had been paid when due. These principles apply in the case of a tenant in common, a tenant for life, a tenant for years under a covenant to pay taxes, a mortgagee or a mortgagor in possession.⁴⁵

Whether, in Virginia, one who holds by a defective title may perfect it by purchasing the land at a tax sale, provided he stands in no relation of trust to the owner, and is implicated in no fraud against him is to be doubted. The doubt is created by the statutory provision that the purchaser is to take at the tax sale the title which is vested in the party who is assessed with the taxes for which the sale is made, that is, the party legally bound to pay the tax (according to the supposition made above, the tax purchaser himself.)⁴⁶

An agent, attorney, trustee, guardian, or other fiduciary having the control and management of real estate, or a joint tenant or tenant in common is disqualified from purchasing the same at a tax sale on his own account, without having previously renounced the agency or trust, even though the principal or beneficiary fails to supply him with funds to meet the taxes. Also, neither a husband nor a wife is permitted to be a purchaser of the property of the other at a tax sale, and an attempted purchase by one of them is treated merely as a payment of the taxes due by the other.⁴⁷

It is expressly provided by statute that the treasurer conducting the sale shall not, directly or indirectly, purchase any real estate

⁴⁴ 2 Minor, *Real Property*, §1273 (2d Ed. Ribble, 1928).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Id.* at §1274.

sold. If he does, he forfeits fifty dollars for every such purchase and the sale is void.⁴⁸

Since the clerk of court is to execute the deed to the tax purchaser, and he has no connection with the sale itself,⁴⁹ he is permitted to purchase at the sale provided that the deed is executed by a special commissioner appointed by the court for that purpose.⁵⁰

Upon completion of the sale the purchaser is given a receipt setting forth the terms of the purchase.⁵¹

Sale Recorded—within sixty days after the completion of the sale the treasurer must report it to the proper court where, after confirmation, the sale is recorded in "The Delinquent Land Book".⁵²

Relief Against Sale—Any person aggrieved by reason of the confirmation of such sale may apply for relief to the proper circuit or corporation court at any time prior to the execution of a tax deed to the purchaser. Upon proper showing the court may annul the sale, exonerate the real estate and restore the purchase money to the purchaser.⁵³

Redemption Subsequent To Sale—After the tax sale, and prior to the expiration of the redemption period and the execution of the tax deed, the purchaser has an equitable interest,⁵⁴ defeasible if the owner redeems. And the Virginia statute provides that he may, after confirmation of the sale by the court, enter and hold possession of the land sold, if neither the owner nor anyone claiming under him be in the actual possession of it; but if someone is in possession, the purchaser may require him to redeem the land

⁴⁸ Va. Code §58-1034 (1950).

⁴⁹ Va. Code §§58-1052, 58-1057 (1950).

⁵⁰ Va. Code §58-1059 (1950).

⁵¹ Va. Code §58-1035 (1950).

⁵² Va. Code §§58-1036, 58-1038 (1950).

⁵³ Va. Code §58-1042 (1950).

⁵⁴ 2 Minor, *Real Property*, §1286 (2d. Ed. Rbible, 1928) See also footnote 3 where it is stated: "Though the above rule seems to accord with the better reasoning, yet there is much conflict as to what title, if any, passes to the purchaser upon the sale, but before the deed is delivered and recorded. It has been said, by way of dictum, that no title passes under the Virginia statutes until the deed has been recorded. *Ashbrook v. Bailey*, 116 Va. 10, 81 S.E. 64 (1914)."

within sixty days, which if he fails to do, the purchaser may enter and take possession.⁵⁵

The owner of the land, his heirs or assigns, or any person having the right to charge the land with a debt may redeem it within three years from the date of sale,⁵⁶ or within three years after the removal of disabilities of infancy, insanity, or imprisonment with the right to such redemption not to exceed twenty-years.⁵⁷

The redeeming party must pay to the purchaser, his heirs or assigns the whole amount paid by the purchaser and such additional taxes, levies, costs and charges as may have been paid by him since the sale, with interest at the rate of 6% per year on the amount so paid.⁵⁸ But, if the purchaser, his heirs or assigns refuse to receive it or do not reside or cannot be found in the county or city, the money may be paid to the clerk of the court.⁵⁹ In either case, the fact of payment must be recorded in "The Delinquent Land Book".⁶⁰

Tax Title—upon expiration of the three year period of redemption, the purchaser of unredeemed real estate, his heirs or assigns must give to all parties concerned four months notice of his intention to apply to the clerk of court for a deed to the real estate.⁶¹ The person entitled to redeem may do so at any time prior to the expiration of the four months.⁶² If the land is not redeemed within the four month period, the purchaser is entitled to a tax deed and may compel the execution of it by motion or petition to the court⁶³ or by mandamus.⁶⁴ He must, however, obtain the tax

⁵⁵ Va. Code §§58-1039 (1950). This section has been further construed to the effect that the owner of the land at the time of the tax sale continues to be the owner until divested of title. *Richmond v. Monument Ave. Develop. Corp.*, 184 Va. 152, 34 S.E. 2d 223 (1952).

⁵⁶ Va. Code §§58-1043 (1950).

⁵⁷ Va. Code §§58-1047 (1950).

⁵⁸ Va. Code §§58-1043 (1950).

⁵⁹ Va. Code §§58-1045 (1950).

⁶⁰ Va. Code §§58-1043, 58-1045 (1950).

⁶¹ Va. Code §§58-1052, 58-1053 (1950).

⁶² Va. Code §§58-1054 (1950).

⁶³ Va. Code §§58-1061 and 1062 (1950).

⁶⁴ *McCullough v. Hunter*, 90 Va. 699, 19 S.E. 776 (1894); *Brooke v. Turner*, 95 Va. 696, 30 S.E. 55 (1898); 4 Va. Law Reg. 85 (1898).

deed within one year after the expiration of the three year redemption period, for, after that period of time has elapsed, the former owner (or his heirs or assigns) may thereafter redeem the land at any time before the deed or order is made.⁶⁵

When the purchaser, his heirs or assigns have obtained a deed, and it has been duly admitted to record, such estate is acquired as was vested in the person assessed with the taxes at the commencement of the year for which the taxes were assessed, or in any person claiming under such party.⁶⁶ Thus, if the party assessed has no title, then the purchaser at the tax sale acquires none.⁶⁷ In addition the purchaser does not take the estate subject to the liens, conditions or incumbrances vesting on it at the time the taxes were assessed.⁶⁸ But, where adverse title has ripened before the tax sale is held or will ripen so soon after the tax sale that suit cannot be instituted before the adverse title ripens, the tax lien is, or may be, valueless.⁶⁹

The tax deed itself is sufficient to pass the title of the former owner, until it is successfully impeached by any contesting party.⁷⁰ The deed can be impeached only by proof (1) that the taxes for which the land was sold were not properly chargeable to it; (2) that the taxes were paid; (3) that the notice of sale was not duly given; or (4) that the payment or redemption was prevented by fraud or concealment on the part of the purchaser; provided that no suit can be brought to set aside, cancel or annul a tax deed, made according to the statute, except for fraud, unless it be brought within two years after the deed is duly admitted to record.⁷¹

As to all steps or circumstances relating to the sale, other than those referable to one or the other of these four heads, the tax deed (supposing it to have been validly executed) is made conclusive

⁶⁵ Va. Code §58-1063 (1950).

⁶⁶ Va. Code §58-1064 (1950). And see *Ashbrook v. Bailey*, 116 Va. 10, 81 S.E. 64 (1914).

⁶⁷ *Ashbrook v. Bailey*, 116 Va. 10, 81 S.E. 64 (1914), citing *Yancey v. Hopkins*, 1 Munf. (15 Va.) 419 (1810).

⁶⁸ 2 Minor, *Real Property*, §1290 (2d. Ed. Ribble, 1928). See also *Simmons v. Lyles*, 32 Gratt (73 Va.) 752 (1880); *Thomas v. Jones* 94 Va. 756, 27 S.E. 813 (1897); *Stevenson v. Henkle*, 100 Va. 591, 42 S.E. 762 (1902).

⁶⁹ *McClanahan v. Norfolk, etc. R. Co.*, 122 Va. 705, 96 S.E. 453 (1918).

⁷⁰ *Bond v. Pettit*, 89 Va. 474, 16 S.E. 666 (1892). See *Huchings v. Gilmer* 1 Va. Dec. 495.

⁷¹ Va. Code §58-1064 (1950).

evidence of the validity of the purchaser's title; and it is made prima facie evidence even of these, ripening into conclusive evidence after two years as to all, save in cases of fraud.⁷²

Effect of Sale on Title of Remainderman—a tax sale on account of the default of the life tenant will not affect or divest the title of a tenant in reversion or remainder.⁷³

The State As Purchaser at the Tax Sale

If there are no sufficient bids, authority is given to the treasurer making the sale to purchase the land in the name of the Commonwealth for the benefit of the county, city or town, respectively.⁷⁴

Such a purchase by the Commonwealth does not interfere with an action or suit by any person claiming to be entitled to the real estate, to recover possession of it, to try the title, to recover damages for any injury done to it, or to prevent injury to it. However, no execution or other process is issued upon a judgment or decree in favor of the plaintiff until he has paid the delinquent and other taxes and charges due the state.⁷⁵

Sale Recorded—a list of all lands purchased by the Commonwealth must be reported to the proper court, confirmed, and recorded in "The Delinquent Land Book".⁷⁶

At the time the list is returned to the court for confirmation, the title vests in the state as of the time the sale was made to it.⁷⁷

Redemption Subsequent To Purchase—within three years of the purchase of the land by the Commonwealth redemption may be made by the previous owner, his heirs or assigns, or any person having the right to charge the land with a debt.⁷⁸ The redemption money must be paid to the clerk who is required to endorse payment on "The Delinquent Land Book".⁷⁹ Also, so long as the state

⁷² *Crawford v. Floyd*, 112 Va. 699, 72 S.E. 711 (1911).

⁷³ Va. Code §58-1065 (1950).

⁷⁴ Va. Code §58-1067 (1950).

⁷⁵ Va. Code §58-1069 (1950).

⁷⁶ Va. Code §§58-1036, 58-1038 (1950).

⁷⁷ *Richmond v. Monument Ave. Develop. Corp.*, 184 Va. 152, 34 S.E. 2d 223 (1952).

⁷⁸ Va. Code §58-1083 (1950).

⁷⁹ Va. Code §58-1073 (1950).

retains the land, the owner of part or all the delinquent land may, with the court's authorization, redeem a part only of the delinquent land and hold it free from any lien for taxes due on the residue of the tract.⁸⁰

Tax Title—if the land is unredeemed at the end of three years, any person may, upon proper application, purchase it from the Commonwealth.⁸¹

Copies of the application must be served on the parties in the same manner as a process in a suit, or, if the parties are nonresidents or cannot be found after diligent search, service may be made by publication.⁸²

If no person who has a right to redeem the land appears within four months and redeems it by paying the required amount to the clerk, then the applicant, within five days from the expiration of the four months, may complete the purchase. If the applicant does not exercise his right within the five days, he forfeits not only the deposit made with the clerk, but also his right to the land, which is again available to anyone desiring to purchase it.⁸³

If the deed is not made out to the purchaser within one year from the application (unless hindered by judicial proceedings), the right of redemption revives to the owner or others entitled to redeem, and continues until the deed is made. The tax deed must be made within two years from the date of the application, and, if the deed be not made within this time (unless hindered by judicial proceedings), the purchaser forfeits both the land and his purchase money.⁸⁴

In addition to the above remedies, the land, if unredeemed for three years, may be sold by a bill in equity filed in the name of the Commonwealth or county, city or town in which it lies. The character of the title acquired by the purchaser at the judicial sale is governed by the principles and rules applicable to judicial sales

⁸⁰ Va. Code §58-1077 (1950).

⁸¹ Va. Code §§58-1083, 58-1084 (1950).

⁸² Va. Code §§58-1086 through 58-1089 (1950).

⁸³ Va. Code §58-1090 (1950).

⁸⁴ Va. Code §58-1093 (1950); 2 *Minor, Real Property*, §1279 (2d Ed. Ribble, 1928).

generally and not by those applicable to tax titles acquired through tax deeds.⁸⁵

Other principles applicable to tax sales made by the Commonwealth are included generally, in the preceding section, "The Private Purchaser at the Tax Sale".

Local Improvements

Special Assessments—The Constitution of Virginia⁸⁶ provides that assessments may be levied for making and improving walkways upon existing streets, paving and improving existing alleys and for the construction or the use of sewers. The taxes or assessments for such local improvements can be imposed on abutting land owners only in cities, towns and counties with a population greater than five hundred inhabitants per square mile.⁸⁷

The amount finally assessed against or apportioned to each landowner, or fixed by agreement with him is a lien on his abutting land from the time when the work of improvement is completed. But, it will not be enforced against a purchaser for value and without notice unless an abstract of the resolution is recorded in the judgment docket of the clerk's office and indexed in the name of the city, town or county and of the owner of the property.⁸⁸

Assessments for local improvements are superior in dignity to all other liens on the land on which they are assessed.⁸⁹

Drainage Taxes—As in the case of state and county taxes, drainage assessments have the force and effect of a judgment. They constitute a lien upon the lands assessed which is second only to state, county and district taxes and levies.⁹⁰ Assessments are not made against "abutting" owners as a class but rather against all landowners whose lands within the drainage district are benefited.⁹¹

Assessments are due and payable on the first Monday in September of each year. They become delinquent if not paid in full by

⁸⁵ Va. Code §58-1108 (1950).

⁸⁶ §170.

⁸⁷ Va. Code §15-669 (1950).

⁸⁸ Va. Code §15-676 (1950).

⁸⁹ *Richmond v. Williams*, 102 Va. 733, 47 S.E. 844 (1904).

⁹⁰ Va. Code §21-374 (1950).

⁹¹ *Strawberry Hill Land Corp. v. Starbuck*, 124 Va. 71, 97 S.E. 362 (1918).

December 31st of the same year. Entry as delinquent on his copy of the assessment rolls by the treasurer of the county in which the lands are located constitutes notice of the lien.⁹²

When lands liable for assessments are sold, in whole or in part, the new owner is liable for the drainage assessment upon the portion of the land purchased.⁹³

Delinquent assessments bear interest at the legal rate plus a penalty of 5% of the assessment.⁹⁴ If an assessment remains delinquent for more than a year, the land will be sold to enforce payment.⁹⁵ If the purchase price has been paid and no objection is made within thirty days after the sale, the land sold is conveyed to the purchaser by special warranty deed. All persons having actual or constructive notice of the sale are precluded from thereafter objecting to it.⁹⁶ Prior to the time such deeds are granted, notice, by publication, must be given to any person who immediately prior to the sale was a record owner of the land, informing them that they may, within four months after the first publication of notice, redeem the land.⁹⁷

Land sold can be redeemed by any person having an estate in or lien on it.⁹⁸ Redemption is made in accordance with the existing general tax law in force when the land is sold.⁹⁹ If the record owner does redeem the land, the purchaser at the sale is repaid from the amount paid in redemption. The former owner will then hold the land discharged from the lien.¹⁰⁰

The governing body of a county may release drainage tax liens provided that the drainage bonds of the district are owned and held solely for the county.¹⁰¹

⁹² Va. Code §21-375 (1950).

⁹³ Va. Code §21-389 (1950).

⁹⁴ Va. Code §21-376 (1950).

⁹⁵ Va. Code §§21-377, 21-278 (1950).

⁹⁶ Va. Code §21-387 (1950).

⁹⁷ Va. Code §21-391 (1950).

⁹⁸ Va. Code §21-383 (1950).

⁹⁹ Va. Code §21-380 (1950).

¹⁰⁰ Va. Code §21-392 (1950).

¹⁰¹ Va. Code §21-426 (1950).

State Gift Taxes

State gift taxes become a lien upon all gifts that constitute the basis¹⁰² for the taxes for a period of ten years from the time they are made.¹⁰³ If the tax is not paid within thirty days after it becomes due,¹⁰⁴ collection may be enforced from the donor or donee.¹⁰⁵ The donee is liable only for so much of the tax as may be due on account of his respective gift.¹⁰⁶ Any part of the gift property sold by the donee to a bona fide purchaser for an adequate and full consideration is divested of the lien, which, to the extent of the value of gift sold, attaches to all the property of the donee, including after-acquired property, except any part sold to a bona fide purchaser for an adequate and full consideration.¹⁰⁷

The amount of the tax must be assessed within three years after the return is filed. However, the tax may be assessed at any time in the case of a false or fraudulent return with an intent to evade the tax or of a failure to file a return.¹⁰⁸

State Inheritance Taxes

Estates of Resident Decedents—Property of which a decedent dies seized or possessed and all property acquired in substitution thereof is charged with a lien for all state inheritance taxes due thereon.¹⁰⁹ The taxes are payable one year after the death of the decedent but may be extended to fifteen months by the Department of Taxation. An exception is made where the right of possession or actual enjoyment follows a life estate or a term of years; then the taxes are payable one year after the right of possession accrues.¹¹⁰

The lien may be discharged by payment of the taxes due and to become due, or by an order or decree of the court discharging the

¹⁰² See Va. Code §§21-218 to 21-222 (1950).

¹⁰³ Va. Code §58-227 (1950).

¹⁰⁴ On or "before" the fifteenth day of April following the close of the calendar year—Va. Code §58-223 (1950).

¹⁰⁵ Va. Code §58-227 (1950).

¹⁰⁶ Va. Code §58-229 (1950).

¹⁰⁷ Va. Code §58-227 (1950).

¹⁰⁸ Va. Code §58-230 (1950).

¹⁰⁹ Va. Code §58-180 (1950).

¹¹⁰ Va. Code §58-176 (1950).

lien and securing the payment of the taxes by bond or deposit.¹¹¹

If taxes are not paid within thirty days after the due date, the land may be sold or, in the alternative, rented or leased for an amount sufficient to pay the taxes due and expenses and fees incurred.¹¹²

When real estate has been sold by the heirs or devisees of the decedent, or their successors in title, to a purchaser for value, the lien expires by limitation if:¹¹³

- a) at the end of the ten years after the death of the decedent, no assessment has been made in the meantime,
- b) more than ten years have passed since the death of the decedent and no assessment has been made up to date of sale,
- c) twenty years have passed since the death of the decedent and the land was originally received from the decedent in fee simple with no remainder or executory interest.

Estates of Non-Resident Decedents—Since June 17, 1930, state inheritance taxes on the estates within this Commonwealth of non-resident decedents are due and payable at the time of death of the decedent.

If not paid within one year, interest attaches at the rate of 12% per year. The taxes interest remain a lien on the property transferred until paid.¹¹⁴ Any real estate which passes in contemplation of death or is intended to take effect in possession or enjoyment at or after the death of the grantor or donor is also subject to the inheritance tax.¹¹⁵

Federal Taxes

Under the United States Internal Revenue Code all taxes and assessments which are due the United States, together with any

¹¹¹ Va. Code §58-180 (1950).

¹¹² Va. Code §58-181 (1950).

¹¹³ Va. Code §58-180 (1950).

¹¹⁴ Va. Code §58-199 (1950).

¹¹⁵ Va. Code §58-200 (1950).

interest, penalties and costs are a lien upon all property and rights to property belonging to the debtor.¹¹⁶ The tax becomes a lien at the time the assessment is made and continues until it is paid or becomes unenforceable by reason of the lapse of time.¹¹⁷

The act provides that the tax lien will not be valid, except for securities,¹¹⁸ as against any mortgagee, pledgee, purchaser or judgment creditor until notice of it has been filed by the Secretary of the Treasury or his delegate. The notice must be filed in accordance with the law of the state in which the property subject to the lien is situated,¹¹⁹ whenever the state by law provides for the filing of such notice.¹²⁰ Where no provision has been made by the state for filing the notice, it must be filed in the office of the United States District Court Clerk for the judicial district in which the property subject to the lien is located. However, if the notice filed with the state is in a form that would be valid if filed with the Clerk of the United States District Court, the notice is valid notwithstanding any law of the State or Territory regarding form or content.¹²¹

To enforce the tax, the Internal Revenue Act provides for the sale of the debtor's real estate.¹²² The sale is made after notice and publication to the highest bidder over a minimum price set by the Secretary or his delegate. If no one bids the amount of the minimum price, the United States purchases the property itself, at the minimum price.¹²³

If the property is not redeemed within the time limited by the act, the Secretary or his delegate must execute a deed of the real estate to the purchaser upon his surrender of the certificate of sale.¹²⁴ The deed operates as prima facie evidence of the facts stated in it, and if the proceedings of sale are pursued substantially in accordance with the law, the deed operates as a conveyance of

¹¹⁶ 26 U.S.C. (I.R.C. 1954) §6321.

¹¹⁷ 26 U.S.C. (I.R.C. 1954) §6322.

¹¹⁸ 26 U.S.C. (I.R.C. 1954) §6323 (c).

¹¹⁹ 26 U.S.C. (I.R.C. 1954) §6323 (a).

¹²⁰ See Va. Code §55-139 (1950).

¹²¹ 26 U.S.C. (I.R.C. 1954) §6323(a)(1)(2)(3).

¹²² 26 U.S.C. (I.R.C. 1954) §§6331-6336.

¹²³ 26 U.S.C. (I.R.C. 1954) §6335(e)(1).

¹²⁴ 26 U.S.C. (I.R.C. 1954) §6338.

all the right, title and interest which the delinquent taxpayer has in the property at the time the lien attaches to it.¹²⁵

At any time before the sale, the owner of the property may pay the tax with interest and costs and from that time all further proceedings against the property will cease.¹²⁶ Within one year after the sale, the owner, his heirs, executors, or administrators, or any person interested in the property or possessing a lien upon it, or any person in their behalf, may redeem the land sold, upon the payment of the purchase price with interest at the rate of 20% per year, to the purchaser, or if he cannot be found, then to the Secretary or his delegate.¹²⁷

Any person having a lien upon or any interest in the property recorded prior to the tax lien notice, or any person purchasing the property at a sale to satisfy such prior lien or interest may make a written request to the Secretary or his delegate to authorize the filing of a civil action to clear title to the property.¹²⁸ If the Secretary or his delegate fails to do so within six months, then after notice to the collector, such person may file a petition with the United States District Court for the district where the land is located, for leave to file a bill to settle all claims to the realty. After a hearing on the petition, the court may enter an order granting leave to file the action.¹²⁹ All persons having liens upon or claiming any interest in the property must be made parties to the suit.¹³⁰ The court will determine the merit of all claims to and liens upon the property.¹³¹

The act provides under what circumstances the tax lien may be discharged. A certificate of release of the tax lien may be issued in cases where the tax and interest have been paid or have become unenforceable,¹³² or if a bond conditioned for the payment of the tax and interest is given and accepted.¹³³ The Secretary or his dele-

¹²⁵ 26 U.S.C. (I.R.C. 1954) §6339(b).

¹²⁶ 26 U.S.C. (I.R.C. 1954) §6337(a).

¹²⁷ 26 U.S.C. (I.R.C. 1954) §6337(b).

¹²⁸ 26 U.S.C. (I.R.C. 1954) §7424 (a) (1).

¹²⁹ 26 U.S.C. (I.R.C. 1954) §7424(a) (2) (3).

¹³⁰ 26 U.S.C. (I.R.C. 1954) §7403(b).

¹³¹ 26 U.S.C. (I.R.C. 1954) §7403(c).

¹³² 26 U.S.C. (I.R.C. 1954) §6325(a) (1).

¹³³ 26 U.S.C. (I.R.C. 1954) §6325(a) (2).

gate may give a certificate of partial discharge of any part of the property subject to the lien, if the value of the balance of such property is worth at least twice the amount of the tax lien and the amount of all prior liens on the property.¹³⁴ Any certificate of release or partial discharge given by the collector is held conclusive that the lien on the property covered by the certificate has been extinguished.¹³⁵

Federal Estate and Gift Taxes

Liens for Estate Tax—The Internal Revenue Act provides that the estate tax imposed by Chapter 11¹³⁶ shall be a lien for ten years upon the gross estate of the decedent. However, if the tax is not paid when due, any person who receives, or has on the date of the decedent's death, property included in the gross estate (under Sections 2034 to 2042 inclusive) is personally liable for the tax to the extent of the value of such property at the time of the decedent's death. But, if such property is transferred to a bona fide purchaser for value, the property so transferred is divested of the lien which will then attach to all the property of the transferor.¹³⁷

Liens for Gift Tax—The Gift Tax imposed by Chapter 12¹³⁸ is a lien for ten years from the time a gift is made. If the tax is not paid when due, the donee is personally liable for it to the extent of the value of the gift. Any part of the property transferred by the donee (or by a transferee of the donee) to a bona fide purchaser, mortgagee or pledgee for value is divested of the lien which then attaches to the property of the transferor (including after acquired property) to the extent of the value of the gift.¹³⁹

Revenue Stamps

An excise tax is imposed upon each deed, instrument or writing (unless deposited in escrow before April 1, 1932) transferring lands, tenements or other realty. The tax is fifty-five cents when the con-

¹³⁴ 26 U.S.C. (I.R.C. 1954) §6325(b)(1).

¹³⁵ 26 U.S.C. (I.R.C. 1954) §6325(c).

¹³⁶ 26 U.S.C. (I.R.C. 1954) §§2001-2207.

¹³⁷ 26 U.S.C. (I.R.C. 1954) §6324(a)(1)(2)(3).

¹³⁸ 26 U.S.C. (I.R.C. 1954) §2501-2524.

¹³⁹ 26 U.S.C. (I.R.C. 1954) §6324(b).

sideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining on it at the time of sale, exceeds \$100 and does not exceed \$500. Each additional five-hundred dollars or part thereof is charged at the same rate.¹⁴⁰

In calculating the amount of stamps which must be fixed to a deed of conveyance, the tax is computed upon the full consideration for the transfer less all encumbrances which rest on the property before the sale and are not removed by the sale.¹⁴¹ A lien or encumbrance which does not affect the consideration or value of property conveyed should not be used to reduce the amount of the stamp to be affixed to the conveyance.¹⁴²

A deed otherwise complete passes title although revenue stamps are not affixed to it.¹⁴³

T. J. M.

8—COVENANTS

The role of the attorney in regard to restrictive covenants is primarily one of interpretation and drafting. He must, as a title examiner, be able to quickly grasp the meaning and scope of any such clauses he may uncover in his search in order to advise his client as to the effects they will have on the title to be conveyed. As the draftsman of a deed, he must have a clear understanding of the law of covenants in order to create a provision that will effectuate the intent of his client.

Covenant or Condition.

Restrictions on the use of land may take the form of either a condition subsequent or a covenant, and it is important that the two be distinguished. Minor points up the distinction as follows:

The essential distinction between a covenant and a condition lies in the nature of the obligation involved and in the

¹⁴⁰ 26 U.S.C. (I.R.C. 1954) §4361.

¹⁴¹ Occidental Life Insurance Co. v. U. S., 102 Ct. Cl. 633, 57 F. Supp. 691 (1944).

¹⁴² *Ibid.*

¹⁴³ Kanner v. Startz, 203 S.W. 603 (1918).

remedy which may be had upon a breach period. A covenant is a promise or agreement contained in a deed. it is contractual in nature imposing a personal obligation upon the covenantor. Upon a breach of the covenant, the remedy is an action for damages, or, in a proper case, a court of equity may grant specific performance. On the other hand, a condition binds the estate and that alone. The remedy for breach of condition is a forfeiture of the estate.¹

In determining whether a particular clause constitutes a condition or a covenant, the courts have developed certain rules of construction. The basic rule is that the intent of the parties as gathered by the whole of the instrument will be controlling. If it is doubtful whether a clause in a deed was intended as a condition or a covenant, it will generally be held a covenant. In *Lowman v. Crawford*,² the court said: "The courts will not construe an estate to be upon condition if the language of the deed will admit of any other reasonable interpretation."

It should be apparent that no set rules can be stated by which one can tell at a glance whether a particular clause is a condition. As a draftsman of a deed, it should be obvious that the attorney, if he intends to create a condition, must include an express statement of that intent supported by a re-entry clause.

Covenants—Rules of Construction

The primary rule of construction of covenants is stated in *Schwarzschild v. Welborne* as follows:

While courts of equity will enforce restrictive covenants where the intention of the parties is clear and the restrictions are reasonable, they are not favored, and the burden is on him who would enforce such covenants to establish that the activity objected to is within their terms. They are to be construed most strictly against the grantor and persons seeking to enforce them, and substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions.³

¹ 1 Minor, *Real Property*, §514 (2d Ed. Ribble, 1928).

² 99 Va. 688, 691, 40 S.E. 17, 18 (1907).

³ 186 Va. 1052, 1058, 45 S.E. 2d 152, 155 (1947).

Another of the basic rules of construction is that the words used are to be taken in their ordinary and popular sense.⁴

There is no hard and fast rule which is applicable to every covenant, but each case must be considered on its own merits, giving meticulous attention to the wording of the particular covenant⁵ and the nature of the alleged inconsistent use.

When Covenants are Unenforceable.

The question arises in the case of a deed poll, whether a particular provision is within the Statute of Frauds and therefore unenforceable since it is not signed by the party to be charged. A covenant is not an interest in land, and, therefore, is not within the statute, and a covenant in a deed poll would be enforceable against the parties. The problem of the enforceability of a covenant under the Statute of Fraud arises particularly where a common grantor in opening up a tract of land attempts to inaugurate a general scheme of improvement and imposes restrictive covenants in each of the deeds in order to accomplish this purpose.

There is some conflict of opinion as to the treatment to be accorded such restrictions.⁶ The result in a given jurisdiction is going to be dependent upon whether or not the provision is to be construed as creating negative easements.⁷ There is no case directly in

⁴ See *Neckamp v. Huntington Chamber of Commerce*, 99 W. Va. 388, 129 S.E. 314 (1925), where the court held that a covenant prohibiting the erection of any "building" other than for dwelling or residential purposes did not prohibit the laying of a railroad track. The Court said, "The word building cannot be held to include every species of erection on land, such as fences, gates or other like structures. Taken in its broadest sense, it can mean only an erection intended for use and occupation as a habitation or for some purpose of trade, manufacturing, ornament, or use, constituting a fabric or edifice, such as a house, a store, a church, a shed."

⁵ See *Fox v. Sumerson*, 338 Pa. 545, 12 A. 2d 1 (1940), where the building of an apartment house was held a violation of a restrictive covenant prohibiting any use other than "private dwelling houses." The court said, "An apartment house is nonetheless a dwelling house though occupied by a number of families but it is not a private dwelling house."

⁶ *Sprague v. Kimball*, 213 Mass. 380, 100 N.E. 622 (1913); *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920).

⁷ For a discussion of this problem, see *Reno*, "Enforcement of Equitable Servitudes in Land," Part II, 28 Va. L. Rev. 1067 (1942).

point in Virginia, but the courts have consistently held that the right under restrictive covenants of the type under discussion is a negative easement.⁸

Restraints on Alienation.

An unlimited power of alienation is generally stated as one of the attributes of a fee simple estate. Thus, a condition or covenant which unreasonably attempts to restrict the right of alienation of a fee simple estate is void.⁹ An exception of this principle exists, however, where the restriction is reasonable:

Obviously, there can be no adequate general test of reasonableness in this connection. The basis for decision would seem to be whether, in the individual case, the policy in support of free alienation on the one hand outweighs on the other the policy to carry out the wishes of the grantor or testator. In connection with the determination of this question, there must be considered also the favor or disfavor which the limitation under scrutiny has in the law.¹⁰

The problem arises primarily in two specific areas—first, where it is attempted to limit the persons to whom the property may be conveyed, and secondly, where it is attempted to limit the grantee's use in order to protect the adjacent lands or grantor's business. With reference to the first aspect of the problem mentioned above, whether or not a condition is good or bad turns on the "degree of restraint."¹¹

⁸ Springer v. Gaddy, 172 Va. 533, 2 S.E. 2d 355 (1939); Meagher v. Appalachian Power Co., 195 Va. 138, 77 S.E. 2d 461 (1953).

⁹ See 1 Minor, *Real Property*, §553 (2d Ed. Ribble, 1928).

¹⁰ *Id.* at §555.

¹¹ See 1 Minor, *Real Property*, §555 (2d Ed. Ribble, 1928) for a discussion of this general problem where Minor points up the difference in degree of restraint as follows: "If the condition merely excludes certain designated persons it is good. But if the condition excludes all except certain specified persons it is bad."

The rule was extended beyond excluding certain designated persons, and for years restrictive covenants which excluded designated races were held valid. In *Shelley v. Kramer*, 334 U.S. 1 (1947), however, the United States Supreme Court held that, although such restrictive covenants were valid as between the parties, judicial enforcement of them by state courts was violative of the equal protection clause of the Fourteenth Amendment.

In *Barrows v. Jackson*, 346 U.S. 249 (1952), the same court held

With reference to the second aspect of the problem the reasonableness of the restraint is again used as the primary test.¹²

Change of Conditions.

It has been seen that, while restricted covenants are not favored, they are allowed where reasonable and where they serve to benefit other property. It follows that when a restriction reasonable in its inception becomes unreasonable, it will no longer be enforced. Thus, where there has been such a change in conditions as to render performance of the condition impossible, unreasonably burdensome, or inequitable, the covenant will not be enforced.

In some instances damages will be allowed for a breach of a covenant although the covenant itself will not be enforced.¹³

Covenants Which Run With the Land.

In order for a covenant to run with the land, that is, for the burden or benefit of the covenant to pass to successors in title of the covenantor and covenantee, two things are essential. First, the covenant must be one which touches and concerns the land; and secondly, there must be privity of estate between the parties to the promise.

It is sometimes stated that the intention of the parties that the covenant run is a third requisite, but this seems to be highly questionable.¹⁴

that an award of damages by a state court in an action for breach of such covenant was also in violation of the equal protection clause.

The result is that, today, such restrictive covenants constitute nothing more than a gentlemen's agreement, unenforceable either in equity or at law.

Contra; see *Charlotte Park and Recreation Commission v. Baringer*, 242 N.C. 311, 88 S.E. 2d 114 (1955), *certiorari denied*, 350 U. S. 983 (1956). In this case, the grant provided for a reversion of the estate to the grantor in the event the land was ever used by non-whites. The court held that this was a determinable fee, the reversion operating automatically without any judicial enforcement by the state court, and, therefore, not in violation of any constitutional rights under the Fourteenth Amendment.

¹² See *Carneal v. Kendig*, 196 Va. 605, 85 S.E. 2d 239 (1955).

¹³ *Amerman v. Dean*, 132 N.Y. 355, 30 N.E. 741 (1892). See also *Note*, 12 Va. L. Rev. 502 (1926).

¹⁴ See *Tiffany, Real Property*, 3d Ed. (1939 Cum. Supp. §409).

No set rule has, or likely can, be formulated as to whether or not a covenant touches and concerns the land. Ordinarily it is held to do so if " . . . it is of value to the covenantee by reason of his occupation of the land or by reason of an easement which he has in the land, or if it is a burden on the covenantor by reason of his occupation of the land."¹⁵ If the covenant does not meet the test of touching and concerning the land, it will not run, and this is true regardless of the intent of the parties to the covenant.

The question of privity of estate is often broken up as to privity on the burden side and privity on the benefit side. It is generally conceded that there must be privity in order for the burden of the covenant to run, but there is some authority for the proposition that there is no requirement of privity in order for the benefit to run.¹⁶

The Restatement¹⁷ is the primary basis for the view that privity is not necessary on the benefit side, but it has not met with approval in all jurisdictions and "the authorities are about equally divided upon the question."¹⁸

Equitable Enforcement of Covenants Against Remote Parties.

In the previous sections, the enforcement of covenants against remote parties at law was discussed. In this section, the discussion will cover similar enforcement in equity where there is no remedy at law because the necessary requirements for the running of the covenants have not been met.

The principal had its inception in the case of *Tulk v. Moxhay*,¹⁹ where the court held it was not a question "whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." The doctrine, as stated, applies only to those who take with notice and would not apply to a bona fide purchaser, but, even at that, it is not clear how far the doctrine will go. It appears only logical that the doctrine is going to be limited in its application according to the

¹⁵ *Id.* at §854.

¹⁶ *Id.* at §849.

¹⁷ Restatement of Property (1944) §548.

¹⁸ Tiffany, *op. cit. supra*, §849.

¹⁹ 2 Phillips 774, 18 L.J.Ch. 83 (1848).

circumstances of each case in the light of the intent of the parties to the covenant and the equities involved.

The doctrine has long had its application in Virginia. In an 1895 case,²⁰ the court in considering a restriction limiting the use of the land to school purposes, said:

. . . without deciding whether this is or is not a covenant running with the land—a subject about which there is much nicety and refinement of learning, a consideration of which would, in this case, be unprofitable—it is sufficient for our purposes here to determine that it is a covenant which restricts the use of land to a particular purpose, and which is binding on all those taking title to the property with notice thereof.”

The doctrine has been applied in a number of other Virginia cases,²¹ and more recently in *Hercules Powder Co. v. Continental Can Co.*,²² where the court upheld a covenant whereby the original grantor, a corporation, had agreed not to engage in the manufacture of wood pulp on property retained by it. The court said:

This particular type of covenant which equity is willing to enforce against assignees taking with notice has been often described. As stated in *Springer v. Gaddy*, 172 Va. 533, 2 S.E.2d 355: ‘It is often referred to, from the English case that is its foundation, as the doctrine of *Tulk v. Moxhay*.’ It is also called the doctrine of *restrictive covenants in equity, and the rights and obligations established by it* are known as *equitable easements* and *equitable servitudes*. The doctrine is, in brief, that when, on a transfer of land, there is a covenant or even an informal contract or understanding that certain restrictions in the use of the land conveyed shall be observed, the restrictions will be enforced by equity, at the suit of the party or parties intended to be benefited thereby, against any subsequent owner of the land except a purchaser for value without notice of the agreement.²³

The doctrine has also been the basis for equitable enforcement

²⁰ Board of Supervisors of Bedford County v. Bedford High School, 92 Va. 292, 295, 23 S.E. 299, 300 (1895).

²¹ Cheatham v. Taylor, 148 Va. 26, 138 S.E. 545 (1927); Oliver v. Hewitt, 191 Va. 163, 60 S.E. 2d 1 (1950).

²² 196 Va. 935, 86 S.E. 2d 128 (1955).

²³ *Id.* at 946.

of restrictions in regard to a number of related problems which do not precisely fit the fact pattern of *Tulk v. Moxhay*.²⁴

Conclusion.

The role of the attorney in regard to restrictive covenants is primarily a dual one of interpretation and draftsmanship. The purpose of this short discussion has been merely to aid the attorney in avoiding pitfalls in this area by pointing up some of the problems which may arise, leaving to him the more searching investigation of the law of covenants.

R. D. K.

9—APPENDIX OF FORMS

A. *Attorney's Opinion of Title (Letter to Client)*

Dear _____:

In accordance with your request of _____, I hereby certify that I have made an examination of the title to that parcel of real estate situated in _____, Virginia, and particularly described by deed dated _____, recorded _____, in Deed Book _____, page _____, found in the Clerk's Office of _____, made by _____ and _____, husband and wife, and certify that in my opinion, based upon a normal search, made in the usual and customary manner, of the records filed in said Clerk's Office, as disclosed by the general indices thereof, from _____ to the present date, there is a good and indefeasible title in fee simple vested in _____, by said Deed, subject only to such liens, defects, and objections as hereinafter mentioned.

I further certify that, according to the indices of the record, there are no unsatisfied mortgages or deeds of trust on said property; that there are no unsatisfied judgments or attachments, contract, *lis pendens*, or transcripts of bankruptcy proceedings that are liens against or affect the title to said real estate, except:

[Here insert such exceptions as exist, if any]

That, according to the records of the Treasurer's Office of

²⁴ See Note, 39 Va.L.Rev. 703 (1953) for a collection of Virginia cases.

_____, there are no unpaid taxes, levies, or special assessments that are liens against said real estate, except the following:

[Here insert such exceptions as exist, if any]

That there are no unsatisfied or unreleased mechanics liens, according to the indices, except:

[Here insert such exceptions as exist, if any]

In addition, the following general contractors, subcontractors, and material men have not been paid in full for work done or materials supplied to the said real estate, as established by the accompanying affidavit of _____ (present owner) :

That there are no recorded leases or contracts to lease shown by the indices in said Clerk's Office;

That the fee simple title to said real estate is subject to the following covenants, party-wall agreements, mineral leases, easements, rights of way, and conditions (with) (without) rights of re-entry or forfeiture, as established by the indices of the records in said Clerk's Office:

The rights, not revealed by the search of the records, of the person or persons now in possession of the said real estate should be investigated, particularly as to rights acquired by adverse possession, easements by implication or by prescription, leases for periods up to five years, contracts to lease for less than one year, or other actual encroachments or restrictions on the premises.

I further advise that there be made an examination and inspection of the property as to boundaries, area, and the location thereon of improvements, with a survey if necessary. You should also determine whether there are any zoning ordinances or restrictions or other governmental regulations affecting said real estate, and whether there are any pending proceedings for improvements which may result in liens upon said real estate.

Attorney

B. *Letter to Lending Institution*

Gentlemen:

This letter is to certify that I have searched the title to that parcel of land described in that certain (deed of trust) (mortgage) ,

dated (recorded date), and of record in the Clerk's Office of the City of Williamsburg and the County of James City, Virginia, in the (city) (county) Deed Book _____, page _____, conveying that certain property situated in the (city of) (county of) Virginia, from _____ and _____, husband and wife, to _____ and _____, trustees.

I do further certify that, by a normal search, made in the usual and customary manner, of the records filed in said Clerk's Office, as disclosed by the general indices thereof, from _____ to the present date, the good and indefeasible fee simple ownership of the above-mentioned parcel of land is vested in _____ and _____, husband and wife, and the above-mentioned (deed of trust) (mortgage) constitutes a valid first lien on said property, and that there are no other enforceable liens or encumbrances, ascertainable from a normal search of the indices, binding on the said parcel of land, except for the following taxes, levies, and assessments as certified by the Treasurer's Office, which are liens but not delinquent or subject to penalty:

Dated: (date of recording of Deed of Trust) _____ Attorney

R. C. V.