REPORT OF THE
VIRGINIA CODE COMMISSION
TO
THE GOVERNOR
AND
THE GENERAL ASSEMBLY OF VIRGINIA

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1971

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Report of the

Virginia Code Commission

to

The Governor and The General Assembly of Virginia

Richmond, Virginia

December 30, 1971

To: HONORABLE LINWOOD HOLTON, *Governor of Virginia*

and

THE GENERAL ASSEMBLY OF VIRGINIA

The General Assembly of 1970 adopted House Joint Resolution No. 106 directing the Virginia Code Commission to report upon specific items set forth therein. At the 1971 Session of the General Assembly House Joint Resolution No. 41 was adopted directing a report upon additional matters. The pertinent portions of the two resolutions follow:

HOUSE JOINT RESOLUTION 106 (in part)

(1) Undertake a general revision of the Code of Virginia, with particular reference to amendments throughout the Code which will be made necessary should the proposed Revision of the Constitution of Virginia be adopted by the voters at the referendum to be held this year on that issue; and

(2) Undertake the study of such other matters as may be referred to the Commission.

(3) Undertake a study of the desirability of adopting, in whole or in part, the Uniform Consumer Credit Code.

(4) Undertake a study and report on all matters relating to separation and divorce.

(5) Undertake a study of Virginia's Workmen's Compensation laws and changes necessitated by the Federal Coal Mine Health and Safety Act of 1969, and other Federal laws.

(6) Undertake a study and report on the rule against perpetuities with a veiw toward preserving its basic policy while making it comprehensible.

Resolved, further, That the Commission is authorized to propose a complete recodification of the statute laws of this State of a general nature, beginning with the latest official Code, the Code of Virginia of 1950, and all Acts of the General Assembly subsequent thereto.

HOUSE JOINT RESOLUTION 41 (in part)

Resolved by the House of Delegates, the Senate concurring, That the

Virginia Code Commission is directed to make a thorough study of (1) the criminal laws of the State and make recommendations for the review and recodification of all statutes of the State relating to crime and criminal procedure. Such review shall include determining whether sections should be deleted or added to the Code, whether changes in the penalty provisions should be made and such other relative changes as the Commission deems appropriate. (2) The Commission is authorized and directed to study the Code of Virginia for the specific purpose of deleting or amending all provisions which may lead to or further discrimination on account of sex and (3) the Commission shall study the necessity for more than one court of record in a city or county and recommend legislation to effect a combination of courts of record in counties and cities where more than one presently exist.

ACTION UNDER THE JOINT RESOLUTIONS

House Joint Resolution No. 106 directed a study of those amendments to the statute laws of Virginia which would be made necessary by the adoption of the new Constitution. This study was made and reported to the Session of the General Assembly which convened in January, 1971.

The Resolution further authorized the Commission to propose a recodification of the statute laws of the State; this essentially would be a revision of the Code of 1950 as amended. The Commission has considered this matter and believes the authority should be continued. We think it better to undertake the revision at a time when our full attention can be directed to this subject.

1. *ITEMS OF STUDY UNDER THE 1970 DIRECTIVE*

THE UNIFORM CONSUMER CREDIT CODE

A special Commission was also created to provide for a study of the Uniform Consumer Credit Code and they have been meeting frequently. The Code Commission sought to work in harmony with the other Commission to avoid duplication and conflict. Accordingly, the Code Commission appointed a subcommittee composed of Messrs. Joseph C. Carter, Jr., and John W. Edmonds, III, of the Richmond bar, Harry L. Snead of the Law School of the University of Richmond, Richard E. Speidel of the University of Virginia Law School, A. Grey Staples, Jr., Counsel to the State Corporation Commission and William G. Thomas of the Alexandria bar.

The subcommittee has analyzed the UCCC, compared it with current Virginia law, examined competing legislation, digested the copious literature and heard the statements of numerous witnesses made in the open hearings conducted by the Commission. The unanimous conclusion of the subcommittee (and of the Commission, which is continuing its study of consumer credit matters) is that it would not be desirable at this time for Virginia to adopt the UCCC, in whole or in part. We concur in this conclusion.

At the conclusion of their assignment for the Code Commission, the subcommittee made a report to us. Excerpts from that report now follow.

The basic reason for our primary recommendation is that the UCCC is still in the process of evolution with no final version clearly in sight. The UCCC is now being studied by the New York Law Revision Commission — the same Commission that influenced major changes in the Uniform Commercial Code after its two year study of that statute was completed in 1957. Finally, the ultimate status of the UCCC is made more uncertain by the continuing pressure in Congress for new federal legislation which, if enacted, could preempt all or part of the UCCC. In short, the uncertain status of the UCCC at a time of increasing pressure for more effective consumer protection dictates a cautious

approach lest Virginia adopt regulatory legislation which is inadequate when compared with the final evolutionary product.

The need for caution now is reinforced by other considerations.

1) The UCCC, if enacted, would change in a substantial way the consumer credit law of Virginia. It is fairly predictable that this change will involve substantial costs. We doubt the wisdom of incurring these costs to obtain the benefits of "imported" legislation still in the process of development.

2) The UCCC presents a unique approach to consumer credit regulation. Just how much regulation is proper to achieve a healthy balance between business and consumer interests is not clear and the UCCC mix is hotly debated. Some critics have questioned the effectiveness of public enforcement through administrative action as proposed by the UCCC rather than private remedies in the courts.

3) Ideally, Virginia should ultimately enact consumer credit legislation which takes the best from any fully developed and tested uniform legislation, yet is responsive in a realistic way to the needs of consumers and business in the Commonwealth. No fully developed model is now available.

There are no pressing needs at present for the adoption of the UCCC in whole or in part that would outweigh the considerations dictating caution, which have been discussed above.

THE RULE AGAINST PERPETUITIES

The Commission has had this reviewed and received a report dealing with that subject. The essence of the report is that no action should be taken at this time to revise the general rule and its attendant exceptions. If unforeseeable circumstances arise, the rule can be altered to correspond to the new reality. We concur in this recommendation and submit portions of that report.

We must determine whether the Rule Against Perpetuities should be abolished or, if not, whether the Rule should be spelled out more clearly by means of legislative enactment to replace the body of case law which has evolved under the Common Law. Without question the Rule is a pure and simple judge-made law of extensive application which is so firmly imbedded in our jurisprudence as not to be disturbed except by statute.

The practicalities of ruling England in the Fifteenth Century led Edward IV to seek a means by which to stop the frequent treasons occurring during the disputes between the houses of York and Lancaster, where attainders had little effect on families whose estates were protected by the sanctuary of entails.

The more modern concept is set out in II Minor, Institutes, 4th Ed., beginning at page 271, where that eminent authority states:

> "It is plain that, without some rule of restriction, these limitations might be multiplied indefinitely in succession one after another, even in favor of persons yet unborn; and experience proves that to tie up property from alienation, and thus render it incapable of being freely used as the interest and convenience of the owner may prompt, is extremely prejudicial to individuals, by dwarfing and trammelling their spirit of enterprise and of industry, and, therefore, is mischievous to the community. Such remote limitations tend to gratify the pride of him who prescribes them, and occasionally avail to save a prodigal from the natural consequences of his folly; but to tolerate them beyond certain limits is to subordinate the substantial interest of the many to the pride and recklessness of the few."

The Rule Against Perpetuities was first enunciated and enforced by Lord Nottingham in the *Duke of Norfolk's Case (Howard* v. *Duke of Norfolk,* 2 Swanst. 454). As Mr. Minor spells it out, the Rule now reads:

> "No limitation designed to take effect *in futuro,* is good unless it be so limited that it must necessarily vest, if at all, within the period of a life or lives in being, and ten months (the utmost period of gestation) and twenty-one years afterwards. Indeed, the limit, after the expiration of the life or lives in being, is twenty-one years, the period of gestation being allowed in those cases only in which gestation exists as an element."

It is not a rule of construction, but a peremptory command of law, which applies to future contingent interests. It is arbitrary for the reason that it must be arbitrary in order to establish a precise limit to the period within which the estate *must* vest.

We are not aware of any ground swell of opinion, either from the legal profession, financial institutions, or the public, which would indicate that there is any dissatisfaction with or need to abolish the Rule. Those individuals who were queried on that issue appeared to be satisfied with the Rule, if they were aware of its history and purposes, or, if they were unfamiliar with the aspect of our law, saw no reason to change it merely for the sake of change. We are unanimous in our recommendation against abolition of the Rule.

With respect to the second inquiry, it is most difficult to conceive of a clearer, more simple definition of the Rule Against Perpetuities than that utilized by Mr. Minor and the Supreme Court of Virginia. Further, whenever a situation has arisen which indicated to the General Assembly that the precise application of the Rule to some particular means of disposition of property should be delineated, legislative enactments have spelled out exceptions or limitations upon the operation of the Rule.

In this latter connection, attention is directed to §§ 55-13, -13.1, -13.2, -31, and -79.36 of the Code, dealing, *inter alia,* with the time a limitation shall take effect; pension, profit sharing and other trusts; *cy pres* doctrine and the Horizontal Property Act, respectively.

Should the need arise in the future to create other exceptions, etc., it is recommended that separate acts of assembly be adopted to accomplish each desired purpose rather than to attempt to include each aspect of the application of the Rule Against Perpetuities in one new comprehensive definition.

MATTERS RELATING TO SEPARATION AND DIVORCE

A study was begun of these questions and a number of meetings of the subcommittee were held. This is an area in which many changes are taking place and what the final outcome of the domestic relation revolution will be, no one can now foresee. We believe the study should be continued until a satisfactory conclusion can be arrived at or at least some reasonable alternatives to present practices proposed.

WORKMEN'S COMPENSATION LAW

Title IV (Black Lung Benefits) of the federal act provides for cash benefits to coal miners totally disabled by pneumoconiosis, defined as any chronic dust disease of the lungs, arising out of employment in underground coal mines, and to widows of coal miners who died from the disease. Among other things, the federal act establishes certain presumptions and benefit rates.

The U.S. Department of Health, Education, and Welfare is responsible for the processing and payment of benefit claims filed before January 1, 1973, and

the U. S. Department of Labor will have responsibility for claims filed from that date forward. [We are advised that Congress is considering changing the date to January 1, 1975.]

For claims filed on or after January 1, 1973 [1975] the responsibility for benefit payments will shift from the federal government to the coal mine operators.

If a state's workmen's compensation law is approved by the U. S. Secretary of Labor as providing adequate coverage for pneumoconiosis, benefit claims will be processed by the state. If not approved, the processing of claims will be handled by the Federal Bureau of Employees' Compensation under the applicable provisions of the Longshoremen's and Harbor Workers' Compensation Act.

The federal act and regulations issued pursuant thereto establish the criteria for determining whether a state's workmen's compensation law provides adequate coverage for pneumoconiosis. The criteria include minimum cash benefit levels; duration of payments; insurance and procedural standards; a presumption of coverage; a statute of limitation; and others.

The choices presented appear to be three: (1) Virginia could revise its workmen's compensation act to conform to the federal act; or (2) Virginia could revise its act to conform to the federal act only with regard to underground coal miners with pneumoconiosis; or (3) Virginia could take no action.

If the first choice was adopted, it would require an almost total revision of the workmen's compensation act solely because of federal standards applicable only to one disease in one industry.

By adopting the second choice, the State would be affording preferential treatment to one group of workers with one disease, as compared to other workers in the same or other industries who are disabled by other occupational diseases or accidental injuries.

We believe that these two choices are not proper or acceptable and that no action should be taken to meet the federal criteria.

2. *ITEMS OF STUDY UNDER THE 1971 DIRECTIVE*

RECODIFICATION OF CRIME AND CRIMINAL PROCEDURE STATUTES OF THE STATE.

While the 1971 Session of the General Assembly was in session, the Commission began upon this task. It was fortunate in being able to obtain as counsel M. Ray Doubles, Esquire, retired Judge of the Hustings Court, Part 2, of the city of Richmond, former Assistant Attorney General, Professor and Dean of the Law School at the University of Richmond (he recently assumed the Deanship for temporary duty).

Judge Doubles has been busily engaged upon the revision and has been reviewing these laws and court decisions, soliciting the views of the Bar, and generally getting the foundation well established for a thorough revision of these laws. It is contemplated that the Commission's report on this revision will be made in the latter part of 1972.

LAWS WHICH DISCRIMINATE ON ACCOUNT OF SEX

One of the major events of our time is the clamor on the part of many women who hold that they are being discriminated against both by custom and by statute; they intend to eliminate every vestige of discrimination.

No one can reasonably disagree with the objective of eliminating discrimination by law. However, this is not always a simple matter of choice in choosing black or white for there are many shades of gray in between. Legislation that was intended for the protection of women is, by some of them, claimed to be discriminatory. This is a field in which one treds with care; the best intentions frequently find objections raised to a proposed policy or change in policy. We have had a detailed search made of the statutes of Virginia and set forth below those which we believe to be clearly discriminatory. As to each such statute, there is also set forth our recommendation concerning it.

§ 17-49 permits the appointment of any female over the age of 18 years as a deputy clerk of court. We recommend repeal of this section.

§ 40.1-105 permits males between 12 and 16 years of age to engage in certain occupations, including bootblacking and selling newspapers, magazines, periodicals or circulars. We recommend amendment of this section so as to permit females in that age bracket to engage in the above-enumerated occupations.

§ 45.1-32 permits males who are at least 18 years of age to work in or around a mine or quarry, but prohibits females of any age from doing such work. We recommend amendment of this section so as to permit females who are at least 18 years of age to engage in such work.

§ 54-42 permits all persons, male or female, who have obtained a license, to practice law. We recommend amendment of this section so as to delete the phrase "male or female" therefrom.

THE NEED FOR MORE THAN ONE COURT OF RECORD IN A COUNTY OR CITY

The General Assembly of 1970 continued the Commission to make a study of the Court System. That Commission has just made its report and the matters referred to in our resolution appear to have been considered by the Court System Commission. It had been our belief that such would be the case and while we are not prepared to state our position on the Court Study recommendations until we see the proposed legislation, we felt it better that the Court Commission undertake this matter; accordingly, we refrained from consideration of this subject in order to avoid duplication and conflict.

3. *OTHER ITEMS OF STUDY*

PROPOSED AMENDMENTS TO DRUG CONTROL ACT

The Narcotic and Drug Laws Commission, which has been studying the items described by its name, sought the views of the Code Commission upon an amendment to Code Section 54-524.104. The Code Commission requested Judge Doubles, its Counsel, to make a study and report upon this subject. Judge Doubles did so and the Commission concurred in his draft which clarified the application of the criminal law to attempts or conspiracies to commit any offense prohibited under the Narcotic and Drug Act, or to one who is an accessory before the fact or a principal in the second degree to the commission of any such offense. Our proposal was transmitted to the special Commission which did not concur therewith, adopting their own amendment.

Further, one of the great difficulties in the Drug Act is the application of appropriate penalties to the "pusher" and the person who, not for compensation, passes on to another a controlled drug. While either action is to be condemned, it is obvious that the commercial pusher is the real villain of the drug world. We considered a number of approaches, among them being a provision that possession of a specified amount of controlled drugs shall give rise to a

presumption that such possession was with the intent to distribute the same whether by sale, gift or other distribution. This fell through because there is little agreement as to what is the threshhold (of quantity) at which the presumption is to apply. After considering the several alternatives, the Commission adopted an amendment to the general effect that there will be a distinction made between the commercial distributor (pusher) and the accommodation distributor (one who passes controlled drugs to another, not for compensation). Anyone convicted and falling into the second category might be given a conditional discharge as a first offense as to possession only with no such grace being extended again to him; the commercial distributor would be dealt with in an entirely different manner. This approach commends itself to us in an area in which appropriate punishment should be meted out to the commercial distributor — pusher — who battens off the misery of his victims; but at the same time it affords a reasonable opportunity for the "innocent" distributor not for profit to be given another chance but only one.

PUBLICATION OF RULES AND REGULATIONS OF STATE AGENCIES

The proposal has been made to the Commission that the Commonwealth arrange to have published the rules and regulations of certain State agencies. The rules and regulations to be published would be those that affect or apply to the general public or to persons having business to transact with the agency issuing the rules. The Commission has considered this subject several times and has received proposals from The Michie Company of Charlottesville and Autocode, Inc., a Maryland firm.

There are several issues presented. Should such a publication be authorized? It has been pointed out that individuals can obtain copies of the rules from the agency involved. Furthermore, the vast majority of such rules are required to be filed with the Division of Statutory Research and Drafting and made available for public inspection. So, there is a central repository for such rules. If such a publication is authorized, should it be in looseleaf binders or in bound volumes? Each method has an advantage. If the looseleaf binder is kept up-to-date, it is as effective as the bound volume but there is always the danger of losing pages or failing to insert up-to-date pages in the case of the looseleaf binder. Should the State support the cost of such an undertaking by the purchase of the same number of sets that it has purchased of the Code for distribution? This will involve considerable expense ranging from $50,000 or slightly above in the case of each of the proposals. If a lesser number is purchased, who will be distributed free copies and who will not? This is not easily decided. What is the probable sale of any such publication? Exclusive of the State purchase, approximately 400 members of the Bar have indicated an interest in such publication but there is no way of knowing how many of them will transform this interest into a purchase. The matter of deciding whose rules to publish is a difficult one. Publication of them all increases the expense considerably and multiplies the problem of keeping the publication up-to-date since some agencies change their rules frequently. On the other hand, if the rules of some agencies are not published, to that extent the utility of a new publication is diminished. Rather than rush into this matter, the Commission has decided to appoint a group to make a study and report upon these questions. Hopefully, after that, the Commission can take action appropriate to the circumstances.

TITLE 8 OF THE CODE

During the course of our study, it was discovered that Title 8 required a thoroughgoing overhaul in order to be of maximum utility in enabling the public to obtain justice and for courts and attorneys to assist in providing justice. In view of the powers conferred upon us by the 1970 Resolution, we

believe that we should proceed with our revision of Title 8. We hope to have the revision in the hands of the profession in advance of the session of 1973.

PROPOSAL TO REPEAL CERTAIN PROVISIONS IN TITLE 58

Judge Ralph T. Catterall of the State Corporation Commission has sought the support of the Code Commission in repealing certain chapters of Title 58. He states that the taxes imposed by such chapters are obsolete, would not affect substantially the State revenue, and will facilitate the transaction of business both on the part of the companies involved and of the Corporation Commission. We are advised that such would be the effect of the proposed bill. We, therefore, endorse this project.

CONCLUSION

For the reasons above stated, we believe that the authority of the Code Commission in the indicated areas should be continued; the findings of the Commission in other areas should be carefully considered in connection with any legislation that may be proposed thereon.

Respectfully submitted,

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