

1962

## Notable Legislation of 1962

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### Recommended Citation

Harry L. Snead Jr., *Notable Legislation of 1962*, 1 U. Rich. L. Rev. 320 (1962).  
Available at: <http://scholarship.richmond.edu/lawreview/vol1/iss5/7>

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## Notable Legislation of 1962

HARRY L. SNEAD, JR.

Unless otherwise indicated, the statutes and amendments noted below will be effective on June 29, 1962. All code references are to the *1950 Code of Virginia*.

### AGENCY:

#### *—When Death Does Not Terminate Agent's Authority*

Section 55-56.1, a new section, makes a radical change in the law of agency by providing that where the agent or third party has acted in good faith, death of the principal does not terminate an agency created by written power of attorney until there is actual notice or knowledge of the principal's death.

The new statute was probably intended to aid title examiners because it further provides that an affidavit of non-knowledge of death of the principal may be recorded and, in the absence of fraud, the affidavit shall be conclusive proof of the non-revocation or termination of the agent's authority. The exception as to "fraud", although desirable, tends to diminish the beneficial effect of the statute; the risk of possible fraud is substituted for the risk of the unknown death of the principal.

A draftsman is permitted to over-ride the statute and provide in the power of attorney that death revokes or terminates the agency.

Good faith is required; parties who relied on an extremely ancient written power of attorney would be acting in bad faith; life is of limited duration.

### CRIMINAL LAW:

#### *—Implied Consent To Blood Test*

This well-publicized statute may be found in Sections 18.1-

55, 18.1-59, and 46.1-430.1. *Its effective date is July 1, 1962.*

Briefly, the statute, which is bottomed on the palpable, odious, noxious, and *unnecessary* fiction that by driving on the highway one has consented to a blood test, operates as follows:

If the test be consented to by the accused the arresting officer must take the accused promptly to a person competent to extract the blood. Where practicable, this person "shall" be a physician of the accused's choice. The sample is placed in each of two containers and both "shall" be sealed in the presence of the accused. One sample is delivered to the accused, the other to the officer; the sample delivered to the officer is tested by the Office of the State Medical Examiner; the sample given to the accused may be tested by a laboratory which has met certain requirements specified in the statute.

If the test be consented to or requested within two hours after arrest and is thereafter conducted but the results are not introduced at the trial for any reason (other than conduct of the accused) the accused must be found not guilty. Further, failure of the Commonwealth to strictly comply with any of the requirements of the section shall create a reasonable doubt as to the defendant's guilt.

Upon arrest it is the officer's duty to advise the accused of the availability of the test and the consequences of failure to submit to the test. If the accused refuses, he is then taken before a committing justice who once again must advise him as to the law and the penalty for his refusal. The accused may consent to or request the test or the accused may then declare his refusal in writing on a form provided by the magistrate; the information which must be on the form again reminds the accused of his rights and the penalty for refusal to take the test. This must take place within two hours after the alleged offense.

If the accused signs the declaration of refusal no blood test is taken. The signed declaration of refusal is attached to a warrant (a copy of the warrant must be given to the accused) and both are forwarded to the court in which the offense of driving under the influence will be tried.

If the accused fails to sign the declaration of refusal (and fails to take the test) the committing magistrate certifies in a signed writing both the fact of refusal and that he advised the accused that such refusal, if found to be unreasonable, constituted grounds for revocation. This certification is attached to a warrant (a copy of the warrant must be given to the accused) and both are forwarded to the court in which the offense of driving under the influence will be tried.

The trial for failure to submit to the blood test shall be fixed at a date subsequent to the trial for driving under the influence.

Failure of the accused to submit to the blood test is not evidence in and shall not be subject to comment during the trial for driving under the influence.

The penalty for unreasonable refusal to take the test is ninety days suspension of license for the first offense and six months for a subsequent offense or refusal within one year of the effective date of any prior refusal.

If the accused be found guilty of both driving under the influence and refusal to submit to a blood test the periods of suspension shall run consecutively, not concurrently.

Doubtless the statute will undergo severe testing by litigation. Many points are not clear. For example, does the officer at the time of arrest have to advise the accused that he may refuse to take the test if he has reasonable ground for such refusal? What constitutes a reasonable ground for refusal to take the test?

—*Banking and Secured Transactions—No Charge for Substitution or Change of Insurance Policies*

Sale of property insurance by lending institutions or their "agents" is a large and profitable business. In an effort to curb the growing trickle of insurance business being enticed away by independent insurers some lenders had begun to make charges for substituting and changing insurance policies.

A new statute, Section 38.1-31.3, provides that neither a

lender secured by property nor "a trustee, director, officer, agent, or other employee" of such lender shall "directly or indirectly" require that a borrower pay a consideration to substitute insurance on the property nor shall they make any charge (other than premium) for any change in the "kind, type, or amount" of such insurance. Violation of the statute is made a misdemeanor.

Does the statute apply to a lending institution which operates its insurance business through a closely controlled separate corporate entity?

*—Contracts—Acceptance of Certain Promissory Notes for Food Made a Misdemeanor*

The hardship caused by the insolvency of a "food plan" concern precipitated the enactment of House Bill 128 which makes it a misdemeanor for a retailer to accept in payment of food a promissory note for an amount in excess of twice the sale price of food delivered to the buyer. "Delivered" is defined to mean "physical delivery to the customer within seven days of the receipt of the note by the seller."

The effect of the statute is to eliminate discounting of long-term promissory notes for food plans as a means of financing the beginning or operation of such businesses.

**DIVORCE:**

*—Significant Changes in Three Years Separation As Ground For Divorce*

Section 20-91(9) has been amended so as to make three years separation a more meaningful and usable ground for divorce. After the effective date of the amendment the parties need not have been residents and domiciliaries of this state at the inception of the separation and a spouse domiciled in Virginia may use an order of publication against a spouse residing or domiciled in another state.

An important and bothersome point of law was resolved by

the addition of a sentence stating that, "A plea of *res adjudicata* or of recrimination with respect to any other provision of this section [20-91] shall not be a bar to either party obtaining a divorce on this ground [three years separation]."

Separation as a ground for divorce is commented upon extensively elsewhere in this issue of the *Law Notes*.

—*Restriction on Power of Court in Divorce Proceedings To Decree Regarding Property of Husband and Wife*

In the 1960 issue of the *Law Notes* a suggestion was made that under Section 20-107 trial courts had authority not only to partition jointly owned property in a divorce proceeding but to effect a property division as well. Snead, *Alimony, Property Division and the Modern-Day Wife*. U. of Richmond Law Notes 242, 249-251 (1961).

The suggestion there made has been nullified by an amendment to Section 20-107 which provides that the word "estate" as used in that section "shall be construed to mean only those rights of the parties created by the marriage in and to the real property of each other." Apparently this amendment makes into law the *dictum* in *Gum v. Gum*, 122 Va. 32, 94 S.E. 177 (1917) wherein it was said that the "estate" to be dealt with by the divorce court was in the nature of dower and curtesy.

*Smith v. Smith*, 200 Va. 77, 104 S.E. (2d) 17 (1958), in which the divorce court was permitted to partition jointly owned realty, is probably no longer law.

INSURANCE:

—*Period of Incontestibility Made Uniform*

Section 38.1-438 was amended to make the period of incontestability of life insurance policies begin two years after the date of the policy. Prior to this amendment some policies had a one year period of contestability, while others had a two year period of contestability.

## SECURED TRANSACTIONS:

*—Endorsee Or Assignee Competent Party To Obtain Marginal Release*

An amendment to Section 55-66.3 makes it clear that "an endorsee or assignee, whether general or restrictive, of a note, bond or other evidence of debt" is a competent party to obtain a marginal release.

## SALES AND TORTS:

*—Lack of Privity Abolished As Defense to Certain Sellers and Manufacturers*

With a suddenness and lack of controversy which surprised even the proponents of the bill, the General Assembly passed House Bill 389 which abolished lack of privity as a defense to certain sellers and manufacturers of goods who are sued for negligence or breach of warranty. There are only two limitations apparent on the face of the bill: the plaintiff must have been a person whom the seller or manufacturer might reasonably have expected to use, consume, or be affected by the goods, and *the section does not have application to any litigation pending at its effective date.*

*Counsel are hereby cautioned not to institute any action for negligence or breach of warranty in which privity might be a defense until after the effective date of the act.*

This far reaching, probably unprecedented, statute nullifies many Virginia cases and races to a conclusion which the Virginia Court might have been decades in reaching.

## TORTS:

*—Time Within Which Notice of Tort Must be Given City or Town Extended in Certain Cases*

Section 8-653 was amended to provide that if an injured person bringing an action against a city or town establishes

by clear and convincing evidence that the injury he received prevented him from giving notice within sixty days, then the time for giving notice shall be tolled until the claimant sufficiently recovers from the injury so as to be able to give such notice.

An interesting question which is likely to arise is not answered by the amendment: Suppose the claimant's injury does not manifest itself in disabling fashion until, say, ten days after the injury? Does the statute apply and, if so, would the claimant have fifty days or sixty days after his "recovery" within which to give notice?

—*Maximum Recovery For Death By Wrongful Act Increased*

An amendment to Section 8-636, authorizes the jury to award a maximum of thirty-five thousand dollars in death by wrongful act actions. This is an increase of five thousand dollars over the previous maximum.

The amended statute does *not* expressly restrict this increased recovery to causes of action arising after the effective date of the amendment (as was done when the 1958 amendment increased the maximum recovery from twenty-five to thirty thousand dollars). One may expect controversy over whether the increased maximum applies to causes of action arising prior to the effective date of the amendment.

TRUSTS:

—*Sequence of Execution of Instruments in Pour-Over Trust*

In the last issue of the *Law Notes* the suggestion was made that, due to the absence of an existing *res* at the time of execution of the trust instrument, many existing pour-over trusts were subject to attacks on their validity. Wiltshire, *Pour-Over Devise or Bequest To Life Insurance Trust—Sequence of Execution of Papers*, 1 U. of Richmond Law Notes 221 at 225-229 (1961).

One of the major amendments to the "pour-over" statute

(Section 64-71.1) has resolved this question by providing that "an unfunded insurance trust shall be deemed established upon the execution of the instrument creating such trust." Thus a draftsman, with safety, may execute the trust agreement prior to the time he has legally and effectually established the trustee as beneficiary of the insurance policy or policies.

#### WILLS AND ADMINISTRATION OF ESTATES:

##### *—Payment of Certain Small Sums Due Persons Upon Whose Estate There Has Been No Qualification*

An amendment to Section 64-119 has raised from three hundred dollars to one thousand dollars the sum which may be paid to a surviving consort by the State or the United States for burial expenses without there being qualification on the estate of the decedent.

##### *—When No Surety Required On Refunding Bond Given In Settlement of Estate of Person Presumed Dead*

Section 64-108, as amended, dispenses with surety on the refunding bond given in administration of the estate of a person presumed dead when the evidence shows the length of absence of the supposed decedent to be more than fifteen years. Prior to the amendment a surety was not dispensed with unless the supposed decedent had been absent more than thirty years.

##### *—Taxation — Change in Method of Computing Taxable Estate When Realty Owned Jointly*

*Effective as to persons dying on or after July 1, 1964,* single family dwellings jointly owned by husband and wife with survivorship and used as their homeplace shall be accorded a different tax treatment: For the purposes of inheritance taxation, no more than one-half the value of such dwelling need be included in the taxable estate of the decedent.

The amendment also contains a limitation on the deduction of any mortgage or deed of trust outstanding against such property. See Section 58-153, as amended.

*—Beneficiary of Life Insurance Policy Not Entitled To Proceeds If Murdered Insured*

An amendment to Section 64-18 provides that a beneficiary who has been convicted of murdering the insured shall not be entitled to receive payment under any insurance policy on the life of such insured; the proceeds of the policy are to be paid to such other persons as are named in the policy, or if none, to the estate of the insured.

An insurance company which pays "without notice of the circumstances" which make the statute applicable does not have to pay again. There is a likelihood that this latter provision will lead to a change in the manner of paying claims, or litigation, or both.

*—Trustee Appointed By Will Can Be A Competent Witness*

Section 64-54 was amended to provide that a trustee appointed by a will can be a competent witness for or against the will.

The amendment removes any doubt as to the competency of trustees. Formerly the statute applied to executors only.

*—Diminution of Estate Which Vests Absolutely in Widow, Minor Children, and Unmarried Daughters of Decedent Householder*

Heretofore, Section 64-121 gave to the widow, minor children, or unmarried daughters of a decedent householder an absolute estate in that property which would be exempt under the "poor debtor's" exemption (Section 34-26) and the "farmer's" exemption (Section 34-27).

The amendment to Section 64-121 does away with this estate of the widow, minor children, or unmarried daughters where

such decedent has a net estate of one thousand dollars or more.

Quite possibly the proponents of the amendment had in mind remedying a situation in which a widow claimed and was entitled to the exempt property and the net estate of a decedent.

The cure offered may be worse than the ill; in varying contexts the statute as amended could operate very arbitrarily and unfairly and therefore could be attacked on the constitutional grounds of lack of due process and equal protection. For example, were a widowed householder to die leaving behind him infant children and a will which bequeathed his net estate of \$1000.00 to some third person then the amended statute would deny these infants even the small claim against their father's estate formerly created by unamended Section 64-121. However, the infant children of a widowed father who left them his entire net estate of \$999.99 would be entitled to claim the exempt property as well. True, the exempt property is "peanuts" but even peanuts should be parceled out with fairness.

The framer's difficulty in injecting monetary limitations into the amendment is compounded because Section 64-121 seems to serve a dual purpose: It protects certain persons from being completely disinherited by giving them an absolute estate in certain property of the householder and at the same time it places that property beyond the reach of creditors of the decedent householder.